MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

APRIL 18 TO JULY 11, 1899

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LANSING, MICHIGAN.

SUPREME COURT.

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F. H. CHAMBERS AND WILLIAM W. CHAPIN

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

[1] Appointed March 15, 1899.

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FOSTER *v.* ROW.[1]

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1. BANKS—INSOLVENCY—EX PARTE ORDERS.

   The circuit court has jurisdiction, upon a showing by the receiver of an insolvent bank that its assets are insufficient to pay depositors, to ascertain *ex parte* the amount required to meet the deficit, and to direct the institution of proceedings to enforce the statutory liability of the stockholders.

2. SAME—LIABILITY OF STOCKHOLDERS TO DEPOSITORS—EXHAUSTION OF ASSETS.

   The liability imposed by 3 How. Stat. § 3208*e*5, upon the stockholders of an insolvent bank for the benefit of its depositors, is not a mere collateral undertaking, or penal in its nature, but is contractual, and immediately enforceable when a deficiency in the other assets is ascertained, without such assets' being first exhausted.

3. SAME—CONSTITUTIONAL LAW—BANKS OF ISSUE.

   Article 15, § 3, of the Constitution, which makes the stockholders of every banking association "issuing bank notes" individually liable for "all debts" of the association to the amount of their respective shares, is not contravened by 3 How. Stat. § 3208*e*5, limiting the liability of stockholders in banks organized under the state banking law to debts due depositors, since that law applies only to banks not of issue.

4. SAME—WHAT STOCKHOLDERS LIABLE.

   The stockholders who are liable are those who are such when the bank becomes insolvent, without reference to the time when the deposits were actually made.

5. SAME—DEFENSES—FRAUDULENT REPRESENTATIONS.

   One who purchases bank stock six months before the bank becomes insolvent, and during such period appears as the registered holder of the stock, cannot avoid responsibility in an action by the receiver to enforce the statutory liability of

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* Continued from Vol. 119.

[1] Rehearing (defendant Chatterton's application) denied June 28, 1899.

stockholders, upon the ground that he was induced to purchase the stock through false representations of the bank's officers as to its value.

6. SAME—TRANSFER ON BOOKS—DEPOSIT AS COLLATERAL.
A purchaser of bank stock deposited it as collateral with the bank for a loan, with which the stock was purchased; but, on repayment of the loan, the bank having suspended, he refused to take the stock. *Held*, that he was the owner of it, and individually liable, notwithstanding the stock had never been transferred to him on the books of the bank.

7. SAME—SALE TO CASHIER.
A stockholder in a bank ceases to be liable as such where he sells and delivers his stock, duly assigned, to the cashier of the bank, who directs a credit to be entered on the transferrer's pass-book for the amount of an overdraft equaling the agreed price, although the cashier never pays the bank or registers the stock to himself.

8. SAME—INSOLVENT CONDITION—KNOWLEDGE OF TRANSFERRER.
The fact that a bank was in a failing condition when stock was transferred will not avoid the transfer as an attempt on the part of the transferrer to escape the statutory liability to depositors, where there is nothing to show that he knew of the condition of the bank.

9. SAME—FRAUDULENT TRANSFER—BURDEN OF PROOF.
The burden is on the receiver of an insolvent bank to show that a transfer of stock, made when the bank was in a failing condition, was effected by the transferrer with the fraudulent purpose of avoiding liability as stockholder.

10. SAME—NONRESIDENT TRANSFEREE.
That the person to whom stock in a failing bank was transferred was a nonresident has no bearing on the good faith of the transfer, nonresident stockholders being, equally with residents, amenable to the banking law.

11. SAME—REGISTERED HOLDER—RIGHTS AND LIABILITIES.
The fact that shares of bank stock are issued transferable on the books of the bank does not impair the right of the holder to pass title to a transferee by assignment and delivery, but it operates merely as a protection to the bank and its patrons by continuing ordinarily the status of the transferrer until the transfer is duly registered.

12. SAME—GIFT—RESPONSIBILITY OF DONEE.
Where a responsible stockholder in a failing bank presents his stock to his son, who is not responsible, before the bank

passes into the hands of a receiver, and the transfer is duly registered, the donor is relieved from statutory liability as stockholder, unless it appears that he was aware that the bank was insolvent.

Appeal from Ingham; Person, J. Submitted October 21, 1898. Decided April 18, 1899.

Bill by Seymour Foster, receiver of the People's Savings Bank of Lansing, against Samuel H. Row, Elgin Mifflin, James P. Edmonds, Mason D. Chatterton, Jacob Stahl, William A. Fraser, and others, to enforce the statutory liability of the stockholders in said bank to the depositors. From a decree for complainant, the above-named defendants appeal. Affirmed as to defendants Chatterton, Fraser, and Mifflin; reversed as to defendants Edmonds, Stahl, and Row.

Russell C. Ostrander, for complainant.

Samuel H. Row, *M. D. Chatterton*, and *William A. Fraser*, *in pro. per.*

Bartlett Wiley, for defendants Mifflin and Edmonds.

E. C. Chapin, for defendant Stahl, and of counsel for defendant Row.

LONG, J. Complainant is receiver of the People's Savings Bank. The defendants, it is claimed, are stockholders in that bank. This suit, by bill in equity, is brought to enforce the statutory liability of stockholders for the benefit of the depositors of the bank. The suit was commenced against all the resident stockholders, and a decree entered against them in the court below. Only the six defendants here have appealed, and each relies upon some special defense not common to the whole body of stockholders. There are some questions raised, however, which go to the jurisdiction, and in which all the defendants have a common interest.

It appears that the bank was organized June 29, 1885,

with a capital stock of $25,000, and was permitted by its articles of incorporation to do a savings business only. On July 5, 1889, amended articles were filed, adding a new clause, stating the bank to be both a commercial and a savings bank. On January 23, 1892, the stockholders voted to increase the capital stock to $150,000. The bank failed and ceased to do business on July 11, 1896. The reasons for such failure need not be set up here. The receiver took possession on July 15, 1896. He found on hand in the bank in cash $2,915.95. There was a balance at the Chase National Bank, New York, of $1,343.82. Excepting these two items, the bank had no cash. The total assets of the bank up to the time of the hearing of this case in the court below were $394,050.65, as shown by the books of the bank, of which the receiver estimates (and his estimate is not disputed) $184,536.45 worthless and $88,305.04 doubtful, leaving $121,209.16 of good assets, which is about the amount of collateral pledged by the bank to secure the persons from whom it had borrowed money. He found the total liabilities of the bank, as shown from the books, exclusive of capital stock, to be $249,140.63, showing a deficit over liabilities and capital stock, after taking out all the good and one-half of the doubtful assets, of over $230,000. The claim of the receiver is that, having ascertained to his satisfaction that after exhausting all the assets of the bank the depositors would not be fully paid, and having also ascertained the amount of the deficiency, it was his duty to apply to the court by petition for an order judicially determining the necessity to proceed against the stockholders, that the amount might be ascertained and an order obtained to enforce the liability. This proceeding was *ex parte*. The petition was filed, testimony taken, and the court found that it would require an assessment of 70 per cent. upon the stockholders to pay depositors and expenses of receivership. The receiver was thereupon directed to proceed by bill in chancery to enforce the liability.

The theory of the receiver is that the bank was insol-

vent, and unable to pay its depositors in cash as their demands might be made upon it; that the liability of the stockholders of the bank to pay depositors is a contractual, and not a penal, liability or obligation; that this statutory liability creates and places at the disposal of the receiver an asset equal in amount to the capital stock, which he can use, when necessary, to pay depositors; that the bank had depositors whose claims were due at any time upon presentation, and due, as matter of law, when the bank shut its doors; that the duty of the stockholders to furnish funds with which to pay depositors was immediate, and the liability under the statute was one to be immediately enforced by the receiver; that the receiver in this proceeding represents in no sense the bank as a corporation, but represents the depositors only; that, the necessity for the assessment being apparent, and the amount of the assessment being ascertained with reasonable certainty, and that assessment being less than the par value of the stock, the proceeding to enforce the liability should be in equity, and might be against all the stockholders, although the obligation on the part of the stockholders is a several, and not a joint, one. On the other hand, it is claimed by some of the stockholders that the liability is a collateral one, and can be enforced only after it has been ascertained that the assets of the bank are insufficient to pay depositors; that this requires that the receiver shall absolutely exhaust the assets of the bank before applying to the stockholders for contribution; that the necessity for an assessment could not be determined by the court *ex parte*, but should have been upon notice and hearing; and that the order made for the assessment, and for this suit to enforce the assessment, was without jurisdiction, and not binding upon any of the stockholders.

Whether the court could proceed *ex parte* to make the order in this case is not now important. The petition made by the receiver gave the court jurisdiction to determine, at least, the necessity for the commencement of

the proceeding against the stockholders to collect some amount, as it was made apparent that there was a deficiency. On the hearing on the bill in the present case, the receiver, without waiving reliance upon the *ex parte* order determining the amount of the deficiency and declaring the necessity for the bringing of the suit, established by testimony the condition of the bank and the necessity for an assessment of at least 70 per cent., being the amount theretofore fixed by the court in the *ex parte* order. There was no testimony offered on the part of the stockholders to show that the bank was solvent, or that the receiver's estimates were not correct; and, in fact, there was no testimony offered by the stockholders showing that the condition of the bank was not as claimed by him, nor did they attempt to question the value fixed by him upon the assets. Counsel for the receiver, however, cites many cases supporting the procedure for the *ex parte* order here taken, though he concedes that a stockholder might show in the proceeding that the bank was not in fact insolvent, but had ample cash or other assets with which to pay its indebtedness; and some of the cases cited by counsel seem to hold that a stockholder might show that the facts upon which the circuit judge acted in making the *ex parte* order were untrue, or that there was collusion or fraud inducing the ordering of the assessment. But, as no such showing was made here, and the complainant did not rest upon the *ex parte* order, but introduced testimony showing the necessity and the amount, that question need not be discussed. We are satisfied that the court had jurisdiction, and that there was no error in directing the proceedings.

The liability may be enforced in law or equity. 3 How. Stat. § 3208*e*5, being section 46. Act No. 205, Pub. Acts 1887. This section provides:

"The stockholders of every bank shall be individually liable, equally and ratably, and not one for another, for the benefit of the depositors in said bank, to the amount of their stock at the par value thereof, in addition to the said

stock; but persons holding stock as executors, administrators, guardians, or trustees, and persons holding stock as collateral security, shall not be personally liable as stockholders, but the assets and funds in their hands constituting the trust shall be liable to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living or competent to act; and the person pledging such stock shall be deemed the stockholder and liable under this section. Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation, or by any receiver or other officer succeeding to the legal rights of said bank."

Section 55 of the act (3 How. Stat. § 3208*f*4) reads:

"On becoming satisfied that any bank has refused to pay its deposits, * * * the commissioner of the banking department may forthwith * * * apply to a court of record * * * for the appointment of a receiver for such bank, who, under the direction of such court, shall take possession of the books, * * * and may, if necessary to pay the debts of such bank, enforce all individual liability of the stockholders."

The national banking law contains a similar provision, the only difference being that the liability is imposed for the benefit of all the creditors of the bank, instead of for depositors only. Section 5151, Rev. Stat. U. S. Under this United States statute, it is held that, when the comptroller of the currency orders an assessment upon stockholders in national banks, the necessity for the assessment and the amount of it are not open to question in a suit against stockholders. *Bushnell* v. *Leland*, 164 U. S. 684. The practice under our state banking law places the circuit judge in the position of the comptroller under the national banking act. *Citizens' Savings Bank* v. *Ingham Circuit Judge*, 98 Mich. 173. The petition for the appointment of the receiver is addressed to the circuit judge, and he makes the appointment. The receiver is an officer of that court. That court, by the terms of the statute, has jurisdiction to determine the necessity for making an assessment and the amount thereof.

The contention of defendants cannot be sustained.

The liability of the stockholders is fixed by statute. It is not a mere collateral undertaking. When the bank became insolvent, and closed its doors, the depositors were entitled to an immediate payment of their money; and, when it was shown that the assets were insufficient to pay them, it became the duty of the stockholders to pay in the necessary amount, not exceeding the par value of the stock, to meet the demand. The obligation or liability of the stockholders is contractual, and not penal. *Western National Bank* v. *Lawrence*, 117 Mich. 669. The stockholder is something more than a surety; he is one of the associates in the bank, and by the terms of the association he is deemed to undertake for the debts of the depositors. *Grand Rapids Savings Bank* v. *Warren*, 52 Mich. 561; *Hobart* v. *Johnson*, 8 Fed. 493. Banking is carried on for the benefit of the stockholders. They are the only persons who profit by it. Depositors place their money in the bank in reliance upon the fact that they may withdraw it at any moment, or at a stated time. When demand is made for it, stockholders are liable for its immediate payment. The statute casts this burden upon them. It is one of the conditions imposed by the statute upon which stock may be issued and held. It became the duty of the receiver here to pay depositors at once, and, if the assets of the bank were insufficient for that purpose, he was bound to ascertain the amount necessary to meet the deficit. He took the proper steps to ascertain the necessity, and the court, upon the testimony, determined the amount which should be paid in.

Counsel for some of the stockholders cite the following cases from other States upon the proposition that no proceedings can be taken against the stockholders of a corporation until the assets have been first exhausted: In *Farmers' Loan & Trust Co.* v. *Funk*, 49 Neb. 353, the action was by a depositor against a stockholder, and it was held that the creditor had no right to maintain an action at law in its own right against the individual stockholder of the bank, merely as such, for the collection of

an amount equal to the par value of the stock. The court also discussed the question of the right of creditors and of the receiver under the banking law to proceed against stockholders before exhausting the corporate assets. Section 4, subd. 7, art. 11, of that constitution, provides:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder."

Section 4, subd. 4, art. 11, entitled "Miscellaneous Corporations," provides that, before enforcement of individual liabilities of stockholders, there must be judicially determined the indebtedness proposed to be enforced and the assets of the corporation be first exhausted. It was held that this last provision was applicable to banking corporations, as well as others.

The case of *Ueland* v. *Haugan*, 70 Minn. 349, was decided upon the wording of the statute of that State, and a distinction was made between that procedure and the procedure under the national banking act. The principle here involved was not there involved. The same may be said of the case of *Cleveland* v. *Burnham*, 55 Wis. 598. But in the case of *Booth* v. *Dear*, 96 Wis. 516, the action was under the banking law of that State, which provides that the stockholders of a State banking corporation shall be individually responsible to the amount of their stock for its indebtedness. The court said:

"Such statute received construction at an early day to the effect that the liability is primary and absolute, and attaches the moment the debt is contracted by the bank; that it is a liability of all the stockholders to all the creditors, on the principle of a copartnership, the stockholders standing on substantially the same footing as though they were partners, save, only, that the responsibility of each is limited to a sum equal to his share or shares of stock. Subject to this limitation, they are answerable as original and principal debtors, and their liability more nearly

resembles that of copartners than any other with which it can be compared."

The court in that case further held that the statute did not require that the assets of the corporation should be fully exhausted before the creditors could proceed to judgment against the stockholders.

The case of *Hanson* v. *Donkersley*, 37 Mich. 184, upon which counsel for defendants rely, was brought under 1 How. Stat. § 4017. That statute provides for the organization of mining and manufacturing companies. It imposes upon stockholders an individual liability for labor done for the corporation, and allows it to be enforced against the stockholders only after the return of an execution unsatisfied, thus making the liability secondary, and not primary; and the remarks of Mr. Justice CAMPBELL in that case have no bearing here. The same may be said of the case of *Kamp* v. *Wintermute*, 107 Mich. 635, brought under a like statute, and of *Voight* v. *Dregge*, 97 Mich. 322, brought under the street-railway act. Each of these acts provides for the return of an execution unsatisfied before the action can be brought against the stockholders. The banking law does not provide for this, and was evidently intended to make the liability of each stockholder primary, and not secondary. As was said in *Grand Rapids Savings Bank* v. *Warren*, *supra*:

"The shareholder is something more than a surety; he is one of the associates in the bank, and by the very terms of the association he is deemed to undertake for the debts which the bank contracts."

It is evident that the banking law of 1887 was framed with great care to insure safe banking, and with a view to protect the depositors by compelling the payment by stockholders of a sum equal to the amount of stock held. This fund should become immediately payable when the necessity for its use is determined and the amount fixed, without waiting to exhaust the assets of the bank, if it appears that the stockholders will ultimately be called upon

to make good the amount. Banking institutions have relations with the public wholly unlike any other business institutions, and the rights of depositors in banks have been carefully guarded by the act. We think the contention of counsel for the receiver is sound in principle and must be sustained.

Counsel for defendants contend that the act is unconstitutional, for the reason that it limits the personal liability of stockholders to depositors, while the Constitution provides that they shall be liable for all debts. This contention cannot be sustained. Section 3, art. 15, of the Constitution of this State, provides:

"The officers and stockholders of every corporation or association for banking purposes, issuing bank notes or paper credits to circulate as money, shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation or association, equally and ratably, to the extent of their respective shares of stock in any such corporation or association."

This constitutional provision relates to banks of issue only. The People's Savings Bank was not a bank of issue. The provisions of the banking law do not come within this constitutional provision. It is limited to banks not of issue. The legislature had the power to impose the conditions prescribed in the act upon banks organized under the act, and to limit the liability of the stockholders to depositors. In *Allen* v. *Walsh*, 25 Minn. 543, this precise question was raised under a somewhat similar constitutional provision, and it was held that that provision was confined to banks of issue, and did not limit the power of the legislature as to banks not of issue. See, also, *Harper* v. *Carroll*, 66 Minn. 487; *Allen* v. *Clayton*, 63 Iowa, 11 (50 Am. Rep. 716).

One of the most important questions in the case relates to the inquiry whether, when a bank suspends, those who are the then stockholders are liable under this statute to those who are then its depositors. It is the contention of

some of the stockholders that those who were stockholders when each deposit was made are liable to depositors; that is, that a stockholder can be called upon to respond to those only who became depositors while he was a stockholder. It is insisted, therefore, that the rule of *Kamp* v. *Wintermute*, 107 Mich. 638, should be applied. That action was brought under an act to revise the laws providing for the incorporation of manufacturing companies, and it was held that statute could not have so broad a construction as to hold one liable who purchases stock in a corporation after the debt is contracted; that is, that a stockholder, under the act, cannot avoid the statutory liability to creditors who are such at the time he transfers his stock, and that the tranferee does not take the stock subject to such statutory liability. Several cases were cited in that case to sustain that principle. That statute, and the statutes of other States under which the rulings were made, had reference to corporations other than banking. They provide a remedy for the individual creditor against the individual stockholder, so that it is not difficult for any individual creditor to ascertain who were the stockholders at the time the debt was created. The liability imposed by these statutes is for the whole debt. A man with five shares of stock of the par value of $50 may be held to pay a labor debt of $500. The effect of these statutes is to make shareholders, as to labor debts, partners, each liable for the entire debt. Our banking statute does not give this remedy to the creditor. It can be enforced only by a bank in process of liquidation, or by a receiver or other officer succeeding to the legal rights of the bank, in a suit at law or in equity. The distinction between the banking statute and these other statutes, and the construction to be placed upon them, so far as concerns the rights and liabilities of stockholders, is well stated by counsel for the receiver, as follows:

"(*a*) In a partnership, all partners are liable for all debts. Corporations are formed for the purpose of avoiding the personal individual responsibility of those associat-

ing, and making the capital stock and assets of the corporation the sole fund for creditors. But the legislature may, and by the constitution of a State is sometimes directed to (sometimes the constitutional provision is self-executing), grant charters on condition that the partnership or common-law liability of the associates as to certain kinds of debts shall continue.

"(*b*) The legislature does so except or preserve a partnership or common-law liability or obligation when it makes all stockholders liable for all debts of a certain kind or class, and provides a direct or personal remedy to the individual creditor of the corporation. In such cases it is held that the stockholders at the time the debt is contracted are like partners, at once and personally liable to pay it,—an obligation not shifted by transfer of stock.

"(*c*) When, however, the legislature has not plainly so attempted to preserve or retain for creditors a liability and remedy which, but for the law of corporations, would exist, but has in the incorporating act added a liability, limited, peculiar, purely statutory, and not in any sense preservative of common-law liability, the remedy provided being for all creditors, or all of a class of creditors, enforceable in their joint interest against the body of stockholders, then the liability attaches when the right of action—the default—occurs, and is against those who are then stockholders."

It is not claimed that these propositions are recognized in all the cases, but counsel submits them as deducible from the cases, and claims that by them the cases may be the better harmonized, and a reasonably safe rule of construction presented. In this contention we agree with the learned counsel. In some of the States, the banking statute itself fixes the rights and liabilities of stockholders in express terms. The New York statute provides that "no action shall be brought against a stockholder after he shall have ceased to be a stockholder." Laws 1892, chap. 688, § 55. In Wisconsin, the statute expressly declares that a shareholder by transfer shall, in proportion to his shares, succeed to all the rights, and be subject to all the liabilities, of prior shareholders. Rev. Stat. 1858, chap. 71, § 5. In Nebraska, the constitution provides that the stockholder shall be liable, etc., while he remains such stockholder. Const. art. 11, § 4, subd. 7. In Minnesota, by

statute, the liability continues for one year after any transfer or sale of stock by any stockholder. Gen. Stat. 1894, § 2501. In Iowa, the stockholder's statutory liability is while he remains a stockholder. Laws 1880, chap. 208, § 1. Our statute (3 How. Stat. § 3208*e*5) simply provides that "the stockholders of every bank shall be individually liable, equally and ratably, * * * for the benefit of the depositors in said bank," etc., and by the same section provides that such liability may be enforced, in a suit at law or in equity, by any such bank in process of liquidation, or by any receiver, etc. It seems clear to us that it was the legislative intent that the stockholders liable to depositors are those who are such at the time the bank becomes insolvent, without reference to the time when the deposits were actually made. Any other construction would practically repeal the entire liability clause. It is within the knowledge of all that deposits in banks are changing hourly during each day's business, thus creating uncertainty concerning the true amount on deposit at any given time. When a bank closes its doors, this change ceases. If the man who has a balance on deposit at the time the bank is closed must ascertain who were the stockholders at the time he made his deposit, and must proceed against them, there could be no common suit by a receiver for the benefit of all the depositors; for the stock in the bank might have been many times changed during the time deposits were made, and no rate could be established. It is more reasonable to hold that the purchaser of stock takes it, as a proportionate share of the bank's assets, subject to the bank's debts. With these rules in view, we may now proceed to determine the special claims made by the several defendant stockholders.

Defendant Chatterton became the registered owner of 25 shares of stock on April 1, 1892. This certificate was afterwards surrendered and divided; one for 20 shares being retained by him, and one certificate issued to his son, Floyd M., for the other 5 shares. Defendant Chatterton remained the owner of these 20 shares at the time

the bank closed. He claims he should not be held as a shareholder because he purchased his stock upon false representations made as to the value of the stock by the officers of the bank. As we have said, the receiver represents the depositors in this suit. It is their rights which are to be protected. The question here raised was squarely presented in *Bissell* v. *Heath*, 98 Mich. 472, and it was held that a stockholder, after having purchased his stock and registered it, receiving dividends, which he retains, and permitting the depositors to rely upon his apparent ownership, cannot repudiate his liability on the ground that he was induced to purchase his stock through fraudulent representations as to the financial condition of the bank. In that case, Mr. Justice MONTGOMERY cited with approval the case of *Stone* v. *City & County Bank*, 3 C. P. Div. 282, in which it was held that where the corporation has gone into liquidation, and is proceeding, under the winding-up act, to make calls to satisfy claims of creditors, it is too late for one who has, up to that time, allowed his name to appear as a stockholder, to avoid liability on the ground that his subscription was obtained by fraud. The rule stated must be applied to defendant Chatterton.

Defendant Fraser became the owner of 10 shares of stock December 31, 1895, and remained the ostensible owner up to the time the bank closed. He makes the like claim as defendant Chatterton, and his case must be governed by the same rule. The decree below fixes the liability of these defendants at 70 per cent. of the par value of their respective shares, and must be affirmed as to them.

It appears that defendant Mifflin held a certificate for 5 shares, dated April 1, 1892. As to these shares he admits he was the registered owner, and liable to the assessment levied. The receiver contends that Mr. Mifflin is the owner of 5 other shares, and liable to pay an assessment upon them. This Mifflin contests. These shares were issued originally to Hart Row. It appears from the testi-

mony that this certificate was left by Row with Mr. Dyer to be sold, and that on September 4, 1895, Dyer sold it to Mifflin for $95 a share, Row paying him a commission of $10. Mr. Row says that he learned from Mr. Otis, the teller of the bank, that the stock had been sold. Mr. Otis testified that Mr. Mifflin came to the bank, and, after consulting with the cashier, he (Otis) was directed to loan Mifflin $500 on his note, which he did, and that Mifflin left with him (Otis) $475 of the $500, requesting him to place it to the credit of Mr. Row. This was done. Mr. Mifflin, on the same day, left with Otis the certificate of shares as collateral to his note. This certificate was placed in an envelope, and marked "Elgin Mifflin." It was assigned in blank by Mr. Row. The matter stood in this way, except for partial payments on the note by Mr. Mifflin, until July 13, 1896,—about 10 months. The transfer was never made upon the books of the bank. The Mifflin note was paid, partly before and partly after the receiver was appointed. Mifflin, upon final payment of his note, being tendered the stock, refused to take it from the bank. The defense now made is that, in enforcing the liability of stockholders, the court will not go beyond the registered holders. There is no doubt, under this state of facts, that Mr. Mifflin was the owner of the stock, and could have compelled a transfer upon the books of the bank. He became a stockholder, had the right to attend meetings and to share in the profits, and, in fact, was entitled to the rights of every other stockholder. *McLean* v. *Charles Wright Medicine Co.*, 96 Mich. 479. Being entitled to all the rights of a stockholder, he cannot escape the liability of such stockholder. The mere fact that the stock had not been transferred on the books of the bank cannot aid the defendant. The stock was fully paid for, and Mifflin was a stockholder within the meaning of the banking act, and the court below was not in error in so holding.

Defendant Edmonds was a registered stockholder, as appeared by the books of the bank when it closed. He

seeks to avoid liability on the ground that he was discharged from the ownership, and from liability as a stockholder, by a sale and transfer of the stock in December, 1894, or January, 1895. It appears, from the testimony of Mr. Edmonds and of Mr. Otis, the teller of the bank, that on the strength of a promised purchase of this stock by Mr. Osband, the cashier of the bank (for himself, not for the bank), Mr. Edmonds overdrew his account at the bank $300. He transferred the stock to Mr. Osband individually. Six days later he received his pass-book from the bank, and it still showed the overdraft. On January 15th he went to the bank, and asked Osband if he had given him (Edmonds) credit for the $300. Osband replied that he had not, but would. Osband then, in the presence of Edmonds, instructed Mr. Otis to place upon Edmonds' pass-book a credit of $300. Otis did so, then and there making as a part of the entry the letters "C. H. O." (meaning C. H. Osband). Osband never paid the bank. The certificate of stock was found by the receiver in an envelope marked "Edmonds." No entry was made on the bank's books to show the transaction, nor any part of it. A dividend paid in July, 1895, was credited to the interest account of the bank. The overdraft of Edmonds still appears on the books of the bank as unpaid. It is claimed by counsel for the receiver that Edmonds was legally bound to see that Osband actually paid his (Edmonds') indebtedness to the bank, and that, under the circumstances, he had no legal right to rely upon Osband's doing it at some time in the future. We cannot agree with this contention. The sale to Osband was completed. The stock had been assigned, delivered, and paid for. The money had been paid to Mr. Edmonds by direction of Osband, the cashier. There is no showing that Mr. Edmonds did not act in the utmost good faith, and counsel for the receiver says in his brief: "I presume that Mr. Edmonds thought that Osband would in some way and at some time make the matter right." The bank continued

to do business some 18 months after this transfer to Osband. The stock was in Osband's hands as owner. He controlled it, and had all the rights of a stockholder thereunder. Mr. Edmonds made no claim thereafter to it. We think the case is ruled by *Snyder* v. *Foster*, 19 C. C. A. 406, 73 Fed. 136, and *Whitney* v. *Butler*, 118 U. S. 655.

In *Snyder* v. *Foster* it appeared that Snyder subscribed for 50 shares of the stock of a national bank, borrowing the money from Collins, the cashier of the bank. As collateral security for the money so borrowed, he indorsed over the certificate to Collins, and left it with him. A few months later he sold the stock to Collins for the amount of the loan and accrued interest, the certificate remaining in the hands of Collins. The bank was solvent at the time, and so continued for five years, during which time Collins collected the dividends on the stock, as shown by the bank's dividend book, but the stock was never actually transferred to Collins on the books of the bank. The by-laws of the bank provided that dividends should be paid to the stockholders in whose names the stock should stand, that certificates should be issued by the president and cashier, and that, when stock was transferred, the certificate should be canceled and a new one issued. Long after the sale to Collins the bank became insolvent, an assessment was made on the stockholders, and the receiver of the bank, finding Snyder's name as a stockholder on the books of the bank, brought suit against him. It was held that it might be inferred as a fact from the evidence that the bank had notice of the transfer of the stock by Snyder to Collins, and the termination of Snyder's relation to the bank as a stockholder, from which fact the legal presumption would follow that the bank would cause such acts to be done in relation to the transfer as its officers were called upon to do, and that the jury would be permitted to draw such inference.

In *Whitney* v. *Butler*, *supra*, it was said:

"It was suggested in argument that the defendants

should have seen that the transfer was made. But we were not told precisely what ought to have been done, to this end, that was not done by them and their agents. Had anything occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been wanting in due diligence, had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. Their conduct was, under all the circumstances, that of careful, prudent business men; and it would be a harsh interpretation of their acts to hold * * * that they allowed or permitted the name of Whitney to remain on the stock register as a stockholder."

In the present case, we think that Mr. Edmonds, having delivered the certificate, properly assigned, to Osband, who was cashier of the bank, and who had control of the stock register, did all he was bound in duty to do to complete the transfer. Nor do we think that, because he was paid from the bank's money, he was bound, at his peril, to see that the cashier repaid it to the bank. The rights of the parties are no other or different than as though Osband paid it from his own pocket. Where he obtained the money was a matter between him and the bank, concerning not in the least Mr. Edmonds, who had every reason to believe that Osband would adjust his account with the bank in the proper manner. There is nothing in the case which would now justify us in regarding Mr. Edmonds as still a stockholder.

The defendant Jacob Stahl has a different defense from the other stockholders. He was the registered owner of 10 shares of stock, the certificates for which were issued to him in 1895 and 1896. On May 20, 1896, he sold and assigned those certificates to his brother-in-law, George Schuman, of Cleveland, Ohio, receiving therefor $700 in cash and $300 in settlement of a claim which Schuman had against him. The assignments were properly made on the backs of the certificates. Mr. Stahl took them to the bank, and asked that new certificates be issued, which

the cashier agreed to do. This was neglected by the cashier. Soon after the sale of the stock, Mr. Stahl learned that the stock was assessed to him, and went to see the cashier about it, who said: "That is all right. The stock is transferred, and I will give you a writing to that effect." He then gave him the following writing:

"May 24, 1896.

"Mr. Jacob Stahl has transferred his stock in this bank to George Schuman, of Cleveland, Ohio.

"C. H. OSBAND, Cashier."

When the bank closed on July 11, 1896, the certificates were in the bank, and no transfer had been made on the books of the bank. The sale to Mr. Schuman is not disputed. The consideration is not denied, and the proofs show that Schuman was a man of considerable means. He died soon after this purchase, leaving an estate estimated at $15,000 to $20,000.

Some intimation is contained in the brief of counsel for the receiver that this was not a good-faith sale. We have examined the testimony with some care, and we are unable to say that Mr. Stahl was not acting in good faith. There is nothing in the evidence to show that he knew or suspected that the bank was in failing circumstances, and that he assigned this stock to avoid liability as a stockholder.

It is the contention of counsel for the receiver that, at the time of this sale, the bank was wholly insolvent, and for that reason, and the reason that Schuman was a nonresident, Mr. Stahl should be held liable as a stockholder. The case is different from that of Mr. Edmonds. There it could not be said that the bank was insolvent at the time of the sale to Osband, and Osband, the purchaser, was a resident of the State. Considerable testimony was given in the case as to the condition of the bank for nearly a year before it closed its doors. The court below found that the bank was insolvent at the time Mr. Stahl made the transfer to Schuman, and remained so until it closed its doors; and we think the testimony sustains this finding.

But, as we have said, there is no testimony showing that Mr. Stahl knew this fact. Can he, then, be held liable, though he did not know it? The court below ruled that he could be so held, because, if he had brought a proceeding against the officers of the bank to compel a transfer by them upon the books of the bank, and they had shown that the bank was then insolvent, and the transfer was to a nonresident, the transfer would not have been enforced by the courts, as it would defeat the depositors of that much of the fund. This is not the true test of Mr. Stahl's liability, and the rule laid down by the circuit judge cannot be sustained. The act under which suit is brought by the receiver is very much like the national banking act, and the rules laid down by the federal courts in reference to the liability of stockholders have great weight in determining the questions here presented. The rule laid down by the federal courts seems to be that the burden is upon the receiver of a national bank to show that a transfer of stock was made by the stockholder for the fraudulent purpose of avoiding liability as such stockholder. *Sykes* v. *Holloway*, 81 Fed. 432. Thompson, in his work on Liability of Stockholders (section 215), lays down the rule that a transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company, and as to the other shareholders, although, as between the transferrer and the transferee, it was out and out; citing *Nathan* v. *Whitlock*, 9 Paige, 152; *McClaren* v. *Franciscus*, 43 Mo. 452; *Marcy* v. *Clark*, 17 Mass. 330; *Johnson* v. *Laflin*, 5 Dill. 65. This proposition by Judge Thompson is quoted with approval by the court in *National Bank* v. *Case*, 99 U. S. 631. It was said by the court in *Bowden* v. *Johnson*, 107 U. S. 261:

"But it was held by this court in *National Bank* v. *Case*, 99 U. S. 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability.

The court in that case defined, as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors."

With these restrictions, and certain others which it is not important to enumerate here, as they do not affect the rights of the parties in this case, it is, we think, well settled by the adjudicated cases that the stockholder has the right to make an out and out *bona fide* sale to any person capable in law of taking and holding the same, and of assuming the liabilities of the transferrer in respect thereto. This right of transfer is of great benefit to stockholders. It is what gives value to the stock. The fact that the shares are transferable on the books of the bank does not limit the right of transfer and to pass the title to the transferee. It is true that the officers of the bank will not be compelled to make the transfer on the bank's books, under the provisions of section 3208*a*8, 3 How. Stat., when the transferrer is indebted to the bank. *Citizens' State Bank* v. *Kalamazoo County Bank*, 111 Mich. 313. But no such claim of indebtedness is here made, and it is well settled that the title passes to the transferee the moment the assignment is made and stock delivered. *Johnson* v. *Laflin*, *supra*. The purpose of requiring a transfer on the books of the bank is that the bank may know who are the stockholders, and, as such, entitled to vote, receive dividends, etc., and for the protection of *bona fide* purchasers of the shares, and of creditors and persons dealing with the bank. It does not restrict the right of the owner to transfer his stock, but clothes the corporation with the power to register *bona fide* transfers. *Black* v. *Zacharie*, 3 How. 483; *Union Bank* v. *Laird*, 2 Wheat. 390; *St. Louis, etc., Ins. Co.* v. *Goodfellow*, 9 Mo. 149; *Moore* v. *Bank of Commerce*, 52 Mo. 377; *Hill* v. *Pine River Bank*, 45 N. H. 300.

No showing is made here that the bank officers refused to make the transfer on the bank's books. Instead, the cashier, who had the power to make it, promised to do so, and led Mr. Stahl to believe that the matter had been properly arranged, so that he was released from liability thereunder and Mr. Schuman protected as a *bona fide* purchaser. Mr. Stahl had a right to rely upon this.

We do not think that the fact that Mr. Schuman was a nonresident can affect the rights of Mr. Stahl. There is nothing in the act which limits transfers to residents of the State. A nonresident may own such shares, and become liable thereunder, the same as a resident owner; and we know of no reason why such liability cannot be enforced in Ohio as well as here. The engagement by the stockholder is contractual, and may be enforced in the courts. *Western National Bank* v. *Lawrence*, 117 Mich. 669. We are aware that Spelling on Private Corporations, at section 469, lays down the rule that the right to transfer terminates by insolvency and dissolution, and that even before the insolvency is made public, if it actually exists, to allow stockholders to transfer their interests to persons beyond the jurisdiction of the court would be opening the door to subterfuges calculated to defeat the claims of creditors, and that creditors might defeat such transfers; but he cites no authorities to sustain this proposition, and, on the contrary, says a number of cases maintain the opposite,—citing the case of *Johnson* v. *Laflin*, *supra*. We think Mr. Stahl cannot be treated as a stockholder, and held liable as such.

Defendant Row was the owner of stock on the first organization of the bank. When it was reorganized, he received a stock dividend, and increased his holding to 25 shares. This was April 1, 1892, and his stock stood in his name on the books of the bank until July 8, 1896, when it was transferred to his son. The bill in this case, after charging the insolvency of the bank and of the son of Mr. Row, to whom the stock was transferred, alleges: "Said Row suspected or believed said bank to be insolvent,

and such transfer was made by him for the purpose of escaping liability as a stockholder in said bank." There is no testimony to sustain the charge that Mr. Row believed or suspected the bank to be insolvent, and that he made the transfer to avoid liability. The bank had been doing business in the usual way up to the time the transfer was made on the books of the bank. It appears that Mr. Row had made advances of like amounts of property to his other two sons, and to equalize the gifts to them he gave this stock to his son Charles. It was consummated by the surrender of the certificate of stock to the proper officer of the bank on June 20th, with instructions to make the proper entry on the stock book to make the transfer complete. On July 8th the proper entry was made, and the certificate delivered to the son; and the bank failed and closed its doors on the 11th, or three days later. It was a completed gift of the stock to the son, and without any knowledge on the part of the donor that the bank was insolvent. The sole question, therefore, is, Did such *bona fide* transfer by gift relieve the transferrer from liability under the statute? This liability is purely statutory, is in derogation of the common law, and must be strictly construed. Courts will not hunt excuses to carry it beyond the plain provisions of the statute. 1 Cook, Stock, Stockh. & Corp. Law, § 214. All the authorities recognize the right to transfer in good faith and for a valuable consideration. When this is done, and the bank is a going one, statutory liability attaches only to those who are stockholders at the time the bank closes, either by action of its directors, by the action of the commissioner of banking, or by proceedings in chancery to wind up its affairs.

The learned counsel for complainant cites no decision to sustain the proposition that a *bona fide* gift and transfer of stock does not relieve the transferrer from liability. His quotation from 1 Cook, Stock, Stockh. & Corp. Law, § 395, does not treat of the question now before us. The author is treating solely of the "rules for corporations in regard to refusing or allowing registries of transfers of

stock." The question the author is discussing is no other than whether a corporation may refuse to register a transfer to an irresponsible transferee. He reaches the conclusion that the officers of the corporation may refuse to do so when the corporation is insolvent, but cannot refuse when the corporation is solvent. The power of the officials of the bank to register transfers is not before us. We are dealing with a case where the transfer has been made. The cases all seem to hold that the intent to avoid liability is a material element in determining the liability of one who has transferred his stock while the corporation was a going one. If this transfer had been made for a valuable consideration, it would, under the authorities, be valid, and relieve the transferrer from liability. No case is cited by counsel which makes a distinction between a good and a valuable consideration. The statute does not restrict, and is not intended to restrict, the transfer of the stock of a bank. The courts, in order to preserve the statutory liability for the benefit of creditors, have held that transferrers in bad faith, no matter what the consideration received, are still the equitable owners of the stock for the purpose of responding to the creditors.

Counsel for complainant relies largely upon the case of *Stuart* v. *Hayden*, 169 U. S. 1. The question here considered was not involved in that case, and there is nothing to show that it was considered by the court. The case was decided upon the intent of the stockholder to avoid his liability. The court used this language:

"Whether — the bank being in fact insolvent — the transferrer is liable to be treated as a shareholder, in respect of its existing contracts, debts, and engagements, if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed, although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible."

It appears, from this, that the question was not discussed by the court, and the last clause must be considered as mere *dictum*.

The precise question was raised and decided in *Sykes* v. *Holloway*, 81 Fed. 432, in May, 1897. The facts are substantially parallel with those in the case before us. The question is thus stated:

"We must presume, from the evidence in this record, that this transfer was made, not for a valuable, but for a good, consideration only, and that it was in fact an out and out transfer, made without knowledge or notice of the embarrassed condition of the bank; yet it was made by a mother, who could respond to her liability as a stockholder, to a daughter, who could not then respond in any degree to that liability. It therefore, to that extent, impaired the security of the existing creditors of the bank; and the inquiry is whether that fact, which was known to Mrs. Holloway, is sufficient to cause the setting aside and cancellation of said transfer."

The learned judge in that case said:

"I find in the decisions some broad expressions which would seem to sustain the contention of the complainant, but I have been unable to find any case in which the pecuniary condition of the transferee is a material element on the question of sustaining the transfer. It is a most material matter where the inquiry is whether or not the transfer is a *bona fide*, out and out transfer, or a mere sham; but, as far as we have examined the cases, none of them go to the effect that if the transfer, though without a valuable consideration, was *bona fide*, and the transferrer had no knowledge of the embarrassed condition of the bank, and no information which would have given him or her such notice, such transfer is invalid or fraudulent. * * * It seems to us that, upon principle, the pecuniary condition of the transferee of stock in a national bank at the time of the transfer, while material upon the inquiry of whether or not the transfer is *bona fide* or colorable, cannot be a decisive element on the question of liability of the transferrer, where the transfer has been made out and out, without knowledge or notice of the failing condition of the bank. Such a test of liability of a transferrer of stock would materially destroy the transferability of such stock, and would be an impracticable test to apply; and even though it be conceded, as in this case, that the consideration for the transfer was a good, but not a valuable, one, that fact should not be sufficient to set aside and make fraudulent the transfer."

It must be assumed that the learned counsel in the present case has carefully examined the decisions, and cited us to all there are upon the subject. Probably the reason that there are no more decisions upon the precise question is that cases have seldom arisen involving it. The courts of England hold that the shareholder is not liable where he has made an out and out transfer, and do not consider the motive; holding, however, that where the transfer is merely colorable, or to a mere dummy, the shareholder retains such an interest as makes him liable. The courts of this country have, as already shown, gone further, and hold the transferrer liable when they find an intent to escape the statutory liability. We see no reason why the rule should be carried further. To hold otherwise would be to hold the stockholder liable where he has made a *bona fide* gift of the same for a good consideration, and to continue his liability for months, and even years, afterwards, if evidence can be produced that at the time the bank was embarrassed. The law contains no language to justify an implication that it was intended to impose this double liability upon *bona fide* transferrers of stock. We think that courts are not justified in reading such a liability into it.

The decree must be affirmed as to defendants Chatterton, Fraser, and Mifflin, with costs, and reversed as to defendants Edmonds, Stahl, and Row, and as to them the bill will be dismissed, with costs of both courts.

The other Justices concurred.

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LESLIE *v.* CITY OF GRAND RAPIDS.

HIGHWAYS—MAINTENANCE—CARE REQUIRED—BICYCLES.

Reasonable care in the construction and maintenance of highways for ordinary vehicles, such as wagons and carriages, is the measure of duty resting upon municipalities and townships under the existing statute (3 How. Stat. § 1446c *et seq.*), and, in the absence of further legislation, the courts will not extend the duty so as to require the highways to be kept safe for bicycles and vehicles of like character.

Error to superior court of Grand Rapids; Burlingame, J. Submitted February 8, 1899. Decided April 18, 1899.

Case by Mary A. Leslie against the city of Grand Rapids for personal injuries. From a judgment for defendant, plaintiff brings error. Affirmed

Taylor & Eddy, for appellant.

Henry J. Felker, City Attorney, for appellee.

LONG, J. This action was brought to recover damages for personal injuries sustained by plaintiff, who was thrown from her bicycle, on the evening of November 26, 1897, in consequence of the defective condition of the asphalt pavement on Canal street, in defendant city. That street was paved with asphalt covering, from 2 to 3 inches in thickness. The break in the pavement into which the plaintiff rode with her wheel was about 2½ feet by 2 feet in extent, and from 2 to 2½ inches deep. The asphalt had been worn away down to the concrete by the passage of teams over it. It is one of the most used streets in the city, hundreds of teams passing over it daily. The asphalt was worn in several other places, as well. These holes or broken places had existed for 60 days or more previous to the accident, so that the real controversy

arises over the question whether the city was bound, under the statute, to keep its streets in a reasonably safe condition and fit for vehicles of that character to pass over them. It appears, without contradiction, that the street was in reasonably safe and fit condition for ordinary vehicles, such as wagons and carriages.

It has been held in this State, and in others, that a bicycle is a vehicle; but the question has never before been presented in this State whether, under this statute, the streets must be kept in a reasonably safe condition for this class of vehicles. When the amendment to the statute was passed in 1887 (3 How. Stat. § 1446c *et seq.*), this class of vehicles was in use only to a limited extent, and we do not think the legislature had this class of vehicles in mind, or intended to place the burden upon townships and cities to keep their roads and streets in a safe condition for them. Reasonable care in the construction and maintenance of highways for ordinary vehicles, such as wagons and carriages, is the measure of duty resting upon municipalities. In *Sutphen* v. *Town of North Hempstead*, 80 Hun, 409, the court said:

"It is apparent that a bicycle rider upon an ordinary country road is exposed to greater dangers than a person riding in a wagon, and the great increase in the number of persons using these vehicles has created a demand for better and safer roads; but, under the present highway laws, a road in a condition which is reasonably safe for general and ordinary travel is all that the commissioners of highways are bound to maintain."

Our statute makes no distinction between country roads and streets in cities and villages. If a highway in the country is not kept in a reasonably safe and fit condition for public travel, the liability for injuries attaches, and the same statute imposes upon cities and villages a like burden. The testimony in the present case is conclusive that, while hundreds of ordinary vehicles passed and repassed over this street daily, no accidents or injuries occurred. There is no question but that the street was

reasonably safe and fit for that kind of travel; and that is all the statute requires. If the statute ought to be extended to cover vehicles of the bicycle class, that question must be addressed to the legislature, and not to the courts.

The court below should have directed the verdict in favor of the defendant; therefore it is unnecessary to discuss the various assignments of error set out by counsel for plaintiff. The jury found in favor of the defendant. That judgment must be affirmed.

GRANT, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

WHITELEY *v.* WHITELEY.

DEEDS—CANCELLATION—GIFT—FRAUD—BURDEN OF PROOF.

Where a son of mature years and business experience obtains from his aged and feeble mother, without consideration, a conveyance of valuable property, which a few weeks before she had devised by a will unsatisfactory to the son, and which, as she had occasionally expressed herself, she had intended to retain control of until her death, and it appears, on a bill to set aside the deed, that she was given no opportunity, before executing the conveyance, to consult with any one except the donee and his immediate family, the burden of showing the good faith of the transaction is upon the donee; especially if the grantor, upon being informed, subsequently, that such a conveyance was of record, repudiated the grant, and claimed that it was represented to her that the paper signed was simply a modification of her will.

Appeal from Ingham; Person, J. Submitted February 9, 1899. Decided April 18, 1899.

Bill by Elizabeth Whiteley, revived in the names of James Whiteley, executor, and others, devisees of deceased,

against Elizabeth Whiteley and Nellie M. Whiteley, to set aside a deed. From a decree for complainants, defendants appeal. Affirmed.

Smith & Hood, for complainants.

M. V. & R. A. Montgomery (*Charles F. Hammond*, of counsel), for defendants.

LONG, J. This bill was filed to set aside a deed made by Elizabeth Whiteley, deceased. The court below entered a decree setting the deed aside. Defendants appeal.

The facts are set out in the opinion filed by the court below. We have read the record with care, and are satisfied that the circuit court was not in error in entering the decree in accordance with the prayer of the bill, and therefore adopt as our own the opinion of that court, as follows:

"This suit was commenced by Elizabeth Whiteley, the mother of John Whiteley and James Whiteley, against Elizabeth, the widow of John, and Nellie, his only child and heir at law. Its object is the cancellation of a certain deed made by the mother to John in his lifetime. The mother herself has died since the bill was filed, and the case stands revived, with her executor and devisees as present complainants. The old lady was owner of a farm in the country and certain real estate in the city. She also had a small amount of personal property. The country and city properties about equaled each other in value. John and James were both of mature years, and were her only children. Her home was, and for a long time had been, with James, but she was in the habit of paying John occasional visits. It cannot be said, from the evidence, that she had, up to the time of the occurrence out of which this suit has grown, more affection for the one son than for the other. John was a man of quite large wealth, and James, I think, was in comfortable financial circumstances. In the early fall of the year 1890, the old lady met with a severe accident, shortly after which she executed a will. By the terms of this will the farm was to go to James, and the city and personal property to John, the latter to pay the former $1,500 in money to equalize the distribution. It is true that the propriety of

drawing the will was suggested to her by James, but it is not shown that he in any way suggested or helped to determine the provisions it should contain. On the whole, these seem to have been strictly in accordance with a purpose the mother had long held, and sometimes expressed to her friends, of retaining all the property under her own control so long as she might live, and then dividing it equally between the two sons.

"John soon heard of this will, and, being unable, as it seems, to discover what it contained, became strongly possessed with the idea that he had been unfairly dealt with in the disposition of the property. In consequence of this, he deliberately set about to secure from his mother such a conveyance in his own behalf as should be satisfactory to himself. With this object in view, his first care was to have the mother brought, from the house where she lived with James, to his own house, where no relative except members of his own immediate family should be near her. What took place when this had been accomplished we do not know, for both the mother and John were dead when the testimony was taken; but presently, and within a few weeks after making the will, she was induced in some way to sign the deed in question. Whatever the representations made to her were, it is clear that the deed was obtained without consultation on her part with other relatives, or even with a disinterested friend. No outsider listened to a word of the negotiations, and the notary, called in by John, was the only person present when the instrument was executed. * * * If there was any consideration for the deed so made, which I doubt, it was so disproportionate to the value of the property described that the transaction, at the best, was no more than a gift. This deed was at once recorded by John, but no further information as to its existence was given to any of the old lady's friends. She went on controlling the property, calling it her own, and paying taxes on it, as though no conveyance had been made. This state of affairs continued nearly two years, until the record of the transfer was discovered in the register's office by one of James' sons. When the old lady was informed that such a deed from her appeared to be in existence, she at once repudiated the transaction, denounced John's conduct, declared that she never intentionally or knowingly executed such an instrument, and filed this bill asking that it be set aside and canceled. She did acknowledge, however, signing some

paper while at John's, but said that she supposed it to be but a modification of the will already mentioned, so that John might have the city property, at her death, without paying to James the $1,500 as contemplated by its original terms.

"Whatever the truth in this matter, I cannot believe that John reflected or stopped to consider that he might be perpetrating a fraud upon his mother. He was absorbed with the desire to so secure to himself what he believed to be his rights that neither the influence of James nor his mother's ultimate wishes could take them from him. But if he did obtain the deed, either through actual deceit or by misapprehension on the mother's part, it was a fraud in fact, however little he may have thought of it in that light. While the transfer was of the nature of an ademption of an intended devise, it yet was a present absolute conveyance in fee, which at once stripped the mother forever of all further control of the property, whatever might be her necessities. If the mother did not desire or propose this, it was a great wrong done her, and a wrong to James, whose intended share would have to bear all the burden of the mother's future expenses.

"In trying to determine what really took place, we at once find ourselves absolutely in the dark as to all of the immediate facts of the transaction. We know nothing positively about what took place between John and his mother from the time she was brought into his family down to the execution of the deed. Both are dead, and we have the sworn story of neither. All that part of the affair—the vital part—is blank. In some instances the relation of parties is such, as where an attorney receives a gift from a client, or a guardian from a ward, and even when the obligation is one of mere *quasi* trust, that the law itself takes notice of the inequality in their situations, and demands of the donee of a gift affirmative proof of the fairness and good faith of the transaction. That rule does not, ordinarily, apply to parent and child, simply as such; but, when the circumstances are unusual and suspicious, it may apply. I think it should be applied in this case. Here the son—a man of mature years and business experience—deliberately planned to obtain valuable property from his very old and feeble mother. As a part of that plan, and for that purpose alone, he has her brought into, and retains her in, the privacy of his own home, away from all other relatives. He instructs the conveyancer, whom she

does not see alone for a moment, and a present conveyance in fee is obtained of valuable property without giving the aged grantor opportunity to consult any adviser or friend. It is hardly necessary to project and carry out such a scheme as this to obtain a free and voluntary gift; and such deed is found to be, not only antagonistic to the general purpose which she is supposed to have always entertained, and which she had recently reiterated by her will, viz., to retain the property to herself so long as she might live, but not in accordance with what would naturally be expected from her feelings towards her other son. These circumstances, as I am firmly convinced, call emphatically, as a matter of public policy, upon those claiming under the deed, for clear and satisfactory proof that the old lady both intended the conveyance and fully understood its purport and effect. 'A gift, though untainted by fraud, will always be set aside if it does not conform to the intention of the donor, or if executed under a total misapprehension as to its effect. In the case of a deed of gift, the question is not, Did the donor execute the deed voluntarily? but, Was it with full knowledge of the nature, effect, and consequences which the law gives it? To be upheld, it must be the pure, voluntary, and well-understood act of the donor's mind. The court will not recognize any deed of gift when it appears that there was any defect in the understanding of the nature of the gift on the part of the donor. If the deed is but tainted with the want of complete understanding of its nature by its author, the court must treat it as invalid, and consider that the property did not pass.' Thornt. Gifts, § 450. And it has also been said: 'If a doubt exists as to whether the donor knew all of the provisions of the deed, it is void.' *Id.* § 448, note 2.

"With the burden of proof, as a matter of public policy, thrown on those claiming under the deed, we yet have only the testimony of the conveyancer as tending to show knowledge and intent on the part of the old lady; and while his good faith in the affair is undoubted, and while full credit is given to his statements, they do not, and, in the nature of things, cannot, go far enough to establish that freedom of action by the old lady, and comprehension of consequences, necessary to sustain the transaction. He saw her but a few moments, and then in the presence of the grantee and his family. His explanation of the character of the paper must have been understood by her, if

she actually understood at all, in the light of what had been said before by John; and of the talk between her and John we know nothing. Neither the conveyancer himself, as he admits, nor the court, can feel sure that this brief explanation, gone over but once, was comprehended by the deaf and feeble old lady in any substantial sense at all. To sustain this gift, under the circumstances, a knowledge of the material facts which led up to the execution of the deed is of more importance than a knowledge of what took place just at the time of the execution.

"A decree must be entered in accordance with the prayer of the bill."

The decree of the court below must be affirmed, with costs.

GRANT, C. J., HOOKER and MOORE, JJ., concurred. MONTGOMERY, J., did not sit.

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WALTER v. MUTUAL CITY & VILLAGE FIRE INSURANCE CO.

1. FIRE INSURANCE—WAIVER OF CONDITIONS—EVIDENCE—QUESTION FOR JURY.

Waiver of a condition in a fire-insurance policy that it should be void if additional insurance was obtained without having the fact indorsed upon the policy is a question for the jury, where it is contended that early notice of the additional insurance was given to the company's secretary, who, notwithstanding, requested proofs of loss, and permitted the insured to incur expense in obtaining them, without intimating that the policy was void.

2. SAME—INSTRUCTIONS.

An insurance company cannot complain of a failure to give requested instructions concerning a waiver of conditions sought to be drawn from the actions of the company prior to a loss, where the instructions given made the right to find a waiver at all depend upon subsequent actions.

3. TRIAL—CONFLICTING TESTIMONY—PROVINCE OF COUNSEL.
An instruction pointing out the fact that two witnesses testify contrary to the plaintiff upon a certain matter is properly refused, it being the province of counsel to comment upon such conflict in the evidence.

Error to Cass; Coolidge, J. Submitted February 9, 1899. Decided April 18, 1899.

Assumpsit by Edgar Walter against the Mutual City & Village Fire Insurance Company for the counties of Berrien, Cass, and Van Buren on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Coy W. Hendryx and *James H. Kinnane*, for appellant.

Charles E. Sweet, for appellee.

HOOKER, J. The plaintiff is the owner of a policy of insurance issued by the defendant, a mutual insurance company, for $80 upon a building, and $300 on the stock, and $20 on furniture and fixtures, contained therein. The building was burned, and this action was brought upon the policy. The plaintiff recovered, and defendant has brought error.

Upon the trial it appeared that the plaintiff obtained a policy of insurance in another company upon the building and fixtures, and that the fact was not indorsed on the policy previously issued by the defendant. The plaintiff testified that he subsequently saw Mr. Porter, the secretary of the defendant, on the street, and told him what he had done, and wished him to take from the policy what was on the building and fixtures, and to put $100 more on the merchandise, making it $400. The change was not made by Mr. Porter. Mr. Porter denied this conversation. The policy sued upon contained the following provision:

"The company will not insure any single buildingand

contents to an amount over $2,000; and in case the assured have, or shall hereafter obtain, any other policy or agreement for insurance, whether valid or not, upon the property insured by this company, the policy of this company is null and void, unless said other insurance is indorsed thereon."

The policy required that the plaintiff should take an inventory of his goods once in three years. After the fire, the plaintiff notified the company by postal card, and received the following answer:

"DOWAGIAC, MICH., Dec. 9, '95.

"EDGAR WALTER,

"Sumnerville, Mich.

"*Dear Sir:* Your card announcing your fire loss, and I hasten to answer. Inclosed you will find a portion of our charter, with section No. 19 marked for your attention, which read carefully. You must furnish us with a duplicate of your last inventory, together with duplicate of all bills of goods bought since the making of your last inventory. If you have not the bills themselves, the dealers will furnish you with those, upon your application to them. Also make a statement of your loss, as to its origin, and have it sworn to before a notary. Then forward all your papers, together with your policy, to this office. Respectfully yours,

"HENRY H. PORTER."

He testified that:

"After receiving this letter I did not furnish an inventory at the time, because I supposed my last inventory was burned up with the balance of the papers; but I afterwards found an inventory made in '94, in a coat pocket at home, and I offered it to Mr. Porter. This was at the second time I was at his office after the fire. He said he did not care for it, or something to that effect. After the fire, and before finding the inventory, I had succeeded in getting most of the bills and duplicates, and either sent them or took them to Mr. Porter. There were numerous small bills that I could not furnish. Mr. Porter examined me. Afterwards, Mr. Hendryx and Mr. Warner, of Decatur, a member of defendant company, came to Sumnerville to look the matter up. I subsequently came before them at their office in the city of Dowagiac. Mr.

Porter was also present. No settlement, or proposition to settle, was then made on either side. (A writing purporting to be an inventory taken in 1894 was here presented to witness and offered in evidence.) I did not offer this at my first interview with Mr. Porter, and I think I told him that I had no inventory, supposing that it had been burned in the fire. I afterwards told him that I had accidentally found it.

"*Q.* Did you show it to Mr. Porter?

"*A.* I offered it to him, but he said he did not care for it. Mr. Porter is the secretary of the defendant company."

On cross-examination he stated:

"I showed the inventory only once. I think it was the time he wrote me to come up there, but I don't remember the date. I have not his letter. At that time I met Dr. Rix, president of the defendant company, and, as I recollect, Mr. Bond. I had made an inventory every year in December. I have no inventory except the one made in 1894. I don't know whether I have preserved them or not. * * * When I first saw Mr. Porter after the fire, I told him I hadn't the inventory of '94. I presumed it was burned. After I found it, I tendered it to Mr. Porter, and he said, in effect, that he did not care for it at that time. I did not refuse to let him have it."

Mr. Porter, defendant's secretary, testified that:

"After the fire, he made out and offered a purported proof of loss. It was at my office that he presented it. I called his attention to it, and noted the fact that it contained no inventory. I told him that he would have to furnish the company with duplicate invoices from the time he took his last inventory, and he said that he had not made any. I said, 'Haven't you made any inventory at all?' and he said, 'No;' that he had not made any in three years. 'Well,' says I, 'Mr. Walter, under the condition of our charter, this company is not liable for this loss,'—that is, if the board of directors was a mind to take that stand; it was optional with them to do it; we had no idea of doing it at that time,—'because the charter requires you to make an inventory.' My son, who is a clerk in the office of the company, was present at this talk, which was in the company's office at Dowagiac. This was on December 26th. Our plan is to take the inventory, and figure from the amount of bills and the last inventory.

That is the only way we have to get at the amount of the stock of goods and adjust it. I afterwards heard from him that he had unexpectedly found his inventory in a little book in his coat pocket. * * *

"After the receipt of this letter [letter referring to inventory], plaintiff was before the adjusting board of defendant company. I had notified him to come, but before I did that I had ascertained about the robbing of the store and the other insurance, and just at the adjournment he took the little book containing the inventory and put it in his pocket. Said he wanted it, as it contained some private accounts, and took it away. At the time the affidavit was made, December 26, 1895, he stated that thieves had broken into the store, and that a portion of the stock had been stolen. Stated that nearly everything had been taken, even to a barrel of molasses. I told him that, if the store had been burglarized, it was his duty to find out and prosecute those who did it. Told him we would do all we could to help him in it. * * * At the time I have testified to, when the plaintiff came before the adjusting board and presented the purported inventory, there were present, besides myself, Dr. Rix and Mr. Warner, officers of said company, and my son.

"What I said to him about getting invoices was written before my interview with him, when he told me he had no inventory. Subsequently, upon my report, action was taken by the board of directors declaring the policy null and void because of the forfeiture resulting from the failure to observe the provisions of the charter. This meeting was on the 17th of March following, and of this action the plaintiff had notice. The talk about the inventory was the first time I saw him, December 26th. Then we had a meeting of the board of adjusters about the middle of January or the first of February,—will not say certain. On December 26th, I told him to get his invoices. Said nothing about inventory, because he said he had none. Pursuant to my directions, he furnished me more invoices, and wrote that letter, that he had unexpectedly found the inventory of his stock of 1894.

"When Walter said he had no inventory, I did not immediately elect to take advantage of that clause in the policy; I had no right to. The board of directors never took any action. The board of adjusters never took any action on that particular part, but it was the whole thing in general. We took exceptions to that, and the fact that

the stock of goods, as Mr. Walter stated in that affidavit, that he had heard these goods were stolen before the fire. On that ground the company was not liable if the goods were stolen. I don't know as they have ever specified any action upon that particular point.

"*Q.* You afterwards notified him of the meeting of the board of adjusters?

"*A.* Yes, sir.

"*Q.* To be present?

"*A.* Yes, sir.

"*Q.* Furnish whatever he could?

"*A.* Yes, sir. That is, he could have a hearing there.

"*Q.* That hearing was for him to produce whatever he could?

"*A.* Certainly. All the action the board of directors took was at the meeting of March 17, '96, and is as follows: 'The policy of Edgar Walter was declared null and void. Attorney Hendryx was present, and reported that he thought the Walter loss at Sumnerville could be settled for a small amount. On motion, Directors Warner and Bond, together with Attorney Hendryx, were appointed a committee to settle the Walter claim, by way of compromise.' Mr. Walter was never notified of this action. He afterwards appeared before the board with his attorney."

It is admitted that by obtaining additional insurance, without having the fact indorsed upon the policy issued by the defendant, said policy became void, unless the condition was waived. The plaintiff's counsel claims that it was waived by the failure of Porter to object to such insurance when informed of its procurement, and that, if mistaken in this, defendant waived the condition by requesting proofs of loss, and permitting the plaintiff to incur expense in obtaining them, without intimating that it considered the policy void. Under our own cases, the court was warranted in leaving the question of waiver to the jury. *Pennsylvania Fire Ins. Co.* v. *Kittle*, 39 Mich. 51; *Carpenter* v. *Insurance Co.*, 61 Mich. 644; *Marthinson* v. *Insurance Co.*, 64 Mich. 372; *Cleaver* v. *Insurance Co.*, 71 Mich. 421; *Burnham* v. *Casualty Co.*, 117 Mich. 155; *Granger* v. *Assurance Co.*, 119 Mich. 177; *First Baptist Church of Jackson* v. *Insurance Co.*, Id. 203.

Error is assigned upon the refusal of the court to give the defendant's third request. It was as follows:

"(3) There is upon the plaintiff the burden to establish every essential element of his case by a clear preponderance of testimony. The burden is upon him to establish the fact that the inventory produced before the board of adjusters of the defendant company, and here offered in evidence, is genuine, and was in fact made in the time and manner it purports to be and as the plaintiff swears it was. There is in the case the testimony of the witness H. H. Porter and his son against the testimony of the plaintiff, tending to show that he stated on December 26th, when offering proof of loss, that he had no inventory, and had not taken any within the past three years, and, in fact, had taken no inventory at all. If you believe, from the testimony on this point, that the plaintiff did not, in fact, take and make the inventory in the time and manner it is here claimed, then your verdict will be for the defendant."

The court was under no obligation to point out the fact that two witnesses testified contrary to the plaintiff upon the subject of the inventory. That was the province of counsel. The question of genuineness was left to the jury, under fair instructions.

Counsel complain of the refusal of the court to give the fifth and ninth requests, reading as follows:

"(5) The plaintiff claims that on or about the time that he paid his last assessment, prior to the fire for which the loss is here claimed, he stated to the secretary of the defendant company, on the street in the city of Dowagiac, that he had taken other insurance on the same property, with another company. This the secretary, in his testimony, denies. If you shall find, as a matter of fact, in the plaintiff's favor in this point, you are further instructed that it is the testimony of the plaintiff that the secretary of the defendant company made absolutely no response or acquiescence thereto, and you would not be authorized to infer a waiver by defendant company from any such statement as the plaintiff claims that he made."

"(9) The effecting of subsequent insurance on the part of the plaintiff rendered the policy of the defendant company void, whether said subsequent insurance was valid

or not, and said policy could only be revived by a new contract."

But he did what was equivalent, by making the waiver depend on the action of the company after the fire.

There are some other questions of minor importance which we think it unnecessary to discuss further than to say that we find no error in them.

The judgment is affirmed.

The other Justices concurred.

PEOPLE *v.* BRILL.

MUNICIPAL CORPORATIONS—ORDINANCES—REPEAL—SALE OF UNSOUND MEAT.

An ordinance prohibiting the sale of unsound meat, and providing a penalty for its violation, becomes inoperative on the taking effect of a charter provision authorizing the council to prevent the selling of such meat, and to punish those who "knowingly" sell it; so far, at least, as the ordinance is broader than the charter.

Certiorari to recorder's court of Detroit; Chapin, J. Submitted February 9, 1899. Decided April 18, 1899.

Daniel Brill was convicted of selling unwholesome meat, in violation of a city ordinance. Reversed.

Warner, Codd & Warner, for appellant.

Charles Flowers, for the people.

HOOKER, J. Section 136 of the charter of Detroit, compilation of 1893, provides:

"The said council shall have power to prohibit, prevent, and suppress the sale of every kind of unsound, nauseous,

and unwholesome meat, poultry, fish, vegetables, or other articles of food and provisions, * * * and to punish all persons who shall knowingly sell the same, or offer or keep the same for sale."

Section 19, chap. 97, tit. 9, of the city ordinances of 1895, is as follows:

"No butcher, forestaller, grocer, trader, or other person shall sell, expose or offer for sale, in any public market, or at any place within the limits of the city of Detroit, any unsound, diseased, stale, rotten, fermented, nauseous, or unwholesome meat, poultry, fish, vegetables, fruits, or other articles of food or provisions."

Section 28 provides:

"Any violations of the provisions of this ordinance shall be punished by a fine not to exceed three hundred dollars and costs of prosecution; and the offender, in case of any conviction, shall be sentenced to be confined in the Detroit House of Correction until the payment of the fine and costs imposed: *Provided*, such imprisonment shall not exceed the period of six months."

The ordinance is said to have been passed in 1881.

The defendant was convicted upon a charge, laid under this ordinance, of selling unwholesome and unsound meat, to wit, hams. The case is brought to this court by *certiorari*. The important questions in the case are (1) whether the ordinance is invalid by reason of the omission of the word "knowingly," and (2) whether the conviction can be sustained in the absence of proof of knowledge.

Counsel for the people endeavors to show that the ordinance was valid when passed, and that it was not affected by the provisions of section 136. In 1827 authority was given to the common council to make by-laws and ordinances relative to public markets within said city. Under this provision, an ordinance was passed punishing the manufacture or sale in the market of unsound or unwholesome food, and the sale of meat, etc., was prohibited, except in stalls of the public market houses rented from the corporation. There was a proviso that persons paying

a license of $100 might sell meat by the carcass or quarter upon streets in the vicinity of the markets.

In 1857 (Act No. 55, Laws 1857) a new charter was enacted. This contained sections authorizing the council to erect and maintain market houses, and to provide fully for the good government and regulation thereof; also to provide for the preservation of the general health of the inhabitants of the city; to make regulations to secure the same; to prevent the introduction or spread of contagious or infectious diseases; to prevent and suppress diseases generally, and, if deemed necessary, to establish a board of health, and to prescribe and regulate its powers and duties; to prohibit, prevent, and suppress the sale of every kind of unsound, nauseous, or unwholesome meat, and to punish all persons who should knowingly sell the same, or offer or keep the same for sale. This charter also contained the provision which now constitutes section 136 of the compilation of 1893, as already stated; the same having been incorporated in the charter of 1883, as also was the provision regarding the public health. Counsel for the people says in his brief that the ordinance (section 19) under which the defendant was prosecuted is an exact reproduction of section 2 of the compilation of 1864. When it was passed does not appear, and it may have been before the word "knowingly" was incorporated in the charter provision relied on.

If, as counsel contends, the ordinance when passed was authorized by the provisions of the then existing charter, the provision mentioned is a modification of the old charter. It is now the only charter; and, if it is inconsistent with the provisions of ordinances which were passed before its enactment, such ordinances must give way. Section 136 of the charter authorizes the council to pass laws to punish those who knowingly sell unsound meat. It is an express provision upon the subject, and must be supposed to have been intended to take the place of the more general provisions of former charters. It stands as the only fundamental law of the corporation, and the ordi-

nances cannot go beyond its provisions in creating penal offenses. *Sheldon* v. *Hill*, 33 Mich. 171; *People* v. *Bussell*, 59 Mich. 109.

We are constrained to hold that the ordinance became inoperative by the enactment of section 136, if it was then in force. The conviction is set aside, and the respondent is discharged.

The other Justices concurred.

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120 45
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PEOPLE v. BLOM.

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MUNICIPAL CORPORATIONS — LIQUOR LICENSE — ORDINANCE — VALIDITY.

An ordinance adopted by a city of 8,000 inhabitants, pursuant to authority in the charter to regulate saloons, requiring applicants for a saloon license to pay into the city treasury a license fee of not less than $300 nor more than $500, to furnish a certificate of good character from six reputable citizens, and to give a bond of $2,000, and restricting the saloon district to specified streets, is a valid ordinance.

120 45
f153 95

Error to Ottawa; Padgham, J. Submitted February 9, 1899. Decided April 18, 1899.

Cornelius Blom, Sr., was convicted of violating a city ordinance relating to the sale of intoxicating liquors. Affirmed.

McKnight & McKnight, for appellant.

George E. Kollen, for the people.

MOORE, J. The respondent is a saloon-keeper, whose sole and only business is selling intoxicating liquors at retail in the city of Holland. He paid the state tax to the

county treasurer, and filed the bond required by the state law. The city of Holland, by ordinance, requires a person, before engaging in the business of keeping a saloon, to pay a tax of $300, and to comply with certain other conditions. The respondent refused to pay this tax. He was convicted of a violation of the ordinance, and has brought the case here for review.

The authority for the passage of the ordinance is in title 7 of the charter. Section 1 of this title reads as follows:

"The city of Holland, in addition to such other powers as are conferred by this act, shall have the following general powers and authority, and the common council of said city may enact, make, continue, establish, modify, amend, and repeal such ordinances, by-laws, and regulations in relation thereto, and for the exercise of the same, as they may deem desirable." Act No. 271, Local Acts 1893.

Subdivision 7 gives the council authority to prohibit and suppress ale, beer, and porter houses, and all places of resort for tippling and intemperance, and to punish the keepers thereof and all persons assisting in carrying on the business thereof. Subdivision 14 authorizes the council to regulate and license all taverns, hotels, and houses of public entertainment, all saloons, restaurants, and eating houses, and all places where tobacco, cigars, and any beverages are kept for sale. The ordinance itself is as follows:

"An Ordinance Relative to Saloons and Saloon-Keepers.

"*The city of Holland ordains:*

"SECTION 1. No person shall keep a saloon within the limits of the city without having first obtained from the common council a license therefor, in the manner hereinafter provided.

"SEC. 2. Every person desiring to keep a saloon within the city shall, before entering upon such business, make application in writing therefor to the common council, specifying the location of the building in which he intends to keep the same, which location shall be either on Eighth street between Land street and River street, or on River

street between Sixth street and Tenth street, and, in case of a firm, such application shall set forth the names of all the parties constituting such firm, which application shall also designate the persons proposed as sureties on the bond as hereinafter provided. Such application shall be accompanied by a recommendation signed by at least six reputable citizens, showing that the applicant is well known to them and is of good reputation.

"SEC. 3. After the granting of such application by the common council, and before issuing the license, the applicant shall pay into the city treasury such sum of money for said license as shall annually be fixed by resolution of the common council, and shall file the city treasurer's receipt therefor with the city clerk. Said sum of money shall not be less than $300, nor more than $500. Such applicant shall also, before such license is issued to him, execute a bond to the city of Holland in the sum of $2,000, with two sufficient sureties to be approved by the common council, conditioned that he shall keep and maintain an orderly and well-regulated saloon during the continuance of such license, and shall pay all fines and costs imposed upon him for the violation of any of the provisions of this ordinance."

The record shows that Holland is a city of about 8,000 people. It has, including defendant's saloon, eight saloons where liquor is sold. Its police force is maintained at an expense of about $1,000. It has had about the same number of saloons as now for several years. There is but one other saloon within 10 miles.

The respondent, in his brief, alleges five reasons why the ordinance in question is invalid, as follows:

1. It is unreasonable, oppressive, prohibitory, and in restraint of trade.
2. It usurps the functions that are exercised by the general laws of the State.
3. The ordinance attempts to collect revenue, instead of regulating and controlling the business.
4. The amount of the license fee is not definitely fixed by the ordinance.
5. The charter nowhere gives the city of Holland authority to license saloons where intoxicating liquors are sold.

The validity of ordinances of like character, and involving the same principles, is sustained in the following cases: *Kitson* v. *Mayor, etc., of Ann Arbor*, 26 Mich. 325; *Wolf* v. *City of Lansing*, 53 Mich. 367; *Sherlock* v. *Stuart*, 96 Mich. 193 (21 L. R. A. 580). See, also, *Adams* v. *Mayor, etc., of Somerville*, 2 Head, 363; *Smith* v. *Mayor, etc., of Knoxville*, 3 Head, 245; *Burch* v. *Mayor, etc., of Savannah*, 42 Ga. 596; *Harbaugh* v. *City of Monmouth*, 74 Ill. 367; 1 Dill. Mun. Corp. (4th Ed.) §§ 327, 328, and notes; 11 Am. & Eng. Enc. Law, 667, 668, and notes; *City of Grand Rapids* v. *Braudy*, 105 Mich. 670 (32 L. R. A. 116, 55 Am. St. Rep. 472); Black, Intox. Liq. §§ 31, 46.

Judgment is affirmed.

The other Justices concurred.

DARMSTAETTER *v.* HOFFMAN.

1. ASSIGNMENT OF LEASE—LIABILITY FOR RENT.
   Where a lessee assigns his interest in the whole or a part of the demised premises for the entire term, the assignee succeeds to all the rights and liabilities of the original lessee, becoming holden for the rent according to the terms of the lease.
2. SAME.
   The assignee's liability, in the absence of a contrary provision in the lease or the assignment, is to the original lessor.
3. SAME—UNAUTHORIZED ASSIGNMENT.
   But where the lease contains a covenant against assignment without the lessor's consent, one who accepts an unauthorized assignment is liable to his assignor for rent, independent of the question whether the latter has paid the same to the lessor.

Error to Wayne; Frazer, J. Submitted October 19, 1898. Decided April 25, 1899.

Assumpsit by Rudolph Darmstaetter and others against Charles Hoffman for rent. From a judgment for plaintiffs, defendant brings error. Affirmed.

Hubbard & King leased to plaintiffs certain premises, to be used and occupied as a billiard hall and saloon. On December 5, 1896, this lease was assigned by plaintiffs to one Charles Kudner, and by Kudner, on December 30, 1896, assigned to defendant. One Alexander White was the owner of the pool tables and other personal property situated in this saloon, and on March 21, 1896, executed to plaintiffs a bill of sale, which was in fact a chattel mortgage. White transferred this personal property to one Brun, who went into possession March 21, 1896. Brun remained in possession, and was in possession at the time this suit was brought. Brun was indebted to the defendant, who, in order to secure this claim, purchased plaintiffs' interest in the chattel mortgage, as well as in the lease. Plaintiffs paid Hubbard & King the rent for February, 1897, before commencing this suit, and paid the rent for March, 1897, after suit was commenced. Plaintiffs covenanted in the lease with Hubbard & King to pay the rent, and always paid them, and also covenanted not to assign or transfer it without the written assent of Hubbard & King, who had not recognized defendant as their tenant. The suit was instituted to recover the rent for those two months. Plaintiffs had verdict and judgment.

William B. Jackson, for appellant.

Cutcheon, Stellwagen & Fleming, for appellees.

GRANT, C. J. (*after stating the facts*). Is defendant liable for the rent? It is the rule that the assignment of a lease, and its acceptance by the assignee, carries with it the obligation to pay the rent. The covenant to pay rent runs with the land. When the assignment is absolute and for the entire term, or for a part of the premises for the entire term, the assignee succeeds to all the rights and

liabilities of the original lessee. *Lee* v. *Payne*, 4 Mich. 106; *Fennell* v. *Guffey*, 155 Pa. St. 38; *Le Gierse* v. *Green*, 61 Tex. 128; Tayl. Landl. & Ten. §§ 16, 448, 450; 1 Wood, Landl. & Ten. § 337.

Defendant therefore became liable to pay the rent to some one. This brings us to the question, Can plaintiffs maintain the action, and that before paying the rent to Hubbard & King? Plaintiffs' counsel contend that the defendant is virtually the lessee of the plaintiffs, and not of the original lessors, for the reason that Hubbard & King have not looked to the defendant for the rent. As already shown, the covenant to pay rent runs with the land, and the assignee becomes liable to the original lessor, unless there is some provision in the lease or assignment to the contrary. Under such leases the original lessee could not sue his assignee to recover the rent due, until he had paid the lessor. But in this case the lessors have not consented to the assignment. There is nothing in the record to indicate that they had any knowledge of it, or had done any act which could operate as a waiver of this covenant in the lease not to assign. Until Hubbard & King had assented in writing, or had recognized defendant as their tenant, that relation did not exist. The assignment was in direct violation of the terms of the lease. We do not think that the defendant is in a position to deny his liability to plaintiffs until he has made some arrangement with the original lessors validating the assignment. No relation of landlord and tenant exists between the defendant and Hubbard & King until they waive this covenant. We are therefore of the opinion that defendant is not in a position to deny his obligation to pay to plaintiffs, and that they may maintain suit before payment to Hubbard & King.

Judgment affirmed.

The other Justices concurred.

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CHICAGO LUMBERING CO. *v.* POWELL.

1. TRUST DEED—POWERS OF TRUSTEE—NONRESIDENTS—FOREIGN STATUTES.

An insolvent in England, having instituted proceedings under the English bankruptcy act for a composition with his creditors, executed, and recorded in this State, a certain deed, which, after reciting a meeting of creditors and the choice of a certain person as trustee, conveyed to such person, "as trustee for the benefit and security of creditors," certain lands situate in this State. *Held*, that resort might be had to the bankruptcy act to determine the powers conferred on the trustee, although the law itself could have no extraterritorial force.

2. SAME—VALIDITY.

It appearing that a trustee under the bankruptcy act has power to convey, the deed in question is sustainable in this State under 2 How. Stat. § 5573, subd. 1, as a conveyance creating an express trust to sell lands for the benefit of creditors.

3. SAME—DELEGATION OF TRUST—ATTORNEY IN FACT.

It is not a delegation of the trust for a nonresident trustee to execute a contract through a resident attorney in fact.

4. LAND CONTRACT—ABSENCE OF WITNESSES—SPECIFIC PERFORMANCE—SUFFICIENCY OF BILL.

2 How. Stat. § 5727, provides that no instrument intended to operate as a conveyance, made in good faith and upon a valuable consideration, shall be wholly void by reason of a defect in the statutory requisite as to attestation, but that the same may be allowed to operate as an agreement to convey, and may be enforced specifically by suit in equity, subject to the rights of subsequent good-faith purchasers. Complainant's bill contained allegations showing a right to certain timber under a contract not witnessed, defendant's subsequent acquisition of title subject to complainant's right, his denial of complainant's interest, and his threat to destroy it. The bill prayed that defendant be decreed to release his pretended claim, and be enjoined from further asserting it. *Held*, that, in the absence of demurrer, it was sufficient as a bill for specific performance.

5. SAME—RESERVATION IN DEED.
A deed of land "subject to all existing * * * timber contracts" is subject to all such contracts, whether recorded or not.

6. SAME.
And no greater estate than that acquired by such deed can be conveyed by the grantee therein by the addition of the words "of record" to a like clause in a deed executed by him.

7. DEEDS—HABENDUM CLAUSE—EFFECT.
Although, in case of inconsistency between the granting clause and the *habendum* in a deed, the former usually governs, if it clearly appears from the whole instrument that it was the intention of the grantor to enlarge or restrict the granting clause by the *habendum*, the latter will control.

8. SAME.
Thus, the words "subject to all existing timber contracts," contained in the *habendum* clause, constitute a valid limitation upon the estate conveyed.

Appeal from Schoolcraft; Steere, J. Submitted January 26, 1899. Decided April 25, 1899.

Bill by the Chicago Lumbering Company against Daniel W. Powell and others to quiet title to certain timber. From a decree for complainant, defendants appeal. Affirmed.

Ball & Ball (*Clark & Pearl*, of counsel), for complainant.

A. B Eldredge (*T. E. Tarsney*, of counsel), for defendants.

HOOKER, J. The bill of complaint was filed to restrain the defendants from cutting timber upon premises which the complainant claimed to own. The pleadings raise a question of ownership between the parties, and the defendants appeal from an adverse decree.

A stipulation shows that Jonathan Nield was the owner of the land on May 22, 1879, and the proof discloses that upon that day Nield and wife made a deed of the land

to Adam Murray, of Manchester, England. The deed recites that:

"*Whereas*, at a meeting of the creditors of the said Jonathan Nield, duly convened and holden on the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and seventy-nine, the said Adam Murray was chosen to be trustee of the separate estate of the said Jonathan Nield;

"*And whereas*, the said Adam Murray, as such trustee, has requested the said Jonathan Nield to execute a conveyance to him, the said Adam Murray, as such trustee as aforesaid, of the lands hereinafter described or intended so to be, with their appurtenances, and the said Jonathan Nield has agreed to make the said conveyance:

"*Now, therefore, these presents witness* that in pursuance of the said agreement, and in consideration of the sum of one dollar, lawful money of the United States of America, to them in hand paid at or before the sealing and delivery of these presents, receipt whereof is hereby acknowledged, the said parties of the first part have granted, bargained, sold, conveyed, and confirmed, and do hereby grant, bargain, sell, convey, and confirm, unto the said Adam Murray, party of the second part, as trustee for the benefit and security of the creditors of the aforesaid Jonathan Nield, his heirs, successors, and assigns, all of the following pieces or parcels of land situate in the State of Michigan, to wit."

It was recorded in the register's office for the county of Schoolcraft on July 24, 1879.

A power of attorney from Adam Murray to Reginald William Petre, executed August 8, 1879, and recorded in said office April 14, 1881, was introduced. It authorized Petre to sell all lands deeded to Murray by Nield, to lease the same, and to sell and dispose of timber growing thereon. Both instruments were executed in England. Petre, as attorney for Murray, on June 8, 1882, sold the timber on the land to Ross & Co. by an instrument in writing, reading as follows:

"In consideration of the sum of $2,340, to be paid in form of a draft on Ross & Co., of Quebec, Canada, I hereby sell the pine timber standing, lying, and being on

the following-described lands in the county of Schoolcraft, State of Michigan, to the said Ross & Co., being on an estimate of 200 ft. B. M. to the acre."

It described the land, and was signed:

"ADAM MURRAY, Trustee, per REGINALD W. PETRE Attorney in Fact."

It was neither witnessed nor acknowledged, and was not, therefore, entitled to record.

On March 10, 1893, Adam Murray conveyed the land to the North of England Trustee Debenture & Assets Corporation, and its deed was recorded on April 17, 1894. This conveyance was "subject to all existing * * * timber contracts." On December 20, 1894, the North of England Trustee Debenture & Assets Corporation deeded the land to the Lac la Belle Company, "subject to all existing * * * timber contracts of record." The complainant acquired the interest of Ross, while the defendants have succeeded to the interest of the Lac la Belle Company.

The defendants oppose the relief sought upon the following grounds:

1. That Petre had no authority to make the timber contract.
2. That, if he had, the instrument was insufficient to convey an interest in land.
3. That, under the recording laws, the defendants were *bona fide* purchasers, and took the land discharged from the timber contract.

The record shows that Nield and his associates in business, all residents of England, being insolvent, instituted proceedings upon their own behalf, for a composition with their creditors, by filing a petition in the county court of Lancashire, under the English bankruptcy act, and Adam Murray was appointed trustee. The bankruptcy act was introduced for the purpose of showing what powers are given to a trustee by that act; and it seems to be conceded that the power to convey, directly or through attorney, is

among them. The conveyance to Murray was voluntary, and the deed, taken in connection with the proceedings under which the trust was assumed, shows that it was the intention that he should dispose of the property for the benefit of Nield's creditors. The deed has referred to these proceedings, and they may be considered in the attempt to ascertain what interest Murray obtained by the deed. It is urged that these proceedings have no extraterritorial force, and that the complainant cannot assert a claim under the foreign bankruptcy proceedings. We understand that the title claimed is not a judicial title. The evidence shows, on the contrary, that the deed was given to the trustee in pursuance of an amicable arrangement between Nield and some persons professing to be his creditors, whereby it was mutually agreed that Murray should take the title of the land, as trustee, for the purpose of the liquidation of the affairs of Nield by arrangement, and not in bankruptcy. The title was accordingly conveyed to Murray by Nield.

In *Graydon* v. *Church*, 7 Mich. 51, it was said that the courts of one State have no power to make their judgments and decrees operate directly upon property in another; and in that case, if the receiver's rights in real property had been left to depend upon the decree of the New York court, they could not be recognized in this State. But an *assignment* had been made to the receiver, and this was respected.

In *Wood* v. *Parsons*, 27 Mich. 163, the court recognized the rule that laws enacted by one sovereignty can have no force within the territory of another, but added:

"Had the insolvent in this case, with or without the intervention or order of the court, made an assignment of this property to Wood, the plaintiff, we see no reason to doubt that such assignment would have operated as a conveyance of the title to any property of the insolvent here, except possibly, in some cases, as against the claims of creditors here."

Again, in *Burrows* v. *Keays*, 37 Mich. 435, this court said:

"A reference to the assignment shows that 'the said party of the first part [Burrows], being insolvent, has voluntarily assigned, and hereby doth voluntarily assign, to the said party of the second part [Keays], all of his estate and effects, real and personal, of every nature and kind whatsoever.' This, we think, is sufficiently full and complete to transfer and pass the title to the plaintiff to the property in question, and gives him a right to come into court and enforce and protect such title, as against the claims of the assignor. Any other view, assuming the position of defendant to be correct, would enable a debtor residing in Canada to send his property into this State, then make a voluntary assignment for the benefit of his creditors, and at once come here and enjoy his property, without any power in the assignee to follow him and obtain possession thereof. This branch of the case very closely resembles *Graydon* v. *Church*, 7 Mich. 50, where the same questions were discussed, and the conclusion there arrived at must govern and determine in this case."

It is said that the deed shows that the property was conveyed to Murray in trust, and that no estate vested under our statute. 2 How. Stat. § 5573, permits the creation of express trusts to sell lands for the benefit of creditors. The deed in question recites that at a meeting of the creditors of Nield, duly convened, Adam Murray was chosen trustee, and that Nield agreed to make to him (Murray), as such trustee, a conveyance of the land therein described, and it proceeds to grant the property unto Adam Murray, as trustee for the benefit and security of the creditors of Jonathan Nield. This deed, of itself and alone, shows that the property was deeded to Murray in trust for the benefit and security of Nield's creditors. It does not in express terms authorize Murray to sell the land for the benefit of creditors. Were it to be conceded that the deed fails to show upon its face an authority to sell for the benefit of Nield's creditors, and that such power cannot be implied from its language, unexplained, the fact remains that the deed clearly shows that the intention of Nield was to convey to Murray, not in his own right, and not in the capacity of trustee simply, but in the capacity of trustee under an appointment recited in the deed itself; and the

plain implication is that the land was subjected to such dispositions as the powers conferred upon him as such trustee permitted him to exercise. It is elementary that the effect of conveyances of land may be affected and limited by other papers to which they refer. Perhaps the most common instances are where land is conveyed subject to outstanding mortgages or contracts to which the deeds refer. In such cases the deeds are construed in the light of such instruments. It is urged that the rule is that the intention of the parties is to be ascertained "by considering all the provisions of the deed, as well as the situation of the parties." See 2 Devl. Deeds (2d Ed.), §§ 836, 839, 840, and cases cited. Counsel cite a number of cases supporting the rule, among them *Chapman* v. *Crooks*, 41 Mich. 595; *Stanley* v. *Green*, 12 Cal. 148; *Mulford* v. *Le Franc*, 26 Cal. 88; *Field* v. *Huston*, 21 Me. 69; *Wilson* v. *Hoffman*, 70 Mich. 552. We are satisfied that the deed should be sustained, under subdivision 1 of section 5573, as a conveyance creating an express trust to sell lands for the benefit of creditors. By the terms of the deed, the powers of the trustee over this land were recognized. It is as though the instrument defining them were incorporated in the deed. We have no occasion to inquire whether the bankruptcy proceedings were regular, for Nield has consented to deed this land to a trustee having powers defined by that law. Hence, Murray is not a trustee with such powers and duties (only) as vest in such trustees under Michigan law, but with such powers as Nield voluntarily gave him; and, not being contrary to the law of this State, the trustee may exercise the powers conferred.

We are satisfied that, under the authorities, Murray might execute the timber contract through an attorney. See 1 Perry, Trusts, § 409, and note. Moreover, we understand that the power was expressly conferred.

Defendants' next contention is that the timber contract was void, because not witnessed, under the doctrine laid down in *Crane* v. *Reeder*, 21 Mich. 61 (4 Am. Rep. 430).

We think it unnecessary to discuss this question, as the instrument certainly conferred an equity under 2 How. Stat. § 5727. It is said that, if this section saves the instrument, "it can only be enforced specifically in an appropriate proceeding, and cannot be held operative to transfer *in præsenti* the title to this timber, and is not available in this proceeding." The bill contains allegations which show complainant's rights to this timber, and that the defendants claim title to the premises under a subsequent conveyance from Murray, whereby they acquired title subject to complainant's rights, but that they deny complainant's interest, and threaten to destroy it. It prays that the defendants be decreed to release their pretended claim to such interest, and that they be enjoined from asserting any title to the timber, or preventing complainant from removing the same. In the absence of a demurrer, the bill should be held sufficient as a bill for specific performance, if such a bill were necessary for the relief of the complainant.

It remains to consider whether the defendants were *bona fide* purchasers without notice of complainant's rights, and therefore protected against them by the recording act. It is admitted that they paid value for their conveyance, but the important question is whether they bought the timber. This must depend on the effect of the deed from Murray to the North British Company, for the insertion of the words "of record" in the deed given by the company did not serve to convey any greater interest than its recorded conveyance showed that it took from Murray. That deed expressly limited the interest conveyed by making it "subject to all existing rights of way, easements, and timber contracts." The substance of defendants' contention is that this should be limited by the recording act, and should not protect any timber contracts that were not recorded. The deed did not purport to convey any timber that had been contracted; it excluded it. Upon its face, it informed the grantee that there were interests that the grantor did not possess. It

did not describe these contracts definitely, as it might have done. It did not except those merely which were recorded; it used the comprehensive term "all." It was as though one should deed a village plat subject to all outstanding contracts for lots. Upon its face, there is a limitation upon the estate which might extend to all of the timber, for all might have been contracted. The recording act does not protect the defendants in their claim for this timber, because their own deed does not purport to convey it. It is urged that, inasmuch as the provision is contained in the *habendum* clause of the deed, it is not a limitation upon the estate. We are of the opinion that this is not a case for the application of such a rule. As a rule, the granting clause prevails over the *habendum* where their respective limitations are inconsistent; but it has always been held that the *habendum* was designed to denote the extent of the estate granted. See 1 Devl. Deeds (2d Ed.), § 213. The same author says (section 214) that:

"Where proper words of limitation are employed in the granting clause, there is no benefit to be obtained by the *habendum*. Where there is a repugnance between the words expressing the grant and the *habendum* concerning the estate the grantee is to take, the rule governing the construction of all contracts will be applied, and effect will be given to both clauses, if possible; yet where there is a definite limitation in the words of the grant, and there is a conflict between them and the *habendum*, the latter must yield. If it appears from the whole instrument that it was intended by the *habendum* clause to restrict or enlarge the estate conveyed by the words of grant, the *habendum* clause will prevail."

Again, in section 215*a*, the author says:

"*When Habendum Controls.* It may be formulated as a rule that, where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the *habendum* to control, the granting words will govern; but, if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the *habendum*, the latter must control. In a

deed from a husband to his wife, after the *habendum* clause was a condition that she should not convey or mortgage the premises without his written assent, and that, in the event of her death occurring before his, the property conveyed should revert to him or his assigns. The court construed the deed as showing an apparent intention that the grantee's interest should cease if she died before the grantor, but that, if she survived him, the absolute title should become vested in her."

Downing v. *Birney*, 112 Mich. 474, recognizes this doctrine. It is there said:

"But the *habendum* is not silent, and was undoubtedly designed to qualify or supplement the premises in some way, which it may legally do, even to the enlargement of the estate granted, or the creation of new estates in new parties, who may be introduced by the *habendum* for that purpose."

We are satisfied that the intention of the parties, as evidenced by the deed to the North British Company, was to exclude the timber rights from the conveyance.

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

GRANT, C. J., MOORE and LONG, JJ., concurred. MONTGOMERY, J., did not sit.

GERMAIN v. CENTRAL LUMBER CO.

1. LOGGING CONTRACT—AMBIGUITIES—PAROL EVIDENCE.
   Parol evidence is admissible to show that under a contract between a logger and a sawyer, which was ambiguous in certain of its provisions, it was contemplated that certain notes to be given for the saw bill were to be received in payment of the same.

2. SAME—SAWYER'S LIEN—RELEASE—ACCEPTANCE OF NOTES.
   A sawyer releases his lien by accepting notes in payment of the saw bill.

3. SAME—PAYMENT FROM SALE OF LUMBER.
   A sawyer waives his lien by accepting notes for his saw bill, and authorizing the owner of the lumber to sell it to pay the notes.

4. SAME—RENEWAL OF NOTES—EFFECT ON LIEN.
   A sawyer releasing his lien by accepting notes in payment of his saw bill does not reacquire a lien by renewing the notes.

5. SAME—EVIDENCE—SUFFICIENCY.
   Evidence that a sawyer aided a purchaser in locating lumber piled on his dock, pointing out to him specific piles as belonging to the logger from whom the same had been purchased, that he requested the purchaser to remove the same as soon as convenient, and that he assisted the inspector sent by the purchaser to make shipment of certain portions, asserting no lien for the saw bill until after several shipments, and then only when the logger became insolvent, is sufficient to support a finding that the sawyer waived his lien.

Error to Saginaw; Snow, J. Submitted January 27, 1899. Decided April 25, 1899.

Replevin by Edward Germain against the Central Lumber Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Hanchett & Hanchett (*Humphrey & Grant*, of counsel), for appellant.

Weadock & Purcell, for appellee.

MOORE, J. This case has been in this court before, and is reported in 116 Mich. 245. A reference to the case as reported will make it unnecessary to make so full a statement of the case as would otherwise be necessary. When the case was here, it was held the contract was not so plain in its terms that it was not susceptible of explanation by parol evidence. Then, as now, the defendant urged that the trial court should have directed a verdict in favor of the defendant, but the court said the questions involved were for the determination of the jury, under all the circumstances. The record in this trial is substantially the same as in the other, except that plaintiff offered more testimony to show that the notes which were given by the Howrys were received as payment of the saw bill, and more testimony was offered than before that defendant waived any lien it might have for the saw bill. There is no more reason now for saying the case is not one for the jury than there was when the case was here before. In the former opinion it was said:

"If the notes for the saw bill were given and received as payment, it was a waiver of the lien. If Mr. Linton surrendered possession of all the lumber to the plaintiff, and agreed that he might remove it, Mr. Linton at that time knowing that plaintiff claimed to have purchased it from the Howrys, that would be a waiver of the lien. These were questions for the determination of the jury. * * * There were two questions for the jury: *First*, whether the notes for the saw bill were received as payment for the sawing; *second*, whether there was such a surrender of the lumber by Linton, and taking possession of it by the plaintiff, as amounted to a delivery of the whole lumber purchased by plaintiff."

The errors assigned, in addition to the one already mentioned, relate to the admission of testimony, the refusal to give certain requests to charge, and the charge as given.

The deposition of the Howrys was taken. They testified the purpose in making the contract was to enable them to have paper to use and get discounted at the banks, and assist them in their lumbering operations, and

that the saw bill for sawing was paid by notes of J. W. Howry & Sons. One of the Howrys said, "We agreed to pay them $1.75 for sawing, and they accepted in payment for same our notes." Another one of them said, "I don't pretend to give the exact language that was used in regard to how the saw bill was to be paid, but we were to pay the saw bill with our notes, and we had the privilege of renewing them if we desired." It is said this testimony is incompetent, because the contract was in writing, and also because one of the witnesses said the agreement was embraced in the writing, and his testimony called for his construction of the contract. The whole defense is based upon the theory that there was not, in fact, a sale of 7,000,000 feet of logs at $12 a thousand from Howry & Sons to the defendant, as indicated by the paper of April 5, 1895, nor a sale in fact of a like quantity of lumber at $12 a thousand by the defendant to Howry & Sons, as indicated by the paper dated April 6, 1895, but that the entire transaction was for the purpose of securing the payment of $25,000 of paper which had been given them by A. T. Bliss, president of the defendant company, and $40,000 which was to be advanced by the defendant company, and to enable it to get the sawing of the logs. The officers of the company testified there never was in fact a purchase of the logs by them at $12 a thousand, or a sale by them of the lumber at a like sum, and it was never expected there would be. It is to be observed that the paper of April 5th does not indicate when or how the difference between the $65,000 of the paper mentioned therein and the $84,000, the price of the logs, is to be paid. The paper of April 6th is also silent as to the terms of payment for the lumber. It provides that notes shall be given for the saw bill, but it does not say by whom they shall be given, for what length of time, or the rate of interest, or whether they shall be received as payment of the saw bill. The most casual inspection of these papers indicates that, unexplained, they do not contain the contract of the parties. To establish the defense, parol testi-

mony was essential. Without it, the defense could not be made. We think it was competent to explain the ambiguities of the contract, not for the purpose of varying it or contradicting it, but to show what, in fact, the contract was.

The court refused to give some of the written requests of counsel for defendant, but in his general charge he gave the substance of all of them which were competent to be given. Without quoting all of the charge, the jury were charged as follows:

"The defendant requests the court to charge you, and he does charge you, that the evidence shows that the defendant sawed for J. W. Howry & Sons, under the contracts made between them dated April 5, 1895, and April 6, 1895, put in evidence by the plaintiff, logs at $1.75 per M. feet, making a total saw bill of $14,137.78. Under the terms of said contract the defendant would acquire a lien upon the whole of the lumber sawed for the amount of the saw bill. The defendant would have a right to permit any part of the lumber to be removed by J. W. Howry & Sons, or by parties to whom they made sales of the lumber, and when so doing might retain a lien upon all of the lumber not yet removed for all of the saw bill not paid, if they had not before that released it; that is, if they had not before that released their lien, if they had one. All that was necessary to retain a lien upon any part of the lumber was that the defendant keep possession of such lumber. The sale to Germain would be subject to the lien which defendant had upon the lumber, whether Germain in fact knew of the lien or not, if they had a lien. The evidence shows that, when Mr. Germain bought the lumber, he knew it had been sawed by the defendant, and that it was upon the defendant's docks and premises. These facts are notice to him of any lien the defendant had on the lumber for saw bill, if they had any. The plaintiff claims that the defendant did not have a lien on the lumber for saw bill. The burden of proof is upon the plaintiff to show, by preponderance of the evidence, that the defendant did not have such a lien. The giving of notes in renewal of notes first given for the saw bill would not discharge the lien, and any number of such renewals would not discharge the lien, unless the notes were taken as payment by agreement in the first instance.

"The plaintiff requests the court to charge you, and he does so charge you, as follows: The construction of written contracts is for the courts, unless their terms are so ambiguous as to require explanation. The contract between the Howrys and the Central Lumber Company, in reference to the method of the payment of the saw bill, is not so plain in its terms as to whether or not the notes given for the saw bill were intended to be given in payment therefor, and evidence has been introduced on this question. I therefore charge you that if, from the evidence, you find it was the intention of the parties that the giving of the notes specified in the contract should be given and accepted in payment of the saw bill of the lumber in question, then the defendant had no lien for saw bill, and your verdict would be for plaintiff. If, from the evidence in the case, you find, by the conduct of the parties in the giving of the notes for the saw bill and the renewal of them for a period of time extending beyond the original six months specified in the contract, that it was understood between the Central Lumber Company and J. W. Howry & Sons that the lumber should be sold by the Howrys to obtain the money with which to pay the notes, then it is conduct that amounted to a waiver of any lien they had for saw bill, if they ever had one. If, from the evidence in the case, you find that the Central Lumber Company accepted the notes of J. W. Howry & Sons in payment for the saw bill, then the defendant would have no lien for saw bill; and the renewal of these notes, no matter how many of them were renewed, such renewals would not give the defendant any lien for the saw bill, and the plaintiff is entitled to recover."

We think this was a fair statement of the law applicable to the case.

There is a sharp conflict in the testimony, but it is claimed on the part of defendant that, giving the testimony of the plaintiff the most favorable construction possible, it does not show a relinquishment of the lien upon the lumber, and that the case is governed by *Hughes* v. *Tanner*, 96 Mich. 113; *McEwan Bros. & Co.* v. *Carpenter*, 111 Mich. 522. We do not think those cases control. In this case, not only were notes given for the saw bills, which were discounted by defendant, some of

which were afterwards renewed, but there was testimony that, before plaintiff bought the lumber, he went upon the docks of defendant for the purpose of seeing the lumber. Mr. Linton, the manager of the defendant company, testified that he knew Mr. Germain was engaged in the business of buying lumber, and was there looking at the lumber with a view of purchasing it; and he told him all of the lumber on the dock not marked up as sold belonged to the Howrys, and did not tell him the defendant had a claim on it for the saw bill. The plaintiff testified that, after he bought the lumber, he went upon the docks where the lumber was, and had a conversation with Mr. Linton, in which he informed him he had bought the balance of the Howry lumber, that he had also bought some lumber from Hargrave's dock, and was pressed to move it, as they were limited for dock room, when Linton said "he was pleased I had bought it, but he was not so pressed for dock room, but hoped I would move it when convenient for me; so long as they had dock room it was immaterial how soon I moved it." The record also discloses that, as early as June 13th, Mr. Germain sent inspectors to the dock to inspect the lumber, and a lighter to carry some of it away, and that one of the inspectors made a list of all the piles of lumber which had been sold by Howry & Sons to Germain, and that Linton pointed out lumber which he said was the Howry lumber, and called attention to piles from which the mark had been removed as lumber that should go to Mr. Germain. There was evidence that Mr. Linton stated to the inspectors who were employed to inspect the lumber that all the Howry lumber on the dock, except that sold to Randall & Boyd, belonged to Germain. One witness testified Linton said that Germain had bought all the Howry lumber, and that all the lumber on the dock marked "J. W. H. & Sons" went to Germain, except some certain piles that were to go to Randall & Boyd, "part of which our inspectors had taken," and Germain's inspectors were to leave some of the same kind for Randall & Boyd. He said the balance

of the lot went to Germain,—was sold to Germain. Shipments were made by Germain's inspectors from that time until July 16th, when the Howrys suspended, without defendant making any claim to anybody that it claimed a lien upon the lumber for the saw bill. We think there was abundant evidence from which the jury might find the lien had been waived.

Judgment is affirmed.

The other Justices concurred.

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CONKLING v. VILLAGE OF MACKINAW CITY.

1. COMMON-LAW DEDICATION—PLATS—PUBLIC PARK.
   Where the owner of wild land plats it into village lots, reserving for a public park a tract naturally adapted to that use, and marking it as such upon the plat, and effects sales of the lots by means of pamphlets which refer to the plat, and set forth the existence of the park as an inducement to purchasers, he cannot thereafter defeat the public right because of a lack of the statutory formalities in the dedication, since the proceedings amount to a dedication at the common law.

2. SAME—ACCEPTANCE—UNINCORPORATED VILLAGE.
   Under such circumstances, it is not necessary that there should be a formal acceptance of the dedication, either before or after the incorporation of the village; the use of the land by the public for the purpose designated being sufficient, especially if the villagers and the grantor make common cause in its improvement.

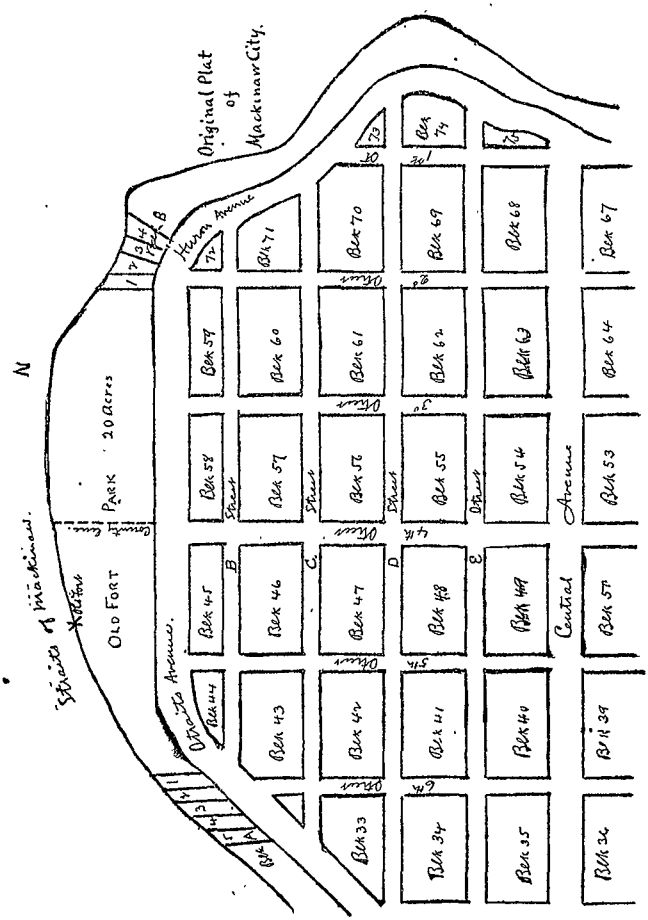
Appeal from Emmet; Adams, J. Submitted February 9, 1899. Decided April 25, 1899.

Bill by Clinton L. Conkling, executor of the last will and testament of Mercie A. Conkling, deceased, against the village of Mackinaw City, to quiet title to land. From a decree dismissing the bill, complainant appeals. Affirmed.

B. T. Halstead, for complainant.

Pailthorp & McCabe, for defendant.

MOORE, J. The complainant filed a bill to quiet the title to about 20 acres of land which defendant claims is a public park. From a decree dismissing the bill, complainant has appealed. The accompanying plat will aid in understanding the situation:



The circuit judge filed a written opinion, from which the following is taken:

"It appears that, at an early day in the history of this part of the State, one Edgar Conkling became imbued with the idea that a large city and commercial and manufacturing metropolis would come into existence, in the natural order of things, at the point where the village of Mackinaw City now stands. He was a speculator in real estate; and, acting under this conviction, and seeing, or thinking he saw, large gains to be made in the enterprise, some time in the year 1854, or about that time, he took steps to purchase nearly all the land in the vicinity of the Straits, including the land in dispute in this case. Other parties became associated with him in the enterprise, and became owners of shares in the property. These owners, being desirous of establishing a city, to be called 'Mackinaw City,' there, on July 30, 1857, executed to said Edgar Conkling and Asbury M. Searles what is called a 'deed of trust;' the trust being that the trustees, Conkling and Searles, or their successors, 'shall at their discretion lay off the whole or any part of said premises into lots, streets, alleys, parks, and other proper arrangements for a town or city, * * * and at their discretion to sell or barter the same, or any portion thereof, in any manner, and for such consideration, as they may deem proper,' and to make and hold all necessary papers, etc., and ratifying and confirming all their acts. * * * Between this date, July 30, 1857, and September 30th of the same year, the trustees caused a survey and map of the proposed city to be made. This plat or map shows on its face a space on the north side, and next to the Straits, not laid off into blocks and lots and streets, but with marks indicating a pleasure ground, and marked, 'Old Fort Park, 20 acres,' being the ground in dispute in this case. The instrument of dedication attached to the map or plat, dated September 24, 1857, dedicates to the public use 'all the streets and avenues,' but does not mention the park. The trustees above named put forth and published a pamphlet containing this map or plat under the date of October, 1857, evidently for the information of prospective settlers and purchasers of lots at Mackinaw City, and intended to influence and induce people to locate there and purchase property. At this time, as I understand the testimony, there were no people residing at Mackinaw City, the whole tract covered by the plat being an unbroken wilderness. In this pamphlet, so published, the park is descanted upon as follows:

"'The park now laid off embraces the grounds of the Old Fort Michilimackinac, sacred in the history of the country. These grounds, now in their natural condition, are unequaled for beauty of surface, location, scenery, soil, trees, etc., by any park in any city in this country; and when the skillful hand of the horticulturist has marked its outline, and threaded it with avenues and footpaths, pruned its trees, and carpeted its surface with green, it will present the very perfection of all that constitutes a park delightful. This park, with suitable blocks and lots for county and city buildings, market houses, schools, etc., will be duly appropriated to these uses whenever the proper authorities are prepared to select suitable sites; and lots for churches and institutions of learning and charity will be freely donated to parties contemplating early improvement. Thus the trustees propose to anticipate, by avoiding the errors of older cities, the wants of Mackinaw City in perpetuity, and free forever its citizens from taxation for any grounds required for public good.'

"The testimony taken tends to show it was the custom of Edgar Conkling, and also of Henry Conkling, who afterwards succeeded to the management of the property, to call the attention of those proposing to purchase to this park, take them to it, and point it out, and expatiate on its advantages to the people, and speak of it as an existing fact, for the public good, and in some cases justifying the large price asked for the lots by the liberality of the proprietors in giving the beautiful park, etc.

"It is claimed on the part of complainant in this case that the language above quoted from the aforesaid pamphlet shows that the trustees only made a conditional offer to dedicate the park; the condition being that the proper authorities should first 'select a suitable site.' I cannot agree with this contention. It seems to me that the trustees and proprietors not only offered and intended to give to the public at once the Old Fort Park as a place of recreation and pleasure, but also offered to give other lands—'suitable blocks and lots'—for the other purposes mentioned, as the necessity might arise from time to time; that is for 'county and city buildings, market houses, schools, etc.' As to the park, no selection of a site by anybody was necessary, as the proprietors had themselves most effectually selected and established its site and location. Consequently, the words 'select suitable sites' could not apply to the park, but only to the other purposes mentioned. I can come to no other conclusion than that the trustees and proprietors, in September and October,

1857, and for many years afterwards, offered unconditionally and presently to donate the park to the public of Mackinaw City as and for the usual purposes of a city park. * * *

"As to the instrument executed by the trustees dated September 24, 1857, it is claimed on the part of complainant that it shows an intent to dedicate only the streets and avenues. I do not understand it in that way. It dedicates the streets and avenues, but says nothing about the park. I cannot see how it could be said to indicate an intent to dedicate only the streets and avenues, especially if taken in connection with the pamphlet and the other acts of the proprietors.

"On the whole, I am satisfied that the trustees offered unconditionally, and so intended, to dedicate the park to the public for park purposes. There are many cases which hold that the making of a plat with streets and avenues and parks designated thereon, and the sale of lots by reference to the plat, constitute an irrevocable dedication to the public of such public grounds; but I am not satisfied that such is the doctrine of the Supreme Court of this State. In this case it appears that the proprietors made a number of sales by reference to the plat, and at the same time represented the Old Fort Park as set apart for public use. I think such sales may be proved as acts *in pais*, to prove the intent of the proprietors to make the dedication. The said map and plat, and the dedication of the same, appear to have been executed by the trustees, Conkling and Searles, and acknowledged before John G. Douglass, a commissioner for the State of Michigan, residing in the city of Cincinnati, Ohio, under the seal of his office, and dated September 24, 1857, and were afterwards duly recorded in both Cheboygan and Emmet counties, in this State, the counties where said lands lie. It seems that this was not, in all respects, in strict compliance with the statute in relation to town plats. If, however, it was a sufficient compliance, then by the statute the fee of all the lands designated on such plat as laid out for streets, parks, and public grounds vested in the county, in trust for the use of the public for the purposes designated. If the curative statute of 1850 would apply, then it would help this conclusion. If, however, there was not a valid statutory dedication, then I think the plat may operate as a common-law dedication, in which case the fee of the land would remain in the proprietors, but the use for the

purposes designated would be in the public of the locality indicated.

"But there must be an acceptance by the public before the dedication would take effect. If in a village which is incorporated, and has a legal existence as a municipal corporation, the acceptance must be by the public authorities of such village. If, however, the public of the locality is not incorporated as a city or village, then I think the acceptance may be shown by acts *in pais* of the people of the locality; such as joining together, with the concurrence of the proprietor, in furnishing money by subscription, or doing work and labor, with the intent to carry out the design of preparing the ground for the purpose of its dedication as a park. I think that in the case of an unincorporated village, as this was, no better mode of acceptance could be devised, and that it should be held binding. See *Baker* v. *Johnston*, 21 Mich. 346–351. In this case the proof tends to show that Edgar Conkling, while managing the property, sold lots according to the plat; that he joined with the people in fitting the grounds for public use in holding picnics and other public gatherings, which continued for several years. If the case depends on this alone, I think I should have to hold that such acts on the part of the inhabitants, acquiesced in by Mr. Conkling, would amount to sufficient acceptance of the dedication offered, and would be binding on the proprietors.

"This, however, is not all. It appears by the bill of complaint, which appears to be admitted by the answer, that on the 15th day of January, 1870, and after Edgar Conkling had acquired the interest of the other proprietors in the lands in question, he (Edgar Conkling), together with his wife, made an instrument by which, after some preliminary matter, they do dedicate and convey to public uses the park in question, upon the express condition that such land shall forever be used and remain a public park, and be fenced and kept in condition by the legal authorities of Mackinaw City; which declaration was duly recorded. This, of course, proceeds on the theory that the former offer to dedicate had not been accepted. But at this time —January, 1870—the village of Mackinaw City had not been incorporated, and had no legal authorities. It was not incorporated until April 10, 1883. According to the terms of this dedication of 1870, no one but the legal authorities of the village had power to comply with the condition, and the offer should stand open till the village

should be incorporated, and legal officers were elected, and for a reasonable time thereafter. But it appears in this case that, almost immediately after the village was incorporated, Mrs. Conkling, who had acquired the title, undertook to fence a part of the park,—not, however, so as to entirely close the same against the public,—thus exercising a right of ownership, but not taking exclusive possession. And about that time the village authorities began taking steps to improve the park and care for it. It is claimed that the condition in regard to fencing the park and caring for it is a condition precedent, so that, until performed, the village would acquire no rights. On the other hand, it seems to me to be a condition subsequent, to be enforced, if at all, by forfeiture. But, as already stated, I do not think the rights of the village depend on this paper of 1870. That was made, as it appears, voluntarily, and in disregard of the rights of the public. I am of the opinion that the bill should be dismissed, with costs."

The statement of the facts made by the judge is fully warranted by the testimony. It only remains to be seen whether he reached correct conclusions of law.

It is claimed on the part of complainant that there was no intent to dedicate the park presently, and that there was no offer to dedicate the land, except the conditional offer made in 1870. In the case of *People* v. *Beaubien*, 2 Doug. 256, which was a case where a plat or map had been prepared, but was not properly acknowledged, so as to constitute a statutory dedication, and deeds had been subsequently made referring to the map, it was held that the deeds, with their references, were proper evidence as acts *in pais* to establish a dedication upon general rules of law, independent of the statute. It was also held they were not conclusive, and that other proof might be offered to show that no dedication was intended; and this case is cited with approval in *People* v. *Jones*, 6 Mich. 176. In *Village of Grandville* v. *Jenison*, 84 Mich. 54, it is said:

"The making of a plat of lands by the proprietor, showing lots, blocks, and streets, evidently for the use of those who shall come to occupy the property, and the subsequent sale of the property in lots or blocks according to

such plat, as was done in this case, is one of the clearest ways of declaring an intention to dedicate. Such an act has been held to conclude the owners, so far as the rights of subsequent purchasers are concerned (5 Am. & Eng. Enc. Law, 405, and cases cited); but the owner is not concluded as to the public unless the dedication be accepted by the public."

See, also, *Tillman* v. *People*, 12 Mich. 401; 2 Dill. Mun. Corp. (4th Ed.) § 636; *Board of Sup'rs of Cass Co.* v. *Banks*, 44 Mich. 467.

In *Baker* v. *Vanderburg*, 99 Mo. 378, it is said:

"To constitute a common-law dedication, there must be an acceptance by the public. 2 Herm. Estop. § 1142. We have held, where there is an unconditional attempt or offer to dedicate a parcel of land for a public square, and such offer is followed by adverse use by the public, that such use is a sufficient acceptance. No formal acceptance by the corporate officials is necessary in such cases. *Price* v. *Town of Breckenridge*, 92 Mo. 382. The acceptance is sufficiently indicated by common use; certainly so in the case of a square or park. *Abbott* v. *Inhabitants of Cottage City*, 143 Mass. 521 (58 Am. Rep. 143)."

See 2 Dill. Mun. Corp. (4th Ed.) § 645; *White* v. *Smith*, 37 Mich. 291.

The case of *Attorney General* v. *Abbott*, 154 Mass. 323 (13 L. R. A. 251), is quite in point. There the owners platted ground, and marked upon the plat spaces as parks, published pamphlets showing the spaces so marked, and sold lots. There was at this time no incorporated village to take action, but the spaces were regarded by the public as parks, and a very little was done to improve them by the villagers. The court used this language:

"The fact that not much was done to adorn these spaces, and that the corporation itself did whatever was done in this respect, and to some extent assumed to exercise a certain control over the land, is not of much weight in opposition to the conclusion to which we have come. The chief element of a public park in such a place, at least till the village is well settled, is to have the land kept open. The adornment would naturally come later, if at all.

The corporation did a little towards improving and caring for these open spaces. It had some interest in doing so. Ordinarily, when parks are established for public use, the municipal authorities exercise control over them. Washb. Easem. 146, 147, 156. It was not so here. Whatever was done was done by the corporation, which, to some extent, did what municipal authorities usually do. The corporation was interested in pushing its speculation, and, as long as it had many lots left for sale, it did something for the parks; but afterwards they were much neglected. On the whole, we think the evidence is sufficient to show an offer to the public of the spaces shown on the last two plans as Ocean, Hartford, and Waban Parks. * * * Without dwelling upon various other particulars of the evidence which tend in the same direction, we cannot doubt that it was a part of the scheme of the enterprise or speculation that the public should understand that these spaces should be left open for public use, and that no right was reserved to sell them for building lots; and that the corporation held out to the public this assurance, and at the time fully and fairly intended to give up this right. * * * The acceptance of such a dedication at common law need not appear of record, and need not be by the town. The acceptance is by the public at large, and the principal thing to show it is use by the public. Washb. Easem. 128, 139, 140. There is no need of a formal grantee. The fee remains in the original owner. *City of Cincinnati* v. *White's Lessee*, 6 Pet. 431. No assent of the town is necessary, because no burden is put upon the town, as in the case of a way. The improvements upon a park thus dedicated are left to be made by those who are interested. The town may take it up, or it may be left to individuals. If in a seaside summer resort no improvements at all are made, there will still be some benefit from having a space left for air, and for an open, unobstructed prospect. Whether the easement of a public park could be accepted merely by enjoying an unobstructed view over it of the ocean need not be considered. Various other acts of use of all the parks are shown, sufficient to show an acceptance of them by the public. Such acceptance need not be very specific.

"The defendant contends that such acceptance must have been by the town of Edgartown originally, or by the town of Cottage City afterwards. The chief argument in support of this view is that there must be some-

body who can be held responsible for the abatement of a nuisance, if one should exist upon the property; and that if the dedication is not to the town, and accepted by the town, there is virtually no owner of the property. This argument is of force, but the technical answer is that the fee remains in the original owner. The dedication for a park carries only an easement. This easement is not in the town, but it is in the public at large. There may be inconveniences in this doctrine, in cases which are supposable and possible, but the doctrine itself has been widely adopted, and has been expressly recognized as in force in this Commonwealth. *Abbott* v. *Inhabitants of Cottage City*, 143 Mass. 521 (58 Am. Rep. 143)."

In *Baker* v. *Johnston*, 21 Mich. 346, this language is used:

"Where the land platted falls within a city or incorporated village, and there are corporate authorities having control over public lands and easements, there is no difficulty in holding that the acceptance must come from the authorized public agents, in order to give the public any rights in the dedicated premises. If those who have authority neglect or decline to act, then no force can be given to the acts of those who have no authority. The statutes have provided for certain cases of public user of highways, but for nothing further. And dedications for other than highway purposes require acceptance in a different way. But it sometimes happens—and it was so in the case before us—that land is platted where no incorporation exists, and where there is no certainty that the locality will become an incorporated town or city within any reasonable time. The population required for an incorporated village must be at least three hundred to the square mile, and the village itself must contain that number. And while that must be a very small village which falls short of three hundred, yet there are such villages; and, if persons should see fit to provide squares and other conveniences and adornments for these small settlements, there would seem to be no sound reason why their validity should not be maintained, although an intention to make a dedication for such limited purposes may not, perhaps, be so easily inferred as for larger settlements. In determining whether a dedication has become complete, it will become necessary in such a case, as it is in the other case, to ascertain what the person dedicating must be assumed

to have reasonably expected would be done by others to meet his offer, and to secure the application of the property to such uses and in such manner as will carry out the design of the dedication. And it may also become a serious question how far the want of corporate capacity may interfere with the acceptance of a dedication that is lacking in some of the elements of certainty."

In the case at bar the ground set apart for a park was historic. It had been the site of a fort which had played an important part in the early settlement of the State. The land was covered with a fine growth of trees. It was bordered by one of the Great Lakes. The outlook was exceptionally fine. If left in a state of nature, it would still be a magnificent park; but it was not left so. The inhabitants, prior to the incorporation of the village, cleared out some of the underbrush, used the ground for picnics, and subjected it to such uses, as a place of general resort for recreation, as might be expected from a community of a like number of inhabitants. See *Archer* v. *Salinas City*, 93 Cal. 43 (16 L. R. A. 145); *Ruch* v. *City of Rock Island*, 5 Biss. 95; *Price* v. *City of Plainfield*, 40 N. J. Law, 608; *Cummings* v. *City of St. Louis*, 90 Mo. 259; *Rutherford* v. *Taylor*, 38 Mo. 315; *Carter* v. *City of Portland*, 4 Or. 339. In the last-named case it is said, quoting from *Rowan's Ex'rs* v. *Town of Portland*, 8 B. Mon. 250:

"To say that a dedication to the use of the future town and of the public, made when the site of the town was in a state of nature, would be lost if not followed by immediate and continued use, or should be limited to the extent to which it was thus used, would deprive the dedication of its practical and its intended value, and would make it a mockery."

See *Town of San Leandro* v. *Le Breton*, 72 Cal. 170.

In the use of a street, where the municipality may be subjected to the expense of erecting and maintaining bridges, or may be liable to persons injured when the streets are not reasonably safe and fit for travel, there is much force in saying that there should be some formal

action taken by the municipal authorities tending to show an acceptance before the dedication should be effective; but in a case like this, where the property, when the offer to dedicate is made, is a beautiful natural park, whose use would be beneficial, and where the villagers have paid more for their homes than they otherwise would because of the assurance that this land was a park, and where the offer to dedicate was made before there was an incorporated village, we do not think it necessary there should be formal action by municipal authorities before the public shall be entitled to the advantages growing out of the proposed dedication.

The decree is affirmed.

The other Justices concurred.

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PEOPLE *v.* REIGEL.

1. GRAND JURY — AUTHORITY OF COURT — CONSTRUCTION OF STATUTES.

   2 How. Stat. § 7562, which provides for the drawing of grand juries at least 14 days before term, and section 9554, which provides that grand juries "shall not hereafter be drawn," unless upon written order of the judge of the court, filed with the clerk, are not to be construed as limiting the power of the court under 2 How. Stat. § 7578, in relation to the calling of grand juries during term, but, rather, as extending it, by permitting the judge at chambers to make an order for a grand jury if he thinks one necessary.

2. SAME—ORDER FOR—FILING WITH CLERK.

   An order for a grand jury, entered on the journal and signed by the judge of the court, is in substantial compliance with 2 How. Stat. § 9554, requiring such orders to be in writing and filed with the clerk.

3. SAME—LOCALITY FROM WHICH DRAWN—SPECIFICATION.

   2 How. Stat. § 7578, providing that when, for any cause,

grand jurors have not been summoned, or a sufficient number of qualified jurors fail to appear, the court may order a sufficient number to be drawn and summoned, and direct from which townships or supervisor districts they shall be drawn, does not contemplate that the direction of the locality from which to draw shall only be made after the grand jury has been drawn from the "body of the county" in the first instance, but permits it to be made prior thereto, where grand jurors have not been summoned.

4. SAME—LEGAL JEOPARDY—WHEN ARISES.
Legal jeopardy is not involved in grand jury proceedings; beginning only when the accused is placed on trial before a petit jury.

5. SAME—INDICTMENT—MOTION TO QUASH—OBJECTIONS AVAILABLE.
On motion to quash an indictment, no objection to the composition of the grand jury is available other than those to which, under the statute (2 How. Stat. §§ 9496, 9497), the accused is limited when held to answer to such jury, viz., that a juror is prosecutor or complainant in a charge against him.

6. SAME.
The objection that a grand jury was procured irregularly, and to the prejudice of the accused, should be addressed to the discretion of the court, which has the same power to set aside the proceedings that it has to vacate the verdict of a petit jury.

7. APPEAL—REVIEW OF DISCRETIONARY ACTION—PRESUMPTION OF HONESTY.
The Supreme Court will presume that questions addressed to the discretion of the trial court were honestly decided, and will not interfere unless abuse of discretion clearly appears.

8. COUNTY TREASURERS—SALARIES—BOARDS OF SUPERVISORS.
Under 1 How. Stat. § 527, providing that the county treasurer shall receive such compensation as the board of supervisors shall deem reasonable, the compensation need not be fixed at a definite sum in dollars and cents, but prospective office charges may be included in the salary allowed; and this rule is not affected by section 508, providing that the annual salaries of county officers shall be fixed by the board prior to their election, and shall not be increased or diminished during the terms for which they shall be elected.

Exceptions before judgment from Bay; Maxwell, J. Submitted February 10, 1899. Decided April 25, 1899.

Michael Reigel was convicted of embezzlement. Reversed.

T. F. Shepard (*J. C. Weadock* and *J. E. Simonson*, of counsel), for appellant.

Horace M. Oren, Attorney General, and *Isaac A. Gilbert*, Prosecuting Attorney, for the people.

HOOKER, J. The defendant was convicted of the offense of embezzlement, upon the following state of facts: He was treasurer of Bay county, having been elected in 1894. At its October, 1894, session, the board of supervisors adopted the report of its committee on ways and means, which, so far as applicable to this case, was as follows:

"TO THE HONORABLE BOARD OF SUPERVISORS OF BAY COUNTY.

"*Gentlemen:* Your committee on ways and means, to whom was referred the matter of the salaries of the county officers, have had the same under consideration, and would recommend that the salaries of the various county officers be as follows for the next two ensuing years: For county treasurer, $3,800, and collection fees on liquor and other taxes."

Acting in conformity to this resolution, the defendant drew from the treasury the sum of $3,800 yearly, and at the end of each year of his term drew the collection charges, the same being audited and allowed by the board of supervisors. Orders were drawn by the county clerk for the amounts. The prosecution rested upon the claim that he was not entitled to the collection charges under the law, and that, as he was bound to know the law, his act necessarily constituted embezzlement.

At the March, 1898, term of the circuit court, the following order was made and entered in the journal:

"At a general term of the circuit court for the county of Bay, commenced and held at the court-house in Bay City, said county, on Monday, March 7th, A. D. 1898. Present: Hon. A. C. Maxwell, circuit judge. Court opened for business in due form.

"In the matter of drawing and summoning a grand jury.

"No grand jury having been drawn and summoned for the present term of this court, and it appearing to the court that there is reason for the summoning of a grand jury, thereupon it is ordered that a grand jury be drawn and summoned forthwith, such jurors to be drawn from the cities of Bay City and West Bay City, and the townships of Bangor, Frankenlust, Hampton, Kawkawlin, Merritt, Monitor, and Portsmouth.

"Thereupon court adjourned until Wednesday, March 9th, A. D. 1898, at 8:30 a. m.

"Read, approved, and signed in open court.

"A. C. MAXWELL, Circuit Judge."

A grand jury was drawn in conformity to such order, summoned, and impaneled, and the indictment upon which the conviction was had was found. Upon his arrest, the defendant, through counsel, moved to quash the indictment upon the ground that the grand jury was not legally constituted, for the reason that it was not drawn under a written order, signed and filed in conformity to 2 How. Stat. § 9554, which reads as follows: "Grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within this State, as provided by law, unless the judge thereof shall so direct by writing under his hand, and filed with the clerk of said court;" and for the further reason that said jury was not drawn from the whole county. This motion was by stipulation to be given the effect of a plea in abatement, should that be held the necessary practice. The court denied the motion, and proceeded to try the defendant.

The evidence showed that the collection charges consisted of the 4 per cent. collection fee provided by statute. The court held that "the effect of this resolution was to fix the salary of the treasurer at $3,800 and the collection fees of liquor taxes, given to treasurers by statute, and it was void as to the 4 per cent. collection fees on taxes collected," and directed the jury to find a verdict of guilty. The defendant has assigned error. The questions dis-

cussed rest upon the following propositions, asserted upon the defendant's behalf:

1. The indictment should have been quashed.
2. The court erred in directing a conviction, because the resolution was valid, and gave the defendant the right to receive the sums taken.
3. In any event, the court should have submitted the question of criminal intent to the jury.

In 1859 the common practice of indicting, through a grand jury, was superseded by that of filing informations (2 How. Stat. chap. 334); and, by section 9554, the grand jury was dispensed with, except in cases where specially ordered. It is contended that this section should be held mandatory, and strictly construed, in connection with section 7562, which provides for the drawing of grand juries by the clerk at least 14 days before term. It is said that the effect of these sections is to require the written order of the judge to be filed at least 14 days before term. Section 7562 was originally designed to prescribe the method of drawing grand juries when they were a regular appendage of the court, and its substance will be found in Rev. Stat. 1846, tit. 22, chap. 103, § 16. Section 9554 appears to have been required to prevent the continuance of the former practice of drawing and impaneling grand juries under chapter 263, of which 7562 is a section. We are not satisfied that it was intended to limit the power of the court in relation to the calling of grand juries during term, but think, rather, it was intended to extend it, by permitting the judge at chambers to make an order for a grand jury if he should think a grand jury necessary, that it might be seasonably drawn in the usual way, which, under the former practice, required no order.

2 How. Stat. § 7578, reads as follows:

"Whenever, for any cause, grand or petit jurors shall not have been drawn and summoned to attend any circuit court, or a sufficient number of qualified jurors shall fail to appear, such court may, in its discretion, order a sufficient number of grand or petit jurors, or both, to be

forthwith drawn and summoned to attend such court: *Provided*, that in drawing jurors under this section the court may, for the purpose of obtaining a jury or talesmen near the county seat, direct from which townships or supervisor districts such jurors shall be drawn."

Such a construction of these statutes as is urged upon us would disregard section 7578, which was an old statute (see Rev. Stat. 1846, tit. 22, chap. 103, § 32), and one that is inconsistent with the claim that the circuit court, when in session, cannot order a grand jury for that term. The last-mentioned section, as it stood when section 9554 was passed, conferred such power upon the court in case a grand jury had not been drawn or summoned, and it was deliberately re-enacted, with amendments, subsequent to the passage of section 9554, without attempting to correct the incongruity which the construction contended for suggests. We see no necessity for such construction, and think it would be against public interest, and contrary to the uniform practice that has prevailed under section 7578. The order in this case was a formal court order, and it is over the signature of the judge, and therefore a substantial compliance with section 9554, if that section should be considered applicable to orders made in court, which we do not decide.

The order, in this instance, specified the townships from which the grand jurors were to be summoned, as provided in section 7578, and they were summoned from seven townships only. The constitutionality of this statute is not attacked, but it is urged that the theory of the law has always been to draw the grand jury from the "body of the county" in the first instance, and that talesmen, or jurors to complete a panel or supply a deficiency, merely, have been permitted to be taken from a particular township or city, and that we should limit the application of this statute to cases where a jury has been drawn, or at least ordered, and not summoned, or some of the jurors have failed to appear. The act is broad in its terms, and seems to cover any and all cases where, for any cause,

such jury shall not have been summoned. In a case where a jury has been regularly drawn, but not summoned, the consequences of an order similar to that complained of would be as serious as though no jury had been drawn, yet such a case would unquestionably be within the statute. Why, then, should we place a strained construction upon it? It is true that the laws have attempted to accomplish an equal distribution of jury duty throughout the county, but such distribution is not a matter upon which the validity of the proceedings depends. There is nothing in our Constitution to prohibit the legislature from regulating the practice by grand jury, any more than that by complaint and examination by a magistrate. Jeopardy does not begin until the accused is put upon trial before a petit jury. It was therefore within the power of the legislature to provide that a grand jury might be summoned from any portion of the county, either in case of emergency or in the first instance.

Sections 9496 and 9497, 2 How. Stat., are copied from the statute of New York. They are as follows:

"SEC. 9496. A person held to answer to any criminal charge may object to the competency of any one summoned to serve as a grand juror, on the ground that he is the prosecutor or complainant upon any charge against such person; and if such objection be established, the person so summoned shall be set aside.

"SEC. 9497. No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed in any other case than that specified in the preceding section."

If at the common law the accused had the right to challenge a grand juror, or the array, in proper cases (which seems to be doubted in *People* v. *Lauder*, 82 Mich. 138), our statute has forbidden this, except upon certain specified grounds; and it would seem to follow that an objection which would not support a challenge could hardly suffice upon a motion to quash the indictment. This is indicated by Mr. Justice MORSE in his opinion in the case of *People* v. *Lauder*, 82 Mich. 134, where he says that one having

no opportunity to interpose a challenge has the right to raise, either by plea in abatement or motion to quash, the same objections to the grand jury that a person under accusation at the time that it was impaneled might have interposed, *but no other*. In *People* v. *Smith*, 118 Mich. 73, it is said that "an objection prohibited by the statute when the grand jury is impaneled cannot be valid when the party is put upon trial under the indictment found." In *People* v. *Lauder*, *supra*, these sections were passed upon. It was there said (page 134) that—

"The decisions in other States throw no particular light on this question, when we consider these statutes, except in States having similar laws. It was evidently intended by the legislature that no mere technicalities or irregularities should be permitted to quash the grand-jury panel, and that only in case of a prosecutor or complaining witness being summoned could the accused person successfully complain and exercise the right of challenge. And, certainly, if a person under accusation and arrest, and about to have his case submitted to the grand jury, could interpose but this one objection to the formation of the grand jury, he would not be permitted, after indictment found against him by such grand jury, to have such indictment quashed for any incompetency of a grand juror, or any irregularity in the selection or formation of the jury, which he could not raise before the jury was sworn. Such a holding would be nonsensical, and entail needless expense. And Lauder must stand in the same position. He can have no advantage over one who might have been under accusation and arrest at the time of the impaneling of the jury.

"I am satisfied that the legislature has wisely ordained that no inquiry for the purpose of quashing an indictment shall be made into the composition of a grand jury, or as to the competency of the individual jurors, except in cases where some member has been the prosecutor of, or the complaining witness against, the person indicted. It must be remembered that the grand jury does not settle the guilt or innocence of the accused, but acts something the same as does an examining magistrate. No irregularities in the examination of an accused person before a magistrate are permitted to quash an information filed in the circuit court against him, and based upon such exam-

ination. The admission of incompetent evidence, or the rejection of proper testimony, by the justice of the peace, or other person holding such examination, has no effect upon the information. This proceeding to find an indictment before a grand jury, or to bind an accused person over to the circuit court by a justice of the peace, is but the presentment of a case to be tried before a petit jury, and the proceeding is not to be governed by any mere technicalities, as long as the substantial rights of the accused to a speedy and fair trial before a jury of his peers is preserved and remains to him. In a case where a grand jury was impaneled without any jurisdiction whatever, or fraudulently, or in willful disregard of the law and the rights of the accused, or when substantial injustice was shown to have been done him by any of the proceedings in organizing the grand jury, or by the proceedings before it after it was organized, it would be the duty of the court, upon proper showing, to quash the indictment."

While the language quoted is from a dissenting opinion, it was concurred in by the entire bench, as appears from the majority opinion (see 82 Mich. 111), and was necessary to the decision of the case. Mr. Justice MORSE cites cases of similar import from several States. 82 Mich. 138. In addition, we refer to the following: *People* v. *Smith*, 118 Mich. 73; *People* v. *Petrea*, 92 N. Y. 142; *People* v. *Hooghkerk*, 96 N. Y. 158; *U. S.* v. *Reed*, 2 Blatchf. 435; *U. S.* v. *Tallman*, 10 Blatchf. 21.

The case of *State* v. *Noyes*, 87 Wis. 340 (41 Am. St. Rep. 45), is in point upon this question. It holds that a grand jury assembled under color of law is a *de facto* grand jury, and an indictment found by such jury cannot be attacked upon the ground that it was not found by a lawfully constituted jury, but that the proceedings of such a jury are valid, the same as are those of a court presided over by a *de facto* judge. In *People* v. *Petrea*, 92 N. Y. 128, an indictment for larceny was found by a jury drawn under a void statute, but the indictment was sustained, upon the ground that "the jury was a *de facto* jury, selected and organized under the forms of law." A similar holding was made in *People* v. *Fitzpatrick*, 66 How.

Prac. 14. In *People* v. *Dolan* it was not known who drew the jury, but the court said:

"It is sufficient to maintain the authority of the grand jury to investigate criminal charges, and find indictments valid in their nature, that the body acted under color of lawful authority." *People* v. *Dolan*, 6 Hun, 232, 64 N. Y. 485, 493.

See, also, *In re Gannon*, 69 Cal. 541; *Ex parte Haymond*, 91 Cal. 545; *State* v. *Belvel*, 89 Iowa, 405 (27 L. R. A. 846); *Ex parte Springer*, 1 Utah, 214.

Missouri has a statute similar to our own. In discussing it, the supreme court of that State said, in the case of *State* v. *Bleekley*, 18 Mo. 430:

"In early days, in this State, it was common for the courts to grant new trials in criminal cases on account of some disqualification of jurors. Frequently after undergoing the labor and expense of a trial, lasting for days, and after a verdict of guilty was found, a new trial was ordered because the prisoner had discovered that one of the jurors was an alien. The legislature determined to put a stop to this practice. * * * The defendant is not permitted to question the manner of summoning the grand jury. Such a cause, on such a subject, is not one of the statutory objections allowed to grand juries or to a grand juror in our courts, and none other can avail."

It does not follow that a meritorious question, arising out of proceedings of the grand jury, or irregularities in its procurement, cannot be reached. They are always within the discretion of the trial judge, who has the power to set aside the proceedings, as he may vacate the verdict of a petit jury, on motion. In *Gibbs* v. *State*, 45 N. J. Law, 379 (46 Am. Rep. 782), the adequacy of such remedy receives the following cogent vindication:

"Nor in abstract speculation would an argument of any force arise from these premises that the remedies thus provided are so utterly insufficient and unreasonable that it must be presumed that a further remedy exists. For my part, I can see no force whatever in such a suggestion. In the first place, we are to remember that the right in question, and which, in some measure, the law should

assuredly secure to the party, is not one that can be called an essential or fundamental right. It is not one necessary for the security of the person, life, or property. The requisite that an accusation of this nature shall proceed from a grand inquest is the provision which the law makes against frivolous or malicious public criminations. The safeguards to such provisions, as I have said, consist in the right to challenge the grand jury and the right to move the court to set aside the proceedings. Are such safeguards unreasonably deficient? I am at a loss to see how any one can so consider. If a man is tried for his life, and is convicted, and he then discovers that by the malice of the summoning officer the jury has been packed, and the trial has been a scheme to take his life, what remedy does the law give him in such an extremity? Absolutely none, but an application to the discretion of the court to set the proceedings aside; and yet it is argued that this same remedy is inadequate in its application to a similar proceeding on the part of a grand inquest. I must repeat that I cannot concede that a right to put in the plea in question belongs to the defendants *ex debito justitiæ*."

In *U. S.* v. *Reed*, 2 Blatchf. 449:

"These objections, however, to the proceedings in the selection and summoning of grand jurors, over and beyond the right of challenge, are presented to the court for the exercise of its sound discretion. It will, therefore, look into the facts presented, on which a charge is made against the regularity of the proceedings in the selection and summoning of grand jurors in a given case, and will hear the explanations on the other side, and its judgment will be determined accordingly. If it sees that there has been improper conduct in the public officers, which has resulted prejudicially to the party accused, it is bound to set aside all the proceedings. On the contrary, although there may be technical objections to the proceedings in point of strict regularity, yet, unless the court is satisfied that they have resulted, or may result, to the prejudice of the party accused, it will not set them aside, because its interposition in the case will not be required on the ground of justice either to the accused or to the public."

Similar language is used in the case of *People* v. *Lauder*, 82 Mich. 138, and would seem to imply that, like

other questions addressed to the discretion of the trial judge, the decision is not subject to review; certainly not, unless in cases of clear abuse. The presumption of the law is that the trial court is competent, and disposed to do justice, and its decision of questions addressed to its discretion should not usually be considered by superior courts. Under the pressure of hard cases, some of the appellate courts of this country have assumed to do so, and, when this is once done, it is afterwards difficult to avoid it, until it becomes a common thing to review discretionary action wherever there is a suspicion of injustice. It is destructive to the dignity and independence of the trial court, and it may be doubted if it is not productive of more injustice than good. It is urged in this case that the trial judge has sought to accomplish the indictment of a large number of innocent persons, through a grand jury who, from the proximity of the residence of its members to the county seat, are alleged to have been prejudiced against them. We can presume neither the one thing nor the other. So long as no error of law is found, we cannot overturn the decisions of courts upon the ground that the judges have erred in judgment or motive. With other prosecutions we have nothing to do upon this record. So far as the indictment is concerned, it appears to have been found by a jury of qualified persons, and the objection to the constitution of the jury is purely technical.

Section 527, 1 How. Stat., provides that—

"The county treasurer shall receive for his services such compensation as the board of supervisors shall deem reasonable, to be allowed and ordered by them."

This is an old statute, and under it this court has held that the amount of compensation need not be fixed at a definite and specified sum in dollars and cents, and that it was competent for the board of supervisors to make prospective office charges a portion of the salary allowed, by a resolution reading as follows: "*Resolved*, that the salary

of the county treasurer for the present year be fixed at $1,500, and that he be allowed his ordinary office charges in addition." *People* v. *Clerk of Board of Sup'rs of Bay Co.*, 38 Mich. 307. Counsel for the people seem to concede that this decision would require a reversal of this case, but for the fact that, some two years after it was rendered, the legislature passed an act in relation to the fixing of salaries by the board, which is said to have been "intended to overcome its effect." See 1 How. Stat. § 508. It reads as follows:

"The annual salaries of all salaried county officers which are now, or may be hereafter by law, fixed by the board of supervisors, shall be fixed by said board on or before the thirty-first day of October prior to the commencement of the term of such officers, and the same shall not be increased or diminished during the term for which such officers shall have been elected or appointed."

We are not satisfied that it was intended to have the effect stated, and think that it was intended to prevent changes in salaries following the election of officers, before the beginning of or during their terms. We see no reason for saying that it was intended to abrogate section 527, or to affect it, except as it forbids changes during an official term. It is apparent that the amount of the salary fixed in this instance was indefinite and uncertain in a sense, because liable to be increased or diminished through variations in the amount of the collection fees. But the statute was designed to prevent repeated or untimely action by the board, and not to prohibit a method of fixing the salary which should make the amount contingent upon the work done, and which has already been approved, provided the resolution fixing the salary should state the rule by which the amount should be determined.

Being unable to concur in the construction given to these statutes, we cannot sustain the conviction. It is therefore set aside, and, inasmuch as the authority to receive the money appears from the record of the board of supervisors,

and cannot be successfully controverted, the defendant is discharged.

The other Justices concurred.

STODDARD v. GIASSON.

TOWNSHIP OFFICERS — COMMISSIONER OF HIGHWAYS — TOWNSHIP CLERK—REFUSAL TO COUNTERSIGN ORDERS—CUSTOM—MANDAMUS.

3 How. Stat. § 1415, provides that, on the performance of contracts, the commissioner of highways shall make payment therefor by orders upon the township treasurer, which shall be signed by such commissioner and countersigned by the township clerk. Section 1425 provides that the township clerk shall be the clerk of the commissioner of highways, and shall, under his direction, record his proceedings in a suitable book, and shall keep an accurate account of all orders drawn by the commissioner on the township treasurer. The section further provides that all books and papers relating to the business of the commissioner shall be preserved by the clerk in his office. *Held*, that *mandamus* would lie on the relation of the commissioner to compel the clerk to countersign orders drawn upon blanks of a stub book kept in the commissioner's possession, where refusal was based solely on a custom in the particular township of drawing such orders on a stub book kept by the clerk.

Certiorari to Wayne; Carpenter, J. Submitted March 14, 1899. Decided April 25, 1899.

Mandamus by Harry C. Stoddard, commissioner of highways for the township of Ecorse, to compel George F. Giasson, clerk of said township, to countersign certain orders on the township treasurer. From an order granting the writ, respondent brings *certiorari*. Affirmed.

James H. Pound, for relator.

Allan H. Frazer (*Ormond F. Hunt*, of counsel), for respondent.

PER CURIAM. The facts in this case are sufficiently stated in the opinion of the learned circuit judge. The facts and the law are so well stated in that opinion that we adopt it as our own:

"Relator, commissioner of highways for the township of Ecorse, applies for a *mandamus* to compel the respondent, clerk of said township, to countersign certain orders on the township treasurer. These orders were drawn by relator upon blanks taken from a book in his possession, containing stubs upon which he describes the order. Respondent contends that the orders should be drawn upon blanks on a stub book kept by him, and that the orders and the stub should be in the same handwriting, according to a custom which has prevailed several years in the township of Ecorse. This is the only question, as it is conceded that the accounts for which the orders are issued are valid, and according to one method or the other the orders should be drawn.

"The law which provides for these orders is contained in section 1415, 3 How. Stat. I quote from that section:

"'Upon the performance of contracts, * * * the commissioner of highways shall make payment therefor by orders upon the township treasurer, which orders shall be signed by such commissioner and countersigned by the township clerk.'

"Section 1425, 3 How. Stat., provides:

"'The township clerk shall be the clerk of the commissioner of highways, and shall, under his direction, record his proceedings in a suitable book, * * * and shall keep an accurate account of all orders drawn by the commissioner on the township treasurer, stating the amount of each, and in whose favor the same were drawn; and all books and papers relating to the business of the commissioner shall be preserved and kept by the clerk in his office.'

"This language clearly indicates that the commissioner shall make the order, and that the clerk shall countersign it. The statute says the commissioner 'shall make payment therefor by orders upon the township treasurer.' The clerk 'shall keep an accurate account of all orders drawn by the commissioner on the township treasurer.' The law gives relator the right to draw these orders, and to no one else the right to control his discretion as to when and where he will draw them. According to respondent's contention, relator can only make this order in his presence,

and on a blank taken from a book in his custody. This gives the respondent the right to control relator's discretion as to when and where the orders shall be issued. Respondent contends that either relator must fill out both these orders and the stub in the book in his custody, which constitutes respondent's account of the order, or that the respondent shall fill out both. If relator must fill out both the order and the stub, he is compelled to perform the duty of keeping an account of these orders, which duty is imposed by law upon respondent. If relator must permit respondent to fill out both the order and the stub, he is prevented from performing the duty which the law says he shall perform.

"To uphold relator's contention does not, as contended by respondent's counsel, adjudge that the custom heretofore followed in Ecorse township was illegal or improper. Heretofore the commissioner has met with the clerk, and permitted him to fill out both the order and the stub in the book in the clerk's custody. I have no doubt of the legality and entire propriety of that method. That was a method which the commissioner had a right to follow, but it seems to me equally clear that he has a right to change it, and adopt another.

"It is contended by the respondent that his duty to keep an accurate account of the orders drawn by relator, and his duty to preserve the books and papers relating to relator's business, justifies him in refusing to countersign orders not taken from the books in his custody. I cannot agree with this contention. Respondent's duty to preserve the books and papers relating to relator's business surely does not deprive relator of the right to keep for his own protection books relating to that business. This is what relator does, and all he does, when he preserves on the stub of the order a description of the order issued by him. Respondent should be afforded the opportunity of knowing whether it is proper for him to sign the order, and of keeping an accurate account of it; but this can be done, and, in my opinion, must be done, without interfering with the legal rights of the relator. When the order in the relator's handwriting is presented to the respondent, he can keep an accurate account of it by filling out a stub in his book, so arranged as to correspond, or by any other proper system of bookkeeping.

"It is argued that, if the order and the stub are made in the same handwriting, a better opportunity is thereby

afforded to detect any change made in the order after the clerk countersigns it. This may be true, but the argument of the relator's counsel that the proposed system, with stubs kept by both relator and respondent, affords less opportunity for a corrupt manipulation of these orders than the system heretofore in use in Ecorse, is at least worthy of consideration. If the respondent thinks that other precautions should be adopted to protect the public treasury against the danger of these orders being raised after they pass from his hands, he can at once place in the hands of the township treasurer a copy of his record of the orders. It is sufficient to say upon this subject that the law determines what safeguards must be observed. The question upon which the decision of this case turns is not, Is the relator's method safer than the one heretofore used? The decision turns upon this question: Has relator a legal right to draw the orders in the method he has chosen? If he has, a court cannot deny that right because, in its opinion, another method is better and safer. As, in my judgment, relator has a right to draw the orders in the method chosen by him, he is entitled to a *mandamus* compelling respondent clerk to countersign them. Respondent must, however, be given an opportunity to make an accurate account of such orders. As respondent refused to countersign these orders in the *bona fide* belief that he would thereby violate an official duty, no costs will be awarded against him."

The judgment is affirmed, without costs.

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PINGREE *v.* AUDITOR GENERAL.

TECUMSEH TELEPHONE CO. *v.* SAME.

1. TAXATION—TELEGRAPH AND TELEPHONE LINES—SPECIFIC TAX.
   The tax provided for by Act No. 168, Pub. Acts 1881 (1 How. Stat. § 1237 *et seq.*), requiring telegraph and telephone companies to pay, in lieu of all other taxes, a tax levied upon an assessment of such lines at their true cash value, is an *ad valorem*, not a specific, tax.

2. SAME—UNIFORMITY.
   The rate of taxation provided by the act—being the average rate of all general, municipal, and local taxes levied throughout the State during the previous year—is determined in a different way, and is different in amount, from that imposed upon other property bearing the same relation to the State, and the act is therefore obnoxious to article 14, § 11, of the Constitution, which requires uniformity in taxation.

3. CONSTITUTIONS—PRACTICAL CONSTRUCTION.
   The rule of construction by long and continued usage should be applied cautiously, and only in cases of doubt, to a provision of the Constitution.

Mandamus by Hazen S. Pingree, governor, to compel Roscoe D. Dix, auditor general, to transfer to the general fund, from the primary-school fund, certain moneys collected for taxes under Act No. 168, Pub. Acts 1881.

Mandamus by the Tecumseh Telephone Company to compel the auditor general to cancel certain taxes assessed against it under the above-mentioned act.

Submitted March 18, 1899. Writs granted April 26, 1899.

Charles D. Joslyn (*Benton Hanchett*, *Charles Flowers*, and *Ashley Pond*, of counsel), for relator Hazen S. Pingree.

Carey W. Dunton (*Benton Hanchett*, *Charles Flowers*, and *Ashley Pond*, of counsel), for relator Tecumseh Telephone Co.

Horace M. Oren, Attorney General (*Alfred Russell*, *Henry M. Cheever*, and *John J. Speed*, of counsel), for respondent.

HOOKER, J. In the year 1881 the legislature passed an act (No. 168, Pub. Acts 1881; 1 How. Stat. § 1237 *et seq.*) entitled "An act to provide for the assessment and taxation of telegraph and telephone lines within the State of Michigan." Its provisions are, in substance, that the auditor general, state treasurer, and commissioner of the state land office shall assess telegraph and telephone lines at their true cash value, and levy a tax upon said assessment at a rate which shall equal the average rate of taxes (general, municipal, and local) levied throughout the State during the previous year, to be ascertained from the records and files of the auditor general's office, which tax shall be in lieu of all other taxes. This tax has since been paid, and the auditor general has treated it as a specific tax, and credited the amounts collected to the educational fund, under the provisions of section 1 of article 14 of the Constitution, which provides:

"All specific state taxes, except those received from the mining companies of the Upper Peninsula, shall be applied in paying the interest upon the primary-school, university, and other educational funds, and the interest and principal of the state debt, in the order herein recited, until the extinguishment of the state debt, other than the amounts due to educational funds, when such specific taxes shall be added to and constitute a part of the primary-school interest fund. The legislature shall provide for an annual tax, sufficient, with other resources, to pay the estimated expenses of the state government, the interest of the state debt, and such deficiency as may occur in the resources."

The application of the governor is for a *mandamus* to compel the auditor general to transfer to the general fund, from the primary-school fund, the amount of moneys collected under the act mentioned, and now on hand, upon the ground that the tax provided in said act is not a specific tax. The Tecumseh Telephone Company's application is based upon the same ground, and asks that the tax be canceled, upon the further contention that the tax, not being a specific tax, is not levied in conformity to other provisions of the Constitution, viz., sections 11 and 14 of article 14, which are as follows:

"SEC. 11. The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

"SEC. 14. Every law which imposes, continues, or revives a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

The auditor general has answered both petitions; claiming that the tax is specific, and not a property tax, and that, if it be determined otherwise, the tax is valid.

In addition to the sections quoted, sections 10 and 12 of article 14 of the Constitution are as follows:

"SEC. 10. The State may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from banking, railroad, plank-road, and other corporations hereafter created."

"SEC. 12. All assessments hereafter authorized shall be on property at its cash value."

The first question presented, then, is, Does Act No. 168 of the Public Acts of 1881 provide for a specific tax, within the meaning of the Constitution? If it does, it disposes of the cases, and both applications should be denied.

Amasa Walker, in his Science of Wealth, at page 339, says that: "Duties are generally of two kinds,—specific and *ad valorem*. Specific duties are imposed by the

pound, yard, gallon, etc." The late Mr. Justice Cooley, in his work on Taxation (2d Ed., p. 238), uses a similar classification as to taxes, and says of specific taxes that:

"Under this head may be classed those which impose a specific sum by the head or number, or by some standard of weight or measurement, and which require no assessment beyond a listing and classification of the subjects to be taxed."

He describes *ad valorem* taxes as follows:

"*Ad Valorem Taxes.* A large proportion of the duties on imports are of this description, and so, sometimes, are many of the taxes which make up the internal revenue. The statute laying them prescribes the rule, but requires the action of appraisers in apportioning them between individuals. By far the larger proportion of all state taxation is also upon property by a valuation, and effect can only be given to it by means of assessors, who value the property, and apportion the tax by their estimate."

A similar description of specific taxes is found in 25 Am. & Eng. Enc. Law, 17, note 3.

In Colton's Public Economy, at page 510, it is said:

"A specific duty is assessed by measure,—as so much per yard, per gallon, per cwt., per caldron, etc.; the instrument of measure being such as the nature of the article requires."

Perry, in his Principles of Political Economy, at page 557, says:

"What is the difference between specific and *ad valorem* taxes, and why should the student take careful note of these, both singly and combined? These terms are used more particularly in relation to tariff taxes, but there is nothing in the distinction itself so to limit its application. A specific tax is a tax of so many cents or dollars on the pound, yard, gallon, or other quantity measurable. An *ad valorem* tax is a tax of so much per centum on the invoiced or appraised money value of the goods subject to the tax."

Bouv. Dict. says:

"*Ad Valorem.* (Lat.) According to the valuation.

Duties may be specific or *ad valorem*. *Ad valorem* duties are always estimated at a certain per cent: on the valuation of the property."

Black's definition is:

"*Ad Valorem.* According to value. Duties are either *ad valorem* or specific,—the former when the duty is laid in the form of a percentage on the value of the property; the latter where it is imposed as a fixed sum on each article of a class, without regard to its value. The term '*ad valorem* tax' is as well defined and fixed as any other used in political economy or legislation, and simply means a tax or duty *upon the value of the article or thing subject to taxation.*"

Black, Tax Titles, § 83, says upon the subject that:

"*Difference between Specific and Ad Valorem Taxes.* In regard to specific taxes, no other apportionment is requisite than that necessarily prescribed by the statute which lays the tax. The share of each taxpayer is completely determined by his condition with reference to the number of the given articles in his possession, or their weight or measurement, or with reference to the fact of his pursuing the particular avocation taxed, or enjoying the particular franchise, or otherwise, as the case may be. But the case is different with respect to *ad valorem* taxes. Here the intervention of ministerial officers is necessary to effect the apportionment between individuals. Assessors are called upon to estimate the value of the property to be taxed, and apportion the shares according to their valuation."

This distinction has been recognized as applied to duties for many years. Benton's Thirty Years in Congress says of the customs act of 1833:

"Specific duties had been the rule, *ad valorem* the exception; from the beginning of the collection of the custom-house revenue. The specific duty was a question in the exact sciences, depending upon a mathematical solution by weight, count, or measure."

In *Gibbons* v. *Ogden*, 9 Wheat. 188, Chief Justice Marshall said:

"The framers of the Constitution, and the people who

adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

Quoting this language, Judge Cooley, in his Constitutional Limitations, said at page 73 (6th Ed.):

"This is but saying that no forced or unnatural construction is to be put upon their language, and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often, by interested subtlety and ingenious refinement, to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to re-declare this fundamental maxim."

It is urged that the framers of the Constitution used the term "specific tax" in a different and broader sense, and that, in contradistinction to the uniform tax contemplated by section 11, it should be construed to mean any tax on property not conforming to such uniform rule. We have only to examine the statutes in force at the time the Constitution was adopted, to see that the term "specific tax" was known and applied in this State previous to the meeting of the constitutional convention. Title 5 of the Revised Statutes of 1846 is divided into chapters 20 and 21. The former treats of the "Assessment and Collection of Taxes;" the latter, of "Specific State Taxes and Duties," —thus indicating that specific taxes and duties embraced taxes other and different from those ordinary taxes which were provided for in chapter 20, and which were assessed and collected locally. An examination of chapter 21 will show that the term "specific taxes" was used in conformity to the definitions above given. Thus banks were taxed a specified per centum upon the amount of capital stock paid in. A similar tax was imposed upon railroad, canal, and turnpike companies. These taxes were payable to the state treasurer. It will be noticed that they were not based upon the actual value of the real and personal property in possession of the companies at the time, but upon the amount of capital that had been previously

invested in their business. The interposition of no assessing officer was required to value the property. Reports to the state treasurer were required (see Rev. Stat. 1846, tit. 10, chap. 55, § 24); and presumably he was to determine the amount, and collect the tax, after making a deduction from the amount of capital stock equal in amount to such property, real and personal, of the banks, as was locally assessed and taxed. The legislatures of 1846 to 1849, inclusive, passed many acts—some general and some special—imposing taxes of this kind upon corporations created by them, such as railroads, plank roads, and mining companies. The briefs of counsel refer to them, and we will not repeat the citations. Without exception, they provide for reports from which the amount of taxes was computed. Other recognized specific taxes, such as taxes upon brokers, peddlers, etc., were included in chapter 21 of the Revised Statutes. It even seems to have been thought advisable to distinguish duties from them. Accordingly the title mentions them, and the chapter (21) imposes *ad valorem* duties upon property sold at auction, and spirituous liquors. In view of these laws, some of which continued in force after the adoption of the Constitution, we are satisfied that the convention understood the meaning of the term "specific taxes," and used it in no other than the common and well-settled sense of the term, which they understood to imply a tax which was made specific in rate and arbitrary in its standard, requiring no assessment beyond a mathematical computation. Of such taxes, Mr. Cooley says:

"License taxes, and other taxes on business or occupations, stamp taxes, taxes on franchises and privileges, are usually specific, as are also other excise and customs taxes. As regards all such taxes, the law by which they are laid is of itself a complete apportionment. Ministerial officers have nothing to do but to list the subjects of taxation; classify them, where that is necessary; ascertain the number, weight, measurement, etc., when taxation depends upon it; and collect the sum which the law has definitely fixed. If the taxes are stamp or license taxes, even the

listing may not be required, but the individual who is to pay them will purchase his stamp or his license, and thus make voluntary payment, as he may have occasion." Cooley, Tax'n (2d Ed.), 238.

If the tax in this case is clearly an *ad valorem* tax, if it is a tax on property,—and this cannot be questioned, because the title and the act both call it a tax on telegraph lines, which are property,—there is nothing in the law to indicate that an occupation tax or tax upon business was intended, even were we to hold that its *ad valorem* feature would not necessarily preclude its being denominated a specific tax.

It follows that the auditor general should not treat this as a specific tax, by crediting it to the educational fund.

It remains to inquire whether this tax can be sustained as an *ad valorem* tax. We have seen that the Constitution requires uniformity in taxation, except as to property specifically taxed. Not being a specific tax, this must comply with this requirement, which it can hardly be said to do. It is to be assessed according to cash value, which is a compliance with section 12; but if assessment as a whole, and not locally, and by a state board, and not by a local board, as in ordinary cases, can be said to be permissible,—which we do not decide,—the fact remains that the rate is determined in a different way, and is different in amount, from taxes imposed upon other property which contributes to state taxes. We must infer that this is a state tax, for it is payable to the state treasurer, and the law does not provide for its application to local purposes. The taxes generally assessed for the State bear a proportion to the amount to be raised, and all taxable property, except that paying specific taxes, is charged with a given and equal per centum upon its assessed value. That cannot be said of this property, for the rate is to be the average of all taxes raised for all purposes,—local as well as state. It is not a specific tax, and it is not within the uniform rule of taxation prescribed for other property, and the law providing for it must therefore be held void.

Counsel urge that this statute has been a law since 1879 (Act No. 77, Pub. Acts 1879), recognized by the departments as valid, and acquiesced in by the corporations taxed under it, and by the public, and ask us to apply to this case the doctrine that "long and continued usage furnishes a contemporaneous construction which must prevail over the more technical import of words." This principle should be applied more cautiously to constitutions than to laws. The inference that the public is satisfied with a construction of a law giving it an effect which the legislature might have lawfully provided, and which would not be disputed had its language shown an intent to do so, is much greater than in the case of a constitutional provision, where the question arises, not in regard to legislative intention, but to legislative power. And, if we could eliminate this distinction, the ability to easily change the law by legislative action would give more force to a construction in conformity to usage than would be justified in the case of a constitutional provision, which cannot be so readily altered. It is a rule which should not be applied except in cases of doubt. Mr. Cooley, in his Constitutional Limitations (6th Ed., p. 85), says:

"Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed."

The rule of contemporaneous construction was applied

in the case of *McPherson* v. *Blacker*, 92 Mich. 377 (16 L. R. A. 475, 31 Am. St. Rep. 587), where the question was what was meant by the language of the Federal Constitution which provides that—

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the congress."

The opinion in that case, and in the case of *City of Detroit* v. *Chapin*, 108 Mich. 136 (37 L. R. A. 391), review the authorities sustaining that rule. In the latter case it was held that the question must be a doubtful one, to permit contemporaneous construction to have weight.

Again, this usage has not the force that it would otherwise have, because the law was not passed until nearly 30 years after the adoption of the Constitution. To apply this principle would be to hold, in substance, that the practical construction of a department, acquiesced in by those affected by the law, possibly satisfied with it because of the favorable consideration that it gives them, has made necessary or proper a construction of the Constitution, upon a most important subject, which, in the absence of the practice under it, would not be indulged.

The applications must be granted,—that of the telephone company, as prayed; that of the governor, to the extent of requiring the amount collected under the law, and now in the hands of the treasurer, to be credited to the general fund. Costs will not follow.

The other Justices concurred.

MONTGOMERY, J. I concur in the opinion of Mr. Justice HOOKER. I think it cannot be maintained that a tax on property based on assessment is a specific tax. The definition of "specific tax" stated by Judge Cooley is a tax which "imposes a specific sum by the head or number, or by some standard of weight or measurement, and which requires no assessment beyond a listing and classi-

fication of the subjects to be taxed." Cooley, Tax'n (2d Ed.), 238. It is true, the capital stock of a corporation may be made the basis of the levy of a specific tax or franchise tax, but this is a method of measuring the tax without resort to assessment. In Burroughs, Tax'n, 168, referring to the federal decisions on the subject, the author states:

"When the tax is on the nominal capital of a bank, without regard to the value of the property of which it is composed, such a tax is annexed to the franchise as a royalty for the grant, and is a tax on the franchise, and not on the property."

But the Supreme Court of the United States, in *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 195, 226, in speaking of a tax imposed under the Nichols law of Ohio, which is, in this respect, similar to the statute involved in this case, say, "The taxation is essentially a property tax." So, in *State* v. *Jones*, 51 Ohio St. 492, the court labored to show that the tax under the Nichols law was a property tax; *i. e.*, that the good will enhanced the value of the taxable property, and might be considered, in assessing the value of the property, as property. It was said:

"If, by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money, within the meaning of the constitution, because good will and other elements indirectly entered into its value."

The authoritative decisions under the Nichols law (*i. e.*, that of the Ohio supreme court and that of the federal supreme court) both rest upon the ground that the tax imposed was a tax on property, and not a tax on franchise or privilege.

The distinction between a franchise tax and a tax

on property is well illustrated by two decisions of the federal supreme court. In *People of New York* v. *Commissioners of Taxes*, 2 Black, 620, it was held that, as a tax on the national securities cannot be levied by a state or local municipality, the same result could not be reached by taxing the value of the stock of a bank which was wholly invested in such securities. But in the case of *Provident Institution* v. *Massachusetts*, 6 Wall. 611, the court had under consideration the statute of Massachusetts which provides for a tax on the average amount of deposits standing on the books of the institution. The court held this a tax on the franchise, and not a property tax. Referring to the case of *People of New York* v. *Commissioners of Taxes*, the court said:

"The statement of that case shows that the assessment was made under a then recent law of the State, which required the tax to be imposed upon a valuation of the stock, like the property of individual citizens, and not, as formerly, on the amount of the nominal capital, without regard to the depreciation. The prior system of taxation in that State was different, and this court admits that, according to that system, it was immaterial as to the character or description of the property which constituted the capital, as the tax was one annexed to the franchise as a royalty for the grant, and was imposed wholly irrespective of the character of the property."

In *Hamilton Manfg. Co.* v. *Massachusetts*, 6 Wall. 632, the court went still further. There the tax was assessed upon the excess of the market value of the capital stock over the assessed value of the real estate and machinery of the corporation. The court held this to be a tax on franchise, and not on property. So, in the same case, the supreme judicial court of Massachusetts had reached the same result. The reasoning by which the result was reached is shown by reference to the opinion of the court in *Com.* v. *Hamilton Manfg. Co.*, 12 Allen, 302. The court say:

"The statute does not require that there should be any return made of the personal property held by corporations

to the board of commissioners who are to fix the amount on which the assessment is to be reckoned; nor is there any valuation or estimate of such property to be made in order to arrive at the amount of the excise or duty."

In the same opinion the court say:

"It certainly cannot be contended that the legislature can legitimately impose a tax on property in the name or under the guise of levying an excise or duty. Such legislation would be a palpable evasion of a distinct and clearly-defined constitutional restriction, and would substitute an unequal and arbitrary system of taxation upon property for one which was intended by the constitution to be equal and proportional."

In no case to which my attention has been called has a tax imposed on the property of a corporation at a valuation fixed by assessors been treated as a tax on a franchise, as distinguished from a tax on property. The case last cited comes the nearest to so holding of any, and this makes the market value of the shares the basis, and distinctly negatives the right to so treat a valuation fixed by assessment. The case of *Bailey* v. *Fuqua*, 24 Miss. 497, distinguishes between a specific and an *ad valorem* tax. The test adopted is whether the tax is assessed on value, and, as the statute under consideration so provided by clear implication, it was held not to provide a specific tax. See, also, *City of Brookfield* v. *Tooey*, 141 Mo. 619.

It is contended, however, that the specific taxes provided for in our Constitution may be taxes on property, and that this implies that they may be assessed upon value. I do not think the latter proposition is necessarily a sound deduction from the former. The exception from the rule of uniformity provided by section 11, of property paying specific taxes, does necessarily imply that specific taxes may, in one sense, be laid upon property. In one sense, specific taxes are laid on property when the capital stock of the corporation, or its gross earnings, is made the basis for a levy; and yet, as we have seen, taxes so levied are specific taxes, or taxes on the franchise, within accepted definitions.

The argument made that the statutes in force when the Constitution was adopted, and which were continued in force, provided for taxes on property which were by the Constitution treated as specific taxes, is sufficiently answered by my Brother HOOKER. As pointed out by him, none of these acts provided for an assessment on the property according to value, but the rate was fixed and calculated on the basis of capital invested, without regard to depreciation.

Is the tax imposed uniform with that imposed upon other property bearing the same relation to the State? Treating the tax imposed as one on property, based on valuation, and not as a specific tax, the corporations and associations mentioned in this act can no more be discriminated against, as to the assessments made or taxes exacted, than can merchants, manufacturers, or farmers. The tax levied in this act is the average rate of all taxes levied by the State, counties, and municipalities throughout the State. A telephone company in Tecumseh, where the local taxation added to the state tax may not exceed 1½ per cent., may, under this act, be required to pay 2½ per cent. Under the Atkinson bill, a railroad in the Northern Peninsula is required to pay the same rate as one having a terminus in Detroit, and extending through territory in which local improvements are expensive, and schools are maintained at great cost.

GRANT, C. J., MOORE and LONG, JJ., concurred with MONTGOMERY, J.

GRANT, C. J. I concur in the opinions of my Brothers HOOKER and MONTGOMERY, but desire to express my views somewhat more fully. Our Constitution authorizes only two kinds of taxes,—one, specific, imposed without regard to the value of the thing taxed; the other, general, based upon assessed cash value, and requiring uniformity. The principal question for determination is, Is the tax imposed by this act a specific tax? If it is a specific tax, the act is valid; if it is not a specific tax, it is void, for non-

compliance with section 14, art. 14, of the Constitution, which provides that "every law which imposes, continues, or revives a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object." This law does not provide the object to which the tax is to be applied. This is so obvious that I spend no time in discussing it. When a tax is specific, the Constitution fixes the object to which it is to be applied.

It appears to me impossible to read the definitions of the lexicographers and the decisions of the courts without reaching the conclusion that the terms "specific tax" and "*ad valorem* tax" have a well-defined meaning; and in the Constitution of this State, as well as in the statutes and decisions, these definitions are clearly recognized. Concise definitions are given in 25 Am. & Eng. Enc. Law, 17, notes 2, 3, and Cooley, Tax'n (2d Ed.), 238. As these are found in the opinions of my brothers, I will not restate them. These two definitions are, in substance, the same as given by other authorities, both legal and lay. A tax based upon the assessed cash value of the property assessed is not a specific tax. It is an *ad valorem* tax, and any enactment by a legislature that it is a specific tax does not make it so; otherwise, the legislature could determine what was meant by the use of terms in the Constitution which have a well-defined meaning. The fact that, in imposing a specific tax, the value of the thing taxed is taken into consideration in determining the amount of it, does not change the nature of the tax. A tax upon the capital stock of a corporation, paid or unpaid, or upon its bonds issued or money borrowed, is just as much a specific tax as is so much per article upon the thing produced. The real value of the capital stock is not its par value. It would probably be safe to say that there is not a corporation in this State whose stock, paid or unpaid, at its par value, is its real value, or whose indebtedness in money borrowed represents its value. It is a well-known fact that the actual value of many of our mining corpora-

tions is many times greater than the par value of the stock, while that of others is many times less than the par value. So a tax upon the bonds or upon the borrowed money of a corporation is not a tax upon the value of the corporation. The next day the money borrowed may be put into improvements which will increase the real value of the property much greater than the amount borrowed, while in other instances it will be a loss. All such taxes are not taxes upon value, but upon the specific thing, regardless of its real value.

It is undoubtedly true, as argued by the learned counsel for the respondent, that value enters into every specific tax. The people do not tax, specifically or otherwise, worthless property. Probably the specific tax on a ton of copper or silver would be placed at a much higher sum than a tax upon a ton of iron; but this fact does not change the nature of the tax. I speak of this because it is argued that when the framers of the Constitution, in section 10 of article 14, provided: "The State may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from banking, railroad, plank-road, and other corporations hereafter created,"—they used the term "specific" with reference to its meaning in the laws as they then existed. This is conceded to be correct; and Messrs. Hanchett and Pond, who, at the request of the governor, have appeared as counsel for the relators, also argued that the term was so used in all laws prior to the adoption of the Constitution of 1850, where a tax upon value was understood to be a specific tax. We have examined all the laws referred to, and we do not find that in any single act passed prior to 1850 is there any language to justify the conclusion that the term "specific tax" was used to apply to an *ad valorem* tax, as in the act under discussion. In all these acts,—and there were many,—the only thing to be done was for the ministerial officer to list the property, and the law stepped in and determined the tax. There was no officer of the State

appointed to assess the value. The real value was wholly immaterial, and not to be considered. The money borrowed might be invested profitably or unprofitably. The tax was on the specific thing, and not upon value. This is the criterion to determine whether the tax is specific or *ad valorem*. There is nothing, therefore, in these acts, to show that the legislature had ever intended to impose a specific tax upon an *ad valorem* assessment. On the contrary, we think the plain conclusion is that the framers of the Constitution used these terms within the definitions above given.

In *Bailey* v. *Fuqua*, 24 Miss. 497, the court say:

"The term '*ad valorem* tax' is as well defined and fixed as any other used in political economy or legislation, and simply means a tax or duty upon the value of the article or thing subject to taxation."

It is stated by one of the learned counsel for the relators, in his brief, that the specific taxes levied prior to the adoption of the present Constitution were not, with possibly one exception, levied upon an assessed value. That exception, I suppose, was under the law approved April 25, 1846; being an act declaratory of the interests of the State of Michigan in mines and minerals. Section 4 of that act (being section 2557 of the Compiled Laws of 1857) provided for a "specific tax of 4 per cent., to be in lieu of all other state taxes, * * * to be assessed thereon upon the average yield and value of such ores." This is called a specific tax in the law, and is a specific tax, being a tax upon the specific article produced, and recognizes a proper principle in specific taxation, viz., that of considering value an element in fixing the amount. But there was no attempt to assess and tax the entire property of the company. A specific tax may be so much per pound, or so much per dollar upon the value, of the article produced. In neither case is any attempt made to assess and tax all the property of the corporation.

In *Walcott* v. *People*, 17 Mich. 68, at page 90, Justice

CAMPBELL, in a dissenting opinion, after referring to sections 11 and 12 of article 14, says:

"Taking these sections together, and reading them according to their natural construction, the conclusion seems unavoidable that taxation by an assessed valuation of property must be the rule, and specific taxation the exception."

The points in that case upon which the court disagreed were (1) whether the power given by the Constitution to continue specific taxes, and to impose specific taxes on corporations thereafter created, limited the right of specific taxation to such cases, or left the legislature at liberty to apply it to other branches of business; (2) whether it was repugnant to that clause of the Federal Constitution which gives congress the power to regulate commerce among the several States. That case was referred to in *Kitson* v. *Mayor, etc., of Ann Arbor*, 26 Mich. 325, which again recognizes the two classes of taxation permissible under our Constitution,—the one, an assessment upon the property at its cash value; and the other, specific taxes not based upon value.

Both an *ad valorem* and a specific tax may be imposed. *State* v. *North*, 27 Mo. 464, upheld an *ad valorem* tax on the goods of merchants, and also a tax on their occupation, to be collected in the form of a license.

In *City of Brookfield* v. *Tooey*, 141 Mo. 619, an ordinance of the city levied a license tax of 1 per cent. per annum upon the cash value of the stocks of merchants. The court held that this was a property tax, pure and simple, and that to call it a tax upon occupation was a misnomer. It was held to be void because not uniform upon all the personal property of the city, in that it levied $1 upon every $100 of assessable personal property belonging to a merchant, and exempted all personal property not belonging to merchants from such tax. So, in *State* v. *Switzler*, 143 Mo. 287 (65 Am. St. Rep. 653), a succession tax levied upon the appraised value of the whole estate left by the deceased, to be paid by the personal

representatives, was held to differ in no particular from a general tax upon property, and to be void because it violated the constitutional requirement of uniformity. In *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217, the statute required every railroad in the State to pay to the State an annual excise tax for the privilege of exercising its franchises in the State; the amount to be determined by the gross transportation receipts of each corporation, person, or association. No question of specific or *ad valorem* taxes was involved. The constitution of Ohio (article 12, § 2) required that laws should be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real or personal property, according to its true value in money. It also provided (article 12, § 3) that the general assembly should "provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues of every description (without deduction), of all banks now existing or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals." The legislature provided for different modes and agencies to determine the true value of property liable to assessment. This law came before the supreme court of Ohio in *Wagoner* v. *Loomis*, 37 Ohio St. 571. The result of the law was an unjust discrimination against banking companies, but this was held to be the fault of the assessing officers, and not of the law. If the officers had performed their duty, the assessment would have been as nearly equal as human judgment could make it.

A statute of the State of Maine provided that every telegraph corporation, company, or person should annually pay into the state treasury a tax of 2½ per cent. on the value of any telegraph line owned by said corporation, company, or person within the limits of the State, including all poles, wires, insulators, office furniture, batteries,

and instruments, and any circumstances or conditions which affected the value of the property. The second section of the act provided for a return to the secretary of state, to be made under the oath of the superintendent of the company. The governor and council were then required to determine the valuation and assess the tax. The telegraph company claimed that the act was void, under article 9, § 8, of the constitution of Maine, which is as follows: "All taxes upon real and personal estate assessed by authority of this State shall be apportioned and assessed equally, according to the just value thereof." The opinion concedes that, if the act imposed a tax upon property, it was void, and then proceeds to demonstrate that it imposed a "tax or excise upon a specific use of the property, and therefore was not within the limitation of the constitution." The opinion states that the law does not cover all the property of the company, and concludes that the purpose was to levy a tax upon the use or business of the company, and that in reality such was the tax imposed. *State* v. *Telegraph Co.*, 73 Me. 518. I do not wish to be considered as assenting to the reasoning of that case. It seems to me a fair deduction from reading the act, which is given in full in the opinion, that the intention was to cover all the property of the company, and put a tax upon the valuation of all its property; but the court held otherwise, and that is the distinguishing feature of the case. In determining the character of this tax, the court say:

"The name is not material. It is the nature of the tax imposed which settles the question as to its validity. If the tax is upon the property as such, it is illegal, by whatever name we may christen it. If upon the franchise, it is clearly within legislative power, though the name be omitted, and though the value of the franchise may be ascertained by an estimate of certain property."

The title of the act here in question is, "An act to provide for the assessment and taxation of telegraph and telephone lines within the State of Michigan," etc. Section 3 of the act requires the board to assess "said telegraph and

telephone lines at the true cash value thereof." If our statute includes all the property of the company, and imposes an *ad valorem* tax upon it, then the Maine case supports the contention of those attacking the validity of the act.

The evident design was to place this property upon an equality, so far as possible, with other property of the State, to make it bear its fair share of the public burdens. The act has none of the features of a specific tax. We are not now concerned with the question whether the appointment of a board to assess the property of these corporations is valid. Some of the authorities already cited support it. So, also, do *Central Iowa R. Co.* v. *Board of Sup'rs*, 67 Iowa, 199; *County of Franklin* v. *Railway Co.*, 12 Lea, 521. I see no objection to this mode of assessment, when the design and effect of the law are to place the property of these corporations upon the same basis as other property of the State.

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LAU *v.* LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.[1]

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RAILROAD CROSSINGS — ACCIDENT TO BICYCLIST — CONTRIBUTORY NEGLIGENCE.

A bicyclist who, upon approaching a railroad crossing with which he is familiar, finds that the first two of the three tracks, which lie eight feet apart, are occupied by lines of freight cars, completely obstructing, in one direction, a view of the third and main track, and who, without dismounting to look and listen, proceeds at a slow rate of speed, and collides with an engine upon the main track, moving, without signals, from the direction in which the view is obstructed, is guilty, as matter of law, of such contributory negligence as will preclude a recovery for the injuries received.

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j156 264

MOORE and MONTGOMERY, JJ., dissenting.

[1] Rehearing denied July 11, 1899.

Error to Wayne; Hosmer, J. Submitted October 4, 1898. Decided May 9, 1899.

Case by Oliver H. Lau against the Lake Shore & Michigan Southern Railway Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Plaintiff, a physician 42 years of age, residing in Detroit, at about 8 o'clock in the evening of September 21, 1896, was traveling on his bicycle to visit a patient. He crossed Hastings street, and, on nearing the tracks of the defendant company, left the street, which was unpaved and somewhat rough, and went upon the sidewalk on the east side. There were three tracks, one main line and two side tracks, the main track being the northerly one. The south rail of the main track is eight feet from the north rail of the nearest side track. Two lines of box cars were standing upon the two side tracks, east of the sidewalk. The car standing upon the middle track, which was next to the main track, stood within three or four feet of the east line of the sidewalk. By an actual measurement made the next morning by one of plaintiff's witnesses, the exact distance was four feet. The side of a box car extends about two feet over the rail, and the side of an engine about the same distance. Plaintiff was perfectly familiar with the crossing, and knew that a train of cars was liable to approach at any moment. The night was cloudy and still. He saw the cars standing to the east, and testified that he went on across the sidewalk, and slowed his bicycle to a gait that he could just keep on it nicely. He further testified that, immediately on passing by the end of the freight car, he was struck by the engine. Upon this point, on direct examination, he testified:

"*Q.* Were you struck by the pilot of the train, or did you run into the train?

"*A.* I was run into. * * *

"Q. How far did you have to run from the instant you saw the light before you could get on the ground,—get off your wheel?

"A. It was almost instantaneously; it was like a shot,—instantly. I don't know how far I did go."

On cross-examination he testified:

"Q. Now, if I understood you correctly yesterday, as you got up about on the track that the cars were standing on, so that you could readily see by the cars, you saw the locomotive passing towards Hastings street, on the main track?

"A. Yes; when I saw it at all, the first I saw it was coming there.

"Q. And you saw it as soon as you could fairly see by the end of this car?

"A. Yes, sir.

"Q. And, when you saw it, it seemed to be almost in front of you, as it were?

"A. Yes, sir.

"Q. Now, at that instant, you undertook to back pedal, did you not?

"A. To prevent myself from going forward, you mean? Yes, sir.

"Q. You threw your weight on the pedal that was coming up, to endeavor to stop the machine?

"A. Yes, sir.

"Q. That is what I meant by back pedaling. Now, it seemed to you almost instantaneous, did it, from the moment you saw the engine that you were in contact with something?

"A. Yes, sir."

On redirect examination he testified:

"Q. Are you prepared now to tell the court and jury—are you prepared positively to tell them under oath—that you did not strike that train between the tender and the first car with your wheel?

"A. My impression is that I did not.

"Q. I understand that your impression is that you did not, but I ask you if you are willing to positively testify now that you did not.

"A. Well, I only want to testify what my impression about the matter is, and that is that I don't know about that part. I don't think I did. * * *

"*Q.* Are you able to give the fact or an impression of the length of the interval between the time when that light flashed in your face and when you were among the wheel and machinery of the locomotive?

"*A.* It was instantly.

"*Q.* There was no interval?

"*A.* No; it was just like a flash,—instantly."

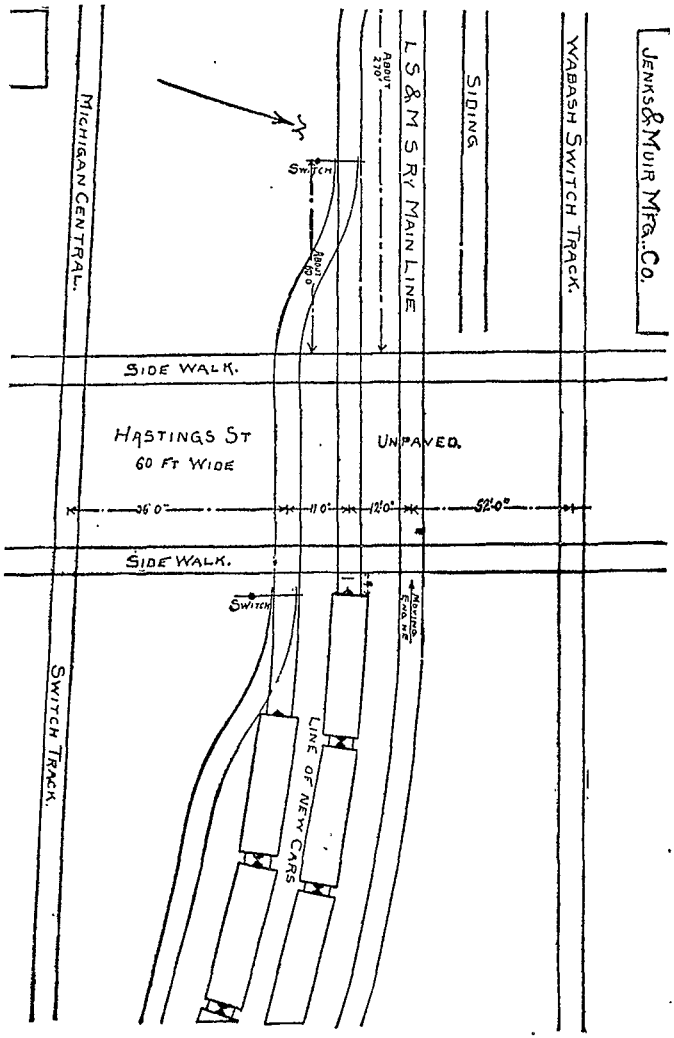
The forward wheel of his bicycle was broken, and the fork was run over by a car wheel. The rear wheel and frame were intact, and the bicycle was found after the accident about eight feet north of the track, while plaintiff lay on the south side. No one of the crew saw the accident. There was testimony that there was no watchman or gate, and that no bell was rung. The train was a freight, and was making a flying switch. The train had been broken in two, and the engine, with some cars attached, was going west. Steam had been shut off. Plaintiff was very seriously injured. The negligence charged is the failure to ring the bell and an unjustifiable rate of speed. After plaintiff had rested, the court directed a verdict for the defendant, but for what reason the record does not show, but counsel state that it was on the ground of contributory negligence on the part of the plaintiff. In order that the situation may be clearly understood, we insert the plat showing the situation.

Wisner & Harvey, for appellant.

Wells, Angell, Boynton & McMillan, for appellee.

GRANT, C. J. (*after stating the facts*). The rights and duties of a traveler upon a bicycle, when approaching a railroad crossing, are before this court for the first time. These rights and duties must be determined without reference to the distressing result of this accident to the plaintiff. The learned counsel for plaintiff, in his argument, conceded that it was the duty of the plaintiff to exercise a high degree of care. Manifestly, this was his duty because of the danger to which he was exposed. Did he,

under the circumstances, exercise that degree of care which the law requires? Had he been on foot and been



injured, he could not recover. *Gardner* v. *Railroad Co.*, 97 Mich. 240; *Braudy* v. *Railway Co.*, 107 Mich. 100.

Had plaintiff the right to ride his bicycle past the obstruction to his sight at such a rate of speed that he could neither control it nor dismount after passing the obstruction, before running in front of or against the engine? He knew the distance between the tracks, and must be held to know that, when his body passed the obstruction, his front wheel would be very near a moving train on the main track. There would have been no substantial delay to him if he had dismounted and walked past the obstruction. He could have dismounted when he was eight feet from the track. Had he done this, the danger would have been avoided. He was experienced in bicycle riding, and whether he could have ridden slowly enough to avoid the danger we need not determine. A bicycle is almost noiseless, and it seems almost incredible that, had he listened, in the stillness of the night, he could not have heard the approaching train. It seems equally incredible that he could not have seen the light of the headlamp of the engine shining upon the sidewalk ahead of him, even if it did not shine on the rails of the track over which the engine was approaching. There was a slight curve in the track east of the crossing, and it is urged that for this reason the headlight did not shine upon the track. There is no testimony in the case to show whether this was so.

We are cited to but one case involving the duty of the bicyclist in crossing a railroad upon the public highway. *Robertson* v. *Railroad Co.*, 180 Pa. St. 43 (57 Am. St. Rep. 620). In that case the bicyclist, instead of dismounting, rode around in a circle in the street, waiting for a train to pass. In endeavoring to cross, he was struck by a train upon another track and killed. In that case the obstruction was a tool-house standing seven feet from the track. The court said:

"The law requires a full stop, not only for the sake of time and opportunity for observation, but to secure undivided attention, and the substantial, and not mere perfunctory, performance of the duty to look and listen. Riding round and round in large circles or small circles,

waiting for a chance to shoot across, is not a stop at all, either in form or substance. Considering the ease of dismounting and the control of the rider over his instrument, a bicycler must, under all ordinary circumstances, be treated as subject to the same rules as a pedestrian."

If a person is required to stop his team and listen in cases where he cannot see, why should not the bicyclist, when his view is obstructed to within a few feet of the track, be required to dismount and ascertain the situation? It is no more trouble for him to dismount than it is for the driver to stop his team and listen. The delay is no longer; the trouble is no greater. In some States the question of contributory negligence is eliminated by statute, and the railroad made liable for damages in every case where it fails to give the statutory signals; but that is not the law in this State. If the plaintiff was going, as he testified, "at a gait that I could just keep on it nicely, so that I could see or hear if anything was in the way of my crossing there in the shape of trains," it is difficult to understand how the flash of the headlight and the collision occurred the instant he came in sight of the train. It is further more difficult to understand how, if he struck the side of the engine, his bicycle was found upon one side of the track and he upon the other. This condition can be accounted for upon no other theory than that he was in front of the engine when he was struck. Cars cannot stop instantly. Engineers and firemen do not always perform the duties imposed upon them in giving the signals. While the presumption may be that they do, human nature is not yet so perfect that every one performs his duty. To sustain the plaintiff's right of action would be to hold that he has the right to rely absolutely upon the performance of this duty by the trainmen, and that he may ride along regardless of consequences, and rely upon the absolute performance of this statutory duty. Ordinarily, this train could be heard when coming a long distance away. Ordinarily, the light from the headlight would be seen shining upon bodies in front of

it within the plaintiff's vision. Yet, in the face of the danger, we are asked to say that he was in the exercise of ordinary care, although, without any inconvenience, delay, or trouble to himself, he might have avoided the accident. The attention of the bicyclist must be more or less diverted by the control and management of his wheel, and this is especially true when he is trying to ride so slowly that he can just keep his balance. It is common knowledge that a good rider can ride as slowly as the average walk and keep his balance. But, if this were not so, it would be an additional reason why he should dismount. So, too, if there was any wind from the southeast, which would prevent his hearing the noise of the train, all the more the necessity for him to take this precaution to protect himself.

No one will contest the proposition that a traveler, in the exercise of due care, is entitled to rely on the statutory warnings. But the troublesome question always is, Was the traveler exercising such care? When the facts are undisputed, and are such that different conclusions cannot reasonably be drawn, the question is one of law for the court. It seems to us only common sense that he, in crossing a place the very existence of which is notice of danger, should stand in no better position than a pedestrian. In a second he can become a pedestrian, and in a second or two more place himself in position to know whether there is danger. If there is no danger, he can mount, and proceed with the delay of only a few seconds. If there is danger, he can avoid it. We think the law requires that he should take this precaution, and does not permit him to rely solely upon his sense of hearing and the performance of duties imposed upon others. Is it not common prudence for one, in entering a dangerous place, to take that course which involves no inconvenience, delay, or trouble to himself, and which will, if followed, insure his own safety as well as that of others? If it is, the law requires him to take it.

The plaintiff in this case was in a better position to pro-

tect himself than was the plaintiff in *Phillips* v. *Railway Co.*, 111 Mich. 274 (66 Am. St. Rep. 392). Mr. Phillips was quite deaf. He was riding in a single carriage, with the top up and curtains off. He could not see the train while sitting in his carriage, because a pile of railroad ties obstructed his view, but could have seen it if he had stopped, stood upright in his carriage, and looked. This court, in a unanimous opinion written by Chief Justice LONG, held that it was negligence in Mr. Phillips not to take this precaution, and that it barred his right of recovery.

We are of the opinion that the circuit judge was right in directing a verdict.

Judgment affirmed.

HOOKER and LONG, JJ., concurred with GRANT, C. J.

MOORE, J. (*dissenting*). I cannot agree with the conclusion reached by the Chief Justice. I do not think *Gardner* v. *Railroad Co.*, 97 Mich. 240, and *Braudy* v. *Railway Co.*, 107 Mich. 100, apply to this case. The plaintiff in each of those cases was upon foot, and in each instance, if he had looked, would have had abundant opportunity to see the danger when he was yet in a place of safety. Not only have pedestrians the right to pass in the public highway, but persons riding in carriages and wagons and upon bicycles. What would be reasonable care in a prudent person riding in a wagon might not be reasonable care in a prudent person riding upon a bicycle. What would be reasonable care in the case of a prudent bicycler might not be reasonable care in a foot passenger. It is true a railroad crossing is a place of danger, and one may not cross it recklessly or negligently. He must, if he would be protected, exercise such reasonable care as an ordinarily prudent man would exercise under like circumstances. In the case of a foot passenger, the courts say, if he has an opportunity to look and listen after passing the obstruction, and while in a place of safety, he is guilty of contributory negligence if he fails to do so. The courts

also hold that one riding in a wagon is bound to stop and listen, if there are obstructions in the way of vision, because it is well understood that the noise accompanying locomotion by animals and a wagon might prevent one from hearing the approach of the train a view of which was obstructed, and, under such circumstances, to fail to stop is not the exercise of the reasonable care of a prudent man. All of us who know anything about the use of a bicycle know there is no appreciable noise in its use. The noise of an approaching train would not be drowned in any degree by the noise of the wheel. It is also true that, while the machine is under much better control than a carriage propelled by horses, it cannot be stopped as quickly as a pedestrian may stop.

In the case at bar the record shows Dr. Lau approached the crossing appreciating it was a place of danger. He ran his wheel as slowly as possible and have it stand up. He looked and listened. There was a curve in the track. His line of vision after passing the obstruction, one witness states, would not reach more than 25 feet down the track. The night was still. What little wind there was came from the southeast. Dr. Lau was going north. He listened, and heard nothing. The record discloses testimony tending to show the train was coming from the east at the rate of 12 miles an hour, making a flying switch. The steam was shut off from the engine; no bell was rung; no whistle blown; no warning given; no watchman, gate, or lights at the crossing. It was very quiet. As Dr. Lau passed the obstruction to his line of vision, he was instantly struck, receiving injuries resulting in the amputation of one of his feet, and other permanent disabilities. 3 How. Stat. § 3375, requires a bell and a steam whistle upon each locomotive engine, and that the bell shall be rung continuously, and the whistle twice sharply sounded, at least 40 rods before the crossing is reached, and makes the company liable for all damages which shall be sustained by any person by reason of such neglect. The testimony of the plaintiff is to the effect that the bell was not rung and the whistle not blown.

The liability of the railroad company attached unless the plaintiff was guilty of such a degree of negligence as to relieve it. *Sanborn* v. *Railroad Co.*, 91 Mich. 538 (16 L. R. A. 119). In that case it was said by Justice LONG:

"The law is therefore well settled that a traveler upon the highway has a right to assume that a railway company will thus perform its statutory duty, and one on a highway, when he approaches a railroad crossing, and can neither see nor hear any indications of a moving train, is not chargeable with negligence for assuming that there is no train sufficiently near to make the crossing dangerous. One in such a position has a right to assume that a railroad company, in handling its cars, will act with appropriate care, and that the usual signals of approach will be reasonably given."

In the opinion written by Justice MONTGOMERY it is said:

"The statute imposes a positive duty upon the railroad company to sound its whistle and to ring its bell at a certain point. It is a well-known fact that not only those about to cross the railroad track, but those in the immediate vicinity, lawfully there, are frequently induced to rely upon the performance of this statutory duty. If they do so, and without fault of their own suffer an injury, we see no reason why the statute should not be so construed as to protect them."

See, also, *Guggenheim* v. *Railway Co.*, 66 Mich. 150; *Richmond* v. *Railway Co.*, 87 Mich. 380; *Van Auken* v. *Railway Co.*, 96 Mich. 307 (22 L. R. A. 33).

The case of *Robertson* v. *Railroad Co.*, 180 Pa. St. 43 (57 Am. St. Rep. 620), is cited as supporting the disposition made of the case by the circuit judge. This court has not been inclined to follow the Pennsylvania courts in negligence cases, but, if it were so inclined, the facts in the Pennsylvania case are so different from the case at bar that its decision is not controlling. The deceased in that case was traveling upon a highway which crossed four railroad tracks. As he approached the crossing, a freight train was passing upon one of the tracks nearest to him. He

did not dismount, but rode his wheel in circles in the highway. As soon as the freight passed the highway, without ascertaining whether the other tracks were free, he started to cross them, and was struck by a train coming from the direction in which the freight train was going. Under such circumstances, it might well be said his want of care caused the injury.

Men and women riding bicycles have the same right to use the highways which is accorded to pedestrians and to persons riding in carriages. It is their duty to recognize that railroad crossings are places of danger, and must be approached with care. They have a right to expect the employés of the railroad company will comply with the provisions of the statute, but this right of reliance will not excuse them if they are heedless and negligent. It is their duty to exercise such reasonable care as an ordinarily prudent person would use under like circumstances. If, when they are doing this, they are injured, because of the failure of the railroad company to ring the bell and blow the whistle, the railroad company is liable for the damage done to them. Whether in this case the plaintiff approached the crossing in the exercise of such reasonable care as a person of ordinary prudence would use under like circumstances was, we think, a question which should have been submitted to the jury. *Carver* v. *Plank-Road Co.*, 61 Mich. 584; *Little* v. *Railway Co.*, 78 Mich. 205; *Breckenfelder* v. *Railway Co.*, 79 Mich. 560; *Richmond* v. *Railway Co.*, 87 Mich. 374; *Rascher* v. *Railway Co.*, 90 Mich. 413 (30 Am. St. Rep. 447); *Ashman* v. *Railroad Co.*, 90 Mich. 567.

Judgment should be reversed, and a new trial ordered.

MONTGOMERY, J., concurred with MOORE, J.

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MOTT v. DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO

1. RAILROAD CROSSINGS—COLLISION WITH HAND-CAR—NEGLIGENCE —QUESTION FOR JURY.

   Plaintiff, in attempting, on a foggy night, to drive across a railroad track, was struck by a hand-car, and injured. In an action against the company, he claimed that he stopped his horse, and looked and listened, before passing upon the track, but that no signals were given to indicate the approach of the car. Considerable noise proceeded from an electric power-house near by. Under the rules of the company, the use of hand-cars at night and in foggy weather was forbidden, except in urgent cases. On the night in question, the section men had been detained in moving a track. The men claimed that warning signals were given, and that they ran the car at a rate of speed not exceeding five miles an hour, and did not see plaintiff until they collided with his vehicle. *Held*, proper to submit to the jury the questions of negligence and contributory negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE.

   One struck by a hand-car while crossing the main line of a railroad at night, when hand-cars are prohibited by a regulation of the company from being on its main line except in cases of urgent necessity, is not chargeable with contributory negligence because he failed to look out especially for hand-cars, where he exercised the degree of care required in looking out for trains.

3. WITNESSES—SPEED OF CARS—COMPETENCY.

   Evidence that a witness has often observed bodies in motion, and has seen horses trot and run, does not render him competent to express an opinion as to the speed of a hand-car seen by him immediately before it struck a vehicle upon a crossing.

4. SAME—EXAMINATION—IMPEACHMENT.

   Asking plaintiff's witness in an action for personal injuries, for the purpose of laying a foundation for her impeachment, if, in a conversation with defendant's employé, she did not make a specific statement in conflict with her testimony, does not entitle plaintiff to place before the jury the whole of the conversation referred to, including claimed admissions of

negligence on the part of the employé, prejudicial to the defendant.

5. RAILROAD COMPANIES—NEGLIGENCE—DECLARATIONS OF EMPLOYÉ—ADMISSIBILITY.

The foreman of a railroad section crew, whose hand-car collided with a vehicle in which plaintiff was riding, and injured him, cannot bind the company by subsequent admissions of negligence.

6. PERSONAL INJURIES—EXCLAMATIONS OF SUFFERING.

In an action for personal injuries, exclamations of present suffering by the person injured are admissible, though made by one of mature years to personal friends after commencement of suit, if not made in contemplation of such persons' becoming witnesses at the trial. GRANT, C. J., *dissenting*.

7. SAME—ARGUMENT OF COUNSEL—INTEMPERATE LANGUAGE.

In an action against a railroad company for personal injuries, plaintiff's counsel, in his argument to the jury, alluded to reputable physicians, who had testified in defendant's behalf, as "hired servants of masters, engaged to do this kind of work," and stated that "they are paid from their treasury, and go with a pass in their pockets." One of them, named Arnold, was denominated "Benedict" Arnold. *Held*, error.

8. SAME—REQUESTS TO CHARGE—ERRONEOUS MODIFICATION.

In an action for injuries received in a collision with a hand-car, it is error for the court to modify a requested instruction that "if plaintiff saw the hand-car before he reached the track, and urged his horse across the track in front of the car, then he would be guilty of contributory negligence," by inserting the word "negligently" before "urged."

9. SAME—PERMANENCY—MORTALITY TABLES—ADMISSIBILITY.

In an action for personal injuries, mortality tables, showing plaintiff's expectancy of life, are inadmissible, where there is no showing that the injuries are permanent.

Error to Shiawassee; Smith, J. Submitted January 3, 1899. Decided May 9, 1899.

Case by Daniel Mott against the Detroit, Grand Haven & Milwaukee Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

About 7:15 on the evening of October 1, 1897, plaintiff, with his horse and buggy, was driving across the defendant's track, in the city of Owosso, on Smith avenue. A section crew, consisting of five men, was coming from the east on a hand-car. It was dark and somewhat smoky and foggy. The section crew had been detained at the Corunna coal mines, in moving some tracks, and were later than usual in going home. The hand-car struck the rear wheel of the buggy, overturning it and throwing the plaintiff out. He did not see the hand-car, nor did those upon the hand-car see plaintiff's horse and buggy, until just about as the collision occurred. The forward wheels of the hand-car were derailed. Plaintiff was found upon the ground, and was taken into the power-house of an electric lighting plant near by. A physician was called to see him, examined him, and found him somewhat bruised, and his shoulder somewhat injured and partially dislocated. The physician put his arm in a sling, and plaintiff went to the home of Dr. Arnold, the local physician of the defendant. The doctor evidently did not consider it necessary to make an examination that night, and told him to come in the morning. Plaintiff started for Dr. Arnold's office in the morning, but, after going a part of the distance, returned to his house; feeling, as he testified, unable to proceed farther.

The doors of the power-house were open, and the witnesses all agree that the noise therefrom prevented one, to some extent, at least, from hearing the approach of the hand-car. Plaintiff testified that, when within about two rods of the track, he stopped a second or two, and looked and listened; that, neither seeing nor hearing anything, he proceeded, still looking up and down the track, and, just as his horse was upon the track, he saw the hand-car approach. The charge of negligence is the unreasonable speed of the hand-car, and the absence of any warning or signal of its approach. The testimony on the part of the defendant is that the speed of the car was four to five

miles an hour, and that a signal was given by the foreman as they came through the fence of the cattle-guard. The testimony on the part of the plaintiff is that the speed was much greater, and that no signal was given until just about as the accident occurred, when the foreman cried, "Look out!" Plaintiff recovered verdict and judgment for $2,000. A motion for a new trial was made, —urging, among other things, that the verdict was excessive. A new trial was denied, to which defendant took exceptions.

At the request of the defendant, the court instructed the jury as follows:

"(1) A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing and of sight to ascertain, before attempting to cross, whether a hand-car is in dangerous proximity. If he ventures upon the track without doing this, it must be at his own risk; and, if he sustains injury thereby, he cannot recover, because of his contributory negligence.

"(2) A person familiar with a railroad crossing, having been frequently over it, and knowing its location, when approaching the same, is under the highest possible obligation to observe such precautions as are needful to avoid collision; and failure to do so would be contributory negligence, which would prevent a recovery for damages if an injury resulted.

"(3) One approaching a railroad track, if the view is unobstructed, must look, and, if the view is obstructed, he must stop, look, and listen; and it will be presumed that he actually saw what he could have seen if he had looked, and that he heard what he could have heard if he had listened. * * *

"(6) If the jury find the plaintiff could have heard the approaching hand-car by stopping his horse and listening before reaching the railroad track, and that he failed to stop and listen, and if you find that this failure to stop and listen was the cause of his not hearing the hand-car approaching, then he would be guilty of contributory negligence, and could not recover.

"(7) If the jury find from the evidence in this case that the plaintiff could have discovered the hand-car, if he had stopped, looked, and listened for it, before he attempted to go on the track, then it was his duty to have done so; and, if you find that he failed to do so, he was

guilty of contributory negligence, and cannot recover. * * *

"(9) You are instructed that it was the duty of the plaintiff, before attempting to cross the railroad track, if it was so dark that he could not see a hand-car that might be approaching, to stop and listen; and, if you find his failure to stop and listen was the cause of his failing to discover that a hand-car was approaching, then he would be guilty of contributory negligence, and could not recover."

Geer & Williams (*E. W. Meddaugh*, of counsel), for appellant.

Watson & Chapman, for appellee.

GRANT, C. J. (*after stating the facts*). 1. Error is assigned upon the refusal of the court to direct a verdict for the defendant. We think the case was a proper one for the determination of a jury, both as to the negligence of defendant and contributory negligence on the part of the plaintiff. The rules of the corporation provide that "hand-cars * * * must not be on the main line during a fog or snowstorm, or at night, except in urgent cases, and then only when ordered by the road-master." It was not customary for hand-cars to be run at night. It was not, therefore, the duty of the plaintiff to be on the lookout for them. When he had exercised that degree of care required of him in looking out for trains, he had complied with the law. If it be conceded that there was no negligence in running the hand-car in the night, common prudence required those in charge to run it over the street at a very moderate rate of speed, especially in view of the darkness, and the noise made by the electric lighting plant. We are not prepared to say that it would not be negligence to run it, even at the rate of speed testified to by the witnesses for the defendant, without any warning. The weight of the car, the tools, and the men upon it, was nearly 3,000 pounds. The momentum of such a weight at five miles an hour would demolish any ordinary vehicle. The instructions quoted above were sufficiently favorable to the defendant.

2. One George Jackson was walking on the west side of the avenue, going south. As he reached the track he turned to the east side of the avenue, and then stepped off the track on the sidewalk to the south. As he was walking he neither saw nor heard anything coming on the track from the east. On his direct testimony he said:

"I don't think I was 10 feet from the hand-car when I first saw it. It had not come through the fence. I did not hear it before I saw it. I turned to see whether they would run into these people. I saw it strike the buggy on defendant's track. As I saw one I saw the other, right at the same instant, as they struck the buggy."

He further testified that he had observed bodies move and in motion a good many times, and had seen horses trot and run. Under objection and exception, he testified that in his judgment the car was going at least 12 or 15 miles an hour. On cross-examination he testified:

"I was not to exceed six feet south of the track when I heard a noise just behind me, a little to the left. I turned to the right, and saw the collision. That is all the opportunity I had to see the car. It ran from the east side of the street, where the cattle-guards are, over to the buggy, while I was turning to the right; and the first I saw of the horse and buggy was when it collided with the car. I could not tell how fast the horse was going. I knew it would be upon a trot, but at what rate of speed I couldn't say. It happened so quick I could not designate the speed they were going."

On redirect examination he testified:

"I should say the horse was going just a fair road gait,—perhaps three or four miles an hour; not running."

He further testified on recross-examination:

"I had a better chance to tell the speed of the hand-car going by me, because I could hear that. My back was towards it. The first thing I saw was when they came together. I must have discovered the speed of the horse and the car at the same time."

There was no other evidence on the speed of the car,

except circumstances and results. The judge, in his charge, gave prominence to the rate of speed; referring to it as being 14 or 15 miles an hour. Under his instruction the jury must have found that the car was running at that speed, for this is the sole reference he makes to it, and he charged that such a rate of speed would be negligence. The witness was not shown to have had sufficient experience to give his opinion as to the rate of speed, under the rule laid down in *Grand Rapids, etc., R. Co.* v. *Huntley*, 38 Mich. 537 (31 Am. Rep. 321). Neither was his observation sufficient to enable him to form an opinion. This evidence was inadmissible, and the court should have excluded it.

3. One Blanche Walton, a witness for the plaintiff, stood upon the sidewalk near the track at the time of the accident. On cross-examination she testified that Mr. Hughes, the section foreman in charge of the hand-car, came to see her the next morning, and that she had a conversation with him. She was then asked, "Didn't you state to him that you heard him make the outcry, 'Look out, there!' just as he was coming through the cattle-guard?" This she denied. Several questions of this character were put to the witness, but she denied having made any such statement. On redirect examination the witness was permitted, under objection and exception, to state all the conversation she had with Mr. Hughes at that time, and testified to damaging admissions made by him, the general effect of which was that he was in fault. Counsel seek to defend the admission of this testimony upon the ground that defendant's counsel had brought out a part of the conversation, and that the plaintiff was therefore entitled to the whole of it. The case is not within the rule claimed by the plaintiff. The question was asked if she did not make a specific statement, evidently for the purpose of laying the foundation for impeaching her. Mr. Hughes is not the defendant, and was in no position to make admissions binding upon the defendant, under the well-settled rule *Andrews* v. *Mining*

Co., 114 Mich. 375, and cases there cited. The matters testified to on this redirect examination had no bearing whatever upon the matters inquired into upon the cross-examination. This testimony was very damaging, and was used in the argument of counsel to attack Mr. Hughes before the jury.

4. On the morning after the accident, plaintiff sent for one of the attorneys in this case and a physician; and suit was commenced on that day by the issuing of summons, and notice served by the attorneys upon the agent of the defendant of the assignment of the claim to them, to protect their fees. The testimony of several of plaintiff's witnesses, who were his particular friends, to exclamations of pain, extending over a considerable period after suit was begun, was admitted, under objection. This question received a very careful consideration in *Grand Rapids, etc., R. Co.* v. *Huntley*, *supra*, where Chief Justice CAMPBELL said:

"The general rule is that they [these statements] must have been made *ante litem motam*, which is interpreted to mean, not merely before suit brought, but before the controversy exists upon the facts."

It is evident, upon this record, that plaintiff immediately contemplated a lawsuit. He sent for a physician and a lawyer at the same time, and the suit was commenced. It was tried first in the January following, the jury disagreeing, while the second trial was in March. Under these circumstances, I think his exclamations should have been excluded. All the physicians (both his own and the defendant's) testify that, applying all the customary tests, they found no evidence of any spinal trouble or permanent injury. Moreover, his own physician testified that he remained in bed when he saw no reason why he should not get up. It is certainly a wholesome rule which excludes such statements when a suit is pending, and the temptation to make testimony is strong. It is suggested that this testimony was admissible under *Strudgeon* v. *Village of Sand Beach*, 107 Mich. 496.

I think not. In that case the plaintiff was an infant of tender years. It was there said:

"The exclamations were made by a child of tender years, in his own home, and not in the presence of any medical attendant, and under circumstances which indicated that they were natural and ordinary exclamations of pain, called out by the suffering of the plaintiff, and not by any motive of making testimony for himself."

This case is rather within the decision of *Laughlin* v. *Railway Co.*, 80 Mich. 154. In that case the expressions were excluded because made "after suit was commenced, and about the time it was expected to come on for trial." So in this case the suit was pending, was being pushed as rapidly as possible, and was tried shortly after the expressions were made. Plaintiff was a man of mature years, and, aside from his expressions, there was no evidence of any serious injury.

5. Counsel for the plaintiff, in his argument to the jury, called the two physicians who testified in behalf of the defendant "hirelings;" denouncing one of them, by the name of Arnold, as "Benedict" Arnold. One of these had been a practicing physician for 37 years, and was a graduate of the University of Michigan and of the College of Physicians & Surgeons in New York city. Among other things, counsel said:

"In the first place, we start out with these doctors,—hired servants of masters. They are engaged by this defendant, and to do this kind of work for them. They are paid from their treasury, and they go with a pass in their pockets."

We think the counsel went too far in denouncing these witnesses, within the following decisions: *Rutter* v. *Collins*, 96 Mich. 510; *Anderson* v. *Railroad Co.*, 107 Mich. 591; *Britton* v. *Railroad Co.*, 118 Mich. 491; *Geist* v. *Detroit City Railway*, 91 Mich. 446.

6. The defendant requested the court to instruct the jury as follows:

"If the jury find that the plaintiff saw the hand-car before he reached the track, and urged his horse across the

track in front of the hand-car, then he would be guilty of contributory negligence, and your verdict will be for the defendant,—'no cause of action.'"

The court gave this instruction, except that he inserted the word "negligently" before "urged." This left the question to the jury to determine whether such an act was negligent or not. There being no dispute about it, and no two inferences to be drawn from it, the question became one of law. The court should have instructed the jury that such an act would be negligence *per se*, and bar the right of recovery.

7. Plaintiff was allowed to introduce the mortality tables, which showed that plaintiff's expectancy of life was about 40 years. These tables are only admissible in a case of permanent injury, or where the suit is brought by the representatives of a deceased person. Plaintiff offered no testimony to show any permanent injury. All the physicians found no evidence of any, and he himself, upon the trial, said that he was not as bad as he used to be. This testimony should have been excluded.

It is strenuously urged by counsel that the defendant was entitled to a new trial upon the ground that the verdict was excessive. Since we have reversed the judgment on other grounds, we do not deem it necessary to discuss this one.

Many other errors are assigned upon the admission and rejection of testimony. They have all received our consideration, and we do not find any error in them.

Judgment reversed, and new trial ordered.

MONTGOMERY, J. We concur in the opinion of the Chief Justice, with the exception of what is said under the 4th heading. We think it settled by our decisions that exclamations of present suffering are admissible unless made to one in contemplation of his becoming a witness. *Will* v. *Village of Mendon*, 108 Mich. 251; *Strudgeon* v. *Village of Sand Beach*, 107 Mich. 496.

MOORE and LONG, JJ., concurred with MONTGOMERY, J. HOOKER, J., did not sit.

CROSS v. DETROIT CITIZENS' STREET RAILWAY CO.

STREET RAILWAYS—FIGHT ON CAR — PROTECTION OF PASSENGER—NEGLIGENCE—QUESTION FOR JURY.

An electric car in which plaintiff was the only passenger was boarded while in motion by three disorderly persons, who continued a fight begun on the street. Plaintiff screamed to the conductor to stop the car, and ran to the rear platform, where she fell and was injured. In an action against the company, plaintiff testified that the conductor stood at the front of the car, and paid no attention to her request. A third person, who claimed to have observed the scene from without, testified that the conductor's position was as stated by plaintiff. Defendant introduced testimony tending to show that the conductor was engaged at the time in an attempt to disarm one of the combatants, and that he called to the motorman to stop the car, but the latter was forcibly prevented from doing so. *Held*, that the testimony was in conflict as to whether defendant's employés used reasonable efforts to protect the plaintiff, and that the question was for the jury.

Error to Wayne; Hosmer, J. Submitted January 4, 1899. Decided May 9, 1899.

Case by Cora E. Cross against the Detroit Citizens' Street Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Brennan, Donnelly & Van De Mark, for appellant.

Thomas Hislop, for appellee.

MONTGOMERY, J. The plaintiff recovered a verdict in an action for negligence, and injuries received in falling from defendant's car while a passenger. The negligence imputed to the defendant by the declaration is the failure to prevent certain rough characters boarding the car in which plaintiff was a passenger, and the failure to stop the car to permit plaintiff to alight when the persons

who had been admitted to the car engaged in a fight. The testimony on the part of the plaintiff tended to show: That she boarded a Jefferson-avenue car late in the evening, intending to alight at Townsend street, a few blocks east of Field avenue. She was the only passenger in the car. That after leaving Field avenue, and while the car was in motion, a man boarded the car, pursued by two others. That the man who first entered was knocked down by the two others, and a fight ensued in the middle of the car. The plaintiff screamed, frantically, "Let me off!" That she got up from her seat and went to the rear platform, and that this is the last she knew, until she was thrown from the car, and received the injuries complained of.

The circuit judge charged the jury:

"It is contended on behalf of the plaintiff that, after leaving Field avenue (and there is no question about that fact), disorderly persons got upon the car, and that at that juncture (I will not pretend to say the exact place) she called upon the conductor in charge of the car to stop the car, so that she might alight. Indeed, she desired, the testimony shows, to get off at Townsend avenue. Her testimony is that no attention was paid to her request. Her testimony is that the conductor stood in the front part of the car, and that no effort was made to stop the car. Now, gentlemen of the jury, all I may say is— I can say, in that regard, if that is true,—if you find from the testimony which has been adduced before you that the conductor was guilty of negligence in failing to stop the car,—then, unless you find that the plaintiff in this case was by her own conduct guilty of contributory negligence, then, and under those circumstances, the plaintiff would be entitled to recover such damages as would compensate her for the injuries she has sustained. * * *

"On the part of the defendant it is contended that the conductor was endeavoring to suppress the disorder that then existed in the car. It is contended on the part of the defendant that, both from the testimony of the motorman and the testimony of the conductor, that he heard her request or cry, whatever it may have been, to stop the car, and that he called to the motorman, who heard him, to stop the car. Well, obviously, gentleman, if this is so,

there is no negligence in this regard; that is, on the part of the conductor. Now, you have heard the testimony of the motorman. The motorman has testified in this case that he heard the call of the conductor to stop the car, and proceeded to do so, but that he was actually prevented, I think, by application of some force— I think it was a bar placed in such a manner, as he says, between his legs (the switch bar), that, while he turned off the controller, he was unable to apply the brake. Well, now, gentlemen, as I have said in the argument (I think, in reply to some question of the counsel, or some argument of the counsel; I do not exactly recall the juncture now), obviously a street-car railway company is not an insurer of the safety of its passengers; and if you find that, by reason of disorderly proceedings in the car, the motorman was unable to apply the brake, then, under those circumstances, having heard the call of the conductor, I charge you that the company is not at fault, because, as I said before, the company is not an insurer of the safety of the passenger, and all that can be expected of the company in that regard is that they shall use due diligence in the conduct of their cars to protect their passengers, but they are not liable for any assault of disorderly persons or any other public enemies. * * *

"I am asked to charge you at this time that if you find the conductor did not promptly try to stop the car, but only did so after he had been engaged in the effort to obtain the revolver,—that, if he acted promptly, the motorman could have stopped it at the time, but could not have done so later on,—the defendant was guilty of negligence in this respect. Well, gentlemen, I decline to give that request. As I say, it depends upon whether you believe the testimony adduced by the plaintiff, or believe the testimony adduced by the defendant. If you believe the testimony adduced by the plaintiff, there was no effort made to stop the car at the time she cried. If you believe the testimony adduced by the defendant, there was that effort, but it was ineffectual, simply and solely by reason of the inability of the motorman to operate the brake. I am not prepared, in this case, to lay down the abstract proposition that it might have been stopped, considering the exceedingly limited space of time in which necessarily this took place,—that it might have been stopped,—or that it was the duty of the conductor, instantly on the appearance of these parties, to stop the car prior to the cry. In

fact, gentlemen of the jury, I am not prepared to say but that it may have been simultaneous, or practically simultaneous. As I said before, you have heard the testimony. I have pointed out what negligence there is in that regard, if there be negligence in the matter, but that is a question for you, and not for me; and I think I have covered all that it is necessary for me to say."

It is contended by defendant's counsel that these instructions were erroneous, for the reason that the evidence, without any substantial dispute, shows that the conductor and motorman did all in their power to stop the car after being called on to do so.

It is not disputed that it was the duty of defendant's servants to use reasonable efforts to protect the plaintiff from injury by the lawless ruffians who had boarded the car; nor do we understand that any contention is made that the conductor was not in fault, if he failed to attend to plaintiff's demand to be let off, if he was in position to comply with that request. But it is insisted that the evidence shows that the conductor was engaged in trying to disarm one of the men, who had drawn a revolver, and that, when the plaintiff demanded to be let off, he (the conductor) called to the motorman to stop the car, that the motorman attempted to do so, and that he was prevented from doing it by some one who boarded the car in front, getting in his way so that he could not apply the brake. If these facts were undisputed, as contended by defendant's counsel, there would certainly be much force in the contention that the conductor was performing his duty as he saw it, with coolness and bravery. We are not, however, able to say that this testimony is undisputed. Mrs. Emma Bates testified that she lived at 1497 Jefferson avenue, the second door east of Sheridan avenue, which is the first street east of Field avenue, and saw the car pass her place; saw the three men struggling in the middle of the car, and saw the conductor standing at the front end of the car, at the vestibule door, right in the doorway; that she saw him still in this position after

they had passed Townsend street, the street next east of Sheridan avenue. The plaintiff testified that the conductor stood at the front of the car, just at the door in the vestibule,—just within the door on the left-hand side of the doorway as the car was going. She further testified: "He did not say anything to me when I screamed and wanted to be let off,—never moved." Defendant's counsel quote this last statement, and insist that it does not contradict the conductor's testimony that he called out to the motorman to stop the car and let the lady off. But the conductor's testimony is that he was not occupying this position at all, but struggling with the desperadoes in the middle of the car, at the time he called to the motorman. But a more complete answer to the contention is that the plaintiff further testified that, when she screamed to be let off, the conductor paid no attention. This was certainly untrue, if he responded to her request by ordering the motorman to stop the car. We think there was testimony to support plaintiff's case, and that the charge fairly presented the correct theory of the case to the jury.

The other questions presented are sufficiently answered by the above discussion.

The judgment is affirmed.

GRANT, C. J., MOORE and LONG, JJ., concurred. HOOKER, J., did not sit.

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PHILLIPS *v.* UNITED STATES BENEVOLENT SOCIETY.

1. TRIAL—STATEMENTS OF COUNSEL—OPENING TO JURY.

It is not error for plaintiff's counsel to state, in his opening address to the jury, that he will be unable to produce a certain material witness, and to give the reason therefor.

2. SAME—OFFER OF INCOMPETENT TESTIMONY.

Counsel should not offer, in the presence of the jury, testimony which he knows is incompetent.

3. MUTUAL BENEFIT SOCIETIES — DENIAL OF LIABILITY—PROOFS OF LOSS—LIMITATIONS—WAIVER.

A mutual benefit society which, on being notified of a claim for accident benefits, at once denies all liability, thereby waives proofs of loss, and a provision of the membership certificate forbidding suit until three months after such proofs are furnished.

4. SAME—DEFENSES — CORRESPONDENCE BETWEEN PARTIES — ADMISSIBILITY.

In an action on a benefit certificate, where defendant denies that plaintiff sustained the accidental injuries claimed by him, it is error to place before the jury a letter written to the company by plaintiff's attorneys, stating that a certain physician, not called as a witness, diagnosed the plaintiff's illness as due to accident, even though portions of the correspondence are admissible for other purposes.

5. EVIDENCE—INSTRUMENT BEYOND JURISDICTION—PAROL PROOF—DEPOSITION.

Parol evidence as to the contents of a written instrument which has been neither lost nor destroyed is inadmissible, though the instrument itself is outside of the jurisdiction of the court, where proof of its contents can be obtained by deposition.

6. MUTUAL BENEFIT SOCIETIES — NOTICE OF CLAIM — MISTAKEN DIAGNOSIS.

Where the holder of a benefit certificate, which provided that the company should be notified within five days, with full particulars, in all cases of accident or sickness, fell ill, and notified the company, in accordance with the diagnosis of the attending physician, that he was disabled from neuralgia, against which, under the circumstances of the case, there was

no indemnity, and it subsequently developed, upon diagnoses by other physicians, that the original diagnosis was incorrect, and that the illness was due to accidental injuries, and the company was notified within five days after such fact was ascertained,—the notice was sufficient, since the member could not be deprived of benefits, in the absence of a definite provision to that effect, by reason of the mistake of his physician.

7. WITNESSES—PHYSICIANS—PRIVILEGE—WAIVER.
A notice to defendant to produce a letter written to him by plaintiff's physician does not justify the admission of privileged communications between plaintiff and his physician over his objection.

8. TRIAL—INSTRUCTIONS—VERDICT—COSTS.
In an action of *assumpsit* against a mutual benefit society to recover accident benefits, it is error for the court to call the jury's attention to the fact that a judgment for plaintiff for less than $100 will entitle defendant to costs.

Error to Shiawassee; Smith, J. Submitted January 5, 1899. Decided May 9, 1899.

Assumpsit by Richard Phillips against the United States Benevolent Society of Saginaw on a policy of accident insurance. From a judgment for plaintiff, defendant brings error. Reversed.

Defendant is a mutual benefit association, organized under the laws of this State, insuring its members against disability from sickness or accident, and from death occasioned by accident. October 23, 1896, plaintiff presented an application for membership. Among the questions required to be answered by this application, and here material, was this:

"Are you now insured in any other company paying sick or accident benefits? If so, give name and amount carried in each.
"*Answer:* No."

By the terms of this certificate, there was no liability for disability arising from sickness or disease unless it began after 90 days' continuous membership. In all cases of

accident or sickness, immediate notice was required to be given in writing, addressed to the secretary, with full particulars thereof. "Failure to give such notice within five days from the happening of such accident or beginning of illness renders the claim invalid, and it cannot be recognized or paid."

Early in December, 1896, plaintiff served a notice in writing upon the defendant, stating that "at 11 minutes past 11 o'clock a. m., on the 5th day of December, 1896, I was totally disabled from doing any work by neuralgia." This notice was not dated, but was promptly served, as defendant wrote December 10, 1896, acknowledging its receipt, and notifying him that he could not recover any sick benefits before January 24, 1897, because he would not have been a member 90 days until that date. This notice was given upon a diagnosis of the case by plaintiff's physician, Dr. Hume. Subsequently another physician, Dr. Cameron, was called in, and plaintiff was taken to the Homeopathic Hospital at the University, and an examination was made by Drs. Cameron and Le Seure. They appear to have pronounced the trouble to be the result of an injury which plaintiff claimed to have received in the car shops of the Toledo & Ann Arbor Railroad Company at Owosso. Thereupon, on January 29, 1897, Dr. Cameron sent to the defendant a written notice, stating that plaintiff "had been suffering for several weeks from an injury sustained in the car shops, which at that time was reported by his physician as sciatica, and treated as such without success. Dr. Osborne, the health officer, and I, examined Mr. Phillips, and failed to find any trace of rheumatism. Whatever information you require covering this case will be freely furnished."

By the terms of the certificate of membership, there was no liability for rheumatism. Plaintiff had not been a member 90 days on the 5th day of December; consequently there was no liability for disease. On February 26, 1897, plaintiff furnished proofs of loss, and commenced this suit April 20th following. Early in February plain-

tiff's wife wrote a letter to the defendant in regard to plaintiff's claim, which is not found in the printed record. To this letter defendant replied February 12th, in which it denied liability by stating that the defendant had had plaintiff examined by three prominent physicians, and it would have to stand by their decision, closing by saying: "We do not think that Mr. Phillips is entitled to any indemnity." Plaintiff had employed Watson & Chapman, attorneys, on January 29th. On the 15th of February these attorneys wrote to the defendant in regard to this claim, but this letter is not found in the printed record. To this the defendant, on February 22d, made the following reply:

"In reply to yours of the 15th, would say that, as there has been no proof filled out in the Richard Phillips case, in order that we may know what he claims, we think, perhaps, there had better be. Of course, there is no use in sending a sick proof, because there would be no way by which he can recover any sick benefits; so, with the distinct understanding that we do not concede any liability whatever, or waive any of the provisions of our certificate or by-laws, or any other rights, we inclose an accident proof to be filled out by Mr. Phillips and his physician in full. Forward same to this office, and we will look it over, and advise you further."

Other correspondence followed in regard to the claim, but, failing to agree, suit was launched. Plaintiff recovered verdict and judgment.

A. L. Chandler (*John A. McKay*, of counsel), for appellant.

Watson & Chapman, for appellee.

GRANT, C. J. (*after stating the facts*). 1. In his opening statement to the jury, counsel for plaintiff said: "I am not going to produce Dr. Le Seure, because we do not feel able to produce him." We see no objection to this statement. It was competent for the plaintiff to show that he could not produce a material witness, and to show the reason therefor.

Upon the trial plaintiff's counsel stated to the court, in the presence of the jury: "Something has been said about getting Dr. Le Seure here. I have his diagnosis, which I will offer in evidence, if my brothers don't object to it." Of course, the presumption is that this diagnosis was favorable to plaintiff's claim; else it would not have been offered. It was clearly incompetent, and his counsel so admitted. The offer should not have been made in the presence of the jury. The jury might readily draw an inference of its contents. Counsel should not offer testimony in the presence of the jury which they know is incompetent. The purpose of such offers is apparent. *Scripps* v. *Reilly*, 38 Mich. 14.

2. It is urged that the suit was prematurely brought, because it was brought before the expiration of three months after filing proofs of loss. The complete reply to this is that the defendant promptly denied all liability. By this conduct the defendant waived proofs of loss and all limitations as to time. These requirements preliminary to the right to bring suit do not apply to cases where the defendant at once denies all liability. *Norwich, etc., Transp. Co.* v. *Insurance Co.*, 6 Blatchf. 241; *Manhattan Ins. Co.* v. *Stein*, 5 Bush, 652; *Francis* v. *Insurance Co.*, 6 Cow. 404.

3. A large number of letters were written by the secretary of the company to the attorneys for plaintiff, and by them to the secretary, after the letter of the company denying liability, and before the bringing of suit, in regard to this claim. This correspondence was had with a settlement in view, and with a distinct statement in the letters of both parties that it should not waive any defenses which the defendant had. In one of these letters, dated March 31, 1897, written by plaintiff's attorneys, the diagnosis of Dr. Le Seure is stated as follows:

"Mr. Phillips was presented to the class in the hospital, and a careful examination made of his condition. A compensating curvature of the spine exists; pelvis tips about an inch. The diagnosis, in my judgment, is a rupture of a tendon of one of the muscles of the hip."

This damaging testimony was placed before the jury for their consideration without any opportunity for cross-examination. Some of these letters might be admissible as evidence of a waiver of the preliminary proceedings to suit, under *Burnham* v. *Casualty Co.*, 117 Mich. 142, if all such proceedings, as above shown, had not already been waived by the denial of all liability. But, even if they were admissible for this purpose, testimony of this character cannot be placed before the jury by such statements in a letter.

4. Defendant offered to show by parol that plaintiff, after the above injury, had applied for membership in another fraternal organization, in which application he stated he had never been sick. This was excluded, under objection. Counsel seek to defend its admissibility upon the ground that the written application was out of the jurisdiction of the court, and in the hands of the chief secretary of that organization, in Toronto, Canada. The written document had neither been lost nor destroyed, and the law provides a way for securing such testimony by deposition. The testimony was, therefore, properly excluded.

5. It is claimed that the plaintiff did not give timely notice of his injury, in accordance with the provisions of the charter and by-laws. Notice was served upon the company with promptness after he had been informed by one of his physicians that his illness did not result from disease, but from an accident. We do not think that the first notice that he was suffering with neuralgia was binding upon him. It would be a hard rule, and one which the rules of the company must place beyond doubt, which would deprive a member of his benefits through the mistake of his physician. The notice was served as soon as he ascertained that the accident with which he had met was the occasion of his trouble. We think this a sufficient compliance with the by-law.

6. Dr. Hume was called as a witness by the defendant, and asked to state what he discovered on making his examination of Mr. Phillips. This was objected to, as a

privileged communication. Defendant's counsel appears to have admitted its privileged character, but sought to justify its admission upon the ground that plaintiff's attorneys had served upon the defendant notice to produce a letter written by Dr. Hume, January 10, 1897, to the defendant. We do not find this letter introduced in evidence. It requires no argument to show that the notice to produce did not justify the admission of the evidence, or change the rule as to privileged communications.

7. The court instructed the jury that, if the plaintiff is entitled to recover in this case, "I instruct you that, unless he recovers over $100, he will not recover his costs, but defendant will recover costs against him." This was an action of *assumpsit*, and although, in an action of tort, such an instruction has been sanctioned (*Stekętee* v. *Kimm*, 48 Mich. 322), it has been held improper in an action of *assumpsit* (*Sixma* v. *Montgomery*, 98 Mich. 193). This was an action of *assumpsit;* therefore the instruction was erroneous.

8. The complaint is made that one of plaintiff's counsel, in his closing argument, used unjustifiable language, which would naturally tend to prejudice the jury, within the rule of *Britton* v. *Railroad Co.*, 118 Mich. 491. There seems to have been much feeling between counsel exhibited on the trial of this cause, as appears from the record. The closing argument of plaintiff's counsel appears in the record, while that of the defendant's does not. There was language used which we think the presiding judge, upon his own motion, should have checked. We do not feel disposed to criticise what appears upon the record here, as it is not likely to occur upon a second trial.

Other questions are raised, but we think they come within the rulings already made, and will not occur upon a new trial.

Judgment reversed, and new trial ordered.

MONTGOMERY, HOOKER, and LONG, JJ., concurred with GRANT, C. J. MOORE, J., concurred in the result.

OLIN v HENDERSON.[1]

1. BOUNDARIES—FIELD-NOTES—EJECTMENT.

The field-notes of a United States surveyor upon his survey of the rear concession of a private claim are admissible in evidence in ejectment for land claimed to be a part of the front concession, where the issue is the location of the boundary line between the two concessions, in connection with the field-notes of the front concession by the same surveyor, for the purpose of showing the location of the witness trees, and the fact that, by establishing the line as claimed by the plaintiff, as owner of the front concession, the defendant, as owner of the rear concession, has all the land his patent calls for.

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2. SAME—LOCATION OF MONUMENTS—RESURVEY—EVIDENCE.

One who resurveyed a private claim, bounded in front by a river, testified that, finding no old monument near the river, he started from a fence, which he knew to be "very nearly" correct, and found witness trees on the line between the front and rear concessions (the location of which line was the matter in dispute) at a distance of 46 feet less than indicated in the government survey, which discrepancy, he explained, might be due to the varying height of the water in the river. His survey agreed with the government survey in the number of acres in the rear concession. The jury were instructed that the value of the survey as evidence depended upon the correct location of the starting point. *Held*, that the testimony was not incompetent, nor, in view of the charge, misleading.

3. SAME—HEARSAY.

Testimony of defendant in ejectment concerning statements made by a United States surveyor when defendant built a fence on what he claimed to be the boundary line of his concession, the true location of which line is the matter in issue, is inadmissible, as hearsay, where plaintiff's grantor, the owner of the adjoining concession, was not present at the interview

[1] Rehearing denied July 11, 1899.

4. EVIDENCE—FACTS EQUALLY WITHIN DECEDENT'S KNOWLEDGE—GRANTEE OF HEIR.

3 How. Stat. § 7545, as amended by Act No. 121, Pub. Acts 1895, providing that in a suit prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party shall be incompetent to testify to facts equally within decedent's knowledge, excludes such testimony where the suit is prosecuted by a remote grantee of decedent's heirs.

5. EJECTMENT—RIGHT TO MAINTAIN.

One in possession of land under an executory contract of sale may maintain ejectment against a trespasser.

6. SAME — PROOF OF POSSESSION — APPEAL — OBJECTIONS NOT RAISED BELOW.

Where defendant in ejectment permits the trial to proceed upon an evident understanding that plaintiff's possession under a contract giving the right to such possession is conceded, his objection, raised for the first time on appeal, that the proof of possession is insufficient, will not be considered.

7. SAME—DECLARATION—ALLEGATION OF TITLE.

Under 2 How. Stat. § 7790, providing that plaintiff in ejectment must show a valid subsisting interest in the premises, and the right to recover the possession thereof, and section 7797, providing that the declaration shall state whether plaintiff claims in fee, or for life, or for a term of years, or otherwise, it is sufficient for one in possession under an executory contract of sale to allege title in fee, without setting up the contract.

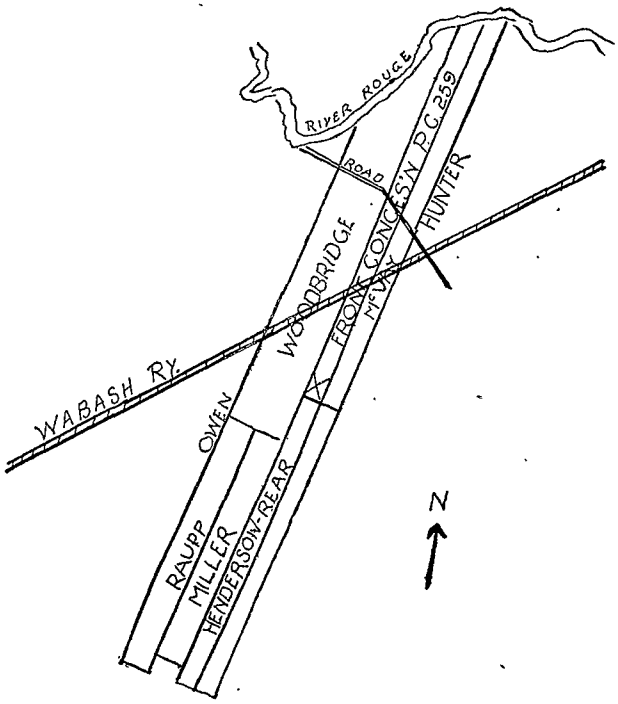
8. BOUNDARIES—AGREEMENT AND ACQUIESCENCE.

To establish a boundary line by agreement and acquiescence, not only must there have been an express agreement, and monuments erected and acquiesced in, but a doubt or controversy must have existed as to the true line; otherwise, the statute (2 How. Stat. § 6179) prohibiting the conveyance of real estate by parol renders the agreement inoperative.

Error to Wayne; Hosmer, J. Submitted January 27, 1899. Decided May 9, 1899.

Ejectment by Rollin C. Olin and Oscar Le Seure against Thomas Henderson. From a judgment for plaintiffs, defendant brings error. Affirmed.

This is an action of ejectment for the recovery of "a parcel of land, 19 rods wide, at the rear of the front concession of private claim No. 259, and being the southerly part of said front concession," containing 2½ acres, which plaintiffs claim in fee. The situation will appear from the following plat:



The land in dispute is marked with a cross.

Plaintiffs introduced the original patent for private claim 259, and deeds which brought the title to Francis F. Palms and others. These parties gave a land contract for the sale of this front concession to Edward T. Adams, trustee, which was by him assigned to plaintiffs, July 28, 1892. This contract, among other descriptions, covers "all that part of the front concession of said private claim 259 lying southwesterly of the road crossing about the center of the

length of said front concession of said private claim 259, said parcel to include all lands from the center of said road or highway to the extreme rear of said front concession, and containing 35 acres more or less, except a strip owned or occupied by the Wabash, St. Louis & Pacific Railway Company." This was the ordinary land contract, and contained the following provision in regard to possession:

"In the event of said second party taking or assuming possession of said premises, in case of such default, said first parties may treat him as a tenant at will, and take the usual summary proceedings before a circuit court commissioner or justice of the peace to eject and remove him from such premises."

The plea was the general issue. The dispute arises over the boundary line between the front and rear concessions.

Defendant's contention is thus stated by his counsel:

"(1) That neither plaintiffs nor their grantors made or proved a claim to anything beyond the rear line of the front concession, which is only 80 acres from the border of the river, and that, by going up to defendant's fence, they had already gone beyond their said rear line, and had more land than they even claimed, and the disputed strip was no part of their tract. * * *

"(2) That the contract gives plaintiffs no title in fee, which is what their declaration claims, but is simply an agreement to sell, which provides that, under certain circumstances, they may become tenants at will of the owners; that it gives them no right of possession; and that, as a matter of fact, it does not appear that they have ever taken possession under it of any part of the front concession, and therefore that they have never even become such tenants.

"(3) That neither plaintiffs nor their grantors have ever been in possession of the disputed strip.

"(4) That the testimony of the surveyors shows that they were not governed by the original survey of this land in making their surveys. * * *

"(5) That defendant and those claiming under him had been in the undisturbed possession of that disputed land for more than 15 years, claiming to own it.

"(6) That defendant and Dennis J. Campau, when they were owners of these adjoining pieces of land, had established and agreed upon a line between them, and that it

had been acquiesced in for many years, and was thus made the true line, independently of the fact that it was or was not the true line."

Two questions were submitted to the jury:

(1) Where was the original line?
(2) Has defendant acquired title by adverse possession?

The issue was found in favor of the plaintiffs.

B. T. Prentis, for appellant.

Keena & Lightner, for appellees.

GRANT, C. J. (*after stating the facts*). 1. Plaintiffs introduced, under objection and exception, the field-notes of the survey of the rear concession. The objection made to this is that it did not tend to show title in the plaintiffs. This survey was made by John F. Monroe, a deputy United States surveyor, in October, 1871, in pursuance of an act of congress. The field-notes of the front concession by the same surveyor were also introduced. The purpose of this was to show the location of the witness trees, and that, by establishing the line as plaintiffs claimed, defendant had all the land his patent called for in Monroe's survey of the concession. This certainly had an important bearing upon the location of the true line, and was admissible for that purpose.

2. A surveyor named Jerome made a survey shortly before the trial. He found no old monument near the river, and started from a fence, which he swears he knew to be very nearly correct. This testimony was objected to, because the surveyor did not start from some monument placed under the original government survey,—citing *Carpenter* v. *Monks*, 81 Mich. 103, and *Jones* v. *Lee*, 77 Mich. 35; but it appears that Jerome found witness trees on the line between the concessions. He, therefore, did find monuments, which were controlling. Starting from this old fence, he made the distance from the border of the river to the witness trees above men-

tioned 46.86 feet less than that in the survey of Mr. Monroe. He testified the difference might be accounted for by the height of the water (the land being low and marshy) when the surveys were made. The defendant's patent called for 78.14 acres. Jerome testified that from the dividing line according to the Monroe survey to the St. Cosme line (the southern boundary) the rear concession contained the same number of acres. The court instructed the jury:

"The only value of a survey as a survey is dependent upon where you believe the original monument to be; and the surveyor has no better knowledge of that—is not presumed to have any better knowledge of that fact—than any gentleman of the jury. It is for you to fix that by the evidence in this case; and the fact that a surveyor, unless he has the original monument to start from, has made a survey, and what he believes or claims to be a property, is no evidence of that property, except as you may find that he has started from the original point."

In view of these facts, we do not think the testimony was incompetent, or that the jury could have been misled into the belief that the old fence near the river, from which Jerome started, was controlling.

In this connection defendant's counsel also urged that it was error not to permit defendant to testify to what Monroe said to him when he built the fence which he now claims to be the dividing line. Plaintiffs' grantor was not present at that interview. The testimony was clearly hearsay, and was properly excluded.

3. Defendant was asked to testify to a conversation between him and Mr. Campau, deceased, in 1873, in regard to the building of this fence. This was excluded, under 3 How. Stat. § 7545, as amended by Act No. 121, Pub. Acts 1895. Counsel sought to defend the admission of this testimony upon the ground that the plaintiffs are not the assignees of Mr. Campau, but are grantees of his heirs several times removed, and that the statute only applies to a case where the property or right was transferred by the deceased in his lifetime. We think the statute is broad

enough to include this case within the beneficent prohibition. This statute was held, in *Lloyd* v. *Hollenback*, 98 Mich. 203, to include the heir. If it includes the heir, for the same reason it should include the grantee or assignee of the heir. It was also held, in *Ripley* v. *Seligman*, 88 Mich. 189, that the assigns of a deceased person include the grantee of the grantee of the deceased person. The testimony was properly excluded.

4. Error is alleged upon the instruction that the question for the jury was where the true line lay, except there had been a line established by adverse possession. Counsel says: "The question was, Where is the south or rear line of the front concession? There may be a little over two acres between the two pieces which has never been conveyed." There is no evidence to sustain the claim that there was any unconveyed land between the two parcels. The entire land had been surveyed and conveyed, and the sole question related to the boundary line between them.

5. It is urged that plaintiffs showed no title in fee, and therefore could not recover; the precise claim being that the contract under which plaintiffs claim title does not convey the fee, and that, having claimed title in fee, they have failed to make their case. To support this proposition counsel cites *Buell* v. *Irwin*, 24 Mich. 145, *Gamble* v. *Ross*, 88 Mich. 315, and several other authorities. We cannot take the time to analyze those cases. An examination will show that they do not apply to this case. The contract contemplated and permitted possession by the vendees. The trial was evidently conducted upon the understanding that the plaintiffs were in possession under the contract, which evidently gave them the right of possession. Ejectment is a possessory action, and a vendee in such contract, in possession under it, is entitled to maintain ejectment against one who has ousted him from the land. *Covert* v. *Morrison*, 49 Mich. 135. A vendor in a land contract giving the vendee right of possession cannot maintain ejectment until he has in some manner

terminated the contract relation. *Michigan Land & Iron Co.* v. *Thoney*, 89 Mich. 226. The suit having been tried upon the theory that plaintiffs were in possession, and no such objection having been made in the court below, it cannot now be raised. 2 How. Stat. chap. 269, provides for the action of ejectment. Section 7797 provides what the declaration shall state. If the plaintiff is a widow, seeking dower, she must set forth this claim.

"In every other case the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or for the life of another, or for a term of years, or otherwise, specifying such lives or the duration of such term."

Section 7790 provides that, in order to recover, the plaintiff must show "a valid subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest, or portion thereof." While it is true that the plaintiffs had not the legal title, and therefore did not show title in fee, as alleged in the declaration, yet, under the statute in question, prescribing the contents of the declaration, there is only one requirement, if the statute is strictly followed, under which plaintiffs could bring their action, and that is that they claimed in fee. While plaintiffs might with propriety have fully set out the contract, and possession under it, we are cited to no authorities requiring this to be done. Defendant is not prejudiced or misled. The point is purely technical. We are not, therefore, disposed to reverse the case upon this ground.

6. The court was requested to instruct the jury as follows:

"If the jury believe the testimony of La Prad and Vermette, which is uncontradicted, then Henderson and Dennis J. Campau agreed upon the boundary line at a time when they were adjoining owners. It is undisputed that both the parties acquiesced in the line so established up to the time when Hubert brought his trespass case. These being found to be the facts, the line so established will be considered the true line, provided the acquiescence was for a considerable period, even though it is less than the 15 years required by the statute of limitations."

This presents the most difficult question in the case. In cases of boundary lines it is often difficult to distinguish when the case is within section 6179, 2 How. Stat., prohibiting a conveyance of real estate by parol, etc., and the case where there has been a settlement of the disputed boundary line, acquiesced in by both parties, and where one party or the other, in consequence thereof, has changed conditions.

The testimony upon this point is as follows: La Prad testified that he lived 11 years at one time upon the Henderson farm, and knew Mr. Campau.

"Mr. Campau told me that he was going to mark the line. I have no learning, so it is quite a job for me to keep dates of all those things. It was before I left the Reeves farm, and I left the Reeves farm in 1873. I had a talk with Mr. Campau at that division line. Mr. Campau told me he wanted me to mark that place, or that line; that they were going to establish and call it a division line between them. So he got me to take a brick, or gave me a brick, and I got a spade, and put it down there, and it is there yet, I suppose. He said they had agreed on that; he and Henderson had agreed that that should be the division line. The fence was there at that time."

Vermette testified, in regard to this fence, as follows:

"I don't remember the time it was built, but I seen a new fence built there, which Mr. Campau— At the west side of the fence, at the corner, which, when I came up there with Mr. McDonnell and Mr. Jim Padley, I told the boys, says I, 'I suppose that is in there to tell us to get out of there.' I said, said I, 'I suppose this is what says, "Don't get in that lot."' 'Oh, no!' he says, 'I don't have anything to do with that; it is Mr. Henderson.' I think it is Dennis Campau. I have known him for quite a few years back. I was on the Henderson farm. He was right there on the west side. I think it is the Woodbridge farm, adjoining Henderson. That fence was newly built. I don't know how long it was built, but that was a new fence.

"*Q.* In what year was that?

"*A.* I think it was in 1867 or 1868. I won't be positive, but I think it was one of them two years that I went

through with the boys hunting. Well, it must be about 33 or 34 years ago, I think.

"*Q.* What did Mr. Campau say to you?

"*A.* Well, he said the agreement; that is, he concluded, him and Henderson, that was his line, and it would be a good thing for to put in a good landmark there,—a stone or a brick. That is all he told me. I didn't ask no questions whether they were going to put it in. It was none of my business, anyhow, to do so. He said he concluded —him and Henderson—that that was the line of their fences between the two, and a stone or a brick would be a good landmark. He said he agreed with Mr. Henderson that was their line, and the fence was on the right line; it was the right line, and this agreement made that the line, and that it was in the right place as he spoke. He said that that was what he and Henderson had agreed upon."

We think the true principle controlling these questions is stated by Chief Justice CAMPBELL in *Smith* v. *Hamilton*, 20 Mich. 438 (4 Am. Rep. 398). The testimony does not show that there had been any dispute, or even a doubt, between Henderson and Campau, as to the true boundary between them. There must be, not only an express agreement, and monuments erected, which have been acquiesced in, but there must have been a doubt or controversy as to the true line; otherwise, the case comes within the prohibition of the statute. So far as appears upon this record, Henderson and Campau may have had no controversy, nor cared sufficiently at the time to have the matter settled. It may have been agreed to solely for temporary purposes, to separate fields or pastures. We do not think defendant showed sufficient to bring the case within the decisions of this court sustaining boundary lines fixed by agreement and acquiescence. *Cronin* v. *Gore*, 38 Mich. 384; *Manistee Manfg. Co.* v. *Cogswell*, 103 Mich. 605; *Pittsburgh, etc., Iron Co.* v. *Lake Superior Iron Co.*, 118 Mich. 109.

Other objections are raised to the charge of the court which we do not think it important to mention. We find in them no error. The instructions fairly left the question

to the jury on the two points which were involved in the case.

Judgment affirmed.

The other Justices concurred.

LAMB KNIT-GOODS CO. *v.* LAMB GLOVE & MITTEN CO. 120 159
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1. TRADE-NAMES—RIGHT TO EXCLUSIVE USE.

One Lamb invented a knitting machine, and sold his rights under his patents to a corporation, which carried on the manufacture at first under the name of the Lamb Knitting-Machine Company, and later under the name of the Lamb Manufacturing Company. The Lamb machine was used by the Lamb Knitting Company, a corporation organized by the inventor for the manufacture of knitted goods, which corporation sold its property and business to the Lamb Knit-Goods Company. The last-named corporation employed in its goods a peculiar stitch, which, however, was in common use before such corporation adopted it. The words "Lamb Knit" had come to be generally applied to goods manufactured on the Lamb machines. *Held*, that the Lamb Knit-Goods Company acquired no exclusive right to the use either of the peculiar stitch, or of the word "Lamb," in combination with other words, to designate goods of its manufacture.

2. SAME—SIMILARITY OF CORPORATE NAMES—INJUNCTION.

Lamb, an inventor of knitting machines, assisted in organizing a corporation for the manufacture of knitted goods, principally gloves and mittens, under the name of the Lamb Knit-Goods Company. After acting for some years as its superintendent, he left its employ, and organized, in another town, the Lamb Glove & Mitten Company, and engaged in the manufacture of gloves and mittens on the Lamb machines. The use of the name was sought to be enjoined under 3 How. Stat. § 4161*a*, forbidding a corporation from assuming a name so similar to that of another corporation as to be liable to mislead. It was shown that the business of the corporations was conducted through agents largely, and that the public

had in numerous instances been deceived. *Held*, that an injunction should issue.

Appeal from Shiawassee; Smith, J. Submitted February 7, 1899. Decided May 9, 1899.

Bill by the Lamb Knit-Goods Company to restrain the Lamb Glove & Mitten Company and Isaac W. Lamb from using the word "Lamb" in connection with their business in such manner as to mislead complainant's customers. From a decree dismissing the bill, complainant appeals. Reversed.

Fred L. Chappell and *H. P. Stewart*, for complainant.

Cahill & Wood, for defendants.

MONTGOMERY, J. The complainant avers by its bill of complaint that it is a corporation, with its home offices at Colon, Mich.; that, prior to its organization, the defendant Isaac W. Lamb had organized a company at Concord, Mich., known as the "Lamb Knitting Company," and that, at the time of complainant's organization, it acquired all of the property, business, and good will of the Lamb Knitting Company from Isaac W. Lamb, and paid a valuable consideration therefor; that, at the time of the organization of the complainant, Isaac W. Lamb was interested in the organization of the company, and received a large amount of the capital stock; that the complainant assumed the name of the "Lamb Knit-Goods Company" with the knowledge and consent and at the desire of Isaac W. Lamb; that the complainant was organized to conduct a business similar to that which had been previously conducted by the Lamb Knitting Company, which was the manufacture and sale of knitted goods, principally gloves and mittens; that these gloves and mittens have in the main been knitted with a peculiar stitch, and that, from the connection of complainant's name with said

goods, the peculiar stitch has become known as the "Lamb Stitch;" that gloves and mittens may be manufactured by the same machine with a different stitch, which will be equal to the complainant's in durability; that the stitch used by the complainant is for the purpose of distinguishing complainant's goods; that, after the organization of complainant, Isaac W. Lamb was in its employ for a number of years as superintendent, but that he became dissatisfied, and left complainant's employ on the 8th of April, 1892; that thereafter he, with the assistance of others, organized a company known as the "Lamb Glove & Mitten Company," at Perry, Mich., and commenced to manufacture gloves and mittens knitted with the same peculiar stitch as that employed by the complainant; that the name adopted by the defendant company is similar to that adopted by the complainant, and that purchasers and dealers are deceived thereby, and buy the goods of the defendant believing them to be the goods of the complainant; that the business of the complainant has been damaged thereby. Complainant avers that it is entitled to the exclusive use of the word "Lamb" in connection with knit goods of any description, and to the word "Lamb" in its corporate name; that it has the exclusive right to use the peculiar stitch; and that for this reason the words "Lamb Knit" have become and are a valid trade-mark at common law. The bill prays an accounting and an injunction.

The answer admits that the complainant assumed the name of the "Lamb Knit-Goods Company" with the knowledge and consent of Isaac W. Lamb, but denies that the complainant is entitled to the exclusive use of the words "Lamb Knit," or the use of the word "Lamb" in connection with other words indicating knitted goods. The answer also admits that the complainant acquired all the property, business, and good will of the Lamb Knitting Company, but avers that Lamb acted in the transaction, not for himself, but as agent for the Lamb Knitting Com-

pany. The answer also admits that the defendant corporation organized with, and is conducting a business under, the name of the "Lamb Glove & Mitten Company," but denies the allegation that this name is so similar to complainant's as to mislead purchasers and dealers. The answer further avers that the peculiar stitch adopted by complainant has been in common use for many years; that the defendant Lamb is the inventor of the knitting machine upon which this stitch is made, and that he sold the rights, under patents granted to him, to the Lamb Knitting-Machine Manufacturing Company of Rochester, N. Y., and the Lamb Knitting-Machine Company of Springfield, Mass., which companies consolidated under the name of the "Lamb Knitting-Machine Manufacturing Company of Chicopee Falls, Mass.," and that this last-named corporation is still doing business under the name of the "Lamb Manufacturing Company," and is manufacturing Lamb knitting machines; that in 1863 defendant Lamb invented a machine for knitting many kinds of knit goods, and procured a patent thereon, and afterwards procured patents on various improvements; that in 1885 he issued printed directions for using the "New Lamb Knitter," manufactured by the New Lamb Knitter Company of Jackson, Mich.; that a large number of persons purchased these machines; that a large number of the persons and corporations which use these machines advertise such goods as made by the Lamb knitters, and that the name of "Lamb," as applied to knitting machines, and the terms "Lamb Knit" and "Lamb Goods," have been in common use in this country, by a large number of different persons, firms, and corporations, for more than 25 years.

The case was heard on pleadings and proofs, and the bill dismissed. Complainant appeals.

We are well satisfied that the complainant has not established its right to the exclusive use of the term "Lamb Knit." The testimony shows that goods manufactured on the Lamb machine were in common use many

years before the organization of complainant company, and that, to distinguish such goods from goods knitted on other machines, they were designated as "Lamb Goods," "Lamb Machine Goods," or "Lamb Knit Goods." It also appears that the peculiar stitch which complainant claims exclusive right to was in common use before complainant adopted it.

The case narrows down to the single question whether the defendant infringed the rights of complainant by the use of a corporate name so similar to that of complainant as to mislead the public, and, if so, what remedy ought to be applied. There can be no doubt that by the transfer to the complainant of the good will of the Lamb Knitting Company it was the intention of the defendant Lamb to grant the right to use his name in connection with the complainant's business. In fact, he assisted in organizing the corporation, and became a stockholder in the complainant company. The statute (3 How. Stat. § 4161*a*) authorizes the formation of a corporation, and provides that no two companies shall assume the same name, or a name so similar as to be liable to mislead. It is contended that the defendant Lamb had entered into no express agreement not to use his own name, and that Mr. Lamb, in making a sale of the Lamb Knitting Company to the complainant, was acting on behalf of the Concord company, and that the Concord company could not, and Mr. Lamb did not, sell the exclusive right to use Mr. Lamb's name, nor undertake that he would not engage in any similar business elsewhere. It appears, however, that the proposition to the promoters of complainant came from Mr. Lamb, and, as before stated, he is estopped from asserting that the company did not take its name rightfully.

Reference is made to the case of *Williams* v. *Farrana*, 88 Mich. 473 (14 L. R. A. 161). That case, however, recognizes a distinction between a corporate name and that of a partnership. In the majority opinion it is said: "A corporate name is regarded in the nature of a trademark, even though composed of individual names, and its

simulation may be restrained. After adoption, it follows the corporation." Reference is also made to *Supreme Lodge Knights of Pythias* v. *Improved Order Knights of Pythias*, 113 Mich. 133. In the latter case there was no evidence that any person had been misled, and, while the case is near the line, the court held that the rights of complainant had not been infringed. In the present case the testimony shows that dealers have been misled, and in view of the fact that the complainant's business is largely the manufacture of gloves and mittens, and that the name "Lamb" is prominent in the corporate name, we think it is likely to mislead. The case is very similar to *Chas. S. Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462 (43 Am. St. Rep. 769). In that case the complainant's name did not describe its business. The business was, in fact, the manufacture and sale of soap. The court restrained the defendant from carrying on the business in the name of the Higgins Soap Company. The court held that, even if the name was assumed in good faith, without design to mislead the public and acquire the complainant's trade, the defendant, knowing the facts, must be held to the same responsibility. See, also, *Holmes, Booth & Haydens* v. *Holmes, Booth & Atwood Manfg. Co.*, 37 Conn. 278 (9 Am. Rep. 324); *Myers* v. *Buggy Co.*, 54 Mich. 215 (52 Am. Rep. 811); *Frazer* v. *Lubricator Co.*, 121 Ill. 147 (2 Am. St. Rep. 73); *Pillsbury* v. *Flour Mills Co.*, 12 C. C. A. 432, 64 Fed. 841; *Walter Baker & Co.* v. *Baker*, 87 Fed. 209.

It is true that the business office of defendant is not located in the same village as that of complainant, but it appears that the business has been conducted through agents largely, and that the public have, in numerous instances, been deceived. We think the case falls within the class in which protection should be afforded.

The decree will be reversed, and a decree entered restraining the defendant from continuing the use of the corporate name "Lamb Glove & Mitten Company," or any name in which the word "Lamb" appears, in connec-

tion with other words indicating a business similar to that of complainant. Subject to this restriction, defendant is at liberty to advertise its goods as made on the Lamb knitting machine.

The other Justices concurred.

RAYMOND *v.* WHITE.

JUDGMENTS—BAR—ACTION FOR INSTALLMENTS.

A judgment for an installment due under a contract whereby defendant agreed to pay plaintiff a specified sum weekly so long as devices invented by plaintiff were used by defendant in his manufactures, in consideration of which plaintiff was to assign patents already obtained and to devote his time to the invention of improvements, is not a bar to an action for installments becoming due after the entry of the judgment; the contract not being a mere contract of service. *Continental Ins. Co.* v. *Lumber Co.*, 93 Mich. 139, distinguished.

Error to superior court of Grand Rapids; Burlingame, J. Submitted February 8, 1899. Decided May 9, 1899.

Assumpsit by Silas H. Raymond against T. Stewart White and Thomas Friant to recover an amount due under a contract for the manufacture of a patented article. From a judgment for plaintiff, defendants bring error. Affirmed.

Bundy & Travis (*Charles Chandler*, of counsel), for appellants.

McGarry & Belden, for appellee.

GRANT, C. J. The contract on which this suit is based is sufficiently stated in 119 Mich. 438. This suit is for a second installment of the weekly stipend agreed upon by

that contract. The defense is the same as in that case, and the further defense was interposed that the prior suit is a bar to this. It was there held that this was not a mere contract of service. The case is not, therefore, within the rule stated in *Continental Ins. Co.* v. *Lumber Co.*, 93 Mich. 139 (32 Am. St. Rep. 494), and authorities there cited. The contract provides for the payment of $20 weekly until it is terminated in the manner therein provided. Defendants cannot disregard one part of the contract, and have the benefit of the other.

Judgment affirmed.

The other Justices concurred.

PEOPLE *v.* McBRIDE.

1. CRIMINAL LAW—EMBEZZLEMENT—DECLARATIONS OF COPARTNER—RES GESTÆ.

   Upon the prosecution of a member of a law firm for the embezzlement of the proceeds of a mortgage placed with him for collection, statements made by his copartner some 15 months after the collection is claimed to have been made, that the mortgage was still unpaid and in process of foreclosure, are not admissible as part of the *res gestæ*.

2. SAME—AGENCY.

   Nor are such statements admissible against respondent on the ground of agency.

3. SAME—DRAFTS—PAYMENT—EVIDENCE.

   In a prosecution for the embezzlement of the proceeds of a draft intended to be made payable to the order of respondent in payment of a mortgage which he held for collection, but, by mistake, drawn to the order of another, the draft, indorsed by respondent, is admissible to show respondent's receipt of the funds, in connection with proof that the drawee was apprised by the drawer of his mistake, and directed to pay the draft to respondent, and that such payment was in fact made.

Exceptions before judgment from superior court of Grand Rapids; Burlingame, J. Submitted February 10, 1899. Decided May 9, 1899.

James E. McBride was convicted of embezzlement. Reversed.

This is exceptions before sentence to review proceedings in which respondent was convicted of embezzlement. The testimony on the part of the people tended to show that in August, 1895, the respondent and his son, Edward G. McBride, were copartners engaged in the practice of law at Grand Rapids; that one Frank Lewis during that month left with respondent a note and mortgage made by one Lyons, of Holland, Mich., for collection; that from time to time he made inquiries about the progress which was being made, and various reasons were assigned by Edward G. McBride why the money had not been received, until in July, 1897, he learned that the money on the mortgage had been paid in January, 1896, and the mortgage discharged; and that the discharge of the mortgage was not executed by him. The people called John A. Seymour, cashier of the Fourth National Bank of Grand Rapids, who testified that on the 22d of January, 1896, he paid to respondent a draft drawn on his bank by the cashier of the Holland City Bank, payable to the order of the Fuller & Fuller Company, and indorsed by McBride & McBride; that before paying the draft he called up the Holland City Bank for instructions to pay this sum to McBride & McBride. The cashier of the Holland City Bank was called, and testified that he drew the draft in question in payment of the money received on collection of the said note and mortgage received from McBride & McBride for collection, and by mistake made it payable to the Fuller & Fuller Company (having just previously drawn a draft in this name), and on the 22d of January, when Mr. Seymour called him up, he instructed him to pay the draft to McBride & McBride. The prosecution also showed a demand

and refusal to pay it over to the complaining witness. The respondent denied having received the money on the draft, and showed that the indorsement of the firm name of McBride & McBride was not in the handwriting of either member of the firm, and gave evidence tending to show that the discharge was signed by the complaining witness. Respondent also gave testimony tending to show that on the 22d of January, 1896, he was not able to be at the Fourth National Bank, as he was confined to his house by illness.

David E. Burns (*John O. Zabel*, of counsel), for appellant.

Horace M. Oren, Attorney General, and *Frank A. Rodgers*, Prosecuting Attorney, for the people.

GRANT, C. J. (*after stating the facts*). The first four assignments of error relate to the admission of statements of Edward G. McBride relative to the progress of the collection, made from time to time, and the fifth relates to the admission in evidence of a statement by him that the firm had received a draft, which, on due inspection, they found did not belong to them. The ruling on the last question was not excepted to, but the court, on making an earlier ruling, stated that all testimony of the statements of Edward G. McBride was taken subject to exception. The character of the testimony admitted against the objections and exceptions noted under the first four assignments may be illustrated by a question put to Albert Lewis, and the answer. The question was:

"You may state what Ed. said to you in regard to this note and mortgage."

The witness answered:

"I went there several different times * * * to see him about other matters, and incidentally he would talk about the Lyons mortgage. He said it was being foreclosed; and one time he said a copy of the notice of foreclosure was being prepared by the printer, and would

soon be through his hands, and we could have a copy of the paper. I asked him what paper it was being printed in, and he said he didn't remember, but he would ascertain, and send us a copy. I think that was in April, 1897; can't say definitely."

As the evidence showed that the mortgage had been discharged and delivered up to Lyons in 1896, it is apparent that this statement, if made by respondent, would be very damaging, as it is an attempt to temporize by an untruth. The very fact that this testimony was important suggests the necessity of care in determining its admissibility. It was mere hearsay, unless it be held that it was a part of the *res gestæ*, or that respondent's partner was so far his agent as to bind him by an admission, or, rather, to reflect upon him an untruthful equivocation. It was clearly not a part of the *res gestæ*.

"The declarations of third persons are not admissible in evidence as part of the *res gestæ*, unless they in some way elucidate, or tend to give a character to, the act which they accompany, or may derive a degree of credit from the fact itself." 1 Rosc. Cr. Ev. (8th Ed.) 41, note.

See, also, *People* v. *Mead*, 50 Mich. 228.

The case of *Simpson* v. *Waldby*, 63 Mich. 439, cited by the counsel for the people, is clearly distinguishable from this. In that case it was held that the statement of a clerk in a bank as to whether a draft had been paid was admissible. This was on the ground that the statement was made in the course of his agency, and constituted a part of the *res gestæ*. It was a civil case, and the statement was one of fact, by one of whom the witness was, by the course of dealing, expected to inquire. This statement, under these circumstances, would bind the firm, for the reason that he spoke for the firm. So, in the case of a partnership, each partner speaks for the firm, and binds all as to its civil obligations. This is on the ground that each partner is agent for all partnership business. It is quite another question, however, whether a copartner may make an admission which will bind his copartner in a criminal proceeding; and it is still a greater stretch of

the authority of an agent to say that he may, by an untruthful account of what has gone on in the business of his principal, subject that principal to punishment as for a crime. See *Lambert* v. *People*, 6 Abb. N. C. 181. Wharton states the rule as follows:

"When the relation of principal and agent in a particular transaction is established, the agent's admissions may be imputed to the principal, if his agency involves the making of such admissions." Whart. Cr. Ev. § 695.

The illustrations given by the author consist of cases in which the statement of the agent was a part of the *res gestæ*.

In 1 Rosc. Cr. Ev. (8th Ed.) 85, it is said:

"An admission by an agent is never evidence in criminal, as it is sometimes in civil, cases, in the sense in which an admission by a party himself is evidence. An admission by the party himself is in all cases the best evidence which can be produced, and supersedes the necessity of all further proof; and in civil cases the rule is carried still further, for the admission of an agent, made in the course of his employment, and in accordance with his duty, is as binding upon the principal as an admission made by himself. But this has never been extended to criminal cases."

We think this testimony inadmissible under either of the rules stated. The statements of Edward G. McBride were made 15 months after the commission of the alleged offense. The statement is not claimed to be a matter of fact, but quite the contrary,—an untruthful account of the state of the business, from which the jury would naturally infer an attempt to cover up an offense.

It is next contended that it was error to permit the draft drawn by the Holland City Bank, payable to the order of the Fuller & Fuller Company, to be admitted. It is said that the draft was either the property of the Fuller & Fuller Company, or was a nullity; that is, it was dead paper in the hands of McBride & McBride. We think none of these objections are tenable. The testimony of the prosecution tended to show that this draft was in fact sent to McBride

& McBride in payment for the Lyons mortgage, that by mistake it was made in the name of the Fuller & Fuller Company, that it was in fact presented for payment by respondent, and that its payment to him was authorized by the drawer, and that the amount of the draft was in fact paid to him. If the jury believed this testimony, it would show, beyond cavil, that the respondent received this money as the proceeds of this collection, and as the attorney of Lewis. It was entirely competent to trace the money into respondent's hands by the method pursued. The same considerations answer the respondent's contention that the court should have directed an acquittal. The case was a proper one for the jury.

None of the other questions require discussion, as they are not likely to arise on a new trial.

For the errors pointed out, the conviction will be set aside, and a new trial ordered.

MONTGOMERY, HOOKER, and LONG, JJ., concurred. MOORE, J., did not sit

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MORLEY BROS. *v.* NATIONAL LOAN & INVESTMENT CO.

BUILDING AND LOAN STOCK—EXEMPTIONS—HOMESTEAD.

3 How. Stat. § 3981*p*, which provides that building and loan stock in the hands of a householder, to the amount of $1,000, shall be exempt from levy and sale on execution or attachment, except where the shareholder has "a homestead exempted under the general laws of this State," renders exempt from execution shares held by a member whose only homestead interest is that which he has in property belonging to his wife, and occupied jointly with her.

Certiorari to Wayne; Carpenter, Hosmer, Frazer, Donovan, and Lillibridge, JJ. Submitted April 4, 1899. Decided May 9, 1899.

Mandamus by Morley Brothers, a corporation, to compel the National Loan & Investment Company to transfer to relator certain shares of stock in respondent corporation. From an order denying the writ, relator brings *certiorari*. Affirmed.

Keena & Lightner, for relator.

Ralph L. Aldrich, for respondent.

LONG, J. This case comes into this court by writ of *certiorari* to review the action of the circuit court for Wayne county in denying the petition for a writ of *mandamus*.

It appears that Morley Bros., doing business at Saginaw, obtained a judgment in the Saginaw circuit court against Fred E. Talmadge, who resides at Saginaw. The judgment not being paid, an execution was issued to the sheriff of Wayne county, and levied upon 20 shares of stock of the respondent company, a corporation organized under Act No. 50, Pub. Acts 1887 (3 How. Stat. § 3981*a et seq.*). The stock was sold upon the execution, and bid in by the petitioner, and a demand made upon the respondent company for a transfer of the stock to it. This was refused on the ground that the stock was exempt from levy and sale on execution.

Section 16 of the act under which the respondent corporation was organized provides:

"The shares held by any member, being a householder, of any association incorporated under the provisions of this act, shall be exempted from levy and sale on execution or attachment to the amount of one thousand dollars in such shares at the par value thereof: *Provided*, that such exemption shall not apply to any person who shall have a homestead exempted under the general laws of this State." 3 How. Stat. § 3981*p*.

It was shown that Talmadge, with his wife and children, has lived for the past seven years at No. 520 Hayden street; that the property belongs and has belonged to the

wife since 1891, and is of the value of about $2,500, but covered by a mortgage of $2,382; and that Talmadge owns no real estate.

The claim of the petitioner is that the homestead exemption provided for by section 7721, 2 How. Stat., is intended for the family, and is exempt in the interest of all the members of the family, equally when the title to the property is in the husband or in the wife, and that, therefore, Mr. Talmadge, the holder of this stock, has a homestead, within the meaning of section 16 of the act.

The land in question belongs to the wife, but is the family homestead. As said by this court in *Rowe* v. *Kellogg*, 54 Mich. 206:

"There can be no question but that the husband has a valuable and important interest, which the courts will protect. As head of the family, he has possession jointly with his wife, and has, therefore, a right to complain of any unlawful interference. * * * The land is in his tenancy, while the family occupy it, as distinctly as if leased to him."

The tenancy here is not, however, sought to be disturbed. The only question is, Has Mr. Talmadge a homestead, within the meaning of this act? Does the fact that he occupies a dwelling house owned by his wife prevent him from claiming the benefit of section 16? He has a beneficial interest in the homestead owned by the wife, so long as she occupies it, but it is an interest which inures to him only as an incident to his being the head of the family. The wife may sell the property without the consent of the husband, and thus defeat his homestead interest and that of the family, or she may abandon her husband and family, and oust them from possession of the property which has been occupied as a home. The nature of and limitations on the husband's interest in the wife's homestead are fully discussed in *Buckingham* v. *Buckingham*, 81 Mich. 89. It was said:

"As against creditors of the wife, he is entitled to be protected in his possession and occupancy of the homestead. The Constitution and laws, however, confer upon

married women such absolute right to the disposition of their own separate property that she may convey the homestead by deed without the husband's joining in the instrument. If she may do this voluntarily, and without his consent, there would seem to be no legal principle which would prevent her from voluntarily deserting her husband and abandoning her homestead."

It can hardly be said that such a homestead as here described is the homestead which the legislature intended, by the act, should deprive the owner of stock of the right to the exemption up to $1,000 from levy and sale on execution. The purpose of the act was to enable persons of small means to acquire a homestead, and we think it cannot be said that the homestead intended by the act which would defeat the exemption was one resting in the unstable holding which the husband might have in property owned by the wife.

The court below very properly denied the writ of *mandamus*. The order will be affirmed.

The other Justices concurred.

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PENBERTHY INJECTOR CO. *v.* LEE.

TRADE-NAMES—RIGHT TO EXCLUSIVE USE—INJUNCTION.

One Penberthy, the inventor of an appliance for injecting water into steam-boilers, procured the organization of a corporation for the manufacture and sale of the appliance, and, in consideration of a transfer of his patent to the corporation, became the owner of nearly all of its shares of stock. He insisted upon the adoption of "Penberthy Injector Company" as the corporate name, and upon the use of his name on the injectors and in all the advertising, which was very extensive, by virtue of which the name "Penberthy Injector" became everywhere familiar to the trade. After six years, Penberthy disposed of his interests in the corporation, and engaged, in

company with former officers and employés of the corporation, in the same vicinity, in the manufacture of injectors under a patent issued to Penberthy covering an appliance of like principle and appearance to that made by the corporation. The firm adopted the name "Lee-Penberthy Manufacturing Company," and used the word "Penberthy" upon its product and in all its advertising. *Held*, that the corporation was entitled to an injunction on the ground of infringement of its trade name.

Appeal from Wayne; Adams, J., presiding. Submitted April 5, 1899. Decided May 9, 1899.

Bill by the Penberthy Injector Company against William O. Lee, Thomas J. Sweeney, Homer Pennock, and William Penberthy, copartners as the Lee-Penberthy Manufacturing Company, to enjoin the use by defendants, in their firm name and in their advertising, of the word "Penberthy," in such manner as to mislead complainant's customers. From a decree for complainant, defendants appeal. Affirmed.

T. T. Leete, Jr., and *James Whittemore*, for complainant.

C. C. Yerkes, *T. E. Tarsney*, and *W. G. Fitzpatrick*, for defendants.

MOORE, J. This is an appeal by defendants from a decree entered in the court below in favor of the complainant. The written opinion by Judge Adams is sustained by the record. It states the question involved so clearly that a portion of it is quoted as a statement of the case:

"The bill in this case was filed in January, 1898, for the purpose of restraining the defendants from infringing a certain trade-mark or trade-name made use of by complainant in its business for several years. It appears from the bill and defendants' answer, and the proofs taken, that complainant is a corporation organized in April, 1886; that the original stockholders were defend-

ants William Penberthy and Homer Pennock, and one S. Olin Johnson; that the capital stock was divided into 2,000 shares, of $25 each, of which William Penberthy took 1,998, and the others 1 each; that the purpose of the corporation was to make and sell injectors for injecting water into steam-boilers, under a patent applied for by said Penberthy; and that, in consideration of the transfer to the company of said invention by said Penberthy, said shares of stock were issued to said Penberthy. He does not appear to have contributed any money, or anything but the invention. The name 'Penberthy Injector Company' was adopted because said Penberthy requested it and insisted upon it; and also he insisted that the name should appear on the injectors, and be advertised in connection with the business, all of which was assented to by his then associates, and carried into effect.

"It also appears that complainant proceeded, as soon as organized, to obtain a manufacturing plant at 228 Abbott street, in Detroit, obtained tools and machinery, and proceeded to make tests and experiments, and manufactured some 2,000 injectors pursuant to said patent, in which experiments and tests and manufacturing the company expended about $5,000, but the injectors so made were a failure, and many were returned; that thereupon the company made certain improvements, which were patented in the name of the company, and known as 'Desmond's first and second patents,' and 'Sweeney's patent,' and finally obtained an injector which was satisfactory, and a success commercially, which it proceeded to manufacture and sell to a large extent, and that upon all so manufactured and put upon the market, at the request and with the consent of said Penberthy, the words 'Penberthy Injector,' in one form or another, appeared, never omitting the word 'Penberthy;' that the complainant issued large quantities of printed matter, and advertised in trade journals extensively, in all which advertising the same name 'Penberthy' appeared in connection with the injector, so that this injector became generally known throughout the United States, and even in foreign countries, as the 'Penberthy Injector,' and as such was favorably received and considered; that in such printing and advertising the complainant expended about $75,000, and by these means the word 'Penberthy,' both upon the injectors and in the advertisements and printed matter, and also as a part of the corporate name of complainant, became of

very great value and importance, as a trade-mark or trade-name, to complainant. It further appears that the defendant Pennock became interested in complainant corporation as a stockholder for several years, and was at one time president of the corporation; that defendant Sweeney was the mechanical superintendent and experimenter for complainant from 1886 up to 1897, and that defendant William O. Lee was employed by complainant as a traveling salesman from 1886 up to 1897, and that the defendant Penberthy was a stockholder in complainant corporation from its organization, in 1886, till 1892, when he sold his remaining stock for the sum of about $5,000, and retired from the corporation.

"It further appears that defendant William Penberthy, in about 1892, and after selling his said stock, obtained a patent upon an injector embodying substantially the same principles, and of nearly the same general appearance, as complainant's injector (the main difference being in the use of rubber ball valves instead of hinge valves, but accomplishing substantially the same purposes, and in substantially the same way); that afterwards (in 1897, if I mistake not) defendant Penberthy, in conjunction with the other defendants, formed a copartnership, under the name of the Penberthy-Lee Manufacturing Company or the Lee-Penberthy Manufacturing Company (both names appearing at one time or another), for the purpose of making and selling injectors under said patent of 1892; that they located their plant in the city of Detroit, and on Abbott street, and have largely advertised their said injectors in nearly the same general form, appearance, and manner as complainant's advertisements, using the word 'Penberthy,' in some form or connection, in all cases, and marking their goods in some form of expression, in all cases, embracing the word 'Penberthy.' And complainant claims all this to have been done in simulation of complainant's trade-mark and trade-name, and for the unjust and fraudulent purpose of trading upon complainant's reputation, and appropriating to themselves complainant's good will, and diverting to themselves the business of the complainant, by inducing the purchasers of injectors to suppose that, in buying the injectors made and sold by defendants, they were purchasing the Penberthy injectors made and sold by complainant, in fraud of the rights of complainant, and to complainant's great injury.

"The proofs taken disclose the fact that, since the filing of complainant's bill, the defendants have become incorporated under the name of the Lee-Penberthy Manufacturing Company; that now they inscribe upon their injectors the words 'Lee Automatic Injector' on one side, and on the other, 'Wm. Penberthy's Patent;' giving, in small letters, the date and number. But no change has been made of any importance in their advertising matter. The word 'Penberthy,' in some form or connection, always appears.

"There does not seem to be much, if any, dispute between the parties as to the main facts in the case. The question is as to the use of the word 'Penberthy' in connection with the manufacture and sale of injectors. The complainant claims that it has the exclusive right to use that name as a trade-mark or trade-name, upon three grounds, namely: (1) That it is a part of its corporate name, and indicates origin and ownership; (2) that the name was adopted in the first place, and used for many years, at the instance and request, and with the knowledge and consent, of said William Penberthy, and that now, after the large expenditures by complainant in advertising its goods under the name, and making its injectors known to the world as, the 'Penberthy Injector,' the defendant Penberthy is estopped from making use of the same name in connection with injectors, and from conferring that right on defendants, either as a copartnership or corporation; and (3) that, under the circumstances, the name has become impersonal, and does not represent William Penberthy, or any other person, but is simply a trade-mark or trade-name applied to complainant's injectors. On the other hand, defendants claim that the only right complainant ever had to the use of the name was by contract, by which it had the right to apply the name to injectors manufactured under William Penberthy's original patent, but only to such injectors; that, having abandoned the manufacture of injectors under that patent, complainant forfeited the right to the use of the name in its business, or as a trade-mark upon its injectors made under other and later patents. And, second, defendants claim that William Penberthy has the natural right, of which he cannot be deprived, to use his own name in connection with his own business, either alone or in connection with others. The question presented is largely a question of law."

After discussing the law of the case, the learned judge continued:

"But it seems to me useless to follow the authorities any further, considering the relations that all of the defendants held to the complainant corporation. Considering the proof, from the testimony of William Penberthy and others, as to his authorizing, requesting, and insisting upon the name 'Penberthy' appearing in the corporate name of complainant, and upon the injectors manufactured by complainant; considering the large outlay by the complainant in advertising and making this name widely known, and the sale by Penberthy of his stock in 1892, and his subsequent proceedings, and the formation of the defendant company, and its location on Abbott street, and their persistence in using the word 'Penberthy' upon their goods, and in their business and corporate name, and in all their advertising matter; and considering the proof that buyers and people dealing with the concern were led to think that defendant copartnership or corporation was a continuation of complainant's business, as successor or otherwise,—I cannot doubt that defendants intended to appropriate a portion of complainant's good will and good reputation. I cannot doubt that the natural tendency of the situation would be to divert the complainant's business to the defendants. I do not question or doubt the general natural right which a man has to use his own name in his own business without interference; but I think, in a case like the present one, such right should be guarded by language sufficiently clear and explicit to notify all persons that the business is not that of another. I do not think this has been done by these defendants, and I am of the opinion that complainant has made out a good case, and is entitled to the injunction prayed for, with costs."

And the following decree was entered:

"That the said defendants, severally and jointly, and the firm and corporation known as the Lee-Penberthy Manufacturing Company, their counselors, attorneys, solicitors, agents, servants, and workmen, be, and they are, each and every one of them, enjoined from the use of the name 'Penberthy' in the firm or corporate name in any way, and from the use of the name 'Penberthy' upon their product, packages, or advertising matter, or advertisements. But said defendants may indicate that their product is manufactured under W. Penberthy's patent, if such be the fact, provided that with each and every such statement, and in connection therewith, there shall be also

indicated, in type equally as prominent, that 'W. Penberthy is distinct from, and has no connection with, the original Penberthy Injector Company.'"

The legal principles involved which are decisive of this case are also involved in the case of *Lamb Knit-Goods Co.* v. *Lamb Glove & Mitten Co.*, *ante*, 159, so it will not be necessary to discuss them here. In addition to the authorities cited in the *Lamb Knit-Goods Co. Case*, the following are cited: *William Rogers Manfg. Co.* v. *Rogers & Spurr Manfg. Co.*, 11 Fed. 495; *Goodyear Rubber Co.* v. *Goodyear's Rubber-Manfg. Co.*, 21 Fed. 276; *R. W. Rogers Co.* v. *Wm. Rogers Manfg. Co.*, 17 C. C. A. 576, 70 Fed. 1017; *Garrett* v. *T. H. Garrett & Co.*, 24 C. C. A. 173, 78 Fed. 472; *Merchants' Detective Ass'n* v. *Detective Mercantile Agency*, 25 Ill. App. 250; *Russia Cement Co.* v. *Le Page*, 147 Mass. 206 (9 Am. St. Rep. 685); *Howe* v. *Machine Co.*, 50 Barb. 236; *Newman* v. *Alvord*, 51 N. Y. 189 (10 Am. Rep. 588).

The decree is affirmed, with costs.

GRANT, C. J., MONTGOMERY and HOOKER, JJ., concurred. LONG, J., did not sit.

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POUND *v.* BOARD OF CANVASSERS OF WAYNE CO.

ELECTIONS—RECOUNT—CIRCUIT JUDGE.

Act No. 125, Pub. Acts 1897, amendatory of an act providing for the election of county boards of canvassers, by section 4 authorizes the board to canvass votes for state and county officers, presidential electors (each year when chosen), members of congress, and members of the legislature. Section 10 provides that any candidate voted for at any election at which state, county, or district officers are voted for, who conceives himself aggrieved on account of any fraud or mistake in the canvass, or in the returns made, may petition for a recount. By section 11, notice of such petition is required to be served on the opposing candidate, personally, or, if he cannot be found, by leaving the same at his residence, 12 hours before its presentation to the board. Section 12 provides that a candidate not receiving a certificate of election may, for errors apparent on the face of the returns, have the same examined and corrected on *certiorari* to the circuit court. *Held*, that a candidate for a state office, such as circuit judge, is not entitled to a recount under the act.

Certiorari to Wayne; Lillibridge, J. Submitted May 2, 1899. Decided May 19, 1899.

Mandamus by James H. Pound to compel the board of canvassers of Wayne county to recount the votes cast for the office of circuit judge. From an order denying the writ, relator brings *certiorari*. Affirmed.

James H. Pound (*Hayes & Lawson* and *George F. Monaghan*, of counsel), for relator.

John G. Hawley and *H. M. Campbell*, for respondent.

MONTGOMERY, J. The relator was a candidate at the April election for the office of circuit judge. On the face of the returns, he was defeated by a narrow margin of 25 votes. When the board of canvassers convened, relator

presented a petition for a recount of the ballots cast at the election, which was refused. After applying to Judge Lillibridge, of the Wayne circuit court, for *mandamus*, and being refused, he applied to this court for relief.

The question presented is whether a candidate for a state office is entitled to a recount, under Act No. 125 of the Public Acts of 1897. In *Vance* v. *Board of Canvassers of St. Clair Co.*, 95 Mich. 462, the question was presented whether a recount could be had of votes cast for a candidate for circuit judge. The act then in force was Act No. 208 of the Public Acts of 1887. It was held that the act did not apply to the office of circuit judge, and that the case was not distinguishable, in principle, from a number of earlier cases which had arisen under the same statute. It is true there was wording in that act broad enough in its terms to include the office of circuit judge, but, in view of other provisions of the act, it was held not to apply. Mr. Justice MCGRATH, speaking for the court, said:

"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 canvasses and the courts are without power in the premises. The very terms of the act itself exclude any inference of its applicability to that class of cases. It limits further inquiry to fraudulent or illegal voting or tampering with the ballot boxes before the recount. It provides that 'any candidate not receiving a certificate of election may, for errors apparent on the face of the returns, have the same examined and corrected upon *certiorari* to the circuit court of the county.' * * * No certificate is issued to a state officer or circuit judge, except by the board of state canvassers. The act clearly contemplates that the writ shall run against the board of canvassers who have acted upon the erroneous returns, and not against the board of state canvassers, who do not have before them the returns complained of."

We find that section 12 of Act No. 125, Pub. Acts 1897,

contains the identical provisions as to *certiorari* found in the act of 1887. There can be no doubt, therefore, that the case is ruled by *Vance* v. *Board of Canvassers of St. Clair Co.*, *supra*, unless the act of 1897 clearly evinces a purpose of extending the right to a recount to a candidate for a state office.

It is contended by the relator that such intention is manifested. The act of 1887 provides that "any candidate voted for at any election, conceiving himself aggrieved on account of any fraud or mistake in the canvass of the votes by the inspectors of election or in the returns made, may * * * present a petition," etc. The act of 1897, in section 10, provides that "any candidate voted for at any election at which state, county, or district officers are voted for, who conceives himself aggrieved on account of any fraud or mistake in the canvass of the votes by the inspectors of election or the returns made by said inspectors, may * * * file a petition," etc. It is contended that this is a clear expression of intention to allow a recount on petition of any state, county, or district officer. On the other hand, it is contended that that language is not broader than that used in the previous statute.

The act in question (Act No. 125, Pub. Acts 1897) is amendatory of the act providing for the election of county boards of canvassers. By section 4 of the act the board is authorized to canvass the votes for state officers, county officers, electors for president and vice-president, members of congress (each year when they are elected), state senators, and representatives in the legislature. It will be seen that at certain elections the canvass is of votes cast for state, county, and district officers, and at other elections representatives in congress are also elected. The language of section 10 was evidently designed to make clear the election to which it was intended to apply its provisions, rather than to designate the officer or candidate who might avail himself of the provisions. Literally, a candidate for congress is within the provisions,

as he is voted for at an election at which state, county, and district officers are elected. State, county, and district officers are named because at each election at which the election commission is to act these officers, at least, are to be elected, and the naming of these officers designates each election. But as in alternate years representatives in congress are elected, and as the terms of the act include any candidate voted for at such election (at which state, county, and district officers are voted for), a member of congress is as much within the literal designation as the state officers. We think the reference to state, county, or district officers must be construed as intended to designate the election intended, and that the words providing as to who may petition for a recount are as general as under the former act. It follows that the case is ruled by *Vance* v. *Board of Canvassers of St. Clair Co.*, *supra*.

Additional evidence that neither this act nor the act of 1887 was intended to apply to state officers is found in the fact that, by section 11, notice is required to be served on the opposing candidate 12 hours before presenting the petition to the board, or, if the candidate cannot be found, by leaving a copy of the notice at his last place of residence. It can hardly be assumed that it was intended to require the attendance of a candidate for state office at a county distant from his residence on 12 hours' notice; much less can it be inferred that leaving a notice at his residence 12 hours in advance of a hearing at which his rights would be affected would be deemed adequate by the legislature. We think this provision and the provision relative to review by *certiorari* indicate that the intention was to limit the general language employed so as to exclude state officers as well as members of congress.

The application will be denied.

The other Justices concurred.

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PATRICK *v.* YOUNG MEN'S CHRISTIAN ASSOCIATION OF KALAMAZOO.

1. DEDICATION—PLATS—PUBLIC USES.
   2 Terr. Laws, 577, which provides that an acknowledged and recorded plat, describing lands intended for streets, commons, or "other public uses," shall be deemed a sufficient conveyance to vest the fee in the county, in trust for the purposes expressed, does not apply to land appropriated on a plat to religious denominations, theirs not being a public use, within the meaning of the act.

2. SAME.
   A common-law dedication does not convey a fee.

3. DEEDS—RESERVATION—CONSTRUCTION.
   A conveyance of a specified portion of a quarter-section of land, with the exception of the "streets and squares" in a village included within it, may, in the absence of other means of interpretation, be construed with reference to a recorded plat made by the grantor, although not alluded to in the deed, and held to except a parcel designated in the plat as a "church square."

4. SAME.
   The owners of certain land platted into village lots executed a deed of their interest, excepting, however, from the grant, certain specified lots, and inserting in the deed, after such exception, the following clause: "Together with all the ground intended for streets and public purposes," etc. *Held*, that the clause was a further reservation, and not an additional grant.

5. COMMON-LAW DEDICATION—PLAT AS EVIDENCE.
   Where land was marked "church square" on a plat filed by the owner, and a marginal reference stated that it was appropriated to the first four religious denominations erecting buildings thereon, it is evidence as an act *in pais*, though not within the existing statute respecting dedications of land to public purposes, of a dedication at common law to the denominations appropriating the square.

6. SAME—ADVERSE POSSESSION.
   Where lands dedicated to the use of a religious denomination,

after being occupied under the dedication for several years, are deeded away to a party not within the terms of the dedication, the latter cannot join the grantor's occupancy with his own to establish an adverse holding against the owner of the reversion.

7. SAME—DENOMINATIONAL USE—POWER OF TRANSFER.
A religious society holding lands under a dedication to the use of the denomination it represents cannot transfer the title to a society of a different denomination, or to one that is undenominational.

8. SAME—ABANDONMENT.
After a church society had erected a building on a lot dedicated to the use of one of the first four religious denominations forming a society in the town and erecting a building on the lot, it conveyed the lot to a Young Men's Christian Association, which demolished the church building, and erected a building adapted to its own wants. *Held*, an abandonment of the use for which the lot was dedicated, entitling the holders of the reversionary interest to the lot.

Error to Kalamazoo; Buck, J. Submitted October 21, 1898. Decided May 23, 1899.

Ejectment by Howard M. Patrick and others against the Young Men's Christian Association of Kalamazoo. From a judgment for defendant, plaintiffs bring error. Reversed.

Charles A. Withey (*James B. McMahon*, of counsel), for appellants.

Boudeman & Adams, for appellee.

HOOKER, J. The plaintiffs are some of the heirs at law of Johnson Patrick, and the action is ejectment, brought to recover the undivided 15-32 of the N. W. ¼ of Church Square, in the city of Kalamazoo (formerly known as the "Town of Bronson"), from its present occupant, the Young Men's Christian Association. This property is situate upon the W. ½ of the S. W. ¼ of section 15, which was located and paid for at the federal land office on November 1, 1830, by Stephen H. Richardson, and on

June 1, 1831, a patent was issued to him from the United States. A few weeks before the patent issued, and on March 12, 1831, Richardson and one Titus Bronson caused to be placed on record in the office of the register of deeds of the county a plat of the village of Bronson, on which plat the land in dispute, with other land, was marked "Church Square," with these explanatory words on the margin of the plat:

"The Church Square is sixteen rods square, and is appropriated to the four first religious denominations who may form societies in the foregoing town, and erect buildings thereon; one-fourth to the benefit of each society."

This plat was not signed by Richardson or Bronson, but was acknowledged by both.

On January 5, 1833, Richardson gave a warranty deed of the W. ½ of the S. W. ¼ of section 15 to Sally Bronson, excepting from the conveyance "the streets and squares of the village of Bronson." On May 4, 1836, Titus Bronson and Sally Bronson, his wife, conveyed to John Berdan, by warranty deed, the W. ½ of S. W. ¼ of section 15, with certain exceptions. Counsel for the plaintiffs contend that Church Square was excepted; counsel for the defendant, that it was not. We are of the opinion that it was excepted, but defer a further statement of the contents of the deed until we reach the question in its proper order, if it shall be thought necessary to discuss it. On October 24, 1836, Berdan and wife gave to Sheldon and Burdick a warranty deed of the same land, making the same exceptions.

On March 8, 1838, Richardson and wife gave a quitclaim deed to Johnson Patrick of the west half aforesaid, without any exception of streets or squares; and on April 2, 1838, Johnson Patrick and wife quitclaimed the same, without exceptions, to Dan Arnold. On January 3, 1839, Dan Arnold quitclaimed to Sheldon and Burdick "all that part of the west half [aforesaid] conveyed by Titus Bronson and wife to John Berdan by deed of May 4, 1836," and on the same day, viz., January 3, 1839, Arnold quit-

claimed to Johnson Patrick all his right and title to the undivided three-fourths of the west half aforesaid. We interrupt the statement to call attention to the fact that the title conveyed to Patrick depends on what Arnold had left after his conveyance to Sheldon and Burdick, which in turn depends upon the interest conveyed to Berdan by the deed from the Bronsons; and, if the deed from Richardson to the Bronsons excepted Church Square, it is manifest that Berdan received no title to Church Square. If it can be said that the title actually conveyed by Berdan is the test of the description in the first deed from Arnold, it is unnecessary to construe the deed to Berdan; but if we say that the measure of the Arnold deed to Sheldon and Burdick is to depend on the meaning of the description in the deed to Berdan, irrespective of the question of his grantor's title, it is a vital question, because Patrick acquired no title whatever to Church Square if it can be said to have been conveyed to Sheldon and Burdick from Arnold, who apparently had it, unless the plat completely devested Richardson of the title, which is one of the questions in the case.

Passing the question for the present, and resuming the statement of fact, we find a number of other deeds, which do not affect the case, except as they aid in bringing outstanding claims of title into the defendant. Among them are conveyances from other heirs of Johnson Patrick. In 1837, St. Luke's Protestant Episcopal Society was formed, and erected a church building on the premises, and occupied the lot until March 18, 1887, when it deeded the property by quitclaim deed to Senator Stockbridge, receiving from him therefor the sum of $6,500. He bought it for the purpose of donating it to the Young Men's Christian Association with a view to the erection of an expensive building thereon, and soon after deeded it to that society, to apply upon his subscription of $10,000 for that object. The building was thereupon erected at a cost approximating $25,000, and it has since been occupied and used for the ordinary purposes of such society.

It is a trite axiom that in ejectment a plaintiff must rely upon the strength of his own, rather than the weakness of his adversary's, title. We have seen that all of these claims of title come from Richardson, who made several instruments of conveyance. First in order is the plat. If the plat was valid, and conveyed an absolute fee to the religious society, it is manifestly the end of the plaintiffs' claim, because Richardson then parted with his entire title. If it was valid, but did not convey the fee, the plaintiffs must show that they own the reversionary interest. This plat appears to have been made and recorded under a territorial law, first enacted in 1821. 1 Terr. Laws, p. 816, § 1. In 1827 it was re-enacted, with some additional provisions relating to the vacation of plats. 2 Terr. Laws, 577. Section 2 of said act is the important one in this controversy, and is as follows:

"SEC. 2. That such maps or plats as are required by this act to be recorded shall particularly set forth and describe all the public grounds within such town, by its boundaries, courses, and extent, and whether it be intended for streets, alleys, commons, or other public uses, and all the lots intended for sale, by progressive numbers, and their precise length and width; and the maps, made and acknowledged before a justice of the peace, a justice of the county court of the proper town where the town lies, or before a judge of the Supreme Court, and certified under the hand and seal of the judge or justice taking such acknowledgment, and recorded, shall be deemed a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named, or intended to be for public uses, in the county in which such town lies, in trust to and for the uses and purposes therein named, expressed, or intended, and for no other use or purpose whatever."

Counsel for the plaintiffs contend that a statutory dedication was not effected, for want of a strict compliance with the statute; but we will pass this point.

In its early days the common law recognized dedication of land for highway purposes without grant or covenant, but it is doubtful if the rule went further. A discussion of this subject will be found in the opinion of the late

Chief Justice CAMPBELL in the case of *Baker* v. *Johnston*, 21 Mich. 340. The opinion recognizes the fact, however, that the weight of authority in this country sustains the proposition that the mere want of a grantee will not defeat a dedication of lands for well-defined public purposes, upon an analogy to charitable trusts, which will not be allowed to fail for the mere want of a trustee, where the purposes are clear and well defined, and the instrument by means of which the trust is sought to be created is in other respects adequate to the purpose. In both cases the necessity of definiteness was recognized, while in cases of dedication to public uses it was as important that there should be some one authorized to accept land dedicated for different and specific purposes in their nature public before the dedication could be made effective as it was that there be some one to assume the management of a trust before it could become operative. The opinion cited shows that the doctrine of the common law has been applied to public squares, commons, and parks, and there are cases that hold that gifts may be made to charitable and religious uses in the same way. In *Hunter* v. *Trustees of Sandy Hill*, 6 Hill, 411, it is said:

"Land may be dedicated to pious and charitable purposes, as well as for public ways, commons, and other easements in the nature of ways, so as to conclude the owner who makes the dedication. This is the general doctrine. *Pearsall* v. *Post*, 20 Wend. 111, 22 Wend. 425. Public highways, and sites for court-houses, churches, and other public buildings, are familiar instances of the application of the principle. It has been applied to the reservation of a spring of water for public use (*McConnell* v. *Town of Lexington*, 12 Wheat. 582; and see *City of Cincinnati* v. *White's Lessee*, 6 Pet. 438; also 20 Wend. 120, 22 Wend. 452); to a public square in a village (*Trustees of Watertown* v. *Cowen*, 4 Paige, 510 [27 Am. Dec. 80]); and to a public burying ground (*Beatty* v. *Kurtz*, 2 Pet. 566. See, also, 6 Pet. 431; 22 Wend. 454, 455, 473; *State* v. *Trask*, 6 Vt. 355 [27 Am. Dec. 554])."

In the case of *Benn* v. *Hatcher*, 81 Va. 25 (59 Am. Rep. 645), it was held that a dedication of land for a cemetery was valid, and it was said that:

"In its technical legal sense, dedication is the appropriation of land for a public use,—as for a highway, a common, or the like,—but may be effectual, it seems, when made to a pious or charitable use, though not distinctively a public one."

The statute in question provides in express terms that the plat shall have the effect to convey the fee of land dedicated to public uses to the county. A plat conforming to the statute, then, operates as a conveyance of a fee, though probably it is a base fee. This was an innovation, for under the common-law rule the owner held the fee in trust to the use of the public; but some of the difficulties resulting from this innovation are elucidated by the opinion in the Michigan case last cited, indicating sufficient reasons for a statute which should give to a formal offer of dedication of public ground by a plat the effect of a conveyance by way of grant to uses, and providing a grantee.

A more important question, however, is whether the statute was designed to apply to any dedication other than those made for general public purposes, and whether it is broad enough to permit the plat to be made a medium for the conveyance of land for all kinds of charities or pious uses. In this country we have no established church, and religious uses are in the hands of corporations or voluntary associations. The same is true, with a few exceptions, of charities, such as colleges, hospitals, etc.; and, while dedications may be made to these, there is no apparent reason for requiring the owner to part with the fee, especially as it is after all only a conveyance to uses, and, if the fee were conveyed, it would be but a base fee, determinable on the happening of a collateral event. Again, by the language of the act this provision applies only to "public ground." Public ground, in the ordinary sense, is ground in which the general public has a common use; and it would not accord with the common understanding of the language used to say that land devoted to the use of a local religious society, or hospital, or academy,

created for church, hospital, or academic purposes, is public ground, even if the use be considered, in a sense, public; and, in the absence of a clear intention to include such, the statute ought not to be so construed. Again, the statute itself contains internal evidences that dedications for such purposes were not designed to be within its meaning; for it illustrates the class of public uses to which it alludes, viz., "streets, alleys, commons, or other public uses," and thus, under the settled rule of *ejusdem generis*, its effect was restricted to public uses of a similar nature. See End. Interp. Stat. 405 *et seq.* We are of the opinion, therefore, that there was no statutory dedication, and that the fee remained in Richardson until he conveyed it to Johnson Patrick.

Common-law dedications do not ordinarily convey the fee. In fact, under the strict rule they never do. See cases cited 9 Am. & Eng. Enc. Law (2d Ed.), 73, note 2; *Baker* v. *Johnston*, *supra*. And though it has been said that "there may be a dedication which is essentially a grant, in which the fee passes," the cases cited in support of the proposition seem to depend upon formal conveyances or statutes. 9 Am. & Eng. Enc. Law (2d Ed.), 74. Thus, in *Van Ness* v. *City of Washington*, 4 Pet. 232, the question was whether the federal government acquired title in fee to the land occupied by streets and public squares in the city of Washington, and the case turned upon the construction to be given to a grant contained in a deed to the government. The case of *Hoadley* v. *City & County of San Francisco*, 50 Cal. 265, arose upon a statute, and the same is true in *U. S.* v. *Illinois Cent. R. Co.*, 2 Biss. 174, *Village of Grandville* v. *Jenison*, 84 Mich. 54, and a large number of other cases; and even in such cases it has been held that a base fee only is conveyed, which is determinable on the happening of a given collateral event. 9 Am. & Eng. Enc. Law (2d Ed.), 74. In the case of *Hunter* v. *Trustees of Sandy Hill*, *supra*, it is said:

"'Dedication,' as the term is used in reference to this subject, is the act of devoting or giving property for some proper object, and in such manner as to conclude the owner. The law which governs such cases is anomalous. Under it, rights are parted with and acquired in modes and by means unusual and peculiar. Ordinarily, some conveyance or written instrument is required to transmit a right to real property; but the law applicable to dedications is different. A dedication may be made without writing,—by act *in pais*, as well as by deed. It is not at all necessary that the owner should part with the title which he has, for dedication has respect to the possession, and not the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. *City of Cincinnati* v. *White's Lessee*, 6 Pet. 431, 438. The principle upon which the estoppel rests is that it would be dishonest, immoral, or indecent, and in some instances even sacrilegious, to reclaim at pleasure property which has been solemnly devoted to the use of the public, or in furtherance of some charitable or pious object. The law therefore will not permit any one thus to break his own plighted faith; to disappoint honest expectations thus excited, and upon which reliance has been placed. The principle is one of sound morals and of most obvious equity, and is in the strictest sense a part of the law of the land. It is known in all courts, and may as well be enforced at law as in equity. This being a case to which the law of dedication applies, the use for which the dedication was made must determine the extent of the right parted with by the owner of the land and acquired by the public. 6 Pet. 438. Where, as in the case of a highway, the public acquire but a mere right of passage, the owner who makes the dedication retains a right to use the land in any way compatible with the full enjoyment of the public easement."

In that case land used for a cemetery was in dispute. The public having laid a road through it, the original owner claimed a forfeiture. In conclusion the court said:

"When the street was opened, a part of the dead, and a part only, had been exhumed, and removed to the new burial ground, and the residue of the bodies still remain.

Before the suit was instituted, this part of the old graveyard was inclosed, and placed in its former condition; the whole constituting, as it formerly did, but one burial place. We think the judge ruled correctly that the plaintiff had no right to the possession, and the nonsuit was therefore proper. What right, if any, may hereafter arise in favor of those who can make title from the original owners, it is not necessary now to inquire. The land is still a public graveyard, inclosed, known, and recognized as such. When these graves shall have worn away, when they who now weep over them shall have found kindred resting places for themselves, when nothing shall remain to distinguish this spot from the common earth around, and it shall be wholly unknown as a graveyard, it may be that some one who can establish a good 'paper title' will have a right to its possession, for it will then have lost its identity as a burial ground, and with that all right founded on the dedication must necessarily become extinct."

No fee having passed through the dedication, we must examine the deeds subsequently made by Richardson. His first deed was a warranty deed to Sally Bronson of the west half of the quarter section, in which he excepted the streets of the village of Bronson. What was meant by the expression, "with the exception of streets and squares in the village of Bronson?" No allusion is made in the deed to any plat, but we cannot conceive of any other method of interpreting the deed than by a reference to the plat, whether we treat it as a valid plat, or a mere private plat made by the grantor for the purpose of facilitating sales of land. There is nothing in the case, except the plat, to afford any light upon the subject. An examination of the plat shows the village laid out into blocks, some of which are squares and some parallelograms. Some of each are subdivided into lots, others are not. Of the squares, some are marked as squares, thus: "Church Square," "Jail Square," "Public Square or Court-House Square," and 'Academy Square," "Burial Ground," "School Lot;" the last two, however, not being squares. We think a reasonable construction

of the deed, in view of the circumstances under which it was made, leads to the exclusion of Church Square from the lands conveyed by Richardson to Sally Bronson. It follows that Johnson Patrick acquired title to the reversionary interest by virtue of the deed from Richardson dated March 8, 1838, and, as we have seen, it was conveyed by him to Arnold. On January 3, 1839, Arnold made two deeds, and this title of the plaintiffs depends on which one conveyed the reversion to these squares; the St. Luke's Episcopal Society being then in possession of the premises, and having erected a church edifice thereon. The first of these deeds to be recorded was a quitclaim deed to Burdick and Sheldon, conveying the premises "conveyed by Titus Bronson and his wife to John Berdan by a deed" therein described. The second was the deed to Patrick, recorded in 1856, and this also was a quitclaim deed.

We will next examine the deed to Berdan, for only by the construction of that deed can we determine whether the squares were included in the deed from Arnold to Burdick and Sheldon. The description was as follows:

"The undivided one-half of the west half of the southwest quarter, also the west half of the southwest quarter, of section number 15, in township number 2 south, and range 11 west, Kalamazoo, Mich., excepting and reserving from sale in the last-mentioned lot the following village lots and parcels of land, namely: One parcel of land, about 11 rods wide, extending from Water street north to east and west quarter section line of said section 15. Also one other parcel of land extending from Main street north to said quarter section line, being 8 rods wide. The former of said parcels having been heretofore deeded to Anthony Cooley. And also the following village lots in the village of Bronson, numbered, according to the last recorded plat of said lots, as follows, namely: 117–two lots north numbered, lying between said lots number 1 and 17. Also lots number 112, 22, 25, 37, 33, 34, 78, 39, 40, 44; said lot 44 being subject to a lease for ten years. Also lots 47, 48, 50, 52, 54, 60, 61, 62, 63, and 56. Also the lots lying between South street and the south line of said

section 15. Also two fractional lots lying between lots 33 and 39 on the west line of said section 15. Also parcel of land 3 rods by 8 lying immediately behind lot number 32, fronting on Main street. Together with all the ground intended for streets and public purposes according to the plat of said village, and together with all the privileges and appurtenances to said land in any way pertaining. To have and to hold the said premises as above described, with the appurtenances, unto the said John Berdan, his heirs and assigns, and to his and their use and behoof forever."

The instrument concluded with the usual covenants of warranty as contained in warranty deeds.

We have already said that the deed from Richardson to Sally Bronson excepted the squares, and it necessarily follows that Berdan took no interest in the squares by this deed. But it might not be a fair construction to put upon the deed from Arnold to Burdick and Sheldon to say that it was meant to convey only what Berdan had acquired title to by the former deed. If we interpret the meaning to be that the description in the deed to Burdick and Sheldon from Arnold should be the same as that in the deed to Berdan, the plaintiffs' title fails if the clause reading, "together with all the ground intended for streets and public purposes according to the plat," etc., is to be construed to be a conveyance, whereas it stands if it is to be treated as an exception. Our deliberate conviction, from the language used, is that it was intended as an exception, because it would seem improbable that Bronson and wife would sell the streets and public grounds and except the lots, and because it seems the natural effect of the language used. This brings us to the conclusion that the plaintiffs have at the least a reversionary interest in this land on the face of the conveyances.

It is contended that a title was gained by adverse possession. The defendant cannot well dispute the claim that its grantor has occupied by virtue of a dedication. Its counsel strenuously insist that it occupied under a statutory dedication, while counsel for the plaintiffs as earnestly assert that it occupied under a common-law dedication, or

its equivalent. The testimony shows that the society erected its first church under the terms of the plat, and there is nothing to indicate that it asserted title in opposition to Richardson's rights for the statutory period necessary to a title by adverse possession. We have said that the dedication gains nothing by the statute. The plat only serves to show what the owner intended, and to make certain the terms under which the St. Luke's Society erected its buildings and maintained possession, from which the offer ripened into a dedication. It is evidence as an act *in pais* of a dedication at common law. *Lessee of Village of Fulton* v. *Mehrenfeld*, 8 Ohio St. 440. The essential elements of hostility and an adverse claim for the necessary period are wanting. All parties at all times seem to have understood that the premises were occupied under the dedication by Richardson, and during later years the recognition of this has been evidenced by efforts to secure deeds from persons in a position to set up claims to a reversionary interest. The evidence shows that the deed from St. Luke's Society was a quitclaim, and that the defendant has secured an undivided interest therein, and that there is, therefore, under the paper title, an estate in common between the plaintiffs and the defendant in the reversion. Thus, in 1886 the heirs of Dan Arnold quitclaimed their interest to Sheldon, and in March, 1887, Sheldon gave a deed to Stockbridge, who also, about the same time, secured deeds from several of the heirs of Johnson Patrick.

There is no doubt of the abandonment of the premises by St. Luke's Church. It sold and vacated the lot and building, and the defendant, after obtaining a deed, demolished the church, and erected a building adapted to its own wants, and, presumably, to the objects of its organization. It is said that these are religious, and that the lot is still devoted to the purposes designed by the proprietor in his offer of dedication. Had the proprietor dedicated directly to St. Luke's Episcopal Society, the case would have been no different in effect than it is now. He

gave to that society, when organized, the use of the premises upon condition of its erecting a building upon them. That a church was intended no one can doubt; and continued user of the gift was, as it is in all such cases, a condition. We cannot look upon this as a passing of title to land upon condition subsequent. We do not mean to say that a misuser necessarily works a reversion to the holder of the fee, but a total abandonment does. *Wanzer* v. *Blanchard*, 3 Mich. 11; *Board of Sup'rs of Kent Co.* v. *City of Grand Rapids*, 61 Mich. 144; *Hunter* v. *Trustees of Sandy Hill*, *supra*. There was a total abandonment in this case, and the plainest principles of justice require that the original holder's claim should be recognized.

The most forcible reasons given for maintaining a right to the fee in the defendant are the long occupancy of the premises by the St. Luke's Society, its attempt to convey them, the erection of a costly building thereon without opposition, and the continuance of the devotion of the land to pious uses. As we have said, the abandonment was complete. The quitclaim deed from St. Luke's Society does not raise a presumption that it was attempting to do more than to abandon the premises to Stockbridge, who had acquired an interest in the reversion. The erection of the building was at most an improvement of the land by a tenant in common, and therefore within the protection of a court of equity in proceedings for partition (*Van Ormer* v. *Harley*, 102 Iowa, 158); while to hold that a dedication of land for the use of a particular sect would justify the extension of the gift to any pious use by any other association of another denomination, or, indeed, not denominational, would be an arbitrary exercise of judicial power, without authority of law. The *status* of the parties is that the proprietor dedicated the property to a use. The gift was accepted, and the property occupied until the desire for a new church and a large money consideration induced an abandonment by the St. Luke's Society. Whether the purposes for which the proprietor

dedicated the land had been fully accomplished, and the expected benefits to him had accrued, does not appear, and the church does not seem to have concerned itself with that question. It was under no legal obligation to do so, and there may have been no moral obligation upon it to occupy longer than it chose. It certainly had no further legal or moral claim to any interest after abandonment, unless it be the alleged release by Johnson Patrick, which is neither produced nor proven to have been made. We are therefore constrained to hold that the land has reverted to the holder of the original title.

The record shows that all of the testimony in the case is before us, and from the undisputed facts we are able to say that the plaintiffs should have recovered.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

SCHMITTDIEL v. MOORE.[1]

1. MORTGAGES—TENDER.
   A tender of payment of a mortgage by a junior incumbrancer, accompanied by a demand for an assignment, does not extinguish the mortgage.

2. SAME—CONVERSION BY SENIOR MORTGAGEE—TROVER.
   A junior mortgagee may maintain trover against a senior mortgagee who converted the security after the junior incumbrancer had tendered him the amount of the senior mortgage.

3. SAME—MEASURE OF DAMAGES.
   The measure of damages in such action, where the property equaled in value both mortgages, is the amount of the junior lien.

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[1] Rehearing denied July 11, 1899.

Error to Wayne; Donovan, J. Submitted November 15, 1898. Decided May 23, 1899.

Trover by John S. Schmittdiel, trustee, against Joseph B. Moore, trustee, John Hurley, and John H. Walsh. From a judgment for plaintiff, defendants bring error. Affirmed.

W. F. Atkinson and *John Miner*, for appellants.

George W. Radford and *T. E. Tarsney* (*Moore & Moore*, of counsel), for appellee.

MONTGOMERY, J. This case has once been considered in this court. A report of the former hearing will be found in 101 Mich. 590. The facts of the case as they appeared on that hearing are fully set out, and we need not repeat them here. It will suffice to refer to such additional facts as were made to appear on the second trial. On the former hearing the case was reversed for the reason that the testimony failed to show that the tender made on behalf of plaintiff was absolute, but that it was made a condition to the acceptance of such tender that the first mortgagee assign to plaintiff, not only the first mortgage, but certain notes containing the indorsement of John Hurley. On the second trial the testimony tended to show, and the jury found, that a tender was made, accompanied by a demand of an assignment of the mortgage only. This occurred after the first tender was made, and there is in the record abundant testimony to support the finding of the jury in that regard.

It is contended by defendants' counsel that the effect of the tender, accompanied by a demand of an assignment of the mortgage, did not operate to discharge the first mortgage, and that the plaintiff's remedy for the refusal to accept the tender is equitable, and not legal. This precise question was not considered in our former opinion, and, so far as the record discloses, has never been decided in this State. The decisions are abundant that a tender

of absolute payment discharges the lien of the mortgage. It is equally clear that a subsequent incumbrancer may tender payment. *Sager* v. *Tupper*, 35 Mich. 134; *Proctor* v. *Robinson*, Id. 294; *Lucking* v. *Wesson*, 25 Mich. 443. But does a tender of payment, accompanied by a demand for an assignment, extinguish the mortgage? It is not the purpose of such a tender. The purpose on the part of the subsequent incumbrancer is to keep the lien alive, and to enforce it against the general owner. In *Proctor* v. *Robinson*, *supra*, the question was whether Robinson had discharged the incumbrance by a tender. The court said:

"Before yielding to a defense of such a nature, and causing such a result, the court is bound to insist on clear proof, and such proof has not been given. On the contrary, the whole facts lead to an opinion that there was no tender, in the sense of an offer made and understood as one to cancel the lien, and the theory of the defense required the establishment of a tender of that kind. An offer of money by a subsequent incumbrancer for the purpose of acquiring a prior incumbrance, or as a step preparatory to a bill to redeem, is quite different in its spirit and equitable bearings."

In *Frost* v. *Yonkers Savings Bank*, 70 N. Y. 553 (26 Am. Rep. 627), which was a case of refusal by the first mortgagee of a tender by a subsequent mortgagee, with a demand for an assignment, such as made in this case, the court say:

"If one desires to make a tender which shall destroy the lien of an incumbrance, and have, so far as concerns it, the effect of payment, he must make an absolute tender of payment, which, if received, will discharge the debt and the incumbrance. Here no such tender was made. What the plaintiff did was a tender in the exercise of his right of redemption, with a demand that the mortgage and judgment be transferred to him. He desired to become a purchaser of the securities, and in such case the tender does not operate to destroy the securities, but gives the party a footing in equity to compel the transfer demanded, if he is otherwise entitled to it. Hence it was properly held below

that the tender did not cancel or discharge the lien of the mortgage or judgment."

In Sheld. Subr. § 16, the English rule is stated as follows:

"The prior mortgagee ought, without judicial proceedings, to accept an offer of payment made to him by a junior incumbrancer, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor; and, if he refuses to do so on demand, and subsequently acquires from the mortgagor the equity of redemption, which was of sufficient value to pay the junior incumbrance, he will be himself held for the amount of the latter."

We think that these authorities, to the extent that they assert that a tender of payment on condition that an assignment be made does not operate to discharge the prior incumbrance, state a reasonable and just doctrine.

The second mortgagee may or may not be damaged by the refusal of the prior incumbrancer to assign. If the prior incumbrance exceeds in amount or equals the value of the property, it is difficult to see how the second incumbrancer is in any way damaged by such a refusal. True, in the protection of his interest, the second mortgagee has the right to become a purchaser, but it would seem that, if this right be enforced in his favor in equity, and particularly if he is fully protected to the extent of the value of his security as it was at the date of the tender, this is the extent to which the law ought to go in his protection. While the cases cited contain expressions indicating that there is a remedy in equity, we do not think it follows that the sole remedy is equitable. After such a tender, the first mortgagee is not entitled to cut off the right of the junior incumbrancer to the value of the property in excess of his (the first mortgagee's) lien. The plaintiff, as mortgagee, may maintain trover for conversion of the property by one who, as against him, has no right to dispose of the property. *Grove* v. *Wise*, 39 Mich. 161; *Wright* v. *Starks*, 77 Mich. 221. After the tender

by the plaintiff, the mortgagee had no right to dispose of the equity of redemption in such manner as to impair plaintiff's rights.

The circuit judge stated in his charge that it was conceded that there was property enough to pay both mortgages. This does not appear to have been challenged at the time, although error has since been assigned on it; but we think it a fair statement of the testimony. This being so, the plaintiff's damages would be the amount of his mortgage.

It is contended that Moore and Hurley were not responsible for the conversion. The assignment to Walsh was made after the demand, but with the intention of continuing the foreclosure proceedings to sale. This was in fact done, Mr. Atkinson acting on behalf of all the parties. We do not think any injustice was done in holding them all responsible.

Error is assigned on the charge of the court; but, in view of the special findings by the jury, we think no error to the prejudice of the defendants was committed.

Judgment affirmed.

The other Justices concurred.

MORROW *v.* MURPHY.

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1. MASTER AND SERVANT—PROFIT SHARING—PARTNERSHIP.
   A contract whereby one agrees to superintend and manage the business of another for a specified yearly compensation, together with a certain share of the net profits, does not make the parties partners.

2. SAME—ACCOUNTING—UNLIQUIDATED DAMAGES.
   In fixing the amount due an employé entitled to receive a certain percentage of the net profits, pending actions in tort brought against the employer, in which the damages are unliquidated, and over which the employé has no control, cannot be taken into consideration.

3. SAME—INTEREST ON INVESTMENT.
   In estimating the amount of the profits in which the employé is entitled to share, the employer should not be allowed interest on his investment, where not provided for in the contract.

4. SAME—CUSTOM.
   A custom of charging to the expense account material and labor furnished to the superintendent of a manufacturing concern for his private use will not bind the employer unless he knows of it.

Error to Wayne; Frazer, J. Submitted January 4, 1899; original opinion May 23, 1899. Rehearing (plaintiff's application) granted July 11, 1899; final opinion, modifying the earlier one, October 3, 1899.

Assumpsit by George L. K. Morrow against Thomas Murphy to recover a balance due on a contract for services. From a judgment for plaintiff, defendant brings error. Modified and affirmed.

Moore & Moore, for appellant.

Thomas T. Leete, Jr., for appellee.

LONG, J. Plaintiff brought suit in *assumpsit* against

defendant for services, claiming that he had worked for defendant for a number of years under an agreement that he should receive for his services $1,200 a year as salary, and 8 per cent. of the net profits; that the services had terminated; and that there was a balance due him of $5,000. Defendant pleaded the general issue, with notice of set-off and recoupment. The case was referred, and the referee made findings, and settled a bill of exceptions, from which it appears that, in 1889, the plaintiff entered into a contract with defendant to superintend and manage the defendant's factory, for which he was to receive $1,200 a year, and 8 per cent. of the net profits. The business was done in the name of the Murphy Iron Works. The original contract was renewed from time to time, without material change, sometimes by a new contract, and at other times by a verbal continuance of a former one, until December 31, 1896, when the contract relations ceased. When the time came for a final separation and settlement, defendant caused an inventory of the property on hand to be made. Plaintiff refused to settle on that basis, and brought this suit. The referee found that plaintiff's salary had been paid in full; that he had drawn $17,970.12 on account of profits; and that there was still due him, on net profits, the sum of $1,455.62. A bill of exceptions, with assignments of error, was settled, and filed with the report of the referee. Exceptions to the report were also filed. The exceptions were overruled by the court below, and defendant brings error.

Defendant claims here that the plaintiff cannot recover in this action, because (1) the parties were partners, the accounts unsettled, and the sole remedy is in equity; (2) it is impossible in the present suit at law to settle the accounts or fix the rights of the parties.

It is unnecessary to set out the whole contract here to determine the question whether the parties were partners. The contract recites that—

"This contract is made * * * between Thomas Murphy, proprietor of the Murphy Iron Works, of the one

part, and George L. K. Morrow, * * * of the other part, whereby the said George L. K. Morrow agrees to manage and superintend the machine and foundry business carried on by the said Thomas Murphy, under the name of the Murphy Iron Works, * * * for which the said Thomas Murphy agrees to pay the said George L. K. Morrow the sum of * * * ; also that, should Thomas Murphy desire to sell out part or the whole of the business, then this contract ceases at that time. * * * "

From the wording of the contract, the pleadings in the case, and testimony given by Mr. Murphy, it is evident that the parties did not become partners. The notice under the plea sets out that the work and labor for which the action was brought was done under a special contract or agreement in writing, by the terms of which defendant agreed to hire the plaintiff at an agreed compensation; that the plaintiff left his employment; that he neglected his duties as superintendent, and that defendant was entitled to his best mechanical ability; that, by such inattention to his duties as superintendent and manager, the business of the defendant was injured. Mr. Murphy's testimony is in keeping with this notice. The fact that the contract provides that the plaintiff should have a share of the profits does not necessarily make the parties partners. The contract simply fixes the measure of plaintiff's compensation for his services as superintendent and manager. *Stockman* v. *Michell*, 109 Mich. 349.

It appeared that three suits were pending against Mr. Murphy at the time this action was brought, and that those suits were still undetermined at the time of the report of the referee. It is contended by defendant that no settlement and adjustment of the accounts could be made, and no determination of the net profits had, until after these suits were disposed of. Two of these actions were in tort, and the damages unliquidated. In the first suit, defendant was sued in Chicago for libel. The second suit was for the unlawful discharge of an apprentice. The third suit was a case in which Mr. Murphy sued to recover on an account of $625. The defense in that case

was that the Murphy Iron Works guaranteed that the furnaces put in should be smokeless, and that they were not as guaranteed. The referee did not take these matters into consideration in fixing the amount due plaintiff on percentages. We think that the referee was correct in this. There was no indebtedness in the actions of tort, and could be none, until they were in judgment, and there was no amount which the referee could deduct from the profits. *Hill* v. *Bowman*, 35 Mich. 191. Plaintiff had no control over these suits. The contract, in effect, provides for a settlement at the end of the year, and that the percentages on accounts unpaid at the time of the year's settlement, which were contracted during the year, were to be paid as soon as such accounts were collected or paid. The referee found that there were certain accounts due and unpaid, which remained uncollected. These accounts were not determined in fixing the amount of the plaintiff's percentage, and the suits were not considered in the computation. Of the third suit, which was to recover on the account of $625, we think no competent evidence was given which would have warranted the referee in taking it into account.

It is contended that the referee charged the defendant too much for the iron castings. Castings had been sold during the year 1896 at from two to five cents per pound. The referee fixed the price at two and a quarter cents. The testimony supports this finding.

Defendant claims that the referee erred in refusing to credit him interest on the part of the purchase price of the plant paid by him. The defendant was receiving 92 per cent. of the profits as a consideration for the investment he had in the business. He also received $3,000 salary per year. We find nothing in the contract which provided for interest on the investment by the defendant, and the referee was not in error in that respect.

There is one item in the account in which we think the referee erred. He found that the plaintiff, while superintendent and manager, was indebted to the Murphy Iron

Works for material and labor furnished to him by it for his own private use to the amount of $388.19. He also found that it was the custom to charge this to the expense account; that Mr. Murphy was also indebted for material and labor furnished for his private use, but the amount could not be exactly determined. He refused to charge plaintiff this, because he says it was the custom to charge this to expense account. We think the evidence does not show that Mr. Murphy knew of any such custom, and, in fact, it appears that Mr. Murphy's private work was charged to himself. Under the contract, Mr. Murphy was entitled to 92 per cent. of this $388.19, which would amount to $357.13. This amount must be deducted from the plaintiff's judgment. Aside from this we find no error in the case. With this deduction from the judgment, it will be affirmed. Defendant will recover the costs of this court.

GRANT, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

ON REHEARING.

PER CURIAM. A rehearing having been granted in this case, we have re-examined the record, and find that an error was committed in charging the plaintiff in the former opinion, *ante*, 204, in his account, the sum of $357.13. It should be but $128.25, and the judgment will be corrected in that respect.

Counsel for plaintiff contends that, in view of this deduction from the original judgment, the plaintiff should be entitled to his costs in this court. We cannot agree with this contention. The plaintiff recovered judgment and his costs in the court below. That judgment for costs will stand. The judgment will be reduced here by the $128.25, and the costs of this court awarded to the defendant. No costs on the rehearing will be allowed.

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BEAKLEY v. ROBERT.

RECORDING LAWS—QUITCLAIM DEEDS.

The recording of a quitclaim deed by a grantee for value, without notice, does not give priority over a senior warranty deed defectively recorded; a purchaser by quitclaim not being a *bona fide* purchaser within the recording laws (3 Comp. Laws 1897, § 8988).

Error to Houghton; Hubbell, J. Submitted January 6, 1899. Decided May 23, 1899.

Replevin by Albert Beakley and George Hall against Prosper Robert. From a judgment for plaintiffs, defendant brings error. Affirmed.

W. E. Gray, for appellant.

Chadbourne & Rees, for appellees.

HOOKER, J. The defendant has appealed from an adverse judgment in an action of replevin. On the trial, his defense consisted in a claim of title to the land from which the cord-wood replevied was cut. Streeter was the common grantor of the parties. March 20, 1873, he conveyed, by warranty deed, to Moralee and Olds, and the deed was recorded, but with a mistake in the description. They afterwards deeded to the plaintiffs, these deeds being duly recorded. On July 17, 1886, Streeter gave a quitclaim deed of the premises to Cameron, and on December 24, 1887, Cameron quitclaimed to Prosper Robert, the defendant, who took his deed without notice, unless the erroneous record was notice. His deed being recorded, it is now claimed that he acquired title by virtue of the recording laws (3 Comp. Laws 1897, § 8988), which make the deed of a *bona fide* purchaser in good faith, for a

valuable consideration, valid, in preference to a prior unrecorded deed. In this instance, however, the defendant's chain of title from the common grantor to himself contains nothing but quitclaim deeds. Streeter, having once sold and conveyed it, had nothing left to convey. Authorities are numerous that one who takes by deed of quitclaim is not a *bona fide* purchaser. Thus, it is said in *May* v. *Le Claire*, 11 Wall. 217, that "one who has acquired his title by a quitclaim deed cannot be regarded as a *bona fide* purchaser without notice;" in *Oliver* v. *Piatt*, 3 How. 333, "A purchaser by a deed of quitclaim, without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice, and he takes only what the vendor could lawfully convey;" in *Dickerson* v. *Colgrove*, 100 U. S. 578, "A grantee by deed of quitclaim is not a *bona fide* holder;" and in *Baker* v. *Humphrey*, 101 U. S. 494, "No one taking a quitclaim deed can stand in the relation of a *bona fide* purchaser." In the case of *DeVeaux* v. *Fosbender*, 57 Mich. 588, the late Mr. Justice CAMPBELL expressed a doubt of the *bona fide* character of such a holding; while the case of *Peters* v. *Cartier*, 80 Mich. 129 (20 Am. St. Rep. 508), expressly holds such grantee not to be a *bona fide* purchaser in a case substantially like the present. See, also, *Johnson* v. *Williams*, 37 Kan. 181 (1 Am. St. Rep. 243), where many authorities are cited.

I am of the opinion that the judgment should be affirmed.

The other Justices concurred.

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JONES v. PREFERRED BANKERS' LIFE ASSURANCE CO.

1. LIFE INSURANCE—NONPAYMENT OF ASSESSMENT—WAIVER.
   The secretary of an insurance company, who was its managing officer, informed an insured, who was delinquent in payment of an assessment, and desired to pay the same and be reinstated, that he would have to furnish a health certificate from the company's physician, for which he provided the insured with proper blanks, which were properly executed and returned to the secretary. *Held*, that a forfeiture for nonpayment was waived.

2. SAME—AVOIDANCE OF WAIVER.
   The waiver could not be avoided by the secretary's procuring from the physician, without the knowledge of the insured, a supplemental statement that the insured's heart action was somewhat irregular, and he could not recommend him as a good risk.

3. SAME—CUSTOM—STATEMENTS OF DECEDENT.
   In an action by the beneficiary in a life-insurance certificate, where a forfeiture for the nonpayment of an assessment is set up in defense, and the plaintiff claims that such defense was waived by the company in accord with its settled custom to reinstate delinquent members in good health, a statement of the deceased in a talk with the secretary of the company, tending to show the deceased's knowledge of the custom, may be shown by witnesses who overheard it.

4. SAME—ESTOPPEL.
   Where it is the custom of an insurance company to accept payment of delinquent assessments if members are in good health, it is estopped to claim a forfeiture if a member, relying on the custom, fails to pay an assessment within the time required, and is in good health when he offers payment.

5. SAME—INSTRUCTIONS—READING TESTIMONY TO JURY.
   For the court to read to the jury in his instructions, in an action on a life-insurance certificate, the testimony of one of defendant's witnesses, on which the question of waiver of a forfeiture pleaded in defense mainly depends, does not give it such undue prominence as to require the reversal of a judgment for plaintiff.

6. SAME—ASSESSMENTS—TENDER—WHEN NOT REQUIRED.

Where an insurance company claims a forfeiture of an insurance certificate for nonpayment of assessments, and refuses absolutely to receive such assessments when payment is offered, the holder is not required actually to produce and tender the money in order to protect his rights.

7. SAME—PHYSICIAN'S TESTIMONY—PRIVILEGE.

An insurance certificate provided that it should be void if any of the answers in the application were untrue. The application contained the representation that the applicant had not consulted a physician except for la grippe, when he was attended by a specified physician. Upon the trial of an action on the policy, the physician was called as a witness for defendant, and was asked if he had treated the applicant for any disease of the heart. It appeared that any information possessed by the witness as to the insured's condition was acquired by observation, and from the latter's statements, while witness was acting as his physician. *Held*, that the question was properly excluded, in view of 2 How. Stat. § 7516, rendering inadmissible the testimony of physicians as to information acquired in attending patients, necessary to enable them to prescribe.

8. SAME—LAPSE—REINSTATEMENT.

Where an insured, whose certificate of insurance has lapsed for nonpayment of an assessment, does all that the company requires to procure his reinstatement, and reinstatement is then refused, he may rest there upon his rights, and need not apply at once to the courts for the relief desired.

Error to Ingham; Person, J. Submitted January 6, 1899. Decided May 23, 1899.

Assumpsit by Lucy Jones against the Preferred Bankers' Life Assurance Company on certain insurance certificates. From a judgment for plaintiff, defendant brings error. Affirmed.

The defendant is organized under Act No. 187, Pub. Acts 1887 (3 How. Stat. § 3960*c et seq.*), and acts amendatory thereof. One Owen Jones became a member of said company, January 20, 1894, receiving three certificates of insurance, for $1,000 each; his wife, the plaintiff, being the beneficiary. Under the terms of these certificates

and the by-laws of the company, assessments were made quarterly, payable at any depository bank, or at the office of the company at Lansing, on any business day during the month succeeding the notice, viz., January, April, July, and October. Mr. Jones paid his assessments at the office of the company until the March assessment, 1896, for $6.30. Notice of this assessment was dated March 16th, was received by Mr. Jones, and was payable any time during the month of April. He failed to pay. A few days after the time for payment had expired, Mr. Jones applied to the secretary of the company, at his office, and offered to pay the premium. Mr. Randall, the secretary, informed him that he would have to furnish a health certificate. A blank health certificate was furnished him. He went to Dr. Hagadorn, the physician for the company, by the direction of the secretary, obtained the certificate, and returned it to the company. This certificate was signed by Mr. Jones, stated that he was in good health, and closed as follows:

"This statement is given as a part of the consideration for a certificate of reinstatement, which shall be void if the above representation be untrue; and I agree to furnish, at my own expense, a medical examination, if required by said assurance company, and submit to the action of said board of trustees on the question of my reinstatement to membership."

Dr. Hagadorn attached his certificate, saying: "I believe the same to be correct in every particular, and that he is now in perfect health." Some time between one and four weeks afterwards Mr. Randall took this certificate to Dr. Hagadorn, and, as the doctor testified, "asked me if I could not put something else on there, so it would help him out somewhat." At Randall's request, the doctor added, underneath his certificate and signature, the following: "Heart action very rapid, and somewhat irregular. Cannot recommend him as a good risk." This statement was unsigned. Mr. Jones knew nothing about it. Mr. Randall testified that he had heard that Mr. Jones was not

in good health, and he declined to reinstate him on account of this information. Whether the matter was ever placed before the board of trustees does not appear. It is perhaps a fair inference that it was not. At any rate, there is no evidence of any action by them. A witness, Thomas Smith, testified that he heard a conversation in May between Mr. Randall and Mr. Jones, which he relates as follows:

"Mr. Jones wanted him [Randall] to accept his money for the insurance, and Mr. Randall would not do it, and Mr. Jones said he ought to be used the same as the others were used,—the other members."

Mr. Jones was not reinstated, and defendant gave testimony tending to show statements made by him that he had abandoned the insurance in this company. He took no other steps to secure his reinstatement, and died January 12, 1897. Soon after his death, plaintiff, through her attorney, wrote to defendant, requesting it to furnish blank proofs of death. The defendant refused this request, stating "that at the time of his death he was not a member of the company." Thereupon this suit was instituted to recover upon these three certificates, claiming that they were in force at the time of Mr. Jones' death.

Three defenses were interposed:

First. That by the failure to pay the assessment in April, 1896, his rights as a member and his certificates became forfeited and lapsed.

Second. That the statements in his application were untrue, by reason of which the policies were void.

Third. That he became intemperate prior to his death.

The provisions of the certificates in regard to forfeiture were:

(1) That upon failure to pay any assessment for death loss, or annual dues, his guaranty deposit ($21) shall be forfeited, and his membership shall thereupon cease.

(2) They shall become null and void if the member is or shall become habitually intemperate in the use of intoxicating liquors.

(3) If such certificates shall have been obtained or continued contrary to, or in violation of, the articles of association, by-laws, rules, or regulations of this assurance company.

The provision in regard to forfeiture and reinstatement is section 2 of article 2 of the by-laws, and reads as follows:

"Upon the failure of any member to pay his assessments or annual dues within the time provided by the by-laws, his membership shall be forfeited, and his right to any share or interest in the funds or property of this assurance company shall cease absolutely at the expiration of the time stipulated in which such payments are required to be made: *Provided*, however, that the board of trustees may reinstate delinquent members on such terms as to them may be deemed just and equitable."

The case was submitted to the jury upon the theory that the forfeiture for nonpayment of dues was waived, and upon this theory verdict and judgment went for the plaintiff.

Frank E. Robson, for appellant.

L. B. & H. M. Gardner, for appellee.

GRANT, C. J. (*after stating the facts*). 1. It is contended by counsel for the defendant that there is no dispute on the testimony; that the policies were forfeited by the failure of Mr. Jones to pay his assessments in April; that the company had a right to refuse to reinstate him, if in their judgment he had become impaired as an insurance risk; that their action, in the absence of fraud, was final; that there was no waiver by reason of the statements made by any officer of the company; and that, therefore, the court should have directed a verdict for the defendant. This presents the principal question in the case. Mr. Randall was the managing officer of the company, and appears to have been intrusted with the full management of its business. The office was at Lansing, and under his control, and he resided there. If it be conceded that Mr.

Jones' policies had become forfeited by the nonpayment of these assessments, the authorities are quite uniform that this forfeiture might be waived. The law does not favor forfeitures, in fact, abhors them, and will avoid them whenever any reasonable ground can be found for so doing. *Hartford, etc., Ins. Co.* v. *Unsell*, 144 U. S. 439, and authorities there cited. It is undisputed that Mr. Randall informed Mr. Jones, within a few days after the time limited for payment, that he would have to furnish a health certificate from the physician of the company, and that he gave Jones such a certificate to be filled out. This he did, and the certificate, in due form, was given to the company, through Mr. Randall. This was a waiver of the failure to pay, and entitled Mr. Jones to reinstatement. This action of the company was not avoided by the subsequent act of Mr. Randall in taking the certificate to the physician, and inducing him to make the indorsement thereon which he did. *Miesell* v. *Insurance Co.*, 76 N. Y. 115; *Jackson* v. *Relief Ass'n*, 78 Wis. 463. The learned counsel for the defendant argues that there is nothing in the testimony to indicate that Mr. Jones was informed that his payment would be accepted after maturity if he were in good health. We think it a fair inference from the testimony that it was the understanding between Mr. Jones and Mr. Randall that the only thing required for him to do, in order to be reinstated, was the procurement of this certificate and the payment of his money. It was in accordance with the usage of the defendant. It is not necessary that there be an express waiver; it may be implied from circumstances. *Mobile Life Ins. Co.* v. *Pruett*, 74 Ala. 487, and authorities there cited.

2. While it is true that Mr. Jones paid all his assessments, except this last, at the office of the company, it is established by the testimony of Mr. Randall, not only that he was in the habit of collecting delinquent assessments both with and without certificates of health, but that he told Mr. Jones that the company undertook to go and see

its members who lived here at Lansing, upon the street, that he could get at handily, and collect their assessments. This was in reply to a question from Mr. Jones asking where he should make his payments. Randall had then collected his membership fee. Besides, the statement made by Mr. Jones to Mr. Randall, which the latter did not at the time deny, that "he [Jones] was entitled to the same treatment as other members," is evidence tending to show that Jones understood this method of doing business. It is urged that this statement of Mr. Jones was hearsay, made in his own interest, and against the interest of the defendant, and after the controversy had arisen. The conversation took place while Mr. Jones was insisting on his rights, and referred to the custom testified to by Mr. Randall. We think it was legitimate evidence to show knowledge on the part of Mr. Jones of the custom. In our opinion, there was enough in the case to go to the jury upon the question of waiver, and to justify the conclusion of the jury that Mr. Jones acted upon it. Upon this point the court instructed the jury as follows:

"Now, if you find that the language and actions of this company, through Mr. Randall, the head of its executive management, clearly indicated on the part of the society that it would not take an advantage of the default of the member here situated as Mr. Jones was, if he did not pay within the 30 days, but that it would accept his payment after that time, providing he were in good health, and if, after the expiration of this month of April, he was in good health, and Mr. Jones knew of this, and relied upon it, and believed it, and was honest in it, the company is estopped from setting up the forfeiture. If the company's conduct was not such as to fairly indicate an intention so to do, but was merely the extension of favors here and there, then it would not be an estoppel. But if the conduct was such as to give people — give Mr. Jones — to understand, as I said, that he might pay after the 30 days, and it would be accepted if he was in good health, then the company is estopped, if he honestly believed that, and acted upon it, providing he was in good health at the expiration of that 30 days, and during the time following, when the negotiations took place between the parties."

This instruction is fully sustained by the authorities. Nibl. Acc. Ins. & Ben. Soc. § 299; 2 Bac. Ben. Soc. §§ 361, 433; *Loughridge* v. *Endowment Ass'n*, 84 Iowa, 141; *Helme* v. *Insurance Co.*, 61 Pa. St. 109 (100 Am. Dec. 621).

3. It is urged that undue prominence was given to the testimony of Mr. Randall, which the court in its instructions read to the jury. We think not. The question of waiver depended mainly upon the testimony of Mr. Randall, and, under the circumstances, we do not think that such undue prominence was given to it as to justify a reversal of the case upon this ground.

4. Error is assigned upon the statement made in the instructions to the jury, viz., that they must determine "whether the probabilities are that he [Jones] knew it." The court in this portion of the instructions was referring to this question of waiver. That expression was used in the following connection:

"The plaintiff in this case asserts that the forfeiture of the policy alleged and insisted upon by the defendant has been waived by it, and that it is now estopped to assert it as against the plaintiff. The burden of proof to sustain such waiver rests upon the plaintiff. I have told you that, in order to create an estoppel as against this company and in favor of Owen Jones, under the claim of the plaintiff herein, it must appear that there has been such a course of dealing between Mr. Jones himself and the assurance company, and between the assurance company and others here in the city, known to Mr. Jones, that Owen Jones was led to believe, and had a right to believe, that if he failed to make his payment in April, 1896, it would be accepted thereafter, or that he would be reinstated upon the payment of his assessment at some date after the maturity of the date of payment, and that, in omitting to make this payment, he did rely upon such a course of dealing. Now, I charge you, gentlemen, further, Mr. Jones not being here to tell for himself what he relied upon or what he knew, that you must determine that from all the evidence in the case, from the conversations between him and Mr. Randall, from the length of time that he was here, the extent of the company's con-

duct as detailed by Mr. Randall, the extent of the district that defendant went over, and from all the circumstances, what Mr. Jones did and said, so far as the evidence discloses it, you are to determine from that whether Mr. Jones did know about this course on the part of the company, whether the probabilities are that he knew it, and you believe that he knew it from the evidence, and whether he relied upon it, and whether he was honest in that reliance."

The court was dealing with a case where the party with whom the transaction was had was dead, and could not speak. The jury, therefore, were charged with the duty to determine the question of waiver from the conduct of the parties, the deceased's knowledge of the method of business, and the actual facts of the transaction. The charge, taken as a whole, cannot be construed to have turned the jury loose in the field of speculation, and to have permitted them to find a verdict without any substantial evidence.

5. The court instructed the jury that, if Mr. Randall refused to receive the assessments from Mr. Jones upon his offer to pay, no actual production of the money was necessary. We think the instruction correct. Where the company absolutely denies liability, a tender would be useless, and the law does not require useless things to be done.

6. Mr. Jones, in his application, was asked the questions:

"*Q.* Are you now in good health?
"*A.* Yes.
"*Q.* Do you usually enjoy good health?
"*A.* Yes.
"*Q.* Who is your physician?
"*A.* Dr. Hayden. * * *
"*Q.* Have you ever had any serious illness or injury, and, if so, when and of what nature?
"*A.* La grippe slightly, several times. * * *
"*Q.* Have you had any sickness in the last five years?
"*A.* Nothing more than la grippe, or cold.
"*Q.* Give name and residence of the attending physician.

"*A.* Dr. Hayden.
"*Q.* How long since you consulted a physician?
"*A.* Four weeks ago.
"*Q.* For what disease?
"*A.* La grippe, or cold.
"*Q.* Give the name and residence of such physician.
"*A.* Dr. Hayden. * * *
"*Q.* Have you ever had any of the following diseases: * * * Disease of the heart?
"*A.* No."

The policy provided that, if any of these answers were untrue, the policy should become null and void. Dr. Hayden was called as a witness for the defendant, and, after testifying that he had been consulted by Mr. Jones for la grippe, he was asked: "Were you consulted by Mr. Jones during this period for any other disease than la grippe?" Objection was made to this as incompetent, under 2 How. Stat. § 7516. The doctor also testified that all the information he had pertaining to any alleged complaints of Mr. Jones was acquired during the relation of physician and patient, and that he had no information pertaining to his condition aside from what he obtained by observation and from his statements while acting as his physician. Dr. Hayden was also asked if he treated Mr. Jones at any time for any disease of the heart. These questions were objected to as incompetent under the statute, and the objection sustained. The statute is as follows:

"No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."

It is sought to sustain the admission of this testimony under *Brown* v. *Insurance Co.*, 65 Mich. 306 (8 Am. St. Rep. 894). In that case the deceased had taken out two policies of insurance, written application being made for each. In her first application she stated that some nine

or ten years before she had had typhoid fever, and that her attending physician was Dr. Henderson. In her second application she stated that she had never been sick. In that case the majority of the court was of the opinion that Dr. Henderson might testify to the fact that he had treated her for typhoid fever, and that it did not come within the prohibition of the statute. That decision must be limited to the facts in that case. Mr. Jones had made no other application, and had made no reference to Dr. Hayden as having treated him for a specific disease, aside from that stated in the application for membership in the defendant. We think this case clearly within the prohibition of the statute, and the questions were properly excluded.

7. The court was requested to give the following instruction:

"If the jury find that Owen Jones made no payment of the assessment of April, 1896, and made no payment of this assessment afterwards during his lifetime, and stated to other persons that he had dropped it or would pay no more assessments upon it, and took no steps to be reinstated other than to make an application, and took no further steps to keep his membership good or to keep the certificates in force, then I charge you that he had abandoned the certificates and his membership, and the plaintiff cannot recover, and your judgment should be for the defendant."

This was refused. That one may acquiesce in a forfeiture is undoubtedly true. The request assumed certain things to constitute of themselves an abandonment of the policies and acquiescence in the forfeiture. This request would permit a jury to consider, as evidence of such acquiescence, the fact that he had made no payment of the assessments, leaving out of consideration the fact that the company absolutely declined to accept and that he had offered to pay. It also would permit them to find that the failure to take steps to keep his membership good or to be reinstated was evidence of such abandonment and acquiescence. If Mr. Jones had done all that the law

required of him to procure his reinstatement, he had a right to rest there upon his rights. The law did not compel him to at once apply to the courts for reinstatement, or to have the policies adjudged to be alive. *Miesell* v. *Insurance Co.*, *supra*. The request, as framed, was properly refused.

Judgment affirmed.

MONTGOMERY, HOOKER, and LONG, JJ., concurred. MOORE, J., did not sit.

WOOD *v.* GENETT.

1. PAYMENTS—APPLICATION.

   A creditor to whom distinct debts are owing may apply payments to either indebtedness, in the absence of a direction by the debtor as to their application.

2. MORTGAGES—FORECLOSURE—DENIAL OF EXECUTION—EVIDENCE.

   In proceedings to foreclose a mortgage, defendant claimed that the mortgage in suit had been satisfied in full by payments which the mortgagee had wrongfully applied to certain other notes and mortgage, the execution of which defendant denied. It appeared that such other notes, which were produced by defendant in court, had been surrendered to him when the payments were made, that he had cut off the signature, and filed the notes with his other papers. While it was shown that defendant was unable to read, or to write other than to sign his name, it appeared that he was methodical in his business, and careful in the matter of taking and preserving receipts. The aggregate of all the payments made by him was $2,500, while the total amount of the mortgage in suit was only $2,000. *Held*, that the improbability of the mortgagor's overpaying his indebtedness $500 without being aware of the fact, and of the mortgagee's surrendering into the possession of the defrauded party notes he had never executed, rendered untenable the theory that the notes and mortgage to which the payments were applied were not executed by the defendant.

Appeal from Charlevoix; Corbett, J. Submitted January 4, 1899. Decided May 23, 1899.

Bill by Mary H. Wood against Maxim Genett and wife to foreclose a mortgage. From a decree dismissing the bill, complainant appeals. Reversed.

The bill in this case was filed to foreclose a mortgage dated October 1, 1877, for $1,000, signed by the defendants, who are husband and wife, and given to the complainant. Five promissory notes executed by defendant Maxim, for $200 each, accompanied the mortgage. The first note had been paid and taken up. The others were due in 1880, 1881, 1882, and 1883, respectively. The defense was payment. Many payments were made by defendant Maxim to the complainant after this mortgage was given,—some money, but mostly in horses, cattle, hay, and other personal property raised upon defendants' farm. There is little dispute over these amounts. The difficulty arises as to their application. Complainant claims that on September 1, 1878, defendant Maxim gave her a promissory note for $361.96, payable on December 1, 1880, and another note for $775, dated November 1, 1878, payable on or before three years thereafter, which was secured by another real-estate mortgage. Sufficient of these amounts paid by defendant to complainant were applied in payment of these notes, and indorsed thereon, the notes surrendered to the defendant, and the mortgage discharged. Complainant's husband was her agent, and did the entire business with Mr. Genett. Proofs were taken in open court, and the court below dismissed complainant's bill, holding that the amounts which had been indorsed upon the last two notes mentioned should have been applied in payment of the mortgage and notes involved in this suit. The learned circuit judge in his opinion gives the reasons for his decree as follows:

"I find from the evidence that it was the desire of Mr. Genett, when he made the various payments, that they

should go in discharge of the mortgage now sought to be foreclosed, and that O. D. Wood, the agent of the complainant, so understood it."

He further finds that on November 16, 1885, the total amount due upon the mortgage was $2,034,64; that payments had been made thereon amounting to $2,504.80; and that the mortgage was overpaid by $470.16. Any further statement of facts material will be found stated in the opinion.

Fred W. Mayne, for complainant.

A. D. Cruickshank, for defendants.

GRANT, C. J. (*after stating the facts*). We cannot concur in the conclusion reached by the learned circuit judge. Counsel for the defendants does not cite any testimony on their part showing any instruction to apply the payments they made upon these specific notes and mortgage. On the contrary, Mr. Wood testified that Mr. Genett directed him to apply payments first upon the $775 mortgage, because it covered more land than did the other mortgage. If no directions were given, then complainant might apply them on either indebtedness. Four indorsements of payments were made upon the $775 note; the last one being made April 2, 1881, at which time the note was surrendered and the mortgage discharged. Several indorsements were also made upon the $361 note, a receipt in full being indorsed thereon November 16, 1885. Mr. Genett took these two notes, and, as was his custom, cut off his signature thereon, and filed them away with other papers. Defendants could not read or write the English language, except that each could write his or her name, and did so upon these mortgages and notes and also upon others. Mr. Genett was a man of considerable business, was evidently methodical, and, while he could not read, was careful to take receipts and to preserve his evidences of payment. There was an open account running between complainant or her agent and the defendant.

They had settlements from time to time. Defendant kept no account. Complainant kept no regular book account of the transactions, but Mr. Wood testified that he made these indorsements upon these various papers at or about the time the payments were made. Mr. Wood did not surrender the $775 mortgage at the time the note was paid. The disputed notes were produced by Mr. Genett at the hearing. The defendants claim that they never executed the disputed notes and mortgage, but the circuit judge did not decide this question. Their denials, however, are not very satisfactory. If they, however, are as strong as their counsel claims, and amount to a flat denial, this places Mr. Wood in the position of having committed both the crimes of forgery and perjury, and also of being simple enough to place the evidence thereof deliberately in the possession of the defendants. We think the clear weight of evidence is against the defendants. It does not seem reasonable that Mr. Genett, as early as 1885, had overpaid this mortgage nearly $500 without knowing it. It is alike unreasonable to believe that he took the two disputed notes, with his signature attached and these payments indorsed thereon, without knowing what they were.

Decree reversed, with the costs of both courts, and decree entered for the complainant in accordance with this opinion. The cause will be remanded to the court below for further foreclosure proceedings.

MONTGOMERY, MOORE, and LONG, JJ., concurred. HOOKER, J., did not sit.

120	226
128	439

120	226
155	213

HOLMES *v.* COMMON COUNCIL OF DETROIT.

MUNICIPAL CORPORATIONS—PUBLIC CONTRACTS—SPECIFICATIONS—MONOPOLIES.

The fact that material to be used in the construction of a pavement or other public work is in the hands or under the control of a single dealer, whether by reason of a patent or otherwise, does not preclude the specification of that material in a contract for such improvement to be let on competitive bidding.

Appeal from Wayne; Hosmer, Lillibridge, and Carpenter, JJ. Submitted January 27, 1899. Decided May 23, 1899.

Bill by Frank B. Holmes and others to enjoin the common council and the board of public works of the city of Detroit from confirming a certain paving contract. From a decree for complainants, defendants appeal. Reversed.

Warner, Codd & Warner, for complainants.

Charles Flowers (*John J. Speed*, of counsel), for defendants.

HOOKER, J. The law creating the board of public works of the city of Detroit provides that all paving shall be done "upon contracts and under specifications to be prepared by such board and approved by the common council," and directs that "the board shall advertise for proposals to execute the work according to plans and specifications, and the board may contract with the lowest responsible bidder." 3 Laws 1873, Act No. 392, § 18. The board adopted specifications for repaving its streets, and these were approved by the common council. It was apparently designed to have some uniform rule. These provided that all brick should be of a quality to be ap-

proved by the board of public works, and equal to approved samples in its office, and that each bidder should state in his bid the kind of brick that his proposition was based upon, which should be of such kind as had been approved by the board of public works. In December, 1897, tests were made under the direction of the board, and three kinds of brick were approved, viz., Nelsonville, Metropolitan, and Century. On April 29, 1898, the board advertised for proposals for repaving Atwater and other streets according to these specifications, each bidder being requested to name in his bid a separate price on each of the three kinds of brick mentioned. The complainants were bidders, as was also John McLaughlin. His bid named the kinds of brick which he proposed to use. The bid of the complainants did not, but was accompanied by a letter which stated that they proposed to furnish "paving block brick of established reputation, that have been tested by the city of Detroit in the recent test by your body, and also the common council, and which have demonstrated in that test, and also in use in different cities, to be equal at least to the Metropolitan, Century, and Nelsonville blocks; and we are prepared to enter into a contract, and guarantee these goods equal to those named."

The board of public works rejected the bid of Holmes & Strachan for the reason that it did not name the kind of brick, as mentioned in the advertisement and as required by the specifications, and reported the bid of McLaughlin, as the lowest bid, to the common council, accompanied with the proper contract for confirmation. The bid of Holmes & Strachan named a lower price than the bid of McLaughlin for which they would do the work. The object of the present suit on the part of complainants is to restrain the common council from confirming the McLaughlin contract. The ground upon which this relief is asked is that the sale of the three kinds of brick in Detroit is controlled by one Stevens, who, as agent for the manufacturer, has exclusive authority in that market, and that there was therefore a monopoly, and no compe-

tition in the bidding. The circuit court so held, and the board was enjoined from executing the contract.

Complainants' proposition seems to be that, under the charter, no paving contract shall be let which involves the use of any material which, by reason of its exclusive production, is not subject to competition, or perhaps, more accurately, complainants' claim is that such contract cannot be made for the use of such material except when it has been subjected to a competition with some other material. This would result in some serious consequences. If such is the rule, the city may be denied the right to have the pavement that it wants, because some one is willing to furnish something else, that may be thought equally good, for a less price. One or two blocks of a street may be paved with Nelsonville brick, but, when it is desired to extend the pavement, they cannot take bids, and proceed to pave with the same, if some other brick can be obtained cheaper. It may be that the cheaper price is made by interested parties, at a loss, to injure a rival, or for some other ulterior purpose, or because of insolvency, or it may be untried brick, or it may happen that the competing brick is not likely to be thereafter obtainable for repairs. But this would make no difference; the city must be subjected to these dangers and inconveniences, because it can obtain a lower bid. Thus, a pavement would be likely to be of a variegated pattern. This doctrine, carried out to its logical consequences, would prevent a city from doing any public work after an intelligent and well-digested plan, and the harmony and beauty of public improvements would be impaired. Whenever any article that should be the subject of a monopoly should be found to enter into a building or other improvement, the contract would be void, and payment could be enjoined by any taxpayer, if complainants' claim rests on solid ground. In this age of improvement and competition, we should not hold that municipalities are denied the most modern methods and improvements, unless it is clear that they have been prohibited. Many valuable innova-

tions involve patents; others are introduced through agencies, as in this case, and they are therefore practically controlled by one person or firm. Again, some kinds of stone come from a single quarry; limes and cements differ in quality, and some may not be safely used; and in many instances the superiority of a given article is generally recognized. In this instance the fact that the Nelsonville brick are handled by a single agent has no especial significance, for back of the agent is the principal; and it goes without saying that he fixes the price, and has his monopoly, whether he has one agent or more.

The gist of the complainants' claim is that the city cannot specify the brick or other material made and controlled by one manufacturer, but must open the proposed improvement to competitors, and submit to the consequences of competition. It is to the interest of the greater number of manufacturers to have such a rule adopted, yet it is not a rule that private persons adopt in their own matters, for obvious reasons. This departure from such business principles is based upon the danger of supposed venality of public officials. The consequence is that, when a public work is to be undertaken, those having it in charge are seldom left to conduct their negotiations, make the contracts, and answer to the public for a faithful performance of duty. Every one who has anything to sell insists on being heard; one accuses another of bribery; the board having the matter in charge, and its individual members, are accused of corruption; and after the award the work is delayed by litigation and injunctions, to the great inconvenience and cost of the taxpayers, and almost uniformly without any good result. So prevalent are these practices that they have become most serious obstacles to public improvement, and prolific sources of slander and vituperation, until many of our best citizens refuse to give to municipalities the benefit of their services, lest they be subjected to such charges. These things are so common that we may properly take notice of them, and we may well doubt a construction of

a law which shall encourage them and produce such results. A more sensible view to take would seem to be that those charged with the making of an improvement should determine definitely what is wanted, and then advertise for bids, and let the contract to the lowest responsible bidder, leaving him to procure the material required as best he may. Such is the view entertained by many eminent jurists. There are others who have thought it necessary to eliminate every element of monopoly, in a vain effort to prevent any corruption whatever, and permit the use of no materials which could not be bought in the open market, or at least from competitive bidders. Such a case is *Fishburn* v. *City of Chicago*, 171 Ill. 338 (39 L. R. A. 482, 63 Am. St. Rep. 236), where it was held that specifications could not lawfully restrict bidders to the use of one kind of asphaltum, which was produced by one concern. The strongest argument of that case is the following, which probably states the merits of the question as strongly as it can be stated:

"But it may be said that cities, in the construction of public improvements, ought to have, as have individuals in the construction of private structures, the right to select for use the article or substance best fitted and adapted to the purpose, and that to deprive the public of the right to select and use such superior articles is opposed to public policy, and positively disadvantageous to the public. The force of this argument must, of course, be admitted; but, upon reflection, it is readily seen it is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance or article, and no other, shall be used. If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance, or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed. An ordinance making it indispensable that an article or substance in the

control of but a certain person or corporation shall be used in the construction of a public work must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation. If all the ordinances adopted by the city council of the city of Chicago providing for the paving of streets and public places in the city should select the stock in trade of a particular firm or corporation as the only material to be used in making such street improvements, the evil would be intolerable; and, if they may lawfully select such article in one ordinance, it cannot be unlawful to make it the settled policy of the city that material for paving streets shall be purchased of but one seller. Because of the error of the court in ruling the proffered testimony was inadmissible, the judgment must be reversed, and the cause remanded."

This case seems to rest on Illinois decisions.

We are cited to the case of *Dean* v. *Charlton*, 23 Wis. 590, where it was held:

"Where a city was empowered by its charter to improve streets at the expense of adjoining lot owners, but required to let all such work to the lowest bidder, it could not contract for laying a pavement at the expense of such lot owners, the right to lay which was patented, and owned by one firm."

It is obvious that a patented article is much more certain to be the subject of a monopoly than brick manufactured from certain clay and by certain parties, and therefore much more likely to require the application of the rule contended for. Yet this court has held that such may be specified by cities. *Attorney General* v. *City of Detroit*, 26 Mich. 263.

Counsel seek to draw the line at patented articles; but we see no distinction between brick made by the Nelsonville company under patents, and brick made by the same company, but not under patents. In the concurring opinion of the late Chief Justice CHRISTIANCY in the case cited, he places a construction upon such laws as that under discussion which commends itself to our approval. He says:

"When the pavement of a street is in contemplation, there are two kinds of competition which it is very desirable to create among those who may wish to undertake the work: *First*, that between the different kinds of pavement, or those prepared to engage in putting them down; and, *second*, that between parties prepared to put down the same kind. It is the latter species of competition only which the charter requires the city officers to take measures to secure, and it is for this purpose only that it requires publication of the notice, plans, and specifications. * * * But those bids only which had reference to the same particular kind, and to the same specifications, could be considered as competing bids, for the purpose of determining who was the lowest bidder, within the meaning of the charter."

In *Kilvington* v. *City of Superior*, 83 Wis. 222 (18 L. R. A. 45), it was held:

"The fact that the mode of building the crematory was patented did not render a contract therefor invalid, under section 921, Rev. Stat. (requiring it to be let to the lowest bidder), where the entire work was done at the general expense of the village, and the use of the patent was offered to the village and to all contractors at a fixed price, and there was free competition as to everything else. *Dean* v. *Charlton*, 23 Wis. 590, distinguished and limited."

The court said:

"Upon the authority of *Dean* v. *Charlton*, 23 Wis. 590, it is contended that, as the mode of building the crematory was a patented one, the contract was void, on the ground that there could not be fair competition in bidding for the work, which by the charter was required to be let to the lowest bidder. Rev. Stat. § 921. The case of *Dean* v. *Charlton* was decided by a divided court, and there was a vigorous and able dissenting opinion by Chief Justice Dixon. The legislature subsequently validated the assessments so held void in that case, and in *Mills* v. *Charleton*, 29 Wis. 400 (9 Am. Rep. 578), and *Dean* v. *Borchsenius*, 30 Wis. 236, the validity of this legislation was sustained. Since that time the direct question involved in that case, which was in respect to assessments against abutting lots for paving the street, has not been before the court; but in *Dean* v. *Charlton* the majority

of the court, after commenting upon the case of *Harlem Gaslight Co.* v. *Mayor, etc., of New York*, 33 N. Y. 309, expressly disclaimed deciding whether the city might not have contracted for laying such pavement at its own expense, under its general municipal powers, which is really the question here presented. In view of the legislation which followed *Dean* v. *Charlton*, and the fact that it was decided by a divided court, and the general tenor of subsequent decisions, and the further fact that patented methods and processes now enter so largely into various classes and kinds of public work, we are not disposed to extend the rule of that case beyond the particular point there decided. In *Hobart* v. *City of Detroit*, 17 Mich. 246 (97 Am. Dec. 185), and *Motz* v. *City of Detroit*, 18 Mich. 515, decided at about the same time, a contrary conclusion was reached; and in *Nicolson Pavement Co.* v. *Painter*, 35 Cal. 699, and *Burgess* v. *City of Jefferson*, 21 La. Ann. 143, the rule of the majority of the court in *Dean* v. *Charlton* was sustained. Since then, in *Re Dugro*, 50 N. Y. 513, the question has been decided in conformity with *Hobart* v. *City of Detroit*, *supra*, and other like cases; and in *Yarnold* v. *City of Lawrence*, 15 Kan. 126, 131, Brewer, J., notices the diversity of judicial opinion on the question, and is inclined to favor the views of the courts of Michigan and New York. *Baird* v. *Mayor, etc., of New York*, 96 N. Y. 567.

"In the present case there was a definite, well-settled price for the patent and specifications, at which it was held and offered to the city and all contractors, which would limit the recovery of the patentee, so that in fact there was free competition for the work and materials, and all else except the patent. The city had the benefit of all the competition of which the nature of the work admitted; and in such cases, where the entire work is done at the general expense of the city, the statute ought not to be so construed as to exclude the city from availing itself of desirable patented works or improvements, as to which there is but one price, and for which there can, in the nature of the case, be no competition, and when for performing the work and furnishing materials the advantage of competition is secured. While the rule of *Dean* v. *Charlton*, 23 Wis. 590, may be upheld as applied to assessments charged against abutting lots, where the lot owners have the right secured to them to construct in front of their property the improvements for or in which a

patented method or process is used, we cannot see that there is any good reason to hold that the statute applies to the patented mode or process, when in respect to all else the statutory requirement of competition is secured. Under any other theory a municipal corporation would be obliged to forego the purchase and use of all patented implements, modes, or processes,—a result which we cannot think the legislature contemplated."

The case of *Mayor, etc., of Newark* v. *Bonnell*, 57 N. J. Law, 424 (51 Am. St. Rep. 609), is in point, also.

The case of *In re Dugro*, 50 N. Y. 516, sustains the authority to use patented articles. In the opinion it was said:

"Section 104 of the act is relied upon as a limitation upon the powers of the common council, to the extent of a prohibition to undertake any work, or order or direct the making or paving any street, in a manner or with a material which will not admit of competitive bids or proposals. It requires all work to be done and supplies to be furnished by contract when the expenditure will exceed $1,000, and directs all contracts to be made or let after an advertisement for proposals, and to the lowest bidder. The statute was complied with, in that the proper officers of the city did advertise for bids or proposals for paving the street, and the contract was let to the only bidder, and at the price named in the bid. The objection is that the Nicolson pavement was patented, and the right to lay it was in a single person or corporation, and that, therefore, the advertisement being for bids to pave the street with that particular pavement, there could be no competition, and the form of advertising for and receiving bids, and acting upon them, was but a form, and was not, and could not be, a compliance with the act looking to competition; and it is claimed that the contract based upon the proceedings was void, and the assessment for the work therefore illegal.

"It is urged, because a statute prescribing general rules for the exercise of the powers granted to the municipal corporation are not, in all their detail, applicable to every case that may arise, that, to the extent they cannot be applied, the powers are annulled and cannot be exercised. This would be to give undue effect to the act prescribing the forms of procedure, and modal in its character, at the

expense of the general grant of power. Whether the corporate authorities could or should have known that there could be no possible competition for the work (if such was the fact, which is not entirely certain), and, knowing that, could or should have made a contract without advertising for bids, need not be considered. There is no pretense of fraud, or that the contract, as made, was not a provident and proper contract, and reasonable and right in all its terms and provisions, so that the form of advertising and receiving bids cannot vitiate it, even if no such procedure was necessary. The general rule is—and this case does not form an exception—that statutes prescribing forms of procedure, and providing for the orderly conduct of proceedings by public officers or bodies, are only obligatory to the extent and in cases to which they are by their terms applicable. The legislature cannot be presumed to have intended to declare that no power should be exercised, or work done, or supplies furnished, unless of a character that would admit of competitive bids. The grant of power was for public purposes, and the discretion vested in the common council was in the interests of the public; and neither the public nor the parties to be benefited by local improvements can be deprived of the benefit of this discretion, or the right to the best or most improved pavements, because full effect cannot in a particular case be given to an act designed for another purpose, to wit, to regulate the exercise of, and not to limit, the power. In other cases in this court a like statute, intended to accomplish the same purpose, that is, the performance of work and the furnishing of supplies at the lowest price and on the most favorable terms, although sufficiently broad in its terms to include the contracts and the services in question, was held not applicable to, and therefore as not embracing, them. *People* v. *Flagg*, 17 N. Y. 584; *Harlem Gaslight Co.* v. *Mayor, etc., of New York*, 33 N. Y. 309.

"This case is not within the precise principle ruled in those cases, but it is quite analogous, and much of the reasoning of the judges who then spoke for the court is entirely applicable here. A thing within the letter is not within the statute unless within the intention. The act of 1870 can have full effect in cases to which it can be applied, but, if there are cases to which it could not be reasonably applied, they are not within the intention, and therefore not within the statute. It seems to be absurd to

say that all powers and all authority is by necessary implication taken from the municipal authorities, except such as can be exercised in strict conformity to this one provision of law; that this section of the law of 1870 is to be the touchstone to determine the limit and extent of the powers vested in the common council, and that all other acts must conform to it. It should rather be interpreted with respect to the other statutes to which it is ancillary. The decisions of the courts in Wisconsin are adverse, while the Michigan courts are in accord with the views now expressed. If, as alleged, there could be no competition for the paving with the Nicolson pavement, the common council had nevertheless the power to cause the street to be paved with it; and it is simply a case not within the statute, although the words are broad enough to include it. It constitutes one of the necessary exceptions to it. No other question was presented upon this appeal; the counsel, in terms, limiting the discussion to the operation and effect of the provisions of the act of 1870, requiring certain contracts to be given to the lowest bidder after an advertisement for proposals."

In *Fones Hardware Co.* v. *Erb*, 54 Ark. 651 (13 L. R. A. 353), the view entertained by Chief Justice CHRISTIANCY was approved. The Arkansas court said:

"When a contract to build a bridge is to be let, there are two kinds of competition that may arise: *First*, that between persons desiring to build different kinds of bridges; and, *second*, that between those desiring to build the same kind. And, as was said by Judge CHRISTIANCY in discussing a provision similar to that under consideration, the bidding which it contemplates is of the latter kind,—bidding for the same particular thing, to be done according to the same specifications; for, says he, no bids for different kinds of work, and referring to different specifications, could be recognized as coming in competition with each other, for the purpose of determining the lowest bid, within the requirement of this section, without opening the door to the same corrupt combinations and furnishing facilities for the same fraudulent practices which it was the purpose of this provision to prevent. *Attorney General* v. *City of Detroit*, 26 Mich. 263."

This rule applied to patented articles should extend to any desirable article, although, from the course of busi-

ness, its manufacturers may have the exclusive sale of it. It is not a question of who makes or sells it, but of quality. In this case the complainants seek to apply a new regulation, viz., that in all such cases the city must be satisfied with some other article alleged to be equally good. They not only did not comply with the specifications, by naming one of the kinds of brick specified, but bid upon a brick the name of which was not divulged, and they now ask relief upon the ground that such a bid should have been considered. Municipal improvements afford an opportunity for corruption and jobbery, and the public opinion that it is not uncommon may be justified. This is perhaps unavoidable, but, whether it is or not, we think the remedy is not that suggested, viz., to deprive the cities of the power to get what is desired, and compel them to take what is not wanted, or nothing. We think the law is complied with, in the absence of actual fraud or corruption, when specifications are submitted to competitive bidding, although some article is specified which, by reason of a patent or circumstances, is in the hands or under the control of a single dealer.

The decree will be reversed, and the bill dismissed, with costs.

GRANT, C. J., MOORE and LONG, JJ., concurred. MONTGOMERY, J., did not sit.

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HOWARD *v.* DICKIE.

1. SLANDER—PRIVILEGED COMMUNICATIONS—CHURCH CONFERENCE.
   A statement by a member of a conference called for the election of church trustees, concerning the character of one of the nominees, in response to an inquiry as to why he opposed his election, when made in good faith and without malice, is privileged.

2. SAME—MALICE—EVIDENCE.
   The fact that the person making the statement had previously notified the pastor that he should oppose the election of the person against whom the statement was directed has no tendency to show malice.

3. SAME.
   The falsity of a privileged statement is no evidence of malice, unless accompanied by proof that its author knew it to be untrue.

Error to Calhoun; Smith, J. Submitted January 26, 1899. Decided May 23, 1899.

Case by Henry Howard against Samuel Dickie for slander. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

T. E. Barkworth, for appellant.

Parkinson & Campbell, for appellee.

MONTGOMERY, J. This is an action for verbal slander. The circuit judge, at the close of the plaintiff's case, directed a verdict for the defendant, and plaintiff brings error. The plaintiff and defendant were trustees of the Methodist Episcopal Church of Albion. A quarterly conference was called for the purpose of electing trustees for the ensuing year. The defendant was an official member of such conference, and entitled to a vote. The trustees were, in accordance with the church discipline, nominated

by the pastor. Among the names proposed was that of the plaintiff. The defendant thereupon moved that the name of F. W. Freese be substituted for that of plaintiff. A member of the board arose, and asked defendant for his reason for making the motion. The testimony is not entirely agreed as to what defendant said in response to the inquiry, but the disagreement is not, perhaps, substantial. If it were, the statement bearing most strongly against the plaintiff must be assumed to have been made. This is that the plaintiff was dishonest; that he was untruthful in his business dealings; that he was not only dishonest in his business, but that also in the church he failed to live up to the vows he took when he joined; that this was common talk; that he (defendant) frequently heard it on the street. Defendant also stated that he was sorry Howard was not there; that he would prefer to say whatever he said in the presence of Mr. Howard. He also said his personal relations with Mr. Howard had always been pleasant. Another witness testified that defendant, on a previous occasion, had referred to a charge that plaintiff had not kept his word in regard to the purchase of the college farm; that he had refused to carry out a verbal contract for the purchase of the farm.

The plaintiff was called as a witness in his own behalf, and testified that he had not been guilty of dishonesty and deceit in his business dealings. The circuit judge was of the opinion that the occasion was privileged, that there was no proof of express malice, and that, therefore, the plaintiff was not entitled to recover. The ruling is challenged on both grounds. It is urged that the occasion was not privileged, for the reason that, if the defendant believed that the plaintiff was wanting in integrity, or that he failed to live up to his vows as a member of the church, it was defendant's duty to take steps to expel plaintiff from the church, rather than to attempt to prevent his election to an office in the church. We cannot assent to his view. The defendant was called on to vote for or against the plaintiff, and it was certainly his duty,

or at least his privilege, to make known, in response to an inquiry from another member of the conference, any facts within his knowledge which bore upon the question of plaintiff's fitness for the place; and if this was done without malice, and in good faith, we have no doubt it was privileged. *O'Donaghue* v. *M'Govern*, 23 Wend. 26; *Dial* v. *Holter*, 6 Ohio St. 228; *Shurtleff* v. *Stevens*, 51 Vt. 501 (31 Am. Rep. 698); *Kirkpatrick* v. *Eagle Lodge*, 26 Kan. 384 (40 Am. Rep. 316); *Howard* v. *Thompson*, 1 Am. Lead. Cas. 167, note.

The question whether there is any evidence justifying an inference of malice is more difficult of determination. The rule is well settled that, when it appears that the occasion is privileged, the plaintiff has the burden of proving actual malice. The rule is stated in a note to *Howard* v. *Thompson*, 1 Am. Lead. Cas. 167:

"The showing of a privileged occasion *prima facie* removes the quality of malice, and puts upon the plaintiff a necessity of showing express or actual malice; and, if this be proved, the defense entirely fails. And this express proof of malice appears to consist in all cases in showing *mala fides* in the defendant,—that is, that the occasion was made use of colorably, as a pretext for wantonly injuring the plaintiff; and this express malice, being matter of fact and motive, is, upon sufficient evidence, a question for the jury. The fact that the words were consistent with malice is not enough; they must be inconsistent with *bona fides*."

We have held that malice may be inferred from circumstances under which the publication takes place in some cases, as that the slander was uttered in the presence of third persons, when no necessity existed for so public an accusation. *Garn* v. *Lockard*, 108 Mich. 196. So, too, if it be shown that the alleged slanderous statement was known to be untrue, this is sufficient proof of malice. *Harrison* v. *Howe*, 109 Mich. 476. But in this case there is no evidence of actual malice unless it be held that the evidence tending to show that the charges made were ill founded is sufficient for that purpose. There was noth-

ing in the manner of the defendant on the occasion in question to indicate ill will towards the plaintiff; on the contrary, the evidence negatives this. No previous utterances of defendant tend to show malice. True, it appeared that the defendant had previously notified the pastor that he should oppose the re-election of the plaintiff as a member of the board of trustees, but this does not tend to show malice. If he had the right to oppose plaintiff's re-election, he had the right to give notice of his intended action. The case, then, must turn upon the question whether malice was made out by proof that the charges made were not true in fact, without additional evidence that they were known by the defendant to be untrue. If the privilege is to prove of actual value to the defendant, it would seem that it is quite unsafe to say that evidence that the statements made are untrue in fact establishes malice. The truth of the words may always constitute a defense. To remove privilege by evidence of the untruth of the words spoken would therefore leave one acting under a qualified privilege in practically no better attitude than one who can plead no such privilege. This question was before the court of queen's bench in *Fountain* v. *Boodle*, 3 Q. B. 5. It was said by Patteson, J., "Falsehood in fact is no proof of malice, unless the proof involves knowledge of the truth." In *Somerville* v. *Hawkins*, 10 C. B. 583, it was said that the supposition that defendant believed the charge is always to be made when the question is whether a communication is privileged or not. In *Harris* v. *Thompson*, 13 C. B. 333, it was said by Williams, J., citing *Fountain* v. *Boodle:* "The mere circumstance of the statement being false will not suffice to show malice, unless there is some evidence to show that the defendant knew it to be false."

The direction of the learned circuit judge was right. The judgment will be affirmed.

The other Justices concurred.

DEFFENBAUGH *v.* JACKSON PAPER MANUFACTURING CO.

1. PRINCIPAL AND AGENT—AUTHORITY OF SUPERINTENDENT—CONTRACT OF EMPLOYMENT—COMPENSATION FROM PROFITS.
   The superintendent of a manufacturing company is not, by virtue of his authority as a general agent, empowered to contract with an employé for an interest in the principal's business or its profits.

2. SAME—RATIFICATION—EVIDENCE.
   Where the superintendent of a manufacturing company makes an unauthorized contract to compensate an employé with an interest in the profits of the business in addition to a specified salary, the fact that the books of account, kept under the superintendent's direction, show payments to the employé in excess of his salary, has no tendency to show a ratification by the company, in the absence of evidence that it was brought home to the company that the excess was paid as commissions

Error to Jackson; Chester, J., *presiding*. Submitted January 27, 1899. Decided May 23, 1899.

Assumpsit by George B. Deffenbaugh against the Jackson Paper Manufacturing Company on a contract of employment. From a judgment for plaintiff, defendant brings error. Reversed.

Plaintiff sued defendant upon a contract of employment, set forth in the declaration as follows: That he was employed as the mechanical superintendent of the defendant's works, in consideration of the yearly salary of $1,200, and the further consideration of 10 per cent. of the yearly net profits of defendant's business in excess of $5,000. The employment was alleged to be for one year from February 1, 1895. The net profits are claimed to be $9,758.32. Plaintiff recovered verdict and judgment for $582.30.

In the latter part of December, 1894, one Charles A.

Jackson entered into negotiations with the managing director of the defendant for employment as superintendent. Jackson and plaintiff had been employed in a similar mill together in Monroe for some years. At the request of Jackson, plaintiff came to the city of Jackson, and looked over the works and books with him. Plaintiff's agreement was made through Mr. Jackson. Plaintiff made two trips to Jackson, and claims that the final arrangement was made about the very last of December or first of January, but the precise date is not given. Plaintiff had no talk with any officer of the company about his employment, and had no letter or other writing to show his contract. In his testimony he stated the contract to be that he was to have $1,200 a year, and was "to receive 25 per cent. of 40 per cent. of all profits over and above $5,000." The contract was to commence the 1st of the February following. Mr. Jackson was at the same time negotiating employment for himself, and desired to secure the services of his brother, Gale Jackson, and the plaintiff. In this he was successful, and his brother was employed as bookkeeper. Mr. Potter, the general agent of the company, conducted the negotiations with Charles Jackson. Mr. Jackson was not then in the employ of the company, and there is nothing to indicate that he had then received any authority to make contracts of employment, or to act for it in any way. Charles Jackson undoubtedly agreed with them for a division of the 40 per cent. profits he was to receive. Jackson continued to work for the company for about a year, and suddenly disappeared, leaving his account overdrawn $1,100. His whereabouts were for some time unknown. The defendant tried to find him, but learned nothing till news of his death in New Orleans was received.

The annual meeting of the company was held on January 18, 1895. The record shows the following:

"Mr. Potter reported that he had arranged with Charles Jackson, subject to the approval of the board, to take the superintendency of the mill, at a salary of $1,500. He

was to associate with him Gale Jackson, at $700 per annum, and George Deffenbaugh, as the master mechanic, at $1,200 per annum; Mr. Charles Jackson to have a further compensation of 40 per cent. of the net profits of the year in excess of $5,000. In pursuance of the above, Mr. Charles Jackson was appointed superintendent from February 1, 1895, to be continued so long as his services were satisfactory to the board."

This is the only written evidence of the arrangement.

Defendant, at the conclusion of the evidence, requested the court to direct a verdict for it. This was refused, and the case submitted to the jury upon the theory of an original contract as alleged, and the jury rendered a verdict as stated.

Pringle & Hewett, for appellant.

Blair, Smith & Townsend, for appellee.

GRANT, C. J. (*after stating the facts*). 1. Plaintiff relies upon the authority of Mr. Charles Jackson, as the agent of defendant, to make the contract declared upon. If Jackson possessed the power to make it, it is by virtue of his authority as a general agent, or special authority conferred upon him by the proper officers of the company. The contract was not within the scope of a general agent to make. Such an agent is not clothed, by virtue of his agency, with power to contract with an employé for an interest in his principal's business, or an interest in the profits thereof. See *Gore* v. *Assurance Co.*, 119 Mich. 136.

2. No special authority was shown. Plaintiff dealt with Jackson alone. He did so at his own risk. He cannot plead ignorance of the law. It was his duty to inquire into the scope of Jackson's agency. If he chose to trust implicitly to his particular friend, Jackson, the defendant is not responsible or liable for it. Only when the contract had been reported by Jackson to the company, and approved and ratified by its proper officers, could it be made liable. Potter, the managing director, concluded the ne-

gotiations so far as lay in his power. He testified that he made the arrangements with Jackson for $1,500, and 40 per cent. of the profits above $5,000, and that Jackson should bring plaintiff, at a salary of $1,200 a year, and his brother, at $700 a year, subject to the approval of the directors. His testimony stands undisputed. The records of the directors' meeting, made shortly after, confirm it. There is no competent evidence of any other contract.

3. There is no tangible evidence to show ratification. The alleged contract was never brought to the attention of the directors, nor was it brought to the attention of any officer of the company until very nearly the close of the year, and probably not until afterwards. The books of account were kept by Gale Jackson, under the direction of his brother Charles. There is no evidence that any other officer or employé directed the keeping of the accounts. Plaintiff received money from the defendant in excess of his salary to the amount of $258. This was charged against him in his account. This did not tend to show any knowledge on the part of any officer of the company of this alleged agreement. It is no uncommon thing for such employés to receive money in advance of their salaries. No officer of the company was informed that this was for commission. Furthermore, the thing having been done under the direction of Charles Jackson, and he, his brother, and plaintiff being interested, by their own private agreement, in this 40 per cent. of the profits, there would seem to be no justice or propriety in holding that these charges were evidence of ratification, or formed any basis for the application of the doctrine of estoppel.

It is also urged that, in several interviews between plaintiff and Mr. Potter, Potter made no disclaimer of liability for this commission. These interviews were had more than a year after the alleged contract was made, and after the year for which suit is brought had expired. This cannot be held evidence of a ratification of the contract. Mr. Potter had no authority to make a contract with the plaintiff or with Jackson for a portion of the

profits. If he had no authority to make it, he certainly would have no authority to bind the company by failure to deny it, or even by admitting it. The only contract made by defendant with plaintiff was the one reported by Mr. Potter to the board of directors, and ratified by it. There is no tangible evidence that any other was made, contemplated, or ratified.

Plaintiff may have honestly understood that the defendant agreed to pay him his share of this commission, but there is nothing to show that defendant so understood it, or had any reason for so doing. It is very evident that Jackson, his brother, and plaintiff had a private agreement in regard to this commission, and the division of it among themselves. Gale Jackson was a party to it. He was plaintiff's witness, and he testified: "My arrangement was a private arrangement between my brother and myself. I understood Deffenbaugh's to be the same. I never made any contract with any one else but my brother Charles." Gale Jackson's account was also overdrawn. Would this overpayment be evidence of knowledge that Gale was to receive a commission, and bind the company to pay it?

Judgment reversed, and new trial ordered.

The other Justices concurred.

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SUPERINTENDENTS OF POOR OF KALKASKA CO. *v.* SUPERINTENDENTS OF POOR OF GRAND TRAVERSE CO.

INDIGENTS—CHANGE OF SETTLEMENT—LIABILITY OF COUNTIES.

Under the statute providing for the support of the poor by the public (1 How. Stat. § 1755 *et seq.*), where a family remove from a county in which they have received aid as indigent persons, and make their home in another county, the latter, and not the former, county is chargeable with their subsequent support, unless they were removed or enticed from their former home with a view to casting their support on another county.

Case made from Grand Traverse; Corbett, J. Submitted February 21, 1899. Decided May 23, 1899.

Assumpsit by the superintendents of the poor of Kalkaska county against the superintendents of the poor of Grand Traverse county to recover an amount paid for the support of an indigent family. There was a judgment for defendant and plaintiff assigns error. Affirmed.

J. L. Boyd, Prosecuting Attorney (*W. D. Totten* and *C. M. Phelps*, of counsel), for appellant.

John J. Tweddle, Prosecuting Attorney, for appellee.

MONTGOMERY, J. The facts of the case agreed upon in the court below, so far as they are essential to an understanding of the legal questions involved, are as follows: The action is brought to recover money claimed to be due the county of Kalkaska for money paid out by said county for aid and support of poor persons claimed to have been residents of the county of Grand Traverse. One Burt Hurlbert was, with his family, a resident of the said county of Grand Traverse for some five years up to about the 21st of September, 1895. The said Hurlbert

lived upon a small farm of some 10 acres near the village of Williamsburg, in said Grand Traverse county, for about five years, and until the said 21st day of September, 1895. In May of the year 1895 the said Hurlbert made application to the supervisor of the township of Whitewater for aid as a poor and indigent person, and received aid from such township as a poor person or person in indigent circumstances. The said township of Whitewater paid at the rate of $2 per week for the support of said Hurlbert and his family from some time in May, 1895, to about the 17th of July, 1895. Said Hurlbert exchanged his little property in the said county of Grand Traverse for a house and lot in the village of Kalkaska, and the said family came to the said village of Kalkaska to reside on the 21st day of September, 1895. They made application to the superintendents of the poor and the supervisor of Kalkaska township for help or aid as poor persons. Such application was made by said Hurlbert about the 20th day of the month of December, 1895, and on the 31st day of December the said supervisor furnished provisions to the said Hurlbert to the extent of $10.40, and continued to furnish provisions and necessaries from that time until about the 4th day of May, 1896, and furnished in all to the extent of $35.88. Soon after the said provisions and goods were furnished by the said county of Kalkaska to the said Hurlbert and family, the superintendents of the poor for said county caused a notice to be served on the said superintendents of the poor of Grand Traverse county, stating the amount so furnished to the said family, and requesting the said superintendents to come and care for the said family, or to remove them to the said county of Grand Traverse, and to repay to the said county of Kalkaska all money paid, laid out, and expended for the said family; and the said superintendents also notified the said superintendents of the poor of Grand Traverse county of the improper removal of the said Hurlbert and family to Kalkaska county. On receipt of such notice by the said superintendents of

the poor of Grand Traverse county, the said superintendents sent to the said superintendents of the poor of the said Kalkaska county a notice denying all liability to the said county for said money so laid out, paid, and expended by said county in the care and support of the said Hurlbert and family, whereupon this suit to recover the amount was commenced against the said Grand Traverse county. The distinction between township and county poor exists in both the said counties of Kalkaska and Grand Traverse. Each township in said counties supports its own poor. The circuit judge held that the plaintiff was not entitled to recover, and from that determination an appeal is taken to this court.

Section 1755, 1 How. Stat., provides that poor persons unable to support themselves shall be maintained by the county in which they may be. Section 1786 provides that, in those counties in which the distinction between township and county poor shall not be abolished by the board of supervisors, the poor having a settlement in any township in such counties shall be supported at the expense of such township, and the poor not having such settlement shall be supported by the county in which *they may be*, as thereinbefore provided. The succeeding section prescribes what shall constitute a settlement. These sections very clearly cast the burden of maintaining paupers upon the county in which they may be, except as to poor having gained a settlement in counties in which the distinction between county and township poor has not been abrogated, in which case the pauper is to be supported at the expense of the township in the county in which he has gained a settlement. Unless, therefore, there is found in some provisions of the statute authority for charging this expense to the county of earlier residence, it is clear that this action cannot be maintained. The only sections having direct bearing on the question are sections 1767, 1768, and 1769. The first of these sections makes it an offense to remove or entice any poor person into another county with the intent to make such county chargeable with his support.

The two succeeding sections provide a remedy by the county which has been compelled to maintain the person so brought, removed, or enticed. Nowhere is there any provision which attempts to prohibit poor people from remaining in any particular county, or to provide for a liability on the part of one county for the support of such poor person who has voluntarily sought another abode. There is such a provision as between different townships of the same county.

The judgment is affirmed.

The other Justices concurred.

ANTI-KALSOMINE CO. *v.* KENT CIRCUIT JUDGE.

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DISCOVERY — PRODUCTION OF CORRESPONDENCE — UNREASONABLE SEARCH—CONSTITUTIONAL LAW.

An order requiring a party to a suit to produce for examination by the adverse party all correspondence "which may contain evidence relating to the matters at issue" does not extend to confidential communications which can be of no benefit to the party seeking the production, so as to render it repugnant to the fourth amendment to the Federal Constitution, and to section 26 of article 6 of the State Constitution, prohibiting unreasonable searches and seizures.

Mandamus by the Anti-Kalsomine Company to compel Allen C. Adsit, circuit judge of Kent county, to vacate an order requiring relator to produce certain records and correspondence for inspection. Submitted April 4, 1899. Writ denied May 23, 1899.

T. J. O'Brien and *Fletcher & Wanty*, for relator.

Hyde, Earle & Thornton, for respondent.

MONTGOMERY, J. This is an application for *man-*

damus to require the respondent to vacate an order directing the relator to produce for inspection of its adversary in a pending suit its books and correspondence for a certain period. The order complained of was made in the case of *Church* v. *Anti-Kalsomine Co.* See 119 Mich. 437. The nature of the action is shown in the opinion of this court in that case when presented to us on demurrer. 118 Mich. 219. After an issue of fact was joined, the plaintiff in the case asked for an order requiring the relator to produce for the inspection of a competent bookkeeper all the books of account, records, files, and correspondence in relation to the business covered by the contract between the parties, including the books of account, records, files, and correspondence of the Diamond Wall-Finish Company, referred to in the declaration, in its possession or control, or in the possession or control of its officers, agents, and employés, or in the possession or control of the officers, agents, and employés of the Diamond Wall-Finish Company. It appeared by the answer to the order to show cause filed by the relator in the circuit court that the relator had given the plaintiff, Mr. Church, and an accountant employed by him, free access to its books of account up to the 17th of December, and had produced at his request any item of correspondence especially requested by him; that at that date the accountant was informed that it would not be convenient to permit him to work in the office the balance of the current year, as the clearing up of the business of the year would render it necessary for the employés of the company to have the exclusive use of the office; but it was at the same time stated that soon after the first of the year the company would again furnish facilities for the prosecution of the investigation. The application was made for the order complained of on the 29th of December. Among the provisions of the order are the following:

"That the said Oscar F. Powell, the bookkeeper selected by plaintiff for that purpose, and who has heretofore been permitted by defendant to examine for plaintiff a portion

of the books of defendant mentioned in said petition, is hereby authorized to list, examine, and take copies of and *memoranda* from the books, records, files, and correspondence of defendant mentioned in said petition, including the books, records, files, and correspondence of the Diamond Wall-Finish Company, also mentioned in said petition, as he and the said plaintiff may be advised. That said defendant, its officers and office employés, furnish to the said Oscar F. Powell such books, records, files, and correspondence of defendant and the Diamond Wall-Finish Company in its possession or control, or in the possession or control of its officers, agents, and employés, or in the possession or control of the officers, agents, and employés of the Diamond Wall-Finish Company, as he may from time to time call for, which may contain evidence relating to the matters at issue in this cause. That it shall not be necessary for the said Oscar F. Powell in such demand or requirement to specify any particular letter or document, but it shall be sufficient for him to designate generally the class of papers and documents required by him. For example, it shall be sufficient for him to call for all the correspondence and reports by and between said defendant, its officers and office employés, and traveling salesmen in its employ, or heretofore in its employ, and the files of defendant in relation thereto."

The relator complains that this order authorizes an unreasonable search of relator's property, and violates the fourth amendment of the Constitution of the United States, and section 26, art. 6, of the Constitution of this State. The counsel for respondent contend that the order of the circuit judge was fully authorized, and cite the case of *Eddy* v. *Bay Circuit Judge*, 114 Mich. 668. The case is ruled by the case cited, unless a distinction is taken between the books and papers of a corporation and its correspondence. The petition sets out that resort to the files and correspondence is necessary to an understanding of the book entries. It is urged that such an order, directed to an individual, might result in the production of confidential communications, and that, as applied to a corporation, it may result in the production and inspection of confidential communications of no benefit to the party seeking the production. We do not think

the order in this case can be construed so broadly. It requires the production of books, papers, and correspondence "which may contain evidence relating to the matters at issue in this case." We think the order was within the power of the circuit judge. See *Germania Fire Ins. Co.* v. *Newaygo Circuit Judge*, 41 Mich. 258; *Petrie* v. *Muskegon Circuit Judge*, 90 Mich. 265.

The writ will be denied.

The other Justices concurred.

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s125 193
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SMEDLEY *v.* KIRBY.

1. MUNICIPAL CORPORATIONS—CASTING VOTE OF MAYOR—INTEREST.

A mayor who employed an attorney to contest an attempted diversion of the public funds by the city council, but incurred no personal liability to compensate the attorney, is not precluded, on the ground of interest, from casting an affirmative deciding vote, where, upon a motion to pay the attorney fees, the vote of the aldermen results in a tie.

2. SAME—DEBTS—ISSUANCE OF WARRANT—MANDAMUS.

Mandamus to compel a city clerk to issue a warrant in favor of a creditor whose claim has been duly allowed by the council will not be refused because the petition fails to allege that there is money on hand sufficient to pay the same, where the claim of lack of funds has at no time been advanced by the clerk as a reason for withholding the warrant, and it does not in fact appear that the funds are insufficient.

Certiorari to Ottawa; Padgham, J. Submitted March 14, 1899. Decided May 23, 1899.

Mandamus by Charles O. Smedley to compel Thomas E. Kirby, clerk of the city of Grand Haven, to draw a warrant on the city treasurer for an amount due relator

for legal services. From an order denying the writ, relator brings *certiorari*. Reversed.

Smedley & Corwin (*J. J. Danhof*, of counsel), for relator.

Charles E. Soule (*Walter I. Lillie*, of counsel), for respondent.

HOOKER, J. In June, 1898, the common council of the city of Grand Haven passed a resolution to transfer from the contingent fund of said city in the hands of its treasurer, and to divide between and add to several other city funds, the sum of $7,000. The mayor, Baar, attempted to veto the resolution, but the clerk, Kirby, refused to file it, and the mayor employed Smedley to institute *mandamus* proceedings to compel it. This was done, and they were successful. The case reached this court, and will be found reported in *Baar* v. *Kirby*, 118 Mich. 392. A similar proceeding was commenced against the council, but it was not brought to this court. The employment of Smedley by the mayor was not authorized by the council, but it is claimed that the mayor had authority to employ counsel, inasmuch as the city attorney was in sympathy with the resolution vetoed, and took the side of the council and clerk in the matter.

In November, 1898, Smedley presented a bill against the city for $349.50 for his services in the two cases mentioned, and another bill against the clerk for $37.80, the costs of this court taxed in the case of *Baar* v. *Kirby*. These claims are said not to have been verified as required by section 20, chap. 8, Act No. 215, Pub. Acts 1895, but the record indicates that they were. They were referred to the finance committee of the council, with the city attorney added, for examination and report. This committee reported at a subsequent meeting, in substance, that:

1. The city had not employed Smedley, and was under no obligation to pay his bill.

2. A reasonable sum should be allowed the mayor to pay his (the mayor's) attorney fees.

3. They recommended that the mayor be allowed $37.80 to pay the bill of costs against the clerk, and $50 for all other legal expenses in his *mandamus* suits.

4. Nothing should be allowed to Smedley on his bills.

Alderman Vos moved to amend this by a resolution allowing $349.50 to the mayor, with which to pay his attorney fees in the case against Kirby. This motion was voted upon by the aldermen, and resulted in a tie. The mayor voted for it, and declared the motion carried. The same course was taken on the motion as amended.

Subsequently four members of the council commenced *mandamus* proceedings against the mayor to compel him to rescind his action in declaring the motions carried, and a few days later this application was filed by Smedley to compel the clerk to draw the warrant for $349.50. In the former, issues were framed and evidence was taken, while the latter was heard upon petition and answer. They were heard together, and the circuit judge makes return of the proceedings and final order in each. The return states as a reason for denying the writ in this case that the two cases were heard together, and the facts brought out in the *Bishop Case* were considered in disposing of this. In short, they seem to have been treated as one case, and, while the *Bishop Case* was not brought here by a separate writ, the matter is all before us. It is manifest that the meritorious question is the same in both, viz., whether the mayor had a lawful right to decide the tie by his own vote. The circuit court found that he had a personal interest in the matter, and, if this is to be treated as a matter of fact, we cannot review it, any more than we could the finding of a jury. But the evidence is all returned, and it is proper for us to examine it, to ascertain whether it furnishes any opportunity for dispute upon the question,—in other words, whether the judge has correctly applied the law to undisputed facts.

Counsel for the relator urge that the council was attempting an unlawful thing; that they intended to divert the public funds from proper uses, under resolutions which

had passed the council, but had been vetoed; that the city clerk and attorney were aiding the council, and that it was within the proper sphere of the mayor to prevent it; and, therefore, that he had authority to employ counsel to aid him in necessary litigation on behalf of the city. This is substantially the broad proposition that, when a mayor thinks the council is taking illegal action, he has authority to bind the city for expenses and costs of necessary proceedings to try the question, or, at least, that he may institute proceedings, and that the test of his authority is the result. We need not discuss this question, as the case can be disposed of upon another ground. As said in the case of *Barnert* v. *Mayor, etc., of Paterson*, 48 N. J. Law, 395: "If this ground of recovery be regarded as untenable or doubtful, I think the action of the city authorities has been such as to raise this into an express promise to pay;" that the right of a corporation to indemnify an officer for losses and expenses incurred in the discharge of an official duty in a matter in which the corporation is interested is undoubted, and this power has generally been found sufficient to afford protection against flagrantly illegal action. One-half of the aldermen were in favor of granting it in this case, and, if the mayor was entitled to vote upon the question, the city is already bound to render compensation. This must depend upon the nature of the mayor's relation to the matter. It is apparent that the employment of relator was on behalf of the city. The mayor expressly avoided a personal liability. This he had a right to do, and, while he could not pledge the credit of the city, it was competent for him to make an arrangement whereby the relator assumed the risk of losing his services if the authorities should not assume the burden at some subsequent time. The charter provides (chapter 8, § 5) that "no alderman shall vote upon any question in which he shall have a direct personal interest." Another provision (chapter 8, § 16) is, "No member of the council * * * shall be interested, directly or indirectly, in the profits of any contract * * * to be performed for the

corporation." This indicates that a pecuniary interest was intended. Anderson defines "interest" as "such relation to the matter in issue as creates a liability to pecuniary gain or loss from the event of the suit." See, also, 11 Am. & Eng. Enc. Law, 422; *Taylor* v. *Commissioners of Highways*, 88 Ill. 526.

We are of the opinion that the vote was authorized by the charter, under the admitted facts. It is urged that the circuit court has determined otherwise upon the question of fact; but we gather from the order and the return that the matter turned upon the legal question, and that it was not found that the mayor had incurred a pecuniary obligation, but that possibly relator might claim so, and that a legal controversy might arise, which the mayor would be brought to the expense of defending to escape pecuniary loss. But there is nothing to show a probability of this. On the contrary, relator does not claim it.

Counsel urge further that the respondent should not be required to issue the warrant, for the further reason that there is no resolution authorizing it. This is upon the theory that the order of the court in Bishop against Baar, holding the mayor's vote illegal, has not been appealed from, and therefore nullifies the resolution adopted, and, further, that this application was for an order to compel the issue of a warrant payable to the relator, while no claim has been allowed in his favor, but only in favor of Baar, the mayor. These are technical. As we have said, the cases were heard together, and, for practical purposes, merged, at the circuit. The merits of both are here, and counsel for both parties have referred to the proceedings in the *Bishop Case*. The appeal has brought up the merits of the whole controversy. The respondent does not appear to have refused to issue a warrant to the relator on the ground that the mayor was entitled to it, or to have offered to issue one payable to the mayor. The relator has signified a willingness to accept such a one. Counsel for the respondent, in their brief, treat the interest of the mayor in the claim as the main question, as it is.

Again, it is said there is nothing in the petition to show that there is money in the fund to pay the order. Of this it is sufficient to say that, if the act forbids the drawing of a warrant in the absence of funds, nothing indicates a refusal upon such ground, and we are not advised that such fund is wanting.

We are satisfied that the relator was entitled to have a warrant for the amount claimed, payable to himself or the mayor; and an order will be entered reversing the order of the circuit court, and directing the writ to issue accordingly, with costs of both courts.

The other Justices concurred.

DE LANO *v.* DOYLE.

MUNICIPAL CORPORATIONS—SCAVENGERS—ORDINANCES—REPEAL.

An ordinance empowering the mayor of a city to license suitable persons as scavengers, and providing, under a penalty for violations, for the carrying on of the business in a specified way, is repealed by a subsequent ordinance covering the same subject-matter, and embracing new provisions placing the collection of garbage under the control of the local board of health, and providing that no license to gather garbage shall be issued by the mayor except on recommendation of such board.

Mandamus by Will De Lano, health officer of the city of Grand Rapids, to compel Emanuel J. Doyle, judge of the police court of said city, to issue a warrant. Submitted March 14, 1899. Writ denied May 23, 1899.

Henry J. Felker (*Edwin F. Uhl*, *William Wisner Taylor*, and *Harvey Joslin*, of counsel), for relator.

G. H. Albers, for respondent.

LONG, J. Relator files his petition for a *mandamus* to compel the respondent, as judge of the police court, to entertain a complaint and issue his warrant for the arrest of one John Sessink for a violation of an ordinance of the city of Grand Rapids entitled "An ordinance relative to scavengers." This ordinance was passed in 1871, and has been amended from time to time. It appears that the relator, on the 16th day of February, 1899, made due complaint before the respondent, as judge of the police court, on oath, that one John Sessink, on the 15th day of February, 1899, and for 30 days prior thereto, had been following the business and occupation of scavenger in said city, without having first procured a license therefor from the mayor, contrary to the provisions of section 1 of the above ordinance; that the said police judge refused to take such complaint or to issue said warrant. Upon the filing of the petition in this court, an order to show cause was issued, and the respondent has made his return thereto. The answer admits the facts stated in the petition, but avers that on July 18, 1898, another ordinance was passed, repealing the ordinance which the relator sought to enforce.

The ordinance of 1871, as amended, provides:

"SECTION 1. No person shall follow the business or occupation of a scavenger in the city of Grand Rapids without first procuring a license therefor from the mayor of said city.

"SEC. 2. The mayor is hereby authorized to license one or more proper persons to act as scavenger, upon such person executing and filing in the office of the city clerk a bond, with sufficient sureties, conditioned for the faithful performance of the duties of his office and the faithful observance of the provisions of this ordinance."

The other sections provide that the scavenger, under the direction of the mayor, marshal, or a member of the board of health, shall have the power to enter upon any premises between sunrise and sunset, and examine any vault, sink, privy, or private drain, and that when such shall need cleaning out, altering, relaying, or repairing,

after due notice to the owner or occupant, the scavenger may clean them out, etc. The scavenger is prohibited from removing the contents of any vault, sink, privy, etc., otherwise than in boxes, etc., made tight and closely covered, and from burying the same in ground within the city limits, etc., and from disposing of the same to any person to be used for manure in any garden, etc., within the city limits. Section 9 of the ordinance provides that any person violating the provisions of the ordinance shall be punished by a fine of not less than $1 nor more than $50, and costs of prosecution, or by imprisonment in the county jail, etc., for a period of not less than 2 days nor more than 60 days.

The complaint made under this ordinance was that "John Sessink did follow the business and occupation of a scavenger without having first procured a license therefor from the mayor of said city of Grand Rapids," etc.

The ordinance passed July 18, 1898, is entitled:

"An ordinance providing for the regulation, collection, removal, and cremation of garbage, offal, dead animals, and other refuse matter, and for the regulation of the crematory, in the city of Grand Rapids."

By the first section of this ordinance the board of health of the city is given control and management of the garbage burner or crematory owned by the city, with power to employ the necessary help and fix the salaries of employés. Section 2 makes it unlawful for any person to place any dead animal or garbage in any lane, alley, street, or other public place within the city, or on any private property, unless inclosed in a water-tight tank, kept in some place accessible to the collectors of garbage. Section 4 authorizes the board of health to enter into a contract with any suitable person to furnish tanks and to gather the garbage, with power also to make regulations as to the manner in which the garbage shall be gathered. It also provides that the person thus entering into the contract for the collection and removal of the garbage shall, upon the recommendation of the board of health,

receive a license for that purpose, issued by the mayor of the city; and it further provides that:

"No license shall be issued to any other person, firm, or corporation for the gathering of such garbage; and such person so licensed shall give a bond to the city of Grand Rapids, with sufficient sureties and in such amount as may be required by said board of health. The condition of such bond shall be that said person so licensed shall in all things carry out the provisions of the contract thus entered into between himself and the board of health, acting for said city, and such rules and regulations as may from time to time be made by said board of health."

Section 5 provides that the scavenger thus licensed shall receive no compensation from the city, but shall be permitted to make arrangements with citizens for the removal of the garbage, etc. Section 6 provides for the manner of the removal of the garbage to the crematory. Section 7 provides the penalty for violations of the ordinance. Section 8 provides as follows: "Any ordinance or part of ordinance conflicting with the provisions of this ordinance be and the same is hereby repealed, so far as the same affects this ordinance."

After this ordinance was passed, a contract was entered into by the board of health of the city with one Charles E. Herrington, as provided by the ordinance, for the removal and destruction of the garbage of the city. This agreement provides that Herrington shall not sublet the contract to any person or persons without permission of the board of health first obtained in writing. The bond was given by Mr. Herrington, as provided by the ordinance, and signed by the mayor, representing the city. The ordinance grants to the person contracting the right to name the persons who shall gather the garbage in the city, and the mayor can issue licenses only to such persons so named.

It is apparent that the ordinance of 1898 was intended to entirely change the manner of gathering the garbage in the city. Under that ordinance the mayor cannot issue a license, except upon the recommendation of the board of

health. The board of health is powerless to recommend the issuing of any other license, by reason of the contract made with Herrington, granting him the exclusive right to gather garbage. The ordinance of 1871 must therefore be treated as repealed. The rule is well settled that, where there are two acts upon the same subject, effect must be given to both, if possible, but if the two are repugnant, and the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it is intended as a substitute for the first, it will operate as a repeal of that act. *U. S.* v. *Tynen*, 11 Wall. 92. We think the respondent was not in error in holding that the ordinance of 1871 was repealed by the ordinance of 1898, and that no complaint can be entertained under the old ordinance.

The question of the validity of the ordinance of 1898 is not raised by counsel, and therefore not passed upon in the present case. We have dealt only with the question which the relator has seen fit to raise.

The writ must be denied.

The other Justices concurred.

ARNDT v. BOURKE.

1. PLEADING—DECLARATION—AMENDMENT DURING TRIAL.
   The fact that defendant, who pleaded the general issue to a declaration for personal injuries, requested plaintiff, at the commencement of the trial, to make at that time any amendments to the declaration that were contemplated, and that, notwithstanding such request, plaintiff first asked permission to amend after nearly all the witnesses were sworn, does not make the allowance of the amendment erroneous, where no claim was made by defendant that the amendment was an improper one, or that its allowance at such time entitled him to a continuance.

2. PERSONAL INJURIES—DEFECTIVE STAIRWAY—EVIDENCE.
   Testimony by various persons as to the condition at different times of a stairway down which the plaintiff fell to her injury is competent, although extending from the day of the accident to a period 10 or 12 days thereafter, where the testimony of each witness supplements that of the others, and tends to show a continuance of the defective condition.

3. SAME—FINANCIAL CIRCUMSTANCES OF PLAINTIFF.—HARMLESS ERROR.
   In an action for personal injuries, error, if any, in admitting evidence that plaintiff is without means, is harmless, where it was admitted solely in rebuttal of evidence that counsel were to have a share of any judgment recovered as their fee, and where the verdict shows that the jury did not consider it in estimating the damages.

Error to Wayne; Hosmer, J. Submitted April 5, 1899. Decided May 23, 1899.

Case by Rosalie Arndt against Michael J. Bourke and others for personal injuries. From a judgment for plaintiff, defendants bring error. Affirmed.

De Forest Paine and *Charles E. Hilton*, for appellants.

Sullivan & Mason (*J. Emmet Sullivan*, of counsel), for appellee.

MOORE, J. This was an action on the case for the recovery of damages for injuries received by the plaintiff from a fall on a stairway leading to the cellar of a building owned by the defendants, and occupied by the plaintiff, her husband and family, as their tenants. Plaintiff had a verdict for $1,000 in the court below. Defendants appeal. The defendants' plea was the general issue.

On the 28th of May the trial commenced. Counsel for the plaintiff made an opening statement to the jury of the facts he expected to prove on behalf of his client. A witness was sworn, when counsel for defendants objected to the proof being offered in evidence which counsel for plaintiff stated was plaintiff's case, for the reason that it was not competent under the declaration, and proceeded to say wherein he thought the declaration was defective. The judge said, as counsel had not demurred to the declaration, he thought the declaration good, but, if it was thought not to be good, he would allow the plaintiff on the trial to amend it. Counsel for defendants replied, if it was to be amended, he would like it amended then, as he was there to try a particular case and no other. The judge directed the trial to proceed. Eight witnesses were sworn on the part of the plaintiff, and eleven on the part of the defendants. Nearly all of these witnesses had testified, when counsel for plaintiff said he desired to amend his declaration. Counsel for defendants objected to the amendment. He was asked by the court if he was surprised. He said he was as to the amendment then proposed. A colloquy then occurred between the court and counsel, indicating that no serious objection was made to the amendment, and it was allowed to be made. Counsel made no claim that he was not prepared to meet the issue as framed, but, on the contrary, offered proof which, if believed by the jury, would be a complete defense to the case made by the plaintiff. No request was made that the case be continued to allow counsel to procure other proof. It is now said the court erred in allowing the amendment to be made.

If a declaration is defective, the question of its sufficiency should be raised by demurrer, so that the defect can be remedied before the parties have been to the expense of getting ready for the trial. Courts do not look with favor upon the practice of waiting until the trial has commenced before questioning the sufficiency of the declaration. Where this is done, the defect must very clearly appear before the objection to taking testimony will be sustained. *Jennison* v. *Haire*, 29 Mich. 210; *Van Middlesworth* v. *Van Middlesworth*, 32 Mich. 183; *Sutton* v. *Van Akin*, 51 Mich. 463. We do not feel at all certain that the original declaration was not broad enough to allow the proof offered by the plaintiff to be received, but, under the record, we do not deem it necessary to pass upon that question. The legislature has provided for the amendment of pleadings so as to allow the trial upon the merits to proceed without unnecessary delay. 3 Comp. Laws 1897, § 10268, and the many cases cited in the note thereto. The amendment allowed was a proper one. It is apparent counsel were advised, at the commencement of the trial, it would be permitted during the trial. Had they claimed they were not prepared to meet the issue as framed, the court undoubtedly, upon a proper showing, would not have compelled the trial to proceed. The action of the court in permitting the amendment was not error.

It was the claim of plaintiff that defendants undertook to put in repair a stairway leading to the basement in the building occupied by herself and her husband as tenants of the defendants, and that, after the stairway was repaired, she was assured by one of the defendants, who acted as the agent for all, that the stairway was entirely safe; but that it was constructed of such improper material that when she used it, some months thereafter, one of the steps broke through, resulting in her receiving serious injuries. Some of the assignments of error relate to the admission of testimony as to the condition of these stairs at times varying from the same day the accident oc-

curred until 10 or 12 days thereafter, upon the ground that too much time had elapsed to make the testimony competent. These stairs were in a house used by but few people. We think the testimony, one witness supplementing the testimony of the others, was all properly admitted. The testimony of the successive witnesses fairly warranted the inference that the defective conditions continued until the latest time mentioned by any of the witnesses.

It was the claim of the plaintiff that, 16 years prior to the accident, she had a hernia, caused by a childbirth, from which she did not suffer until she fell upon the stairs, when the hernia grew rapidly, and at the time of the trial it was very large. It was her claim the enlargement of the hernia was caused by the injury. Dr. McGraw was called as a witness by defendants to show that the enlargement might have been caused by subsequent childbirths (it having been shown Mrs. Arndt was the mother of four children), and that it was a common experience for such hernias to increase in size with very stout women. Objection was made to a question put to him upon the cross-examination. Under the latitude allowed in a cross-examination, the question was not objectionable.

Counsel for defendants drew out, by cross-examination, from the plaintiff and her husband, that the attorneys for the plaintiff were to have a share of any judgment which might be recovered by the plaintiff. After this testimony was drawn out, plaintiff was permitted to show that neither Mr. nor Mrs. Arndt had any property of their own. It is said this was error, as it was calculated to prejudice the jury in favor of the plaintiff against the defendants; counsel citing *Chicago, etc., R. Co.* v. *Bayfield*, 37 Mich. 214, and *Hunn* v. *Railway Co.*, 78 Mich. 529 (7 L. R. A. 500). In each of those cases the suit was brought by the representative of the estate of the deceased, who received injuries resulting in his death. Proof in those cases was received to show the needy condition of the family of the deceased, and as bearing upon the question of damages, and the court very properly said the

proof was not competent for that purpose. In this case counsel for the defendants contended the claim of plaintiff was not an honest one, but was a speculative one, and, for the purpose of sustaining their contention, put in the proof that the plaintiff was to share the verdict with her attorneys. To meet that contention, proof was introduced showing the poverty of the plaintiff and her husband, for the purpose of showing their inability to employ counsel in any other way than in the way they were employed. There is nothing in the record to show the testimony was used by counsel, court, or jury for any other purpose. In view of the amount of the verdict, it is clear the jury did not, because of it, enhance the damages of plaintiff, and, if its admission was error, we do not think it can be said to have been harmful error.

Counsel assign error upon the refusal of the court to give their requests to charge. Such of them as were proper to be given were fully and completely covered in the general charge.

The judgment is affirmed.

The other Justices concurred.

McKAY v. GARDNER.

ADVERSE POSSESSION—SUFFICIENCY OF TITLE.

Where, on the death of the owner of premises, one of the heirs, without objection from the others, takes possession under a claim of ownership, and holds the same adversely for the statutory period, a deed from him will vest a good title in the grantee.

Error to Saginaw; Wilber, J. Submitted April 18, 1899. Decided May 23, 1899.

Ejectment by McIntosh McKay against Edward Gardner and wife. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Reversed.

John F. O'Keefe, for appellant.

Lamson & Denfeld (*F. Brucker*, of counsel), for appellees.

MOORE, J. Plaintiff brought ejectment to recover 4.52 acres of land, which he claims to own as part of lot 10 on the S. W. ¼ of section 34, in township 11 N., range 4 E. Defendants claim the land is part of the W. ½ of said section 34, and they also claim that, if it is not, they are the owners of it by adverse possession. The circuit judge directed a verdict in favor of defendants upon the ground that plaintiff had shown neither record title nor title by adverse possession.

A reference to the government plat will simplify the situation. The plat was drawn from a survey made in 1822. It shows the land in dispute was a part of lot 10, and was not a part of lots 5 and 11, as platted by the government. In August, 1837, the government issued a patent to John McKenzie, of Saginaw county, Mich., of "the northeast part (number ten) of the southwest fractional quarter of section thirty-four."

It was the claim of plaintiff that John McKenzie went into possession of this land shortly after he obtained his patent, and he and those representing him, either as tenant or heir, continued in possession of the disputed tract until within seven or eight years; that plaintiff succeeded to that title by a warranty deed from John McKenzie and his wife, of Genesee county, Mich., dated March 9, 1896. The last-named John McKenzie was the nephew of the John McKenzie named in the patent from the general government. It is the claim of plaintiff that John McKenzie, the uncle, died nearly 50 years ago, leaving neither father, mother, brother, nor sister; that John

McKenzie, the nephew, furnished some money which was applied on the purchase of the land when it was bought, and that, after his uncle's death, he, without objection upon the part of the other nephews and nieces, took possession of the land, claiming to own it, and had possession of it for more than 40 years before he made the deed to plaintiff.

Testimony was introduced tending to show the truth of the above claim. It was contended by defendants the above claim was untrue, and that defendants or their predecessors had been in possession for so long they had gained title by adverse possession.

We think the judge erred in taking the case from the jury. The record does not disclose a deed from the uncle, John McKenzie, to his nephew, and in that sense it is true the plaintiff has not shown record title in himself; but if it be true, as contended by plaintiff, that the nephew went into possession of the lands, and held them adversely long enough to acquire title to them, he could convey that title to plaintiff by deed, and the plaintiff would have a good title thereto, unless the defendants had held possession of the premises long enough to acquire title by adverse possession. It was a disputed question who had been in possession of the premises at different times, and the length of time the several parties were in possession. These questions should have been submitted to the jury under proper instructions.

Judgment reversed, and new trial ordered.

The other Justices concurred.

KEWEENAW ASSOCIATION *v.* O'NIEL.

1. HIGHWAYS—DONATION OF RIGHT OF WAY—CONDITIONS.
   Permission to road commissioners to open a highway across timber land provided they make payment for the timber cut by them, the amount of such timber to be estimated by the owner after the line of the road is staked out by the commissioners, gives them no authority to cut trees on the proposed right of way before the owner has had an opportunity to make his estimate.

2. ACCESSION—CONFUSION OF GOODS.
   The owner of logs which another manufactures into lumber, and in good faith mingles with his property of like kind and equal value, does not acquire title to the whole, but can only claim a proportionate share of the lumber.

Error to Gogebic; Haire, J. Submitted April 4, 1899. Decided May 23, 1899.

Replevin by the Keweenaw Association, Limited, against Charles O'Niel. From a judgment for defendant, plaintiff brings error. Reversed.

Ball & Ball, for appellant.

Button & Norris, for appellee.

HOOKER, J. The plaintiff brought replevin for a quantity of lumber which defendant caused to be manufactured from timber cut from land owned by the plaintiff. By way of defense the defendant asserted that some of this lumber was cut from trees that he obtained from another locality, and the remainder was the product of two trees that were cut by road commissioners in constructing a highway upon the premises of the plaintiff, and that the same were taken by him under permission given him by the road commissioners. There was evidence tending to prove the first of these claims, and the jury seem to have

found it to be true. The second was proved by the undisputed evidence, and the court directed the jury to find for the defendant as to the two trees. Upon a general verdict and judgment for the defendant, the plaintiff has brought error, and contends that the defendant acquired no title to the two trees.

The defendant proved by one Sherman that he (Sherman) was the manager of J. M. Longyear's land office at Marquette; that Mr. Longyear was the land agent of the plaintiff, and the office mentioned was the office of the plaintiff; and that, in the ordinary course of business, correspondence relative to lands belonging to the plaintiff passed through the hands of the witness. The following letters were thereupon read in evidence:

"J. M. LONGYEAR, AGENT,
"THE KEWEENAW ASSOCIATION (LIMITED).
"MARQUETTE, MICH., May 31, 1895.
"CONRAD CARLSON, ESQ., (C. T.)
"Clerk Board of County Road Commissioners,
"Bessemer, Mich.

"*Dear Sir:* The question of granting the right of way asked for by your board, as per your letter of the 27th inst., has been referred to the owners of the lands touched by the highway in question, and I will advise you in due course as may be directed. Permit me to inquire upon what grounds the board of county road commissioners have assumed to act in the matter of opening a local road lying wholly within the boundaries of Ironwood township. Why is it that the township authorities are not moving in the matter of this highway, instead of the county board?

"Yours truly,
"Dictated S. J. M. LONGYEAR, Agent.
"M."

"J. M. LONGYEAR, AGENT,
"THE KEWEENAW ASSOCIATION (LIMITED).
"MARQUETTE, MICH., July 2, 1895.
"CLERK OF GOGEBIC COUNTY, (C. T.)
"Bessemer, Mich.

"*Dear Sir:* Referring to your application of the 27th of May, on behalf of the board of county road commissioners, for the right of way for a highway in towns

47–47 and 48–47, same has been referred to the owners of the following described lands; and I am directed to advise you that the right of way will be donated, providing the board will provide and make payment for the value of timber to be cut in opening the right of way. The lands herein referred to are the entire section 3, and the N. E. qr. section 9, 47–47, and the S. E. qr. section 33, 48–47, from the south line northerly to the main line of the Duluth, South Shore & Atlantic Ry. Will you please have me advised as to when the board will have the line of the road staked out, so that we can go over it and estimate the amount of timber that will be cut, and also send me map or other description that will give me the width to be cut on our land? We would prefer to estimate the timber after the line is actually staked out on the ground, if practicable, as in that way we will have the correct estimate of the timber.

"Yours truly,

"Dictated S. J. M. LONGYEAR, Agent.

"M."

The plaintiff contends that this testimony does not show that the road commissioners were given authority to cut the two trees standing upon the proposed right of way; and, if the letters were to be so construed, it does not appear that Longyear authorized the writing of said letters, or that he had authority to do so if he did. We think the plaintiff is justified in its contention. The letters indicate a willingness to permit the construction of the highway. They give no authority to do so, or to cut timber, except upon the condition stated therein. They contemplated that the plaintiff should have an opportunity to estimate the timber before it was cut, and did not authorize the cutting of timber until that condition was complied with. It follows that the judgment must be reversed.

There is another question raised by the record, which may arise upon another trial. The logs from the two trees, which, upon this record, appear to be the property of the plaintiff, were commingled with the logs from other trees, which the jury must have found to have been cut from lands not belonging to the plaintiff. It is contended,

however, that this commingling of the logs resulted in such a confusion of property as to give the plaintiff the title to the whole. The doctrine of accession through confusion of goods is old. *Stephenson* v. *Little*, 10 Mich. 433; *Wetherbee* v. *Green*, 22 Mich. 317 (7 Am. Rep. 653); *Fowler* v. *Hoffman*, 31 Mich. 225. But it involves a forfeiture, and is never applied where it can be consistently avoided. In *Wetherbee* v. *Green* it is said:

"But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own, or that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own, or be obliged to take and pay for his neighbor's, as he would have been under the civil law. Morton, J., in *Ryder* v. *Hathaway*, 21 Pick. 305. In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the accident or inadvertence, unless a just measure of redress to the other party renders it inevitable. Story, Bailm. § 40; Sedg. Dam. 483."

In such cases, as in those where the commingling is lawful, as by agreement, the rule does not apply, and the parties become tenants in common of the whole. 6 Am. & Eng. Enc. Law (2d Ed.), 593, and cases cited. There is no reason why the same rule should not apply in any case where the goods are identical in quality, and of equal value. Id. 597. The law will not deprive a wrong-doer of his property, if it can be justly avoided; and in the case of *Mittenthal* v. *Heigel*, (Tex. Civ. App.) 31 S. W. 87, it is said that, when mortgaged property is commingled with property of like kind and equal value, the more equitable doctrine of giving to each party his due proportion will govern, rather than the harsher one of holding the whole subject to the mortgage. See, also, *D. M. Osborne &*

Co. v. *Cargill Elevator Co.*, 62 Minn. 400; *Armstrong* v. *McAlpin*, 18 Ohio St. 184.

The record discloses no bad faith, and there is nothing to indicate a difference in quality or value of the lumber of the same kind. If, therefore, the plaintiff was entitled to the product of the two trees, it should have contented itself with a proportionate share of the lumber.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

McLAIN *v.* HOWALD.

1. WILLS—CONSTRUCTION.
   A testamentary gift, to take effect upon the termination of a life estate in the widow, of a specified sum to "each of the children" of a named daughter, includes not only the children in being at the death of the testator, but those born subsequently during the lifetime of the widow.
2. SAME—CHILD EN VENTRE.
   A child *en ventre sa mere* at the termination of the life-estate is also entitled to take under the will.

Appeal from Hillsdale; Chester, J. Submitted April 5, 1899. Decided May 23, 1899.

Bill by Ora S. McLain and others, infants, by Julian A. Palmer, their next friend, against John Howald, administrator *de bonis non*, with the will annexed, of the estate of Samuel Helsel, deceased, and Jacob Helsel, Elias Helsel, and Edwin Spitler, residuary legatees, for a construction of said will. From a decree dismissing the bill, complainants appeal. Reversed.

W. D. Fast, for complainants.

Spencer D. Bishopp, for defendants.

HOOKER, J. Samuel Helsel died leaving a will, as follows:

"That I, Samuel Helsel, of Amboy, Hillsdale Co., Michigan, being of sound mind and aged seventy-two years, do hereby make and declare this to be my last will and testament:

"*First.* In the event of my death, I give and bequeath to my wife during her natural life, or during her widowhood, all my real estate, wherever situated, to use, occupy, and have all of the benefit to be derived therefrom; also I hereby give or devise to my wife two horses and harness and wagon, and all farming tools, two cows, all household goods, to be stipulated same as the real estate; my wife to keep the farm and buildings in good repair and pay all taxes during her occupancy, as above stipulated.

"In the event of the death of my wife, or her remarrying, I hereby direct that my property shall be disposed of as follows, to wit:

"To my son Josiah's children, I hereby give or bequeath the sum of one hundred dollars.

"To my daughter Rebecca, I give one hundred dollars.

"To my daughter Elizabeth, I give one hundred dollars, to be divided between her two children equally.

"To my son Samuel Helsel's child, I give fifty dollars (child's name Elizabeth).

"To my daughter Catherine's two children, I give one hundred and fifty dollars each.

"To my daughter Mary Ann, I give to each of her children one hundred dollars.

"To my sons Elias and Jacob and to Edwin Spitler, I hereby give all the remainder of my estate, to be divided equally between them, share and share alike; and I hereby direct that all personal estate that I may die possessed of shall be disposed of and held until the event of the death or remarrying of my wife, and then divided as above stipulated, excepting that already mentioned and arranged for above in this will; the farm to be well taken care of, and no timber used or cut except what may be necessary for the use thereof, in keeping in repair."

Mary Ann Helsel had six children. Two were born before the testator's death, and these have been paid $100 each. Three were born after the testator's death, and before the death of the testator's widow, the life tenant, and one was born a few days after her death. The last

four claim to be entitled to the sum of $100 each, under the clause contained in the will, *i. e.*, "to my daughter Mary Ann, I give to each of her children one hundred dollars;" and the bill is filed by them for a construction of the will.

It is contended that the intention that each child of Mary Ann who was then in existence, or who might be in existence before the time fixed for distribution, should receive $100, is fairly deducible from the will. A cogent argument in support of this proposition is the following, taken from the brief of counsel:

"Now, the question is, Did Mr. Helsel intend that the children who might be born after his death to Mary Ann, and before the period of distribution, should take, under his will, $100 each? We answer, 'Yes,' because he very clearly limited and designated the legatees in all of the preceding legacies, except the one to Josiah's children, to whom he gave $100. In all the other bequests he absolutely limited the gift to the number designated and the child named. He went so far as to mention the name of the child of his son Samuel Helsel. And from this we conclude that he intended all of the children of Mary Ann in being at the period of distribution should take under this clause, in view of the fact that he had postponed the time of enjoyment of the legacies till the event of the remarrying or death of his widow. * * * Edward L. McLain was born in the same month the life tenant died. In law, a child is considered born, for all beneficial purposes, while in the mother's womb. * * * Therefore he takes as well as the others, under this clause."

While it cannot be disputed that it is the policy of the law to treat estates and rights in property as vested, when practicable (see *Doe* v. *Considine*, 6 Wall. 458), there are cases where such rights must give way in favor of other persons. "Thus, where a gift to a class is to take effect after the testator's death, the estate given will be cut down by the birth of others who come within the description before the period or event upon which the gift is to take effect or the distribution is to be made; such will be included as within the probable intention of the

testator." In *McArthur* v. *Scott*, 113 U. S. 340, a gift to grandchildren was held to include any grandchild of the testator who might be born after the testator's death, and before the time of distribution fixed by the will. See, also, *Doe* v. *Considine*, 6 Wall. 458, where it is held that although the estate be vested under the devise, to take effect in enjoyment at a future period, the estate vests in persons as they come *in esse*, subject to opening and letting in others as they are born afterwards. In the case of *Hall* v. *Hall*, 123 Mass. 124, it was said:

"It is a testamentary gift to a class of persons, which is made by the testator to take effect at a period beyond the time of his death; and the general rule applies that those who come within the description before the period or event upon which the gift is to take effect or the distribution is to be made will be included as within the probable intention of the testator." *Fosdick* v. *Fosdick*, 6 Allen, 41; *Worcester* v. *Worcester*, 101 Mass. 128; *Hatfield* v. *Sohier*, 114 Mass. 48.

In the case quoted from, the court were of the opinion that the grandchildren took contingent interests, which did not immediately vest; but, as we have seen from the case of *Doe* v. *Considine*, the same result would be reached if it were otherwise.

In *Worcester* v. *Worcester*, *supra*, it was said:

"When it [a testamentary gift] is postponed beyond the time of his [the testator's] death, then those who come within the description before the period or event upon which the gift is to take effect or the distribution is to be made will ordinarily be included as within the probable intention of the testator."

There is a class of cases which hold that, when a construction of the will that will let in children who are born after the death of the testator has the effect to defer the distribution of the estate, it should not be indulged, and in such cases those children will not be considered within the testator's intention. *Ringrose* v. *Bramham*, 2 Cox, Eq. Cas. 384, is such a case, and children born after the testator's death were excluded because, inasmuch

as each additional child increased the amount to be taken from the estate under the provision in question, the distribution of the testator's personal estate would have to be postponed until the amount of such legacies could be so ascertained. That case distinguished the case of *Gilmore* v. *Severn*, 1 Brown, Ch. 582, where the amount of the fund was fixed, and was not dependent upon the number of beneficiaries. *Storrs* v. *Benbow*, 2 Mylne & K. 46, supports this doctrine; also, *Butler* v. *Lowe*, 10 Sim. 322.

But in all of these cases the birth of the claimant occurred after the period fixed for distribution, so we need not conclude from them that the death of the testator necessarily determines the rights of the children. If the right to have the property distributed at once existed, such would be the rule; but, if such right was definitely and certainly fixed by a subsequent date or contingency, the rule might be different, because, until that time arrived, the effect of letting after-born children in would not be to postpone the date of distribution. Hence such cases are not within the rule, because not within the reason of the rule. Accordingly, we have cases which, at first blush, might seem at variance with this principle, but which are not, because of the deferred time for distribution. In *Mann* v. *Thompson*, Kay, 645, the time was indefinite. The case of *Myers* v. *Myers*, 2 McCord, Eq. 214, contains a discussion of this distinction. In short, until the time for distribution arrives, unborn children are in the same position, when the gross amount of the legacies depends upon the number of legatees, as they are where a gross sum is bequeathed, and the aliquot parts are to depend upon an indefinite number of legatees. The right of the unborn to a portion of such a fund is recognized in *Knorr* v. *Millard*, 57 Mich. 268. We are therefore of the opinion that the court erred in dismissing the complainants' bill, as we think the three children who were born before their grandmother died were entitled to take under the will.

Can the same be said of the fourth, who was born after

the death of the widow? She died March 4th, and the child Edward was born before April 1st of the same year. For all purposes of construction, a child *en ventre sa mere* is considered as a child *in esse*, if it will be for its benefit to be so considered. This rule was established in *Doe* v. *Clarke*, 2 H. Bl. 399. In *Clarke* v. *Blake*, 2 Ves. Jr. 673, it was held that, under a devise to all of the children of A. except B., a posthumous child was entitled to take. See, also, *Pierson* v. *Garnet*, 2 Brown, Ch. 47; *Cooper* v. *Forbes*, Id. 63; *Freemantle* v. *Freemantle*, 1 Cox, Eq. Cas. 248. "The child *en ventre* is supposed to be actually born at the period of distribution." See, also, *Mogg* v. *Mogg*, 1 Mer. 654; *Rawlins* v. *Rawlins*, 2 Cox, Eq. Cas. 425. 10 Am. & Eng. Enc. Law, 624, treats such children as *in esse*; citing numerous authorities in support of the text. This is in accord with our own statutes (2 How. Stat. §§ 5546, 5784, 5809, 5847). *Chambers* v. *Shaw*, 52 Mich. 21; *Catholic Benefit Ass'n* v. *Firnane*, 50 Mich. 82. It may be that these statutes do not in terms cover this case, but they are in harmony with the settled rule when they declare that "posthumous children are considered as living at the death of their parents." Section 5784. And it is held that such children may sue for an injury or loss sustained while *en ventre sa mere*. 27 Am. & Eng. Enc. Law, 420, and note. We feel justified, by these authorities, in saying that Edward McLain, being *in esse*, though *en ventre sa mere*, at the time of the death of the life tenant, was entitled to take under the will with his older brothers and sisters.

It follows that the decree must be reversed, and a decree entered in this court in accordance with the prayer of the bill; costs of both courts to be paid out of the estate.

The other Justices concurred.

HOSEY *v.* IONIA CIRCUIT JUDGE.

1. APPEALS FROM PROBATE COURT—FILING OF RECORD—DELAY—DISMISSAL.

   3 How. Stat. § 6782, requiring persons appealing from probate court to file in the circuit court, within 30 days, proof of service on the adverse party of notice of the appeal according to the order of the probate court, and providing that, upon failure to do so, the order appealed from shall stand as though no appeal had been taken, unless the circuit court shall, upon application made within the first 10 days of the succeeding term, reinstate such appeal on a showing that appellant was prevented from perfecting the same by circumstances not under his control,—is mandatory, and, where appellant fails to comply with its provisions, the circuit judge is bound, upon motion, to dismiss the appeal.

2. SAME—NOTICE—SUFFICIENCY OF SERVICE.

   Where an order allowing an appeal from probate court requires notice to be given to certain persons "by delivering to them a certified copy of said order," personal service upon each is necessary, and service by mail is insufficient.

Mandamus by Julia Hosey and others to compel Frank D. M. Davis, circuit judge of Ionia county, to dismiss an appeal from probate court. Submitted May 2, 1899. Writ granted May 23, 1899.

V. H. & H. H. Smith and *Allen B. Morse*, for relators.

Chaddock & Scully (*George E. Nichols*, of counsel), for respondent.

LONG, J. Motion was made in the Ionia circuit court to dismiss an appeal from the allowance of a will by the probate court of that county, on the ground that no personal service was made on James Hosey, one of the heirs at law. It appears that the probate court allowed the appeal, and ordered notice to be given to Frank, Nicholas,

James, and Julia Hosey "by delivering to them a certified copy of this order * * * within 30 days from the date of the order." This notice was personally served on all the parties except James Hosey. The claim of appeal was filed March 25, 1898. On November 7th a motion was made to dismiss the appeal, on the ground, among others, that no sufficient service of notice was made on James. On November 12th proof was filed that the order was sent to James by mail. This proof consists of the affidavit of Elizabeth Abbott, which recites that on April 5, 1898, she "served a true and compared copy of the annexed notice and order allowing appeal upon James Hosey, * * * by depositing the same in the post-office at the city of Ionia, Michigan, plainly addressed to 'James Hosey, St. Joseph, Michigan,'—that being the last place of residence of said James Hosey,—and with full legal postage prepaid." The court below refused to dismiss the appeal, but made an order granting the parties 30 days' additional time to make the proper personal service on James Hosey. *Mandamus* is asked to compel the circuit judge to vacate this order and dismiss the appeal.

The service made was not in compliance with the order of the probate court, which required personal service upon all the parties named. The statute (3 How. Stat. § 6782) requires that:

"The person appealing shall procure and file in the circuit court to which the appeal is taken, within thirty days after such appeal is taken, a certified copy of the record or proceedings appealed from, of the notice of and reasons for such appeal, and of the bond on appeal filed in the probate court, and of the order of the probate court directing notice to the adverse party, together with evidence that notice has been given to the adverse party according to the order of the probate court. And in case the record herein required to be filed in the circuit court shall not be filed in such court within the time herein directed, such appeal shall cease to be of effect, and the order or decree so appealed from shall stand as though such appeal had not been taken: * * * *Provided*, that the circuit

court to which the appeal is taken shall have power, upon application within the first ten days of the term of court next succeeding the expiration of the said thirty days for filing said certified copy, to reinstate said appeal, when the party making the appeal has been prevented from perfecting the same by circumstances not under his control."

There was no application to reinstate the appeal. Two terms of court had passed from the time the order for the appeal was made before motion was made to dismiss, and during that time no personal service was made on James Hosey. The statute requiring notice to the adverse party is mandatory, and, until the party is given such notice, the circuit court has no jurisdiction over the parties to the record. *Merriman* v. *Jackson Circuit Judge*, 95 Mich. 277. The order made by the probate court required personal service. The notice by mail was not sufficient notice. In *McCaslin* v. *Camp*, 26 Mich. 392, it was said:

"There is no rule of court authorizing service by mail of any papers in cases or upon persons not already before the court, and subject to its complete jurisdiction. There can be no mail service on parties or attorneys who have not appeared generally in the cause before the circuit court, and are not already in court."

The statute directs that the probate court shall make an order directing the notice to the adverse party, but it also requires that proof of the same shall be filed in the circuit court within 30 days after the appeal is taken.

A very different question would have arisen had an application been made to the circuit court for leave to perfect the appeal, and a showing made that the party making it had been prevented from perfecting it by circumstances not under his control; but no claim of that kind is made.

The writ must issue as prayed.

The other Justices concurred.

120 283
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PEOPLE v. JONES.

1. FIXTURES—MALICIOUS INJURY—INFORMATION.
   An engine rested on a brick foundation, and was inclosed in a frame building in such manner that it could not be removed without taking out a side of the building. In deeds and mortgages it had been treated as a part of the realty. The only testimony tending to show an intention to treat it as personalty was that of the owner, who stated that he "had in mind" the removal of the engine. *Held*, that an information charging an injury to the engine as a malicious injury to personal property was bad.

2. SAME—SEVERANCE—INTENT.
   The "intent" which is of controlling influence in determining whether a fixture is or is not a part of the realty must relate either to the time of annexation or to some actual or constructive severance.

Error to Berrien; Coolidge, J. Submitted May 3, 1899. Decided May 27, 1899.

Lorenzo Jones and Andrew Goines were convicted of willful and malicious injury to personal property, and sentenced to nine months' imprisonment in the state house of correction at Ionia. Reversed, and respondents discharged.

Hardin W. Davis (*O'Hara & O'Hara*, of counsel), for appellants.

G. M. Valentine, Prosecuting Attorney, for the people.

MONTGOMERY, J. The respondents were informed against under section 9167, 2 How. Stat., for willfully and maliciously injuring and destroying a stationary engine, claimed to be the personal property of Seeley McCord. The only question raised by the brief of respondents' counsel is whether, under the evidence, the engine in question was personal or real property.

The engine in question rests on a brick foundation, is inclosed in a frame building, and could not be removed except by taking out one side of the building. There was unity of title as to the land and the engine. It has passed by deed of the land, and has been mortgaged as a part of the realty. The only testimony tending in any way to show an intention to treat the engine as personal property is the statement of the owner, as a witness, that he had in mind the removal of the engine. This does not show that he had formed the purpose to do so, much less does it show that, when the engine was annexed, he had any such purpose, or any intention of treating it as personalty. It is clear that the property described in the information was real estate. It is true the intent of the owner is often of controlling influence in determining whether a fixture is or is not a part of the real estate; but the intention must relate either to the time of annexation or to some actual or constructive severance.

We need not discuss the question whether malicious injury to real property is punishable at common law, as the information charges malicious injury to personal property, and cannot be supported by evidence of a different offense.

The circuit judge should have directed a verdict. Judgment reversed, and respondents discharged.

The other Justices concurred.

STEVENS v. MCLACHLAN.[1]

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1. TRADING PARTNERSHIP—NEGOTIABLE PAPER—ISSUANCE BY INDIVIDUAL PARTNER.
   A member of a trading partnership has implied power to borrow money for the use of the firm, and to issue firm paper therefor.

2. SAME—PRESUMPTIONS.
   One who loans money to a member of a trading partnership, on firm paper, is entitled to assume that the money is borrowed for the use of the firm.

3. SAME—DEFENSE TO NOTE—MISAPPLICATION OF PROCEEDS.
   It is no defense to a trading firm's note, taken in good faith, for value, and before maturity, that the partner who issued it applied the money obtained thereby to his own use.

4. SAME—PARTNER AS PAYEE—NOTICE.
   The fact that partnership paper is made payable to a member of the firm is no evidence that it is not a partnership transaction.

5. SAME—ACTION ON NOTE—BURDEN OF PROOF.
   In an action upon notes or drafts issued by a trading partnership, the burden of proof is upon the defendants to show any fraud or lack of authority in the issue of the paper, or that it was not given for partnership purposes.

6. SAME.
   When defendants have made such a showing, plaintiff then has the burden of proving that he took the paper in good faith and for a valuable consideration.

7. SAME—NOTICE OF DEFENSE—CIRCUMSTANCES—SUFFICIENCY.
   Circumstances sufficient merely to put a cautious man on inquiry are insufficient to charge one taking a partnership note from one of the partners with knowledge of the fact that it was given in fraud of the rights of the other partners, but, to have that effect, the circumstances must be such as to show actual bad faith on his part.

8. SAME.
   Bad faith on the part of one seeking to enforce against a

[1] Rehearing denied July 11, 1899.

firm a note given by one of the partners may be established by evidence that he took the note with actual knowledge that it was given for other than partnership purposes.

9. SAME.

The fact that plaintiff had loaned money in other transactions individually to the partner issuing the paper is not evidence to charge him with bad faith; nor does it tend to show a misapplication of the money obtained on the firm note.

10. SAME—RENEWALS—EFFECT.

The renewal of the notes of a trading partnership after the holder has been informed by one of the partners that the notes were issued without authority will not impair the holder's right to recover from the firm.

11. NEW TRIAL—EVIDENCE.

The fact that it was impossible to get a copy of the evidence given upon a former trial in time to read from it material evidence upon a second trial is not ground for a new trial, where the same stenographer took the testimony upon both trials, and could have read the portions of evidence desired.

Error to Wayne; Lillibridge, J. Submitted January 4, 1899. Decided June 5, 1899.

Assumpsit by Nathan H. Stevens against Duncan A. McLachlan, James Gourlay, and others, upon negotiable paper. From a judgment for plaintiff on verdict directed by the court, defendants McLachlan and Gourlay bring error. Affirmed.

The declaration in this case is upon the common counts in *assumpsit*, with notice that the suit is based upon certain promissory notes and drafts, copies of which are attached to the declaration. The first was a draft of $1,641.67, dated Detroit, October 5, 1896, payable four months after date, signed, "A. R. Linn, Broker," payable to the order of himself, and addressed to D. A. McLachlan & Co., 34 Buhl Block, Detroit, Mich. It was indorsed: "A. R. Linn, Broker. James Gourlay." Written across its face was the following: "Accepted October 5, 1896. D. A. McLachlan & Co." A note for $965, dated October 21, 1896, signed, "D. A. McLachlan & Co.," indorsed,

"A. R. Linn, Broker. James Gourlay." A like note for $1,500, dated November 11, 1896. A note for $645, dated October 30, 1896. A note dated November 2, 1896, for $395. A note for $975, dated November 5, 1896. All these notes were signed the same, and indorsed the same, as the note first above described. Also, a draft for $635.17, dated Detroit, December 2, 1896, drawn in the same manner, with the same indorsement, and accepted in the same manner, as the draft above mentioned. Defendant McLachlan gave notice with his plea —

(1) That the notes were neither signed nor indorsed by him in his individual or any other capacity, nor was the signing or indorsing authorized by him.

(2) That they were negotiated without his consent or authority, and without any consideration received by him, or paid to the firm of D. A. McLachlan & Co.

(3) That neither he nor the firm of D. A. McLachlan & Co. received any moneys or any benefit by reason of the same.

(4) That the firm name of D. A. McLachlan & Co. upon said notes was unauthorized and a fraud upon him.

(5) That plaintiff, at the time of taking said notes, knew that they did not appertain to the business of D. A. McLachlan & Co., and were not given for the use of said firm.

(6) That plaintiff was interested with said Linn in other business enterprises, and that the proceeds of said notes were used in such enterprises.

(7) That he is not liable thereon, because of the fraud of others, of which fraud plaintiff is chargeable with knowledge.

Defendant Gourlay gave notice that he would show that the notes were used by Linn in his own business and in the business of the Anderson Safety Elevator Company, and not in the business of D. A. McLachlan & Co., sugar dealers, and that plaintiff had notice thereof.

The court directed a verdict for the plaintiff.

On March 16, 1896, McLachlan and Linn entered into a copartnership to do business in teas, sugars, molasses, etc., under the firm name of D. A. McLachlan & Co. McLachlan agreed to furnish $5,000 in cash, and such

other assistance as he might deem necessary. Linn was intrusted with the entire management of the business; the agreement providing that "A. R. Linn shall buy and sell merchandise for the benefit of said firm, using all former names as indorsers when he can obtain the same." Profits were to be divided equally between them. The agreement was to continue until McLachlan should elect to alter or discontinue it. The business was carried on for some time, and profits made and divided. It finally became unprofitable. For some time prior to the date of this agreement, Linn had been engaged in business, had become involved, and did business under the name of "A. R. Linn, Broker," and "A. R. Linn, Agent." Gourlay had been one of his indorsers. Mr. Stevens resided in Chatham, Ontario. Mr. Linn applied to him for a loan of money for the firm of D. A. McLachlan & Co., stating the purpose for which it was to be used. One Mattullath was also employed by Linn for the firm, and he negotiated some of these loans. The notes in suit were renewals of other notes. McLachlan insists that he knew nothing of the existence of these notes until October, 1896. He claims that the moneys received were neither borrowed nor used for the purposes of his firm, that the firm was an accommodation maker, and that Linn had no authority to sign them. He also makes the further defense that the firm, being an accommodation maker on the original notes, was discharged by the renewal of the notes extending the time. Any further necessary statement of facts will be found stated in the opinion.

Gartner & Stricker, for appellant McLachlan.

Harlow P. Davock, for appellant Gourlay.

J. H. Cole (*Geer & Williams*, of counsel), for appellee.

GRANT, C. J. (*after stating the facts*). The rules of law applicable to the commercial paper here in controversy are well established. As briefly as I am able to state them, they are as follows:

1. D. A. McLachlan & Co. being a trading or commercial partnership, each member of the firm, and especially the one intrusted with the transaction of its business, was authorized to bind his partner in all transactions pertaining to the business of the firm. Among these was the right to borrow money for the firm, and to issue notes therefor, or to draw drafts for the same purpose. The lender was entitled to assume that the money was borrowed for the use of the firm. *Winship* v. *Bank*, 5 Pet. 529; *Stimson* v. *Whitney*, 130 Mass. 591; *Kimbro* v. *Bullitt*, 22 How. 256; *Dowling* v. *Bank*, 145 U. S. 512; *Smith* v. *Collins*, 115 Mass. 388; *Sherwood* v. *Snow*, 46 Iowa, 481 (26 Am. Rep. 155); 4 Am. & Eng. Enc. Law (2d Ed.), 176; *Feurt* v. *Brown*, 23 Mo. App. 332.

2. If plaintiff took the paper in good faith, for value, before maturity, and without knowledge, either actual or constructive, that it was tainted with fraud, his title thereto is perfect. In such case it is no defense that the money was misapplied by one of the partners. *Nichols* v. *Sober*, 38 Mich. 678; *Fuller* v. *Percival*, 126 Mass. 381; *Atlas Nat. Bank* v. *Savery*, 127 Mass. 75 (34 Am. Rep. 345); *First Nat. Bank* v. *Morgan*, 73 N. Y. 593; *Real-Estate Investment Co.* v. *Smith*, 162 Pa. St. 441; *Phillips* v. *Stanzell*, (Tex. Civ. App.) 28 S. W. 900; *Whitaker* v. *Brown*, 16 Wend. 505; *Mechanics' Bank* v. *Foster*, 44 Barb. 87; *Gale* v. *Miller*, Id. 420.

3. The taker of a promissory note or bill of exchange may lawfully presume that it is a partnership transaction. *Schwanck* v. *Davis*, 25 Neb. 196; *Doty* v. *Bates*, 11 Johns. 544; *Whitaker* v. *Brown*, 16 Wend. 505; *Haldeman* v. *Bank*, 28 Pa. St. 440 (70 Am. Dec. 142); *Littell* v. *Fitch*, 11 Mich. 525; *Carrier* v. *Cameron*, 31 Mich. 373 (18 Am. Rep. 192).

4. The fact that such paper is payable to a member of the firm is no evidence that it is not a partnership transaction. *Ihmsen* v. *Negley*, 25 Pa. St. 297; *Haldeman* v. *Bank*, 28 Pa. St. 440 (70 Am. Dec. 142); *Feurt* v. *Brown*, 23 Mo. App. 332.

5. The *onus probandi* was upon the defendant to show any fraud, lack of authority, or that the paper was not given for partnership purposes. *Littell* v. *Fitch*, 11 Mich. 525; *Carrier* v. *Cameron*, 31 Mich. 373 (18 Am. Rep. 192); *Doty* v. *Bates*, 11 Johns. 544; *Whitaker* v. *Brown*, 16 Wend. 505; *Sherwood* v. *Snow*, 46 Iowa, 481 (26 Am. Rep. 155); *Phillips* v. *Stanzell*, (Tex. Civ. App.) 28 S. W. 900.

6. When such fraud is shown, the *onus probandi* then shifts to the plaintiff to show that he took the paper in good faith and for a valuable consideration. *Vosburgh* v. *Diefendorf*, 119 N. Y. 357 (16 Am. St. Rep. 836), and authorities there cited.

7. Proof of circumstances which would be sufficient to put a prudent man upon inquiry is not sufficient to defeat recovery. The circumstances must be such as to show *mala fides* on the part of the holder. This may be shown by evidence of actual knowledge of the purposes for which the paper was given. *Nichols* v. *Sober*, 38 Mich. 678; *New York Iron Mine* v. *Citizens' Bank*, 44 Mich. 344; *Miller* v. *Finley*, 26 Mich. 249 (12 Am. Rep. 306); *Borden* v. *Clark*, 26 Mich. 410; *Chapman* v. *Remington*, 80 Mich. 552; *Goodrich* v. *McDonald*, 77 Mich. 486; *Atlas Nat. Bank* v. *Savery*, 127 Mass. 75 (34 Am. Rep. 345); *Goodman* v. *Harvey*, 4 Adol. & E. 870.

8. If the plaintiff was a *bona fide* holder of the original paper, his right to recover is not defeated by renewals, and McLachlan was not released thereby. *Tilford* v. *Ramsey*, 37 Mo. 563; *Preston Nat. Bank* v. *Pierson*, 112 Mich. 435; *Wilson* v. *Richards*, 28 Minn. 337; *Hopkins* v. *Boyd*, 11 Md. 107.

We have cited only a few of the authorities referred to in the briefs of counsel. Mr. McLachlan saw fit to enter into a trading partnership with Mr. Linn, which expressly provided for the borrowing of money, the making of promissory notes, and the procuring of indorsements. Mr. Linn, both by express contract and by implication, had the power to borrow the money and make the paper in contro-

versy. If there is any competent evidence in the record that the money obtained from plaintiff was not used in the partnership business, it has escaped my attention. Mr. Linn testified that it was. The only testimony to the contrary is that of Mr. Gourlay on redirect examination, who testified that Mr. Linn, after the controversy over these notes had arisen, said to him that "he put fifteen thousand or twenty thousand dollars into the elevator scheme." This testimony might be legitimate to impeach Mr. Linn if the proper foundation had been laid, but it is not affirmative evidence of a diversion of the money obtained upon these notes from the business of McLachlan & Co. If, however, there were such evidence, the record is barren of testimony tending to show that plaintiff was guilty of any *mala fides* in the transaction, or that he had any knowledge that the moneys obtained from him were to be, or ever were, diverted from the partnership. Linn informed him of the partnership, told him what he wanted the moneys for, and plaintiff took the paper in full reliance upon Linn's representations. In some cases he advanced the money; in others he indorsed the paper, and the money was obtained at the bank. When the notes became due, he paid them. The mere fact that he was engaged in other transactions, and had indorsed other paper, and had loaned other moneys to Linn and Mattullath, is no evidence of bad faith, and does not tend to show that any of these moneys were appropriated for other purposes. Upon the record, the court properly directed a verdict for the plaintiff.

Some of these notes were renewed after McLachlan had notified plaintiff by letter, repudiating his liability upon them, and stating that Linn had no authority to make them. The partnership at the time was in existence, and, under the authorities above cited, McLachlan was not relieved by the mere renewals. Having power to make them, he had also the power to renew them while the partnership lasted.

The only remaining question is whether the court erred in the exclusion of testimony. The defendants offered in

evidence other notes of similar character to these, which are also in suit, and also certain letters which passed between the parties. There is nothing in them which could be construed to show notice to plaintiff of any of the defenses set up, or any knowledge thereof on his part. They were properly excluded.

Defendants made a motion for a new trial upon the ground that they had been deprived of certain evidence given by plaintiff upon a former trial. This evidence consisted of testimony which had been taken between the same parties in a suit tried just before the trial of the present case, which lasted nearly a week. The same attorneys tried that case; the same stenographer took the testimony. This testimony was subsequently written out, and the claim is now made that it was impossible for the defendants to have had a copy of it for use upon the present trial, and that plaintiff gave testimony upon the other trial material to the defense in this case. If this were so, the stenographer could easily have had his attention called to it, and the testimony read over, during the progress of this trial. We think the court properly refused to grant a new trial upon this showing.

Judgment affirmed.

MONTGOMERY and LONG, JJ., concurred with GRANT, C. J. HOOKER and MOORE, JJ., did not sit.

STOCKMAN v. MICHELL.

REFERENCE—ACCOUNTS—SUBMISSION OF ISSUES.

The appointment of auditors under 2 How. Stat. § 7386, in cases involving the examination of accounts or of vouchers, is discretionary with the court; but, where such auditors are appointed, no issue should be submitted to the jury until after the account is stated.

Error to Wayne; Donovan, J. Submitted January 25, 1899. Decided June 5, 1899.

Assumpsit by Gustavus Stockman against Carl H. Michell for services rendered. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Sloman & Groesbeck (*Benjamin Jacobson*, of counsel), for appellant.

Henry A. Haigh (*F. L. Brooke*, of counsel), for appellee.

MONTGOMERY, J. This case has been before the court, and is reported in 109 Mich. 348. On the second trial the plaintiff was sworn as a witness, and his counsel attempted to prove by him what the profits of the business of the defendant were during the period of plaintiff's employment. The court refused to permit the testimony, on the ground that this court had, in its previous decision, indicated that the case was a proper one for reference to an auditor to state the account, but offered to permit the plaintiff to take the verdict of the jury as to whether the contract declared upon really existed. The plaintiff's counsel declined to try the case piecemeal, and a verdict was thereupon directed for the defendant. Plaintiff brings error.

It was not the intention of our former decision to convey the impression that the duty of submitting to auditors was imperative. It is a matter within the discretion of the court. *Pierce* v. *Thompson*, 6 Pick. 193. The trial judge was evidently of the opinion that this was a proper case for an auditor, and we have no reason to doubt the correctness of his views on this question. We think the practice does not justify a division of the issues, but that under the statute (section 7386, 2 How. Stat.) the reference to auditors should precede the verdict. The plaintiff sought to have the books of account of the defendant produced, and it is possible that their production might have shown a want of necessity for a reference to auditors. We are not quite able to understand why the books of account were not produced; and an opportunity afforded the court of determining whether such a necessity existed; but, in any view, we think the court was in error in directing a verdict for the defendant. It was within the power of the defendant to move for a reference to auditors. It was equally within the power of the court to direct it. The case was entirely within the control of the court; but we think it was not proper to compel the plaintiff to submit a single issue to the jury, and resort to another trial after the account is stated before he can obtain final judgment.

The judgment will be reversed, and a new trial ordered.

The other Justices concurred.

IRION *v.* CITY OF SAGINAW.

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DEFECTIVE SIDEWALKS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

A pedestrian is shown to have been guilty of contributory negligence, precluding her recovery for injuries sustained from a defective cross-walk, where she testifies that she had in mind the bad condition of the walk when she reached it, that it was light enough for her to see it, and that she knew if she passed over it she must exercise a great deal of care, but took the chance of passing over it in safety; there being a safe way at the side of the walk.

Error to Saginaw; Snow, J. Submitted January 27, 1899. Decided June 5, 1899.

Case by Mary Irion against the city of Saginaw for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

E. L. Beach, for appellant.

Weadock & Purcell, for appellee.

LONG, J. Plaintiff recovered in the court below, and defendant brings error. The cross-walk upon which the plaintiff was injured was one leading from the street curb to the sidewalk, was slanting, and the boards were loose. The stringers were rotten, and the boards lay upon the ground. As she attempted to cross this walk, and when she had put her right foot on one of the planks, it turned under her, tipped up, and she was thrown backward. She admits that when she arrived at this cross-walk it was light enough for her to see it. She also admits that she knew that this cross-walk was broken and in bad condition, and that if she attempted to cross it she must exercise great care. She was asked:

"*Q.* When you got up to this sidewalk, you knew it was not nailed, and was in bad condition?

"*A.* Yes.

"*Q.* You knew, if you went over that walk, you had got to exercise a great deal of care, didn't you?

"*A.* Yes, sir.

"*Q.* And when you got up there, you took the chances of going over there, and going over in safety?

"*A.* Yes, sir.

"*Q.* You knew that when you stepped on there?

"*A.* Yes, I saw the sidewalk was bad.

"*Q.* That is why you used extraordinary care in going over it?

"*A.* Yes, sir."

It appears also that by stepping one side a few feet she could have passed along without going over this walk.

Under these circumstances the court should have directed the verdict in favor of the defendant. The case is ruled by the following cases: In *Black* v. *City of Manistee*, 107 Mich. 60, the negligence complained of related to the construction of the walk, whereby it was claimed that the accumulation of ice and snow was increased, and made more dangerous than it would naturally have been upon a better located and constructed walk. The fall occurred in the daytime. Plaintiff admitted that she saw the ice before stepping upon the place where she fell; that she knew it was dangerous, but proceeded without taking hold of the hand-rail, because she had a book and a parcel in her hand, and was afraid she would slip under the hand-rail to the ground, a distance of three or four feet below. Like the present case, there was another and safe way. It was said:

"Where a person actually sees the danger before the accident, there is as great reason for him to avoid it as there is for the municipality to provide against it beforehand. She could as well judge of the safety of this icy walk from its appearance at the time as the authorities could anticipate the danger when the walk was constructed."

The court below directed the verdict in favor of defend-

ant on the ground of plaintiff's contributory negligence, and the judgment was affirmed here.

That case was cited and approved in *Grandorf* v. *Railway Co.*, 113 Mich. 496, in which Mr. Justice MONTGOMERY, writing the opinion, said:

"Plaintiff cites the case of *Laughlin* v. *Railway Co.*, 62 Mich. 220, and other cases, in which it is held that knowledge of an obstruction or defective condition of a street does not make it negligence *per se* for the plaintiff to continue to attempt to pass over such defective way; but none of these cases go the length required here, where the nature of the obstruction, and the steps necessary to avoid it, are both apparent and in the mind of the plaintiff at the very moment of the accident. If this had been a defect of which the plaintiff simply had had previous knowledge, and which knowledge was not in her mind at the time, or if her attention had been diverted from the obstruction, there would be ground for the plaintiff to stand upon. * * * She knew precisely the risk she assumed, and assumed it. The case falls within *Black* v. *City of Manistee*."

The present case cannot be distinguished from the above cases. Here the plaintiff, by her own admission, as above stated, had in mind the bad condition of the walk when she reached it that night. It was light enough for her to see it, and she says she knew if she went over it she must exercise a great deal of care, and took the chances of going over in safety. This certainly cannot be said to make a case for the jury to pass upon.

The following cases lay down no rule which, under the facts of this case, would justify the court in submitting this case to the jury: In *Lowell* v. *Township of Watertown*, 58 Mich. 568, it appeared that the accident happened on a dark night, while the plaintiff was walking along the highway. He was familiar with the locality, and knew of the defect, which consisted of a hole about a foot square, made for the purpose of allowing the water from the highway to pass into an underground drain. Plaintiff testified that he was thinking of this hole from the time he crossed the bridge until he stepped into

it. He was trying to avoid it when he stepped into it, and it was held that the question of his contributory negligence was for the jury. The case would have been quite analogous to the present if the plaintiff there had seen the hole, and attempted to step over it, or to jump across it, and had fallen in. He would then have taken his chances.

In *Dundas* v. *City of Lansing*, 75 Mich. 509 (5 L. R. A. 143), the plaintiff testified that she was not thinking of the hole in the walk, nor looking for it, and that, if she had been thinking about it, or looking for it, she would not have stepped into it. It was a dark, stormy night, with snow or mist falling, and she was hurrying along to get home. This cannot be likened to the present case, where the plaintiff, in approaching this broken walk, saw it, knew it was in bad condition, and says she took her chances in going over it.

In *Whoram* v. *Township of Argentine*, 112 Mich. 20, it appeared that the plaintiff knew there was a hole in the highway the fall before, but supposed it had been remedied, and that when he approached the place he was not thinking about the hole being there. It was held that the case was ruled by *Bouga* v. *Township of Weare*, 109 Mich. 520. In that case it appeared that, while the plaintiff's driver knew about the hole, he had forgotten about it when he approached it in the darkness of the night.

I have examined the original record in *Harris* v. *Township of Clinton*, 64 Mich. 447 (8 Am. St. Rep. 842), and it appeared that Sopher, who hired the horse of the plaintiff, drove over the highway about 1 o'clock in the daytime, and found the water covering the approach to the bridge some seven or eight inches deep. He crossed in safety. On his return, about 7 o'clock in the evening, it was still light. He drove across the bridge, and, when he arrived at the approach at that end, he found the water a little higher than when he crossed at 1 o'clock. The approach was a narrow embankment, and had two or three curves. In going over at this time he drove too

near the edge of the embankment, his horse slipped, fell in, and was drowned. He had no other way to recross the stream. He had recrossed the bridge, and arrived at the approach, when he found the water had risen since he passed before. He was familiar with the way, and had he kept upon the embankment, as he did in going over first, apparently he would have gone in safety. As said by the court. "The danger in this instance consisted in the liability of driving off the embankment because it was more or less obscured by the water flowing over it." The question of the negligence of Sopher was held to be for the determination of the jury, and, I think, very properly. If, as in this case, however, there had been a perfectly safe way by the side of that embankment, and he had taken the one which might prove dangerous, can there be any question that, as matter of law, Sopher would have been held guilty of negligence? If there had been another and a safe way, the case would have fallen within the rule in *Black* v. *City of Manistee*, *supra*, and the present case.

No case in this or in any other court, which I have been able to find, goes to the length of holding that a recovery may be had under the circumstances as stated in the present case.

The judgment must be reversed, and a new trial granted.

GRANT, C. J., HOOKER and MOORE, JJ., concurred. MONTGOMERY, J., did not sit.

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BENNETT *v.* EDDY.[1]

1. MALICIOUS PROSECUTION AND FALSE IMPRISONMENT—PROBABLE CAUSE—EVIDENCE.

In 1891 a company was formed to take charge of plaintiff's newspaper, and plaintiff was given stock in the company, and made manager of the paper, at a weekly salary. In 1896 defendants, who were stockholders in the company, had plaintiff arrested for the alleged embezzlement of the funds of the company between February, 1895, and May, 1896. Plaintiff claimed that he really owned the paper; that defendants were merely assisting to maintain it, to reflect their political convictions; and that the funds alleged to be misappropriated had been used to pay debts which had been guaranteed by defendants. *Held*, in an action for malicious prosecution and false imprisonment, that plaintiff, on the issue of probable cause, could show his transactions with defendants from the time the company was organized, and was not limited to the period during which the misappropriations were alleged to have occurred.

2. SAME.

Evidence as to what was done with the company's property after certain mortgages thereon were foreclosed and plaintiff's connection with the paper had ceased, and as to attachment suits commenced against the plaintiff by one of the defendants, was irrelevant, and should have been excluded.

3. SAME—TRIAL—PREJUDICIAL REMARKS OF COURT.

Where the theory of the defense in an action for malicious prosecution and false imprisonment included the claim that defendants' connection with plaintiff's arrest was on probable cause and by advice of counsel, it was prejudicial for the court to make a remark at the beginning of the trial, in the presence of the jury, that ignored this claim, and indicated that, if defendants procured plaintiff's arrest, it was conclusive of their liability.

4. SAME—DAMAGES—LACK OF EMPLOYMENT.

The fact that the plaintiff in an action for malicious prosecution and false imprisonment remained idle after his arrest,

[1] Rehearing denied July 11, 1899.

during a period when many others were out of employment, cannot be ascribed to the arrest, and made an element of damages, unless there is evidence connecting it therewith.

5. SAME—EVIDENCE.

Where, in an action for malicious prosecution and false imprisonment, in which defendants deny any connection with the proceedings against plaintiff after stating the facts to the prosecutor, and upon his advice making the complaint, the plaintiff is permitted to show the circumstances attending his arrest in another State, it is error for the court to exclude the testimony of the prosecutor as to the directions given by him to the officer who made the arrest.

6. SAME—ADVICE OF PROSECUTING ATTORNEY—DISCLOSURE OF MATERIAL FACTS.

In an action for malicious prosecution and false imprisonment it appeared that, after defendants had consulted the prosecuting attorney about proceeding against plaintiff for embezzlement, an expert bookkeeper was employed to examine plaintiff's books, and report to the prosecutor. *Held*, that the bookkeeper's testimony as to what he learned and what he reported was admissible, as bearing upon the question whether all the material facts were submitted to the prosecuting attorney before the criminal case was commenced.

7. SAME.

Defendants' testimony as to what they told the prosecuting attorney was admissible for the same reason.

8. SAME.

For the same reason, the prosecutor, who was present at the trial and heard all the testimony, should have been permitted to testify whether or not any testimony had been given relating to facts known by defendants and not disclosed to him before the criminal complaint was made.

9. TRIAL—WITNESSES—CROSS-EXAMINATION—CONTROL BY COURT—ABUSE OF DISCRETION.

For the court arbitrarily to excuse a witness from further cross-examination before counsel, who shows no disposition to abuse the privilege, has had an opportunity to ask him with respect to material matters, is prejudicial error.

Per MOORE and MONTGOMERY, JJ.; GRANT, C. J., and LONG, J., concurring in the reversal.

Error to Bay; Maxwell, J. Submitted February 8 1899. Decided June 5, 1899.

Case by Edwin T. Bennett against John F. Eddy, Edgar A. Cooley, and Edwin T. Carrington for malicious prosecution and false imprisonment. From a judgment for plaintiff, defendants bring error. Reversed.

C. L. Collins and *Lyon & Pierce*, for appellants.

Fales & Kelley, for appellee.

MOORE, J. In November, 1896, defendants Carrington and Eddy swore to a complaint charging plaintiff with the embezzlement of money belonging to the Tribune Publishing Company. A warrant was issued, and by virtue thereof plaintiff was arrested. A *nolle pros.* was afterwards entered in the case. The plaintiff claimed that defendant Cooley acted with the defendants Eddy and Carrington, and sued all of them in an action for false imprisonment, and recovered a large judgment. The case is brought here by writ of error.

It was the claim of defendant Cooley that he had nothing to do with the arrest and imprisonment of the plaintiff. It is the claim of all the defendants that there was probable cause for the complaint, and that it was made without malice. It is also claimed that, before the complaint was made, a full and fair statement of all the facts possessed by them was submitted to the prosecuting attorney and the assistant prosecuting attorney, who decided it was a proper case for criminal proceedings, and that the prosecuting attorney's office had full charge of the case.

Error is assigned as to the conduct of counsel in his opening statement to the jury; as to the conduct of the judge in the trial of the cause; as to the admission and nonadmission of testimony; as to the charge of the judge, and his refusal to give certain charges offered by defendants, and his refusal to direct a verdict in favor of defendants.

Prior to August, 1891, plaintiff was the owner of the Bay City Tribune. He was considerably in debt, and Mr. Cooley was upon some of his paper as indorser. In

August, 1891, a corporation was formed, known as the Tribune Publishing Company. Directors were elected. They were authorized by the stockholders to accept from the plaintiff the good will and all the business and assets of the Bay City Tribune in full payment of the capital stock, which was fixed at $50,000. The defendants and others became stockholders in the corporation. In January, 1892, a loan of nearly $10,000 was obtained through the agency of defendants and others, the payment of which was secured by plaintiff assigning stock at 50 cents on the dollar. In February, 1895, an arrangement was made by which preferred stock should be issued for one-half the capital stock, which should be entitled to a fixed dividend of 7 per cent. per annum. Common stock could be surrendered for preferred stock by paying in addition to the common stock one-half the face value of the preferred stock in money. This stock was to be surrendered upon certain conditions, the principal ones of which were that the debts of the company, for which defendants and others had become liable, were paid. After the company was organized, Mr. Bennett was appointed manager, and was to have a salary of $50 a week. The president and vice-president were authorized to borrow $5,000, which amount was afterwards increased to $6,000. In February, 1896, a committee made an examination and report of the business of the company, and recommended that the stockholders guarantee a credit of $4,000 upon condition that Mr. Bennett transfer to a trustee certain real estate and a life-insurance policy to indemnify the stockholders against loss. This was done, and the credit guaranteed. It is claimed that Mr. Bennett at this time represented the indebtedness to be less than $4,500, when it was in fact nearly $10,000 more than that amount. The business demanded more money, and in May, 1896, three chattel mortgages were given to a trustee to secure various debts, —among others, those due to employés of the paper,—and one chattel mortgage given to the First National Bank to secure $8,000. Shortly afterwards one of these mortgages

was foreclosed, and the connection of the plaintiff with the paper ended. The defendants examined, or caused to be examined, the books of the company, and say they came to the conclusion that between February, 1895, and May, 1896, plaintiff, as shown by the books and other evidence, had collected large sums of money belonging to the publishing company, and appropriated it to his own use.

Upon the trial of this cause the plaintiff was allowed to show the transactions relating to the first organization of the company, his relations to the shareholders and the subsequent transactions of the company, and the relations of defendants to it and the plaintiff, until his connection with the company ceased. It is the claim of defendants that this testimony should have been confined to what occurred between February, 1895, and May, 1896, the period of time during which it is alleged the embezzlement occurred. It is admitted by plaintiff that the books show, and the fact was, that he drew out of the company between February, 1895, and May, 1896, more than the amount of his salary,—$50 a week. His claim is that, though the business was nominally that of the publishing company, it was actually his, and was so understood, not only by himself and his office force, but by defendants. His claim is they were anxious to have a paper maintained which should reflect their political convictions, and were willing to aid him in maintaining such a paper; that the organization of a company was a convenient form through which to carry out their purpose; and that what occurred, including the writings in the nature of defeasances, and the conveyance of the real estate and the life-insurance policy by him, shows that the business was his, and that the stock was held as security, and was to be returned to him when the debts were paid. It is his claim that it was expected he would draw out of the business more than his weekly wages, to make payments upon the debts which had been guaranteed or indorsed by the defendants, or some of them, and that all the amounts so drawn out by him had been so applied, and some of the money paid to

the defendants, and that they understood what was done, and the method of doing it, in many of the transactions, and that he did not embezzle any of the funds belonging to the company. We think this testimony was admissible, as bearing upon the question of whether the defendants Carrington and Eddy had probable cause to believe the plaintiff guilty of embezzlement, and for making the complaint, and whether it was made by them in good faith. Probable cause involves a consideration of what the facts are, and what are the reasonable deductions from the facts. It is therefore what is denominated a "mixed question of law and fact." If the facts are not in dispute, the question is for the court. Upon the disputed facts the jury must be left to pass, but the court must determine, on the facts found, whether or not probable cause exists. Cooley, Torts (2d Ed.), 209. In this case there was a dispute between the plaintiff and defendants as to the manner in which the business was conducted, the knowledge the defendants had of the condition of the accounts, and the disposition made of the proceeds of the business, which made it necessary for the court to submit these facts to the jury.

The court allowed, over the objection of defendants, testimony to be given as to what was done with the property of the publishing company after the mortgages were foreclosed, and as to the organization of a new company. It also permitted the files to be introduced in evidence in an attachment suit commenced by Mr. Cooley against the plaintiff. This testimony did not throw any light upon the issues involved in this case, and was well calculated to prejudice the jury against the defendants. If any injustice was done the plaintiff in those proceedings, it can not be litigated in this one. The admission of this testimony was error.

One of the first things done, after the trial was entered upon, was for the plaintiff to introduce evidence in relation to the organization of the company in 1891 and 1892.

Objection was made to the admission of the testimony; the defendants claiming the testimony should be confined to what occurred from February, 1895, to May, 1896, when it was alleged the embezzlement occurred. The court said:

"This evidence is addressed in another direction. If the defendants procured the arrest of the plaintiff in Chicago under that warrant, by the officer, they are liable, and I will so charge the jury; and this testimony may enormously enhance the damage, it seems to me."

This was said before the testimony of the first witness for the plaintiff was completed. It anticipated and cut off the defense which defendants sought to make, and which they had a right to make if they could,—of probable cause, and that the complaint was made by the direction of the prosecuting officer after a full statement of the facts to him. This statement was prejudicial, and ought not to have been made.

The plaintiff was allowed to show he failed to get employment after his discharge, and that he had been idle nearly all the time from the time of his arrest until this suit was commenced. Objection was made because it did not appear the situation arose from any act of defendants. The judge replied, "Well, the jury may think it did," when the following occurred:

"*Q.* Mr. Bennett, you may state what the treatment of the public and the people that you are acquainted with was, in this city, after your arrest. (Objected to by defendants, unless he goes into it before the arrest as well as after.)

"*The Court:* He may answer. (The defendants excepted to the ruling of the court.)

"*The Court:* Now you may sit down. I can't be bothered so much by objections.

"*A.* Well, I was pointed out as an embezzler. I think many people thought I was a thief. My wife was shunned in the same way. Many of the best friends I had before went by and didn't even speak to me.

"*Q.* You may state, Mr. Bennett, as to whether you ever had been idle before this occurrence since the time you left school, when you were a boy.

"*A.* No, sir; never lost a day."

Upon another occasion the court told counsel to sit down, and refused to allow him to state his objection to the testimony. If the defendants were liable at all, they were liable for such damage as was caused by them; but it does not follow that, because Mr. Bennett was out of work at a time when it is a matter of common knowledge that a great many people were out of work, defendants were responsible for his idleness. The treatment of the counsel was also well calculated to prejudice the cause of his client before the jury.

Mr. Bennett was a witness on his own behalf. Counsel for the defendants sought to cross-examine him in relation to an account which he claimed contained the items, or some of the items, showing his relations with the company. The court, upon his own motion, told him he need not answer, and afterwards arbitrarily excused him from further cross-examination, when counsel had not completed the cross-examination. A good deal of discretion should be allowed to the trial judge in directing the course of the trial, but it is very apparent from the record that the cross-examination was cut off by this action of the court before counsel had an opportunity to cross-examine the plaintiff in relation to matters that were material. The right to cross-examine is a valuable right, and, while the court has an undoubted right to prevent its abuse, there is no evidence here of any disposition on the part of counsel to abuse his right of cross-examination. *Chandler* v. *Allison*, 10 Mich. 460; *Thompson* v. *Richards*, 14 Mich. 172; *O'Donnell* v. *Segar*, 25 Mich. 367; *People* v. *Barker*, 60 Mich. 277 (1 Am. St. Rep. 501), and cases there cited.

While Mr. Gilbert, the prosecuting attorney, was testifying, it was sought to show what directions he had given the officer about going to Chicago and making the arrest. The court refused to allow this. We think this was error. It was the claim of defendants that they had nothing to do

with the proceedings after the complaint was made. Mr. Carrington and Mr. Eddy claimed they had no knowledge it was proposed to arrest the plaintiff in Chicago, until after his arrest was made. As testimony was allowed to be given on the part of the plaintiff as to the arrest and what was done in Chicago, it was very proper to show who caused the arrest at Chicago to be made.

The testimony shows that, after the defendants consulted the prosecuting attorney about instituting the criminal proceeding, Mr. Marshall (an expert), at the suggestion of the prosecuting attorney, was employed by defendants to examine the books, and to learn what he could about the accounts, and report to the prosecuting attorney what he found. Mr. Marshall was examined as a witness. It was sought to show what he had learned, and what he reported to the prosecuting attorney that he had learned. This testimony was excluded. It should have been admitted, as bearing upon the question of whether all the material facts had been submitted to the prosecuting attorney before the criminal case was commenced. This ruling will also apply to the refusal of the court to allow Mr. Carrington to testify what he informed the prosecuting attorney.

Mr. Collins, the assistant prosecuting attorney, was present during all the trial, and heard the testimony of the witnesses as to the knowledge possessed by the defendants of the facts connected with the business when the criminal complaint was made. He was asked to state what testimony, if any, he had heard relating to facts known by the defendants that were not detailed to him prior to the time criminal complaint was made. This testimony was excluded. The defendants claim they were protected by the advice of counsel. It was claimed on the part of plaintiff that they had not disclosed to counsel all the facts they knew. The law is that if one about to institute a criminal complaint takes advice of counsel learned in the law, and places all the facts before him, and acts upon his opinion, he will be protected, provided

the disclosure appears to have been full and fair, and not to have withheld any of the material facts. Cooley, Torts (2d Ed.), 211. Mr. Collins should have been allowed to answer the question, as bearing upon the question as to whether all the material facts had been stated to him before the complaint was made.

It is claimed that the court should have directed a verdict upon the ground that defendants were protected by the advice of counsel. In the note to Cooley, Torts (2d Ed.), 212, it is said the mere fact of getting advice is not conclusive in favor of the defendant (citing cases), and that the advice must be honestly given, and acted upon in good faith. In this case it is claimed defendants had such knowledge of facts that they did not believe Mr. Bennett was an embezzler, and that they did not communicate all the facts they knew to counsel. We are not prepared to say there was no proof bearing upon this claim, and that the court should have directed a verdict in favor of defendants. *Harris* v. *Woodford*, 98 Mich. 147.

We do not deem it necessary to discuss the other assignments of error. They are either not well taken or are not likely to occur again.

The judgment is reversed, and a new trial granted.

MONTGOMERY, J., concurred with MOORE, J. GRANT, C. J., and LONG, J., concurred in the result. HOOKER, J., did not sit.

HEATH *v.* HEATH.

APPEAL—CONFLICTING EVIDENCE—REVIEW.

A finding of fact in a chancery case, based upon the conflicting testimony of witnesses examined in open court, will not ordinarily be disturbed on appeal.

Appeal from Tuscola; Beach, J. Submitted February 9, 1899. Decided June 5, 1899.

Bill by Ezra Heath, administrator of the estate of Joshua A. Heath, deceased, against Selah Heath, to set aside a deed. From a decree for complainant, defendant appeals. Affirmed.

Joshua A. Heath died December 1, 1895. Until August 14th of the same year he resided upon his farm in Fairgrove, Tuscola county. He was the owner of 120 acres of land. Complainant was appointed administrator. Claims were allowed against the estate amounting to $594.95. On August 14, 1895, Joshua deeded to his son, the defendant, 80 acres of land, the consideration stated in the deed being $1. At the same time he deeded the other 40 acres to his son Emerson. The administrator found no property with which to pay the debts and expenses of administration, and filed this bill to set aside the deed to defendant on the ground that it was void as against creditors. Defendant claimed that the deed was made in consideration of a debt due from his father to him, and an agreement to take care of him during the remainder of his life. Joshua was then 72 years old, in failing health, and expected to live but a short time. The claim of the administrator is that the deed was without consideration as against creditors, and that there was no consideration other than the promise to take care of his father. Defendant lived at Cheboygan, and, after the deed was made, took his father home with him. Proofs

were taken in open court, and a decree entered for the complainant.

John E. Kinnane, for complainant.

T. W. Atwood, for defendant.

GRANT, C. J. (*after stating the facts*). No legal questions are involved. The question is one of fact purely, and the result depends entirely upon the credit to be given to the testimony. On all the facts there is a direct and sharp conflict of evidence. It would be unprofitable to state it in detail. We see no occasion to disturb the conclusion reached by the circuit judge, who saw the witnesses, and was in a better position than we to judge of their credibility.

Decree affirmed, with costs.

MONTGOMERY, MOORE, and LONG, JJ., concurred. HOOKER, J., did not sit.

PEOPLE v. LONGWELL.

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INTOXICATING LIQUORS—VIOLATION OF LOCAL OPTION LAW—ILLEGAL SALE BY DRUGGIST—RESPONSIBILITY FOR ACT OF CLERK. Under section 16 of the local option law (3 How. Stat. § 2283*b*5), providing for the punishment of "any person who himself, or by his clerk, agent, or employé," shall make sales of liquor in any county in which the law is in force, unless such sales are made by a druggist or registered pharmacist in compliance with the restrictions imposed by the general law, it is no defense to the prosecution of a druggist for selling to an intoxicated person, in violation of section 3 of the general law (3 How. Stat. § 2283*c*6), that the sale was made by a clerk in respondent's absence, and contrary to his express instructions.[1] LONG, J., dissenting.

[1] As to one's criminal liability for the act of his servant, partner, or agent in the sale of liquors, see note to *Williams* v. *Hendricks*, (Ala.) 41 L. R. A. 650.

Exceptions before judgment from Van Buren; Buck, J. Submitted February 10, 1899. Decided June 5, 1899.

E. B. Longwell was convicted of violating the local option law. Affirmed.

A. Lynn Free and *Alfred J. Mills*, for appellant.

James E. Chandler, Prosecuting Attorney, for the people.

GRANT, C. J. The respondent, a druggist, was convicted of selling liquor contrary to Act No. 207, Pub. Acts 1889. His defense was that the sale was made by his clerk, contrary to his general instructions. Should this defense have been submitted to the jury? We think not. The statute provides that "any person who himself, or by his clerk, agent, or employé, shall violate any of the provisions," etc. It is conceded, in statutory crimes of this character, that the legislature may do away with the intent as an ingredient of the offense, and make the act itself criminal, whether it is done by himself or by his clerk, agent, or employé. Chief Justice COOLEY, in *People* v. *Roby*, 52 Mich. 577 (50 Am. Rep. 270), clearly draws the distinction between those cases where intent is a necessary ingredient of the crime and where it is not, and has cited numerous authorities. The first inquiry, then, is, What does the statute mean? It is not a case for interpretation. The language is unequivocal, and makes the druggist liable for any violation of the law by his clerk, agent, or employé. It is pertinent to examine some prior decisions of this court which are relied upon.

The first is *Faulks* v. *People*, 39 Mich. 200 (33 Am. Rep. 374). That opinion does not cite the statute under which the conviction was had. An examination of the record of the case shows that it was Act No. 193, Pub. Acts 1877. That act does not contain the words, "or by his clerk, agent, or employé." It is limited to the person actually making the sale.

In *People* v. *Parks*, 49 Mich. 333, respondent was convicted under section 12 of Act No. 259 of the Public Acts of 1881, which reads as follows: "All persons engaged in the business of selling or keeping for sale any of the liquors mentioned in sections 1 and 2 of this act, whether as owner, or as clerk, agent, or servant, shall be equally liable as principals for any violation of any of the provisions of this act." By reference to section 2 of the same act it will appear that "the fact of selling, giving, or furnishing any of said liquors to any minor or to any intoxicated person * * * shall be a *prima facie* presumption of an intent on the part of the person so selling, giving, or furnishing such liquor to violate the law." Two things are apparent under this act: (1) That it contains no language making the owner responsible criminally for the act of his clerk, agent, or servant, and (2) that, while the intent was an ingredient of the offense, that intent was to be presumed from the act of selling, etc., and cast the *onus probandi* upon the liquor seller to show the absence of intent.

In *People* v. *Metzger*, 95 Mich. 121, the point was not involved. What was said, therefore, is *dicta*. An examination, however, of section 13, Act No. 313, Pub. Acts 1887, under which the respondent was convicted, will show that the language is substantially the same as the act of 1881, and makes the act itself *prima facie* evidence of the intent. Section 24 provides that "any person or principal shall be liable for the acts of his clerk, servant, agent, or employé for any violation of the provisions of this act." Where an act contains provisions apparently in conflict, courts will construe them, if possible, so that both shall stand. It would undoubtedly, therefore, be properly held that section 24 did not take away the defense of want of intent, but left a respondent to show such want of intent on his part. It is manifest, therefore, that both the acts of 1881 and 1887 make an intentional participation an ingredient of the offense. They only shift the burden of proof.

Black cites the statutes of several States containing provisions like the one under which respondent was convicted, and states:

"It is held to be no defense to an indictment against the principal that the unlawful act was done without his knowledge or consent, or without his authority, or in his absence, or even that it was done in contravention of his express and *bona fide* orders." Black, Intox. Liq. § 370, and authorities there cited.

Black closes the section with the following language:

"The object of these statutory provisions, in effect, is to require the principal to see to it, at his peril, that no unlawful sales are made in his establishment. And, if it savors of severity to subject him to punishment for the acts of others which he had expressly forbidden, it must be remembered that he can escape liability by selecting servants and agents who will keep within the law, and obey his orders, or by abandoning a business which exposes him to such hazards."

The statute in unequivocal language makes the druggist responsible for the acts of his clerk in making these illegal sales. It is as easy for liquor dealers to employ clerks and agents who will carry out their instructions not to make prohibited sales as it is to employ those who will obey their instructions not to open their places of business contrary to law.

The conviction is affirmed.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred with GRANT, C. J.

LONG, J. (*dissenting*). Respondent was indicted by a grand jury in Van Buren county, charged with having, on the 3d day of December, 1897, as a druggist and registered pharmacist, sold and delivered to John Price, who was intoxicated at the time, eight ounces of alcohol, contrary to the provisions of the local option law in force in that county. The indictment charges that the sale was made by the respondent personally. On the trial the people

introduced testimony which, it is conceded, established that the local option law was in force in that county at the time of the alleged sale, and that respondent was a druggist, and had filed his bond as such, at that time. The testimony also tended to show that the sale was made by a clerk of the respondent, and not by the respondent himself; and that Price was intoxicated at the time. Respondent introduced testimony which tended to show that he (respondent) had warned and instructed his clerks, including the one who had sold the alcohol to Price, not to sell to prohibited persons, during prohibited hours, or in violation of law, or otherwise than as a druggist legally might, and to obey strictly all the provisions of the law; and that he (respondent) was not present at the time when the sale was made to Price. At the close of the testimony, the court was asked to instruct the jury:

"1. If a clerk or agent, without the knowledge and against the instructions of his employer, sells intoxicating liquor to a person who is intoxicated at the time of the sale, the employer is not criminally responsible for the act; and although you should find from the evidence that the said John Price was intoxicated at the time of said sale, yet if you find that the respondent did not make the sale, but that it was made by the respondent's clerk or clerks, and without the knowledge and against the instructions of the respondent, then the respondent is not criminally liable, and you should acquit him.

"2. If you are satisfied from the evidence that the respondent instructed his clerks to carefully observe the local option law, and particularly not to sell liquor to a person intoxicated or under the influence of liquor, and that, on the evening of December 3d last, some clerk or clerks in his employ sold liquor, namely, alcohol, to John Price, without the knowledge or consent of the respondent, and against his express orders, then the respondent cannot be convicted."

The court refused these requests, and directed the jury, substantially, that if they found that the clerk made the sale to Price while he was intoxicated, and intoxicated to such an extent that the sale should not have been made,

then the employer would be liable for the act of his clerk, notwithstanding the prohibition. The jury found the respondent guilty, and the case comes into this court on exceptions before sentence.

Act No. 207, Pub. Acts 1889, by section 16 (3 How. Stat. § 2283*b*5), provides that:

"Any person who himself, or by his clerk, agent, or employé, shall violate any of the provisions of section 1 of this act, shall, for the first offense, be deemed guilty of a misdemeanor," etc.

Section 1 (3 How. Stat. § 2283*a*) provides:

"It shall be unlawful for any person, directly or indirectly, himself, or by his clerk, agent, or employé, to manufacture, sell, keep for sale, give away, or furnish any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors * * * in any county of this State on and after the first day of May next following after the adoption by the board of supervisors of such county of a resolution prohibiting the same, as provided in section 13 of this act: * * * *Provided, however*, that the provisions of this section shall not apply to druggists or registered pharmacists in selling any such liquors under and in compliance with the restrictions and requirements imposed upon them by the general laws of this State."

The general law for the taxation and regulation of the manufacture and sale of spirituous and intoxicating liquors provides, by section 3, Act No. 313, Pub. Acts 1887 (3 How. Stat. § 2283*c*6), that no druggist shall, directly or indirectly, by his clerk, agent, or servant, sell such liquors to any person who is intoxicated at the time.

It is contended that the court was in error in not giving these requests to charge and in the charge as given. It is conceded by counsel for respondent that the rule has been laid down by this court in *People* v. *Roby*, 52 Mich. 577 (50 Am. Rep. 270), and in *Wolcott* v. *Judge of Superior Court*, 112 Mich. 311, that want of intent, or ignorance of the fact or state of things contemplated by the statute, does not constitute a defense. But counsel contend that these cases are clearly distinguishable from the

present. In the *Roby Case* the respondent was convicted of the offense of keeping his saloon open on Sunday. In the *Wolcott Case* the respondent was convicted of the offense of selling liquor without having first filed the necessary bond. It is claimed by counsel for respondent that the reason for holding that the want of knowledge of the fact or state of things contemplated by the statute did not excuse the violation of the statute was that the want of knowledge proceeded from carelessness, or a will to disobey the statute, or an indifference to its commands, while those elements do not enter into the present case; that the respondent had no intention of committing the offense himself, or having his clerks commit it; that he was not present when it was committed, knew nothing about it, or that it was likely to be committed; that he neglected no duty, but, prompted by a desire to obey the law, he exercised every precaution within his power to see that it was obeyed.

I think counsel correct in their contentions. It was held in *People* v. *Parks*, 49 Mich. 333, that a liquor dealer was not criminally responsible for the sale of liquor by his clerk to an habitual drunkard, such sale being made without the knowledge or consent of the respondent. The prosecution was had in that case under Act No. 259, Pub. Acts 1881. That case followed and cited *Faulks* v. *People*, 39 Mich. 200 (33 Am. Rep. 374), in which it was held that it was a defense to a charge of selling liquor to a minor that the dealer had reason to believe, and did believe, him to be of age; and in *People* v. *Metzger*, 95 Mich. 121, it was held that a saloon-keeper was not criminally liable for the act of his bartender in selling spirituous liquors without his knowledge or direction, and during his absence from the saloon, he having paid the tax imposed on the business of selling malt liquors only. These were cases in which the want of knowledge of the facts on the part of the respondents was not the result of carelessness or negligence, or a desire to disobey the law, as in the *Roby* and *Wolcott Cases*. They are cases in

which the respondents had no intention of committing the offenses themselves, or to have them committed by their clerks, agents, servants, or other employés, and where the respondents were not present when they were committed, knew nothing about their being committed, or that they were likely to be committed. They are like the present case, though this case is much stronger in favor of the innocence of the respondent. Here it was attempted to show that sales were made by the clerk after he had been instructed by the respondent that such sales must not be made.

In 1 Bish. Cr. Law (7th Ed.), § 219, it is said:

"We shall see that the general doctrine of the criminal law is the one which exempts the master or principal from responsibility for a crime by the servant or agent. Thus, under the statutes forbidding the sale of intoxicating drinks without license, and the former enactments against selling goods to slaves without the consent of their masters, it is sufficient in defense that the sale was made by the defendant's clerk, unauthorized either absolutely or by implication."

Even where the statutory words were "by an agent or otherwise," it was held in *Barnes* v. *State*, 19 Conn. 398, that the servant's want of authority would excuse the master.

In *Com.* v. *Stevens*, 153 Mass. 421 (25 Am. St. Rep. 647), it apppeared that the respondent was charged with unlawfully selling intoxicating liquors to a minor. The respondent was a druggist, and was authorized to sell to certain persons, but not to minors. One of his clerks made a sale to a minor, and the principal question at the trial was whether the respondent was criminally responsible therefor. There was evidence in the case that the respondent had instructed all his clerks not to make sales to minors, nor, indeed, to any person under 25 years of age. The learned judge who tried the case instructed the jury that, if they were satisfied that these instructions were given by the respondent, but that the clerks were to

determine the question of minority simply from the appearance of the customer, and the respondent authorized and permitted them to sell without further inquiry if they believed such persons to be 25 years of age or upwards, and that the clerk who made the sale in the case applied this test, and in good faith sold to the customer, then the respondent would be liable, even if he had no personal knowledge of the sale, because the servant in such case was carrying on the respondent's business in the way he directed and obeying his instructions, and that, under such circumstances, the act of the servant would be the act of the master. The correctness of that instruction was the principal question in the case. The court said: "The instructions to the jury allowed them to convict the respondent, even though the jury should find that he had in good faith given instructions not to sell to minors." The exceptions to the charge were sustained. It was further said in the case: "While a broader rule prevails in respect to a master's civil responsibility for the acts of his servant or agent, ordinarily he is not held responsible criminally unless he in some way participates in, countenances, or approves the criminal act of his servant."

In *Anderson* v. *State*, 22 Ohio St. 307, it appeared that the respondent was convicted for unlawful sales to a minor, in violation of a statute which declared it to be unlawful for "any person or persons, by agent or otherwise, to sell intoxicating liquors" in the cases specified in the act. It was said by the court:

"To bring a person within the operation of the act, the elements which constitute the offense must attach to him. He must make the sale. It is immaterial whether he does it directly or indirectly. The object in using the phrase 'by agent or otherwise' was to show expressly and unequivocally that the act was intended to embrace every means that the person charged might employ in effecting the illegal sale. * * * The accused in such case has the right to rebut the presumption of *prima facie* agency which the evidence makes against him by showing, if he can, that the criminal act was in fact committed without his authority, and against his instructions."

In *Lathrope* v. *State*, 51 Ind. 192, it was held that if a clerk in a saloon sell intoxicating liquor to one in the habit of getting intoxicated, without the knowledge and against the instruction of his employer, the latter is not criminally responsible for the act. The same rule is laid down in *State* v. *Baker*, 71 Mo. 475, and this is the general rule laid down by all the courts in construing similar statutes.

In the present case, however, the court below, in giving construction to the statute, applied the rule in civil cases, which holds the principal, as to third persons, liable for the acts of his agent done within the general scope of his authority, irrespective of actual instructions that were unknown to the person dealing with the agent. No such rule applies in criminal cases. The accused in a criminal case has the right to rebut the presumption of *prima facie* agency which the evidence makes against him by showing, if he can, that the criminal act was in fact committed without his authority, and against his instructions. That was what was shown in the present case, and the court was asked to direct the jury that, if they found that the sale was made without the respondent's knowledge or consent, they must acquit him. The requests set out here should have been given.

I think the conviction should be reversed, and a new trial ordered.

BAUMGARTNER v. STURGEON RIVER BOOM CO.

1. WATERS — STOPPAGE OF LOGS — OVERFLOWED LANDS — ACTION FOR DAMAGES — PLEADING.

   A declaration in an action against a boom company for damages resulting from an overflow of water caused by the stoppage of logs in a navigable stream need not allege that the company was negligent.

2. DECLARATION — MEANING OF TERMS — "GROWING HAY."

   The term "growing hay," used in a declaration alleging damages from an overflow of plaintiff's land, means grass in its growing state, while the term "hay" would cover only that which is cut and dried.

Error to Baraga; Haire, J., presiding. Submitted April 4, 1899. Decided June 5, 1899.

Case by Philip G. Baumgartner against the Sturgeon River Boom Company for causing the flooding of plaintiff's land. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff commenced this suit by filing and serving a declaration in a plea of trespass on the case, in which he alleged that the defendant maintained a boom on the Sturgeon river, four miles below his farm, which was situated along the banks of the river, for the purpose of stopping logs floating down the river; that during three years it did stop the logs, causing them to jam and accumulate for 15 miles up the river, and thereby caused the water to back up and overflow onto the plaintiff's lands; that said waters would not have overflowed in any one year onto his lands were it not for the said boom and said logs; that the natural and inevitable result of maintaining said boom and stopping said logs was to flood his land; that in so doing defendant had caused certain

ditches of the plaintiff to be filled with sand and drift-wood, and that said overflow "did utterly destroy, in each year, hay of the said plaintiff then upon said land growing," and alleged the amount each year. To this declaration defendant demurred: (1) That it did not state that the damage was caused by the negligence of defendant; (2) that it did not allege no contributory negligence on the part of the plaintiff. The demurrer was overruled. Defendant pleaded the general issue, and the case went to trial upon the merits, resulting in a verdict for the plaintiff. Upon the trial, defendant seasonably objected to any testimony under the declaration for the same reasons as those stated in the demurrer. After the testimony closed, it requested the court to direct a verdict in its behalf for the further reason that the plaintiff had shown a loss of no hay which had been grown and matured into a marketable crop.

Gray & Looney, for appellant.

Button & Culver, for appellee.

GRANT, C. J. (*after stating the facts*). 1. The rights of boom companies and others in driving logs down the navigable streams of this State were settled in *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308. Under that decision log drivers have no right to stop the logs flowing down the stream so as to interfere with the natural flow of the water with the running logs in it. If stopping the logs caused the water to overflow, the boom companies are responsible in damages for the overflow. In such cases the pleader need only allege the obstructions, the stoppage of the water, the consequent overflow and damage, to make his declaration sufficient. It is unnecessary to add the allegation that this was negligently done. The act speaks for itself, and carries with it the obligation to respond in damages. Negligence is not a necessary element of liability. It may be necessary to stop the logs in order to save them, and the boom company might

be liable to the log owners for loss if it failed to stop them. But this necessity does not relieve the company from liability for the overflow. The demurrer was therefore properly overruled.

2. If the declaration had alleged the destruction of so many tons of hay each year, we think the position taken by the defendant would have been sound, because hay is not grass in a growing state, but the grass after it has been cut and dried for fodder. Webst. Dict.; Cent. Dict. But under the declaration in this case it is manifest that the word was not used in this sense, because it referred to it as growing upon the land, and described the injury as occurring to the "growing hay." We think there was no opportunity of being misled, and that the instruction to direct a verdict was properly refused.

Judgment affirmed.

The other Justices concurred.

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BRATFISCH v. TOWNSHIP OF MASON.

1. HIGHWAYS — BRIDGES — DEFECTS — ABSENCE OF RAILINGS — INSTRUCTIONS.

The fact that, in an action against a township for injuries claimed to have resulted from the defective condition of a bridge, which was built over a creek at a height of 3½ feet, was from 12 to 14 feet in width, and constituted but 8 or 10 feet of a country highway, the court recognized, in one portion of his charge, the failure to provide railings for the bridge as a ground of negligence, is not reversible error, where it was followed immediately by instructions which limited the ground upon which plaintiff might recover to the existence of a certain hole in the bridge.

2. SAME — INSTRUCTIONS NOT BASED ON EVIDENCE.

An instruction, in an action against a township for injuries resulting from a defect in a bridge, of which it was claimed

the township had constructive notice, that plaintiff could not recover, if the defect had existed only two days, without showing that the township had notice and a reasonable time thereafter to make repairs, is not erroneous as permitting the jury to find actual notice, of which there was no evidence, where the context made it apparent that the court was simply stating a rule of law.

Error to Arenac; Sharpe, J. Submitted January 5, 1899. Decided June 5, 1899.

Case by Minnie Bratfisch against the township of Mason for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

M. D. Snow (*Snow & Snow*, of counsel), for appellant.

John F. O'Keefe, for appellee.

MOORE, J. The plaintiff recovered a judgment against defendant for personal injuries received by her, occasioned by being precipitated from a highway bridge into the creek below. The assignments of error all relate to the charge of the court, or to his refusal to give certain requests proffered on the part of the defendant.

The record shows that the creek on which the bridge was constructed ran through what had been a cedar swamp. The bridge was planked with two thicknesses of plank. The lower plank were 14 feet long, and the upper, 12 feet long. The bridge constituted 8 or 10 feet of the highway. North of the bridge was a hill, the foot of which was about 10 rods away. South of the bridge was another hill. The bridge itself was about 3½ feet above the water. The roadway from the base of one hill to the other was originally constructed by placing logs across the roadway, and filling upon top of them with dirt. The roadway was elevated some feet above the swamp, and was 11 or 12 feet wide. There was no railing upon the bridge itself nor upon its approaches.

It is the claim of plaintiff that upon August 7, 1897, she

and her sister approached this bridge from the north, driving with a tight rein a gentle horse, hitched to a buggy or light wagon, the horse traveling upon a moderate trot; that, as the horse came upon the bridge, it took fright at a hole near the north side of the bridge, which was 6 to 10 inches wide and about 2 feet long, and suddenly shied, precipitating the vehicle and its occupants into the stream below, severely injuring the plaintiff. It is claimed that this hole in the bridge had been there since June, and was not far from the residence of the highway commissioner, who passed over the bridge frequently. It is claimed that because of the hole in the bridge, and the failure to erect a railing upon the bridge and embankment, the highway was not reasonably safe and fit for travel. It was the claim of defendant that the accident did not occur as the result of a defective bridge, but occurred because the horse got beyond the control of the driver when coming down the hill, and the wheels got out of the track, and ran off the roadway just as the conveyance got to the bridge. It is also claimed that, if there was a defect in the bridge, it had not existed long enough to create any liability. It is also claimed the horse was not safe to drive; that the hole was not the proximate cause of the accident, but that the horse probably got frightened at a bear or at children in the woods, or at a stump, and shied for that reason. Another defense interposed is that, as plaintiff passed over the bridge in the morning, and knew of its condition, she did not approach the bridge with that caution she ought. These various claims were submitted to the jury by the judge, and were passed upon by the jury. The only witnesses to the occurrence were the plaintiff and her sister.

The defendant asked the court to take the case from the jury "for the reason that plaintiff's own negligence contributed to her injury, in that she drove the horse down the hill upon the bridge on a trot, in a reckless manner, and before she reached the bottom of the hill the horse was beyond her control, and consequently the injury resulted." It is said in the brief that, as the horse pro-

ceeded down the hill, it increased its speed, and by the time it reached the bottom it was going at so rapid a pace that it became unmanageable and was beyond the control of the driver. This request and the argument of counsel are not based upon the record. It is true, some isolated portion of the testimony of the plaintiff, taken by itself, might be given such a construction; but the record discloses the plaintiff was a German, who understood and spoke English very imperfectly. She desired to give her testimony through an interpreter. It was thought best not to use an interpreter. It is perfectly clear from her testimony that, when she spoke of the horse as beyond her control, it related to the time when it saw the hole and suddenly shied, and did not relate to what occurred before the horse reached the bridge; while the testimony of the sister was very clear that the horse approached the bridge slowly, and that it was not until it shied that it got beyond the control of the plaintiff. In view of the testimony, it was very proper for the judge to refer the question of the negligence of the plaintiff to the jury, which he did in the following language:

"It was the duty of the plaintiff, as a matter of law, to provide herself with a reasonably safe conveyance when going upon the public highway, and that she should have a reasonably gentle and safe horse, and the duty was upon her to exercise reasonable care and prudence in driving along this highway and over this bridge; and, if she failed or neglected to observe any of these precautions, she is, in law, guilty of what is known as 'contributory negligence,' and she cannot recover in this case. 'Contributory negligence' means that by her own carelessness or negligence she has contributed to her own injury. And, if she has done that, under the law she is not entitled to recover at all, as you cannot apportion the negligence.

"Now, the mere fact that the plaintiff might have seen this hole in the board when she drove over it in the forenoon of that day would not, of itself, constitute her guilty of contributory negligence in endeavoring to pass over that bridge again that evening. You have a right to consider the fact, to say whether, under the evidence, a reasonably careful and prudent person would have endeavored to

cross that bridge, as she did, in the evening, knowing of the existence of the hole (if you find there was one, and she knew of its existence). And if you find that a reasonably careful and prudent person would not, having the knowledge she had, have offered to pass over that bridge, as she did on her return, then that would amount to contributory negligence on her part. Having a knowledge (if you find she had) of the fact that there was a hole in the bridge, then it became incumbent upon her to exercise more care and caution in crossing the bridge the second time than she would have otherwise been called upon to do. In other words, if she knew there was some danger in crossing the bridge,—if she realized that,—with the hole in it, then she would be expected to exercise care and caution proportionate to the risk she ran."

We do not think the defendant can complain of this charge. *Bouga* v. *Township of Weare*, 109 Mich. 520; *Whoram* v. *Township of Argentine*, 112 Mich. 20; *Schwingschlegl* v. *City of Monroe*, 113 Mich. 683, and cases cited there.

It is also claimed that the court erred in submitting to the jury the question whether the township was guilty of negligence in failing to provide railings to the bridge. It is said there was no dispute about the size of the bridge and the width of the stream, and the court ought to have said, as a matter of law, that the township was under no obligations to provide railings. That portion of the charge reads as follows:

"Now, the defendant in this case denies that the bridge was in the defective condition claimed by the plaintiff. It is admitted that there were no railings on the sides of this bridge. And I leave it to you, as a matter of fact, to say whether or not—when you consider the manner in which this bridge was constructed, its height above the water course, the condition of the road, and the entire surroundings—it was the duty of the defendant township to have constructed a railing along the sides of the bridge. That only becomes important for you to consider if you determine that the absence of the railing was in any manner the cause of the injuries which she sustained, and that these injuries were not caused by her own contributory negligence."

If what has just been quoted was all the judge said, it is possible it would have presented the case to the jury improperly; but he continued his charge by saying:

"The defendant claims that the accident was not caused by reason of her horse shying at a hole in the bridge, but that in some way she lost control of the horse on its way down the hill; and they claim that the horse or carriage had been—partly, at least—out of the regularly-traveled highway for some distance before it reached the bridge, and that the front wheel of the carriage struck the corner of the bridge, and tipped it and her over into the creek. Now, if you find that that is true,—if you find that the accident in this case was not caused in any way by the condition of the bridge, that the horse didn't become frightened at a hole in the bridge,—then the plaintiff in this case cannot recover. * * * Now, I will call your attention more particularly to some of the questions of fact which you must determine in this case. First, perhaps, would be, as suggested by counsel, Was the bridge reasonably safe and fit for public travel? If you find that it was, you should not discuss any other subject or question in this matter, because that would then put an end to plaintiff's case. If that bridge was reasonably safe and fit for public travel at the time she attempted to pass over it on her way going south that day, then the plaintiff cannot recover in this case."

The same statement was made to the jury in other portions of the charge. It is quite apparent that the jury must have understood that, before a verdict could be returned in favor of plaintiff, they must find the accident resulted from the defective bridge. The defendant denied that the bridge was defective. This raised a question for the jury, and not for the court. *Harris* v. *Township of Clinton*, 64 Mich. 447 (8 Am. St. Rep. 842); *Shaw* v. *Township of Saline*, 113 Mich. 342; *Perkins* v. *Township of Delaware*, Id. 377. If the jury believed the testimony offered on the part of the plaintiff, there was an abundance of testimony upon which to base the finding.

The court failed to give some of the defendant's requests to charge. This is said to be error. Some of the requests failed to contain all the essentials which made them proper

requests to be given, and for that reason were properly refused. Others of them were fully and completely covered by the general charge. The questions involved are not new, but have recently been passed upon by this court, so that a discussion of them would be unprofitable.

Judgment is affirmed.

MONTGOMERY, J., concurred with MOORE, J.

GRANT, C. J. I concur in sustaining the judgment in this cause. An examination of the record has convinced me that the case was fairly presented to the jury, and that there is no occasion for us to reverse the case for certain expressions used by the court in his instructions, which, standing alone, might be reversible error. While the court in one part of his charge recognized the failure to erect railings as a ground of negligence, he immediately followed the instruction by saying, "If you find that the horse did not become frightened at a hole in the bridge, the plaintiff cannot recover."

Counsel for defendant have argued very strenuously that the court permitted the jury to base their verdict upon a finding that the highway commissioner had actual knowledge of this defect, while in fact there was no evidence of any such knowledge. This claim is based upon the following instruction:

"Now, I say to you, as a matter of law, that if the hole was made there on Thursday, only two days before the accident occurred, that the plaintiff in this case could not recover without showing that the township, through its officials, had notice of the fact that there was a hole there in the bridge, and that, after receiving such notice, they had a reasonable time (the officers) to repair the defect, and did not do it."

The court was simply stating a rule of law, and it is evident from the connection that the jury must have so understood it; for the court immediately followed this instruction with one in regard to constructive notice, upon which alone the jury could have based their verdict.

I do not wish to be considered as assenting to a holding that it was negligence on the part of the township in this case not to erect railings across this bridge, which was composed of plank 14 feet long. If such liability exists in this case, it follows that there are many culverts and similar bridges in every township in this State for which a township would be liable should a traveler, under similar circumstances, drive off the end. This bridge was constructed in the usual way in which bridges of this character and culverts are constructed, and always have been. It is not, and never has been, customary to provide railings. The roadbed was in good condition and of sufficient width. I am not prepared to hold that the statute covers such cases.

HOOKER and LONG, JJ., concurred with GRANT, C. J.

MAY *v.* GENESEE COUNTY SAVINGS BANK.

1. BANKS AND BANKING—ASSIGNMENT OF STOCK—EVIDENCE.
   An assignment of a certificate of bank stock, absolute in form, may be shown to be for security merely.

2. SAME — LIABILITY OF STOCKHOLDERS — ERRONEOUS RECORD — PLEDGEES.
   One with whom bank stock had been deposited as collateral notified the cashier of the bank to transfer the stock to him as pledgee. Instead of complying, the cashier issued a new certificate, absolute in form, and entered the transaction as an absolute transfer of the stock. *Held*, that, since it is the bank's record of its stockholders, and not the form of its certificates, that constitutes notice to creditors, and the pledgee was in no way responsible for the erroneous entry, he could not be held liable to depositors upon an assessment as stockholder, under 3 How. Stat. § 3208e5, exempting from such liability those holding stock as collateral.

3. AGENCY—COLLECTION OF DEBTS—AUTHORITY.
Persons dealing with an agent for collection are chargeable with knowledge that, in the absence of special authority, he can accept nothing but money in payment of debts.

Appeal from Ingham; Person, J. Submitted April 18, 1899. Decided June 5, 1899.

Bill by John A. May, receiver of the Ingham County Savings Bank, against the Genesee County Savings Bank, to enforce defendant's statutory liability as a stockholder in complainant bank. From a decree for complainant, defendant appeals. Reversed.

On July 20, 1895, Mr. Arthur O. Bement borrowed $4,000 of the defendant bank, giving his promissory note, payable on demand. The note recited that certificate No. 188, for 50 shares of the capital stock of the Ingham County Savings Bank, was deposited with the defendant as collateral security for said loan. Bement's certificate of stock was dated October 23, 1893. Upon the back of the certificate was an assignment by Bement to the defendant bank as pledgee of said 50 shares. Bement did not pay the note. On January 16, 1896, the bank sent its attorney and its vice-president, Mr. Atwood, to Lansing, with instructions to collect other claims against E. Bement & Sons and another person. Mr. Atwood took with him the note of A. O. Bement, and while in Lansing learned that Bement & Sons were at that time indebted to the Ingham County Savings Bank in the sum of $26,000, the most of which had been in existence for three years. Mr. Atwood, considering that it would be safer for his bank to have this 50 shares of stock transferred to it as pledgee, so informed May, the cashier of the Ingham County Savings Bank. This was agreed to. The old certificate, No. 188, was surrendered, and a new certificate, No. 258, for 50 shares, issued to the defendant bank. This certificate was absolute in form, and contained no statement that it was issued to the defendant bank as

pledgee. The transfer was entered upon the books of the Ingham County Bank, and stood there in the name of the defendant bank until the Ingham County Savings Bank closed its doors, and failed; but of this entry the defendant had no notice or knowledge. The bank was at that time a bankrupt concern, and probably always had been, as it had been reorganized out of the remains of another insolvent bank, from which it received and carried as assets a large amount of worthless credits. When Mr. May handed the new certificate to Mr. Atwood, Mr. Atwood asked to have it issued to the bank as pledgee, to which May replied that it was just as well to let it stand as it was, and this was done. The certificate and the note, which Mr. Atwood had with him, were then pinned together, and returned to the defendant bank, and have since been in its possession. Mr. Bement had paid nothing upon the note. Without detailing the testimony, we find as a fact that this certificate of stock was issued to the defendant with the distinct understanding on the part of the defendant bank and the Ingham County Bank that it was to be held as collateral security to Bement's note, and that no arrangement was made with Bement for the sale of the stock. The defendant never authorized Mr. Atwood to purchase this stock in discharge of Bement's indebtedness, or for any other consideration, but always treated the transaction as designed for security only, and held the certificate for that purpose. The court made an order authorizing the receiver to assess the stockholders in order to pay the depositors. Under this order the assessment of the defendant is $3,250. The court below held that the defendant was liable as a stockholder.

S. L. Kilbourne, for complainant.

George R. Gold (*George H. Durand*, of counsel), for defendant.

GRANT, C. J. (*after stating the facts*). The statute under which this liability is sought to be enforced against defendant reads as follows:

"The stockholders of every bank shall be individually liable, equally and ratably, and not one for another, for the benefit of the depositors in said bank, to the amount of their stock at the par value thereof, in addition to the said stock; but persons holding stock as executors, administrators, guardians, or trustees, and persons holding stock as collateral security, shall not be personally liable as stockholders, but the assets and funds in their hands constituting the trust shall be liable to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living or competent to act, and the person pledging such stock shall be deemed the stockholder and liable under this section. Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation, or by any receiver or other officer succeeding to the legal rights of said bank." Act No. 205, Pub. Acts 1887, § 46; 3 How. Stat. § 3208*e*5.

Decisions under the national banking act do not control the question under our statute, for the former exempts from personal liability only persons holding stock as executors, administrators, or trustees, and does not in terms exempt holders for security. Counsel cites 1 Cook, Stock, Stockh. & Corp. Law, § 247; *Aultman's Appeal*, 98 Pa. St. 505; *Crease* v. *Babcock*, 10 Metc. (Mass.) 525; *Holyoke Bank* v. *Burnham*, 11 Cush. 183; *Grew* v. *Breed*, 10 Metc. (Mass.) 569; *Price & Brown's Case*, 3 De Gex & S. 146; *Richardson* v. *Abendroth*, 43 Barb. 162. Some of the above cases involve statutes whose language is entirely different from our own. See *Crease* v. *Babcock*. Others hold that one who holds stock as collateral security is still liable where he has had the stock transferred in his own name, as absolute owner, on the books of the corporation; while, under the text of Mr. Cook, the liability is imposed upon a pledgee "who has had the stock *transferred into his own name on the corporate books.*" These authorities do not apply to this case. Even under the national banking act a creditor receiving a transfer of shares in a national bank as security for his debt is not subject to the personal liability imposed by the statute, where the certificate is surrendered, and a

new one issued in the name of the creditor as pledgee, and afterwards held in good faith as such pledgee, and as collateral security. *Pauly* v. *Trust Co.*, 165 U. S. 606. The court in that case cite *Anderson* v. *Warehouse Co.*, 111 U. S. 479, and say:

"This court in that case recognized it to be well settled that one who *allows* himself to appear on the books of a national bank as an 'owner' of its stock is liable to creditors as a shareholder, whether he be in fact the absolute owner or only a pledgee."

If the defendant had authorized the absolute transfer, or knew that it had been made upon the books of the bank to it as absolute owner, and had thus held itself out to the public as such, a question would be presented which we need not discuss. The defendant did not know it, and did not hold itself out as owner. If, therefore, it can be held liable under our statute, it must be because it received a certificate absolute in form. The certificate is no notice to creditors of the bank. It is the record of stockholders kept in the bank, upon which depositors and other creditors rely. A transfer absolute upon its face may always be shown to be an assignment as collateral security. Thus a deed may be shown to be in fact a mortgage. Upon the same principle, an assignment of a certificate of bank stock, absolute in form, may be shown to be for security merely. It would be a harsh rule that an officer of a bank may, by making a false entry, or by failing to make the correct one, impose the statutory liability, when it is known to him that the stock is held as security merely, or in some other fiduciary capacity. We do not think our statute can be thus construed. Mr. May, the cashier, knew that this stock was held in pledge to secure a loan to Mr. Bement. It was his duty, for the protection of his own bank, if for no one else, to so enter the transfer upon its books. His failure to do so cannot affect the rights of the defendant. Mr. Atwood had no authority from the defendant bank to purchase this stock and discharge the debt. An agent to collect debts, in the absence of special

authority, is authorized to receive money alone. It appears conceded that one bank cannot purchase the stock of another except as it may do so to protect its own loans. The officers of the Ingham County Bank were chargeable with knowledge that Mr. Atwood, as defendant's agent, had no such authority, and they dealt with him at their peril. If Mr. Atwood had reported to May that he had such authority, his statement would not be received as evidence of it. Mr. Atwood reported to his principal that he had received this stock as security. The defendant bank ratified no other arrangement; it knew of no other. The mere fact that the certificate was absolute in form was not notice that Mr. Atwood had purchased it for the bank, and had discharged the debt. The entire transaction was the ordinary one of securing a loan from a failing debtor, and was so understood by all the parties to it.

Decree reversed, and decree entered for the defendant, with the costs of both courts.

The other Justices concurred.

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CALKINS v. BUMP.

1. BENEFIT SOCIETIES—DISSOLUTION.

   For a fraternal benefit society, organized under 1 How. Stat. §§ 3949–3955, to call in outstanding certificates, cancel the same, discharge existing indebtedness, and proceed to issue certificates not authorized by the organic act, will not work a dissolution of the original corporation, since corporations can be dissolved by their own act only by proceedings under 2 How. Stat. chap. 282.

2. SAME—CORPORATE EXISTENCE—ESTOPPEL TO DENY.

   Where an assignment of mortgages, executed to a benefit association duly incorporated, is made under the corporate name and seal, the assignee is estopped to claim that, at the time of the assignment, the corporation had been abandoned, and succeeded by a voluntary association.

3. SAME—POWERS—ENDOWMENT INSURANCE.

A mutual benefit society, organized under 1 How. Stat. §§ 3949-3955, is not authorized to incorporate in its certificates of membership a provision for the payment of an endowment at a fixed time.

4. SAME—TRUST FUND—DISTRIBUTION.

Members of a mutual benefit association contributed to a common fund, the creation of which was unauthorized by law. The fund was invested in securities, which the association assigned to a trustee for the benefit of certain members, whose certificates had matured. *Held*, that a decree setting aside the assignment, and ordering the transfer of the securities to a receiver for distribution among all the members, was proper, since the fund was a trust fund, in which every member who contributed was beneficially interested *pro rata* to the amount of his contribution.

5. TRUSTS AND TRUSTEES—ACCOUNTING—DEPRECIATED SECURITY.

A trustee is not chargeable with the face value of a mortgage which he discharged for less than such value, where he realized on it the full value of the mortgaged property.

6. SAME—INTEREST.

A trustee who, under mistake of law, pays money to the wrong party, or holds it without investment, awaiting the determination of court as to whom it should be paid, is not chargeable with interest thereon.[1]

Cross-appeals from Kent; Grove, J. Submitted April 18, 1899. Decided June 5, 1899.

Bill by Charles W. Calkins, receiver of the Supreme Assembly of the National Dotare, against Charles M. Bump, trustee, to recover possession of certain assets of the society. From the decree rendered, both parties appeal. Affirmed.

Crane, Norris & Stevens, for complainant.

Joseph W. Smith (*Lyon & Pierce*, of counsel), for defendant.

Long, J. The complainant is the receiver of the

[1] The liability of trustees for compound interest is considered in an extensive note to *Re Ricker*, (Mont.) 29 L. R. A. 622.

Supreme Assembly of the National Dotare, being appointed by the circuit court, in chancery, of Kent county. The supreme assembly of this order was organized as a corporation some time in the year 1889, under the provisions of Act No. 104, Laws of 1869, as amended by various acts, now standing as sections 3949–3955, 1 How. Stat. It is a secret or fraternal society, lodge, or council, under the supervision of a grand or supreme body, securing members through the lodge system exclusively. By the general laws of the association, it was authorized to establish and maintain, by means of assessments on its members, a benefit fund, from which a sum not exceeding $1,200 should be paid to any member of the order who had contributed to said benefit fund for six consecutive years, upon the surrender of the benefit certificate, etc. A guaranty reserve fund was provided for, and this fund was to be invested in bonds and mortgages.

It is contended by complainant that the corporation was not authorized to engage in the business of what is commonly known as "endowment insurance," or the payment of a specified sum of money after the arrival of a certain stated time, and was not authorized to issue policies or certificates, and was not authorized to make contracts with its members or others, whereby it engaged to pay to its members or others any specified sum at the arrival of a certain and fixed period, as such policies, certificates, and contracts were beyond the power of the corporation to make, but that, after the organization was formed, it issued to a large number of persons what were termed "benefit certificates," whereby, among other things, it undertook to engage to pay a specified sum at the expiration of six years from the date of the respective certificates, or, should the member, after 90 days of continuous membership, die before the expiration of six years, then the organization agreed to pay to the member's wife or other dependent relative a sum not exceeding the amount stated in the certificate, in lieu of the payment of

the specified sum at the expiration of the six years; said certificates being conditioned upon the payment by the holder of certain assessments, dues, and demands.

It is shown that the supreme assembly is the owner of several thousand dollars' worth of notes, mortgages, and other securities payable to it, and that on or about January 11, 1897, certain persons, claiming to be the officers of the supreme assembly, executed and delivered to the defendant assignments, without any consideration whatever, of a large number of such notes and mortgages; that he now claims to hold them as trustee for various persons who are the holders of benefit certificates, and who claim the right to be paid out of the proceeds of these notes and mortgages the full amount of their certificates, as though they were valid obligations. It is contended that, at the time these assignments of mortgages and notes were made to the defendant, the corporation was hopelessly insolvent. It is shown that there are upwards of 1,000 members of the organization, who have paid into the treasury large sums of money on account of assessments upon benefit certificates held by them, and it is contended that they are entitled to share in the distribution of the fund *pro rata* with all other creditors. The complainant claims that he is now entitled to the possession of these notes and mortgages for the purpose of such distribution.

The complainant's claims are largely admitted by the defendant. He admits that he has these notes and mortgages, but denies that the action of the officers of the organization in assigning and transferring them to him was unlawful, and claims that the officers were fully authorized to use the reserve fund of said order, of which these notes and mortgages were a part, to pay claims that had fully matured, or to use said reserve fund in such manner as to secure the stability of the order; that they were warranted in doing so in the present case, as these claims were due; and that the existence of the organization was threatened, as suits were to be brought unless

settlements were made with the *cestuis que trustent.* Defendant denies that the order was insolvent at the time these assignments were made. In reference to the Louise Mead note and mortgage, which is claimed by the complainant, the defendant claims that it was settled by him for the sum of $2,500, and the greater part of the proceeds distributed *pro rata* among the *cestuis que trustent* of the defendant before the injunction was served; also that a quitclaim deed was taken from Eliza Mitchell for her equity, by the direction of the court, at an outlay of $60; that the defendant has not been able to sell the property for $400, and that a tax claim has been acquired against the property represented, for which the defendant must pay $365; and that the remainder of the notes and mortgages are not worth their face value.

In a supplemental answer by the defendant, it is claimed that the supreme assembly mentioned in the bill is not the same organization from which he obtained the securities; that in the early part of 1890 the officers of the supreme assembly, of which the complainant was appointed receiver, called in all the benefit certificates issued by it, canceled the same, discharged all the indebtedness, and thereupon a voluntary association was organized for the protection and benefit of its members, under the title of "Supreme Assembly of the National Dotare;" that the securities claimed by complainant were obtained from this new organization.

The court below, on March 1, 1898, entered a decree finding that the complainant was entitled to recover from the defendant the notes and mortgages, and setting aside the assignments thereof; that the corporation was insolvent, and the notes and mortgages were a part of the trust fund held by the corporation for the benefit of all its members and certificate holders. The defendant appeals from this part of the decree. The court also, in the same decree, directed that an accounting should be had, and referred the matter to a circuit court commissioner for that purpose. The court fixed the basis of such accounting as follows:

"The defendant to be charged with the face value of all of said notes and mortgages, and with all interest and other sums, not principal, collected by him upon any and all of said notes and mortgages; defendant to be credited with the face value of all such mortgages as he shall turn over to the complainant pursuant to this decree, and with the proceeds of the Eliza Mitchell mortgage; and defendant to be further credited with all sums paid by him pursuant to the orders of this court, and with all sums paid by him for taxes, insurance premiums on the mortgaged premises, or other sums paid to protect the securities from paramount liens; and, if the defendant shall claim other credits on said account, said commissioner shall report the same, with the testimony and his opinion thereon," etc.

The commissioner reported that, as to the Mitchell mortgage, the defendant should be charged with $400 received, and credited by the following amounts:

Paid for equity of redemption	$60 00
" " insurance	8 75
" " taxes	47 35
" " tax history	50
" " services on transfer	10 00
	$126 60

—Leaving a balance with which defendant is charged of $273.40.

As to the Louise Mead mortgage, the commissioner found:

That the defendant should be charged with the amount realized of		$2,500 00
And that he should be credited thereon as follows:		
For recording assignments of mortgages	$7 15	
For attorney's retainer to advise defendant	50 00	
For attorney's time, etc., at Alpena	32 00	
For attorney's fees in Bump v. Bloecker	53 80	
For attorney's fees in Eddy v. Bump	24 00	
For attorney's fees in Thielman v. Bump	22 00	
For typewriting	3 00	
For stamps and stationery	1 85	
For publishing foreclosure notice	24 50	
For sheriff and register fee in Bump v. Thielman	2 45	
		220 75
Leaving balance charged against defendant on that mortgage of		$2,279 25
And making a total charge against defendant on these two mortgages of		$2,552 65

The court confirmed this report, so far as it charged the defendant with this $2,552.65, but held the report erroneous in not charging him with the sum of $8,900 on the following account:

For face of Burley mortgage	$1,600
" " " Gillen "	500
" " " Godhardt "	300
" " " Bloecker "	3,000
" " " Mather "	1,500
" " " Maczkowski "	300
" " " Eddy "	1,200
" " " Tifft "	500

Said mortgages were ordered to be assigned by defendant to the complainant within 10 days by the decree theretofore entered in the case, and in which defendant had wholly made default. The court thereupon decreed that defendant owed the complainant, on account of the before-mentioned matters, the sum of $11,452.65, but that he should be allowed the following deductions:

To Robert L. King, circuit court commissioner, for taking testimony on part of defendant in accounting	$11 50
To Harry A. Silsbee for taking testimony	4 85
To Joseph W. Smith for attorney's services in accounting	104 80
To Smith and defendant in attending upon the accounting	12 50
To Walker & Fitzgerald for legal services and expenses as counsel for defendant	211 35
To defendant for his services as trustee	100 00
For items upon the bill of Joseph W. Smith filed before the commissioner, attached to the deposition of Bump	227 18
Total amount of these items	$672 18

All other exceptions to the commissioner's report were overruled, and it was decreed that the defendant was owing the complainant the sum of $10,780.47, which was decreed to be paid as follows: $8,900 by assigning the mortgages before mentioned, with the exception of the Mead and Mitchell mortgages, and the balance of $1,880.47 to be paid in cash; and, if default was made in the payment, that complainant have execution therefor, with interest thereon from the date of the report of the commissioner, to wit, August 2, 1898, at 6 per cent. From this accounting both parties appeal.

We will first deal with the main questions in the case;

that is, those relating to the original decree. We think the court was not in error in holding that the two organizations were identical. The Supreme Assembly of the National Dotare was duly incorporated. There has never been a dissolution of the original corporation. It could not be dissolved by its own act, except by proceedings taken under chapter 282, 2 How. Stat. *Town* v. *Bank of River Raisin*, 2 Doug. 530. No such proceedings were taken.

But counsel for defendant contend that he is not seeking to show a dissolution, but an abandonment, and that he never had any dealings with the old corporation, and never received any securities from it. This position cannot be sustained. The mortgages were all executed to the "Supreme Assembly of the National Dotare, a corporation organized under the laws of the State of Michigan, mortgagee," and the assignments to the defendant were all executed under its corporate seal, by virtue of a resolution of the governing board of the corporation. The defendant cannot now be heard to say that the old corporation had been abandoned, and that he was dealing with a voluntary association which succeeded to it. Having dealt with the Supreme Assembly of the National Dotare as a corporation, and claiming title through it as a corporation, he cannot be heard to deny its corporate existence. *Swartwout* v. *Railroad Co.*, 24 Mich. 389; *Merchants', etc., Bank* v. *Stone*, 38 Mich. 779; *Estey Manfg. Co.* v. *Runnels*, 55 Mich. 130.

We are also of the opinion that the court was not in error in holding that the endowment provisions of the certificates of membership issued by the corporation were void. This act was before this court in *Walker* v. *Commissioner of Insurance*, 103 Mich. 344, and there received the construction for which complainant now contends. In that case, the fraternal society was called the "American Monitor," and its constitution provided for endowments payable at the end of 100 months. It was held that this provision was in excess of the power granted

by the act, and that it could not do any business except such as was permitted by the act. The same construction has been placed upon a similar statute in Illinois. *Chicago, etc., Indemnity Ass'n* v. *Hunt*, 127 Ill. 257 (2 L. R. A. 549); *Rockhold* v. *Benevolent Society*, 129 Ill. 440.

It appears, however, that these parties have put money into a common fund. The purposes for which it was paid in are found to be illegal, and equity requires that there should be an adjustment among all the parties on a fair accounting. The court below held that the parties holding these matured certificates had no legal right to be paid in preference to other certificate holders and members. Some members have paid in more than others. The receiver was appointed to make the proper and equitable distribution. In order to do this, he must first have possession of the securities which are now in the hands of the defendant, when a proper distribution can be made. The fund became a trust fund, in which every member who contributed thereto became beneficially interested *pro rata* the amount of his contribution. *Burton* v. *Schildbach*, 45 Mich. 504; *Stamm* v. *Benefit Ass'n*, 65 Mich. 317, and cases there cited; *In re Youths' Temple of Honor*, 73 Minn. 319. The original decree will therefore be affirmed.

As to the accounting: The complainant contends that the defendant should have been charged with the actual value of the Louise Mead mortgage. It appears that the defendant discharged that mortgage for $2,500, and it is claimed that the proofs show that it was worth much more than that. Some of the witnesses testified that it was worth $5,000. It appears that the mortgage was worth no more than could have been realized out of the property. From a careful reading of the testimony on this subject, we are satisfied that the amount fixed by the court was all that the mortgage was worth, taking into consideration the situation and surroundings of the property.

It is next claimed by complainant that the defendant should have been charged with interest on the amount

realized by him from the sale of mortgages. The only principle upon which trustees are chargeable with interest on trust funds is that they have received interest, have used the money themselves, or that they have been negligent either in not paying over the money or in not loaning or investing it so as to render it productive. The defendant trustee in the present case received no interest on the fund. After receiving this fund from the sale of mortgages, he paid a portion of it over to his *cestuis que trustent*. While we have found that these payments were unauthorized and illegal, as the entire membership was entitled to share in them, yet there is nothing to show but that defendant acted in good faith and under a mistake of law. He also kept the money without making any use of it until the court should determine to whom it should be paid. He was acting as trustee for the members whose certificates had matured, and his duty towards them was to protect their interest in the fund until the final determination of the rights of the parties. The court below did charge him with interest after the date of the report of the commissioner in the accounting. The rule seems to be that where the trustee, by mistake of law, pays the wrong person, and is compelled to pay again to the proper person, the court will not impose interest. *Saltmarsh* v. *Barrett*, 31 Beav. 349.

We are also of the opinion that, under the circumstances here shown, the court was not in error in allowing the trustee the sums he did for his services, costs, and expenses.

There are no other questions in the case, in our opinion, calling for discussion. We think the court below arrived at the correct conclusion on the whole matter of the accounting. The decree will be affirmed, with costs to the complainant.

The other Justices concurred.

WILDER v. SANCHE.

1. TRIAL—INSTRUCTIONS—MODIFICATION OF REQUESTS.
   A judgment for plaintiff will not be reversed because the court added to one of defendant's requests to charge some words of explanation which were not in themselves clear, if from the whole charge it is apparent that the jury must have correctly understood the issues.

2. SAME—WITNESSES.
   There is no error in instructing the jury that they should find for plaintiff or defendant, according to their belief in the witnesses, "taking them in sides," if the issues are squarely raised, and the contention of each party finds support only in the testimony of his own witnesses. *Henderson* v. *Railway Co.*, 116 Mich. 368, distinguished.

Error to Wayne; Donovan, J. Submitted April 18, 1899. Decided June 5, 1899.

Assumpsit by Marshall P. Wilder against Hercules Sanche upon a promissory note. From a judgment for plaintiff, defendant brings error. Affirmed.

Flowers & Moloney, for appellant.

Ed. E. Kane, for appellee.

LONG, J. This action was brought upon a promissory note of $1,000 given by the defendant to the plaintiff, and due one year after date, with interest at 6 per cent., payable semi-annually. Defendant pleaded the general issue, and gave notice thereunder that he would show that the consideration for the note had failed, and that it was without consideration, for the reason that on or about October 25, 1892, he made a contract with the plaintiff and his father by which they agreed to assign to him 220 shares of the capital stock of the Dr. Hercules Sanche Company, to be held by him until he should acquire all of the shares

of the other shareholders, and, in the event of his being unable to effect this purchase, said shares were to be returned to said plaintiff and his father, and, if defendant should acquire all the shares of the other shareholders, the said plaintiff and his father were to have the option of having said stock returned to them, or demanding payment of $1,000, and interest at 6 per cent. per annum from the date of said agreement; that at the time said agreement was made, and as a part of it, defendant gave to plaintiff and his father the note in suit, and it was not intended as an absolute promise to pay; that the defendant did not procure the stock of the other stockholders in said company, and had elected and offered to return said shares to plaintiff and his father, and had demanded the return of said note, and plaintiff and his father had refused to accept the stock and return the note. With this plea the defendant filed his affidavit that he did not make and deliver the writing in the declaration mentioned in the manner and form as the plaintiff alleges.

It appears that the company referred to in the notice was organized under the laws of New Jersey in December, 1891, for the purpose of controlling certain patents and mechanical appliances invented by defendant. Plaintiff and his father received 220 shares of the capital stock. Defendant contends that some time in September, 1892, the directors, during his absence, wrongfully voted themselves large sums of money; that, this fact coming to his attention, he arranged with certain directors to join with him to undo this action, and in some way rid themselves of the directors who had participated in that act; that action was thereafter taken by which the said resolution of the board was rescinded; that several consultations were had with parties friendly to the defendant and his interests, and that it was finally agreed that all those parties, including plaintiff and his father, should assign their stock to defendant, for the purpose of centralizing all the stock held by the friendly stockholders; that, at the time the note was given, another agreement was

made, which was signed by plaintiff, or by his father for him, under which it was agreed to return to defendant the note in suit at any time before the note was paid, if the defendant should be unsuccessful in securing all the stock of the stockholders; that he did not obtain all the stock, and offered to return plaintiff's to him, and demanded his note, which was refused; that this agreement was lost, and could not be produced on the trial.

On the other hand, the plaintiff contended that he made an absolute sale of this stock to defendant, and took his note therefor; that no such agreement as claimed by defendant was ever made, but that the only agreement made was put in writing and signed by defendant; that plaintiff held it, and produced it on the trial, and it is as follows:

"NEW YORK, November 1, 1892.

"I hereby agree to return to Mr. Marshall P. Wilder and Dr. Louis De V. Wilder, his father, the stock which they have sold to me in the Dr. Hercules Sanche Company at exactly the same price which I gave them, and at any time before my note given therefor is fully paid up, but not thereafter.

"HERCULES SANCHE."

The court below, at the close of his charge, stated to the jury:

"Now, gentlemen, * * * this case all results down to two questions, and they are just as simple as A, B, C, * * * Was the note given for stock, out and out, without any condition? If it was, the verdict is for the plaintiff, $1,302.50. Second. Was the note given with conditions that it might be given back, and the stock taken back, on the happening of conditions? If so, the verdict should be for the defendant, no cause of action."

The plaintiff had a verdict for $1,302.50. Defendant brings error.

The assignments of error all relate to the charge of the court, and the requests to charge.

In his second request, the defendant asked the court to charge:

"If you find from the evidence in this case that at the time the note sued upon was given, and at the time Exhibit 2 [the agreement signed by defendant, and above set out] was signed, another paper was signed by plaintiff, by and under which the plaintiff, or his father for him, agreed to accept from the defendant the return of the stock for which the note was given at any time before the note was paid, and you further find that the defendant offered to return the stock to the plaintiff for the note, then your verdict should be for the defendant."

It is contended that, while the court recognized in his charge the right of defendant to have this request given, yet its entire sense and meaning were destroyed by the remarks of the court in giving it. The request was given almost word for word as drawn, but the court added:

"Now, gentlemen, that request is so long it had better be explained. What does it mean, in two lines? It means if there was a lost paper that made this a conditional note, and they took back and he got his note, you would find for the defendant, because it made a condition of it. That is what that long request means. But they put it in a good many lines,—legally, but too long."

While the explanation of the request by the court was not very clear, yet we cannot believe the jury were misled by it, when we consider the other parts of the charge,—especially the concluding portion of it, which we have quoted.

The defendant, by his fifth request, asked the court to charge:

"The affidavit made by Hercules Sanche denying the execution of the note in suit in manner and form as declared upon was a proper affidavit to be filed in this case, under the defendant's theory of the case; for, if the papers claimed to have been signed by the defendant were signed, then the note set up in the declaration in this cause was not in manner and form the agreement made by and between the parties, and the defendant could not compel the plaintiff to prove the execution of the different papers unless such an affidavit had been filed."

This request was given in full, but counsel contend that

the effect of it was destroyed by the remarks of the court following it; that the purpose of the request was to explain to the jury the reason for filing the affidavit, as counsel for plaintiff on the trial sought to impress upon the jury that the defendant had committed perjury in making it. There is nothing in the remarks of the court which could in any manner take away the effect of the request as given. The court said that:

"They had a right to make this affidavit, if they believed in the lost paper and the other conditions. In order to bring in the defense, they had to make some affidavit substantially as stated."

But, aside from this, when the matter of the affidavit was spoken of on the trial, the court said to counsel:

"The lawyers make up their papers in the case, and then they ask their clients to sign them, and, if they are any way obedient, they will sign them; and, if there is any blunder about it, it is the lawyer who is to blame, and not the parties."

The defendant had nothing to complain of in these remarks.

The court, in one part of his charge, stated to the jury:

"If you believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides now, then the plaintiff has made out a case. If you believe the defendant's side of the case, taking it in sides by the witnesses, then the defendant has make out a case."

It is claimed by counsel that this was error, and the case should be reversed for that part of the charge. In support of this proposition, counsel cite *Henderson* v. *Railway Co.*, 116 Mich. 368. While the language used by the court in that case was similar to the above, and was held to be damaging to the defendant, the reason it was so held was that, in any view of the case, many of the facts testified to by the plaintiff's witnesses might be true, and yet no liability exist. That cannot be said in the present case. Here the issue was squarely made. The defendant testified to a certain contract being made, and signed by plain-

tiff; that it was lost, but, if produced, would show that the plaintiff agreed to surrender the note when the stock was tendered back. The plaintiff testified that no such agreement was ever made, and in the final portion of the charge the court very plainly stated this issue. We think it cannot be said, under these circumstances, that the defendant's case was damaged by this charge.

There are some other portions of the charge of which complaint is made, but a reading of the whole charge, in view of the matters in controversy, convinces us that no error was committed.

The judgment will be affirmed.

The other Justices concurred.

JACOBSON *v.* ISMOND.

APPEAL—EQUITY—REFORMATION OF INSTRUMENTS—FRAUD.

A decree reforming a mortgage so as to cover land claimed by complainant to have been omitted through defendant's fraud, being sustained by the evidence, was affirmed.

Appeal from Calhoun; Smith, J. Submitted April 18, 1899. Decided June 5, 1899.

Bill by Esther Jacobson against Oscar C. Ismond to reform a mortgage. From a decree for complainant, defendant appeals. Affirmed.

Frank W. Clapp, for complainant.

Fred M. Wadleigh, for defendant.

LONG, J. This bill was filed to correct and reform a mortgage, given by defendant to complainant, so that it

will embrace and cover lot 83 of Frisbie's Third addition to the city of Battle Creek, and render it a security for the payment of $1,000. The mortgage in question was dated February 7, 1896, due one year from date, with interest at 7 per cent., payable annually. There was no personal liability on the mortgage so executed, and the court below decreed that the principal and interest be paid within 30 days, or that defendant execute and deliver to the complainant a deed of the premises within that time. Defendant appeals.

It is claimed by complainant that she was engaged in the mercantile business at Reed City in February, 1896; that she wished to go out of business, and advertised the fact; that one Mr. Warren answered the advertisement, saying that he had Battle Creek real estate belonging to Oscar C. Ismond, and would exchange it for the merchandise; that, after some correspondence, the parties met at Battle Creek; that complainant and her son were shown two pieces of property, one known as the "Jefferson-Street House and Lot," and the other as the "River-Street Property;" that it was finally agreed that complainant would take these two pieces of property and some vacant lots for $8,500, and that the difference between the value of these properties and the value of the merchandise, when inventoried, should be secured by defendant by chattel mortgage on the stock; that, after the negotiations had continued for some time, it was suggested that such a mortgage on the merchandise would not be desirable, as it would amount to about $2,000; that the complainant and her son were then shown various other properties in Battle Creek claimed to be owned by the defendant, among which was a lot with a new house on it, mostly completed; that further negotiations were deferred until after the parties met at Reed City, and the mortgage taken, when the agent of defendant presented two mortgages, for $1,000 each. One covered what was called the "Gull Lake Property," and the other property in Battle Creek. These mortgages were tendered to secure the difference between

the value of the property and the value of the goods as inventoried, which amounted to $2,000. The complainant claims that neither she nor her son knew anything about the description of the Battle Creek property, as it was described by metes and bounds in the mortgage; that they stated to the agent of defendant that they knew nothing of the description, and did not know whether it covered lot 83 of Frisbie's Third addition, which had been shown them at Battle Creek, when the agent said: "The house and lot is in, and everything is all right." This testimony is corroborated by Mr. Charles A. Withey and the son of complainant. The exchange was then made. In each of the mortgages personal liability was waived, and a clause inserted that, in the event that defendant elected not to pay the money, he was to deed the property to complainant at the maturity of the mortgages, so that she might be saved the expense of foreclosure. Thereafter the defendant sent forward a deed to the properties described in the mortgages. It is claimed that complainant soon after sent her son to Battle Creek to take possession of the properties, and then for the first time ascertained that the house and lot in question were not included in the mortgage to the Battle Creek property, nor in the deed sent to her, but the mortgage and deed covered other and worthless property. The claim on the part of the defendant is that no such property as claimed was shown complainant, nor was it contemplated to be conveyed by this mortgage and deed.

The question involved is one of fact. We have read carefully the whole testimony in the case, and are satisfied that the claim of complainant is fully sustained by the evidence and the circumstances surrounding the case.

The decree entered by the court below must be affirmed, with costs.

The other Justices concurred.

ISMOND v. SCOUGALE.

1. TROVER—PLEADING—NOTICE OF DEFENSE—FRAUDULENT CONVEYANCES.

In trover by one claiming, as purchaser, goods seized by defendant under attachment, notice with the plea that the goods attached belonged to the person claimed to have sold them is sufficient to apprise plaintiff that the *bona fides* of the sale is questioned, and to admit evidence that it was fraudulent.

2. SAME—CONSIDERATION—EVIDENCE.

In an action of trover it appeared that one A. purchased a stock of goods, worth from $1,500 to $1,700, upon credit to an amount exceeding $1,300. After a claimed exchange of the goods for real estate owned by plaintiff, defendant attached them as the property of A., maintaining that the alleged exchange was a sham to defraud creditors. Plaintiff claimed that a loan to A. of $75, represented by a note given some time previous to the exchange, figured as a part of the consideration. He admitted that the note remained among his papers, that a portion of the land was worth less than $200, and that the residue was mortgaged for $250. *Held*, that evidence that the mortgaged land was worth less than the amount of the incumbrance was admissible, in connection with the other evidence, as bearing on the existence of a fraudulent intent.

Error to Shiawassee; Smith, J. Submitted April 18, 1899. Decided June 5, 1899.

Trover by Oscar C. Ismond against Monroe L. Scougale, sheriff of Shiawassee county. From a judgment for plaintiff, defendant brings error. Reversed.

Charles M. Hamper (*Van Ranst Pond* and *Charles A. Withey*, of counsel), for appellant.

Watson & Chapman, for appellee.

LONG, J. This is an action on the case, brought against

the defendant, who is sheriff of Shiawassee county, to recover the value of certain goods taken on a writ of attachment in favor of the Rodgers Shoe Company against Willis L. Ash and Alice Boyd, partners under the firm name of Ash & Boyd. It appears that Ash & Boyd were carrying on a retail shoe business at Durand, in that county, in May, 1898. Their stock was worth from $1,500 to $1,700. They were largely indebted to the Rodgers Shoe Company, of Toledo, Ohio. The credit man of the company (one Robert W. Barton) visited Ash & Boyd on May 12, 1898, to get security for the amount of the indebtedness to his firm; this indebtedness growing out of sales of shoes to the firm. Instead of giving security, they gave their note for $1,047.58, and made a statement in writing to him of the assets and liabilities, showing their assets at $2,200, and liabilities as follows:

To Rodgers Shoe Company	$1,047 58
" N. W. Gokey & Son	189 00
" Childs & Lee	100 25
	$1,336 83

They also on the same day wrote the Rodgers Shoe Company, at Toledo, that there would be no incumbrance placed on the stock while they were indebted to the company; that the prospects were good for a nice spring trade; and saying they would pay $50 per week on the note. The note was payable on demand. On the next day after the giving of this note, Ash & Boyd claimed to have sold out to the plaintiff, who went into possession of the store and goods. On June 11th following, the attachment was levied in behalf of the Rodgers Shoe Company. On going into possession of the goods on May 14th, plaintiff kept Ash with him in the store, and immediately issued the following advertisement of sale of the stock:

"Klondike in Durand. Closing-Out Sale of Boots and Shoes. Now is your chance. The Ash & Boyd stock of boots and shoes will be sold for what they will bring," etc.

The claim of the defense is that the pretended sale to the plaintiff by Ash & Boyd was a mere sham and subterfuge to cheat and defraud the Rodgers Shoe Company out of its claim. The plaintiff testified that he received the goods from Ash & Boyd in exchange for 80 acres of land in Benzie county, a lot in Battle Creek, and a note or obligation he held against Mr. Ash of about $75. On his cross-examination he was asked in reference to this Battle Creek lot, and stated that it was not worth $200; that the land in Benzie county was mortgaged for $236, with accumulated interest of $20. Being asked about the Ash obligation, he said he loaned money some time before to Ash to about $75, and took his note; that the note was probably with his papers in Battle Creek. Mr. Nathan Dedgen was called as a witness for the defendant, and testified that he knew the land in question in Benzie county; that a fair valuation of it would be from 50 to 75 cents per acre; that it was 80 acres, and was not worth the mortgage on it; and that plaintiff got it without ever seeing it. Defendant also produced as a witness one William Habbler, and asked him if he knew the value of the Benzie county land. This was objected to, and the court asked:

"How is it important at all as to how good a bargain Ismond [the plaintiff] got out of these parties for the store, unless there was a combination to perpetrate a fraud upon the creditors of your shoe company? * * *

"*Counsel:* Suppose this land was worth only 50 cents an acre, and that was all he paid for these boots and shoes; * * * I would like to ask if that is not evidence of fraud.

"*The Court:* If Ash & Boyd were bringing suit against Ismond, it might be evidence of fraud, but it is not evidence of fraud for the purpose of defrauding the shoe company, because, if he bought it for nothing of these parties, it did not concern the shoe company. They had no lien upon the property.

"*Counsel:* We cannot put in all the evidence at once.

"*The Court:* There ought to be some evidence tending to show some purpose in defrauding the parties who were operating under the attachment. The objection is good, as being incompetent and immaterial."

Other and like testimony was excluded by the court. In fact, all through the trial the court refused to receive evidence which was offered tending to show that the transaction between the plaintiff and Ash & Boyd was a sham, and yet the court stated that there was nothing offered tending to show that any fraud was attempted to be perpetrated. The only question submitted to the jury was as to the value of the stock taken from the plaintiff.

The court was in error in this. The notice under the plea of the general issue was that the stock attached was the property of Ash & Boyd. This was sufficient notice of the defendant's claim. It was stated repeatedly by counsel for defendant that they claimed that the transaction between the plaintiff and Ash & Boyd was a fraud upon the creditors of Ash & Boyd. The Rodgers Shoe Company was an attaching creditor, and had the right to contest the *bona fides* of this claimed sale to the plaintiff. There was some testimony received in the case which had a tendency to show this, and other testimony was offered which the court improperly ruled out. Great latitude should have been allowed in admitting testimony which had a tendency to show the true state of facts in reference to the transaction. It was of great importance to show just how the plaintiff became possessed of this stock of goods. If this land in Benzie county was worth no more than the mortgage upon it, the jury had the right to consider that as some evidence of fraud. The fact that the note, which was a part of the consideration for the sale, was still in plaintiff's possession at Battle Creek, had some tendency to show fraud. At least, these were questions for the consideration of the jury.

The jury returned a verdict in favor of plaintiff. The judgment must be reversed, and a new trial granted.

The other Justices concurred.

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ATTORNEY GENERAL *v.* BOARDS OF SUPERVISORS OF KALKASKA AND ANTRIM COUNTIES.

MANDAMUS—BOARDS OF SUPERVISORS—REBUILDING BRIDGE.

Mandamus will not issue, on relation of the attorney general, to compel adjoining counties to rebuild, upon its former site, a bridge over a navigable stream between them, where the legislature, by special act, has authorized a rebuilding upon a different site, concerning which the boards of supervisors of the respective counties are unable to agree.

Mandamus by Horace M. Oren, attorney general, to compel the boards of supervisors of Kalkaska and Antrim counties to rebuild a bridge. Submitted April 18, 1899. Writ denied June 5, 1899.

William D. Totten (*C. M. Phelps*, of counsel), for relator.

J. L. Boyd, Prosecuting Attorney, for respondent Kalkaska county board.

Andrew B. Dougherty (*Fitch R. Williams*, of counsel), for respondent Antrim county board.

HOOKER, J. We are asked to issue a writ of *mandamus* to compel two adjoining counties to rebuild a bridge across a navigable stream which is the boundary line between them. This is upon the grounds—*First*, that it is a common-law duty; and, *second*, that the counties are under contract obligations with the State to do so. Whatever we may think of these two grounds as furnishing a sufficient reason for such relief as is here asked, in ordinary cases, we are of the opinion that the legislature has authorized the building of a bridge, to take the place of the former one, upon a different site, thereby authorizing the counties to allow the highway in question to remain without a bridge at the former site. See Act No. 458,

Local Acts 1897. Since this act was passed, the boards of supervisors have been unable to agree. The Antrim county board has at all times been willing to aid in building a bridge, but upon a different site. The Kalkaska board, by its answer, admits its duty, and expresses its willingness, to join in the construction of a bridge, but only upon the old site. The relator, moving at the instance of some of the inhabitants of the vicinity, seeks to compel the erection of the bridge upon the former site. There is no more reason for our compelling Antrim county to join in building a bridge at the old place than there would be to require Kalkaska to consent to the new. It is not for us to fix a site for this bridge. The power is expressly conferred upon the two boards, and not upon us. We have no doubt that, when the necessity for a bridge becomes sufficiently urgent, the inhabitants of the vicinity will find a way to induce the boards of supervisors to take action in the premises.

The writ is denied.

The other Justices concurred.

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PEOPLE, *for use of* HIGLEY, *v.* LAIDLAW.

STATUTORY BONDS—WRONG OBLIGEE—ACTION—BY WHOM BROUGHT.

Where one having a contract from a city to do paving gives a bond, as required by 2 How. Stat. § 8411*b*, to protect parties furnishing labor and material for the improvement, which, however, instead of running to the people, as provided by said section, runs to the city, action thereon must be in the name of the city; section 8411*c*, providing that an action may be brought by those entitled in the name of the people, applying only to an action on such bond as is mentioned in the preceding section.

Error to Wayne; Frazer, J. Submitted April 19, 1899. Decided June 5, 1899.

Assumpsit by the people of the State of Michigan, for the use and benefit of Joseph J. Higley and others, against Thomas J. Laidlaw and others, upon a statutory bond. From a judgment for plaintiffs, defendants bring error. Reversed.[1]

William Stacey, for appellants.

Warner, Codd & Warner, for appellees.

MONTGOMERY, J. This suit was brought for the use of Higley and others on a bond given to the city of Battle Creek, Mich., by the defendants herein. Laidlaw Bros. had a contract from the city of Battle Creek to do certain paving, and the bond sued on was given by them to the said city of Battle Creek ostensibly under section 8411*b*, 2 How. Stat., which requires a bond in such cases to protect parties furnishing labor and material for public works, but, instead of running to the people of the State of Michigan, it runs to the city of Battle Creek. The other defendants are the sureties on the said bond. On the trial of the case, the defendants objected to the introduction of the bond in evidence, on the ground that it was given to the city of Battle Creek, and was therefore not admissible in evidence in a suit brought in the name of the people of the State of Michigan.

We held in *Board of Education of Detroit* v. *Grant*, 107 Mich. 151, that a bond with the conditions named in 2 How. Stat. § 8411*b*, was valid, although the obligee named was in that case the board of education, and not the people of the State of Michigan. In that case, however, the action was brought in the name of the obligee.

[1] Plaintiffs applied for a rehearing, asking leave to amend all pleadings and proceedings by substituting as plaintiff the city of Battle Creek, for use, etc., and that, upon such amendment and substitution, the judgment appealed from be affirmed. The application was denied July 11, 1899.

This practice accords with the requirements of the common law. 3 Enc. Pl. & Prac. 639; *Town of La Grange* v. *Chapman*, 11 Mich. 499; *County of Bay* v. *Brock*, 44 Mich. 45; *Stephenson* v. *Manufacturing Co.*, 28 C. C. A. 292, 84 Fed. 114. It is suggested that this case is taken out of the rule declared in *Town of La Grange* v. *Chapman*, for the reason that the statute (section 8411c) provides that an action may be brought by those entitled, in the name of the people of this State. The action is authorized on such bond as is mentioned in the preceding section. This is not such a bond, and, although enforceable under the rule in *Board of Education of Detroit* v. *Grant*, we think it must be enforced by an action in the name of the obligee.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

MARKILLIE *v.* ALLEN.

EQUITY—SUBROGATION—REVIVAL OF LIEN—HOMESTEAD.

A wife who had fraudulently obtained from her husband, who was incompetent, a conveyance of certain lands, deeded them to a third person, with an understanding that they should be reconveyed at the husband's death. Subsequently, upon a bill filed by the husband's heirs, both conveyances were set aside. The premises, when restored, were incumbered by a mortgage, the proceeds of which had gone to discharge a mortgage for a like amount upon the grantee's homestead. *Held*, that the lien upon the homestead should be revived, and the heirs subrogated to the rights of the original mortgagee.

Appeal from Van Buren; Buck, J. Submitted April 20, 1899. Decided June 5, 1899.

Bill by George W. Markillie and others against Charles Allen, Eliza Allen, and Wealthy Markillie, to revive a mortgage. From a decree for complainants, defendants appeal. Affirmed.

T. J. Cavanaugh and *Alfred J. Mills*, for complainants.

Lincoln H. Titus (*William J. Barnard*, of counsel), for defendants.

MONTGOMERY, J. The complainants are heirs at law of William Markillie, deceased. In a prior proceeding brought by these complainants against the defendants Wealthy Markillie and Charles Allen it was determined that the defendant Wealthy Markillie had obtained the conveyance of certain land from her husband, William, by undue influence, and that not only the conveyance to her, but a subsequent conveyance by her to the defendant Charles Allen, should be set aside. *Markillie* v. *Markillie*, 115 Mich. 658. While the title to this property stood in Charles Allen, he gave a mortgage of $650, in which his wife joined, covering the land conveyed to him by Mrs. Markillie. The present bill is filed setting up these facts, and further averring that the money received on this mortgage was used by Charles Allen to discharge a lien which existed on certain land conveyed by him to Mrs. Markillie, amounting at the time to $604.43, and praying that complainants be subrogated to the rights of the lienholder as they existed prior to the payment, and that a lien be declared in their favor to the amount stated, with interest. The circuit judge granted the relief, and defendants appeal.

It is strenuously insisted that the circuit judge was in error in finding for the complainants on the facts. On the part of the complainants the testimony tends to show that the money was received on the mortgage made by Charles Allen and wife to cover the 80 acres conveyed to him by Mrs. Markillie on the same day that the other mortgage

was paid. It appears that Charles Allen was present when it was paid. On the part of the defendants it is testified that the $650 borrowed on this mortgage was paid by Charles Allen to Mrs. Markillie, and two witnesses are called, who testify that they were called to witness the payment. Mrs. Markillie was not called. Defendant Charles also testified that his brother, Eugene Allen, paid and discharged the mortgage on the homestead, and called his brother to corroborate him. It is clear that the circuit judge, who saw these witnesses, discredited them; and a careful reading of the testimony, together with the reasons assigned by the circuit judge for his conclusion, satisfies us that the conclusion was justified by the circumstances in the case. It appears that on the trial of the former case Mrs. Markillie testified that the exchange of the property was without boot money. Charles Allen sat in court, and heard this testimony, and did not deny it. His attempt to explain his conduct is not, to our minds, satisfactory. The history of the dealings between the Allens, which left Eugene under the duty of discharging the Charles Allen mortgage, is, to say the least, vague and unsatisfactory. We are satisfied from the testimony that the mortgage was paid on the same day that the loan was made by Charles Allen, and, on the whole record, we are not disposed to disturb the finding of the circuit judge as to the facts.

It is contended that the decree is unauthorized, for the reason that it creates a lien on the homestead without the consent of the wife. This is not a proceeding to create a lien. It is an application to a court of equity to undo a fraud,—to trace a fund equitably belonging to complainants, and, when it is found that it was used to discharge a lien, complainants ask to revive that lien, and that they be subrogated to the rights of the original mortgagee. The power to do this is clear. 2 Pom. Eq. Jur. §§ 1044, 1051, 1053; *Pennell* v. *Deffell*, 4 De Gex, M. & G. 372; *Michigan Air-Line R. Co.* v. *Mellen*, 44 Mich. 321.

The decree is affirmed.

The other Justices concurred.

SMALLEY *v.* BODINUS.

NOTARY PUBLIC—ADMINISTERING OATH TO COPARTNER—MECHANICS' LIENS.

A notary has no authority to administer an oath where affiant is his copartner, and the matter is one in which the firm is interested. So *held* where the statement of a mechanic's lien in favor of a firm was sworn to before one of the partners.

Appeal from Wayne; Grove, J., presiding. Submitted April 20, 1899. Decided June 5, 1899.

Bill by Edwin E. Smalley, as successor and assignee of himself and De Witt C. Spaulding, copartners, against William C. Bodinus and others, to enforce a mechanic's lien. From a decree for complainant, defendants appeal. Reversed.

Sheridan J. Colby (*Harrison Geer* and *J. H. Cole*, of counsel), for complainant.

Walker & Spalding, for defendants.

HOOKER, J. Edwin E. Smalley and De Witt C. Spaulding were copartners, and, as such, had a claim for lumber furnished by them to one Gardner, who put it into a house belonging to the defendant, upon which it is sought by this proceeding to enforce a lien. The statement of the lien which was filed appears to have been signed and sworn to by Smalley before Spaulding, his copartner, and the defendant claims that this rendered the statement invalid, upon the principle that the interest of Spaulding disqualified him from acting in the premises, and the statement is the same as if it had not been verified. It is urged that the statute confers authority on any notary to administer oaths, and we are cited to some cases where this court has held that an oath may be administered by a solicitor of

the affiant. But that presents a somewhat different question, as in that case the attorney cannot be said to be an interested party, while here the copartner clearly is so. But in that case the legislature expressed its disapproval of the practice by forbidding it soon after the decisions were filed. We have held that an acknowledgment of a deed taken by the grantee is void. *Groesbeck* v. *Seeley*, 13 Mich. 329; *Laprad* v. *Sherwood*, 79 Mich. 524. Counsel cite cases from other States supporting this proposition. It may be possible to draw a distinction between an acknowledgment and an affidavit; but it seems to us that the same reason forbids official action by one who is to be benefited in both cases. Perhaps no great hardship would result should this affidavit be held valid, inasmuch as it has in no way misled any one, and furthermore states the truth; but the rule, once established, would be applicable to other affidavits, where the dangers of the practice would be more apparent.

The decree of the circuit court is reversed, and the bill dismissed, with costs of both courts.

The other Justices concurred.

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In re GALLAGHER'S ESTATE.

1. EXECUTORS—COMPENSATION—ERRONEOUS INSTRUCTION—HARMLESS ERROR.
   It cannot be presumed that the finding of a jury as to the number of days an executor devoted to the business of the estate would be influenced by the amount of compensation allowed by the statute, and hence an instruction that such allowance is $1.50, instead of $1, per day, though erroneous, will not be deemed to have been prejudicial.

2. SAME—EXTRAORDINARY SERVICES—EXTRA COMPENSATION.
   The discretion exercised by the circuit judge in determining whether services rendered by an executor were attended by such unusual difficulties as to entitle him to extra compensation under 3 Comp. Laws 1897, § 9438, will not ordinarily be reviewed.

3. NEW TRIAL—ORDER OF REFUSAL—FAILURE TO EXCEPT.
   Where no exceptions are taken to an order denying a motion for a new trial, the matter is not open for review.

Error to Wayne; Frazer, J. Submitted April 20, 1899. Decided June 5, 1899.

In the matter of the estate of Patrick Gallagher, deceased, Maria J. Quinn, guardian, appealed to the circuit court from an order of the probate court charging a certain balance against Jeremiah Connor, the executor. On the trial in the circuit court, the jury found a much larger balance due, and Daniel Sullivan, the executor's surety, made a motion for a new trial. After a denial of the motion, Sullivan died, and Thomas F. Sullivan and another, his executors, bring error. Affirmed.

Keena & Lightner, for appellants.

Rowland M. Connor (*John D. Conely*, of counsel), for appellee.

HOOKER, J. Jeremiah Connor was appointed executor of the last will and testament of Patrick Gallagher, who died in 1886. His final account was heard in the probate court on May 28, 1895, and a balance was found against him amounting to $577.38. On appeal, the jury found the sum of $3,943.76 due from him to the estate. This trial occurred in October, 1897. At the time he was appointed executor, one Daniel Sullivan signed his bond as surety. He took no part in the proceeding in either court, but obtained leave to move for a new trial, which motion was denied. After his death, which occurred in March, 1898, his executors removed the case to this court by writ of error.

The items over which there is contention are (1) a claim for services for which a *per diem* allowance is sought; (2) a sum for extraordinary services, which the circuit judge denied; (3) an amount claimed for attorneys' fees; (4) the denial of a motion for a new trial.

The executor, Connor, testified that he spent from 150 to 200 days in the business of the estate from the time of his appointment to the time of filing his final account. He commenced and prosecuted a number of lawsuits, including a proceeding for the construction of the will. The court instructed the jury that the executor was entitled to $1.50 per day for the time spent in the service of the estate. The jury thereupon rendered a finding upon the issues, from which we quote the following:

"The following items of charges made by said executor against said estate, viz.: Wood judgment, $140; city taxes, 1887, $200,—were not paid by said executor as stated in said account; but the following sums were paid, viz.: Wood judgment, $112.50; city taxes, 1887, $153.

"The following items of charges made by said executor against said estate, viz.: Baker & Clark, attorneys' fees, February 9th, $100; Baker & Clark, attorneys' fees, December 14, 1892, $105; Baker & Clark, attorneys' fees, December 14, 1892, $125,—are excessive and unreasonable in amount. Two hundred dollars is a reasonable charge for the services mentioned in said items.

"The following charges made by said executor against said estate, viz.: A. P. Lyons, attorney's fees, $120; J. L. Cummins, fees, $25,—are disallowed.

"The following charge made by the executor against said estate, viz.: Sheriff of Oakland county, $23,—was paid as stated by said executor.

"Said executor spent 100 days in services for said estate.

"Said executor collected and accounted for personal property to the amount of $1,912."

The order of the court, based upon this verdict, allowed Connor 100 days, at $1 per day. This was in accord with the statute (3 Comp. Laws 1897, § 11220).

It is contended that the executor was prejudiced by the mistake in the instructions; but this can be only on the theory that the jury would have allowed him for more days had they known that the statutory *per diem* was but a dollar. We cannot assume that the jury would so far violate their duty as to disregard the evidence as to the number of days spent. They return that the time used was 100 days, and we must presume that this was correct, and the judge was justified in allowing for that time at the statutory rate. Had it been a case where the jury were called upon to render a general verdict, and they had answered a special question in a similar manner, it would have been the duty of the judge to correct the verdict.

The same statute (3 Comp. Laws 1897, § 11220) authorizes the allowance of a further sum for extraordinary services where the settlement of the estate is unusually difficult. Section 9438 contains a similar provision for extra compensation in addition to a commission. The appellants make claim under the latter section. They say that the matter is within the discretion of the circuit judge, but insist that he erred in not making such allowance, and ask that the order be reversed, and the cause be remanded, to give him such opportunity. The court expressly found that there were no unusual difficulties or responsibilities in the execution of the trust. It is not usual for this court to review the discretion of the trial

court in such matters. See *Mower's Appeal*, 48 Mich. 441; *In re Power's Estate*, 92 Mich. 106; *In re Brewster's Estate*, 113 Mich. 561; *In re King's Estate*, Id. 606. We think this finding should not be disturbed.

It is urged that, under the testimony, the court should have directed the jury to find a verdict for the amount claimed to have been paid to Baker & Clark for attorneys' fees, amounting to $330. The jury found that $200 was a reasonable sum, and in this the circuit judge concurred. We are of the opinion that the cross-examination of the executor afforded a sufficient reason for considering the question of the reasonableness of these disbursements.

In disposing of the motion for new trial the court said:

"The court having heretofore granted leave to make a motion for a new trial on the part of the parties now moving, for the purpose of allowing them an opportunity to review my decision before us now, in Quinn against Gallagher's Estate, the motion for a new trial is denied, for the reason that I think the charge of the court to the jury was correct in every particular. I see no error committed on the trial, and the moving party on this motion is allowed 30 days in which to settle a bill of exceptions to take this matter to the Supreme Court for review."

As no exceptions are taken to this order, it cannot be reviewed. *Stevenson* v. *Railway Co.*, 118 Mich. 651.

The order of the circuit court is affirmed.

The other Justices concurred.

DONALDSON v. CRANE.

1. TRESPASS—POSSESSION—ADMISSIONS OF LANDLORD—EFFECT ON TENANT.

   The possession by a tenant of the portion of the demised premises near a disputed boundary line is not affected by a statement of his landlord to the owner of the adjoining parcel that he "would never use" such portion; and such statement will not support an action of trespass by the adjoining owner against the tenant, who continues in possession of the portion.

2. SAME—DIRECTING VERDICT.

   Where, in an action of trespass *qu. cl.*, the testimony conclusively shows that plaintiff had no actual possession, and that defendant did have such possession, and still has it, the latter is entitled to have verdict directed in his favor.

Error to Lenawee; Chester, J. Submitted May 4, 1899. Decided June 5, 1899.

Trespass *quare clausum fregit* by Edward H. Donaldson against Arthur Crane. From a judgment for plaintiff, defendant brings error. Reversed.

Watts, Bean & Smith, for appellant.

Salsbury & O'Mealey, for appellee.

HOOKER, J. David E. Blowers died in 1876 seised of a parcel of land, separate portions of which became the property of his two nephews, Edward and Norman, about the year 1878. Norman owned the south portion and Edward the north. Subsequently Edward conveyed his tract to Ferguson, who in turn deeded to Donaldson, the plaintiff. The other tract became the property of Mrs. Wendle. Crane, the defendant, was her tenant at the time this action was begun, residing upon the premises.

She lived in Jackson county. The action is trespass *quare clausum.* Plaintiff claims that the defendant, Crane, entered and destroyed certain corn which the plaintiff had planted upon the premises under the following circumstances: When the plaintiff entered under his deed, he found Mrs. Wendle occupying the adjoining premises up to a certain fence, which the defendant claims to have been established by the Blowers brothers as the line. The plaintiff testified that, after he took possession of the tract purchased from Ferguson, he leased the field south of this fence in the spring of 1895 from George Blowers, and that he asked George "what was the matter with his drawing the fence away, and plowing right through there, and dividing the ground as near as he could where the fence stood?" He was told that he (George) thought Mrs. Wendle would have no objection. Thereupon he drew the fence away, and planted the two adjoining parcels (his own, and that which he says he leased from George). He says that he divided the crop up to the line where the fence had stood.

A little while after his crop came off, the plaintiff caused the line to be surveyed, and claims that it was found to be some rods farther south than that occupied by the fence which he had removed. He testified that after the survey he had some talk with Mrs. Wendle, and that she compared deeds with him, and said in response to his question, "What are you willing to do about it?" that "she would never use that piece of land." She admitted that they talked, but denied that she made such statement, and said that she claimed that the fence was upon the line which had been established by agreement. It does not appear that Crane had anything to do with this talk, or that he was present, though at that time he was in possession of the farm. The plaintiff said that he did not know as he ever surrendered the parcel to her after cropping it, but it is obvious from his own testimony that he did nothing more with the parcel until he began plowing in 1896. At that time Crane had possession as tenant. He went there

to plow on May 1st, and was forbidden to do so. Thereupon he did no more until he went to Adrian, and consulted counsel. On his return he found that Crane had finished plowing the piece, and had sowed oats. He then went over it, and planted it to corn, and then Crane dug up the corn. He then brought this action before a justice of the peace, alleging title to the premises. The case was certified to the circuit, and the plaintiff recovered a verdict for five dollars damages. It is manifest that the case was brought with a view of settling the title, or, rather, fixing the line between the parcels, and much of the testimony offered was addressed to the question whether a line had been established by agreement.

The defendant claimed that in 1878 or 1879 the two brothers made measurements, and agreed upon a line which should be the boundary; that they turned a back furrow to mark it through the cleared land, and blazed trees through the woods; and that a fence was built upon the line of the dead furrow, and, though the fence had at times been shifted for convenience, the dead furrow had always been recognized by the occupants as the line, until the plaintiff questioned it. The plaintiff did not contradict the fact of the agreement, but he offered testimony which he claims tended to show that it was not an agreement settling the boundary, and the statement of Mrs. Wendle "that she would not use it any more," which he says was an abandonment of any such claim, and tends to prove plaintiff's possession. This action is not brought against Mrs. Wendle, and the defendant is not bound by her promises, if she made any. His possession could not be affected by such statement.

The important question is whether Crane abandoned the disputed portion and the plaintiff took possession. The evidence conclusively shows that, previous to the removal of the fence, Mrs. Wendle had quiet and undisturbed possession. The plaintiff occupied it under her afterwards as a cropper, and, after taking off his crop, he did nothing more with the disputed territory, except to

run a survey over it, until he undertook to get possession by plowing it on May 1st, and planting corn on Crane's oat field. In our opinion, the testimony conclusively shows that he had no actual possession, and that Crane had such possession, and, for aught that appears, has it yet. This is fatal to the plaintiff's case, and the court should have directed a verdict for the defendant. *Newcomb* v. *Love*, 112 Mich. 115.

This case appears to be an illustration of the folly of trying to obtain possession of land through an action for trespass. The law prescribes ejectment as the method, and, lest injustice should be done, provides a second trial as a matter of right. We do not feel called upon to discuss the other questions in the case, or to direct a new trial, as upon plaintiff's own testimony he should not recover.

The judgment is reversed, and no new trial ordered.

The other Justices concurred.

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RUMSEY *v.* SETTLE'S ESTATE.

LIMITATION OF ACTIONS—ACKNOWLEDGMENT OF DEBT.

Within six years after one indebted on notes of different dates had promised by letter to pay the creditor "every cent" he owed, he wrote a second letter to the creditor, stating that he would like to fix the matter up by giving a new note, and inquiring as to what sum in cash, in case the creditor should consider a note worthless, he would take to balance all the debtor owed. *Held*, that, under 2 How. Stat. § 8725, the letters operated to keep the cause of action alive, as to all of the notes, for six years from the date of the last letter.

Error to Montcalm; Davis, J. Submitted May 9, 1899. Decided June 5, 1899.

Chauncey J. Rumsey presented a claim against the estate of Robert C. Settle, deceased, for the amount of six promissory notes. The claim was allowed by the commissioners as to one of the notes only, and claimant appealed to the circuit court. From a judgment for claimant for the entire amount, on verdict directed by the court, defendant brings error. Affirmed.

Frank A. Miller and *Morse & Locke*, for appellant.

L. C. Palmer (*George E. & M. A. Nichols*, of counsel), for appellee.

MOORE, J. In the circuit court a verdict was directed in favor of the claimant by the circuit judge. The defendant brings the case here by writ of error. A number of errors are assigned, but, in our view of the case, a disposition of one of them disposes of the case. Prior to 1890, Mr. Settle was a resident of Ionia county. In 1890 he entered into the employ of the Wagar Lumber Company, and removed with his family to Alabama, where he died in 1897. It is claimed by defendant that Mr. Settle always intended to return to Michigan, so that he did not lose his domicile here; while it is asserted by claimant that he lost his domicile in Michigan, so as to suspend the running of the statute of limitations against his debts. Prior to going to Alabama, Mr. Settle had given six notes, which were owned by Mr. Rumsey. The first of these notes came due January 3, 1885. The last one matured October 4, 1897. When presented as a claim against the estate of Mr. Settle, all of them had outlawed except the last one, unless the statute of limitations was suspended by the absence from the State of Mr. Settle, or unless the following letters were such an acknowledgment of the debt as to prevent the running of the statute. The last note was allowed by the commissioners on claims. The circuit judge bases his action in directing a verdict upon the letters. They read as follows:

"MUIR, MICH., August 12, 1889.

"MR. C. J. RUMSEY.

"*Dear Sir:* I have not seen you, so I will drop you a few lines, and say to you that, as far as my matters are with you, they are all right, and I shall wipe out the most of it this fall. I am having a little trouble with Mr. Town, but, as soon as that is through, you will get some money. I will say this: That every cent I owe you will be paid. I shall get the Wilbur matter fixed up next week, and you will get what is due you there. Thanking you for your patience with me, I remain,

"Yours respectfully,

"R. C. SETTLE."

"WAGAR, ALA., April 18, 1893.

"CHAUNCEY J. RUMSEY.

"*Dear Sir:* When I was at Muir last year, I fully expected to fix matters with you in some way, but there was no chance for me to do so, for I did not collect a cent that I expected, and probably never will. Now, what I was going to write is this: I am working for the Wagar Lumber Co., and getting a good, fair salary, but, after paying living expenses, and my wife goes home summers, there is but little left. Now, I owe the Ionia County Savings Bank $300, with L. N. Olmstead as indorser, and I owe H. R. Wagar about $400, and I owe you. Now, I want to fix your matter up in some way; that is, give you a new note, or, if you think a note worthless, what will you take in cash, and balance all I owe you? I have not said anything to H. R. W., but, if you make it low enough, maybe I could get him to lend it to me, and add to his note against me. After I hear from you, I will speak to him. Yours truly,

"R. C. SETTLE."

And written on margin of letter:

"Rumsey: Put this down as low as you can, for I am afraid it will be more than he would be willing to lend me without any security, and I have none to give him."

Objection was made to the admission of the first letter, because it was written more than six years before the claim was presented against the estate.

The provisions of the statute are as follows:

"In actions founded upon contract, express or implied,

no acknowledgment or promise shall be evidence of a continuing contract, whereby to take a case out of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party to be charged thereby." 2 How. Stat. § 8725.

None of the notes, at the time this letter was written, were outlawed. The letter contains an acknowledgment of the debt, and a promise "that every cent I owe you will be paid," and we think it clearly would prevent the running of the statute for six years from the time it was written. This would carry the time forward until August 12, 1895, more than two years after the last letter was written. Did the writing of the last letter, under these circumstances, renew the debt? Mr. Settle owed Mr. Rumsey not simply the amount due on one note, but the amount due on all of them. Under these circumstances he writes:

"When I was at Muir last year, I fully expected to fix matters with you in some way. * * * Now, I owe the Ionia County Savings Bank, * * * and I owe you. Now, I want to fix your matter up in some way; that is, give you a new note, or, if you think a note worthless, what will you take in cash, and balance all I owe you?"

Can there be any doubt this referred to all the notes, and that Mr. Settle recognized he still owed them and desired to pay them?

The decisions are somewhat conflicting as to what the writing must show. 1 Wood, Lim. § 68, states the rule as follows:

"*Present theory:* It may now be said that the theory of acknowledgment is settled as to simple contracts on the principle that there is required either an express promise to pay the debt, or an absolute admission of indebtedness from which a promise to pay may naturally be inferred, which new promise is sufficiently supported by the consideration of the past debt; and a clear admission of a debt being evidence, if unrebutted, of a new promise to pay

sufficient to avoid the statute, it follows that three questions will usually arise as to any alleged acknowledgment: *First*, is there an admission of the debt in question? *second*, is such admission narrowed by any qualification which rebuts the presumption of a promise, or subject to any condition on the fulfillment of which the implied promise is dependent? and, *third*, if there is a condition, has it been satisfied? On the first question there is considerable liberality in construing a reference to a debt as an admission. Thus, where the admission was in the following terms: 'I am ashamed the account has stood so long,' it was held to be a good acknowledgment. *Cornforth* v. *Smithard*, 5 Hurl. & N. 13. In another case the debtor wrote as follows: 'I hope to be in Hampshire very soon, when I trust everything will be arranged with W. [the creditor] agreeable to her wishes;' and this was held a sufficient acknowledgment. *Edmonds* v. *Goater*, 15 Beav. 415. And in a later English case the two following letters, written by the defendant, were held sufficient to prevent the operation of the statute, although in fact no account was sent in, in compliance with the request in the letters. *Quincey* v. *Sharpe*, 1 Exch. Div. 72. The letters were as follows:

"'January 13, 1872.

"'MR. QUINCEY.

"'*Sir:* I shall be obliged to you to send in your account made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders until this be done.

"'I am, sir,

"'Your humble servant,

"'J. SHARPE.'

"'February 19, 1872.

"'MR. QUINCEY.

"'*Sir:* You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week. To oblige, sir,

"'Yours, etc.,

"'JOHN SHARPE.'

"Thus it will be been that an admission of the debt will be sufficient, although the exact amount payable is disputed, or remains to be proved."

The letter of April 18, 1893, meets all the requirements of the statute. See *Ten Eyck* v. *Wing*, 1 Mich. 40;

Crane v. *Abel*, 67 Mich. 242; *In re King's Estate*, 94 Mich. 411; *Chidsey* v. *Powell*, 91 Mo. 622 (60 Am. Rep. 267); *Wilcox* v. *Clarke*, 18 R. I. 324; *Lang* v. *Gage*, 66 N. H. 624; *McNear* v. *Roberson*, 12 Ind. App. 87; *King* v. *Davis*, 168 Mass. 133; *Hill* v. *Hill*, 51 S. C. 134; *First Nat. Bank* v. *Woodman*, 93 Iowa, 668 (57 Am. St. Rep. 287); *Walsh* v. *Mayer*, 111 U. S. 31; *Howard* v. *Windom*, 86 Tex. 560; *Woodbridge* v. *Allen*, 12 Metc. (Mass.) 470; *Mitchell* v. *Clay*, 8 Tex. 443; *Custy* v. *Donlan*, 159 Mass. 245 (38 Am. St. Rep. 419).

The judgment is affirmed.

The other Justices concurred.

BLACKMAN *v.* SIMPSON.

FALSE IMPRISONMENT—JOINT TORT FEASORS—DIVIDED ACTION—SATISFIED JUDGMENT AS BAR.

A satisfied judgment for plaintiff in an action of false imprisonment against the complaining witness, the magistrate, and the constable, in which the declaration alleged the continuance of the imprisonment until a delivery by the constable to the sheriff, is a bar to a subsequent suit against the sheriff, upon substantially the same state of facts, for the continuance of the false imprisonment until the evening of the next day.

Error to Grand Traverse; Corbett, J. Submitted May 10, 1899. Decided June 5, 1899.

Case by William Blackman against Oscar Simpson for false imprisonment. From a judgment for defendant, plaintiff brings error. Affirmed.

Underwood & Umlor, for appellant.

Pratt & Davis, for appellee.

MOORE, J. The plaintiff brought this action against defendant to recover for false imprisonment. The circuit judge rendered judgment in favor of defendant. The plaintiff brings error.

July 24, 1897, James Days made a complaint against the plaintiff before Mr. Chase, a justice of the peace. The justice issued a process for the arrest of the plaintiff. It was placed in the hands of Mr. Wyckoff, a constable, who arrested the plaintiff, and brought him before the magistrate, where such proceedings were had that the magistrate issued a commitment to the constable, who took the plaintiff about 20 miles to the county jail, and delivered him, at 8 o'clock on the morning of July 25th, to the sheriff, the defendant in this case. The sheriff had plaintiff in custody until about 5 o'clock the next day, when he was discharged. It is conceded the proceedings before the magistrate were void. In December, 1897, the plaintiff sued the complaining witness, the magistrate, and the constable in an action of false imprisonment. He filed a declaration in the case, in which the foregoing facts were set up, and stated the false imprisonment continued until about 8 o'clock on the morning of July 25th, and that, because of these acts, he had been damaged in reputation, and disgraced among his neighbors and other citizens, and suffered great anxiety and pain of body and mind, and that he had been hindered about his business for a long time, to wit, "for the space of two days, and the plaintiff has been and is greatly injured by the said premises in his good name, fame, credit, and reputation on and by reason of the stigma cast upon him by said illegal, unjust, and unwarrantable and void proceedings and false imprisonment inflicted on him, as aforesaid, by the defendants, and each of them, whereby the said plaintiff says he has sustained damages, and is damaged and injured, to the amount of five thousand dollars, and therefore he brings suit," etc. The plaintiff recovered a judgment, which was paid in full to the clerk of the court, and by him to the plaintiff.

After this payment was made, the plaintiff commenced this suit for false imprisonment against Oscar Simpson, who was the sheriff at the time plaintiff was detained in the jail. In his declaration he set up substantially the same state of facts that he had narrated in the former declaration. In addition thereto, he stated he was imprisoned by defendant from about 8 o'clock on the morning of July 25th, and that the false imprisonment perpetrated by defendant continued until about the hour of 5 o'clock in the evening of July 26th. He claimed, as the result of said false imprisonment, he had been damaged in reputation, and disgraced among his neighbors, and suffered anxiety and pain of body and mind, and been hindered in his business for a long space of time, to wit, "for the space of four days, and the plaintiff has been and is greatly injured by the said premises in his good name, fame, credit, and reputation on and by means of the stigma cast upon him by said false imprisonment inflicted on him, as aforesaid, by the said defendant, whereby the plaintiff says he has sustained damages and is injured to the amount of five thousand dollars, and therefore he brings suit." The defendant pleaded the former suit, judgment, and satisfaction thereof in bar to this suit. The circuit judge held the plea to be good. It is the claim of the plaintiff that, as in the first case he stated the false imprisonment continued until 8 o'clock on the morning of July 25th, while in this case he stated it commenced at that time, and continued until 5 o'clock in the evening of the next day, and as the sheriff had nothing to do with him prior to 8 o'clock of July 25th, there are two causes of action, and the second one is not affected by what was done in the first.

It may, perhaps, be doubted whether the sheriff could be made liable for what occurred before the plaintiff was brought to him; but can it be doubted that t e complaining witness, magistrate, and constable could be held for the results of their acts? If plaintiff suffered anxiety and pain of body and mind, and disgrace, and a stigma at

tached to his good name, must he be limited in his recovery of damages, in the first trial, to what occurred in these respects prior to 8 o'clock on the morning of July 25th? How would the jury decide what he suffered before, and what after, 8 o'clock, in his reputation and injury to business? As the proceedings from the inception are admitted to be void, there can be no doubt the parties to the first suit were joint wrong-doers, not only as to what occurred prior to 8 o'clock, but during the entire time of the false imprisonment, and the plaintiff could have recovered against them his entire damages.

"The law permits all the wrong-doers to be proceeded against jointly. It also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy, regardless of the participation of the others. While the wrong is joint, it is also, in contemplation of law, several. * * * The officer who serves a void writ is not the less an individual wrong-doer because of the magistrate being liable for having issued it. And, while in such cases the person injured may pursue all, so he may pursue any number of those who are legally chargeable with the wrong. If one is sued alone, it is no defense to him that others are not brought in to share the responsibility. If all are sued, one cannot excuse himself by showing the insignificance of his participation, as compared with that of others. * * * Nor, after suit is brought, can there be any apportionment of responsibility, whether the suit be against one or against all. Each is responsible for the whole, and the degree of his blamableness * * * is immaterial." Cooley, Torts (2d Ed.), 153.

There can be no doubt plaintiff might have recovered all his damages in the first suit, and we have no means of knowing he did not.

In the false-imprisonment case of *Thompson* v. *Ellsworth*, 39 Mich. 719, Justice GRAVES said:

"It is a principle of general application, in actions against wrong-doers, that the plaintiff may recover, by way of damages, at least all that he has lost up to the commencement of the suit through the wrongful act for which the defendant is sued (*Rundle* v. *Little*, 6 Q. B.

178); and it is also a general rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all, and that actions cannot be repeated from day to day, as the diurnal effects of the one original wrong happen to mature."

The authorities are not agreed whether the bringing of a suit against one will prevent bringing a second suit against others. Some of them hold the bringing of the first suit is an election, which will preclude the bringing of other suits. See 2 Black, Judgm. § 780. Justice Kent stated the rule to be that the party injured may bring separate suits against the wrong-doers, and proceed to judgment in each, and that no bar arises as to any of them until satisfaction is received. *Livingston* v. *Bishop*, 1 Johns. 290 (3 Am. Dec. 330). This is the prevailing doctrine in this country. Cooley, Torts (2d Ed.), 159. If the several judgments vary in amount, the plaintiff may elect to take the larger sum, or, if all the defendants are not solvent, he may elect to proceed against the solvent party; but the authorities are all agreed that the satisfaction of any particular judgment will release the other wrong-doers. *Power* v. *Baker*, 27 Fed. 396; Cooley, Torts (2d Ed.), 159; 2 Black, Judgm. § 782.

The plaintiff having sued three of the four wrong-doers in an action in which he might have recovered all his damages, in which action he recovered a judgment which has been paid and received by him, he cannot recover against the fourth wrong-doer.

The judgment is affirmed.

The other Justices concurred.

H. M. LOUD & SONS LUMBER CO. *v.* TOWNSHIP OF VIENNA.

TAXES—LEVY AND SALE—VOLUNTARY PAYMENT.

Where, upon a sale of property under a tax levy, the owner appears by an agent, who, without protest, takes part in the bidding, procures the property to be struck off to him, and, upon the representation that he has not the required funds with him, induces the treasurer to accompany him to the owner's office, where payment is made, such payment will be construed to be voluntary, even though the treasurer is required to give a receipt reciting that the money is "paid under protest after levy."

Error to Montmorency; Kelley, J. Submitted May 10, 1899. Decided June 5, 1899.

Assumpsit by the H. M. Loud & Sons Lumber Company against the township of Vienna to recover taxes alleged to have been paid under protest. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Main J. Connine, for appellant.

James Francis, for appellee.

MOORE, J. The plaintiff sued the defendant to recover taxes paid by it to the treasurer of the defendant, claiming the assessment was void, and that the taxes were paid under protest. The circuit judge directed the jury to return a verdict for the defendant. The case is appealed here by the plaintiff.

The plaintiff was the owner of the lands upon which the taxes were assessed. As the taxes were not paid, the treasurer made a levy upon logs belonging to plaintiff, and advertised them for sale on the 5th of March, at which time they were offered for sale to the highest bidder. Mr. Park, the superintendent of the plaintiff, ap-

peared in its behalf, and bid upon the logs. A man by the name of Stevenson also bid. After several bids were made, as Mr. Park was the highest bidder, the logs were struck off to him. Mr. Park's version, upon the cross-examination, of what occurred, is as follows:

"I saw the notice that he had up for the sale. I think the date of the sale was March 5th. He offered the logs at that time to bidders. I don't know who the first bidder was, but think it was a man from Lewiston, by the name of Stevenson. I don't think any offer was made by the thousand, but an offer by the bulk. I have forgotten how much the first bid was. There was a certain amount offered for the logs. There were several bids. The next bid was a higher bid made by me. There was a bid made over me, and I bid over that again. I could not say how many bids there were made altogether. I made the highest bid made there that day. The logs were struck down to me as the highest bidder at that sale. I bought the logs in at that sale of the township treasurer. I did not pay him the money there for the logs I had bid in. The reason why I did not pay him the money there was because I wanted to counsel the members of the firm at Au Sable first. I had the money there to pay, but I did not want to pay until I heard from them. I paid for the logs on the 6th of March. I was bidding them in for the plaintiff. I think the amount of the bid was somewhere near the amount of the taxes. I think it was a trifle over.

"*Q.* When Mr. Jones went down with you, he went down to get pay for the logs that he had sold to you on that 5th day of March?

"*A.* He went down to get pay for his taxes,—the amount of his taxes. * * * The sale was temporarily suspended at my request, until I could get the money and pay the taxes."

Mr. Jones' version of the transaction is as follows:

"Mr. Park made the last bid, and there were no more bids made after he made the bid, and it was struck off to him. The first bid made by Mr. Park did not come up to the amount of the tax. After the bidding was closed, there was something said about that he did not have the money to pay the bid that he had made on the logs, and he wanted I should go to Au Sable, and he would pay the

money there. He said he did not have the money there to pay it, and, of course, I said then it would go to the next highest bidder, if he could not pay it. And he went on and said, if I would go down to Au Sable with him, he would get the money there, and pay it. I went. After we got there, they looked over the tax, and made out a receipt and a check, and presented them to me—the check and the receipt—to sign; and I said I did not think I could take this tax under protest. I got the money, and came home."

On cross-examination, witness, when shown the tax receipt, testified:

"That is my signature on the back of the tax receipt. When I signed that there, I think the writing, 'Paid under protest after levy,' was there immediately above my signature. I received the money on the 6th of March."

No written protest specifying the grounds of protest was made by the plaintiff, and the record does not disclose any statement was made to the treasurer why the plaintiff claimed the right to pay the taxes under protest. In *Hinds* v. *Township of Belvidere*, 107 Mich. 664, it was held, in an action to recover taxes paid under protest, no showing can be made or recovery had upon any ground not named in the protest. This transaction is not a very creditable one to the plaintiff. Its representative appeared at the sale, and without protest took part in the bidding, and bid higher than another; and prevented the property from being sold to him. When the property was sold, it was represented that if the treasurer would go to the office of the plaintiff, which was not in the township where the sale was made, the amount of the bid would be paid to him. When he arrived there, an attempt was made by the plaintiff not to carry out the arrangement which induced the treasurer to be there, but to place him at a disadvantage.

The case is quite like that of *Gachet* v. *McCall*, 50 Ala. 307, where the owner appeared at the sale, and voluntarily promised the collector, if he would postpone the sale until

the next day, he would pay the taxes and fees. The sale was postponed, and on the next day, pursuant to the promise, the owner paid the amount in full, but declared he paid the fees under protest. It was held this was a voluntary payment, and that no portion of the money could be recovered back.

Judgment is affirmed.

The other Justices concurred.

DAVIDSON *v.* FOX.

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1. JUSTICES OF THE PEACE — ATTACHMENT — SERVICE — FOREIGN CORPORATIONS.

In 1879 the justice's court act was so amended as to permit the issuance of attachments against foreign corporations (2 How. Stat. § 6831). Sections 6840 and 6841, being parts of the original act, provide for service of the writ either personally or by leaving a copy with the custodian of the property seized. Another statute (2 How. Stat. § 8143) provides that in suits commenced by attachment against a foreign corporation, if personal service is had on any officer, member, clerk, or agent of such corporation within this State, the same proceedings shall be had as in case of an attachment against a natural person. *Held*, that section 8143 is permissive merely, and does not provide an exclusive mode of service, but that service upon a foreign corporation may properly be made in accordance with the provisions of the justices' act.

2. SAME—SUBSTITUTED SERVICE—RETURN.

A constable's return that the defendant named in a justice's writ of attachment has no last place of residence within the county is not insufficient for failure to certify that he has made diligent search to find a last place of residence.

3. SAME.

A return of substituted service of a justice's writ of attachment, which states that the officer retained the writ in his

hands, and "made diligent search" for defendant, during all the time in which personal service might be made, is not open to the objection that it does not show that defendant could not be found, where the return begins with the statement "I * * * am unable to find" the defendant.

4. SAME.

Substituted service of a justice's writ of attachment, made more than six days before the return day of the writ, is valid, where the officer's return shows that he retained the writ and made diligent search for the defendant for the full time required.

Error to Wayne; Carpenter, J. Submitted April 20, 1899. Decided June 5, 1899.

Trover by Alexander Davidson against David W. Fox, the Detroit Journal Company, Fred H. Lutz, and William W. Watson. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

George W. Bates, for appellant.

Bacon & Palmer, for appellee Watson.

A. Ward Copley (*Cutcheon & Stellwagen*, of counsel), for other appellees.

MONTGOMERY, J. This is an action of trover to recover the value of certain store fixtures and bicycle sundries taken on two attachments in favor of the Detroit Journal Company and Fred H. Lutz, respectively, against the property of the Davidson Cycle Company, a foreign corporation. Plaintiff is the assignee of the Davidson Cycle Company. Defendant Fox is the constable who served the writs. Defendant Watson is a warehouseman with whom the property was stored. The circuit judge held that the attachment proceedings were valid, and directed a verdict for the defendants. The plaintiff contends that the law makes no provision for service of attachment from justices' courts against foreign corporations, and that if

section 8143, 2 How. Stat., applies to such proceedings, the service should be on an officer or agent of the corporation. It is also contended that the return of service is defective in each case, for reasons which will be referred to later on.

1. Prior to 1879 justices of the peace had no jurisdiction to issue attachments against foreign corporations. In that year section 6831, 2 How. Stat., was amended so that it now provides that:

"Any plaintiff shall be entitled to an attachment against a defendant in any action founded on a judgment, or on a contract, express or implied, if such plaintiff, or some person in his behalf, shall make and file with the justice an affidavit * * * containing a statement. * * * *Fifth*, that the defendant is a foreign corporation."

The clause last quoted is the one introduced by way of amendment. Language could not well be clearer. Is the service provided by the justices' act sufficient? This amendment is to the justices' act, and the act, as amended, is to be construed as a whole. Sections 6840 and 6841 provide for service either personally or by leaving with the custodian of the property seized. But it is contended that section 8143 provides the exclusive mode of service in attachment cases. This section makes no provision for service in case no officer, member, clerk, or agent of such corporation be found within the county. The language of the section is permissive, and we think it should be so construed. It does not, therefore, provide an exclusive mode of service.

2. In the Journal Company case the return of service is as follows:

"By virtue of the within writ of attachment, I, David W. Fox, on the 9th day of September, 1897, at the city of Detroit, Wayne county, Michigan, seized the goods and chattels of the defendant, the Davidson Cycle Company, a foreign corporation, within named, which are mentioned in an inventory, of which the annexed is a copy; and I hereby certify that I have made diligent search and in-

quiry, and am unable to find said Davidson Cycle Company, or any person on whom personal service of the within writ could be made as against the said Davidson Cycle Company, within the said county, and therefore, on the 14th day of September, 1897, because the said defendant could not be found, I left a copy of the within attachment and of the said inventory, duly certified by me, with Frank H. Chapman, in whose possession I found the said goods and chattels; and I certify that said defendant has no last place of residence within said county; and I further certify that I retained the within writ in my hands, and made diligent search for the said defendant, during all the time within which personal service might by law have been made."

In the Lutz case the return was as follows:

"By virtue of the within writ of attachment, I, David W. Fox, on the 10th day of September, 1897, at the city of Detroit, Wayne county, Michigan, seized the goods and chattels of the defendant, the Davidson Cycle Company, a foreign corporation, within named, which are mentioned in an inventory, of which the annexed is a copy; and I hereby certify that I have made diligent search and inquiry, and am unable to find said Davidson Cycle Company, or any person on whom personal service of the within writ could be made as against the said Davidson Cycle Company, within the said county, and therefore, on the 15th day of September, 1897, because the said defendant could not be found, I left a copy of the within attachment and of the said inventory, duly certified by me, with Frank H. Chapman, in whose possession I found said goods and chattels; and I certify that said defendant has no last place of residence within said county; and I further certify that I retained the within writ in my hands, and made diligent search for the said defendant, during all the time within which personal service might by law have been made."

Each of these returns shows—

First. That the officer was unable to find the defendant.

Second. That he retained the writ in his hands, and made diligent search for the defendant, during all the time in which personal service might by law be made.

Third. That the defendant had no last place of residence within the county.

Fourth. That service was made on the person in whose possession the property was found at least a sufficient length of time before the return day.

It is urged that the return should have certified that the officer made diligent search to find a last place of residence of defendant, and that a return in terms that the defendant has no last place of residence within the county is not sufficient. The statute does not require any more specific return in that regard than was made in this case. *Buehler* v. *De Lemos*, 84 Mich. 554; *Nicolls* v. *Lawrence*, 30 Mich. 395, 397.

It is also said the return, showing the officer retained the writ in his hands, and made diligent search for defendant, during all the time in which personal service could be made, does not show that he could not find the defendant. It is true, this language does not, standing alone, show this fact; but the officer also returns, "I * * * am unable to find the said Davidson Cycle Company." This is sufficient.

The fact that substituted service was made in one case more than six days before the return day does not invalidate the service, in so much as it appears that the officer retained the writ and made diligent search for the defendant for all the time required. *Matthews* v. *Forslund*, 113 Mich. 416.

We find no error. Judgment affirmed.

The other Justices concurred.

JUNE TERM, 1899.

HAWKINS *v.* COMMON COUNCIL OF VILLAGE OF LITCHFIELD.

1. VILLAGES—COMMON COUNCIL—RESOLUTIONS—REPEAL.
   A resolution of a village council stands until modified or repealed.

2. SAME—LIQUOR BONDS—APPROVAL.
   The arbitrary refusal of a village council to accept a liquor bond which complies with the terms of a resolution of the council then in force cannot be sustained under the power to suppress saloons, conferred upon it by Act No. 3, Pub. Acts 1895, chap. 7, § 1, such power being exercisable only by ordinance.

3. SAME—MANDAMUS.
   A village council having in good faith, without passing on the sufficiency of the sureties, refused to accept a liquor bond, *mandamus* should merely require the council to examine into their sufficiency, and approve the bond if found sufficient.

Certiorari to Hillsdale; Chester, J. Submitted June 6, 1899. Decided June 8, 1899.

Mandamus by Jennie Hawkins to compel the common council of the village of Litchfield to approve a liquor bond. From an order granting the writ, respondent brings *certiorari*. Modified and affirmed.

Stone & Twiss, for relator.

Frankhauser & Cornell, for respondent.

PER CURIAM. The village of Litchfield was organized under the general incorporation act for villages. Act No. 3, Pub. Acts 1895. Under paragraph 7, § 1, chap.

7, power is conferred upon villages to, by ordinance, suppress saloons for the sale of spirituous and intoxicating liquors. At a regular meeting of the common council on October 5, 1896, the common council, by resolution, fixed the saloon bonds at $6,000, with three sureties. At a regular meeting held May 3, 1897, by resolution the bonds were reduced to $3,000, with two sureties. May 2, 1898, one liquor bond was presented and approved in the sum of $3,000. No resolution was passed that year nor since fixing the amount of the bond. Relator presented her bond in the sum of $3,000, with two sureties. The common council refused to accept the bond, and relator applied to the circuit court for the writ of *mandamus* to compel its approval. The circuit court granted the order, and respondent removed the matter to this court by the writ of *certiorari*.

A resolution of the common council stands until modified or repealed. A common council is a continuing body. The resolution of 1897, fixing the amount of such bonds at $3,000, remained in force until further action of the council was taken. None having been taken, it follows that the bond was in compliance with the law, provided the sureties were sufficient.

It is contended that the council may suppress saloons by refusing to accept the bond. We cannot concur in this view. The law contemplates some formal action upon the subject by ordinance, and not otherwise.

The action of the council appears to have been taken in good faith, and they have not passed upon the sufficiency of the sureties. We think the order of the circuit court, therefore, too broad. It will be modified so as to compel the common council to meet, examine into the sufficiency of the sureties, and approve the bond if found sufficient.

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BLODGETT *v.* FOSTER.

1. CONTRACTS — ABANDONMENT — SUBSTITUTED AGREEMENT — CONSIDERATION.

   Plaintiffs' assignor, after entering upon the performance of a contract with defendants for the sale of lumber to be cut from a large tract of land, decided, because of its unprofitableness, to abandon it, and respond in damages, rather than attempt to fulfill it. Defendants desired the completion of the contract, and to that end entered into a new agreement, whereby they were to pay an increased price for the lumber if the contract was faithfully performed. Under this agreement, the contract was carried out by the seller, defendants from time to time giving their acceptances for the lumber at the increased rate. *Held*, that the new contract was based upon a sufficient consideration, and that defendants were bound by it.

2. SAME—INSURANCE—VALUE.

   A contract for the sale of lumber provided that the seller should make monthly statements to the purchaser, showing the quantity and grades of lumber in the yards, and should procure such lumber to be insured, at the joint expense, to a specified percentage of its value. *Held*, that the contract price was to be treated as the value for the purpose of insurance.

3. SAME—TIME—WAIVER.

   Where one who sold under contract certain lumber to be cut and delivered to the purchaser, finding himself unable, because of litigation, to begin work until some months after the time agreed upon, explained the situation to the apparent satisfaction of the purchaser, and the latter thereafter accepted the lumber manufactured under the contract, making no claim, in any of the numerous statements of account submitted by him, for damages for delay, he (the purchaser) will be deemed to have waived the terms of the contract as to time of performance.

Appeal from Kent; Grove, J. Submitted April 4, 1899. Decided June 19, 1899.

Bill by Delos A. Blodgett and Delos F. Diggins against

John J. Foster and Henry N. Anderson for an accounting. From a decree for complainants, defendants appeal. Affirmed.

Crane, Norris & Stevens, for complainants.

Fitz Gerald & Barry (*Francis A. Stace*, of counsel), for defendants.

MOORE, J. A reference to the report of this case when it was here before (*Blodgett* v. *Foster*, 114 Mich. 688) will do away with need of making so long a statement of the case as would otherwise be necessary. Upon the trial of the case the witnesses were examined in open court. As a result of concessions made by the solicitors in open court, there are not many questions now open for controversy. One of the most important questions relates to the effect of a contract reading as follows:

"In consideration of the faithful performance of the above and foregoing contract by the parties of the first part, which they agree to do, it is hereby agreed by the parties that the prices for lumber shall be one dollar per M. feet higher than prices named in the within contract.

"CHITTENDEN & HERRICK,
"By C. C. CHITTENDEN.
"JOHN J. FOSTER & Co.,
"By JOHN J. FOSTER."

This contract was made in April, 1893, and was indorsed upon a contract, known as the "Lake City Contract," dated April 23, 1892, between the same parties, providing for the sale of lumber to be cut from standing timber estimated to make 15,000,000 feet. There is not very much controversy about the circumstances under which this contract was made. Chittenden & Herrick had entered upon the manufacture of the lumber. The stock did not turn out as they expected. It was either very good or very poor. There was but very little of the intermediate grades. They found they could not carry out the contract without loss. They concluded that, in

justice to themselves and their creditors, they ought not to continue it; that it would be better for them and their creditors that they should become liable for any damages for its breach, rather than to attempt to carry it out, and they decided not to carry it out. After reaching this conclusion, Mr. Chittenden had an interview with defendants, and explained the situation fully to them, when it was agreed that defendants would advance the price a dollar a thousand, and Chittenden & Herrick should complete the contract. Prior to this, Foster & Co. had been authorized to make payments on the contract to Blodgett & Co., who were authorized to receive them. Later a copy of this contract of April, 1893, was attached to the copy of the prior contract in the hands of Blodgett & Co., and the contracts were assigned to them. After this contract was made, lumber was manufactured and shipped to Foster & Co., who prepared statements, some 19 of them, showing the amounts received by them, in which the lumber was billed at the enhanced price, and acceptances for the balances shown by these statements were remitted by them to Blodgett & Co. 13,500,000 feet of lumber was manufactured under these two contracts, and was received by defendants. It is now claimed by them there was no consideration for the contract of April, 1893, and that they should not be bound by their statements or by the contract. It is contended by complainants that defendants are bound for two reasons:

1. Because Chittenden & Herrick decided to give up the old contract, and this was assented to by the defendants' consenting to make a new contract, in which the price of the lumber should be one dollar a thousand greater than in the old contract.
2. Because Blodgett & Co., who were bankers, made large advances to Chittenden & Herrick on the strength of this new contract, of which Foster & Co. had knowledge.

The circuit judge found in favor of the contention of complainants.

The authorities are conflicting as to whether such a contract as the one of April, 1893, is based upon a sufficient consideration. The question is not an open one, however, in this State. In *Moore* v. *Locomotive Works*, 14 Mich. 266, defendant refused to complete its contract with the plaintiffs, except under a substituted agreement. In disposing of the case, after a review of the authorities, Justice COOLEY, speaking for the court, said:

"Each of these cases is to the point now in issue before us. It is true that in each the abandonment of the contract by the plaintiff was before very much had been done under it, and on the claim that the bargain was a hard one upon him. But neither of these circumstances can distinguish the cases from the present. An unprofitable contract is not, by that circumstance, made any the less binding on the promisor; and the promisee has the same right and the same power to discharge a contract in consideration of a new promise, after breach as before. A different case would be presented if the plaintiffs below had relied upon an agreement to waive the damages, made after delivery, for in that case nothing would have remained for them to do or to promise which could be a consideration for the waiver. But here, although they had done the work which enabled them to deliver the engine, they refused altogether, according to their statement, to go further, except under the substituted agreement; so that the plaintiffs in error actually received the property under the promise which they now insist is invalid. If they regarded it for their interest at the time to make the arrangement, and have obtained the property under it, it is not in our power now to set it aside on the ground of their being entitled to just as much under the contract before existing. They knew their legal rights at the time, and must be supposed to have consulted their own interests in entering into the new arrangement."

In *Goebel* v. *Linn*, 47 Mich. 489 (41 Am. Rep. 723), an ice company had agreed with a brewer to furnish him ice for the ensuing season at $1.75 a ton. The crop of ice harvested in the winter was a short one. Ice was furnished under the contract until May, when the ice company refused to furnish any more for less than $3.50 a ton. The

brewer agreed to pay this, and ice was furnished under this agreement. It was claimed by the brewer that the ice company took advantage of his necessities, and the new contract was made under duress. It was also claimed he obtained only what by his contract he was entitled to have at the lower price, and the new contract was without consideration. The court said:

"It is very manifest that there is no ground for saying that the note in suit was given without consideration. It was given for ice which was furnished by the payee to the defendants, which was owned by the payee and bought by the defendants, and for which defendants concede their liability to make payment. What the defendants dispute is the justice of compelling them to pay the sum stipulated in the note, when, according to their previous contract, they ought to have received the ice for a sum much smaller. The defense, therefore, is, not that the consideration has failed, but that a note for a sum greater than the contract price has been extorted under circumstances amounting to duress. It is to be observed of these circumstances that, if we confine our attention to the very time when the arrangement for an increased price was made, the defendants make out a very plausible case. They had then a very considerable stock of beer on hand, and the case they make is one in which they must have ice at any cost, or they must fail in business. If the ice company had the ability to perform their contract, but took advantage of the circumstances to extort a higher price from the necessities of the defendants, their conduct was reprehensible, and it would, perhaps, have been in the interest of good morals if defendants had temporarily submitted to the loss, and brought suit against the ice company on their contract. * * * But the defendants did not elect to take that course. They chose, for reasons which they must have deemed sufficient at the time, to submit to the company's demand, and pay the increased price, rather than rely upon their strict rights under the existing contract. What these reasons were is not explained to us, except as above shown. * * * What is certain is that the parties immediately concerned, and who knew all the facts, joined in making a new arrangement, out of which the note in suit has grown. The case of *Moore* v. *Locomotive Works*, 14 Mich. 266, where a

similar case was fully considered, is ample authority for supporting the new arrangement."

See *Conkling* v. *Tuttle*, 52 Mich. 630.

In this case, if Chittenden & Herrick did not go on with their contract, defendants could have sued them for a breach of it. They did not see fit to do this, but, instead, agreed, in order to have the contract completed, they would pay one dollar a thousand more for the lumber. Relying upon this agreement, Blodgett & Co. made advances to Chittenden & Herrick, who manufactured the lumber, relying upon the new agreement. The defendants received the lumber under the new agreement, and from time to time sent their acceptances, for the amount due upon the basis of the new agreement, to Blodgett & Co. Under these circumstances, we do not think they can say they are not bound by the agreement.

The next question of importance relates to one item of $325 paid for insurance on the Hoxeyville contract, and one item of $1,033.34 for insurance on the Lake City contract, which it is claimed complainants should pay. The circuit judge rejected these items. Whether they should be rejected or not depends upon the construction to be given to the provisions contained in the contracts in relation to insurance. In the first-named contract, the parties of the second part therein agree to pay one-half of the insurance on said lumber. In the Lake City contract the language as to insurance is: "Said Chittenden & Herrick agree to keep said lumber insured to 80 per cent. of its value, and to pay two-thirds of the cost of the insurance; the other third to be paid by the parties of the second part." It is the claim of Chittenden & Herrick that the lumber was to be insured treating its value as being the price for which they sold it. Defendants claim it was to be insured for its market value, irrespective of the price which they paid for it. The question is not free from difficulty. The insurance was to be of lumber at Hoxeyville and Lake City. Its value there was, doubtless, what

the parties had in mind. Chittenden & Herrick were required to make a monthly statement to Foster & Co. of the quantity of lumber in the yards, and of the different grades and qualities. With this statement in hand, and the prices named in the contract which were to be paid for the lumber, it was a simple matter of computation to learn what the value of the lumber was which was to be insured. Chittenden & Herrick were to procure the insurance. If the price for which they sold the lumber was not to be regarded as its value for insurance purposes, how could they arrive at the amount for which it should be insured? It was not marketed by them to anybody except the defendants. They had no way of knowing how much it brought in the market. The defendants never furnished them monthly statements of its value, based upon the price it brought in the market. Mr. Foster testified it was none of the business of Chittenden & Herrick for what Foster & Co. sold the lumber. There was no testimony in the case showing what the various grades of the lumber was worth, from month to month, at Hoxeyville and Lake City, except as it may be inferred it was worth the price for which Chittenden & Herrick sold it to Foster & Co. We think that price should govern in construing these contracts.

The remaining important question for discussion is a claim of $4,000 damages for delay in commencing the work at Lake City. The contract provided the work should be commenced June 15, 1892. It was not commenced until September or October. The cause of this delay is explained by Mr. Chittenden as caused by litigation between the party from whom they bought the timber and one who claimed adverse title to it. This litigation resulted in the person from whom they bought the timber being enjoined from selling it. He said the matter at the time was explained to Mr. Foster, who said he was entirely satisfied, and to go ahead with the manufacture. An examination of the record convinces us the defendants were satisfied with the explanation, and excused the

delay. There were upwards of 13,000,000 feet of lumber manufactured by reason of this contract. A great many statements of account were made by the defendants, and a great mass of correspondence resulted in relation to it. No claim was made, in these statements or in this correspondence, of any intention to claim any damages because of the delay in commencing the work. These statements are 21 in number, running over a period of nearly two years. No item for damages was charged against Chittenden & Herrick upon the books of defendants. The contract of April, 1893, was made after this delay occurred. There is nothing to indicate any claim of damages until they filed their answer in this case. They accepted the lumber manufactured under this contract, making no claim on account of delay. By accepting and retaining the lumber under such circumstances, they have waived the terms of the contract as to time. See *Crane* v. *Wilson*, 105 Mich. 554.

The claims for damages on account of misgrading the lumber and lath, and for wrongful piling of lumber, have been considered, but we do not deem it necessary to discuss them. We do not think the court erred in his disposition of the case.

The decree is affirmed, with costs.

GRANT, C. J., MONTGOMERY and HOOKER, JJ., concurred. LONG, J., did not sit.

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MCCARTHY *v.* DETROIT CITIZENS' STREET RAILWAY CO.

STREET RAILWAYS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

A person of mature years, familiar with the situation at a street-railway crossing, who went behind a passing car and upon a parallel track, where she was struck by a car approaching from the opposite direction, was guilty of contributory negligence, where the tracks were five feet apart, and there was no obstacle preventing her from seeing the car which caused the injury, had she looked for it after the first car had passed.

Error to Wayne; Donovan, J. Submitted April 5, 1899. Decided June 19, 1899.

Case by Lizzie McCarthy against the Detroit Citizens' Street Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Plaintiff (then 26 years old), on March 20, 1896, about 6 o'clock p. m., was going home from her place of business, in the city of Detroit. She went west on Michigan avenue as far as the east side of Wayne street, at which point she contemplated crossing to the north side of Michigan avenue. Defendant has double tracks on Michigan avenue; the north track being used for cars running westerly, and the south track for cars running easterly. There is a space of 5 feet between the north and south tracks, and 15 feet from the curb to the south rail of the south track. From the curb one may see down the street in an easterly direction three blocks. As plaintiff started from the curb, there was a car on the south track going east, and she waited for it to pass, standing about 6 feet from the car. At the same time there was a car on the north track going west. After the south car passed, she attempted to cross, and was struck by the west-bound car.

Plaintiff did not see the car going west, although she claims to have looked, until she was between the rails of the north track. She then attempted to step back, but could not get out of the way before the car struck and injured her. She testified that no gong was sounded on the west-bound car, although gongs were sounding, as her other witnesses testified. There was another car coming on the south track, half a block away. At the time there were no vehicles or obstructions between the cars so as to obstruct the view. The car that struck plaintiff was going from 6 to 8 miles an hour,—the speed allowed by the city ordinance. Defendant moved the court to direct a verdict for defendant. The court submitted the case to the jury, who rendered a verdict for plaintiff.

Brennan, Donnelly & Van De Mark, for appellant.

William Look and *Ira G. Humphrey*, for appellee.

Grant, C. J. (*after stating the facts*). For about a year plaintiff had crossed the street at this place, and at the same time of the day, when cars were running frequently. She was therefore entirely familiar with the situation, and the danger incident to the place, and the necessity of care upon her part. She stood about 6 feet from the track till the east-bound car had passed. Can it be doubted that the moment she had crossed that track and entered upon the place between, at which time she was about 5 feet from the other track, she could have seen the approaching car, had she looked? If this be so, how can it be said that she had performed the duty which she owed to herself,—to look before advancing upon the other track? It is evident that she did not look until she had stepped upon the track where the car was approaching. She had walked about 15 feet without looking. The car approaching on the south track was too far away to give her any apprehension. She had only to glance to the right as she advanced after the car on the south track

moved away from her, and she would have seen the car approaching. This case cannot be distinguished from *McGee* v. *Railway Co.*, 102 Mich. 107 (26 L. R. A. 300, 47 Am. St. Rep. 507); *Henderson* v. *Railway Co.*, 116 Mich. 368; *Borschall* v. *Detroit Railway*, 115 Mich. 473.

Judgment reversed, and new trial ordered.

The other Justices concurred.

FARWELL *v.* HALLADAY.

BONA FIDE PURCHASER—RECORD—ERRONEOUS INDEX—NOTICE—EVIDENCE.

A purchaser of lands from one of his neighbors, whom he had long known, and who he knew owned no other land in the vicinity, will be held to have had notice of an incumbrance, where it appears that, before purchasing, he went with the vendor to the office of the register of deeds, where he found a mortgage by the vendor indexed as covering other lands in the same section, the record of which he refused to examine, but which in fact was a record of the mortgage on the land in question, and it further appears that, during the negotiations, this mortgage was referred to as being upon the lands covered by the deed.

Appeal from Emmet; Adams, J. Submitted April 5, 1899. Decided June 19, 1899.

Bill by Margaret Farwell against Harmon Halladay, Ella E. Halladay, and Fred L. Heller, to foreclose a mortgage. From a decree for complainant, defendant Heller appeals. Affirmed.

On May 23, 1882, the defendants Halladay, husband and wife, executed a mortgage to one Simon King, guar-

dian, for $200, on the N. W. ¼ of the S. W. ¼ of section 31, town 33 N., range 6 W., which was their homestead. The mortgage was recorded on the following day in the office of the register of deeds for Charlevoix county, volume 7, page 43. The mortgage and the note accompanying the same were afterwards duly assigned to complainant, who filed this bill to foreclose. The Halladays deeded this land to the defendant Heller on May 31, 1887, by warranty deed, which was duly recorded the same day. On the back of the mortgage was the usual certificate by the register of its recording. The mortgage, as written, erroneously described the property as the N. E. ¼ of the S. E. ¼ of the same section, town, and range. The mistake was discovered before execution, and the correct description written in. Heller claims to be a *bona fide* purchaser without notice, actual or constructive, of this mortgage. Evidently by mistake of the register, the mortgage was erroneously indexed as against the N. W. ¼ of the N. W. ¼ of the same section, town, and range. In October, 1887, the volume containing the record of this mortgage was destroyed by fire. Defendant Heller claims that he went with Halladay to the office of the register of deeds at the time of his purchase; that they gave the description of the land to the deputy register of deeds, and asked to have the title examined; that the deputy informed him that there was no mortgage upon the land. They did find, however, the index of a mortgage executed by Halladay and his wife to Mr. King, indexed as above stated. They declined to examine the record of this mortgage. The learned circuit judge filed a written opinion holding that the mortgage was duly recorded by the correct description, and that Heller had notice and knowledge of its existence at the time he purchased.

H. R. Lovell, for complainant.

J. M. Harris, for appellant.

GRANT, C. J. (*after stating the facts*). We think there is ample testimony to sustain the conclusion of the learned circuit judge. Mr. Halladay owned no other land in that section. Heller was his neighbor, and had been for many years. We think it is a fair deduction from the evidence that Heller knew of the existence of this mortgage. There was no record of any other undischarged mortgage given by the Halladays. Heller knew that they had given a mortgage. It is evident from the testimony of the witness Garbutt, the attorney for Halladay and Heller, who drew the deed and took the acknowledgment thereof, that this mortgage, was referred to, at the time the negotiations for the purchase were going on, as being upon the land covered by the deed.

Whether, under the circumstances of this case, the index of the mortgage, to which Heller's attention was called at the time, was sufficient to put him upon inquiry, we need not determine.

Decree affirmed.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred. LONG, J., did not sit.

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GERARDO *v.* BRUSH.

1. CONTRACT OF EMPLOYMENT—AUTHORITY OF AGENT—EVIDENCE.
   A finding that the captain of a yacht was authorized to bind defendant, the owner, by hiring plaintiff for the season as engineer, is sustained by evidence that defendant's attorney sent to the captain a season's contract, signed by defendant, and containing a blank for the engineer's signature, which contract bore date of about the time that the captain had, to defendant's knowledge, hired plaintiff under a parol agreement, the terms of which were in dispute at the trial, but which plaintiff claimed was for a season's employment.

2. SAME—WRONGFUL DISCHARGE BY AGENT—NOTICE TO PRINCIPAL.
   Where the captain of a yacht is authorized by the owner to discharge subordinates, one whom the captain wrongfully discharges is not obliged, before he can recover for breach of the contract of employment, to seek out the owner and demand the fulfillment of the contract.

3. SAME—CONDUCT OF SERVANT AFTER DISCHARGE.
   The fact that an engineer on a yacht, after his wrongful discharge by the captain, made an assault upon the latter, which, had it occurred during the term of his employment, would have justified his discharge, cannot be urged as a cause for the discharge in defense of an action for breach of the contract of employment.

4. WITNESSES—CREDIBILITY—INSTRUCTIONS.
   A refusal to instruct that, if the jury should believe that a witness has testified falsely or erroneously in any particular, they may disregard his whole testimony, is not erroneous, since the request does not take into consideration the materiality of the testimony, the intention with which it was given, nor the fact of corroboration by other witnesses.

Error to Wayne; Hosmer, J. Submitted April 5, 1899. Decided June 19, 1899.

Assumpsit by William Gerardo against Alfred E. Brush for the breach of a contract of employment. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff claims that he was employed as engineer on board the defendant's yacht for the season of 1897, commencing April 1st. His contract was with Capt. Klintworth, the captain of the yacht, and was made about the 27th of March. The contract rested in parol. The claim of the defendant is that plaintiff was employed from month to month, and that he was discharged at the end of the first month. After the season closed, plaintiff brought suit for breach of contract, claiming the right to recover the contract price, less what he had earned meanwhile. He had verdict and judgment.

Thomas S. Jerome, for appellant.

D. B. Hayes and *R. I. Lawson*, for appellee.

GRANT, C. J. (*after stating the above facts*). 1. Defendant insists that the evidence shows no authority on the part of Capt. Klintworth to make the contract for the defendant. Plaintiff testified that Capt. Klintworth informed him that the engagement would be by the season, and not by the year; that on the 18th or 20th of April the captain informed him that his services would no longer be required after that month; that he saw Mr. Brush on the yacht about the 28th of April, and asked him why he was not going on the new boat which defendant had purchased, with the rest of the crew, to which defendant replied, "I suppose you are;" that he informed Mr. Brush that the captain had told him that his services would not be required after the 1st of the month; that defendant replied he would see him again about it; that he never signed a written contract; that a contract was sent to Capt. Klintworth for him to sign, providing for his employment by the season, and that he did not sign it because it was not handed to him to sign. Plaintiff then rested. Defendant then moved the court to direct a verdict for him on the ground that plaintiff had shown no authority on the part of Capt. Klintworth to enter into the contract, and that plaintiff made no claim upon defendant

for further wages, and gave him no notice of any claim of continuous employment or refusal to acquiesce in his discharge. The motion was denied.

When plaintiff rested, he had shown no authority in Capt. Klintworth to make the contract in suit. Defendant then introduced Capt. Klintworth, who testified that he had no authority to make a contract, except from month to month; that he himself was not hired by the season, and so could not hire plaintiff for that time. He further testified that he had been employed by defendant prior to that time as captain, but had never been employed for the season. It further appeared from his testimony that, during the first or second week in April, defendant's attorney prepared a contract with him for the season, and also prepared a contract in blank for the engineer to sign, which blank contract was dated March 27th, and signed by defendant, and a blank left for the engineer's signature. This contract did not contain the name of the engineer, but was to be a contract for the season from April 1st to November 30th, at a salary of $65 per month. It appears from plaintiff's testimony that Mr. Brush knew that he had been employed as engineer. The fact that a contract was written out, dated at the same time that plaintiff claims his parol contract was made, is evidence tending to substantiate the plaintiff's statement. We think that this blank contract was properly admitted in evidence for this purpose, and that the question of the terms of the employment were properly left to the jury. It is evident that Capt. Klintworth was authorized to make a contract of employment. It may be inferred that he reported this contract to the defendant or his attorney, and that a blank contract was prepared accordingly.

2. Defendant next insists that plaintiff has not placed himself in a position to insist upon the breach of the contract; citing and relying upon *Collins* v. *Hazelton*, 65 Mich. 220. That case differs from this in the fact that plaintiff was discharged by a mill foreman, and there was no authority shown on the part of June to discharge plain-

tiff, nor any actual knowledge and approval of his discharge. There was also doubt as to whether the plaintiff had been dismissed at all. In this case the authority of Capt. Klintworth to discharge plaintiff is unquestioned. We think the case comes within the rule of *Jones* v. *Transportation Co.*, 51 Mich. 539. Under plaintiff's testimony, he was peremptorily discharged. Under defendant's theory, there was no discharge, because it was a hiring from month to month, and the contract was terminated. We do not think that plaintiff was under obligation to find Mr. Brush, and inform him of his discharge, and demand a continuance in his employ. While Capt. Klintworth did not notify plaintiff that he was discharged for incompetency, he testified that, while he saw nothing against his competency while employed on the yacht, he had heard reports of acts of incompetency, and therefore notified him that he would not be wanted after one month.

3. Plaintiff was paid off at the end of the month. At that time a dispute arose between the captain and plaintiff in regard to a charge made that he had stolen certain tools. After he had been paid, and the captain was walking away, plaintiff asked him if he meant to say that he (plaintiff) stole the tools, to which the captain replied, "Well, the tools were there this morning, and they are gone this afternoon;" whereupon plaintiff assaulted the captain. This testimony is undisputed. An instruction was requested to the effect that this gave cause for discharge, even if plaintiff had a contract for the season, and that, therefore, plaintiff could recover only nominal damages. An assault upon the master of a vessel is a very serious offense, justifying plaintiff's discharge if it occurred during the term of his employment. If the assault had taken place after plaintiff was notified that his service would terminate at the end of the month, and before such termination, a question would arise which we need not determine. It is a fair inference from the testimony that this occurred after his service was terminated. This being so, such action would constitute no defense.

4. Defendant preferred the following requests:

"(1) If you believe that in any part of his testimony any witness has sworn falsely or erroneously, you are entitled to disregard all his evidence.

"(2) It appears in evidence in this case that plaintiff's testimony as to his employment is contradicted by the testimony of Mr. and Mrs. Klintworth. His testimony as to other matters is contradicted in one case by Mr. Taylor and Mr. Caswell, in another case by Mr. Wallace, and in another case by Mr. Blankerts. If you believe that in any of these cases plaintiff has testified falsely, you are entitled to disregard his whole testimony."

These requests were refused, and nothing appears to have been said by the court, in its instructions to the jury, upon the credibility to be given to the witnesses. The first request is faulty in that—*First*, it leaves out the question of materiality; and, *second*, it would have instructed the jury that they could disregard all his evidence if they found that upon any point he had sworn erroneously. This is not the law. Impeachment by contradictory testimony must be on a material matter, and an error or mistake on the part of a witness does not warrant an instruction that the jury may entirely disregard the testimony. The second request is also faulty, in that it left out entirely the question of intentional falsehood. The word "false" does not necessarily involve turpitude of mind. One definition of "false" is "erroneous," "untrue." The false swearing must be intentional or willful to justify a jury in disregarding the testimony entirely, and an examination of the authorities will show that courts have usually so instructed. *Hamilton* v. *People*, 29 Mich. 173; *O'Rourke* v. *O'Rourke*, 43 Mich. 58; *Knowles* v. *People*, 15 Mich. 408. The request also is silent upon the question of corroboration. The jury should be instructed upon this point, for, if the witness is corroborated on some material points, that fact should be considered by the jury in determining what weight they should give to the testimony. It is not customary, nor do we think it good practice, to specify the witnesses by

name, as was done in this request. It may be technically correct where the judge determines, as a matter of law, that the point upon which contradiction is claimed is a material point. In this connection we call attention upon these technical charges to the language of the court in *Hillman* v. *Schwenk*, 68 Mich. 296. It may be unfortunate that the judge did not instruct the jury upon this question, for it is a case where such instructions would have been very appropriate. The judge would have done well to instruct the jury orally upon the subject; but, inasmuch as the requests preferred are not warranted by the law, we cannot reverse the judgment for this reason.

This case was submitted on briefs. The attorneys for plaintiff make no reference whatever to this point, and the attorney for the defendant cites no authorities, but contents himself with the mere statement that the refusal was error. We cannot commend this method of preparing briefs. It may save labor for attorneys, but it adds to the labor of the court.

Judgment affirmed.

The other Justices concurred.

FRIAR *v.* SMITH.[1]

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1. BROKERS—DOUBLE AGENCY—COMMISSIONS.
   A broker employed to sell property cannot be at the same time the agent of the purchaser, and entitled to commissions from both parties, unless both principals know that he is acting in such dual capacity.

2. SAME—MIDDLEMEN.
   A broker employed as a mere middleman, not to negotiate a sale or purchase, but simply to bring two parties together, and permit them to make their own bargain, may recover an agreed compensation from either or both, though neither may know that compensation is expected from the other.

Error to Kent; Adsit, J. Submitted April 5, 1899. Decided June 19, 1899.

Assumpsit by James Friar and Martin Friar against Henry C. Smith to recover a commission on an exchange of real estate. From a judgment for plaintiffs, defendant brings error. Affirmed.

Wolcott & Ward, for appellant.

Dunham & Dunham, for appellees.

MONTGOMERY, J. The plaintiffs are real-estate brokers. This action is brought to recover a commission claimed to be due from defendant for introducing him to another customer of plaintiffs, with whom defendant made an exchange of property. The plaintiff James Friar, on the trial at the circuit, testified that he told the defendant that he had certain farms in his hands which the owner desired to exchange for city property, and that defendant agreed with him that, if he (Friar) would bring him (defendant) a customer with whom he could make a deal, a

[1] Rehearing denied November 7, 1899.

commission would be paid. The witness also testified that the defendant was at the time informed that the plaintiffs also expected a commission from the other party to the transaction. This testimony was corroborated by other witnesses. It appeared in the case that the plaintiff James Friar had given a somewhat different version of the transaction in the justice's court; that he omitted to state that defendant was informed that plaintiffs expected a commission from the other party; and that he testified in justice's court that defendant's promise was to pay a commission to any one who made a deal for him. The defendant denied any agreement to pay commissions at all, and denied that he was told that plaintiffs were to receive a commission from the other party to the trade. It appeared that plaintiffs subsequently introduced to defendant one Hanrahan, who owned two farms near Grand Rapids, and that an exchange was made by defendant of his property for one of these farms. The witness James Friar testified that his arrangement with Hanrahan was identically the same as with defendant. The defendant's contention apparently was twofold:

(1) That he made no agreement to pay commissions, but dealt with plaintiffs as agents of Hanrahan.
(2) That, if the jury should find an agreement to pay commissions, the evidence given in justice's court by plaintiff James Friar disclosed a contract against public policy, and that for this reason plaintiffs were not entitled to recover.

A number of exceptions were noted to rulings on admission of testimony, which we have examined, but do not discuss at length, as we are convinced that no damaging error was committed in this regard.

The rules of law applicable to this class of cases are briefly stated:

1. An agent to sell may not become the agent of the purchaser, nor may an agent to buy become the agent of the seller, unless the principals are duly acquainted with the fact that the agent is acting in such dual capacity.

Mechem, Ag. § 943; *Scribner* v. *Collar*, 40 Mich. 375 (29 Am. Rep. 541); *Leathers* v. *Canfield*, 117 Mich. 277.

2. If, however, both principals, with full knowledge, consent that the agent act on behalf of both, the agreement for compensation is binding. See cases cited above.

3. Defendant, who knows that his agent expects a commission, may defeat recovery by showing that the other principal of the agent is unaware of the fact of such double agency, and this on the ground that the parties have engaged in a transaction against public policy. The law will not enforce their contracts, but will leave them where it finds them. *Rice* v. *Wood*, 113 Mass. 133 (18 Am. Rep. 459); *Rice* v. *Davis*, 136 Pa. St. 439 (20 Am. St. Rep. 931); *Everhart* v. *Searle*, 71 Pa. St. 256.

4. But there is another class of cases, in which the broker is not employed to negotiate a sale or purchase, but simply to bring two parties together, and permit them to make their own bargain. In such case he is a mere middleman, and may recover an agreed compensation from either or both, though neither may know that compensation from the other is expected. This is on the ground that such an employment does not place the broker in a position where he can sacrifice the interests of his principal, and because he is not, as agent of the owner, bound to secure the best price obtainable, or, as agent of the buyer, to purchase at the least price at which the property can be bought, as in such case he has nothing to do with fixing the price. Neither party has contracted for his skill, knowledge, or influence, and he stands entirely indifferent between them. Mechem, Ag. § 973; *Ranney* v. *Donovan*, 78 Mich. 318; *Montross* v. *Eddy*, 94 Mich. 100 (34 Am. St. Rep. 323); *Rupp* v. *Sampson*, 16 Gray, 398 (77 Am. Dec. 416); *Orton* v. *Scofield*, 61 Wis. 382.

The pivotal question in this case is whether the plaintiffs brought themselves within the rule last above stated, and whether the charge of the court fairly presented the question to the jury.

After presenting plaintiffs' theory to the jury, the circuit judge charged as follows:

"There has been considerable said in your presence about agency. Now, under the defendant's theory of this case, they claim that the contract, if one was made between the parties, was one of agency, and not, as the plaintiffs claim, one that would constitute them middlemen. The law does not recognize the liability of either party to such an agency as the defendant claims was the case. A man cannot act for the best interests of his principal in that manner; that is, as the agent of both parties, where he, or the agent, has to do the work,—effect the exchange. Therefore, the law holds it is against public policy to permit a recovery by an agent for a compensation for making a sale or exchange of property from either the grantor or the grantee, unless such party against whom he seeks to collect had full knowledge of such double agency at the time he employed the agent. This rule of law on this subject is the same today as it was in Jerusalem 2,000 years ago. A man cannot serve two masters at the same time, especially where their interests are diametrically opposed; and if you find that the contract that was made was one of agency, instead of that of middlemen,—that the plaintiffs were to make the trade, instead of the parties,—then plaintiffs are not entitled to recover.

"Now, the plaintiffs' claim in this case is that they did not agree to do anything for the defendant, but they allege that the defendant agreed that, if they did do certain things,—that is, bring to the defendant a man with whom he could trade his property for a farm,—then, in that event, the defendant would pay the plaintiffs a commission therefor. This distinction of the claims of these two parties is well defined, and it is for you to determine which theory is true; that is, whether or not the defendant agreed to pay the plaintiffs for bringing to him a man with whom he could trade, they to do nothing in the matter, or whether or not the defendant agreed that they (the plaintiffs) should make the deal, as they term it,—the trade or exchange,—in which event they would be his agents, instead of middlemen, doing nothing between them. I want you to understand that distinction. That is the distinction in this case. Which is true? If it is as the plaintiffs claim, then they are entitled to recover. If it is not as they claim,—if the contract was not made as they claim,—then they are not entitled to recover. If the alleged agreement had been that the plaintiffs agreed with

the defendant that they would take his property, and do the best they could to find a purchaser for it by way of sale or exchange, and actually did find Hanrahan, and negotiate the exchange with him,—make the trade, or deal, as they term it,—then that would have constituted an agency, an agreement to do something; and, if they were to receive a commission from Hanrahan as well as from Smith, then in that event the law would not allow them to collect from either Smith or Hanrahan, unless the party sued had full knowledge of such double agency prior to the sale or exchange."

Various clauses of this instruction are criticised, but on full consideration we are all agreed that the jury could not fail to understand, from the instructions, that the plaintiffs were only entitled to recover in case it was found, as a fact, that they contracted only to bring the parties together, and that, if this engagement was made to make the deal, they could not recover.

Error is assigned upon refusal to charge as requested. An examination of these requests not given, in connection with the charge, discloses that such of the requests as were proper were covered by the general charge, in which the court sought to narrow the issue to a single point. Under the instructions given, the jury must have found that the plaintiffs were middlemen, and, if this fact was found, they were entitled to recover, if, as the jury evidently found, there was an agreement for compensation.

We discover no prejudicial error. The judgment is affirmed.

The other Justices concurred.

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MICHIGAN CENTRAL RAILROAD CO. *v.* BULLARD.

1. RAILROAD COMPANIES—LEASE OF RIGHT OF WAY—VALIDITY.
   A lease by a railroad company to a manufacturing company of a portion of its right of way, subject to termination on 60 days' notice, made with a view to affording facilities for furnishing freight to the company, is valid.

2. LANDLORD AND TENANT—TITLE—ESTOPPEL—MISTAKE OF FACT.
   Where one in possession of land, the title to which is in himself, accepts, under a mistake of fact, a lease thereof, not under seal, from one not in possession, he is not estopped thereby from showing the facts in contravention of the lessor's claim of title.

3. SAME.
   A person in possession conveyed property, and the vendee accepted a lease, not under seal, from one not in possession. The property, with the outstanding lease, was turned back to the vendor, whom the lessor sued for possession under the lease. *Held*, that, if the conveyance by defendant was of the absolute title, he would be estopped to contest the lease, except so far as the lessee might himself have contested it.

Error to Calhoun; Smith, J. Submitted April 5, 1899. Decided June 19, 1899

Summary proceedings by the Michigan Central Railroad Company against George A. Bullard to recover the possession of real estate. From a judgment for complainant on verdict directed by the court, defendant brings error. Reversed.

Jesse M. Hatch (*H. E. Winsor*, of counsel), for appellant.

Hulbert & Mechem, for appellee.

MONTGOMERY, J. This is a summary proceeding to

recover possession of a parcel of land in the city of Marshall. The circuit judge directed a verdict for complainant, and defendant brings error.

The property in question is a portion of what complainant claims as its right of way or depot grounds. The complainant introduced a lease of the premises to defendant, and showed that he had failed to surrender the premises according to its terms of rental. The defendant then sought to show that he was himself the owner of the premises, and had been for many years before the lease was executed, and was in possession when he received the lease from complainant. It appeared that in 1891 defendant conveyed the land adjoining (and, it is claimed by defendant, the land in question) to the National City Bank of Marshall, and that a similar lease to that made by the defendant was executed by the receiver of the bank; that, before executing the lease, the receiver advised with defendant, who stated his understanding that the building of defendant extended over the line, and that a corner of the building was on railroad ground, and advised the receiver to sign the lease. This lease was not under seal. The land was turned back to defendant, with the lease outstanding, and the lease was turned over to defendant. The record does not show very clearly what the nature of the holding of the receiver of the bank was, as against the defendant, although it is inferable that the defendant still retained an interest in the land, and that reliance was placed on him by the receiver in determining whether to accept the first lease, and that, if he was mistaken as to the line between his property and that of the company, the receiver was likewise mistaken. The defendant offered to show that he owned, and had for 15 years owned and occupied, the land in question, and that the lease was made under a mistake of fact as to his ownership. This testimony was excluded.

A number of questions are raised,—among others, the right of the company to lease any portion of its right of

way. The lease in question was made subject to termination on 60 days' notice, and was made to a manufacturing company with a view to affording facilities for furnishing freight to the company. Such a lease is not invalid. *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454; *Illinois Central R. Co.* v. *Wathen*, 17 Ill. App. 582; *Gurney* v. *Elevator Co.*, 63 Minn. 70; *Roby* v. *Railroad Co.*, 142 N. Y. 176.

The important question is whether the defendant was in position to raise the question of title; for, if he was, the circuit judge was in error in his ruling, and the remedy is in ejectment. If the possession of the defendant had been uninterrupted, his offer of proof would have indicated that he was prepared to show—*First*, that he had title to the premises in question; *second*, that he took the lease in question under a mistake of fact; *third*, that he did not derive possession from the complainant. An estoppel of the tenant arises out of indentures under seal, or from possession given, whereby an advantage is derived by the tenant from the act of the landlord. But where one in possession agrees by parol, or by an instrument not under seal, to rent, there is no just ground for denying the right of such tenant to show that the agreement was made under a mistake of fact, that the title to the property was in himself, and the lease therefore without consideration. *Fuller* v. *Sweet*, 30 Mich. 237 (18 Am. Rep. 122); 2 Tayl. Landl. & Ten. § 707, and cases cited in note.

It is claimed by complainant that defendant derived his possession from the receiver of the bank, who held under a lease from complainant, and that it was in fact deriving possession from complainant. If the absolute title passed to the bank from defendant, this position of complainant would be unassailable, unless a like mistake was shown by the receiver to relieve him from the apparent estoppel. We cannot determine on this record that the full title passed to the bank; nor are we, in view of the broad offer of the defendant, able to say that he was not prepared to show the same reason for a failure of estoppel by the receiver as applied to himself.

We think the judgment should be reversed, and a new trial ordered.

The other Justices concurred.

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THORKILDSEN *v.* CARPENTER.

TAX DEEDS—QUITCLAIM—FAILURE OF TITLE—RECOVERY OF CONSIDERATION.

Where the holder of a tax title conveys by quitclaim deed, both parties acting in good faith, believing that the deed conveyed a valid title, the grantee is not entitled to recover back the consideration on a failure of the title.

Appeal from Muskegon; Russell, J. Submitted April 19, 1899. Decided June 19, 1899.

Bill by Thomas Thorkildsen against George W. Carpenter and Stephen H. Clink for a refunding of moneys paid in part consideration for a deed, and for the cancellation of a note and mortgage given for the balance. From a decree dismissing the bill on demurrer, complainant appeals. Affirmed.

Defendant Carpenter was the owner of a tax title upon certain lands, the original title to which was in a corporation known as the Lake Harbor Company of Muskegon. On August 7, 1897, he sold these lands to the complainant, and executed to him a quitclaim deed. The consideration was $525,—$275 in cash, and note and mortgage given back upon the same land for $250. The deed and mortgage were duly recorded. The contract was made through defendant Clink, an attorney, who stated to complainant, as alleged in the bill, that—

"Said tax deed conveyed an absolute and paramount title; that the Supreme Court had been holding tax deeds for that year valid, and enforcing them; that, in the opinion of said Clink, there could be no successful defense to said tax deed or title, and that, if your orator would purchase said above-described premises from said Carpenter, he would receive a good and indefeasible title."

In January following, the auditor general canceled this sale and deed to Carpenter, and issued a certificate of error, which was duly recorded in the office of the register of deeds. On being informed by his solicitor of this fact, complainant tendered to defendant Carpenter a duly-executed deed of said premises, and demanded a return of his money and the surrender and discharge of the note and mortgage. This was refused, and thereupon complainant filed this bill for the cancellation of the note and mortgage and the recovery of that portion of the purchase price paid in cash. To this bill the defendants demurred. The demurrer was sustained, and the bill dismissed. The bill also states that complainant had been informed by his solicitor that the cancellation by the auditor general was invalid.

Alex. Sutherland, for complainant.

H. B. Fallass, for defendant Carpenter.

Stephen H. Clink, in pro. per.

GRANT, C. J. (*after stating the facts*). Complainant insists that he is entitled to relief upon any one of four grounds: (1) Want of consideration; (2) false representations; (3) mutual mistake; (4) nonexistence of the subject-matter.

Good faith on the part of the defendants is conceded. It is also conceded that all parties acted in good faith, and believed the tax title was good. This is evidently a case of speculation. There was no fraud. Complainant chose to rely upon a quitclaim deed, by which he took only the title which defendant Carpenter had. *Peters* v. *Cartier*,

80 Mich. 124 (20 Am. St. Rep. 508); *Beakley* v. *Robert*, *ante*, 209. Complainant purchased at his own risk. Courts cannot read covenants into deeds. This would be in direct contravention of the statute. 2 How. Stat. § 5655. Complainant chose to buy upon the faith of the validity of the tax title without any examination. It was a voluntary payment, not induced by any fraud. Under his own allegation, Mr. Clink gave him only an opinion as to the soundness of the title. Where one took a quit-claim deed, and was evicted by an older and better title, held, that he could not recover the price paid. *Soper* v. *Stevens*, 14 Me. 133. Where both parties acted under the belief that the quitclaim deed conveyed a valid title, and the title wholly failed, held, that the grantee could not recover back, "for the parties to deeds know that a warranty is required to hold the seller to warrant the title, and they regulate their contracts accordingly." *Earle* v. *De Witt*, 6 Allen, 520, cited and approved in *Tucker* v. *White*, 125 Mass. 346. Chancellor Kent held: "The vendor [of land] selling in good faith is not responsible for the goodness of his title beyond the extent of his covenants." *Gouverneur* v. *Elmendorf*, 5 Johns. Ch. 79. See, also, *Stoddard* v. *Prescott*, 58 Mich. 542; *Inhabitants of Barkhamsted* v. *Case*, 5 Conn. 528 (13 Am. Dec. 92); *Clark* v. *Sigourney*, 17 Conn. 511.

Decree affirmed, with costs.

The other Justices concurred.

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WHEELER *v.* JENISON.

1. TRIAL—EVIDENCE OF CONTRACT—NEGOTIATIONS ON SUNDAY—INSTRUCTIONS.

   The admission of testimony as to Sunday negotiations, in an action on a contract, is without prejudice, where the jury are instructed that all testimony tending to establish a Sunday contract is withdrawn from their consideration, and that, to entitle plaintiff to recover, they must find that the contract was made on a week-day.

2. SAME—WITNESSES—ABSENCE FROM JURISDICTION—TESTIMONY ON FORMER TRIAL.

   The fact that one who was a witness on a former trial is absent from the jurisdiction of the court is sufficiently shown, to admit of his testimony's being read in evidence, by the affidavit of the officer into whose hands a subpœna had been placed for service on the witness, that he was unable to find him in the State, and was informed that he was in a remote State, supplemented by the testimony of the witness' attorney that he had been informed by his client that he was going to such other State, and that he had, within a month previous to the trial, received from him letters postmarked in that State.

3. SAME—ARGUMENT OF COUNSEL—IMPROPER REMARKS.

   Remarks in the argument of counsel as to matters outside the record are insufficient ground for reversal of the judgment rendered, where the trial court instructs the jury that such remarks are improper, and they are withdrawn by the counsel uttering them.

4. SAME—INFERENCES FROM TESTIMONY.

   The fact that counsel in his argument, in commenting upon the testimony of a witness and her manner of giving it, draws incorrect inferences, is not ground for reversal.

5. SAME—DENIAL OF NEW TRIAL—APPEAL.

   Although the trial court, in overruling a motion for a new trial, stated that, in his opinion, the verdict was against the weight of evidence, the Supreme Court will not reverse his decision, if from the whole statement of his reasons for denying the motion, and from the evidence returned, it is not clear that the verdict was against the weight of evidence, or worked an injustice to appellant.

Error to Kent; Adsit, J. Submitted April 19, 1899. Decided June 19, 1899.

Assumpsit by Morton B. Wheeler and Siegel D. Kopf against Luman Jenison and Lucius Jenison for goods sold and delivered. From a judgment for plaintiffs, defendants bring error. Affirmed.

C. H. Gleason, for appellants.

Peter Doran (*Charles A. Watt*, of counsel), for appellees.

MOORE, J. The defendants appeal from a judgment obtained against them by plaintiffs. The bill of particulars is as follows:

1897, July 6.	Gas plant sold to defendants	$365 00
1897, July 6.	Extra light for bar-room sold to defendants	4 10
1897, July 17.	Repairing leaky sink	1 45
1897, July 17.	200 pounds of carbide, at 6 cents per pound	12 00
1897, July 17.	200 pounds of carbide, at 6 cents per pound	12 00
1897, July 20.	200 pounds of carbide, at 6 cents per pound	12 00
1897, July 23.	Bell call system sold to defendants	12 00

It is the claim of plaintiffs that, prior to June 27, 1897, one of the defendants came to their store to inspect an acetylene gas light they were showing; that at his request one of the plaintiffs and their agent, Keisel, visited defendants' hotel and grounds at Jenison Park, on Sunday, June 27, 1897, and made him a proposition for lighting the hotel and grounds at Jenison Park with a plant similar to the one shown him at the store; that a proposition was made, reading as follows:

"I propose to furnish and install in your hotel and grounds at Jenison Park one 50 one-half foot burner Star acetylene gas machine, together with all piping and fixtures necessary to make a complete gas-lighting plant for *i. e.* hotel office and parlor, dining-room, and 14 outside lights on grounds. Fixtures for dining-room to be 2-light bronzed pendants; office and parlor, 2-light brass pendants; 10 outside lamps for posts. You to furnish balance of outside lamps, and all the posts for outside lighting; also to

furnish man and team to plow furrow for laying pipes, and board for men while engaged in constructing and erecting plant. Price complete, including 100 pounds of carbide, $365. Respectfully,

"W. C. KEISEL.

"Further, material and workmanship to be first-class in every particular, and guarantee the lights to be uniform and steady. Further, if all the outside lamps are furnished by you, a reduction of $2.50 each for each lamp so furnished by you. Payments 50 per cent. in 30 days, balance of 50 per cent. in 60 days."

Mr. Jenison said the terms and price were satisfactory, and wanted plaintiffs to put in a plant at once. He said he would call at their office with his attorney, and draw up a contract according to the terms of the proposition and the verbal agreement. Later Mrs. Hanchett, acting for defendants, telephoned they feared the proposed plant would be dangerous, and to do nothing until Mr. Jenison called. Mr. Jenison called on plaintiffs June 28th or 29th, and said he had heard objections to the proposed plant. Plaintiffs claim he was told they were without foundation, but they did not desire to sell him what he did not want, and, if he would pay the freight for the things ordered, that would end it. It is claimed that, after further talk, Mr. Jenison's fears were removed, and he directed the plant to be put in, and agreed to pay for it at the times and prices named in the written proposition, which was then before the parties, and that, acting upon this agreement, made upon a week-day, plaintiffs put in the plant. One of the plaintiffs testified that, after the work was completed, he had a talk with Mr. Jenison, who said he was pleased with the light, and asked the witness to look after the carbide, and see that plaintiffs' firm kept plenty on hand, so they would not be without lights. The plaintiffs claim that the quantity of carbide charged in the bill of particulars was furnished defendants, as well as the other items named in the bill of particulars; that statements of the account were sent to Mr. Jenison, who said: "You have been sending me statements, and I am tired of it. I intend to pay one

hundred cents on the dollar, but I cannot be forced." It is claimed the plant was completed July 10th. The hotel, including the plant, was burned July 24th. It is claimed by the plaintiffs that, after the fire, their agent was at the hotel grounds, and had a talk with Mr. Jenison. Concerning this the agent testified:

"He [Jenison] said: 'I would like to have you come back with me to my barn. There was some carbide that was not used, and see if it is all right, and, if so, I wish you would take it back, and give me credit for it.' And I said: 'Certainly; if there is anything here I can take back in that respect, that is all right. I will take it back, and give you credit for it,'—which I did."

The amount taken back and credited was 250 pounds. It is the claim of plaintiffs that the call bells and repairing the sink were for defendants, whose arrangements with the tenant, Mr. Bryant, as testified to by defendants' witness, were as follows:

"Mr. Bryant leased the property, and was to furnish the hotel with provisions, and pay the help, and divide the profits at the end of the season. We were to furnish the house with all the furnishings, and buy them,—pay for them."

It is the claim of defendants that they did not know the plaintiffs in the transaction; that they dealt with one Keisel, and no acceptance was given the written proposition on Sunday; that on Monday, at the store, Mr. Jenison expressed his distrust of the safety of the proposed plant, and that, after much talk, it was agreed the plant was to be put in on trial, defendants to have 30 days in which to try it, and were to be under no obligations to purchase it unless satisfactory to them after 30 days' trial, and that this verbal agreement was to be put in writing by defendants' attorney, and was to control; that such an agreement was drawn, and was to be signed, but was not, though Mr. Keisel agreed to sign it while the work was going on. Defendants also claim that none of the other items were properly chargeable to them. The respective

parties gave testimony tending to show their respective claims. The testimony was as conflicting as could well be. The witnesses for the plaintiffs were flatly contradicted by the witnesses sworn on the part of the defendants. The case was submitted to the jury, who found in favor of plaintiffs.

After the plaintiffs rested their case, defendants asked the court to direct a verdict, for the reason that the testimony showed no contract was made except a contract made on Sunday. At this time defendants had not rested their case, and when their motion was overruled they entered fully upon their defense. It is not possible to read the testimony without arriving at the conclusion that this plant was put in pursuant to an agreement made subsequent to Sunday. The important controversy about this agreement is whether it provided for an absolute sale, as claimed by plaintiffs, or whether the plant was put in upon trial, as claimed by defendants.

It is said the court erred in allowing any testimony as to what occurred on Sunday, and that a Sunday contract is void, and a ratification of it is impossible; citing *Tucker* v. *Mowrey*, 12 Mich. 378; *Winfield* v. *Dodge*, 45 Mich. 355 (40 Am. Rep. 476); *Brazee* v. *Bryant*, 50 Mich. 136. The court instructed the jury that all testimony, so far as it tended to establish a Sunday contract, was withdrawn from their consideration. He charged them, "A contract wholly or in part made on Sunday is absolutely void by the laws of this State, and cannot be enforced by either party." They were also told that, unless the contract was made upon a week-day, plaintiffs could not recover, and that the burden was upon the plaintiffs to establish their case. We do not think defendants have any right to complain of this feature of the case.

This case was tried once before, at which trial Mr. Keisel's testimony was taken. At the present trial the plaintiffs claimed he was out of the State, and was at Seattle, Wash. They showed by the affidavit of a deputy sheriff that a subpœna had been put in his hands for

service, that he was unable to find Mr. Keisel in the State, and was informed he was at Seattle. It was also shown by an attorney that Mr. Keisel informed him he was going to Seattle to take charge of the business of a Grand Rapids company, and had been absent from Grand Rapids two months, and the attorney was employed to look after his business interests here, which business required him to correspond with Mr. Keisel; that he knew his handwriting, and that he received one letter from him postmarked Seattle, Wash., March 10, 1898, and another postmarked April 18, 1898. This trial commenced May 13, 1898. It is alleged the admission of this testimony was error; that, before it should have been permitted, the testimony of some person with whom he had formerly lived should establish the fact of his absence. The important thing to be shown to allow the testimony to be read is the absence of the witness from the jurisdiction of the court. It is immaterial by whom it is shown, if it is in fact shown. We think it was established, and the testimony was competent. *Howard* v. *Patrick*, 38 Mich. 795; *Stewart* v. *Bank*, 43 Mich. 257; *Dunbar* v. *McGill*, 69 Mich. 297.

It is claimed plaintiffs failed to establish any liability on the part of defendants to pay for the carbide and the other items in the bill of particulars, and the court should have so directed the jury. We cannot say from the record, taking the surroundings of the case, the relationship of the tenant with the defendants, the statement which Mr. Keisel says was made to him by one of the defendants, that there was no proof of a liability. We think, with the trial judge, it was a question for the jury.

Complaint is made of the argument of plaintiffs' counsel, which it is said was prejudicial, and, taken in connection with all the surroundings of the case and the verdict of the jury, should be regarded as reversible error; counsel citing *Seligman* v. *Ten Eyck's Estate*, 60 Mich. 269, *Donovan* v. *Richmond*, 61 Mich. 470, *Amperse* v. *Fleckenstein*, 67 Mich. 248, and many other cases. Any argument of counsel based upon matters outside the record

is reprehensible, and ought to be promptly stopped by the trial judge. It is, however, just as much incumbent upon the attorneys of the defeated party to confine themselves to the record as for the other attorneys to do so. The record is not very full as to what occurred, but it is full enough to indicate the remarks of counsel were not unprovoked in one of the instances about which complaint is made. When the attention of the trial judge was called to the argument, he at once said to the attorney it was improper, and what was said was withdrawn by the attorney. While condemning the course of counsel, we are not inclined, under such circumstances, to reverse the case. *Sweet* v. *Railroad Co.*, 87 Mich. 559; *De Long* v. *Booming Co.*, 88 Mich. 282. In the other instance of which complaint is made, the attorney was commenting upon the testimony of a witness, and her manner of giving it. While we might not be inclined to draw the same inference from this testimony that counsel drew, we do not think what he said is reversible error. The case of *Dikeman* v. *Arnold*, 83 Mich. 221, is in point.

A motion for a new trial was made and overruled. Among other reasons urged why a new trial should be granted was that the verdict was contrary to the weight of evidence. In his disposition of the motion the trial judge said:

"One of the principal reasons alleged on the part of the defendants for a new trial in this case is that the verdict of the jury was against the weight of the evidence. In the opinion of the court, that was true."

It is urged here with great persistence and apparent feeling that the verdict rendered was an unrighteous one; that, the circuit judge having found it was against the weight of evidence, it was his duty to set the verdict aside; and, as he has failed to do so, this court ought to do what he ought to have done. Before determining this question, however, the rest of what the circuit judge said upon that branch of the case ought to be quoted. It is as follows:

"Yet it does not necessarily follow that a new trial should be granted for that reason. It is the province of the jury to find the facts from the evidence. It is its duty to find those facts, if in favor of the plaintiff, from a fair preponderance of the evidence. Fair preponderance of the evidence means the weight of the evidence, which the jury was instructed did not mean the greater number of witnesses sworn on a given point. The credibility of the witnesses was for the jury. All the facts and circumstances proved in the case the jury had the right to consider in determining whether the witnesses testifying on the part of the plaintiffs were entitled to greater credit than those testifying on the part of the defendants, notwithstanding the witnesses on the part of the defendants exceeded those on the part of the plaintiffs in number. The court, from personal acquaintance with defendants' witnesses, may have thought they were entitled to greater credit. It was not the province of the court to determine that question. The jury has determined that against the defendants, as it had a right to do, and the court would not be justified in granting a new trial on that ground."

The testimony in the case, as we have before said, was very conflicting. While the judge ought not to invade the province of the jury, and substitute his judgment of the questions of fact for that of the jury, he ought not to hesitate to take the responsibility of setting a verdict aside if he is clearly of the opinion the verdict is an injustice to the parties. We all know the weight to be given to the testimony of a witness will be largely determined by his appearance and manner. The jurors and the circuit judge saw the witnesses. Their opportunities for deciding who of these witnesses were telling the truth were much better than ours. We are not so clearly satisfied the verdict is against the weight of evidence, and worked an injustice to defendants, as to feel justified in reversing the case.

The other assignments of error have been considered, but we do not deem it necessary to discuss them.

Judgment is affirmed.

The other Justices concurred.

LEE *v.* FIERO.

MORTGAGES—BILL TO CANCEL—INCAPACITY OF MORTGAGOR.

A decree for defendant in a suit to set aside a mortgage for the alleged incapacity of the mortgagor was affirmed; there being evidence to show that the mortgagor understood the transaction in question, and that it resulted beneficially to his estate.

Appeal from Cass; Coolidge, J. Submitted April 21, 1899. Decided June 19, 1899.

Bill by James E. D. Lee, Almira Lee, and Sylvia True against Byron Fiero, executor of the last will and testament of David Lilly, deceased, and Charles Lee, to set aside a mortgage. From a decree for defendant Fiero, complainants appeal. Affirmed.

Complainant Almira is the widow, and her co-complainants and defendant Charles the children, of William Lee, deceased, who died intestate December 3, 1893, aged 71 years. He had occupied as a homestead the land (about 40 acres) covered by the mortgage here involved for about 45 years. This was school land, and until January or February, 1887, William Lee had not fully paid for it; there being due at that time $128. In 1885 William Lee executed a land contract to Charles for 2½ acres of this land. Charles took possession and erected buildings thereon. In January or February, 1887, Charles applied to Mr. Michael for the loan of $368, and offered, as security, to give a mortgage, to be made by his father, upon this 40 acres. Mr. Michael went to Lansing, paid $128, and obtained the patent to William Lee. William then executed to Mr. Michael, as executor of an estate, the mortgage in question, for $368, which was duly signed by his wife. At the same time Charles exe-

cuted to his father a mortgage on his land for $240, which was part of the $368 mortgage. Mr. Michael kept all the papers, and afterwards assigned the mortgage in dispute to defendant Fiero's testator. At the time these papers were executed, William Lee had had two strokes of paralysis, which incapacitated him from talking. The claim of the complainants is that William was incapacitated from executing this mortgage, and that its contents were not explained to him or to his wife at the time. James was a witness to the mortgage, and to the deed from William to his son Charles. The bill is filed to set aside this mortgage. Proofs were taken in open court. The court found that the mortgage was given as the result of a family arrangement, participated in by all except Mrs. True; that the mortgage by William was valid as to the $128; and that complainants were entitled to subrogation as to the mortgage from Charles.

F. J. Atwell, for complainants.

Coy W. Hendryx and *Howell & Carr*, for defendant Fiero.

GRANT, C. J. (*after stating the facts*). We think the decree and finding of the court are fully justified by the evidence. Mr. Michael acted in good faith, and William Lee and his wife and children were benefited to the extent of $128 paid by him to perfect the title. The mortgage from Charles was taken to protect William for money loaned Charles. While there is evidence to show the incompetency of William, there is also evidence to show that he understood the transaction, which resulted in securing title to his homestead. The decree was just and equitable, and is affirmed, with costs.

The other Justices concurred.

ADAMS *v.* WERNER.

LANDLORD AND TENANT--REPAIRS - EVICTION.

Where, by act of an employé of the landlord, leased premises are rendered unfit for the purpose for which they were hired, and such condition is aggravated by the landlord's failure properly to make repairs which he assumes to make, the tenant may, after his refusal to restore the premises to a condition adapted to the tenant's needs, treat such conduct as an eviction, and vacate the premises; and this although the tenant himself covenanted to repair.

Error to Marquette; Stone, J. Submitted April 20, 1899. Decided June 19, 1899.

Assumpsit by Sidney Adams against Gustavus A. Werner for rent. From a judgment for defendant, plaintiff brings error. Affirmed.

Button & Culver, for appellant.

Hill & Smith, for appellee.

MOORE, J. This case was tried before the judge without a jury. The judge made the following findings:

"1. On the 8th day of July, 1895, the plaintiff, being the owner of the 'Adams Block,' so called, on the east side of Front street, in the city of Marquette, in which block was located a gallery known as 'Childs' Art Gallery,' rented the said art gallery to the defendant for the term ending April 30, 1897, to be occupied for an art gallery, for the rental of $10 a month until May 1, 1896, and $20 a month, payable on the last day of each month, for the remaining 12 months. Said lease was in writing, and contained, among other provisions, the following:

"'And also that said party of the second part [the defendant] will, at his 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 yield and deliver up the same in like condition, as when taken, reasonable use and wear thereof and damage by the elements excepted.'

"Then follows the usual clause for peaceable and quiet enjoyment on paying the installments of rent aforesaid. The lease was received in evidence upon the trial, and is made a part of this finding.

"2. The defendant entered into possession of the said art gallery, which consisted of a number of rooms, including an operating room, which had a skylight of glass about 13 by 18 feet in size, such as is in general use in the photograph and like business. During the continuance of such lease, and in the month of August, 1896, the defendant applied to the plaintiff for a reduction of the rent for the remainder of the term, and complained of the dullness of business. After some discussion of the subject, the plaintiff agreed to reduce the rent to $15 per month for the remainder of the term, upon condition that said defendant was to remain a tenant for another year, to wit, from May 1, 1897, to May 1, 1898, at the old rental of $20 per month. These terms were agreed upon, and such arrangement was made by the parties.

"3. The skylight referred to contained large lights of glass, 20 by 30 inches, and in the month of March, 1897, during the term of said written lease, some men in the employ of plaintiff, while engaged in throwing snow from a roof adjoining said skylight, accidentally broke two or three lights of glass in said skylight, the snow falling thereon. An attempt was made by the plaintiff's agent to repair the injury, and two more lights were broken in the process, making five lights broken in all. No putty was used in the attempted repairs, the frame and woodwork being wet and the weather cold, but nails were driven in, fastening the glass. The next day one of the lights of glass broke across where the nail had been driven, and the defendant called the attention of the plaintiff's agent to the broken glass, and complained of it. The said damage done to the skylight by the falling snow was not properly repaired, and the skylight leaked badly whenever it rained, or whenever the falling snow melted, during all the subsequent occupancy by defendant, rendering it necessary to use boxes and pans to catch the water, and rendering it unpleasant and unsuitable, if not impossible, to do a profitable business in the operating room at such times, and

materially affecting the business of the defendant, the falling water injuring the carpet, curtains, and furniture of defendant, of which condition the defendant complained to the agent of the plaintiff.

"4. At the close of the term of the written lease, to wit, on May 1, 1897, the defendant was in arrears for rent for February, March, and April, 1897. The defendant was called upon for rent by the agent of the plaintiff at the close of each month, and he refused to pay the rent until the skylight was repaired, and so stated to such agent. The defendant continued to occupy the premises under the verbal arrangement and agreement of August, 1896. The plaintiff's agent applied to the defendant monthly for the payment of rent. The defendant on these occasions complained of the leaking condition of the skylight, and paid no rent (except $15 in June, which was applied in payment of the February rent), and said he wanted to see the plaintiff, and he also complained that the rent was too high. This condition of things continued until August 2, 1897, when the plaintiff wrote a letter to the defendant, of which the following is a copy:

"'MARQUETTE, MICH., August 2, 1897.

"'G. A. WERNER, Esq.,

"'City.

"'*Dear Sir:* September last I agreed with you that in consideration of your agreeing to pay $20 per month for rent of gallery from May 1, '97, to April 30, '98, and also agreeing to pay this rent promptly on the 1st of every month, that I would take off $5 a month from your lease until May 1, '97. Trusting your honor to do as you agreed, I told my clerks to collect only $15 a month until May 1, '97, and $20 after that. On this agreement you are now $90 behind with your rent, that was to have been paid promptly. Will you please give us check or pay this back rent at once?

"'Yours truly,

"'S. ADAMS.'

"Soon after receiving this letter, the defendant saw the plaintiff, and complained that the rent was too high, denied that he had ever agreed to pay $20 a month after May 1, 1897, and complained of the leaky condition of the skylight, and refused to pay any rent until the skylight was repaired. The plaintiff refused to repair the skylight, claiming that it was the duty of the defendant to do so under the terms of the lease. The defendant then said to the plaintiff that he would move out, and somewhere from

the 10th to the 16th day of August, 1897, he commenced to make preparations to move, and arranged to repair his own building for the business. He continued, however, to occupy the plaintiff's premises until about September 15, 1897. Although the plaintiff had refused to repair the skylight, he sent a man into the gallery soon after the defendant had determined to move out, and about August 21st, with instructions to repair the skylight. The defendant objected to being disturbed, and said he was going to move out, and told the man to wait until he had moved. The same man came back about a week later, and was again sent away by defendant. The defendant at this time was engaged in moving out, having already removed the negatives and some stock. The plaintiff finally sent men to repair the skylight. They commenced the work about September 7, 1897, and completed it about September 17th. They put in 15 new lights of glass, and three men worked three days or more. During the time they were at work the defendant completed moving out, and vacated the premises, to the knowledge of the plaintiff.

"5. At the time of the commencement of this suit, rent remained unpaid for the months of March and April, 1897, at the rate of $15 per month, and for May, June, July, August, and September, 1897, at the rate of $20 per month, —making, in all, $130. The defendant was entitled to a credit for work of $2, leaving a balance due the plaintiff of $128, to the close of the month of September, 1897, for rent. Before the trial of the case, the defendant tendered to the plaintiff, and paid into court, the sum of $160.25 in full for damages and costs to that time. I find that the amount so tendered was sufficient to pay the plaintiff's demand and the costs of said suit up to the time of such tender.

"From the foregoing facts I find, as matter and conclusion of law, that the said premises, by reason of the leaky condition of said skylight, were in an untenantable condition, and were unfit and unsuitable for the carrying on of said business, and that it was the duty of the plaintiff to repair the same; that the plaintiff's servants, while in his employ, having injured the said skylight as aforesaid, it became and was the duty of the plaintiff to properly repair the same; and that his refusal and neglect to repair said skylight, after complaint and notice by the defendant, justified the defendant in terminating the lease and vacating the premises; and that the conduct of the plaintiff in the premises amounted to an eviction in the law."

When the original lease was made, as well as when it was modified by the verbal arrangement, the building was adapted to the needs of the tenant, who had hired it for a particular business. This was understood by the landlord. Through the act of the landlord, injuries were done to the building which rendered it practically useless for the purpose for which it was hired. The attention of his agent was called to the condition of the building. He undertook to make repairs. His efforts resulted in making a bad matter worse. Through the act of the landlord, represented by his employés and agent, the tenant was deprived of the beneficial use of the building. The conclusion of the circuit judge is justified by the following cases: *Young* v. *Collett*, 63 Mich. 331; *Pridgeon* v. *Boat Club*, 66 Mich. 326; *Bostwick* v. *Losey*, 67 Mich. 558; *Leonard* v. *Armstrong*, 73 Mich. 577; *Pierce* v. *Joldersma*, 91 Mich. 463; *Grove* v. *Youell*, 110 Mich. 285; *Fisher* v. *Nergararian*, 112 Mich. 327.

Judgment is affirmed.

The other Justices concurred.

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GAGE *v.* TOWNSHIP OF PITTSFIELD.

1. HIGHWAYS—DEFECTIVE PROCEEDINGS—EVIDENCE OF USER.

The records relating to defective proceedings in laying out a highway, and evidence that it was generally understood in the community that it was a public highway, are admissible to show that a highway had been laid out, and, though not properly laid out, had been used sufficiently long to become a public highway, under 3 How. Stat. § 1315, providing that "all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways."

2. SAME—OPENING ACROSS RAILROAD—LIABILITY FOR DEFECTS.
Where a new highway is opened across a railroad, the township, and not the railroad company, is charged with the duty of keeping in safe condition for public travel that portion of the highway lying within the railroad right of way, but not being a part of the crossing itself nor of the approaches thereto.

Error to Washtenaw; Kinne, J. Submitted April 20, 1899. Decided June 19, 1899.

Case by Joseph E. Gage against the township of Pittsfield for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

John P. Kirk (*Randall & Jones*, of counsel), for appellant

Lawrence & Butterfield, for appellee.

MOORE, J. Plaintiff recovered a judgment of $250 against the defendant for injuries received by reason of a defective highway, from which judgment defendant appeals.

The accident occurred near Pittsfield Junction. It was the claim of plaintiff that the highway was laid out in 1882, and had been in use ever since. It was the claim of defendant that the proceedings to lay out the highway were void, and that it had not been used as a highway for 10 years. The records relating to laying out the highway were offered in evidence. Their admission is said to be error, because the proceedings were defective. It is also said evidence that it was generally understood in the community that it was a public highway was incompetent. Section 1315, 3 How. Stat., provides, among other things, that "all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways." The object of this proof was to show that a highway had been laid out, and, though not properly laid out, had been used sufficiently long to become a highway. A

like statute was construed in *Potter* v. *Safford*, 50 Mich. 46. In commenting upon this statute, Judge COOLEY says:

"The question, then, is whether user alone for 10 years is sufficient. * * * It is notorious that the proceedings in a great many cases are carelessly managed and defective, and will not stand the test of legal scrutiny. In a strict sense, a road is not laid out unless the proceedings are in conformity with the law, but, in a popular sense, every road may be said to be laid out where proceedings have been taken by the highway authorities for the purpose, however irregular the proceedings may be, or however imperfect. * * * It is of great importance, after a way has been used for many years, in reliance upon proceedings supposed to be effectual to constitute it a highway, that parties who had acquiesced should not be encouraged or suffered to inquire into technicalities for the purpose of defeating the public right. Ten years is ample time to allow for contesting such proceedings. If the time were shortened, it would, I think, be still better."

In *Village of Grandville* v. *Jenison*, 84 Mich. 68, it is said:

"The extent to which a road is traveled does not govern. The law does not fix the number who must travel upon a road in order to determine whether it exists by user. It must be used by the public, and the public are all who have occasion to use it. In the case of *Baldwin* v. *Herbst*, 54 Iowa, 168, it was held that it would be sufficient to constitute a highway by user if it was traveled over as much, or about as much, as it would have been if it was laid out by the statute, and traveled as much as the circumstances of the surrounding population and their business required."

Proceedings had been taken by the highway authorities to lay out this road as long ago as 1882. The petition was signed by the railroad company, as well as others. A release of right of way was obtained through legal proceedings, and the payment of damages to some of the landowners. While it is not shown that all of the proceedings were regular, proof was offered tending to show that, immediately following those proceedings, the highway was

opened to travel, and had been used by the public from then until the time of the accident, and is now used as a public highway. This testimony was disputed. The question was left to the jury, under a careful charge, and the jury found in favor of the plaintiff's contention. We find no error in this. See, also, *Wicks* v. *Ross*, 37 Mich. 464.

It is claimed that, as this accident occurred within the hundred feet of the right of way of the railroad company, it was the duty of the railroad company, and not the township, to make the repairs, and, if there is any liability for the accident, it is the railroad company which is liable, and not the township. The accident occurred near the limit of the right of way, not upon the crossing itself nor upon an approach to it, but in the highway. In considering this proposition, it must be borne in mind that the railroad was in existence before the highway was laid out. In *Chicago, etc., R. Co.* v. *Hough*, 61 Mich. 507, it was said by Chief Justice CAMPBELL:

"If a railroad interferes with an existing highway, it must bear all the expense of crossing, and restoring the highway, as far as practicable, to safe condition; and the fencing and cattle-guards are necessary for that purpose. But, as pointed out in *People* v. *Railway Co.*, 52 Mich. 277, when a new highway is created, then it belongs to those who create it to bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions."

It would hardly be claimed that it would be competent for the legislature to provide for laying out a highway through a farm, and that, when so laid out, the owner of the land should be required to keep the highway in repair. Why should a different rule apply to railroads, as to that portion of the highway which is no part of the approach to, or the structure itself used by, the railroad? The statute does not relieve the township from liability for defects in the highway itself simply because it is within the right of way of a railroad. 3 How. Stat. § 1446*f*. Coun-

sel have failed to call our attention to any decision which supports their contention, while section 1322, 3 How. Stat., as amended by Act No. 145, Pub. Acts 1893, indicates very clearly that a highway across a railroad right of way is under the control of the township authorities.

It was the claim of the plaintiff that the township authorities had allowed the water to stand in the middle of the highway until, by the passage of conveyances, a deep and dangerous hole had been created; that, in attempting to avoid the hole, the wheels of his wagon dropped into a deep rut, and he was thrown from the wagon, head first, to the ground, and received severe injuries; and that the road had been in this condition so long the township authorities must be presumed to have had notice of the defect. His claim in these particulars was denied. The case is much like *Handy* v. *Township of Meridian*, 114 Mich. 454. The circuit judge gave a fair, clear, and intelligent charge to the jury, who found in favor of the plaintiff.

It is not necessary to discuss any other questions raised by counsel.

Judgment is affirmed.

The other Justices concurred.

SMEAD v. ROGERS.

APPEAL—DECREE ON CONFLICTING EVIDENCE—FRAUDULENT CONVEYANCE.

The Supreme Court will not reverse a decree setting aside a conveyance as in fraud of creditors, where the evidence is conflicting, unless it is clearly against the weight of the evidence.

Appeal from Lenawee; Chester, J. Submitted May 4, 1899. Decided June 19, 1899.

Bill by George A. Smead against Charles E. Rogers, Roye M. Rogers, and Emma L. Rogers in aid of execution. From a decree for complainant, defendants appeal. Affirmed.

John A. Riley and *Watts, Bean & Smith*, for complainant.

Salsbury & O'Mealey, for defendants.

MONTGOMERY, J. This is a bill filed in aid of execution at law. Prior to the 23d day of January, 1893, Charles E. and Emma L. Rogers were owners, as tenants of the entirety, of an undivided half of the property in question, which consists of a canning plant and machinery in the village of Blissfield, under a conveyance of record. Albert S. Bush and wife were the owners of the other moiety. Mr. Rogers and Mr. Bush were engaged in the business of canning fruits and vegetables. On the date above stated, Bush and wife conveyed the undivided half of the premises to Roye M. Rogers, the son of Charles E. and Emma L., and they thereafter conducted the business. On the 7th day of January, 1897, the complainant commenced a suit by attachment against Charles E. and Roye M. Rogers, and caused the attachment to be levied

on the property in question on that day. On July 7, 1897, judgment was recovered in the sum of $2,255.56, and execution was afterwards duly taken out, and a levy duly made. In the meantime, on January 8th, the day following the attachment, a deed from Charles E. and Roye M. Rogers to Emma L. Rogers, bearing date of November 30, 1894, was placed of record. This bill was filed to have it declared that this deed is fraudulent as to the complainant. The circuit judge granted the relief, and defendants appeal.

Under the statute (Act No. 99, Pub. Acts 1897), the burden of proof rests with the defendant Emma L. Rogers to establish the *bona fides* of the transaction. The question for our decision is whether she has met this burden, and established the *bona fides*. The circuit judge had the advantage of seeing the witnesses and noting their appearance on the stand, and we should proceed reluctantly to reverse his decision on a question of this nature, although it is our duty to do so if fairly convinced of his error. A thorough examination of this record has failed to satisfy us that the conclusion of the circuit judge was not warranted. On the contrary, there are many circumstances which impress us as persuasive, and which tend to show a purpose to withhold this conveyance from record, with a full knowledge that the effect would be to give a false credit to the grantors. There is credible testimony that the title of Charles E. and Roye M. to this property was asserted by the defendant Roye M. in the presence of his mother, and not denied by her. There is a marked conflict in the testimony as to how the alleged consideration was paid. It is beyond doubt that the defendant Emma must have known that her husband and son were incurring indebtedness, and, in addition to this, the alleged consideration is grossly inadequate. The conclusion that there was a fraudulent purpose is, in our opinion, justified. *Ryan* v. *Meyer*, 108 Mich. 638; *Township of Maple Valley* v. *Foley*, 113 Mich. 622; *Preston Nat. Bank* v. *Pierson*, 112 Mich. 435. The case is distinguishable from

Barkworth v. *Palmer*, 118 Mich. 50. In that case there was no proof of actual fraud.

The decree does not by its terms subject the undivided half of the property held by Mr. and Mrs. Rogers as tenants of the entirety to complainant's execution, and in this respect it is entirely proper, as the conveyance was promptly placed of record when made, and long before complainant's rights accrued.

The decree is affirmed, with costs.

The other Justices concurred.

WATSON *v.* DINGMAN.

ATTACHMENT—SERVICE AND RETURN.

A return of service indorsed by the sheriff on a writ of attachment in the following language: "I served a certified copy of the within writ on A. * * * by delivering the same to A., and * * * I served a certified copy, together with a copy of the inventory, on B.,"—is fairly to be interpreted as denoting service of a copy of the writ, as well as of the inventory, upon B.

Error to Missaukee; Aldrich, J. Submitted May 10, 1899. Decided June 19, 1899.

Proceedings under the log-lien law by James Watson against Charles M. Dingman and Charles L. Dolph. From a judgment for plaintiff, defendant Dolph brings error. Affirmed.

George J. Cummins, for appellant.

F. O. Gaffney, for appellee.

MOORE, J. Prior to May, 1898, the plaintiff was em-

ployed by Mr. Dingman in getting out in the woods, and driving in the river, cedar logs belonging to Mr. Dolph. On May 17, 1898, he sued out a writ of attachment against Mr. Dingman and against the logs, under the provisions of Act No. 229, Pub. Acts 1887 (3 How. Stat. § 8427*a et seq.*). About 10,000 pieces of cedar were seized under this writ on the 17th day of May. On the 23d day of May, Mr. Dolph gave a bond, and secured a release of the timber. The sheriff made on the writ of attachment the following return:

"STATE OF MICHIGAN, } ss.:
County of Missaukee. }

"I do hereby return that, by virtue of the foregoing writ of attachment, I did, on the 17th day of May, A. D. 1898, attach the following property, viz.: About ten thousand pieces of cedar from eight inches to two and one-half feet thick, eight feet long, marked some Cccc, some Cccc Ccc, some Ccc, some C A, and cut by C. M. Dingman; and I do further return that at the village of Temple, in the county of Clare, on the 17th day of May, A. D. 1898, I served a certified copy of the within writ on Charles L. Dolph, the owner of the above-described property, one of the defendants in said attachment named, with a copy of said writ, duly certified, as I am commanded, by delivering the same to Charles L. Dolph; and I do further certify and return that I served a certified copy, together with a copy of the inventory, on C. M. Dingman, in the township of West Branch, Missaukee county, Michigan, on May the 18th, 1898.

"Inventory of goods seized by me by virtue of this writ: About ten thousand pieces of cedar from eight inches to two and one-half feet thick, marked as follows: Some Cccc, some Cccc Ccc, some Ccc, and some C A.

"JOHN R. TENANT,
"Sheriff in and for Missaukee Co., Mich.

"My fees, $7.00."

On the return day of the writ, May 27th, no appearance was made by either of the defendants, and a judgment was rendered in favor of the plaintiff. On the 31st of May Mr. Dolph filed an affidavit and bond, and took a general appeal of the case to the circuit court. On the

16th of June, by his attorney, Mr. Dolph entered a general appearance in the case. In July the case was tried by a jury. Defendant Dolph called Mr. Dingman as a witness. A trial upon the merits was fully had. After the testimony was all in, the defendant asked to have a verdict directed in his favor, for the reason that the return of the sheriff in justice's court, not showing that a copy of the writ of attachment was served upon Mr. Dingman, did not give the court jurisdiction. This was the first time objection was made to the jurisdiction of the court. The court refused to direct the verdict as requested, and allowed the sheriff to amend his return by inserting after the words "certified copy" the words "of said writ." The case was submitted to the jury, who returned a verdict in favor of the plaintiff. The refusal of the judge to direct a verdict, and his allowing the return to the writ to be amended, are said to be error.

It may well be urged that the taking of a general appeal, the entry of a general appearance, and entering upon the trial without questioning the jurisdiction of the court would be a waiver on the part of the defendant; but we do not deem it necessary to pass upon that question. Neither is it essential to say whether the judge could allow an amendment under the circumstances of this case, because an examination of the return shows the writ was properly served. The return of service was made on the writ itself. It proceeds to say how service was made on Mr. Dolph: "I served a certified copy of the within writ on Charles L. Dolph, * * * as I am commanded, by delivering the same to Charles L. Dolph; and I do further certify and return that I served a certified copy, together with a copy of the inventory, on C. M. Dingman," etc. A fair interpretation of this language is that the sheriff served a writ of attachment, duly certified, upon Mr. Dolph, and also served a certified copy of it, together with a copy of the inventory, upon Mr. Dingman.

Mr. Dolph has no reason to complain of the action of the circuit judge. The contract between Mr. Watson and

Mr. Dingman was made in the fall of 1897. It was the claim of the plaintiff that he was to stay with Dingman until the job was done, including the driving of the logs, for which he was to receive $24 a month for the work in the woods and $1.50 a day for the driving; and that, though he worked for Mr. Tower 13 days after the logs were put in the river before the Dolph logs were driven, because it was desired to have the Tower logs go out first, the contract was a continuous one, and that he was entitled to a lien on the logs, not only for driving them, but also for the work done in the woods. It was the claim of the defendant that the hiring by the month was one contract, and the hiring by the day was a separate and distinct arrangement, and that the work by the month ended more than 30 days before the filing of the notice of a claim of lien, and that for that work the plaintiff was not entitled to a lien, and the judge should so direct the jury. His refusal to do so is said to be error. Testimony was offered tending to sustain the diverse claims of the parties. Under a very careful charge, these claims were submitted to the jury, who found in favor of the plaintiff. We do not think there is reversible error in the case.

Judgment is affirmed.

The other Justices concurred.

PHELPS v. CITY OF DETROIT.

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1. MUNICIPAL CORPORATIONS — RAILROADS — BRIDGING TRACKS — DAMAGES TO ABUTTING PROPERTY.

   A city which proceeds, under charter provisions inadequate to confer the power, to construct a bridge over railroad tracks at a street crossing, is liable in damages to the owner of abutting property, the rental value of which is depreciated by the structure.

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d142 [1]145
142 [2]146

2. SAME—CONTINUING WRONG—LIMITATION OF ACTIONS.

   The maintenance by a city of a bridge across railroad tracks, which it was without authority to construct, and which depreciates the rental value of abutting property, is a continuing wrong, for which the property owner may recover his damages arising within the period of limitations, although the right of action for the erection of the structure is barred.

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f143 [1]671

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Error to Wayne; Carpenter, J. Submitted April 19, 1899. Decided June 19, 1899.

Case by Ralph Phelps, Sr., against the city of Detroit, for the unauthorized maintenance of a bridge in front of plaintiff's premises. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Edwin F. Conely, *Orla B. Taylor*, and *Ralph Phelps, Jr.*, for appellant.

C. D. Joslyn and *Arthur Webster*, for appellee.

LONG, J. This is an action on the case to recover damages for the depreciation of the rental value of plaintiff's property by the action of the city in constructing a bridge on the highway in front of such premises over the Michigan Central Railroad tracks. The plaintiff is, and has been for many years, the owner of several lots, upon which houses have been constructed, fronting upon Fourteenth

avenue, in the city of Detroit, conforming to the grade of the street, and from which he had received large amounts of rent. In 1875 the defendant erected a bridge over the Michigan Central Railroad tracks, which cross Fourteenth avenue adjoining the plaintiff's premises. This bridge takes up the entire width of the street, except about five feet on each side, thus depriving the property of the benefits of the street as a street. The approaches to the bridge, which are immediately in front of the plaintiff's premises, are built of stone, iron, and earth, and vary from 10 to 40 feet in height. This bridge and its approaches have remained in this condition continuously since its erection, in 1875. It is admitted by the defendant that the erection of the bridge caused some damage to the plaintiff's property, but it is contended: (1) That there was never any liability whatever on the part of the city for damages occasioned by the erection of the bridge; (2) that, if there ever was any liability, the claim is barred by the statute of limitations. The court below concurred in these views, and directed the verdict in favor of defendant.

We cannot concur in either of these contentions. Since the decision of this court in *Schneider* v. *City of Detroit*, 72 Mich. 240 (2 L. R. A. 54), we have always supposed that the question of such liability was settled in this State. The charter provisions considered were similar to those in force in 1875, when this bridge was constructed. The facts in that case were identical with the present, but the question of the statute of limitations was not involved. The inquiry there was whether the common council of the city of Detroit had authority to construct the bridge over the railroad tracks; and it was conceded by Mr. Justice CHAMPLIN, who wrote the opinion, that, if the authority to build the bridge existed,—all the proceedings having been regular, and the bridge and approaches having been erected according to plans adopted,—the city would not be liable. The charter of the city under which the council claimed the right to construct the bridge provided that it (the council) should have power to establish, widen, and

extend streets and avenues in the city, and to grade, pave, repair, and otherwise improve the streets and highways. Section 33, chap. 7, Act No. 326, Local Acts 1883. The only section of the charter (section 38 of the same chapter) which then conferred in express terms upon the council the authority to erect a bridge in the street restricted that authority to the purpose of sewerage or drainage, and, as Mr. Justice CHAMPLIN there said, "did not extend to the purpose of securing a safe crossing of a railroad track by erecting a bridge in the street." He said further:

"Is the authority implied from the section conferring power to grade, improve, or extend streets? * * * I do not think it is either expressly given or necessarily implied by the terms of the charter. The construction of bridges over railroads is not the ordinary or usual method of grading streets. The exercise of the power to erect such bridges in streets would necessarily involve quite an amount of abutting property in damage, and some entirely in destruction, for any beneficial use or enjoyment. Such consequences cannot be brought under the general power to grade streets, but must be provided for under the power of eminent domain. Private property cannot be appropriated for the public use without the necessity therefor is first determined by a jury under our Constitution, and compensation awarded and paid. Doubtless the method of crossing a railroad by a viaduct is safer than a crossing at grade, and upon streets which are recognized thoroughfares, over which the public are almost constantly passing, such bridges would greatly conduce to the public safety and convenience, and it would be wise for the legislature to confer upon municipalities the authority to erect such structures in the streets, and condemn private property for that purpose, if necessary; but, until this is done by special enactment, I do not think it can be done under the power now conferred by the general authority to grade, make, repair, and improve streets. It follows that the city authorities had no right to erect the bridge in the street in question so as to injure plaintiff in the usual and ordinary enjoyment of his property, and the city is liable to him for the injury for which he has complained in damages."

The writer of the present opinion concurred with Justice CHAMPLIN. Mr. Justice CAMPBELL said in the case:

"I agree in the result arrived at by my Brother CHAMPLIN. But I have no doubt the city may build bridges where necessary for a safe passage, subject always to the payment of damages when it injures private property, as was done here."

These views were concurred in by Justices SHERWOOD and MORSE.

The learned counsel for the defendant in the present case seem to have entirely misconceived what Mr. Justice CAMPBELL had in mind in adding what he did to the opinion. He agreed in the result,—that is, agreed that the city was liable for the damages sustained by the plaintiff,—and undoubtedly agreed also to the proposition that the charter provisions were not broad enough to warrant the action, and consequently the power, if it existed, must necessarily come from the right of eminent domain; that, this right not having been exercised, the city had acted without authority, and was a wrong-doer, and must respond in damages. But the learned counsel for the defendant say that—.

"Mr. Justice CAMPBELL must have had in mind the damages following a direct injury, such as was sustained by the plaintiff in *Ashley* v. *City of Port Huron*, 35 Mich. 296 (24 Am. Rep. 552), and not damages for incidental injury caused by changing the grade of a street or erecting a necessary bridge."

The views expressed by Mr. Justice CAMPBELL must be read in the light of the questions there involved, and the result which Mr. Justice CHAMPLIN reached, in which all the members of the court concurred.

Even if the city, in the present case, had been clothed with the power to construct this bridge by right of eminent domain, no such proceedings having been taken, it would be held liable for damages to abutting property. *Hoffman* v. *Railroad Co.*, 114 Mich. 316. In 1893 an act was passed by the legislature with special reference to

proceedings for the separation of grades. Act No. 92, Pub. Acts 1893. In the case of *Harper* v. *City of Detroit*, 110 Mich. 427, it appeared that the action was brought to recover damages to abutting property in the construction of a bridge by the city over certain railroad tracks. No proceedings had been taken under the act of 1893 to condemn the property and fix the damages. It was held that proceedings should have been taken under this act, which was intended for the protection of owners of property upon highways and streets; and that, such proceedings not having been taken, the city was liable in damages.

We not only think the case of *Schneider* v. *City of Detroit* settles the question in favor of plaintiff's contention, but that upon principle the city must be held to respond in damages to abutting property owners. The city has the undoubted right to establish and change the grades of streets, and to make use of them for the common and ordinary purposes for which they were intended; but it has no more right to destroy the use and enjoyment of the abutting property, for the benefit of a railroad company, and without compensation, than a railroad company would have under like circumstances; and in such cases, where damage is by injury aside from actual taking of property, the rule is to make the party whole as far as practicable.

But counsel for defendant contend that the action is barred by the statute of limitations. The action was brought to recover for injuries sustained by the maintenance of the bridge during the period of 3½ years previous to the commencement of suit. The position of the plaintiff is that the maintenance of the bridge is a continuing wrong or nuisance, and that, though the right of recovery for the original erection of the bridge has been lost by the lapse of time, yet the right to recover for the injury done during the last six years remains. On the other hand, counsel for defendant contend that the bridge in question is a permanent structure, and the injury to the

plaintiff, if any,—past, present, and future,—was ascertainable and complete as soon as the bridge was completed.

There are some authorities which seem to sustain the contention of counsel for defendant. In *Town of Troy* v. *Railway Co.*, 23 N. H. 83 (55 Am. Dec. 177), the rule was laid down that, whenever the nuisance is of such a permanent character that it will continue without change from any cause but human labor, the damage is original, and may at once be compensated; and that, therefore, no future action can be maintained as for a continuing nuisance. This rule has been followed in some of the other States, but it has been criticised and repudiated by most of the courts of this country. It has never been the rule in this State.

In *Hoffman* v. *Railroad Co.*, *supra*, the question was squarely presented. There counsel for the railroad company claimed that a railroad, when once constructed, is of such a permanent character that it is to be presumed that it will remain permanently, and that whatever damages were done to the premises were done in 1880, and the owner of the abutting property was not only entitled to recover the damages which had then accrued, but for all that might thereafter accrue. The action was brought for damage to the abutting property in the reduction or diminution of its rental value for the six years prior to bringing the suit, on May 16, 1894. There had been no condemnation proceedings, and this court quoted with approval the following language from *Grand Rapids, etc., R. Co.* v. *Heisel*, 47 Mich. 393:

"There is no reason, and, so far as we can discover, no law, which allows the wrong-doer to cast any portion of an actual and appreciable loss on the party whom he injures. In such a case as this, it is in the power of the company, and always has been, to have the compensation settled once for all, and to get any benefit which the law attaches to such a method of ascertainment. Until this is done, the possession is a continuous wrong, for which, as intimated in our former decision, the amount accruing year by year is recoverable."

The plaintiff recovered her damages for the six-years rental prior to the commencement of suit. The judgment was affirmed, and it was said, "We think the principle announced by the court in the *Heisel Case* should control this case."

Not only is this the rule as settled in this State, but the same general rule obtains in most of the States. In the recent case of *City of Chattanooga* v. *Dowling*, 101 Tenn. 342, the supreme court of Tennessee had before it the like question. The court said:

"The question here presented is, Conceding the liability of the city to suit for the injury complained of, should all the damages have been recovered in one action by the injured party, or can he maintain successive suits until the nuisance is abated? * * * To hold that for such a nuisance the injured party could have only one action, in which he must recover all his damages, past and prospective, would not only be to assume that the wrong-doer will always persist in his misconduct, but would be in effect to give him a license to continue in it. The courts will do neither."

Uline v. *Railroad Co.*, 101 N. Y. 98 (54 Am. Rep. 661), was an action for damages occasioned by the unlawful maintenance of a railroad in front of plaintiff's premises, the grade being raised, etc. The road was built 40 years before the action was commenced. Two extra tracks were laid in 1874. Suit was brought in 1883. The case is in every respect like *Hoffman* v. *Railroad Co.*, *supra*. The court held that it was a continuing wrong, and that successive actions might be brought for damages occasioned thereby. The court said, "The law will not proceed upon the assumption that a nuisance or illegal conduct will continue forever."

City of Nashville v. *Comar*, 88 Tenn. 415, was a decision by Mr. Justice Lurton, now of the United States court of appeals. He takes up the case of *Town of Troy* v. *Railway Co.*, *supra*, and the cases of other courts which have followed that case since, and shows with great clearness that those cases are not only illogical, but that they

are in opposition to the great weight of authority. After speaking of the rule announced in the *Troy Case*, that "wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated," the learned justice says:

"This seems to us an artificial and arbitrary test. There are supposable nuisances which, by the effect of time, might at last abate themselves; but by far the greater number of trespasses, wrongs, and nuisances would continue indefinitely without the expenditure of human labor to remove or abate them. It is a rule which does not recommend itself by either its reasonableness, its certainty of application, or its justice."

He then cites many cases in support of his contention, and proceeds:

"This assumption that a wrong-doer is to be presumed, from the mere character of the work, to intend to continue in his wrong, and that he will not remedy his defective or unskillful work, is repudiated in the majority of the American cases."

We deem it unnecessary to quote from the multitude of cases cited in the briefs of counsel for the plaintiff here. The doctrine contended for by them is supported, not only by the great weight of authority in this country, but in England. Two English cases may be mentioned as supporting their contention: *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127; *Crumbie* v. *Wallsend Local Board*, L. R. 26 Q. B. Div. 503. The following cases in this country support the rule: *Town of Roxbury* v. *Railroad Co.*, 60 Vt. 121; *Inhabitants of New Salem* v. *Eagle Mill Co.*, 138 Mass. 8; *Ramsdale* v. *Foote*, 55 Wis. 557; *Reed* v. *Mayor, etc., of Birmingham*, 92 Ala. 339; *McGowan* v. *Railway Co.*, 23 Mo. App. 203; *Fell* v. *Bennett*, 110 Pa. St. 181; *Reid* v. *City of Atlanta*, 73 Ga. 523; *Sloggy* v. *Dilworth*, 38 Minn. 179 (8 Am. St.

Rep. 656); *Omaha, etc., R. Co.* v. *Standen*, 22 Neb. 343; *Schulte* v. *Transportation Co.*, 50 Cal. 592. We close this part of the case by the further citation from the opinion of Mr. Justice Lurton, in which we concur:

"It seems to us that the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong, when the cause of the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that, where the cause of the injury is one not presumed to continue, that the damages recoverable from the wrongdoer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance."

The judgment below must be reversed, and a new trial granted.

The other Justices concurred.

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SHEFFERLY *v.* AUDITOR GENERAL.

TAX SALES--SETTING ASIDE DECREE.

A decree for the sale of land delinquent for taxes will not be set aside after confirmation of the sale, even though such decree has not been enrolled, on the ground either that the township treasurer failed to make the tax out of personal property, or that his return to the county treasurer was prematurely made, in view of the provision of section 70 of the tax law (Act No. 206, Pub. Acts 1893) that, while the practice with reference to setting aside sales shall be the same, so far as applicable, as in cases of mortgage foreclosure, no sale shall be set aside after confirmation, except in cases where the taxes were paid or the property was exempt from taxation.

Appeal from Macomb; Eldredge, J. Submitted January 3, 1899. Decided June 28, 1899.

Petition by Mary Shefferly against Roscoe D. Dix, auditor general, Alexander McMillan, and Charles Cannell, to reopen a decree in a tax proceeding. From a decree for petitioner, defendants McMillan and Cannell appeal. Reversed.

Louis C. Wurzer, for petitioner.

Dwight N. Lowell, for appellants.

GRANT, C. J. The petitioner, Mary Shefferly, resided in Detroit. She had a mortgage upon the land described in the petition, situated in the township of Warren, Macomb county. In 1893 a tax was levied upon her mortgage interest under the law of 1891. The tax was not paid, was returned delinquent, and sold December 20, 1895, under the tax proceedings taken by the auditor general. The lands were bid off to the State, and were purchased July 24, 1896, by the defendant Cannell. The redemption expired November 30, 1896. January 28, 1898, she filed this petition to reopen the decree. Relief was granted upon the payment of the tax, interest, and costs.

The reasons assigned by her counsel for setting aside the decree are:

1. That the decree was never enrolled, and that, therefore, the court was clothed with power to modify or set it aside.
2. That the township treasurer failed to make the tax out of the personal property.
3. That the return of the township treasurer was premature, in that it was made on February 5, 1894, and should not have been made until March 1st.

The court, in vacating the decree, relied upon *Benedict* v. *Auditor General*, 104 Mich. 269. That case has been misconstrued, as was held in *Brooks* v. *Auditor General*, 119 Mich. 329. All the points raised have been disposed of against the claim of the petitioner in the prior decisions of this court. *Brooks* v. *Auditor General*, *supra*;

Spaulding v. *O'Connor*, 119 Mich. 45; *Auditor General* v. *Sparrow*, 116 Mich. 574.

Decree reversed, and petition dismissed, with costs.

MONTGOMERY, MOORE, and LONG, JJ., concurred. HOOKER, J., did not sit.

KELSEY *v.* WAYNE CIRCUIT JUDGE.

MANDAMUS—DISSOLUTION OF INJUNCTION—REVIEW.

Where, upon an application for *mandamus* to compel a circuit judge to vacate an order dissolving an injunction, the return of the respondent fairly indicates that the merits of the question received consideration, the Supreme Court will not be inclined to interfere with his discretion.

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Mandamus by Eber L. Kelsey to compel Edward D. Kinne, circuit judge, presiding in Wayne county, to vacate an order dissolving an injunction. Submitted February 7, 1899. Writ denied June 28, 1899.

Moore & Moore, for relator.

Humphrey & Grant, for respondent.

HOOKER, J. A statement, in chronological order, of some of the more important facts upon which the question before us depends, will aid in making the case plain. Charles E. Kelsey was the owner of a lot of lumber. Some of it lay upon docks of the W. & A. McArthur Co., Limited, and some upon premises of the Cheboygan Lumber Company; these concerns having possession of, and liens for sawing upon, the respective portions of the lumber. Kelsey was in debt to others, and on October 15, 1895, executed to the complainant, the Union Trust Com-

pany, as trustee, two chattel mortgages, which were at once filed. The first of these secured three notes in favor of Eber L. Kelsey and Charley L. Kelsey. This mortgage was made subject to certain liens for saw bills and purchase price. The second mortgage secured other claims, including the two liens mentioned. On December 30, 1895, one Bowen, an unsecured creditor of Kelsey, attached this lumber in an action against Charles E. Kelsey. The sheriff, Ming, did not remove it, but put notices of the levy upon it, and put it under surveillance, and at all times claimed possession, until it was replevied from him by Eber L. Kelsey. On April 2, 1896, the complainant sold the lumber upon an alleged foreclosure of the first mortgage, and Eber L. Kelsey purchased it, with full notice of the claim made by the attaching creditor and sheriff. On being refused possession, he replevied it from Ming, the sheriff, and upon the trial he was defeated, and the sheriff recovered a judgment for the amount of the levy, the attachment case having gone to judgment. Upon review in this court, the judgment in the replevin case was reversed. See *Kelsey* v. *Ming*, 118 Mich. 438. From that decision it is evident that the validity of the chattel mortgages was in dispute, and this was held to be a question for the jury. It was also said that, if the first mortgage was valid, it was not extinguished by an irregular sale, but that the purchaser would succeed to the rights of the mortgagee. It was also held that, if the plaintiff had succeeded to the rights of the mortgagee and lienholders, the judgment of the attaching creditor could not be given priority over such claims of the plaintiff without determining their validity, and a judgment for the amount of the claim would not be the proper one.

After the reversal of the replevin case, the Union Trust Company filed a bill in this case in the circuit court for the county of Wayne, the replevin suit being pending in the county of Cheboygan. The bill alleges the various claims of the parties interested, and asks that the validity of the mortgages and liens and the rights of the parties be

determined, and that in the meantime an injunction issue to restrain the defendant Ming from any further proceedings in the replevin case. An order was made allowing such injunction, upon condition that a bond in the sum of $1,500 be filed. This was not complied with, and the writ was not issued upon this order. Eber L. Kelsey was made a defendant, and he filed a cross-bill, setting up substantially the same state of facts alleged in the original bill. This also prayed a similar injunction, and an order like that made upon the original bill was made. This was complied with, and the writ issued. Ming answered, and made a motion to dissolve the injunction, which was granted, as shown by the following order:

"In this case it is ordered that the order for the injunction on the bill and cross-bill is set aside, but without prejudice to the rights of the complainant in the original bill or cross-bill, or either of them, to apply to the judge of the circuit court for the county of Cheboygan, or the judge presiding at that court, for a renewal of said orders, or either of them, and the issue of new injunction or injunctions thereon; this court being of the opinion that each of said applications should have been made to the judge of the circuit court of the county of Cheboygan, or to the judge presiding in said court, and therefore it did not pass upon the merits of the applications for or the issuing of the injunction, or the rights of the parties to such injunction.

[Signed] "E. D. KINNE,
"Acting Circuit Judge."

The present proceeding is an application for *mandamus* to compel the circuit court, in chancery, to vacate the order dissolving the injunction.

In his return to the order to show cause, the learned circuit judge states that in his answer, which was sworn to, the defendant Ming denies all of the equities in the original bill, and, further, that respondent considered fully the merits of the matter brought before him in the motion to dissolve the injunction, and ordered the injunction to be set aside, but without prejudice to the right of the com-

plainant, or defendant Kelsey, to apply to the circuit judge of the county of Cheboygan, or the judge presiding at that court, for a renewal of said orders, or either of them, and that at the special request of the solicitors for the complainant in the cross-bill, after the defendant's solicitors had left the room, he incorporated into the order this language: "And therefore it did not pass upon the merits of the applications for or the issuing of the injunction, or the rights of the parties to such injunction." The return states further:

"This language was put into said order for the reason that complainant's solicitors stated that the circuit court for the county of Cheboygan, upon his application, might refuse to hear the same on the ground that said application was *res adjudicata*, having been passed upon by this respondent, sitting as one of the judges of the Wayne circuit court; and that this respondent did not refuse to pass upon the merits of said motion for dissolution, as stated in the eighth paragraph of said petition. This respondent denies that he made any statement that the merits of said petition had not been considered, and alleges that the merits of said application were fully considered, but that he made the statement in said order that they had not been passed upon for the reasons alleged in the eighth paragraph of this answer."

It also states:

"This respondent avers that no bond was filed by the Union Trust Company, as complainant in the original proceeding, and no injunction was issued in said original cause, but that, after a full consideration of the merits of the whole proceeding, he made his order in both the original and cross actions, for the purpose of setting aside the order allowing the injunction in the original suit, and for dissolving the injunction issued in the cross action; and that he made said order of dissolution after full consideration of the case in the manner aforesaid, and after the same had been fully argued by counsel for the respective parties; and that if he had been so requested by Messrs. Moore & Moore, solicitors for the cross complainant, he would have immediately decided said motion for the dissolution of injunction upon the merits of said case; and that the only reason that this respondent did not pass upon

the merits in making his order for dissolution was he was specially requested by Messrs. Moore & Moore, solicitors for cross complainant, to make the order in the form in which it now appears; and that said order, a copy of which is attached to the petition in this case, was prepared by Messrs. Moore & Moore, the solicitors for the cross complainant, and this respondent was requested to sign the same in the form in which it was drawn, and without passing upon the merits, so that they would not be concluded by such decision in any application that they might make to the circuit court for the county of Cheboygan in any subsequent proceedings taken by them; and that said order in its present form was made by this respondent for the benefit and protection, and at the urgent request, of Messrs. Moore & Moore, solicitors for the cross complainant in said action."

The order, as explained by the return of respondent, indicates that the learned circuit judge, in the exercise of his lawful discretion, dissolved this injunction, but that he endeavored to so frame his order as not to preclude the complainant, or defendant Kelsey, from taking steps to procure another injunction in Cheboygan county, where the property was situated and defendant Ming resides. We cannot suppose that he meant to indicate the opinion that an application could be made before the Cheboygan court in this proceeding, as counsel appear to claim, and his answer indicates the contrary. Counsel urge that the respondent should have passed on Mr. Kelsey's right to this injunction, and that, not having done so, his order should be vacated. Counsel say, in a letter accompanying the brief:

"It is obvious that, should this court merely pass upon our right to have the injunction heard on its merits in the Wayne circuit court, we should regard an adverse decision in the Wayne circuit court as error, and immediately ask this court to determine whether or not the case was one for equitable interference. It seems to us, therefore, that the court will be able to determine our right to the injunction in this hearing, and obviate the necessity of repeating our application to the Supreme Court."

From this we infer that counsel assume that we would

review the order dissolving this injunction on the merits. We have very rarely interfered with the discretion of a circuit judge upon the granting or dissolving of injunctions, when he has passed upon the merits. We have so often declined to consider the merits of such applications that we do not repeat the discussion of the cases here. See McGrath, Mand. Cas. Nos. 810, 814–850. But, as will be seen from some of these decisions, we do vacate orders granting injunctions where they are clearly in direct violation of law, and should an officer refuse to hear or pass upon the merits of an application, whether from an admitted misconception of law or otherwise, we might require him to consider and pass upon them. But that is not this case. We think the return shows that the merits of this question were considered. The application is therefore denied.

The other Justices concurred.

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BROUGHTON *v.* JONES.

1. CORPORATIONS—CHATTEL MORTGAGES—AUTHORITY TO EXECUTE—SPECIAL MEETING OF DIRECTORS.

   A chattel mortgage covering all the property of a corporation, executed under authority given at a special meeting at which only two of the four directors were present, the remaining two not having been notified of the meeting, is invalid.

2. SAME—ASSENT OF STOCKHOLDERS.

   A chattel mortgage executed by directors of a corporation without proper authority will not be treated as the act of the stockholders, where it does not appear that the stockholders held any meeting for the purpose of giving the mortgage, or that all of them assented to it.

3. APPEAL—REVIEW—QUESTIONS NOT RAISED BELOW.

   A point raised for the first time on appeal will not be considered.

Error to Wayne; Frazer, J. Submitted April 4, 1899. Decided June 28, 1899.

Replevin by Frederick Broughton against Henry K. Jones. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

John H. Powell, for appellant.

Lewis H. Paddock, for appellee.

MOORE, J. The defendant, Henry K. Jones, obtained a judgment against the Detroit Mill-Supply Company, and levied upon certain personal property which he claimed belonged to it. The plaintiff claimed to be entitled to the possession of said property by virtue of a chattel mortgage for $1,300 given to him by said Detroit Mill-Supply Company, and replevied the property levied upon. After all the proofs were in, the circuit judge directed a verdict in favor of defendant, for the reason that no authority had been shown for the giving of the mortgage. The plaintiff brings the case here by writ of error.

It is his claim that early in 1896 he loaned Mr. Taylor $700 to enable him to engage in business; that afterwards Taylor and one Major E. Jones formed a partnership, under the name of the "Universal Engineer & Mill-Supply Company," into which partnership the business of Taylor was merged, the new company assuming the debt of Taylor to Broughton, giving the latter notes therefor. In June, 1896, a corporation was formed called the "Detroit Mill-Supply Company," and it is the plaintiff's claim that this corporation took over the business of the Universal Engineer & Mill-Supply Company, and assumed the debt due plaintiff. He also claims that in October, 1896, he loaned the new corporation $400, and that said corporation also owed S. Smith $200, which debt was assigned to him, and that on December 3, 1896, the corporation was authorized to give him a mortgage for these debts, and that on December 5th such a mortgage was given.

It was filed on the 12th of December, and soon thereafter Mr. Broughton took possession of the property by virtue of his mortgage, and was in possession when defendant levied upon the goods. It is the claim of defendant that the debt of $700 was the debt of Taylor, and not of the Detroit Mill-Supply Company; that the $400 was not borrowed of Broughton, but was borrowed of one Kretzschmar, and the note of the corporation was given for it. No proof on the trial was given as to the debt of $200 to Mr. Smith. It is also the claim of defendant that, while the mortgage is dated December 5th, it was not given until the 11th, and after one of the creditors of the company had attached some of the goods of the company, and was given without authority, and for the purpose of defrauding the creditors.

A number of errors are assigned, but, if the circuit judge was right in holding the mortgage was given without authority, that will end the discussion. The property covered by the mortgage was practically all the property of the corporation. To take possession of the property described in the mortgage was to take possession of all the property of the corporation, and practically ended the business. There does not seem to be any written record of the election of directors, but we think it is clearly established there were four directors, who undertook to and did manage the affairs of the company. Such authority as was given to execute the mortgage was given at a special meeting of the directors, at which meeting but two directors were present. There is nothing to show that the other directors were ever notified that such a meeting was to be held or that such action was to be taken. While the management of corporations is usually left to their directors, no court, so far as we know, has ever held that one-half of the directors of a corporation, without the knowledge of the others, can dispose of all the property of the corporation by action at a special meeting, notice of which is not given to all the directors. The case comes within *Covert* v. *Rogers*, 38 Mich. 363 (31 Am. Rep. 319); *Doyle* v. *Mizner*, 42 Mich. 332.

Plaintiff urges that, though the directors were not properly authorized to make this mortgage, it may be treated as the act of the stockholders; citing *Eureka Iron & Steel Works* v. *Bresnahan*, 60 Mich. 332; *Preston Nat. Bank* v. *George T. Smith Middlings Purifier Co.*, 84 Mich. 364. The trouble with this contention is there is no evidence to show that there was a meeting of the stockholders held for the purpose of giving this mortgage, or that all of them ever assented to the giving of it.

It is now urged that, as the record shows that upon the same day the mortgage was filed a bill of sale was given to John H. Jones as trustee for all the creditors, one creditor could have no rights over the others. This claim was not made in the court below, but, on the contrary, Mr. Broughton claimed to be in possession of the goods under his chattel mortgage. It has been so often held that we will not consider a point raised here for the first time, it is not necessary to do more than cite some of the authorities. *Waterman* v. *Waterman*, 34 Mich. 490; *Hogelskamp* v. *Weeks*, 37 Mich. 422; *Maxwell* v. *Bridge Co.*, 41 Mich. 453; *Chatterton* v. *Parrott*, 46 Mich. 432; *Winchester* v. *King*, 48 Mich. 280; *O'Neil* v. *City of Detroit*, 50 Mich. 133; *Lane* v. *Boom Co.*, 62 Mich. 63.

We do not deem the other assignments of error of sufficient importance to discuss them.

Judgment is affirmed.

The other Justices concurred.

FLETCHER *v.* HAGERMAN.

EQUITY — AGREEMENT FOR SUPPORT — SPECIFIC PERFORMANCE — SECURITY.

The execution of a mortgage in complainant's favor, to secure his support for the remainder of his life, was properly decreed to cover property received by defendant, directly or indirectly, by reason of complainant's discharge of a mortgage, where, although it was contemplated and agreed at the time of the discharge that complainant's support should be secured upon property to be received in exchange for that upon which the discharged mortgage was an incumbrance, defendant, after receiving the former mortgage and its discharge, declined to give any security.

Appeal from Hillsdale; Chester, J. Submitted April 5, 1899. Decided June 28, 1899.

Bill by Saunders Fletcher against James P. Hagerman and Martha J. Hagerman to compel the execution of a mortgage. From a decree for complainant, defendants appeal. Affirmed.

A. L. Guernsey and *W. D. Fast*, for complainant.

F. A. Lyon, for defendants.

HOOKER, J. The defendants have appealed from a decree requiring them to execute a mortgage upon certain property for $1,000, in complainant's favor, to secure his support for the remainder of his life. The decree was based upon an alleged arrangement between them whereby the mortgage theretofore existing was delivered to complainant's daughter, one of the defendants, upon condition that he should receive such support, and a subsequent agreement that defendants would secure him for such support upon other property, to be received in exchange for the farm upon which the former mortgage was an in-

cumbrance, provided that complainant should discharge such mortgage, which he did. The learned circuit judge, who saw the witnesses, was of the opinion that it would be unconscionable for the defendants to refuse such security after receiving the former mortgage and its discharge, and in this view we concur. We are of the opinion that the defendants have been disposed to provide for the complainant, but have felt that it would be an injustice to them if required to pay or secure the amount of the original mortgage, in view of their agreement made at a time when their differences were under discussion. At that time the farm which the defendants had received from the complainant was in their possession, but, after it was proposed to part with it, he refused to discharge the mortgage unless the defendants would protect him, which they agreed to do. The circuit judge has placed a construction upon the acts and agreements of the parties which does substantial justice, and is as favorable to the defendants as they had a right to expect. We are satisfied that the Camden property was purchased with funds that indirectly came from the property received from the complainant, if it was not paid for with money received by reason of his discharge of the original mortgage. The decree of the circuit court is therefore affirmed.

GRANT, C. J., MONTGOMERY and MOORE, JJ., concurred. LONG, J., did not sit.

ST. JOSEPH VALLEY RAILWAY CO. *v.* GALLIGAN.

DEEDS—CONSTRUCTION—EASEMENTS—WATERS.

One who conveys to a railroad company for a right of way the natural bed of a creek, and a strip of adjacent land, specifying in the deed that the latter grant is for the unobstructed flow of the diverted waters, "and for no other purpose, except to keep the banks on either side properly piled, planked, and protected from washing," and reserving the right to "cover" the creek, and, when so covered, to use and occupy all space to the line of the railroad right of way, is not restricted to a covering by platform, but may place a shop building over the stream in such way as not to obstruct it; the grantee having an easement merely, which does not affect the grantor's title or possession.

Appeal from Berrien; Coolidge, J. Submitted April 18, 1899. Decided June 28, 1899.

Bill by the St. Joseph Valley Railway Company to restrain Michael J. Galligan from covering a creek with a building. From a decree dismissing the bill, complainant appeals. Affirmed.

Sam H. Kelley, for complainant.

A. P. Cady, for defendant.

LONG, J. The only question in this case is the construction to be placed upon the language contained in a deed from defendant to complainant. It appears that defendant was the owner of lot 12 in block 1 in Thresher's addition to the city of Benton Harbor. On December 5, 1896, defendant and wife conveyed by warranty deed to complainant, for a cash consideration, a part of said lot, the description being as follows:

"All that part of lot number twelve in block one in Thresher's addition to the village, now city, of Benton

Harbor, lying west of Ox creek, as located according to annexed plat, being that part of lot twelve lying west of a line beginning fifty-four feet west of the northeast corner of said lot twelve; running thence south, twenty degrees and thirty minutes east, seventy-five feet; thence south, sixty degrees and thirty minutes east, thirty-three feet, to a point at the alley thirty-four feet west from the southeast corner of said lot twelve; also a right of way fourteen feet wide immediately east of said described line, to allow Ox creek to flow unobstructed, and for no other purpose, except to keep the banks on either side properly piled, planked, and protected from washing. Parties of the first part except from the operation of this deed, and expressly reserve to themselves, their heirs and assigns, the right at any time to cover Ox creek wherever it touches or crosses lot twelve aforesaid, and, when so covered, to use and occupy all space and land to the line of said railway right of way first above mentioned. Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining."

This deed was put in escrow pending the fulfillment of a certain contract executed at the same time of the execution of the deed, which contract is as follows:

"This contract and agreement, made and entered into this 5th day of December, 1896, between Michael Galligan, of Benton Harbor, Michigan, party of the first part, and the St. Joseph Valley Railway Company, a corporation, party of the second part, witnesseth:

"*Whereas*, the said first party has sold to said second party, and conveyed by warranty deed, part of lot number twelve in block one, Thresher's addition to the city of Benton Harbor, and has also conveyed the right of way for Ox creek over said lot, according to the description in said deed and the annexed plat thereof:

"*Now, therefore*, in consideration of the premises, and other valuable considerations, the said railway company, its successors and assigns, hereby agrees to so change the present location of Ox creek so that the angle or turn of said creek will be ten feet south of the southwest corner of the building belonging to said Galligan on said lot. The said railway company is also required to construct at least five piling, at twelve feet apart, on each side of the said creek from Territorial street to the rear end of said building, and to board the same up with two-inch plank.

"These several matters to be done by said railway company are to be done on or before March 1st, 1897; and said railway company is hereby discharged from any and all damages that may hereafter occur by reason of said piling, other than such damages as are directly due to the negligence of said railway company; and said railway company is hereby released from any and all damages that may have heretofore occurred by reason of the construction of said road or said Ox creek. Said piling to be oak, at least sixteen feet long, and not less than ten inches in diameter at the butt end. The covenants and agreements herein made to be binding on the said parties, their heirs, administrators, successors, and assigns.

"It is hereby agreed that, should said railway company desire, it may substitute eight feet piling in lieu of the sixteen feet piling hereinbefore mentioned, provided said railway company shall fill the rear of the lot east of Ox creek and south of the boiler shop with sand to a level with the front of said lot."

Complainant complied with the conditions of the said contract, and by authority of defendant or his agent the deed was delivered to complainant about January 27, 1897.

It was admitted that complainant's roadbed is now operated on the original and natural bed of the creek. In order to so occupy the creek bed, complainant purchased by deed a strip of land 14½ feet wide off the west side of lot 12 for additional roadbed, and also a right of way across defendant's land, 14 feet wide, for a new channel for the creek. On the east portion of said lot defendant had a boiler shop, and about February 15, 1897, he began making preparations to remove it over and upon the piling along the banks of said creek, so that the boiler shop would be directly over the creek, and be immediately adjacent to the bridge across the creek, which bridge is the entire width of Territorial street. Complainant filed its bill to restrain the defendant from moving said building over said Ox creek, and, upon a hearing of said cause, the temporary injunction, issued at the time of the filing of the bill of complaint, was dissolved, and the court dis-

missed the bill of complaint, and assessed damages against the complainant in the sum of $139, together with $20 fees to the circuit court commissioner and costs to be taxed, whereupon complainant appealed. The question is whether or not the word "cover," as used in the deed, authorized the defendant to remove his boiler shop over the creek. Defendant contends that it did.

We think the court was correct in his construction of the deed, and in holding that the defendant might place his shop there. The deed, so far as concerns this portion of the land, grants only a right of way for Ox creek "to flow unobstructed, and for no other purpose," except, as stated in the deed, "to keep the banks on either side properly piled, planked, and protected from washing." The right to cover Ox creek wherever it touches or crosses lot 12 is expressly reserved by the grantor, with the right, "when so covered, to use and occupy all space and land to the line of said railway right of way," etc. This grant amounts to no more than an easement, and in no way affects the title or possession of the grantor. *Morrill* v. *Mackman*, 24 Mich. 279 (9 Am. Rep. 124). The grantee had a qualified possession only so far as it might be needful for its enjoyment. *Morrill* v. *Mackman*, *supra*. It appears that the only purpose for which the complainant desired the premises was for the making of a new channel for the creek, and for the flow of the water therein. The defendant surrendered no possession except for that purpose, and at the same time he reserved the right to cover and use it for his own purposes. Complainant contends that this covering was only to be by platform. There is no such limitation in the exception in the deed, and it cannot fairly be inferred from the testimony that that was the understanding between the parties.

The decree below must be affirmed.

The other Justices concurred.

SHIELDS *v.* MOODY.

REPLEVIN—JUDGMENT.

In replevin against a sheriff for goods levied upon as the property of a third person, where the issue as to plaintiff's ownership is found against him, judgment is properly entered for a return of the property, without limitation to the amount of defendant's lien.

Error to Mecosta; Edwards, J. Submitted April 21, 1899. Decided June 28, 1899.

Replevin by Fannie Shields and Benjamin T. James against Bert D. Moody, sheriff of Mecosta county. From a judgment for defendant, plaintiffs bring error. Affirmed.

John T. Clark, for appellants.

Joseph Barton, for appellee.

MONTGOMERY, J. This is an action of replevin to recover one brown stallion, one single harness, one road bike sulky, one cutting-box, two canvas tents, one adz, one spike-maul, one sledge-hammer, and one corn-cutter, all of which had been duly levied upon by the defendant, as sheriff, under a valid writ directed against the property of James Shields, the husband of the plaintiff Fannie Shields. The jury rendered a verdict for the defendant, upon which judgment was entered for a return of the property. The plaintiffs moved for a new trial, which was refused, and have brought the case to this court for review on error.

The contention chiefly relied upon is that the undisputed testimony showed that the plaintiffs were the owners of the property, and that a verdict should have been directed in their favor. No request for such an instruction was made, but, as plaintiffs moved for a new trial on the

ground that the verdict was against the evidence, it is necessary to inquire whether there is any testimony to sustain the finding.

The plaintiffs' theory was that a firm known as the Big Rapids Real-Estate Company was composed of the two plaintiffs, and that the property in question all belonged to this firm. Mr. Shields appears to have had full control of the business of the firm, with no definite arrangement as to how he was to be compensated. Mrs. Shields testified that he was to be paid according to what he did. The most valuable of the property is the brown stallion, which Mrs. Shields testifies she bought in Tennessee. It does not appear very satisfactorily where she obtained the money to pay the price, which was about $2,500. She further testified that all the personal property which they brought to Big Rapids was turned over to Mr. Shields for property and interest in lands, and to secure Mr. Stearns upon some paper made by Mr. Shields. It appears that this property was placed with Mr. Stearns as security, and that later on Mrs. Shields paid $382 in full of all demands against Mr. Shields, and Mr. Stearns assigned to her all his right, title, and interest in three horses, including the one in question. This does not show absolute ownership in Mrs. Shields,—much less in the two plaintiffs. Certain of the other property was received on a purchase from one Holland. It appears the personal property was purchased in connection with certain farm lands. The title to the lands was taken in the name of Mrs. Shields. James was not named as grantee. It appears that payment was made partly in cash and partly by mortgage. One thousand four hundred dollars was paid down by Mr. Shields with money borrowed in his own name. Apart from many circumstances which are calculated to arouse the suspicion that these transactions are merely colorable, there was ample testimony justifying the conclusion reached.

It is claimed that the judgment for the return of the property was erroneous; that it should have been limited

to the amount of defendant's lien. Plaintiffs made no such contention on the trial. The distinct question presented was whether the plaintiffs were the owners of the property. The jury found they were not. It is only where one party is the general owner, and the other has a lien, that the judgment is limited to the amount of the lien. *Alderman* v. *Manchester*, 49 Mich. 48.

The other questions do not appear to us, after full consideration, to require further discussion.

The judgment is affirmed.

The other Justices concurred.

MEESKE *v.* PFENNING'S ESTATE.

1. SURETIES—CONTRIBUTION—PAYMENT—BY WHOM MADE.
   The fact that a payment made by a surety, with the consent of his co-surety, in settlement of a claim against them, was by the check of a corporation of which he was an officer, will not affect his right to contribution from the co-surety, where he was charged by the corporation with the amount of the check.

2. APPEAL—EXCLUSION OF EVIDENCE—OBJECTIONS—PRIVILEGED COMMUNICATIONS.
   The exclusion of the testimony of an attorney as to a conversation with his client, upon the objection that it was privileged, will not be reviewed, and the character of the testimony, as privileged or otherwise, determined, where appellant conceded below that the conversation was privileged, and merely asked the witness for a conclusion which in that view was incompetent.

Error to Muskegon; Russell, J. Submitted April 19, 1899. Decided June 28, 1899.

Gustav Meeske presented a claim against the estate of

Casper Pfenning, deceased, for contribution to the payment of a claim against them as co-sureties on a bond. The claim was allowed in the probate court, and Helen Pfenning, administratrix, appealed to the circuit court. From a judgment for claimant, defendant brings error. Affirmed.

James E. Sullivan, for appellant.

Stephen H. Clink, for appellee.

HOOKER, J. The Muskegon Brewing Company was a corporation, and its only stockholders were Gustav, Otto, and Paul Meeske, respectively president, treasurer, and secretary. Each used the check of the company to pay his personal obligations, such check being charged against him upon the books of the company. For the fiscal year beginning May 1, 1893, Henry Seider furnished a liquor bond, with Gustav Meeske and Casper Pfenning as sureties. During that year one Johnson was drowned, and his widow subsequently prosecuted Seider and his bondsmen for causing his death, and recovered a judgment in the federal court at Grand Rapids against all of the defendants. That judgment was paid by Gustav Meeske with the brewing company's check, and he and Pfenning amicably adjusted the matter. Afterwards several children of Johnson began suits against the same parties, one of which went to judgment against them; and Gustav Meeske and Casper Pfenning determined that it would be wise to settle them, which was done for $1,300, which sum was paid, with some other items, by Gustav, with the brewing company's checks. Soon afterwards Pfenning died, and a claim for contribution was filed against his estate by Gustav Meeske.

At the time of said settlement, an assignment of the judgment was taken by the defendants' attorney, who drew it to the brewing company. It never came to the hands of either Gustav or the brewing company, but remained with counsel. Meeske testified that counsel was

not instructed to take such assignment to the brewing company. The defendant's counsel made the claim that the settlement was made with funds of the brewing company, and upon its behalf, and that it became the owner of the judgment and claims, and that the claimant, not having paid the judgment and the amount paid in settlement of other suits, has no right of action against the estate of his co-surety for contribution. The circuit judge left these questions to the jury, with the instruction that unless the claimant had proved that the judgment had been paid by him, and at his expense, he could not recover.

The claimant testified that he directed his lawyer to settle the cases, in accordance with an arrangement between him and his co-surety, Pfenning. He admitted that he paid the money to his lawyer, with which to settle, through a brewing company's check, and testified that he was in the habit of using those checks to pay his individual debts, the amounts being charged to him on the company's books. The defendant introduced no testimony, except that of Mr. Chamberlain, the lawyer who represented the claimant and his co-defendants. He testified that the firm of Chamberlain & Cross defended the case in the federal court, and that their employment was by the Muskegon Brewing Company, who paid them; that, after the judgment was rendered, it was assigned by Mrs. Johnson, for the purpose of taking steps to collect it as against the other defendants, who made no contribution to the payment that was made; that is, he purchased the judgment from the plaintiff with money that was furnished him by the Muskegon Brewing Company, and took an assignment to himself, and held it in trust for that company. He testified further that he was employed by the company to defend the other cases, and was paid by it. A judgment of $350 was obtained in one of these cases. There was talk about settlement, and he was instructed by the brewing company to settle the whole matter. His only talk was with Gustav Meeske. The examination proceeded as follows:

"*Mr. Clink:* Does the court think that is competent?

"*The Court:* I think so.

"*Mr. Clink:* He was your client in that case, was he?

"*Mr. Chamberlain:* Yes; he was my client in that case.

"*The Court:* Do you claim those communications were privileged?

"*Mr. Chamberlain:* It is for the court to say; whatever conversation occurred between Mr. Meeske and myself occurred as between client and counsel.

"*The Court:* If that privilege is claimed, I think it is good, as to the conversation.

"*Mr. Sullivan:* I haven't asked him about the conversation. Did you follow those instructions?

"*The Court:* What instructions are those?

"*Mr. Sullivan:* That were given you by Mr. Meeske in the settlement of that matter.

"*The Court:* That would be the same. I will sustain that objection.

"*Mr. Sullivan:* There hasn't been any objection made.

"*The Court:* It is the same rule. Of course, if it is privileged, it is a question for the court.

"*Mr. Sullivan:* It isn't unless it is objected to. Any communications made between counsel and client—These communications, if I understand the rule, are privileged communications, and we haven't got authority or right to go into what the communications were. Now, I asked him if he received any instructions. He said he did. I didn't ask him what those instructions were, at all; didn't ask him to break the privilege in any way, shape, or manner. As far as this record is concerned, that answer stands at this time.

"*The Court:* I understand what you asked; you asked to accomplish the same thing.

"*Mr. Sullivan:* Take an exception. (Witness shown Exhibits A, B, C, D, and E, stipulation and assignments of judgments.)

"*Q.* Those six papers that I have shown you, were they all one part of the same transaction, made at the same time?

"*A.* They were all made and executed substantially at the same time, and all with reference to the same transaction of the matter of the settlement of these suits. The check for $1,300 passed through my hands at about the same time, and the check and these papers all relate to

the same transaction. I ceased to act as attorney in these cases when I turned the papers over to Mr. Clink, which was some time prior to the 4th of March, 1898. Mr. Clink came to my office, and asked me for such papers as there were in the cases. I found all there, and turned them over to Mr. Clink.

"*Q.* You say those different exhibits that were introduced here in evidence, with the exception of the check, that they were all prepared by you. By whose instructions were they prepared?

"*Mr. Clink:* I object to that as incompetent.

"*The Court:* I will sustain the objection.

"*Mr. Sullivan:* Take an exception.

"*Q.* Did you prepare the assignments of those two judgments to the Muskegon Brewing Company?

"*A.* Yes, sir.

"*Q.* Did Gustav Meeske instruct you to prepare those assignments?

"*Mr. Clink:* I object to that as incompetent and privileged.

"*The Court:* I will sustain the objection.

"*Mr. Sullivan:* Give me an exception.

"*Q.* Did Casper Pfenning ever instruct you to settle those cases?

"*A.* No, sir.

"*The Court:* Did he understand that you were operating for him together with the other parties, or don't you know?

"*A.* There was some conversation in which he took part. This conversation extended over a long period of time, and a good many consultations about it; and there were conversations in regard to some portions of this litigation in which Casper Pfenning took part, in which he was present.

"*Q.* Did you generally appear for him?

"*A.* I appeared for him, yes, in a general way, and entered a general appearance for the defendants in all these cases. There wasn't any special appearance for anybody, or any separate appearance for anybody.

"*Q.* Do you know whether he understood that or not?

"*A.* Why, I knew that he knew I was acting."

Cross-examination by Mr. Clink:

"*Q.* You say whatever talk you had with reference to this matter was with Gustav Meeske?

"*A.* In regard to the settlement?

"*Q.* Yes.

"*A.* I think exclusively. I don't remember having a conversation with anybody else on that subject at all.

"*Q.* You had no other employment in these cases, as far as Gustav Meeske or the Muskegon Brewing Company is concerned, than that which is set out in your written contract, did you?

"*A.* No, sir.

"*Q.* That covered this matter? That provided that you should take charge of the affairs—the individual affairs—of Gustav Meeske, did it not?

"*A.* The contract?

"*Q.* Yes.

"*A.* Well, I think it did. That was the understanding, at any rate, and that is what we did. Any private business that any of the members of the brewing company had to do, I did.

"*Q.* And Gustav Meeske was the party that you were representing in the case, was he not? The brewing company was not a party to that suit, was it?

"*A.* No, sir; the brewing company was not a party to the suit,—not to the record.

"*Q.* It wasn't a party to the suit, was it?

"*A.* No, sir.

"*Q.* Then in that suit you represented Gustav Meeske, didn't you?

"*A.* Why, sure.

"*Q.* Under this employment that you speak of?

"*A.* Certainly, I represented Gustav Meeske."

The record contains all of the evidence in the case. Under the proof, it was conclusively established that the settlement was made with the assent of Pfenning, through Chamberlain, who had acted and was acting as counsel for all of the defendants in the case. It is also conclusively established that the Muskegon Brewing Company was not a party to the litigation, and that the money paid was charged up to Gustav. The assignment was not made to the brewing company, but to counsel; and it was held for and on behalf of Gustav Meeske, who paid it. There was no proof to the contrary, and the court might properly have directed a verdict for the claimant upon the evidence as it stood.

It is urged that the court erred in excluding the answers to some questions asked by counsel for the defendant of the witness Chamberlain. On direct examination, defendant's counsel disavowed asking the witness for the conversation between himself and Gustav Meeske, relating to the settlement, which counsel for claimant contended to be privileged. Gustav had stated that he directed Chamberlain to settle the matter for a price which Chamberlain had named. Defendant's counsel asked Chamberlain to state what the instructions were. The court excluded the answer upon the ground that the conversation was privileged, and that the question practically asked for the conversation. In this last proposition the court was right, and he was also justified in holding that the question was objected to. Counsel apparently conceded that he was not entitled to the conversation, but insisted that the witness swear to the conclusion. Under these circumstances, the ruling should not be held erroneous upon the ground now argued, viz., that the conversation was not privileged, whatever we may think of the question of privilege.

The judgment is affirmed.

The other Justices concurred.

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CARLSON v. CINCINNATI, SAGINAW & MACKINAW RAILROAD CO.

1. RAILROADS—INJURY TO SECTION HAND—CONTRIBUTORY NEGLIGENCE.

A railroad section hand, whose duty it was, under the rules of the company, to be on the lookout for trains, was guilty of contributory negligence, precluding a recovery for injuries sustained by reason of a switch engine's being backed down upon him while he was engaged in cleaning the tracks at a highway crossing, where he saw the engine when it was several hundred feet distant, awaiting a signal to cross, and resumed work with his back towards the engine, without keeping watch upon its movements.

2. SAME—RULES—BACKING ENGINE ACROSS HIGHWAY.

A railroad company is not liable to a section hand injured by a passing engine while he was cleaning the tracks at a crossing, on the ground of failure to observe a rule requiring a lookout on the footboard of an engine backed across a public highway, as the rule is for the protection of the public, and not of employés.

Error to Bay; Maxwell, J. Submitted April 21, 1899. Decided June 28, 1899.

Case by John Carlson against the Cincinnati, Saginaw & Mackinaw Railroad Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Plaintiff had been in the employ of the defendant as a section hand in its yards at West Bay City for about five years. One of his duties was to clean the tracks at the highway crossings, one of which was at Main street. Defendant has four tracks across this street, and the Michigan Central Railroad three. While plaintiff was at work picking out the dirt between the planking and the

rails, a switch engine backed against and seriously injured him. The engine had backed down the track to within about 300 feet of the crossing. The crew consisted of the conductor (who was also yard-master), engineer, fireman, and two switchmen. The intention was to cross the highway to a point two miles distant. The semaphore was against the right to cross. The engineer gave the customary signals by whistling to the signalman in control of the semaphore. After giving this signal, the engine stood there some time before receiving notice from the signalman to cross. Plaintiff saw the engine, and stood there watching it for 10 or 15 minutes. He testified, "I watched it so long because I was afraid of it, and wanted to see which way it was going." He then went to work, and looked up twice at the engine while at work. The conductor had left the engine, and gone into the interlocking tower, where plaintiff saw him. Plaintiff stood with his back towards the engine, or, as he expressed it, "with my back sideways towards the engine." He went to work, "feeling satisfied that the engine would not come where he was." Upon receiving notice from the tower, the engineer backed up, and when the engine reached the crossing it was going five or six miles an hour. The trainmen were in the cab with the engineer. No one stood upon the footboard on the back of the tender. The coal was piled up on the tender so high that those in the cab could not well see over it. Rule 40 of the defendant reads as follows:

"In no case must a train be backed over a public crossing or highway, unless there is a man on rear car to see that crossing is clear; nor must a car be cut loose and allowed to run over a public crossing or highway, unless there is a man on same."

The signalman in the tower and the conductor saw that plaintiff was paying no attention as the engine approached near him, hallooed to him, and did all in their power to attract his attention, but without avail. The court instructed the jury that the employés upon the engine were

fellow-servants, and that for their acts the defendant was not liable. The theory upon which the case was left to the jury appears from the following charge:

"I charge you that, if the plaintiff was free from fault, and if this accident happened by reason of a regulation of that road permitting the running of an engine through and across the streets of the city without any lookout, the defendant is liable. I do not think it is liable on any other theory."

The gates at this crossing, which were about 200 feet apart, were down on account of the passing of a train upon the Michigan Central just before, and the coming of this switch engine. Just how far the plaintiff was from each gate is not shown by the record. He evidently was within less than 100 feet of one of them.

Geer & Williams (*E. W. Meddaugh*, of counsel), for appellant.

Simonson, Gillett & Courtright, for appellee.

GRANT, C. J. (*after stating the facts*). The only ground of negligence upon which plaintiff could recover was that submitted to the jury, viz., the failure to have an employé stand upon the footboard of the tender to warn him. The object of the rule requiring an employé to be upon the footboard when backing across public highways is for the protection of the public, and not of the employés of the company. *Rohback* v. *Pacific Railroad*, 43 Mo. 187. There was no more danger to the plaintiff in working upon this crossing than there was at any other part of the tracks in the yard outside the highway. There is no testimony tending to show that employés understood that this rule was intended for a protection to them, or that the plaintiff so understood it. Evidently he knew that he was going into a place of danger; that it was his duty to keep a sharp lookout for his own protection; and that he did not rely upon such a warning, because he stood there 10 to 15 minutes, waiting for the

engine to pass over. All the witnesses who testified upon the subject, both those for the plaintiff as well as for the defendant, testified that it was the plaintiff's duty to watch out for approaching cars, and to get out of the way. One of the rules of the company provides: "Trackmen may expect trains at any moment, and must always be on the lookout and prepared for them." It is expected, and it is not unreasonable, that trackmen should look out for approaching trains and engines, and especially in yards, where they may be expected at any moment. There was a train going upon another road, and there was a mill near by, making some noise. The law did not permit the plaintiff to rely upon his sense of hearing alone. Obviously he did not intend to, but it is certain that he did. He knew that the engine might come that way. The engineer had signaled for the right to cross. There is nothing to show that he did not hear this signal. The gates were closed. A glance at his surroundings would have warned him of danger. A glance every few seconds towards this engine would have disclosed its approach. Such precaution would not have interfered with his work, and, if it would, there is nothing to indicate that the defendant prohibited him from taking it, or that it expected him to work without taking it.

Keefe v. *Railway Co.*, 92 Iowa, 182 (54 Am. St. Rep. 542), is very similar in its facts to this case. The plaintiff's intestate was struck by the tender of an engine which was backing up. The court said:

"The presence of the tracks and cars thereon, and the movement of engines, were constant warnings to him of danger. It is the duty of persons employed in such places to be reasonably diligent in guarding against accidents, and especially to observe and keep out of the way of moving engines and cars. They have no right to rely wholly upon the persons in charge of them to prevent accidents, but must use due care to avoid danger. These rules are founded upon the necessities of the business of operating railways. They are reasonable and just, and are fully sustained by the decisions of this and other courts."

Where plaintiff, an employé, stood with his back to the approaching cars, and did not look back or watch for the moving engine, and was struck, it was said:

"It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employés who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants, and if, by any means, negligence could be imputed to them, surely the plaintiff, by his negligent inattention, contributed directly to the injury." *Aerkfetz* v. *Humphreys*, 145 U. S. 418.

Under circumstances somewhat similar, the supreme court of Massachusetts held that an employé had no right to abandon the use of his eyes, and rely upon a warning from every car that might be shunted upon the track where he was working. *Lynch* v. *Railroad Co.*, 159 Mass. 536. See, also, *Schaible* v. *Railway Co.*, 97 Mich. 318 (21 L. R. A. 660); *Daly* v. *Railway Co.*, 105 Mich. 193.

The plaintiff was clearly guilty of contributory negligence. It is unnecessary to discuss the other points raised.

Judgment reversed, and new trial ordered.

The other Justices concurred.

120 486
136 85

120 486
156 239

PEOPLE *v.* TALBOT.

1. INTOXICATING LIQUORS—SUNDAY OPENING—INFORMATION.
   An information for violation of the statute requiring all saloons where intoxicating liquors are sold or kept for sale, "either at wholesale or retail," to be closed on Sunday, need not state whether respondent's saloon was a wholesale or a retail one, the offense and penalty being the same in either case.

2. SAME—DEFENSES.
   It is no defense to a prosecution for keeping a saloon open on Sunday that no liquor was sold, or that the only entrance to the living apartments occupied by the respondent was through the rooms used for saloon purposes.

Exceptions before judgment from Berrien; Coolidge, J. Submitted May 3, 1899. Decided June 28, 1899.

Timothy Talbot was convicted of keeping his saloon open on Sunday. Affirmed.

Respondent was convicted of keeping a saloon open on Sunday. He lived over his saloon. There was a room back of the bar-room. From this room a pair of stairs led up to his living rooms. Swinging doors opened from this room into the saloon. On the Sunday in question the officers went to the back door; were admitted; two persons were sitting at a table; two glasses on the table; the doors into the saloon were open, and one of the respondent's bartenders was behind the bar. The defense was that no liquor was sold; that respondent was away from home, and had given strict orders to his bartender not to open the saloon.

James O'Hara (*O'Hara & O'Hara*, of counsel), for appellant.

G. M. Valentine, Prosecuting Attorney, for the people.

GRANT, C. J. (*after stating the facts*). 1. The second count—the one upon which respondent was convicted—charged him with keeping a saloon, "the same being a place where spirituous, intoxicating, malt, brewed, and fermented liquors were sold and kept for sale; such saloon not being a drug-store." Objection was made to a conviction under this count, because it did not state that liquors were kept for sale either at wholesale or retail. The proposition deserves no discussion. The statute provides that all saloons where any such liquors are sold or kept for sale, either at wholesale or retail, shall be closed. It was not necessary to allege that the saloon was a wholesale or a retail one. The statute applies to either. The offense and punishment are the same.

2. The other defense is covered by previous decisions of this court. *People* v. *Schottey*, 116 Mich. 1; *People* v. *Bowkus*, 109 Mich. 360. The fact that the only entrance to his home was through this room is no defense.

Conviction affirmed.

The other Justices concurred.

In re GRAMMEL'S ESTATE.

120 487
146 352

GUARDIAN AND WARD—INVESTING FUNDS—FAILING BANK—NEGLIGENCE.

The fact that a guardian, instead of loaning his ward's money on real estate, deposited it at interest in a savings bank, and permitted it to remain there for more than six months, when the bank became insolvent, is not conclusive, as a matter of law, that he was negligent, so as to charge him with the loss of the fund, where there is evidence that the bank was thought to be stable, and that the guardian had good reasons for not investing elsewhere.

Error to Ingham; Wisner, J., presiding. Submitted May 3, 1899. Decided June 28, 1899.

The probate court of Ingham county disallowed certain items in the final account of Frederick Schneider, as guardian of Rudolph and Louise J. Grammel, minor heirs of George Grammel, deceased, and the guardian appealed to the circuit court, where the order settling the account was set aside. Rudolph and Louise J. Grammel bring error. Affirmed.

Kilbourne & Harris, for appellants.

Russell C. Ostrander, for appellee.

Sidney T. Miller, *amicus curiæ*.

HOOKER, J. On July 25, 1892, George Grammel died intestate, leaving a widow and five children, of whom the appellants were two. Prior to October, 1892, the appellee was appointed guardian for them; and among other property was two-thirds of the proceeds of a life-insurance policy for $5,000. It was received about October 7, 1892. He deposited this sum in the Central Michigan Savings Bank, a banking institution organized under the law of this State, and took a certificate bearing interest at 4 per cent., upon the condition that the deposit be continued three months or more. The bank failed and closed its doors on April 18, 1893, and has not fully paid its depositors. Upon a final accounting, the guardian claimed credit for the deposit, and charged himself with dividends received. The probate court refused to allow this claim. In the circuit court this decision was reversed, and he was given credit for the amount, and allowed the statutory commission, amounting to $120, and the statutory per diem of $1 for 175 days. The wards have appealed, alleging that the court erred in allowing the guardian credit for the amount lost through the failure of the bank.

The only question that we may consider is whether we should say that upon this record it conclusively appears

that the guardian was negligent in depositing or leaving the money in this bank for so long a period. We agree with counsel for the appellants that a guardian is required to use care and diligence in handling the property of his ward, but we cannot say that he may not deposit it in banks that have good standing, and of whose stability he is honestly confident. Under some circumstances, he would be negligent if he did not. See *Woodruff* v. *Snedecor*, 68 Ala. 437. The length of time that he should permit a fund to lie in a bank must depend upon circumstances, and these circumstances may be as variable as the exigencies of the situation may be variable. Ordinarily it is the duty of guardians to invest funds with a view to their safety and increase. In so doing they are bound to the observance of fidelity, and such diligence as men of ordinary intelligence observe in managing affairs of their own. Woerner, Guardianship, 197. In the language of Lord Hardwicke in *Knight* v. *Earl of Plymouth*, 1 Dickens, 120, "if there is no *mala fides*, nothing willful in the conduct of the trustee, the court will always favor him." Counsel strenuously insist that the guardian should not have left this fund in the bank, where it drew but 4 per cent. interest, when, as they contend, it could have been loaned for more. The implied argument is that, if he had done his duty, the money would have been loaned upon real estate, and consequently would not have been in the bank at the time of the failure. In *Post's Estate*, Myr. Prob. 230, it was held that a guardian is not responsible for the loss of funds occurring by reason of the failure of a bank in which he had deposited the ward's funds, unless by the exercise of reasonable diligence and prudence he might have known it to be in an unsafe condition. See, also, 1 Perry, Trusts, § 443; 2 Beach, Trusts, §§ 492, 499; *In re Hunt*, 141 Mass. 515. There are cases which indicate that deposits with bankers are permissible only for temporary purposes. See *Moyle* v. *Moyle*, 2 Russ. & M. 710; *Johnson* v. *Newton*, 11 Hare, 160; *Darke* v. *Martyn*, 1 Beav. 525.

But, if we adhere to that doctrine, it is nevertheless true that the length of time that a fund may prudently be left with a banker depends upon the condition and reputation of the bank, and the duty of the trustee as to investing the fund. In this case there was evidence tending to show a sufficient reason for not investing it elsewhere, and raising a question of fact as to his negligence. This was passed upon by the circuit judge, and it is not our province to review his decision upon the facts. We cannot say that they conclusively show negligence, and therefore affirm the order of the circuit court.

The other Justices concurred.

FISHER *v.* HARDWOOD MANUFACTURING CO.

JUSTICES OF THE PEACE—LOG-LIEN PROCEEDINGS—SERVICE UPON OWNER—WAIVER OF DEFECTS.

Where the owner of logs attached in proceedings under the log-lien law appears before the justice on an adjourned day, pleads the general issue, and goes to trial upon the merits, he waives the right to object that service was not made upon him until the return day of the writ.

Error to Bay; Maxwell, J. Submitted May 4, 1899. Decided June 28, 1899.

Proceedings under the log-lien law by Samuel Fisher against the Hardwood Manufacturing Company, Limited, and Nathan B. Bradley. From a judgment for defendant Bradley on verdict directed by the court, plaintiff brings error. Reversed.

This suit was commenced in justice's court by attachment to enforce a lien for labor. The work was done for

the defendant the Hardwood Manufacturing Company, and defendant Bradley claimed to be the owner of the property attached. Service was made upon defendant Bradley on the morning of the return day of the writ. Bradley did not appear. Three adjournments were had without his appearance. On the last adjourned day Bradley appeared by his attorney, declaration was filed, plea of the general issue entered by both defendants, case adjourned, trial had upon the adjourned day upon the merits, and judgment rendered for plaintiff. Defendant Bradley took a general appeal. Upon the trial in the circuit court, without the introduction of any testimony, the court directed a verdict for the defendant, on the ground that the justice obtained no jurisdiction.

J. E. Kinnane, for appellant.

Simonson, Gillett & Courtright, for appellee Bradley.

GRANT, C. J. (*after stating the facts*). The cases of *Noyes* v. *Hillier*, 65 Mich. 636, and *Newbauer* v. *Newbauer*, 112 Mich. 562, have no application. In those cases the defendant did not appear. In this case the jurisdictional defects were waived by a general appearance, plea of the general issue, and trial upon the merits. *Manhard* v. *Schott*, 37 Mich. 234; *Dailey* v. *Kennedy*, 64 Mich. 211.

Judgment reversed, and new trial ordered.

The other Justices concurred.

DEAN *v.* ANDREWS.

DEEDS—RESERVATION OF CROPS.

The Supreme Court, agreeing with the circuit judge that the reservation in a deed from complainant to defendant was of the crops "sown" in the fall of 1896, and not, as claimed by defendant, of the crops "I own" in the fall of 1896, affirmed the decree restraining defendant from interfering with complainant's removal of crops sown at such time.

Appeal from Oakland; Smith, J. Submitted May 4, 1899. Decided June 28, 1899.

Bill by Sedgwick Dean against Charles B. Andrews and another to restrain interference with the removal of crops. From a decree for complainant, defendants appeal. Affirmed.

A. & S. H. Perry, for complainant.

Sidney T. Miller and *Charles T. Alexander*, for defendants.

HOOKER, J. This case involves a question of fact. The complainant exchanged a farm for other real estate. His deed contained a clause which, according to the complainant's contention, reads as follows, viz.: "Excepting the right of possession of the above-described property until April 1, 1897, and the right to gather the crops sown in the fall of 1896." The defendants insist that the word "sown" should be read "I own." The defendants refused to permit complainant or his tenant to care for or harvest the wheat and rye growing on the land in the spring of 1897, and this bill was filed to restrain them from preventing such care and removal, and from causing it to be removed themselves. A demurrer was interposed and overruled. No appeal from this order was taken, and

subsequently the bill was amended, and the case went to hearing upon proofs taken in open court. A decree was entered in favor of the complainant, and the defendants have appealed.

It would subserve no useful purpose to reiterate the testimony. We are of the opinion that the agreement between the parties was as the complainant contends, and that the deed should be construed to read "sown," instead of "I own." As the complainant has secured the grain, it is only necessary to add that the decree is affirmed, with costs.

The other Justices concurred.

COMMISSIONER OF HIGHWAYS OF TOWNSHIP OF TITTABAWASSEE *v.* SPERLING. 120 493 140 625

HIGHWAYS—OBSTRUCTING WATER-COURSE—DEFENSES.

It is no defense to an action by a commissioner of highways for flooding a highway by the erection of a dam across a natural water-course that, owing to the construction of a ditch along the highway by the township authorities, water that otherwise would not have reached defendant's land was projected upon it through such water-course.

Error to Saginaw; Snow, J. Submitted May 4, 1899. Decided June 28, 1899.

Case by the commissioner of highways of the township of Tittabawassee against Fedinand Sperling for injuring a highway by willfully obstructing a water-course. From a judgment for plaintiff, defendant brings error. Affirmed.

Trask & Smith, for appellant.

Snow & Snow, for appellee.

MOORE, J. This action was commenced in justice's court, by summons, to recover the statutory penalty for willfully obstructing a ditch. The declaration was in two counts, one alleging that defendant had obstructed a natural water-course, and the other count for obstructing a drain constructed for the purpose of draining a highway. The plea was the general issue. The trial in the justice's court resulted in a judgment against defendant for $25. Defendant appealed to the circuit court, where the case was tried, and resulted in a verdict and judgment against the defendant in the sum of six cents and costs. The defendant brings the case into this court upon a writ of error, upon claimed errors in the charge as given, and refusals to give certain charges as requested by defendant. We do not deem it necessary to discuss the assignments of error relating to the refusal to give the requests to charge, for the reason they were either not proper to be given, or else were sufficiently stated in the general charge.

The statute under which this proceeding was begun reads as follows:

"Whoever shall willfully obstruct the navigation of any river or stream which is now or may hereafter be declared a public highway, by felling any tree therein, or by putting into any such river or stream any refuse lumber, slabs, or other waste materials, or who shall willfully obstruct any highway, or fill up or place any obstructions in any ditch constructed for draining the water from any highway, or who shall injure any highway by diverting any creek, or by obstructing any water-course or sluice, shall forfeit for every such offense a sum not exceeding twenty-five dollars." 3 How. Stat. § 1403.

The record shows that defendant lives on the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 8, and has lived there since 1887. There is a highway running north and south on the east side of his farm, and one running east and west on the north side of it. A natural water-course has its rise in a northeasterly direction from the center of defendant's farm as it lies on the north and south road, and it passes across the highway through a culvert which is about 6

feet wide and 16 feet long, and which has been in existence for upwards of 20 years; then running in a south and west direction, it becoming a ravine, with banks 20 feet high, across Mr. Sperling's farm, it empties into the Tittabawassee river. Mr. Sperling constructed a dam of logs and dirt on his land west of the highway, between 3 and 4 feet high, and higher than the surface of the highway, and about 8 rods long. This dam was so constructed as to completely stop the water and leave no outlet for it. The effect of the dam is, in the springtime, to back the water up so that the highway is completely submerged from 6 inches to 2 feet in depth with water. Upon one occasion the culvert was floated out. It cost the township $6 to replace it.

It is the claim of defendant that the authorities had constructed a ditch on the east side of the highway, which brought water from the north which would not, in its natural course, reach defendant's lands, and projected it upon his lands, which action, it is claimed, justified him in erecting the dam. It is also claimed that defendant made an arrangement with the pathmaster, Munger, by which he was to cut a ditch along the highway which would carry this water to the river, and was given permission to build the dam in question. It is alleged that the court erred in his instructions to the jury in relation to these two defenses.

One does not find in all the testimony any authority to construct a dam. Mr. Munger testified that he never gave defendant authority to erect this dam. It is very doubtful, if he had attempted to do so, whether he would have been authorized to bind the township by any permission he could give; but it is very clear from the testimony that he did not give defendant permission. It is doubtful if any testimony was given fairly showing that any appreciable flow of water from the north was caused by reason of the ditch put upon the east side of the highway. Testimony was introduced on the part of the township that the only ditch put there was simply one just sufficiently large to drain

the surface of the highway, and by reason of putting it there no water reached defendant's land that would not naturally reach it. If the opening of this had that effect, it is possible that the defendant might have the right to stop the flow of water from it into the channel of the natural stream, though we express no opinion upon that point; but it would not justify him in building a permanent dam across the channel of this stream.

The charge of the court was very long, and, in the main, we think it a fair and correct statement of the law; but whether it is or not we do not think it necessary to decide, in this case, for the reason that, according to defendant's own version of the transaction, the plaintiff was entitled to a judgment against him, and the jury have made it as small as they could, and render any judgment at all.

Judgment is affirmed.

The other Justices concurred.

RETAN *v.* SHERWOOD.[1]

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145 [1]223

1. EJECTMENT—ENFORCEMENT OF EQUITIES.
   Equities existing in favor of plaintiff in ejectment against a co-tenant, who quitclaimed to defendant, cannot be enforced in such suit.

2. SAME—INTEREST CLAIMED—AMENDMENT OF DECLARATION.
   It was error to refuse to permit plaintiff in ejectment to amend her declaration, alleging title in fee, to conform with proofs showing clearly that her ownership was of an undivided interest.

Error to Ionia; Davis, J. Submitted May 10, 1899. Decided June 28, 1899.

[1] Rehearing denied September 27, 1899.

Ejectment by Melissa Retan against Ann E. Sherwood, Emma H. Sherwood, and James Steel. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Reversed.

Edwin H. Lyon (*Frank C. Miller*, of counsel), for appellant.

A. A. Ellis, for appellees.

HOOKER, J. Lorenzo W. Chubb owned the 56 acres of land that is the subject of this controversy, and the record title stood in his name until his death, which occurred in 1887. Ann E. Sherwood was Chubb's sister, and upon the trial she testified that her husband and herself lived on the premises for many years, having taken possession of them under a contract of purchase from Chubb, and that after her husband's death, in 1895, she continued to occupy the premises; her daughter, also a defendant, living with her. The other defendant was her tenant. She stated that her husband had no deed, and, although counsel for the plaintiff state in their brief that "there was testimony tending to show that the title actually stood in Sherwood," they fail to point it out, and we have not discovered it. A contract dated September 20, 1875, was produced, whereby Sherwood agreed to purchase and Chubb to sell the premises for $3,081, and a note and mortgage upon the premises, given by Sherwood to Chubb for the purchase money, $2,710.50, dated November 20, 1879, was offered in evidence. It contained the following: "'This mortgage is intended to apply same as a contract for same land of date Sept. 24, '75, between these parties." Chubb left a widow, Effaline, a son, Ira, and a daughter, Melissa, the plaintiff. He died intestate, and one Woodworth was appointed administrator. The inventory of the estate included the mortgage, and did not include this land. On a final accounting the son and daughter were declared to be the heirs, and they took the

real estate subject to dower, and the personal property was assigned to them and the widow. In the adjustment the administrator assigned the mortgage referred to to the widow by assignment dated February 25, 1888, and in 1890 she assigned it to the plaintiff, who foreclosed it by advertisement, and bid in the premises for $4,000 on July 6, 1895. It is claimed that proper demand for possession was made, and this action of ejectment was brought to recover the land, the whole of which plaintiff claimed to own in fee. Ann E. Sherwood claimed that she went into possession, with her husband, under the contract, and never asserted any other title, except under a quit-claim deed of an undivided half interest made to her by Ira Chubb, the son, on August 18, 1894, for a nominal consideration. The court held that the plaintiff could not recover the entire premises, refused leave to amend the declaration, and directed a verdict for all of the defendants.

Counsel for the defendants admitted that the plaintiff owned one-half of the premises, and contended that possession of that was never refused. The refusal to permit an amendment was made upon the statement by the court that the evidence did not show that the defendants had ever denied the plaintiff's title to an undivided half of the land. The questions, then, are: Was the court right in saying, *first*, that the plaintiff owned only the undivided half of the premises? and, *second*, that the evidence did not show an ouster by her co-tenant?

At Chubb's death the legal title was in him, and descended to his son and daughter, subject to the dower right of Effaline Chubb, and subject also to Sherwood's rights under the contract. That title now stands one-half in the plaintiff, and the other half in the defendant Ann Sherwood under the deed from Ira Chubb. The interest that Mrs. Sherwood obtained by the quitclaim deed was only the interest that Ira Chubb had (*Beakley* v. *Robert*, *ante*, 209), and she took it charged with any equities that existed against Ira Chubb in favor of his sister, the plaintiff, arising out of the assignment of the mortgage.

But, if there are any such equities, they cannot be enforced in an ejectment case, and therefore the plaintiff could not recover more than an undivided half of the premises. The evidence clearly shows that she is entitled to one-half, and we think that there was evidence of a denial of this right upon which a jury might have found an ouster by Mrs. Sherwood. *Whiteley* v. *Whiteley*, 110 Mich. 556; *Carpenter* v. *Carpenter*, 119 Mich. 167. This should reverse the case, unless the judge was right in saying that an undivided one-half could not be recovered under this declaration, which claimed the entire fee, and in refusing an amendment. But we think he erred in this. *Bringhurst* v. *Railroad Co.*, 78 Mich. 570; *Hoban* v. *Cable*, 102 Mich. 206. We discover no testimony that shows that defendant Emma H. Sherwood is claiming title; but, like the tenant, she resides upon the premises, and apparently claims the right to do so.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

BURNHAM *v.* NORTH BRITISH & MERCANTILE INSURANCE CO.

GARNISHMENT—INTERPLEADER.

Case ruled by *Burnham* v. *Home Insurance Co.*, 119 Mich. 588.

Error to Charlevoix; Corbett, J. Submitted February 7, 1899. Decided June 29, 1899.

Garnishment proceedings by James K. Burnham, Frederick C. Stoepel, and others, copartners as Burnham, Stoepel & Co., against the North British & Mercantile Insurance Company, as garnishee of Neil Gallagher. William J.

Quan was interpleaded as a claimant under an alleged prior assignment. From a judgment for plaintiffs, claimant and the garnishee bring error. Affirmed.

Remy & Mann and *Dart & Dart*, for appellants.

Pratt & Davis (*Geer & Williams* and *J. H. Cole*, of counsel), for appellees.

PER CURIAM. This case does not differ in any material respect from that of *Burnham* v. *Home Ins. Co.*, 119 Mich. 588. The questions involved are discussed in the opinion in that case.

The judgment is affirmed

FISH *v.* CRAWFORD MANUFACTURING CO.

1. CONTRACTS—SALE OF LUMBER—INSPECTION CHARGES—LOCAL CUSTOM—PLEADING.

   Where the seller of lumber permitted plaintiff to make an inspection thereof under the direction of the purchaser, and afterwards paid him one-half of his charges, he may be held for the balance upon proof that by a local custom the seller was required to pay the entire inspection charges in the first instance, although the custom is not specially declared upon; it being merely a matter of evidence to establish the implied contract.

2. SAME—WEIGHT OF EVIDENCE—QUESTION FOR JURY.

   There being some testimony to support a custom, its weight was for the jury.

Error to Menominee; Stone, J. Submitted October 21, 1898. Decided July 5, 1899.

Assumpsit by John Fish against the Crawford Manu-

facturing Company for work and labor. From a judgment for plaintiff, defendant brings error. Affirmed.

Sawyer & Waite, for appellant.

W. H. Phillips, for appellee.

MONTGOMERY, J. Plaintiff is a lumber inspector. On the 26th of September, 1895, the defendant sold to one Adam Schillo, of Chicago, a quantity of lumber on dock at Menominee. The agreement for sale was silent as to the inspection. The plaintiff inspected the lumber by direction from Schillo, as he (Schillo) testified, after an agreement between the defendant and himself that plaintiff should tally the lumber. The defendant's officers saw the plaintiff at work inspecting, and permitted him to go on, and finish the work, and afterwards paid him one-half of his charges. The plaintiff claims that by a local custom the seller of lumber to Chicago or Milwaukee purchasers pays the entire of the inspection charges, at least in the first instance. The circuit judge left it to the jury to find whether the custom claimed to exist in fact prevailed, instructing the jury that a custom, in order to be controlling, must be definite, precise, and unvarying.

It is contended that it was error to submit the question to the jury, for two reasons: *First*, that the custom was not declared upon; and, *second*, that the evidence did not show a custom.

We think it was not necessary to declare specially upon this custom. It was, in this case, only a matter of evidence, adduced for the purpose of showing what the implied contract between the defendant and plaintiff was. If the custom was for the seller to pay the entire of the inspection charges, the defendant, when he saw this plaintiff making the inspection, might well be understood to have assented to his doing the work on such terms.

We think we cannot say that there was no testimony tending to support the claim of plaintiff that the custom exists. This being so, its weight was for the jury.

No other questions call for discussion. The judgment is affirmed.

The other Justices concurred.

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ANDRUS *v.* SCUDDER.

EQUITY—APPEAL—PLEADINGS—UNAUTHORIZED DECREE.

The Supreme Court, upon affirming a decree dismissing a bill praying for the reformation of a contract so as to show a consideration due from complainant less than the amount stated in the contract, and for an injunction against the prosecution of an action at law to recover the amount therein stated, cannot, for the sake of obviating the necessity of further legal proceedings, enter a money decree for defendant, where the pleadings in the injunction suit are not framed to authorize such relief.

Appeal from Wayne; Smith (George W.), J., presiding. Submitted February 7, 1899. Decided July 5, 1899.

Bill by Ward L. Andrus against John Scudder and Frances M. Scudder for the reformation of a contract, an accounting, and to enjoin an action at law. From a decree dismissing the bill, complainant appeals. Affirmed.

On May 1, 1895, complainant executed and delivered to defendant Frances M. Scudder the following agreement:

"For and in consideration of the sum of ten thousand dollars furnished me by Frances M. Scudder, of Detroit, Michigan, the receipt of which is hereby acknowledged, for the purpose of carrying on a wholesale fruit and fancy grocery business at 53, 55, and 57 Jefferson avenue, as Ward L. Andrus & Co., of which firm I am sole partner, I hereby agree to pay said Frances M. Scudder or assigns

at the end of each year ten thirty-fourths of the net profits of said business. The said Frances M. Scudder may withdraw at any time the aforesaid funds so furnished by her by giving sixty days' notice thereof. This agreement shall be in force five years from May 1st, 1895, unless otherwise terminated. It is expressly understood that said Frances M. Scudder shall not in any manner or in any way have any voice, direction, or control in the management of said firm on account of said funds so furnished; and I hereby agree not to personally or otherwise sign or indorse any note, bond, or other obligation not pertaining to the business of said firm, or do any act which would place in jeopardy the money furnished by said Scudder."

A notice of withdrawal was duly served. On February 9, 1897, complainant paid defendant Frances $5,000. He refused to pay the balance, and thereupon she instituted a suit at law against complainant for its recovery. This suit was instituted February 27, 1897. To the declaration filed, defendant, on April 3, 1897, filed a plea of the general issue. The case was set for trial December 2, 1897. On November 17th, defendant, Andrus, amended his plea by giving notice that his signature to the contract was fraudulently obtained by the misrepresentations of plaintiff or her representative as to the contents thereof. On December 1, 1897, complainant filed his bill, setting up the fraud, praying for the reformation of the contract, for an accounting, and an injunction against the prosecution of the suit at law. The two particulars in which a reformation is asked are that the consideration in the contract should have been $8,000, instead of $10,000, and that Mrs. Scudder should participate in the losses as well as the profits. Proofs were taken in open court, and the bill dismissed.

Corliss, Andrus & Leete (*John D. Conely*, of counsel), for complainant.

Bowen, Douglas & Whiting, for defendants.

GRANT, C. J. (*after stating the facts*). Counsel for complainant, in their brief, say that the questions involved

are ones of fact. The sole witnesses to the agreement are the complainant and defendant John Scudder, who acted for his wife, his co-defendant. She personally took no part in the negotiations. The testimony of these two witnesses on every material fact is in direct conflict. Upon the facts, therefore, the result would depend upon the credit the court should give to one or the other. The court below reached the conclusion that complainant "has not been able to establish the fraud by such a preponderance of evidence as entitles himself to relief." We think the circuit judge was in a better position to decide the question of fact than we are. There was nothing unreasonable in the contract. We find nothing in the surrounding circumstances from which we can reasonably infer that complainant has a preponderance of the evidence.

Defendant Frances insists that decree should be entered in this court for the amount due, and thus obviate the necessity of resorting to the continuation of further legal proceedings. The pleadings are not framed to meet any such case. Therefore all we can do is to affirm the decree dismissing the bill.

Decree affirmed, with costs.

The other Justices concurred.

HUBBARD *v.* AUDITOR GENERAL.

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1. TAXES—VOID SALE—CERTIFICATE OF ERROR—MANDAMUS.
   Where a void tax deed has been issued, and the original owner applies to the auditor general for a certificate of error, tendering the full amount of the tax, he is entitled to such certificate, and, if the auditor refuses to issue it, *mandamus* will lie to compel him to do so.

2. SAME—PURCHASE OF STATE TAX LANDS—ACCEPTANCE OF CHECK AS PAYMENT.
   The fact that the auditor general sees fit to accept a check in payment for state tax lands is not a matter of which the original owner can complain, where the check is afterwards paid; and in such case the payment will be deemed to have been made as of the time of the receipt of the check.

3. SAME—INSUFFICIENT DEPOSIT—RIGHTS OF APPLICANT.
   An applicant to purchase state tax lands, who deposits an amount insufficient to cover all of the descriptions applied for, is not entitled to deeds for the several descriptions in the order named in his application, where there is nothing to indicate that he intended to take a part of the lands if he could not obtain them all.

4. SAME—PAYMENT OF TAX LIENS—VOID DEED.
   Under section 84 of the tax law of 1893 (Act No. 206, Pub. Acts 1893), requiring a purchaser of state tax lands to pay all taxes remaining a lien thereon at the time of his purchase, one who pays a part of the price to the auditor at the time of making his application to purchase, and the balance on a subsequent day, is bound to pay any tax that has become a lien upon the land in the interim, in default of which the deed issued to him is void.

Mandamus by Frank W. Hubbard and James O. Wallace to compel Roscoe D. Dix, auditor general, to issue a certificate of error. Submitted February 15, 1899. Writ granted July 5, 1899.

The petition alleges that relators are the owners of the S. E. $\frac{1}{4}$ of section 30, township 16 N., range 13 E., being

in the township of Verona, Huron county; that on November 30, 1896, William A. Garner and George F. Brown filed a written application with the respondent for the purchase of six descriptions of land, of which the description above is the first; that at the time said Garner and Brown deposited with the auditor general their personal check for $100, to be applied upon the purchase of said lands; that they were then informed by the auditor general that the total amount due was $176.39; that on December 1, 1896, Brown and Garner sent from Flint to the auditor general a check for $76.39, balance due; upon information, that neither of said checks was cashed by the auditor general until after December 2, 1896; upon like information, that it was not the custom of the auditor general to accept personal checks as cash upon application to purchase state tax lands; that on December 31, 1896, the auditor general wrote Garner and Brown, accounting for the $176.39, and returning to them $35.74, that amount being the excess over the taxes due; that a tax deed was issued to Garner and Brown, dated December 28, 1896, for said lands. The petition further sets up that the taxes for the year 1896 were not included in the purchase, and were not paid by Garner and Brown. On October 28, 1898, relators made application to the respondent to pay or redeem the taxes upon said land, and tendered $166.25 for that purpose, and prayed that a certificate of error be issued against the deed to Garner and Brown. The respondent refused to accept the money or issue the certificate of error, whereupon relators brought this petition for a writ of *mandamus* to compel such action.

The answer admits the application, the payment of $100 by check drawn upon the Citizens' Commercial Savings Bank of Flint, the receipt of the subsequent check, the issuance of the deed to Garner and Brown, and the refusal to issue the certificate of error. The answer further sets up a receipt for $100 given by the then auditor general, November 30, 1896, in accordance with the application, and avers that said checks became at once, on receipt thereof, part

of the public funds, were without delay deposited in the state treasury, and credited to the public fund known as the "Auditor General's Deposit;" that it has for a long period of years been the custom in that department to receive personal checks on banks, tendered by responsible applicants, and to treat the same as cash.

Bacon & Palmer (*William T. Bope*, of counsel), for relators.

Horace M. Oren, Attorney General, for respondent.

GRANT, C. J. (*after stating the facts*). 1. It is urged that the writ of *mandamus* will not lie against respondent, because the action was wholly within his discretion and judgment. No such discretion is lodged in the auditor general. When one has complied with the law in applying to purchase state lands, he is entitled to his deed or patent. When a void deed has been issued, and the original owner applies to the auditor general, tenders the full amount of taxes due, and demands a certificate of error, he is entitled to it, and the auditor general cannot refuse it. *Mandamus* is the proper remedy to compel performance, and determine the validity of the reasons for refusal.

2. Relators are not in position to question the method of payment between the auditor general and tax-title purchasers. The auditor general saw fit to accept the check in payment. It was paid, and the deed issued. This point is ruled by *People* v. *Commissioner of State Land Office*, 19 Mich. 470.

3. It is urged that, the deposit of $100 November 30th being more than sufficient to pay the taxes due on the first description, Garner and Brown were entitled to deeds for the descriptions in the order named in the application, under *People* v. *Commissioner of State Land Office*, 23 Mich. 270. That case applies only to selections of lands under some law or grant from the government. It does not apply to purchasers. *Webster* v. *Newell*, 66 Mich.

503. This application was to purchase certain parcels of land. There was nothing in it or outside it to indicate that Garner and Brown intended to take one piece if they could not get all. The application was treated as an entirety; for the next day they completed their right, as they supposed, by paying the balance due. The purchase was not, therefore, completed until December 2d, when the second check was received by the respondent. At that time the taxes of 1896 had become a lien, and should have been paid, to entitle Garner and Brown to a deed. *Hughes* v. *Jordan*, 118 Mich. 27.

The writ will issue, but without costs.

The other Justices concurred.

WATSON *v.* ALBERTS.

CONDITIONAL SALE—BONA FIDE PURCHASER—FIXTURES.

A *bona fide* purchaser of land, and of a permanent distillery plant thereon, acquires title to a steam pump attached to the distillery, as against one who sold the pump, knowing it was to be so attached, under a contract providing that title should remain in the seller until payment of the price.

Error to Muskegon; Russell, J. Submitted April 19, 1899. Decided July 5, 1899.

Trover by William G. Watson and others against Silas L. Alberts and another. From a judgment for defendants on verdict directed by the court, plaintiffs bring error. Affirmed.

Plaintiffs sold to one Minnick a steam pump, to be used by him in a peppermint distillery on his farm. It was sold on credit, the title to remain in plaintiffs until the

price ($50) was paid. It was attached to a drive-wheel, and connected by a steam-pipe to the boiler; was fastened to a plank, which rested on timbers set in the ground. The pump and the entire distillery plant was in a permanent building. Defendants bought Minnick's farm and distillery in good faith, without notice or knowledge of plaintiffs' claim, and believing that the pump was a part of the realty.

A. S. Hinds (*Arthur Jones*, of counsel), for appellants.

Stephen H. Clink, for appellees.

GRANT, C. J. (*after stating the facts*). The property was sold to be attached to the distillery, and plaintiffs so understood it. It was so attached, and was sold by Minnick, as a part of the realty, to defendants, who were *bona fide* purchasers. The case is ruled by *Wickes Bros.* v. *Hill*, 115 Mich. 333.

Judgment affirmed.

The other Justices concurred.

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THORNTON *v.* DAMM.

1. EXECUTION—PAYMENT—EVIDENCE.

   Where one of several defendants in execution, under threat of levy on her individual property, gives to plaintiff's attorneys a check for the full amount, with no provision for the money's being in any event returned to her, the transaction amounts to a payment of the execution, even though her attorney testifies that it was distinctly understood that it should not have that effect, but should be deemed a payment merely for the protection of plaintiff's attorneys, the execution to be kept alive and used for defendant's benefit.

2. SAME—PAYMENT BY ONE DEFENDANT—ENFORCEMENT AGAINST CO-DEFENDANTS.

   One of several defendants in execution may, after paying the same, recover from his solvent co-defendants their proportionate shares, and no more.

3. SAME—NOTES—CONSIDERATION.

   A note given by one of several defendants in execution to a co-defendant, to avoid a threatened levy by such co-defendant to enforce the collection of the execution, which such co-defendant has paid, the maker of the note having paid in cash his proportionate share, is without consideration and void.

Error to Muskegon; Russell, J. Submitted April 19, 1899. Decided July 5, 1899.

Assumpsit by Anna C. Thornton against Peter Damm upon a promissory note. From a judgment for plaintiff, defendant brings error. Reversed.

Arthur Jones, for appellant.

Stephen H. Clink, for appellee.

MONTGOMERY, J. This is an action on a promissory note made by defendant August 10, 1897, payable to the order of Stephen H. Clink, and indorsed by him in blank.

The face of the note is $100, and the recovery was for the amount, including interest,—the whole sum being $108.60. The defendant brings error.

The defense relied upon in the court below and in this court was duress and failure of consideration. Briefly stated, the circumstances under which the note was given were as follows: In 1896 some 40 residents of Muskegon, including both plaintiff and defendant, had engaged in a contest over the taxes assessed against their property. In this contest they had been unsuccessful, with the result that execution issued out of this court in favor of the auditor general and against the contestants in that case, amounting to $256.96, including sheriff's fees. Mr. Clink, from the date of the issue of this execution, acted as the attorney of Mrs. Thornton. Bunker & Carpenter were attorneys for the auditor general, the plaintiff in execution. Mr. Clink was a witness, and testified as follows:

"I was endeavoring to help her to protect her interests. The execution was in the hands of the sheriff. Bunker & Carpenter, I guess, had control of it. Prior to the taking of this note from Mr. Damm, Mrs. Thornton had given a check for the amount of the execution to Bunker & Carpenter, but not in payment of the execution. They had threatened to levy upon her property, and the check was given to prevent the levy. It was done some days prior to the making of this note. I couldn't give the amount exactly, but I think it was $256.66. It represented the full amount of the execution, together with the sheriff's fees for collection. After that check was given, no further effort was made to collect the execution from Mrs. Thornton. That was the arrangement with Bunker & Carpenter,—that they should take that check for the purpose of making them whole, so they would be safe in the matter, and could have the use of the money if they wanted it; but it was distinctly understood that it did not pay or satisfy that execution, and that the execution should be kept alive and used for the benefit of Mrs. Thornton. I told Bunker & Carpenter to direct the sheriff to make a levy on Mr. Damm's property. I may also have told the sheriff to make the levy, but I required of Bunker & Car-

penter that they do that,—or of Bunker; I did all the business with Mr. Bunker. I believe the sheriff did go and attempt to collect that execution from Mr. Damm. I told him to, and I told him to make a levy if he did not get the money. That was before the note was given. After that Mr. Damm came to see me. There was no threat to make a levy, so far as I know. My instructions were to make a levy, not make any threat about it; to go down and get that money, or make a levy on Damm's property. We wanted Mr. Damm to bear an equal part of it, and get a hold, and try to do something to help collect in. I don't know that any particular amount was settled upon. I think that was left with the idea that we would arrange that when somebody was set in motion with that execution. I couldn't say why Mr. Damm came to see me, whether or not because of the threat which he claims had been made by the sheriff, but I suppose he came because he thought the execution was going to be levied upon him. He told me the sheriff or deputy sheriff had been there to make a levy on his property. I do not know whether Mrs. Thornton sent him to me or not. I don't know whether he told me she did or not. I demanded that he pay $126, and I told him that, unless he did pay that, this execution would be levied upon him to compel him to pay it. I suppose I told him that, because that is what I meant to do, and, if he hadn't given that note, there would have been an execution levied on his property,—that very execution would have been levied. I told him some collections had been made. I don't remember that I told him about how much remained uncollected. I do not think that my idea was at that time to make him pay the uncollected portion of the execution; my idea was at that time that each one should assume about one-half of that matter.

"Now, I looked upon it that these two were the pecuniarily responsible ones of the lot, and that Mrs. Thornton had had to put up all the money, and there wasn't another soul on the list that wanted to make a move in any way, shape, or manner to get a cent. Her money was gone from her. I proposed that Mr. Damm should share that responsibility with her, and should do just as much hustling as she did, now she had put up the whole of it. As I say, some little amount had been collected; there could be no mistake about that, nor any injustice about it. I am explaining to you just what basis I proceeded upon. I

wanted to state that if Mrs. Thornton collected more than her share of it, or more than her half, it would be turned over to help out, and if he collected more from these parties (and they all had an opportunity to go to these people and collect), and if he collected more than his part that he assumed, he could turn it over to her. I told him she had made some collections. I didn't know how much she had collected. I didn't tell him she had collected one-half the execution. I didn't tell him whom she had collected from. I did not know who paid. I did know of one occasion where some few dollars were paid in my office, but just what it was I didn't know,—by Mrs. Miller. I do not think there was any division made of the parties who were liable, no agreement as to whom Mrs. Thornton was to collect from and whom he could collect from. I do not believe any statement was made to Mr. Damm as to who had paid.

"Whatever arrangement was made between myself and Mr. Damm was made with the view of allowing both these parties to collect from the remainder of the persons named in the execution,—collect whatever they could to recoup for the amount that they had put up. I had instructed Mrs. Thornton to make all the collections she could. I am not sure whether I deducted from the gross amount of the execution the amount that Mrs. Thornton had collected, and divided up the remainder in two parts, one-half of which should be shared by Mr. Damm and the other by her, or whether I took out what I figured would be Mrs. Thornton's own share,—what she should have paid individually,—and then let each of them divide the balance. I have forgotten just exactly what basis. I am inclined to think that I deducted the share that Mrs. Thornton would have to pay if these people paid equally. I am not sure whether that was $6 or not, because I am not sure of the number of persons in the execution. I think there were something over 40. It would probably be about that amount. I suppose I showed Mr. Damm the basis for the demand. I don't know whether I figured it out to him or not."

The defendant testified as follows:

"I gave the note at Mr. Clink's office. The deputy sheriff came down with an execution, and was going to levy on my property if I didn't pay up that execution for the Supreme Court costs. This was a few days prior to the

time I gave the note. * * * I went to see Mr. Clink the same day. I told him I was sent there, had seen Mrs. Thornton, and she told me to go to him about it. He says, 'Well, it's got to be paid, or else it will have to be levied on your property.' He figured out how much I had to pay, and told me it was $126. I don't know how he figured it. He said there was some collected on that execution, and, if I paid that for my share, then that would cover it. He didn't tell me any sum that had been collected; he said somewhere about $130. He required me to pay the balance of it, and said that, if I didn't, it would be levied on my property. I paid him $26 in money, and gave this note. I didn't have any other reason for giving this note than that of saving my property from the levy of this execution. I would not have given this note had it not been for the threats to levy on my property if I didn't give it. I didn't owe Mrs. Thornton anything. The note was given to Mr. Clink, but was to pay this debt."

Cross-examination by Mr. Clink:

"I guess that you told me that Mrs. Thornton had put up the entire amount of this execution. You told me I could go and take that execution and levy on somebody else. You offered me a list on typewritten paper, and told me to go and make collections. I guess I told Mrs. Thornton that she had more time to collect than I did. I know I was up there, but I don't just exactly remember what our conversation was. I think that was the same day or the day after giving the note. I know it wasn't more than a week.

"*Q.* You never made any effort to get any of these people named in this execution to pay their share?

"*A.* Well, I kind of thought I had done wrong already to settle it the way I did, so I thought I would not try to do anything there in that case, you see.

"*Q.* You didn't say anything that you were dissatisfied until the note was due, did you?

"*A.* No; I did not."

It also appeared that, before the note in question was given, Mrs. Thornton had received from various parties who were liable jointly with herself and defendant their respective proportionate shares of the amount of the execution, and had given them receipts agreeing to save them

"harmless from any further payments or costs for and on account of said execution."

The contention of defendant is that, before payment of the execution, it might have been enforced against either one of the many defendants, and that such defendant would be entitled to recover of each of his co-defendants ratably an aliquot part of the whole; that in no event could he recover more than such a sum as would be produced by dividing the amount paid among the solvent debtors. It is the further contention that, under the evidence in this case, the execution was paid by Mrs. Thornton, and the rule governing her rights is that given in Beach on Contracts (section 682): "Where one of two defendants in a joint judgment pays it, but not with the intention of discharging it, he may enforce the judgment against the co-defendant for his legal proportion of the debt"—and that this was the extent of her right.

On the other hand, plaintiff's counsel contends that the testimony does not show payment by Mrs. Thornton, because she parted with the money on the strength of the distinct agreement that the money should not pay the execution, and should not be received for that purpose, and that the arrangement was in all respects a fair one, by which the parties, finding themselves jointly liable, divided the loss. The court instructed the jury in accordance with plaintiff's theory, and in effect that, if the defendant understood the situation, he was liable on the note.

If the amount of the execution had been divided among the solvent debtors, the share of each would have been about $13. Defendant had paid $26 in cash, aside from the note in question, so that the question whether there was any consideration for the note must, in our opinion, be determined by ascertaining what right the plaintiff had, as against him, when the note was taken. If there had been no payment of the execution by plaintiff, there was nothing to prevent an agreement as to a division of their burdens, if made in good faith on both sides; and, as the jury found there was no deception in the case, the question again

recurs, Was there a previous payment by the plaintiff? for, if there was, the law defines the extent to which the writ of execution remains available. While the plaintiff may elect to proceed against any one of numerous co-defendants, the law does not warrant him in placing a weapon in the hands of the one called upon to make payment with which he can attack another co-defendant. Such an agreement would be against public policy.

We have no doubt, from Mr. Clink's testimony, that the money was paid by Mrs. Thornton to Bunker & Carpenter on this execution. He says the arrangement was that Bunker & Carpenter should take the check for the purpose of making them whole, so that they would be safe in the matter, and could have the use of the money if they wanted it, but that it was distinctly understood that it did not pay or satisfy that execution, and that the execution should be kept alive and enforced for the benefit of Mrs. Thornton. There is no suggestion that in any event the money was to be returned to Mrs. Thornton, and, so far as the agreement to keep the execution alive is concerned, it is treated as an agreement to permit Mrs. Thornton to enforce the execution against her co-defendants to the extent that the law justified a resort to them, *i. e.*, for their proportionate share. The attempted use of this execution to enforce the collection of the full face, made by Mrs. Thornton's attorney, was unauthorized, and the note given to avoid such a levy was without valid consideration. The verdict should have been directed for defendant.

Judgment reversed, and new trial ordered.

The other Justices concurred.

In re JONES AND CLINK.

ATTORNEYS—IMPROPER LANGUAGE IN BRIEFS—CONTEMPT.

The Supreme Court, though deeming improper certain language used in the briefs of opposing counsel, were not disposed to take further action thereon, where counsel disclaimed, in answer to an order to show cause, any intent to use language which could be construed into a contempt of court.

Order requiring Arthur Jones and Stephen H. Clink to show cause why they should not be adjudged guilty of contempt. Issued April 19, 1899. Dismissed October 3, 1899.

PER CURIAM. In this matter the court, upon its own motion, issued an order to the respondents to show cause why they were not guilty of contempt in the use of language which appeared in the brief of respondent Jones in *Thornton* v. *Damm*, *ante*, 510, and in the motion of respondent Clink to strike the brief from the files. Each respondent filed an answer disclaiming any intent to use language which could be construed into a contempt of court. That the language was improper cannot be denied, and can only be overlooked upon the ground that it was used in the heat of excitement. Under the disclaimers made by counsel, we are disposed to take no further action in the matter.

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BIG RAPIDS NATIONAL BANK *v.* PETERS.[1]

1. PRINCIPAL AND SURETY — EXTENSION — RELEASE — RESERVATION OF REMEDY.

   A surety is not released by an extension of time to the principal debtor, where the remedy against him is expressly reserved by the creditor.

2. SAME—EVIDENCE.

   Evidence that the holder of a promissory note, on granting an extension of time to the principal debtor by accepting a new note, expressly refused to surrender the original note or to discharge the surety thereon, is sufficient to sustain a finding that the remedy against the surety was reserved.

3. BILLS AND NOTES—OWNERSHIP—QUESTION FOR JURY.

   Where defendant denied plaintiff's ownership of a note sold by plaintiff before maturity, but redeemed, according to plaintiff's testimony, after it went to protest, it was not error to permit the jury to pass upon the question of ownership.

4. SAME—INTEREST—COMPROMISE VERDICT.

   Defendant cannot complain of a verdict against him, as a compromise, because it does not include interest on the notes in suit.

Error to Manistee; McMahon, J. Submitted April 19, 1899. Decided July 5, 1899.

Assumpsit by the Big Rapids National Bank against Richard G. Peters upon promissory notes. From a judgment for plaintiff, defendant brings error. Affirmed.

C. H. Gleason (*Arthur Lowell* and *Fletcher & Wanty*, of counsel), for appellant.

M. Brown (*McAlvay & Grant*, of counsel), for appellee.

HOOKER, J. The plaintiff's action was brought to re-

[1] Rehearing denied November 7, 1899.

cover a balance alleged to be due upon eight promissory notes. The plaintiff obtained a verdict. Peters, the appellant, was a member of a copartnership styled Arthur Meigs & Co. These notes were signed by Carman, and were payable to Arthur Meigs & Co., and were by them indorsed and negotiated. Carman appears to have made the notes as an accommodation to Meigs & Co., who received $10,000 in money from the plaintiff upon them, or similar notes which these renewed. The earliest note sued upon was dated July 25, and the latest October 10, 1890. In October, 1890, Meigs & Co. became pecuniarily embarrassed, and sold their shingle mill to Carman, who promised to assume and pay the outstanding notes as a portion of the consideration. Of this the plaintiff was at once informed. The notes were not paid at maturity, and this action was brought against the maker, Carman, and indorsers, Meigs & Co. Service was not obtained upon Carman or Meigs. The defendant claimed that, through Carman's assumption of the debt, Meigs & Co. became his sureties, and that they were released by reason of an extension of time given to Carman by the plaintiff. To establish this defense, he proved that, after the maturity of these notes, the bank received other notes from Carman, signed by Carman, Bromley & Childs, from time to time, for a period of two or three years or more; discounts being regularly paid thereon. It appeared that the plaintiff was asked to receive other paper in lieu of the original notes, but refused, saying that it should not give them up until paid. There is testimony to the effect that, when the arrangement was made by which the subsequent notes were agreed to be taken, it was accompanied by a refusal to surrender the original paper or release the indorsers until the same was fully paid.

The court instructed the jury that, by the agreement for the purchase of the shingle mill, Carman became the principal debtor, and Meigs & Co. sureties; and he directed the jury to inquire whether, in the subsequent arrangement between Carman and the bank, it reserved the right

of action against the sureties. Counsel for the defendant allege error upon the last proposition, claiming that the court should have directed a verdict for the defendant, upon the ground that the undisputed testimony showed that he was discharged by an extension of time to the principal debtor.

It is not every extension of time that discharges a surety.

"If the creditor, at the time he releases the principal, reserves his remedies against the surety, such release amounts to a covenant not to sue only, and does not discharge the surety." 1 Brandt, Sur. § 147.

In *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, 7 Ch. App. Cas. 142, Lord Hatherley said:

"It is competent to the creditors to reserve all their rights against the surety, in which case the surety is not discharged; and for this reason: That the contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal."

The opinion of Mr. Justice Andrews in the case of *Calvo* v. *Davies*, 73 N. Y. 217 (29 Am. Rep. 130), is to the same effect. It was there said:

"The remedies against the surety are reserved. The agreement does not operate as an absolute, but only as a qualified and conditional, suspension of the right of action. The stipulation in that case is treated, in effect, as if it was made, in express terms, subject to the consent of the surety, and the surety is not thereby discharged."

See, also, *Hagey* v. *Hill*, 75 Pa. St. 108 (15 Am. Rep. 583); *Wyke* v. *Rogers*, 1 De Gex, M. & G. 408; *Sohier* v. *Loring*, 6 Cush. 537. Many other cases will be found cited in 24 Am. & Eng. Enc. Law, 830, note 2. The same doctrine is laid down in our own case of *Bailey* v. *Gould*, Walk. Ch. 482. If, therefore, the defendant stood in the attitude of surety, the court committed no

error in submitting the question of his discharge to the jury. We cannot agree with counsel that there was no testimony tending to show such reservation. The cashier testified that they would not carry the notes on the books of the bank, but that he told Carman that he might substitute other paper. He said further: "There was to be no extension. I told him, plainly, we would not release Mr. Peters under any circumstances, or him either." In this connection, we may add that we think the verdict was not so at variance with the weight of the evidence as to make a refusal to grant a new trial erroneous.

One other question demands notice, and requires a further statement of facts. It has been said that eight notes were sued upon, one of these being known as "Exhibit A." This was a renewal of a former note for $1,000, and was sold by the plaintiff, before maturity, to the Mecosta County Savings Bank. When Exhibit A became due, Carman paid Comstock, plaintiff's cashier, $500 upon it, and a Carman, Bromley & Childs note for $500. The defendant claims that the plaintiff was not the owner of Exhibit A, and therefore had no right of action upon it, and that the admission of testimony regarding it was erroneous. It is said that the jury must have found that the plaintiff owned this note when suit was commenced, although there was no testimony showing it. We find, on examining the record, that Comstock testified that the plaintiff redeemed this note, after it went to protest, by placing in the place of it $500 in cash and one of the Carman, Bromley & Childs notes. Again he said: "The plaintiff bank got the note by paying a Carman note and the money, after the protest. * * * I paid $500 in cash, and put in a Carman, Bromley & Childs note for $500, and took out this note." The judge left the question of ownership to the jury, and we think this was right.

But it is urged further that the record shows that the verdict was a compromise, and that it appears from the following circumstances: A witness testified that the amount due upon the eight notes, including principal and

interest, was $7,211.27, and, excluding Exhibit A, $6,333.39. The verdict was for $5,000, from which counsel conclude that the jury gave plaintiff the principal of the eight notes, without interest, and that the verdict must have been the result of a compromise, because there was no dispute about the amounts due upon the respective theories. If the jury intended to render a verdict for the principal of the eight notes, only the plaintiff can complain of the fact that interest was not included, as the defendant was not injured. We cannot presume that they did not so find. The inference of a compromise is not a necessary one. The point is ruled by *Benedict* v. *Provision Co.*, 115 Mich. 527.

The judgment is affirmed.

The other Justices concurred.

BUXTON *v.* JONES.

DEEDS — CANCELLATION — EXCHANGE OF LAND — MISREPRESENTATIONS.

One who exchanged city property for a farm cannot have the transaction set aside for misrepresentations as to the cost, value, and productiveness of the land, where he visited the land in company with his father before making the exchange, and apparently relied on the latter's judgment as to its productiveness and value, and afterwards occupied the land for three years without making any complaint.

Appeal from Wayne; Daboll, J., presiding. Submitted April 20, 1899. Decided July 5, 1899.

Bill by Elmer E. Buxton and Rhoda Buxton against Charles B. Jones and Charlotte Jones to set aside certain conveyances. From a decree dismissing the bill, complainants appeal. Affirmed.

E. S. Clarkson, for complainants.

Park & Shields, for defendants.

LONG, J. The bill in this cause was filed to set aside a conveyance made by complainants to defendants of certain property in Detroit, and to set aside and cancel a note and a mortgage given by complainants to defendants on land in Huron county which had been conveyed to complainants by defendants. It appeared that complainants owned a house and lot in Detroit, which they wished to trade for a farm. They heard of some land in Huron county, and complainant Elmer E. Buxton went to see it. Soon after, Charles B. Jones, having heard of this trip of complainant to see this land, came with one Binkle to Detroit to see about a trade for his (Jones') land. The parties at this time talked about an even exchange of properties, as each claimed that his property was worth $2,250. Soon after this talk, complainant Buxton and his father went to see the defendants' land, in Huron county, and met defendant Jones and Mr. Binkle there. It was while there, upon the land, that the complainants contend that the defendant made the false representations respecting the land. It is claimed —

1. That defendant Jones fraudulently misrepresented the value of the land, saying it was worth $30 per acre.
2. That he fraudulently misrepresented the original cost of it.
3. That he fraudulently misrepresented the productiveness of the soil, especially for crops of hay and wheat, saying that it would produce 2½ tons of hay per acre.
4. That Binkle was the agent of defendant, but, by his professions of friendship, led the complainants to believe that he was acting in their interests.

The cause was heard below on proofs taken in open court, and the bill dismissed. Complainants appeal.

It appeared on the hearing below that, before the complainants made this exchange, the father of complainant Elmer E. Buxton went with him to the farm, and care-

fully examined it; that they stopped overnight with Binkle before going to the farm, and took him with them to see it. The defendants testified that Binkle was not their agent in the transaction; that they made no representations that the land would produce 2½ tons of hay per acre, but that the only statement made was that, if the land was worked right, it would produce a fair, average crop. After complainants went into possession of the farm, they continued to work it for over three years without any complaint. They then attempted to sell it, but claim they could not sell it for the amount allowed for it in the trade, and then commenced the present suit.

We have examined the case with some care, and think the court below reached the correct conclusion. The evidence in the case does not convince us that the complainants have made out a case by their proofs which would warrant a decree setting aside these conveyances. No fraud is proved, and what was said about the value of the farm was but the expression of an opinion. The complainant saw the premises, took his father with him, and apparently relied upon his judgment as to its productiveness and value.

It appears that the Detroit property had a mortgage on it for $750, and, to make the trade, the complainants executed a mortgage on the Huron county lands to take the place of it. It is this mortgage which is attempted to be set aside, and which the court below refused to do.

The decree of the court below must be affirmed, with costs to defendants.

The other Justices concurred.

ERVAY *v.* ERVAY.

DIVORCE—REFUSAL TO PAY SUIT MONEY—CONTEMPT—PRACTICE.

Filing interrogatories, and giving an opportunity to produce witnesses to rebut the showing made by the wife as entitling her to an allowance for expenses of suit pending divorce proceedings, are not prerequisite to a commitment of the husband for contempt in refusing absolutely to obey an order requiring such moneys to be paid.

Appeal from Ionia; Davis, J. Submitted April 20, 1899. Decided July 5, 1899.

Bill by James A. Ervay against Eliza M. Ervay for a divorce. Complainant appeals from an order committing him for contempt in disobeying an order for payment of suit money. Affirmed.

W. H. Mains and *R. A. Hawley*, for complainant.

Chaddock & Scully, for defendant.

LONG, J. Complainant filed his bill for divorce against defendant on the ground of cruel treatment. In the bill it is charged that the parties were some years ago each the owner of an undivided half of 60 acres of land, but that, at the defendant's request, a contract for a division of the land was made, so that complainant became the owner of 40 acres, and the defendant of 20 acres, on which were the buildings and orchard, with the agreement that the complainant should have the use of the whole land so long as both should live. The defendant filed an answer in the nature of a cross-bill, denying the cruelty charged in complainant's bill, and charging him with extreme cruelty, and asking a decree of divorce and alimony, both temporary and permanent. In this cross-bill, defendant denies that she ever consented to let complainant have the use of

the 20 acres of land, but alleges that he took possession thereof, and is now in possession, and refuses to allow her the income or any of the proceeds thereof. She subsequently filed a petition for an allowance for the costs and expenses of the case, setting up therein that this 20 acres of land was in the possession of complainant, and that he refused to deliver up the possession to her, and that she has no means except this land, and a limited amount of wearing apparel, and $24 worth of personal property, and $5 in money; that the complainant's land is worth $1,200; that he has $500 worth of personal property, and receives a pension of $144 per year; that she is 51 years of age, in feeble health, unable to work, and if compelled to mortgage her 20 acres of land, which is of the value of only $600, and already mortgaged for $72, she will not be able to pay the mortgage. Complainant filed an affidavit in opposition to the petition for alimony, in which he admits that he draws the amount of pension stated, but says that the personal property possessed by him is of the value of no more than $200, and that the land owned by him is mortgaged for $200. The complainant filed with this affidavit the contract between the parties relative to the division of the lands and property of the parties. The court, on considering the petition and affidavit, made an order that complainant pay $25 to defendant's solicitors within 20 days from the date of the order. A demand accompanying a certified copy of the order was made upon complainant for the payment of this amount, which was refused. Defendant's solicitors thereupon filed an affidavit setting forth that, when the demand was made for this money, the complainant stated that he would not pay the same until the final end of the suit, and that he would go to jail before he would pay it. The court thereupon made an order that complainant show cause why an attachment should not issue against him for his refusal to comply with the order. Complainant filed an affidavit on the order to show cause, reiterating therein the facts set up in the former affidavit, and again setting forth the terms of the contract; but the

affidavit does not deny that he holds possession of the defendant's 20 acres of land, nor does he deny that he is able to pay the amount named in the order. Subsequently an order was made that complainant be committed for contempt in refusing to obey the order for payment of suit money.

Complainant appeals from the order, and it is here contended that the court was in error in making the order until he had ordered interrogatories to be filed, and the complainant given an opportunity to produce his witnesses to rebut the claim made by the defendant in the petition. The filing of interrogatories was not necessary to this proceeding. *Edison* v. *Edison*, 56 Mich. 185. The order to show cause was issued and served on the complainant. He absolutely refused to comply with it, and made no showing on the return which the court below deemed a sufficient excuse. He had a full opportunity to make a showing. 2 How. Stat. § 7260, provides that "when any rule or order of the court shall have been made for the payment of costs, or any other sum of money, and proof by affidavit shall be made of the personal demand of such sum of money, and of a refusal to pay it, the court may order a precept to commit the person so disobeying to prison," etc.

It is also contended that the defendant had sufficient property of her own to carry on the litigation, and therefore no order should have been made. The showing made, we think, warranted the court in finding otherwise.

The order must be affirmed.

The other Justices concurred.

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YOUNGS *v.* CLARK.

TAX SALES—VALIDITY OF DECREE—PREMATURE ADJOURNMENT OF COURT.

Under section 66 of the tax law (Act No. 206, Pub. Acts 1893), providing that if it shall be made to appear to the court, within five days after the day fixed for hearing the petition of the auditor general for the sale of delinquent lands, that any person, without fault on his part, has been prevented from filing objections to the tax, additional time may be granted for that purpose, a decree of sale is void as to a landowner who did not appear, where the court finally adjourned on the fourth day after the day fixed for the hearing of the petition. *Peninsular Savings Bank* v. *Ward*, 118 Mich. 87, followed.

Appeal from Marquette; Stone, J. Submitted April 21, 1899. Decided July 5, 1899.

Petition by Clark W. Youngs against Frederick O. Clark and others for a writ of assistance. From an order denying the writ, petitioner appeals. Affirmed.

W. S. Hill, for petitioner.

Clark & Pearl, for respondents.

LONG, J. This is an application for a writ of assistance under the tax law. The land in question was returned delinquent for the taxes of 1893. It was sold to the State in December, 1895, and reoffered by the county treasurer in December, 1896, and sold to the petitioner, who received a certificate of sale at that time. At the same time, petitioner purchased the lands for the taxes of 1894, and received a certificate subject to redemption. Petitioner sent his certificate on the purchase for the 1893 tax to the auditor general, and on March 25, 1897, a deed was issued to him. A deed on the sale for the taxes of 1894 was also issued to him after redemption expired. Objection is

made to the issuing of the writ of assistance, on the ground that the deed is void for the reason that the court, at the time the decree was entered, failed to remain in session five days after the time fixed by the court for the hearing of the auditor general's petition, so as to allow that time in which objections might be filed, in accordance with the provisions of section 66 of the tax law of 1893 (Act No. 206, Pub. Acts 1893), and therefore that the decree so entered is void, and no deed could issue on a sale made thereunder.

It appears that November 5, 1895, was the day designated by the court as the day for hearing the tax petition. The court finally adjourned on November 9th. The respondents were entitled, upon a proper showing, to the five days in which to make their objections. They were deprived of that right by the adjournment of the court before the five days had elapsed. Under the ruling of this court in *Peninsular Savings Bank* v. *Ward*, 118 Mich. 87, the court below very properly refused to grant the writ of assistance.

The order below must be affirmed.

The other Justices concurred.

PEOPLE *v.* NUNN.

1. CRIMINAL LAW—ACCOMPLICES—UNCORROBORATED TESTIMONY.
   A person charged with a crime may, in this State, be convicted upon the uncorroborated evidence of an accomplice.

2. SAME—AFFIDAVIT IMPEACHING TESTIMONY—NEW TRIAL.
   The denial of a motion for a new trial in a criminal case on the ground of newly-discovered evidence, consisting solely of the affidavit of an accomplice to the effect that the testimony given by him upon the trial was false, will not be disturbed on appeal.

3. SAME—PREMEDITATED HOMICIDE—DEGREE OF CRIME.
   One who induces another, by promise of reward, to lie in wait and commit homicide, is guilty of murder in the first degree, and a jury, in passing upon his guilt, is properly limited to the consideration of that offense.

Error to Gladwin; Sharpe, J. Submitted May 2, 1899. Decided July 5, 1899.

Benjamin C. Nunn was convicted of murder in the first degree, and sentenced to imprisonment for life in the state prison at Jackson. Affirmed.

Sumner Collins, for appellant.

Guy E. Smith, Prosecuting Attorney, for the people.

LONG, J. Respondent was convicted of murder in the first degree. The information charged in one count that one Richard Roy Nunn feloniously, willfully, and of his malice aforethought did kill and murder one Curtis Wright, and that Benjamin C. Nunn, the respondent, though not present, did aid and abet in the commission of the crime.

Richard Roy Nunn is the son of respondent. On the trial this son testified that his father, about a week before the shooting of Wright, promised him that, if he would

kill Wright, he would give him half of certain money he claimed he had in Canada, which he was then going after; that his father went from home, and on July 10th he (the witness) went over to Wright's, entered the chicken-house, took some chickens, and put them in a bag he had with him; that one of the chickens made a noise, when Wright and his wife came out with a dog; that he lay down in the grass, but the dog followed, and barked at him, when he fired one shot at the dog; that Wright then ran towards him, and he fired the other shot at him. Wright died from this second shot. The witness testified, further, that he went there that night to shoot Wright, because he was asked by his father to do so. Respondent denied this story, and testified that he knew nothing of the killing of Wright; that he did not advise it; and that he had no talk with his son about it. Respondent was convicted, and sentenced to the state prison for life. A motion for a new trial was subsequently made in the case, claiming:

1. That the verdict was against the weight of evidence.
2. That the testimony of Richard Roy Nunn given on the trial was false and perjured, as he himself admits, and that without his testimony there was no evidence of respondent's guilt.
3. That there is newly-discovered evidence.

This motion was denied by the court below, and the proceedings for such new trial are incorporated in the bill of exceptions.

It is contended here that the respondent was convicted upon the uncorroborated testimony of Richard Roy Nunn, upon the theory that respondent was an accessory before the commission of the crime, and a conspirator with him in its accomplishment, and that, under such circumstances, the conviction should be set aside. It is settled in this State that a person charged with a crime may be convicted upon the evidence of an accomplice, without any corroboration or confirmation of such testimony from other sources. *People* v. *Gallagher*, 75 Mich. 512, and

cases there cited. There were some corroborating circumstances, however, in this case.

The charge of the court was fair, and fully protected all the rights of the respondent. The court charged the jury that:

"The respondent has pleaded not guilty to the information, and the presumption of law falls on him all through this case that he is innocent until he is proven guilty. He does not have to establish his innocence; the people have to establish his guilt. The burden of proof is on the people all the way. They have to satisfy your minds beyond any reasonable doubt, by the evidence which they have produced before you for your consideration, of the guilt of the respondent. If, after you have considered the testimony in this case, and viewed it in connection with the surrounding circumstances, you can say, in your own minds, you have a reasonable doubt as to whether or not the respondent is guilty, then it is your duty to acquit him; he is entitled to the benefit of that doubt. On the other hand, after you have considered the evidence, if no such doubt exists, it is your duty, as honest, intelligent, conscientious jurors, to say by your verdict that he is guilty. * * *

"Now, there has been considerable said by counsel on both sides as to the weight which the jury in this case should give to the testimony of Richard Roy Nunn, and it may be somewhat difficult for me to lay down any principles of law governing that question for you. It is not my province and I wish to say to you that you must not form any opinion of the facts in this case from anything I may say to you. You must not form any idea that I think the facts are established one way or the other. You are the sole judges of the facts, and, if anything I should say should intimate to you how you might think I felt as to the facts, you are to disregard that in making up your verdict. You have a right to follow the directions of the court as to the matters of law, but you are to be in no way guided by any impressions you may have formed as to the court's opinion of the questions of fact. Now, the fact that this young man, by his own admissions upon the stand, is a bad boy; or the fact that he has told stories which are untrue before this relative to this same offense and his connection with it; the fact that he has been in the habit of stealing, and perhaps committing other crimes,

—are things which you are to weigh carefully and consider in giving credit to his testimony. You have to consider the several stories that he has told, and you have a right to think and reason out in your own minds, if you can, what, if any, motive he had in telling these several stories. And in that way you must reason out and satisfy your own minds as to which of these stories is probably true. It is only important in that you must determine as to whether or not the story that he has told upon the witness stand in this trial, and which he now insists is true, is, as a matter of fact, true. If, after you have considered his life and character, the stories he has told, and all the circumstances surrounding his connection with this affair, you honestly and conscientiously believe the story that he has told here of his father's connection with this crime is true, then it is your duty to believe it, and your verdict must be governed by it. * * *

"If you find that Roy Nunn and George Martell, or any other person or persons, went to Mr. Wright's for the purpose of stealing poultry, and that the killing of Mr. Wright was simply to prevent identification or capture and personal injury to themselves, then Mr. Nunn is not guilty.

"The testimony of an accessory in a crime should be received with extreme caution, and every possible motive for falsehood should be taken into consideration as affecting his credibility. If you cannot believe the testimony of Roy Nunn fully and freely,—that is, if you have any reasonable doubt of his story being true,—you have no right to convict the respondent. * * *

"Now, this is an important case,—important to the people and important to the respondent. The people of this county are interested in seeing to it that no man who has been guilty of the offense such as the respondent is here charged with should be allowed at liberty. It is important to the respondent, in that no man who is innocent of the crime should be punished or convicted of that crime. Thus, you can see that you have an important and solemn duty to perform in this case,—the duty of determining the guilt or innocence of the accused. You must approach the consideration of the case with the careful, honest, intelligent consideration such as jurors should give to matters of such importance. Your sympathies should not enter into the consideration of the matter. It is the duty of the court and the duty of the jury, in this

case, to weigh out and administer to this respondent justice, and your verdict should be founded along that line. It should not be guided by sympathy, or should not be guided by revenge. The fact that the deceased, Mr. Wright, was foully murdered, is not any reason this man should be convicted unless he is guilty. All such sentiment you are to leave behind you when you enter the jury-room to consider of your verdict in this case, and, as honest, intelligent citizens of this county, you should, under the instructions I have given you, find your verdict from the evidence."

Counsel for respondent contends that if the shooting was done by Richard Roy Nunn for the purpose of aiding his escape, and not in furtherance of the original design entered into between himself and his father, respondent could not be convicted. The court covered that entire question in his charge.

The newly-discovered evidence consists principally of the affidavit of Richard Roy Nunn, which was read on the motion for new trial. It was made since his confinement in the state prison, and in it he states that his testimony given on the trial of the respondent was false in every particular, so far as it inculpated his father in the commission of the crime, and he also states that George Martell went with him on the evening in question, and that Martell carried the gun and did the shooting. This affidavit was fully considered by the court below, and the motion for new trial was denied. That court had seen the witnesses upon the trial and heard their testimony. He saw and heard the testimony given by Richard Roy Nunn, and the finding of the court in the refusal of the motion has great weight with us in determining the question. That court was in better position to determine the truth or falsity of that affidavit than we are. The affidavit is not supported by any other circumstance than the bald statement of the affiant that his father is not guilty, though on the witness stand, and subject to severe cross-examination, he told the story of his father's complicity in the crime.

It is further contended that the court was in error in not directing the jury that they might render a verdict for a lesser offense than murder in the first degree. There was no error in this. If the respondent was guilty at all, it was of murder in the first degree, and nothing short of that. The jury were left to determine his guilt or innocence, and the court properly instructed them that, if they found him guilty, it must be of murder in the first degree. *People* v. *Repke*, 103 Mich. 459.

We are satisfied that justice has been done in the premises, and that the court below was not in error in refusing the new trial. The conviction must be affirmed.

The other Justices concurred.

THOMAS *v.* AUDITOR GENERAL.

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1. TAXES—SETTING ASIDE SALE—RELIANCE OF OWNER ON PRIOR DECREE.
   A tax sale will be set aside at the suit of a landowner who had no actual notice of the proceedings, and who had previously obtained, in a court of competent jurisdiction, what he believed to be a valid decree setting aside the tax.

2. SAME—EQUITY PRACTICE—PARTIES.
   Owners of distinct parcels of land affected by the same tax may join in a bill to set it aside as invalid.

3. SAME.
   The auditor general is not a necessary party to a bill to set aside a township tax.

Appeal from Gogebic; Haire, J. Submitted April 18, 1899. Decided July 5, 1899.

Petition by Samuel Thomas and John W. Sterling against Roscoe D. Dix, auditor general, John R. Moore,

and Charles E. Miller, prosecuting attorney, to set aside a tax sale. From a decree for petitioners, defendant Moore appeals. Affirmed.

M. J. Sherwood and *A. E. Miller*, for petitioners.

Frank F. Kutts and *Charles M. Humphrey*, for appellant.

LONG, J. The land in controversy, situated in the township of Bessemer, county of Gogebic, was assessed in the year 1892 for certain state, county, township, highway, school, "old highway," and other taxes; and, while the roll was still in the hands of the township treasurer, the taxes were all paid, except one-half of the highway tax, and the so-called "old highway" tax. Subsequently the lands were returned delinquent for this unpaid one-half of the highway and the old highway tax. In June, 1894, the owners of land in this township, who had all paid in the same way all taxes but these two, joined in a bill against the township, asking that the one-half of this highway tax and the old highway tax for the year 1892 be decreed to be illegal and void, and the lands freed from the lien of these taxes, and the cloud created thereby removed. The appearance of the township was entered by solicitor, a copy of the bill served upon him, and, no answer being made by the township, its default was taken, and a decree rendered on August 16, 1894, as prayed for in the bill. The auditor general was not made a party to this proceeding. It appears that these lands were returned delinquent for these taxes of 1892, and in July, 1894, the auditor general filed his petition for the sale of the lands. The order on the petition fixed the time for hearing as of August 27th, which was 11 days after the decree of the circuit court declaring the taxes illegal and void. No appeal had been taken from that decree. The decree on the auditor general's petition was rendered September 28, 1894. In December, 1894, the land in controversy was sold under the auditor general's proceedings,

bid in by the State, and on March 22, 1897, purchased by, and deeded to, defendant Moore by the auditor general. It was found by the court below that the petitioners here, who are the owners of the land in controversy, had no knowledge of the sale of the lands in the proceedings by the auditor general, or that defendant Moore claimed any title to them, until May 17, 1897, when an agent of petitioners accidentally noticed the publication of an order on a bill filed by defendant Moore to quiet title. On ascertaining this, the petitioners presented a certified copy of the decree of the circuit court of August 16, 1894, to the auditor general, who on July 20, 1897, issued a certificate of error canceling the tax deed to the lands held by defendant Moore. Petitioners then filed this petition. Defendant Moore appeared, proofs were taken, and the court below made a decree setting aside the tax deed, and vacating the decree entered on the auditor general's petition. Defendant Moore appeals.

While many questions are raised and discussed by the defendant, but two or three need be noticed. The petitioners had prosecuted their bill to have these taxes declared void to a decree in the circuit court in chancery in Gogebic county. The defendant township appeared in that case, and no appeal was taken. The petitioners rested upon their supposed rights under that decree. The defendant contends that the proceedings under that decree and the decree itself are void on their face. The proceedings were had before a court of competent jurisdiction, and that court, by its decree, held that the taxes were void. The owners of the land rested upon that. No actual notice was given to them of the filing of the auditor general's petition, or of any of the proceedings taken thereunder. It is true that the usual notice was published upon the filing of the auditor general's petition, but the owners of the land, having taken the proceedings to set the taxes aside, had no reason to anticipate that any such proceedings would be taken, as the decree was not appealed from. They had paid all the taxes they considered valid, and had a right to suppose

that the whole controversy in reference to the taxes was ended. The case falls in principle within the cases of *Hand* v. *Auditor General*, 112 Mich. 597; *Hough* v. *Auditor General*, 116 Mich. 663; *Carpenter* v. *Jones*, 117 Mich. 91; *Kneeland* v. *Wood*, Id. 174. In those cases it appeared that the parties had made every proper effort to pay the taxes assessed, and were misled by the officers having the matter in charge. In the present case, the parties had taken the steps which the law points out to rid themselves of an invalid tax, and free the land from the incumbrance thereof. They rested upon what they thought to be a valid and proper decree. The township had notice of this proceeding, and appeared therein. These were township taxes solely, and no other governmental subdivision had any interest in them. The state and county taxes had been paid for that year. We shall, however, refer briefly to the contentions of defendant.

It is claimed that, in the bill against the township, there was a misjoinder of complainants. The complainants had each paid all taxes on their lands except one-half of the highway tax and the old highway tax. They each had the same interest in the proceedings. They were each similarly affected by what they claimed to be the illegal tax. The tax was assessed at the same time on each parcel, and under the same statute, by the same assessing officer. It is settled in this State, under such circumstances, that the parties may join as complainants in a bill to set aside illegal taxes. *Scofield* v. *City of Lansing*, 17 Mich. 437; *Zabel* v. *Harshman*, 68 Mich. 270; *Turner* v. *Hart*, 71 Mich. 139.

It is also contended that the auditor general was a necessary party to the proceedings against the township to set aside these taxes. This contention cannot be sustained. The township taxes, as soon as assessed, became a debt due to the township, and the county treasurer, in making the sale, bid in the lands "in the name of the State, for the State, county, and township, in proportion to the taxes, interest, and charges due each."

These last propositions, however, have no significance in the present case. We are satisfied to rest our ruling in affirming the decree below upon the proposition that the petitioners had the right, under the circumstances, to rely upon the decree setting aside the taxes.

The decree of the court below must be affirmed, with costs to the complainants.

The other Justices concurred.

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CHITTENDEN v. CITY OF LANSING.

MUNICIPAL CORPORATIONS—CONTRACTS—AUTHORITY OF BOARD OF PUBLIC WORKS—ALTERATIONS.

Under the charter of the city of Lansing, the common council determines when a public building shall be erected. The board of public works then prepares plans and specifications, and submits them, with an estimate of the cost, to the council. Bids are advertised for, and are reported by the board, with recommendations, to the council, which alone may authorize the execution of a contract. *Held*, that a provision in such a contract that, in case of alterations, a fair valuation of the work added or omitted should be made by the board of public works, and the sum agreed to be paid for the work, according to the original specifications, increased or diminished in accordance therewith, gave the board no authority to bind the city for alterations in an amount in excess of the contract price.

Error to Ingham; Person, J. Submitted May 4, 1899. Decided July 5, 1899.

Assumpsit by Charles M. Chittenden against the city of Lansing for extra material furnished under a building contract. From a judgment for defendant, plaintiff brings error. Affirmed.

Kilbourne & Harris, for appellant.

Charles B. Collingwood, City Attorney, for appellee.

HOOKER, J. The plaintiff was the successful bidder for the contract for the erection of the city hall at Lansing. According to the specifications, the bidders named the stone from which they respectively proposed to build the face of the walls, and the plaintiff named "Blue Amherst." His bid also contained a tender of "Blue Amherst Select" at an increased cost of $2,160. After his bid was accepted, the board of public works directed him to substitute Blue Amherst Select for Blue Amherst stone, and he at once changed his order in compliance therewith. The council repudiated this action without delay. The building was completed and accepted, and the contract price of $108,000 was paid to the plaintiff, but the council refused to pay the sum of $2,160 for the substitution of Blue Amherst Select stone, denying the authority of the board of public works to make the change and bind the city therefor, and claiming that the council did not consent thereto. The brief of counsel for the plaintiff states that the committee of the board of public works recommended the acceptance of the bid of the plaintiff on March 25, 1895, and that the report was adopted by the board, and its action was ratified and confirmed by the council, on the same day. Counsel say that the specifications required alternative bids on stone, and that the contract executed by the board of public works on behalf of the city contained paragraph 3 of the specifications, reading as follows, viz.:

"(3) Should any alterations be required in the work shown or described by the drawings or specifications, a fair and reasonable valuation of the work added or omitted shall be made by the board of public works, and the sum herein agreed to be paid for the work, according to the original specifications, shall be increased or diminished, as the case may be. In case such valuation is not agreed to, the contractor shall proceed with the alteration, upon the written order of the said board, and the valuation of the work added or omitted shall be referred to three (3)

arbitrators (no one of whom shall have been personally connected with the work to which these presents refer), to be appointed as follows."

Their contention appears to be that this paragraph authorized the board of public works to increase the expenditure by changes in the specifications. But we agree with the learned circuit judge that this cannot be true. Under the charter the city council determines whether it will build a public building. The board then procures plans and specifications, and reports them, with an estimate of cost, to the council. Bids are advertised for, but before a contract can be made it must be authorized by the council. In this case the council authorized a contract to be made binding it to pay $108,000 for the construction of a building according to certain plans and specifications. The board of public works cannot bind the city by an agreement to increase the contract price. We are not cited to any case upholding such power. If this arrangement binds the city, then there is no limit to the power of the board to make changes in material and construction at the public expense. We feel that this is a hard case, and that there is a moral obligation on the part of the council to pay for this extra which the public would be slow to forgive a private person for disregarding; but we have not the power to give relief.

The judgment is affirmed.

The other Justices concurred.

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GLOVER *v.* RADFORD.[1]

1. ACTIONS—FRAUD—ELECTION OF COUNTS.
   It is error to require an election of counts in an action based upon fraudulent representations in the sale of corporate stock, where one count is framed on the theory of plaintiff's rescission on learning of the fraud, and his resulting right to recover the purchase price, and the other, designed to meet a possible failure to establish rescission, seeks damages for the fraud.

2. RESCISSION OF CONTRACT—LACHES—EVIDENCE.
   In an action to recover the price paid for corporate stock, based upon a rescission for fraudulent representations in its sale, it was error to exclude testimony, offered to excuse apparent laches, of one who was elected director subsequent to the sale to plaintiff, as to the steps that led to the discovery of the fraud.

Error to Wayne; Frazer, J. Submitted May 9, 1899. Decided July 5, 1899.

Case by Henry P. Glover against George W. Radford, James W. Fales, and Alexander McVittie for alleged false representations on the sale of corporate stock. From a judgment for defendants, plaintiff brings error. Reversed.

Fred A. Baker, for appellant.

E. G. Stevenson and *T. E. Tarsney*, for appellees.

HOOKER, J. The defendants purchased, for $30,000 in cash, the exclusive right to the Dr. Keeley Gold Cure for the State of Michigan. With two others, they organized a corporation called the Keeley Institute, with $50,000 capital stock in 2,000 shares. The articles stated that

[1] Rehearing denied November 7, 1899.

$30,000 was paid in. It began business at Northville, December 2, 1891, where it was continued until May, 1892, when it was removed to Ypsilanti. Its only substantial asset was the right to use the Keeley cure in Michigan. One Van Cleve, representing the plaintiff and other residents of Ypsilanti, had some negotiations with the defendants, who at that time controlled, if they did not own, all of the stock of the corporation, with a view to procuring an interest in the concern and having the business removed to Ypsilanti; and such an arrangement was made whereby amended articles were filed increasing the stock to $250,000, of which the Ypsilanti parties subscribed $50,000. The evidence shows that the defendants sold one-fifth interest in the concern for $50,000, and that this consideration went to them; and we think that the record shows that the increase of capital stock to $250,000 was with the assent of plaintiff, and the knowledge on his part that only $30,000 had been paid in. The business was not successful at Ypsilanti. This action was brought to recover the consideration paid, or damages for deceit on the part of defendants in the sale.

The claim of plaintiff's attorney is that the purchase by his client was induced by the representation that the concern was earning 12 per cent. upon $250,000, that this was not true, and that the plaintiff did not discover the fraud until a short time before the action was commenced, and that he then sought to rescind, but his offer was refused. He then brought this action, joining counts based upon rescission and upon breach of the contract. The court held that the counts were inconsistent, and required the plaintiff to elect which theory he would stand upon, and counsel chose rescission, taking exception to the ruling. Counsel asked the witness Coombs what he did, after being elected upon the board of directors in March, 1893, in regard to finding the situation of the company, stating that the answer would bear upon the question "when the fraud was discovered." The court excluded the answer against the plaintiff's exception.

These are the most important questions in the case, and we think there is error in both. There can be no doubt that the two theories were inconsistent in a sense, because one is based upon the continuation of the contract and the other upon its rescission. The plaintiff attempted to rescind by tendering the stock and demanding the money that he paid for it. If there was fraud, he had the right to do this, provided he had not waived it and could put the defendants *in statu quo*. But he took the chance of being unable to convince the court and jury that he had not waived his right to rescind, and, if he should fail in this, he could not recover if he relied upon the single count, although the jury might find that he had been defrauded. If there was fraud, and he did not succeed in rescinding the contract, he certainly ought to have the right to recover damages for the injury he had suffered, if any. Had defendants consented to rescission, and acted upon it, the case would have been different, for there might then have been an estoppel; but there is nothing in the nature of an estoppel here. We have frequently held that one is bound by his choice between inconsistent rights or remedies; but, where there is no estoppel, this cannot usually be, unless the person really had a right of election. In this case the plaintiff claimed that he had a right to rescind, and tried to rescind, but he did not succeed, either because he really had no such right or because he failed to seasonably assert it. He supposed that he had a remedy growing out of rescission, but it turned out that he was mistaken, and this left him the right to recover for the fraud, if there was fraud. This subject was discussed in *McLaughlin* v. *Austin*, 104 Mich. 491; *Chaddock* v. *Tabor*, 115 Mich. 33; *Sullivan* v. *Ross' Estate*, 113 Mich. 316. It is a common practice to permit the joining of counts which state the cause of action differently, to prevent a possible variance between the declaration and the proof. The plaintiff should not have been required to elect between the counts of his declaration.

The case being tried upon the theory of rescission, it

was competent for the plaintiff to offer testimony to explain the delay in commencing the suit and excusing laches. The testimony of Mr. Coombs was offered for that purpose. Being excluded, we cannot tell whether it would have sustained the claim of counsel or not, but we think that he should have been permitted to introduce such proof.

We think a discussion of other questions raised unnecessary. The judgment is reversed, and a new trial ordered.

The other Justices concurred.

ADAMS v. NOBLE.

PARTY WALLS—COVENANTS RUNNING WITH LAND.

A party-wall agreement whereby the first party is given the right to build the wall at his own expense, and the second party, his heirs, executors, administrators, or assigns, is given the right to connect with the wall at any time upon payment to the first party, his heirs, executors, administrators, or assigns, of one-half the cost, the parties then to become joint owners, and which expressly provides that the undertaking shall be perpetual, and shall create covenants running with the land, entitles the successor in title of the first party to the payment made on the use of the wall by the second party or his assigns, as against one who claims under an assignment of the agreement.

Appeal from Kent; Adsit, J. Submitted May 4, 1899. Decided July 5, 1899.

Bill of interpleader by William M. Adams and George W. Hart against Albert D. Noble, Mary A. Kendall, and Abbie A. Weller, to determine the title to a fund arising from a party-wall agreement. From a decree for defendant Kendall, defendant Noble appeals. Affirmed.

T. J. O'Brien and *James H. Campbell*, for appellant.

Champlin & Stone, for defendant Kendall.

MOORE, J. In August, 1875, a contract was made between Peter Kantenberger and Gerret Brusse, with the following provisions:

"*Whereas*, the said Kantenberger is seised and possessed in fee of that certain piece of land, situate in said city, known and described as lot No. three (3) in block No. one (1) of the original Converse plat of a subdivision of said city, which plat is now vacated, and said Brusse is seised and possessed in fee of that other piece of land adjoining and lying along the westerly side of said first parcel, and being lot No. four (4) of said block No. one (1) of said vacated plat, said premises being on the north side of Grand river, fronting on West Bridge street, and between West Water (or Front) street and Grand river; and

"*Whereas*, the said Brusse is about building on his aforesaid lot a brick building, the easterly wall whereof it is intended shall be not less than sixteen inches thick, and shall rest the one-half its width on the west margin of said Kantenberger land, and the other half its width on the east margin of the said Brusse land:

"*Now, therefore*, the aforesaid parties of the first and second part agree to and with each other as follows:

"1. That said Brusse shall have the right, at his own present charge and expense, to place, erect, keep, and maintain said wall one-half its width on the west margin of the said lot No. three (3) of block No. one (1) aforesaid.

"2. That said Kantenberger, his heirs, executors, administrators, or assigns, may at any time hereafter, whenever he or they may see fit, make connection to said party wall, and use the same in the construction of any building he or they may erect on said lot No. three (3), so that from thenceforward such wall shall be and become the division wall between the buildings erected on said lots three and four (3 and 4), and shall belong to, and be kept and maintained by, the owners of such buildings at their equal expense: *Provided*, always, and the above second clause, and the rights thereby conferred, shall depend and be contingent upon the said Kantenberger, his heirs, executors, administrators, or assigns, paying or causing to be paid to the said

Brusse, his heirs, executors, administrators, or assigns, the one-half part of the original cost or expense of said wall, for material and construction, to be arrived at either by actual statement of the same or by appraisal of competent persons. And until such cost or expense is actually paid to the said party of the second part, his legal representatives, heirs, or assigns, the said party of the first part shall not make any attachment to said wall, or use the same in any manner or for any purpose, as a party wall or otherwise; but, when such payment is duly made by said party of the first part, his legal representatives, heirs, or assigns, then the said wall, and the whole thereof, shall be and become the joint property of the owners of the buildings which it supports and divides.

"*Further*, the parties hereto, each to the other, hereby agree that the aforesaid agreement and undertaking shall be perpetual, and shall create covenants running with the lands described above, and shall be and remain forever binding upon said parties, and their heirs and assigns, forever."

This case depends upon the construction to be given to this contract. The owner of lot 3 has recently used the party wall, and is ready to pay for so doing. Mr. Noble claims he is entitled to the fund, for the reason that he has an assignment of the contract in relation to the wall. Mrs. Kendall claims she is entitled to it, because by *mesne* conveyances she has become the owner of lot 4. The court below found in favor of Mrs. Kendall. From that decree Mr. Noble appeals. His solicitors say in their brief that there is only one point in the case; that there is no statute of this State, nor reported decision of this court, on this point; that—

"The rule of law upon which we rely is as follows: An agreement for a party wall to be built by one party, half the cost to be paid to him by the other party whenever he should desire to use it, is personal; and such payment cannot be enforced by a grantee of the party who built the wall, though the agreement also provided that it should be construed as a covenant running with the land."

They cite in support of that proposition *Sebald* v. *Mulholland*, 155 N. Y. 455; *Voight* v. *Wallace*, 179 Pa. St.

520; *Weld* v. *Nichols*, 17 Pick. 538; *Joy* v. *Savings Bank*, 115 Mass. 60; *Gibson* v. *Holden*, 115 Ill. 199 (56 Am. Rep. 146); *Behrens* v. *Hoxie*, 26 Ill. App. 417; *Bloch* v. *Isham*, 28 Ind. 37 (92 Am. Dec. 287); 1 Jones, Real Prop. § 800; *Parsons* v. *Loan Ass'n*, 44 W. Va. 335; and other cases.

It is the claim of the solicitors for Mrs. Kendall—

"1. That the covenant to pay and to receive the money paid is, under the agreement, a covenant running with the land, and passes to the grantees by deed of the covenantors.

"2. That, under this contract, the title of the whole wall was vested in Mrs. Kendall until payment by the grantees of Kantenberger, and, when such payment is made to Mrs. Kendall, there is, by force of the covenant, a constructive sale by her of the undivided half of the whole wall, which then becomes the joint property of the owners of the buildings which it supports and divides."

To the last-named proposition they cite *Gibson* v. *Holden*, 115 Ill. 207 (56 Am. Rep. 146). To the first proposition they cite *Mott* v. *Oppenheimer*, 135 N. Y. 312 (17 L. R. A. 409); *Weyman's Ex'rs* v. *Ringold*, 1 Bradf. Sur. 40; *King* v. *Wight*, 155 Mass. 444; *Richardson* v. *Tobey*, 121 Mass. 457 (23 Am. Rep. 283); *Maine* v. *Cumston*, 98 Mass. 317; *Tomblin* v. *Fish*, 18 Ill. App. 439; *Roche* v. *Ullman*, 104 Ill. 11; *National Life Ins. Co.* v. *Lee*, (Minn.) 77 N. W. 794; and many other cases.

It is insisted by the solicitors for Mrs. Kendall that a distinction is to be made between the cases where the covenant to reimburse is personal to the party who built the wall, and those where the covenant to reimburse is by one party, his heirs, executors, administrators, or assigns, to the other party, his heirs, executors, administrators, or assigns, and that this contract belongs to the last-named class. It is urged that, when this distinction is borne in mind, the conflict between the authorities is more apparent than real.

It is difficult to harmonize all the authorities, but we think they may fairly be divided into two classes,—one class holding that the covenant for payment is personal,

and does not run with the land, when it is apparent from the contract that the payment should be made to the party building the wall, and there are no words indicating that the right to receive payment shall pass to his assigns; the second class holding that the covenant runs with the land, and passes to the purchaser or assignee, when the contract evinces such intention, and where the language used is between the parties and their assigns, and the contract declares the covenant shall be perpetual, and binding upon the parties and their heirs and assigns. 1 Jones, Real Prop. § 799, reads as follows:

"A party-wall agreement in the usual form between adjoining landowners runs with the land. Thus, an agreement under seal between adjoining lot-owners, for themselves, their heirs and assigns, acknowledged and recorded, and providing that either party may build a party wall, one-half on the land of each, and that, whenever the other party uses the wall so built, he or she shall pay one-half the cost of its erection, is a covenant running with each lot. Such an agreement creates an easement of use and support in favor of each lot-owner and his successors in title in the half of the wall which stood on the other lot, and in the land under the same. Each lot of land becomes entitled, therefore, to the benefits, and subject to the burdens, arising from the covenants contained in the agreement, and relating to the erection and maintenance of the wall. They inhere in and belong to it."

In this case Brusse was given the right, at his own cost and expense, to erect one-half the wall on lot 3. When the wall was erected, the right to have the wall remain there could not be withdrawn, and, though it was on Mr. Kantenberger's land, the latter, his heirs, executors, and assigns, could none of them use it until he or they had paid Brusse, his heirs, executors, and assigns, one-half of the original cost of the whole wall. This they had a right to do whenever they desired to make such use of the wall, and that right could be enforced when the money was paid, even though not asserted until long after Brusse was dead. The contract then provided that, when the money was so paid, the said wall, and the whole thereof, should become

the joint property of the owners of the buildings which it helps to support; that the agreement should be perpetual, creating covenants running with the land, and binding upon the parties, their heirs and assigns, forever. We think this contract falls within the second class mentioned above, and the decree is affirmed, with costs.

The other Justices concurred.

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ATTORNEY GENERAL, *ex rel.* BARBOUR, *v.* PINGREE.

1. MUNICIPAL CORPORATIONS — POWER TO OPERATE STREET RAILWAYS—CONSTITUTIONAL LIMITATIONS—INTERNAL IMPROVEMENTS.

   Act No. 338, Local Acts 1899, purporting to empower a commission, to be appointed by the common council of the city of Detroit, to acquire for the city, and maintain and operate in its behalf, the system of street railways which lies partly within and partly without the corporate limits, and comprises over 140 miles of track, is void under article 14, § 9, of the Constitution, prohibiting the State from being a party to or interested in any work of internal improvement, the operations contemplated by the act being of sufficient magnitude to constitute internal improvements, and the legislature being powerless to authorize the municipality to do what the State could not itself do.

2. SAME — OWNERSHIP OF TRACKS ENTIRELY WITHIN CORPORATE LIMITS.

   Whether municipal ownership of tracks entirely within the corporate limits might be authorized under the Constitution, —*quære.*

Quo warranto by Horace M. Oren, attorney general, on the relation of George H. Barbour and others, against Hazen S. Pingree, Elliott G. Stevenson, and Carl E. Schmidt, to determine the validity of the act creating the Detroit Street-Railway Commission. Submitted May 5, 1899. Judgment of ouster entered July 5, 1899.

Elisha A. Fraser and *Jasper C. Gates* (*Charles A. Kent*, *Hinton E. Spalding*, *Otto Kirchner*, and *Elbridge F. Bacon*, of counsel), for relators.

John J. Speed (*Henry M. Duffield*, *Fred A. Baker*, *John C. Donnelly*, and *Charles D. Joslyn*, of counsel), for respondents.

MOORE, J. This is a proceeding brought to test the validity of an act approved March 24, 1899, entitled "An act to authorize the city of Detroit to construct, acquire, maintain, and operate street railways, and to construct extensions thereof." Act No. 338, Local Acts 1899. The provisions of the act material to this discussion are as follows:

"*The people of the State of Michigan enact:*

"SECTION 1. That the common council of the city of Detroit be, and is hereby, authorized and empowered to appoint by resolution, at any time within the next 20 years, three persons, electors and freeholders of said city, who shall constitute a board of commissioners, to be known as the Detroit Street-Railway Commission. One of said commissioners shall be appointed for the term of two years, one for a term of four years, and one for a term of six years. Their successors shall be persons of like qualifications, and shall be appointed by the common council on the nomination of the mayor of said city, at the expiration of said term, for the term of six years. Vacancies shall be filled by appointment by the mayor, and persons so appointed shall hold office for the unexpired term. All members of said commission shall hold their offices, respectively, until their successors are appointed and qualified. Any person otherwise eligible may be appointed as aforesaid, notwithstanding he may hold other office, excepting that of alderman."

"SEC. 5. The said commission may in their discretion, and upon such terms and conditions as they may deem advisable for the interests of said city, acquire, by deed, lease, or other satisfactory conveyance from the company or companies owning the same to said city, any street railway or railways existing at the time of the passage of this act, and lying wholly within or partly within and

partly without said city, operated by the same company or companies, together with the property, assets, rights, privileges, etc., owned and used in connection with or pertaining to said railways, including rights to routes belonging to such company or companies upon which a railway shall not be in operation, and may operate and maintain said street railways so acquired, for the carriage of passengers and freight for hire.

"SEC. 6. Said commission may provide for the payment of rentals or other obligations, and may provide for a sinking fund for the discharge of any liens upon any of the property acquired by them, and may pledge the earnings and receipts of said railways for these purposes, and may use the earnings in operating and maintaining the same, and may use any surplus of earnings in acquiring any bonds secured by lien upon the property so acquired, or may use such surplus in making needed extensions or betterments to said railways. Said commission shall have no power to incur any obligation on behalf of said city, except such as shall be chargeable only upon the railways and property so acquired, and the earnings and increments and extensions thereof.

"SEC. 7. The said commission shall manage, maintain, and operate any street railway so acquired or extended, and may purchase from the revenues thereof all lands, tracks, cars, motors, dynamos, machinery, equipment, tools, and furniture necessary and useful therefor to be used in connection therewith, and may establish rates of fare for the carriage of passengers and freight, provided the rates of fare shall not exceed those now charged by the Detroit Citizens' Street-Railway Company. In operating any railway so acquired, the commission may exercise such other general powers as are possessed or exercised by boards of directors of corporations organized under the laws of this State providing for incorporation of street-railway companies.

"SEC. 8. After acquiring any railway or railways pursuant to section five hereof, said commission shall have the power to enter into agreements with any street-railway company, having a line of street railway, for or in relation to the exchange of tickets and transfers, and for the carriage of passengers, use of tracks, or operation of cars: *Provided*, that such agreements shall not be inconsistent with or in violation of the terms of the conveyance or contract mentioned in section five hereof."

"SEC. 11. All causes of action relating to or arising out of the owning, operating, or control of any street railway constructed or acquired by said commission shall be prosecuted by or against said commission by the name herein designated, and said commission shall carry into effect, pay, or discharge any order, decree, or judgment, in any suit or proceeding to which it shall be a party, in like manner as if the same were prosecuted or defended by said city: *Provided*, that no action for negligent injury arising out of the operation of said railways shall be maintained unless it be commenced within one year from the time when the injury was received, nor unless notice shall be given in writing, within thirty days from the time of such injury, to the said commission, its secretary or attorney, of the time, place, and circumstances of such injury, and of the nature thereof.

"SEC. 12. Nothing in this act shall be construed as granting any franchise to any of the existing street-railway companies, or as extending the life of any existing franchise, or as implying any franchise rights in case of reversion of the property to the grantors or their successors; and said commission is hereby expressly prohibited from granting or extending the life of any franchise under any of the powers conferred upon it by this act."

After the passage of the act, the common council, at an adjourned special meeting, appointed the respondents as members of the commission, and they at once entered into negotiations for the purchase of the various street railways in Detroit.

The case is one of vast importance, not only because of the magnitude of the interests involved, but also because the law proposes an entirely new departure in this country, in relation to the ownership and management of one of the most important interests in the business world. We are not favored with precedents which will aid us, because, with all of their zeal and ability, counsel have not been able to find where an undertaking just like this has been entered upon. We have, however, had the benefit, not only of well-prepared written briefs, but of such oral arguments as the learned counsel, who have given the questions involved special thought and investigation, cared to

make. We have endeavored to give the case such attention as its importance deserves.

It is claimed on the part of the attorney general that the act is unconstitutional and void for the following, among other, reasons:

"1. Because said act undertakes to confer upon the city of Detroit authority to engage in a work of internal improvement, contrary to the provisions of section 9 of article 14 of said Constitution.

"2. Because said act undertakes to confer upon a municipal corporation powers which are neither local, legislative, nor administrative, contrary to the provisions of section 38 of article 4 of said Constitution.

"3. Because said act purports to give to said Detroit Street-Railway Commission, mentioned in said act, unlimited and unrestricted power to contract debts for, and loan the credit of, said city of Detroit, contrary to the tenor and effect of section 13 of article 15 of said Constitution, which provides that the legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit.

"4. Because the powers to contract and purchase, sought to be conferred by said act upon said Detroit Street-Railway Commission, cannot be either conferred upon or exercised by said commission, under said Constitution.

"5. Because said act attempts to clothe said Detroit Street-Railway Commission with legislative powers as to street railways, and the operation and management of the same.

"6. Because said act is an unlawful interference with the rights of local self-government vested by said Constitution in the citizens of said city, in that it undertakes to take out of the control of the common council and board of estimates of said city the several matters of purely local concern above mentioned, and vest the same in the said Detroit Street-Railway Commission, which is a body the members of which hold their offices for long, appointive terms, are a law unto themselves, and are subordinate and responsible neither to said citizens nor to their representatives, in any manner or form."

Is the act contrary to section 9, art. 14, of the Constitution? The section reads as follows:

"The State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property."

It is doubtless true, as urged by counsel, that the State legislature is given a general grant of legislative power, and that its power to legislate is subject only to such limitations as are imposed thereon by the express or implied limitations contained in the Constitution of the State or the Constitution of the United States. To understand the force and effect of the provisions of our Constitution in relation to the attitude of the State towards internal improvements, it may be well to consider the experience of other States and of our own State prior to the adoption of our present Constitution. The war of 1812 demonstrated the great need of a better system of intercommunication between the various portions of the country. The condition of the highways, both land and water, was such that troops and provisions could be moved but slowly and at great expense. This was also true of the products of the country. Succeeding the war of 1812, the State of New York entered upon the construction of the Erie Canal. Its construction was doubtless of great benefit to the agricultural and commercial interests of the State, and especially to the city of New York. Other States were prompted to follow the lead of New York, and projected the digging of canals, the improvement of waterways, and the construction of railroads. Nearly all the State Constitutions adopted between 1830 and 1850 either gave the legislature permission, or made it mandatory, to "encourage internal improvements within the State." Many enterprises of this character were entered upon which were ill-advised. So many of them were undertaken, many of the States incurred obligations they were unable to meet. The rate of interest in these new countries was much higher than capital commanded in Europe. Money from there after 1830 was furnished almost without limit, to be invested in the various projects devised by the several

States. The State debts increased from $13,000,000 in 1830 to $100,000,000 in 1838. After the financial crisis of 1837 came, foreign capitalists who sought to draw out this money were unable to do so. An effort to collect these obligations proved abortive. Upon one pretext or another, many of the States repudiated their debts made for internal improvements. The States most disastrously affected were Maryland, Pennsylvania, Indiana, Illinois, Louisiana, Mississippi, and our own State. 2 Cycl. Pol. Science, 571.

For the period between 1835 until the financial panic of 1837 occurred, the State of Michigan had a wonderful growth. The opening of the Erie Canal, and the facilities for travel furnished by the Great Lakes, made it comparatively easy for the residents of New York, New Jersey, and New England who were seeking to better their condition to reach our borders. The climate was good, and the soil was fertile. The example of New York in constructing works of internal improvement was thought worthy of imitation. The Constitution adopted upon the admission of the State into the Union provided:

"Internal improvement shall be encouraged by the government of this State; and it shall be the duty of the legislature, as soon as may be, to make provision by law for ascertaining the proper objects of improvement in relation to roads, canals, and navigable waters, and it shall also be their duty to provide by law for an equal, systematic, economical application of the funds which may be appropriated to these objects." Const. 1835, art. 12, § 3.

The governor of the new State, in a message to the legislature, called its attention to its duty to act under the constitutional provision. The legislature was not slow to respond. A canal was projected from Mt. Clemens to the mouth of the Kalamazoo river, and one around the falls of the St. Mary. A number of State railroads were surveyed, and their construction entered upon. To meet the expense, the governor was authorized to borrow, upon State bonds issued for the purpose, $5,200,000. These bonds were all negotiated, though, owing to the failure of one of

the companies and one of the banks which undertook to negotiate them, the amount for which they were negotiated never found its way into the State treasury. It became evident the amount of the loan would not begin to complete the internal improvements already begun. Then came the financial panic. Bankruptcy and financial ruin were upon every hand. The State, at a great sacrifice of its property, made an arrangement with its creditors which left its credit good, but left it very badly in debt. Cooley, Hist. Mich. 279; Camp. Hist. Mich. 495.

As the result of this experience, the State had the canal at the St. Mary's river, which was afterwards taken over by the Federal Government, and is now one of the most important improvements upon the Great Lakes; a short section of a canal, which has never been of any use, except to furnish water-power to private parties; and some uncompleted railroads, which the people were glad enough to have sold to private corporations. Justice COOLEY states the situation in detail (Cooley, Hist. Mich. 289):

"The works of internal improvement still remained on the hands of the State, and in the day of its poverty and trial they were continually calling upon a depleted treasury for money to keep them in progress. But, now that the great bubble of speculation and inflation was burst, it became plain to the comprehension of the dullest that some of the State projects were wild and chimerical, and they were abandoned altogether. Such was the case with the projected canal from Mt. Clemens to the mouth of the Kalamazoo river, which it was now seen would be worthless if constructed. The only works of much promise were the Central and Southern of the three railroads, which were now very well under way. But doubts were arising in the minds of the people whether the State had been wise in undertaking the construction and management even of these,—whether it was possible for the State to do either the one or the other with the same prudence and economy as could private owners. These doubts soon matured into a settled conviction that the management of railroads was in its nature essentially a private business, and ought to be in the hands of individuals. By common consent it came to be considered that the State, in entering upon these works, had made a serious mistake; and the legislature, in an act for funding the loan bonds, invited proposals from State creditors for the purchase of the State

railroads. The times were not then propitious; but in 1846 the Central and Southern Railroads, so far as they were then constructed, were sold by the State to corporations which had been chartered for the purpose of purchasing. The aggregate price was two millions and a half,—a sum very much below what had been their cost to the State. But the people felt that the roads were well off their hands, and, as has been said by one familiar with the whole history: 'Here virtually ceased to exist all our works of internal improvement. Nothing but the *debris* of our airy castles remained, and that only to plague our recollections.' The two great railroads, when taken up by corporations, went rapidly forward to completion; and they soon became great national highways, whose utility to the State was quite equal to the highest expectations ever formed concerning them.

"Having all their bitter experience with internal improvements fresh in mind, when they formed a new Constitution, in 1850, the people resolved to put it out of the power of the legislature again to involve them in extravagant projects. And here we reach another landmark, significant in itself, but especially notable when contrasted with the provision respecting internal improvements which has already been quoted from the Constitution of 1835. In 1850 the people deemed it necessary to prohibit what in 1835 they commended, and they now provided that 'the State shall not subscribe to, or be interested in, the stock of any company, association, or corporation,' and also that 'the State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property.' These were very positive provisions, and by adopting them the people believed they had rendered it impossible that projects of doubtful wisdom and utility should be engaged in at the public cost.

"But diseases in the body politic, like those in the human system, are likely to take on new forms from time to time, and they are not to be exorcised by words or kept off by constitutional inhibitions. The mania for internal improvements at the cost of the public, when it returned 15 years later, under the administration of Gov. Crapo, took on the form of aid to railroad corporations by the several municipal bodies in the State. Such aid was being given in other States, and railroads, as a consequence,

were being constructed with a rapidity never paralleled. Michigan was lagging behind the rest of the country. Why should this be so? Every town which should subscribe to the stock of a railroad would immediately receive a full return in the enhanced value of its landed property, and would have the stock besides. This was what was commonly said and commonly believed; and the legislature, well reflecting the common desire, passed a general law under which townships and cities were to be permitted to vote aid to railroads. The railroads, under another general law, might be laid out anywhere by the projectors, at pleasure, so that monopoly in these public conveniences seemed to be effectually provided against. The governor vetoed the railroad-aid act, but the legislature passed it over his veto. The business of voting aid to railroads was soon active, and the most visionary scheme was found as likely to receive aid as any other,—perhaps more so, for more work would be done for it. Nothing is so easy as to build railroads, if it can be accomplished by dropping votes into a box. Only fossils and croakers will disturb the public mind by reminders that the sums voted must at some time be paid, and that the roads, when built, may pay nothing towards them. The State, in detail, by its corporations, was fast plunging into indebtedness, which had already reached an aggregate of several millions, when the process was arrested by a decision of the State Supreme Court that the act under which the voting had taken place was unconstitutional. The decision was a bitter disappointment to many, and the public clamor for a time was loud and earnest; but a movement to obtain an amendment to the Constitution which would permit such municipal aid to railroads was unsuccessful, and the excitement soon died out. The people had taken the 'sober second thought,' and had become convinced that municipal corporations, in their power to contract debts or to expend public moneys, should be confined closely to proper municipal purposes. And this conclusion may be taken as a third conspicuous landmark in the history of internal improvements in Michigan."

The cases referred to by Justice COOLEY were *People* v. *Township Board of Salem*, 20 Mich. 487 (4 Am. Rep. 400); *People* v. *State Treasurer*, 23 Mich. 499; and *Thomas* v. *City of Port Huron*, 27 Mich. 320.

We think it may fairly be said of the case of *People* v.

Township Board of Salem that the opinion was rendered upon the ground that the tax proposed would be levied for a private rather than a public purpose. This, however, cannot be said of the case of *People* v. *State Treasurer*. In the last-named case it was held that the construction of the railroad was an internal improvement, within the meaning of the Constitution, and that what the State could not do, it could not authorize the townships and cities to do. The language of the opinion is not susceptible of any other construction. It is very clear from what has been quoted from the history of Michigan, written by Judge COOLEY, and published in 1885, that he so construed the decisions cited. The language of the opinion is as follows:

"Our State had once before had a bitter experience of the evils of the government connecting itself with works of internal improvement. In a time of inflation and imagined prosperity, the State had contracted a large debt for the construction of a system of railroads, and the people were oppressed with heavy taxation in consequence. Moreover, for a portion of this debt they had not received what they bargained for, and they did not recognize their legal or moral obligation to pay it. The good name and fame of the State suffered in consequence. The result of it all was that a settled conviction fastened itself upon the minds of our people that works of internal improvement should be private enterprises; that it was not within the proper province of government to connect itself with their construction or management; and that an imperative State policy demanded that no more burdens should be imposed upon the people by State authority for any such purpose. Under this conviction they incorporated in the Constitution of 1850, under the significant title of 'Finance and Taxation,' several provisions expressly prohibiting the State from being a party to, or interested in, any work of internal improvement, or engaged in carrying on any such work, except in the expenditure of grants made to it, and also from subscribing to, or being interested in, the stock of any company, association, or corporation, or loaning its credit in aid of any person, association, or corporation. Article 14, §§ 7–9. All these provisions were incorporated by the people in the Constitution as precautions against

injudicious action by themselves, if in another time of inflation and excitement they should be tempted to incur the like burdensome taxation in order to accomplish public improvements in cases where they were not content to wait the result of private enterprise. The people meant to erect such effectual barriers that, if the temptation should return, the means of inflicting the like injury upon the credit, reputation, and prosperity of the State should not be within the reach of the authorities. They believed these clauses of the Constitution accomplished this purpose perfectly, and none of its provisions had more influence in recommending that instrument to the hearty goodwill of the people."

The doctrine of these cases was again affirmed in *Thomas* v. *City of Port Huron*, 27 Mich. 320. These cases all hold that what the State cannot do itself cannot be done through the aid of inferior municipalities.

Counsel urge that the doctrine announced in *People* v. *Township Board of Salem*, *People* v. *State Treasurer*, and *Thomas* v. *City of Port Huron* was never accepted as correct by the profession in this State, and is contrary to the decisions of other courts. If we understand the logic of the argument, it is that those cases should be overruled. We have had occasion recently to consider a contention of like character, and supposed we had so clearly expressed ourselves that the doctrine of those cases could no longer be questioned. We do not deem it necessary to repeat what was said upon that subject in *Dodge* v. *Van Buren Circuit Judge*, 118 Mich. 189.

Counsel suggest it is as competent to authorize the city to own and operate a street railway as to acquire and maintain a public park, waterworks, a lighting plant, or a fire department, or to construct drains or to build sewers. It may be somewhat difficult to draw the line as to what a municipality may properly do and what it may not do, but all the things above mentioned are authorized and defended because it is a proper exercise of the police power. An adequate supply of water is needed for protection against fire. 1 Dill. Mun. Corp. (4th Ed.) §§ 144, 146.

"There can be no matter of higher public concern to every city than the supply of pure and wholesome water for all useful purposes; and as population becomes more and more compact, and cities grow, the ability of the individual member of the municipal corporation to supply his individual wants in that direction constantly diminishes, and in all the larger places it becomes a matter of absolute public necessity that the city itself should directly or indirectly provide the supply. Nothing else so directly and materially affects the health of the community as the character of its water supply." Prent. Police Powers, 303. Drains and sewers and parks are all needed in the interest of public health. 2 Dill. Mun. Corp. (4th Ed.) § 598; *Kinnie* v. *Bare*, 68 Mich. 625; Prent. Police Powers, 56, 131, 242. Lighted streets tend to the prevention of crime. Police powers have their origin in the law of necessity. Id. 4. The exercise of these powers has little in common with what is sought to be done here.

It is urged that the internal improvements contemplated by the Constitution must be of sufficient magnitude to concern the people of the State (citing *Sparrow* v. *Commissioner of State Land Office*, 56 Mich. 575), and that street railways are mere local improvements, or a strictly local interest, not known at the time the Constitution was framed, and are not such improvements as are contemplated by the phrase "internal improvements" (citing *Detroit Citizens' St. Ry. Co.* v. *City of Detroit*, 12 C. C. A. 365, 64 Fed. 628; *Detroit City Ry.* v. *Mills*, 85 Mich. 634). It is not claimed these cases are directly in point, but that some statements contained therein lead to the conclusion just stated. The questions involved in this case were not at issue in the cases cited, and the opinions do not tend, in our judgment, to support the contention of counsel. We shall have occasion later to consider whether the improvements are of sufficient magnitude to be deemed internal improvements.

It is said, if the theory of the relators is sound, the city of Detroit cannot construct a macadamized road, or pave

a street, or build a sewer. It is a complete reply to this suggestion to call attention to the fact that by sections 23 and 38 of article 4, and section 1 of article 11, the Constitution has given to townships the control of highways, and to the cities and villages the control of the streets, for all purposes germane to their use.

It is said that, while steam railroads are in a sense public highways, in another and legal sense they are not public highways, but that street railways are in every proper sense public highways, public utilities of a local character, and are not internal improvements, within the meaning of our Constitution. Our attention is called to the case of *Sun Printing, etc., Ass'n* v. *Mayor, etc., of New York*, 152 N. Y. 257 (37 L. R. A. 788), as sustaining this contention. It is true, that case holds that it is within the legislative power to authorize the city to construct a street railway under the streets of New York, and, when constructed, to lease it for not less than 35 nor more than 50 years, at a rental not less than the interest paid by the city for the construction, and 1 per cent. in addition. The writer of the prevailing opinion stated that the case was not free from difficulty, and the court considered the case, "hoping to reach a result that will afford necessary relief to the people of the city and at the same time preserve the general policy of our system of government." It appears in that case that, pursuant to the provisions of the act, the commissioners entered upon their duties, and located a road to be built under the streets, through the main portions of the city, and then tried to induce private capitalists to undertake its construction. No private capitalists were willing to undertake the construction of the road, and it was undertaken by the commissioners for the city. In the course of the discussion, reference is made to certain cases decided by the Ohio court, and this language is used:

"We do not understand that the views above expressed are in conflict with the Ohio cases. In that State the constitution does not limit municipal expenditures to 'a city purpose.' We do not, however, wish to be under-

stood as approving of those cases, especially in so far as they sustain the right of a city to construct a railroad mainly outside of its own territory and state."

In conclusion, the opinion is as follows:

"Our government was established by the people for their own protection and welfare. Their policy was to foster and protect individual industry and enterprise. To such policy we owe our advancement as a nation, and to such we must look for our future prosperity. The constitution should be construed with reference to this general policy, and ordinarily railroads should be constructed and operated by private capital. The situation, however, in the city of New York, is most peculiar. A long, narrow island lies between two rivers,—so narrow in places that there are practically but two or three streets through which the masses must reach its business center. The population of the city during the last half century has increased from three hundred thousand to over a million and a half of people. The travel upon its existing railroads during the last twenty years has increased from one hundred and fifty millions in 1874 to upwards of four hundred and forty-eight millions in 1894. It was conceded upon the argument that the crowded and congested condition of the travel upon the streets in the city renders the proposed structure necessary. These considerations have induced us to give to the provisions of the act a most liberal construction. The commissioners located the road, and tried to induce private capital to construct and operate it. In this they have failed, and the situation is such that the city must itself construct the road, or go without it. Here we have a demand for a great public highway, which private enterprise and capital will not construct. It is necessary for the welfare of the people, and is required by them. It is public in character, and is authorized by the legislature. Our conclusion is that, under the circumstances and situation here presented, the proposed road may properly be held to be 'for a city purpose,' and that the acts are not in contravention of the provisions of the constitution."

The doctrine stated in the Ohio case cited (*Walker* v. *City of Cincinnati*, 21 Ohio St. 14 [8 Am. Rep. 24]) is contrary to the holdings of this court, as has already been shown, and cannot be reconciled with the later cases of

Taylor v. *Commissioners of Ross Co.*, 23 Ohio St. 22; *Wyscaver* v. *Atkinson*, 37 Ohio St. 80; and *Counterman* v. *Township of Dublin*, 38 Ohio St. 515. It is evident that the conclusion reached in the prevailing opinion is based upon the ground that because of the crowded condition of the city, and its peculiar shape, the improvement was a necessary one, and that, as private capital and enterprise would not enter upon its construction, it was lawful to authorize the city to do so. None of the conditions existing in New York, justifying the city, if it was justified, in entering upon the construction of the road, exist in Detroit. The city is already well supplied with means of transit, and, if abuses exist in the management, the authorities have ample power to correct them. The dissenting opinion in the case is more in harmony with the law in this State than is the prevailing opinion.

We are not entirely without light in relation to what constitutes an internal improvement, within the meaning of the Constitution. We have already seen that steam railroads come within the category. In the case of *Ryerson* v. *Utley*, 16 Mich. 269, it was held that an attempt to improve the navigation of the Muskegon river by removing therefrom sand flats came within the constitutional inhibition. In *People* v. *Township Board of Springwells*, 25 Mich. 153, it is said that a macadamized road is a work of internal improvement.

"The shortness of the road does not change its character. The restriction is not against great works, but against all works of that kind, and the case comes within the language and intent of the prohibition."

The court held that work of that character must be done by the local authorities, because, under the Constitution, they had been intrusted, as we have already stated, with the care of the highways.

In *Anderson* v. *Hill*, 54 Mich. 477, it was held that a township could not be authorized to vote money to aid in deepening or straightening the Dowagiac river, because it was an internal improvement. The court said:

"That the straightening or otherwise deepening the channel of the Dowagiac river, in Van Buren county, expresses a work of internal improvement, needs no argument. * * * If the legislature has the authority to pass a law permitting the majority of the legal voters of a particular township to impose a tax to aid the State in the work of an internal improvement, it has the authority to impose such by direct enactment, without the intermediate step of a vote of the people, and against their wish; and the rule is well settled, if it has not the power to impose such tax directly, it cannot authorize the imposition of the tax indirectly, through a vote of the municipality or people."

In *Sparrow* v. *Commissioner of State Land Office*, 56 Mich. 567, it was held that straightening and opening the channel of Cedar river was an internal improvement, though the decision was put upon another ground. Justice CAMPBELL used this language:

"There can be no doubt of its being a work of internal improvement. That phrase is as broad as language can make it. It can make no difference for what direct or indirect purpose of public utility an improvement is made, so long as it comes within such a definition, and it can make no legal difference over how much of the State it passes. All works of convenience, whether for travel, drainage, or irrigation, are similar in their nature when small and large, and works for all of these purposes have been made of all dimensions, and for large and small districts. It is impossible to draw any line of magnitude. Any such work that is deemed important enough for the State to construct is within the rule, and, if not built in the permitted way, is within the prohibition."

Justice CHAMPLIN agreed with this statement, while Justice COOLEY said he did not intend to question the correctness of the decision in *Ryerson* v. *Utley* and *People* v. *Township Board of Springwells*.

In *Wilcox* v. *Paddock*, 65 Mich. 23, it was held that the straightening and deepening of Maple river was an internal improvement, within the meaning of the Constitution.

The constitution of Minnesota has a provision that "the

State shall never contract any debts for works of internal improvement, or be a party in carrying on such works." Const. Minn. art. 9, § 5. A bill was passed providing for a board of railway and warehouse commissioners, who were authorized to erect a State warehouse or elevator at Duluth, for public storage of grain. This was held to come within the constitutional inhibition, and the learned judge enters upon an extended discussion of what constitutes internal improvements, and the authorities relating thereto. It is too long to insert here. This language is used in the opinion:

"The time was when the policy was to confine the functions of government to the limits strictly necessary to secure the enjoyment of life, liberty, and property. The old Jeffersonian maxim was that the country is governed the best that is governed the least. At present the tendency is all the other way, and towards socialism and paternalism in government. This tendency is perhaps to some extent natural, as well as inevitable, as population becomes more dense, and society older and more complex in its relations. The wisdom of such a policy is not for the courts. The people are supreme, and, if they wish to adopt such a change in the theory of government, it is their right to do so. But in order to do it they must amend the constitution of the State. The present constitution was not framed on any such lines." *Rippe* v. *Becker*, 56 Minn. 100.

When the reasons arose for placing in the Constitution the provisions in relation to internal improvements, judged from our standpoint, the railroads were imperfect. Their passenger cars were not much heavier than the large stage coaches, and would carry from 18 to 24 passengers. In many instances the rails were flat bars of iron, less than an inch thick, laid upon rails of wood, and kept in place by spikes. The roadbeds were not well graded nor heavily ballasted. The locomotives weighed from two to six or seven tons. Cars were passed over the steeper grades by counterweights of box-cars, weighted with stone, which balanced them like window weights balance window sash. As there were no long railways, there was no freight-

ing, except light articles, for any considerable distance. The rolling stock was cheap and scanty. Great weight and great speed would have destroyed the tracks. The entire cost of building what is known as the "Michigan Central Road," to Marshall, was about $2,000,000, and it is probable the value of all internal improvements entered upon by the State was less than $5,000,000. Camp. Hist. Mich. 484.

The pleadings show that the various street-railway companies own and operate in Detroit 141 miles of street railways, which the respondents propose to take over. If the tracks inside the car barns and abandoned tracks be added, the single-track mileage is about 179 miles. There is a bonded debt upon these roads of upwards of $10,000,000, and their property is regarded as worth between $5,000,000 and $17,000,000. It is currently reported that the commission propose to pay upwards of $16,000,000 for this property, besides assuming its indebtedness. By virtue of agreements made between these companies, there are run on their lines in Detroit cars owned by other companies, which start from Pontiac, Oakland county; Mt. Clemens, in Macomb county; Ann Arbor, in Washtenaw county; and the city of Wyandotte, in Wayne county. The tracks of these roads are laid in a very substantial manner. The cars of the outside roads will accommodate 50 to 75 passengers each, are of great size, and run at frequent intervals. It is a matter of common knowledge that over some of these lines cars marked "special" are now run at frequent intervals, carrying freight. An electric road is now projected from Ann Arbor to Lansing, and from other of the lines now reaching Detroit to various points in the interior of the State. This method of transit, or some improvement thereon, is yet in its infancy. It does not require one with the ken of a prophet to see that in the near future the villages and cities of the State will be connected with a network of methods of rapid transit.

By the terms of the act (section 5), it is provided that—

"The said commission may in their discretion, and upon such terms and conditions as they may deem advisable for the interests of said city, acquire, by deed, lease, or other satisfactory conveyance from the company or companies owning the same to said city, any street railway or railways existing at the time of the passage of this act, and lying wholly within or partly within and partly without said city, operated by the same company or companies, together with the property, assets, rights, privileges, etc., owned and used in connection with or pertaining to said railways, including rights to routes belonging to such company or companies upon which a railway shall not be in operation, and may operate and maintain said street railways so acquired, for the carriage of passengers and freight for hire."

Section 8 provides that, after acquiring any railway pursuant to section 5, the "commission shall have the power to enter into agreements with any street-railway company, having a line of street railway, for or in relation to the exchange of tickets and transfers, and for the carriage of passengers, use of tracks, or operation of cars," provided such agreements shall not be contrary to the provisions of section 5.

It is stated in the brief of one of the counsel for respondents that during the past year the railways of Detroit carried 45,000,000 passengers. The steam roads of 1850, crude as they were, provided improved methods of moving passengers and freight over what had before been in vogue. The electric roads of 1899 are still greater improvements for the same purpose. The rails used by the electric railway are much heavier and more substantial. The track is much more substantial than those used prior to 1850. The cars will accommodate three or four times as many people. The transit is much more rapid. The entire cost of all the improvements entered upon by the State would not amount to one-half the amount which the record discloses the commissioners expect to pay for the property they intend to take. To say the system of railroads as it existed in 1850 constituted internal improvements, within the meaning of

the Constitution, and that the system of roads existing in Detroit, which are to be taken over by this commission, and the lines leading thereto, with which said commission are allowed to make agreements for deeds, leases, and in relation to the exchange of tickets and transfers, is not a system of internal improvements, within the meaning of the Constitution, is to deny to words in common use their ordinary and accepted meaning. If the legislature may authorize the city of Detroit to enter into the proposed arrangement, it may authorize any other municipality to do so, and, by concert of action between the various municipalities, they may cover the State with means of rapid transit, owned and operated by the municipalities. This would enable the State to do, by means of agencies called into being by itself, what it cannot itself do, and what the Constitution forbids its doing.

It is said that the Constitution was adopted a long while ago, and that this is a gigantic age, in which enterprises are being formed on a scale so vast as to be almost beyond comprehension, and the Constitution ought to be given a construction in keeping with the spirit of the age. This argument is more properly addressed to the people than to the courts. Constitutions do not change as public opinion changes. Their provisions do not mean one thing one day and another another day. The written Constitution is the most solemn declaration of the people in relation to the powers of State. It was drawn by their representatives selected especially for that purpose. It had their approval at the polls. Every officer of every kind in the State is required to take an oath to support it, before he can enter upon the duties of his office. It is not a pleasant duty to declare that a law passed by the legislature and approved by the governor is not valid. When such a law is enacted, courts cannot for a moment hesitate in performing that duty, disagreeable as it is. The provisions of the Constitution involved in this controversy have been in existence for nearly half a century. As we have already shown, they were construed along the lines of this

decision nearly 30 years ago. The people of the State have not indicated in the way provided by the organic law any dissatisfaction with these provisions. The courts cannot substitute their judgment of what the Constitution ought to be for what the people have made it. Its provisions must remain and control until the people see fit to change them in the way provided by the Constitution itself. *McPherson* v. *Secretary of State*, 92 Mich. 377 (16 L. R. A. 475, 31 Am. St. Rep. 587).

It is not necessary to discuss the very serious question whether a commission could be authorized to buy from five to eighteen million dollars' worth of property, and subject the city of Detroit to the liability growing out of the operation of upwards of 100 miles of electric street railways, without giving the citizens and taxpayers an opportunity to say whether they wanted to purchase and operate such a business or not, nor is it necessary to discuss the other questions raised by counsel; for, if we are right in our conclusion that the law is unconstitutional, this disposes of the case.

We were asked by one of the counsel, in his oral argument, whatever our decision in this case might be, to decide the question whether the city, under any circumstances, may build or buy lines of street railway in its streets, all lying within the city limits, and lease them upon such terms as the city authorities shall deem to be for the best interests of the citizens. It is not necessary to pass upon the question just stated in order to dispose of this case. The law under consideration involves much more than the simple question of municipal ownership of the tracks within the corporate limits, and, in the decision of the case before us, we do not deem it wise to express any opinion upon any question other than the one before us. It will be soon enough to pass upon the other question when it is necessarily before the court, and when the court can have the benefit of the conditions and surroundings then existing.

We think the law unconstitutional, that there is no such

office as the "Detroit Street-Railway Commission," and that respondents have no title thereto, and that judgment of ouster should be entered.

The other Justices concurred.

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SMITH *v.* CITY OF DETROIT.

1. CONDEMNATION FOR STREET OPENING—PARTIES—MORTGAGEES—COLLATERAL ATTACK.

   The fact that a mortgagee was not made a party to proceedings to condemn land for street purposes does not deprive the court of jurisdiction, so as to open the judgment to collateral attack by property owners assessed for benefits, where there was sufficient land left to pay the mortgage, and the city was in full possession of the street.

2. SAME—DESCRIPTIONS OF PROPERTY—SUFFICIENCY.

   Nor is it prerequisite to jurisdiction that the property of each owner be described separately and accurately in the petition, if the owners are in fact notified that their lands are sought to be condemned; 3 How. Stat. § 3064*j*, providing that an amendment may be allowed in the description of property proposed to be taken whenever it will not interfere with the substantial rights of the parties.

3. SAME—SETTING ASIDE ASSESSMENT—REMEDY BY COUNCIL.

   Section 61, chap. 7, of the Detroit charter, as amended by Act No. 463, Local Acts 1895, provides that, when any special assessment shall be held invalid by a court of competent jurisdiction, the common council may order a new assessment for the same purpose. An assessment for benefits for the opening of a street was set aside because the resolution of the council apportioning the amounts to be paid by the city and by assessment upon the local assessment district did not declare that the amount so assessed was a just proportion of the amount awarded by the jury. *Held*, that, while the preliminary determination was no part of the "assessment," it was proper for the council to correct the resolution, and order a new assessment based thereon.

Appeal from Wayne; Lillibridge, J. Submitted May 10, 1899. Decided July 5, 1899.

Bill by Thomas Smith and others against the city of Detroit to restrain the collection of an assessment in a street-opening proceeding. From a decree dismissing the bill, complainants appeal. Affirmed.

John J. Speed, for complainants.

C. D. Joslyn, for defendant.

MONTGOMERY, J. December 31, 1894, a petition was filed by the defendant to condemn property for the opening and extending of Mack avenue from Collins street to McDougall avenue. A verdict from a jury having been obtained, the verdict was confirmed, and the amount was certified to the common council. On April 6, 1897, the common council adopted a resolution fixing an assessment district, determining that the lands within the district were benefited by the opening of Mack avenue, and that there be levied the sum of $5,618.33, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by such improvement, and directing the board of assessors to proceed and make the assessment roll. It was further resolved that $3,745.54, being 40 per cent. of the amount awarded, be paid by the city out of the street-opening fund. The assessment roll was made as ordered, and confirmed; property of the complainants, among others, being assessed. The complainants thereupon filed their bill of complaint, and, the defendant having appeared and answered, it was decreed that the resolution of the common council apportioning the respective amounts to be paid by the city and by the assessment district did not determine that the sum to be assessed was a just proportion of the amount awarded by the jury, and the city was perpetually enjoined from collecting the assessment. This decree was entered on the 2d of November, 1897. On the 7th of December, 1897, the common

council adopted a resolution, whereby it was resolved that the vote by which the assessment district for the opening of Mack avenue was adopted be rescinded. On the same date the council adopted a further resolution, fixing a district composed of identically the same property embraced in the district covered by the resolution of April 6th, and they further resolved that the sum of $5,618.33 was a just proportion of the compensation awarded by the jury which should be assessed upon the district, and the board of assessors were ordered to make an assessment roll for said amount. This assessment roll was made, and confirmed by the common council December 28, 1897. The same lands were assessed, and for the same amounts, as those described in the roll which was declared illegal by the decree above mentioned. The complainants thereupon filed the present bill of complaint, and pray for a perpetual injunction against the collection of the assessments against them.

It appears that the original petition filed was amended. This amendment was made by striking out parts of the description of the property to be taken, and inserting other matter; but there is nothing definite to show what was original and what is amendment. It stands now, "As amended by the order of the court." No order permitting the amendment was ever entered, although the stenographer's notes taken on the trial show an amendment of some kind was permitted.

The description of the entire property to be taken was given accurately, but, in describing parcels which were supposed to belong to the individuals named as owners, there was some inaccuracy, one parcel being described as "a small strip in unplatted alley." It also appeared that one description was mortgaged, and the mortgagee was not made a party to the condemnation proceedings. It appeared, however, that there were sufficient lands to pay the mortgage outside of the street, and which would be previously liable, and that the city was in full possession of the street.

Was it a prerequisite to jurisdiction that the property of each owner should be described separately and accurately, it appearing that the owners were in fact cited in? The statute (3 How. Stat. § 3064*c*) provides that—

"A description of the property to be taken shall be given, and generally the nature and extent of the use thereof that will be required in making and maintaining the improvement shall be stated, and also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises."

Section 3064*j* provides that amendments, either in form or substance, may be allowed to any paper, petition, process, record, or proceeding, or in the description of property proposed to be taken, or the name of any person, whenever the amendment will not interfere with the substantial rights of the parties. It appears that the owner was notified of the proceedings, and that an attempt was being made to condemn lands in which he had an interest, and that the description, though incorrect, was subject to amendment. We think the court had jurisdiction, therefore, and that the proceedings are not open to collateral attack. *Borgman* v. *City of Detroit*, 102 Mich. 261; *Scotten* v. *City of Detroit*, 106 Mich. 564; *Brown* v. *City of Saginaw*, 107 Mich. 643.

The complainants contend that the common council had no authority to adopt a new resolution after the first assessment had been declared invalid for the want of a sufficient one. Section 61, chap. 7, of the charter of Detroit, as amended by Act No. 463, Local Acts 1895, provides that—

"When any special assessment shall be * * * held invalid by the judgment or decree of any court of competent jurisdiction, the common council may cause a new special assessment to be made for the purpose for which the original assessment was made. Such new assessment shall be made in the manner for making original assessments of like nature."

It is contended that the preliminary determination as to

the proportion of the compensation which shall be paid by the owners of the property specially benefited is no part of the assessment, and that, therefore, the council did not, under this statute, have authority to make a correction of the earlier resolution fixing this proportion. The purpose of this enactment is clear enough. The legislative intent was that assessments should not fail because the authorities had failed in following the statute. It is true the preliminary determination is not the assessment, but it is the new assessment which is attacked. The statute furnishes authority for making this, and, unless there is something in the determination of the court in the first case which precludes the council from taking the preliminary action which had been omitted, we are not able to discover any valid objection to the exercise of that power. The bill charges that the decree in the first case found that the resolution of the common council, apportioning the respective amounts to be paid by the city and by assessment upon the local assessment district, did not determine that the amount so assessed was a just proportion of the amount awarded by the jury. The council, not having made such a determination, proceeded, on December 7, 1897, to pass a resolution which was in part as follows:

"It is hereby determined that the sum of five thousand six hundred eighteen and 33-100 dollars is a just proportion of the compensation awarded by the jury for the property taken for said improvement, which should be paid by the owners or occupants of the above-described pieces and parcels of real estate, which will be thus benefited by said improvement."

We think it was competent for the council to make this determination when it did, and, having made it, the authority for a reassessment is given by the statute cited above.

We think the other criticisms of the proceedings presented in the brief of counsel without merit. The decree is affirmed, with costs.

The other Justices concurred.

GRAHAM *v.* LAMB.

1. DEEDS—PARENT AND CHILD—CANCELLATION—RIGHTS OF MORTGAGEE—CONSTRUCTIVE NOTICE.

   Knowledge on the part of a wife that her husband, previously married, procured from his daughter, without any consideration, shortly after the latter became of age, a quitclaim deed of property which she had inherited from her mother, is sufficient to put her on inquiry, before accepting a mortgage upon the property, as to the character of the transaction, and will subject her, as mortgagee, to the right of the daughter to have the deed set aside on showing that she had no knowledge that the title to the property had descended to her on her mother's death.

2. HUSBAND AND WIFE—MORTGAGE TO SECURE HUSBAND'S DEBT—MARSHALING SECURITIES—HOMESTEAD.

   A wife, by including her separate property in a mortgage, together with the property of her husband, to secure her husband's debt, does not make it the primary fund out of which the debt should be satisfied, though his property included in the mortgage constituted the homestead.

Appeal from St. Clair; Vance, J. Submitted June 7, 1899. Decided July 5, 1899.

Bill by Olive L. Graham against Hosea and Eugenia Lamb, and Ellis B., Daniel, and Susan B. Clark, executors of the last will and testament of Ira M. Clark, deceased, to set aside a deed. From the decree rendered, complainant appeals. Modified.

Atkinson, Wolcott & Moore, for complainant.

Thomas Wellman, for defendants Lamb.

John C. Graham, for defendants Clark.

MONTGOMERY, J. This is a bill to set aside a deed. The circuit judge found the following facts:

"On January 4, 1873, Hosea Lamb owned in fee the W. ½ of the N. E. ¼ of section 2, township 8 N., of range

16 E., St. Clair county, Mich. On that date he quitclaimed to his wife, Mary A. Lamb, the S. ½ of the W. ½ of the N. E. ¼ of said section 2, township 8 N., of range 16 E., for the stated consideration of $400, but no consideration was paid in fact. Hosea Lamb was indebted at this time on two notes given to one Lewis Potts, and, believing the indebtedness unjust, made this deed to his wife to avoid their payment. At this time he lived on, and made his home on, the north 40 acres. These Potts notes came to the hands of one William Stevenson, who recovered a judgment thereon against Hosea Lamb in this court in June, 1873, and execution upon this judgment was levied upon the 80 acres above described, about November 25, 1873. December 6, 1873, Hosea Lamb and his wife, Mary A., mortgaged the whole 80 acres to Robert J. Arnott for $202 to pay the Stevenson judgment. On February 12, 1878, Hosea and Mary A. Lamb, his wife, mortgaged the same 80 acres to Ira M. Clark for $400, and the proceeds of this mortgage, at least in part, were used to pay up the Arnott mortgage. Ira M. Clark died, and the defendants Ellis B., Susan B., and Daniel Clark are executors of the estate of Ira M. Clark, deceased. About May, 1885, Mary A., wife of Hosea Lamb, died, leaving the complainant, Olive Lamb, her sole heir at law, and owner in fee, subject to the Clark mortgage, of the S. ½ of the W. ½ of the N. E. ¼ of said section 2, township 8 N., range 16 E., being the land in controversy. August 25, 1885, Olive Lamb quitclaimed the 40 acres last above described to her father, Hosea Lamb. No consideration was paid for this deed, and it recites that it was made on account of love and affection. At the time of giving this deed, Olive Lamb did not know that her mother owned this 40 acres at the time of her death, and did not know that she became the owner thereof on the death of her mother. She was then shortly past her majority, and was living with her father, and keeping house for him, on the 80 acres where she had lived from childhood.

"It is my conclusion that Olive Lamb was not advised or informed of her real interest in this 40 acres, either by her father or any one else, at the time she signed the quitclaim deed, and she did not know the nature of the business she transacted, or the rights or interests she had which were being transferred.

"About one and a half years after the death of his wife, Mary A. Lamb, Hosea Lamb married his present

wife, Eugenia Lamb, one of the defendants. Of this marriage there is one child, now about 6 years old. Eugenia Lamb, shortly after her marriage with Hosea Lamb, loaned him some money, and gave him some cattle to double, amounting in all to a considerable sum of money. Hosea Lamb had been interested in a store at Jeddo, and that business failed in 1895, involving him in debt. When Eugenia, his second wife, learned of his financial condition, she asked him for security for the money and property she had loaned him after their marriage. At the time he received this money and property from her he promised to give her security for their repayment when she requested it. On June 17, 1895, Hosea and his wife, Eugenia, went to an attorney, M. N. Mugan, who figured up the amount due from Hosea to Eugenia, and on that day Hosea gave his wife, Eugenia, a real-estate mortgage for $800 on the S. W. ¼ of the N. E. ¼ of section 2, township 8 N., range 16 E., the same premises Olive Lamb deeded to her father, August 25, 1885, and at the same time secured the indebtedness by a chattel mortgage on all, or nearly all, of his personal property. At the time Eugenia Lamb took this mortgage for $800, on June 17, 1895, she had no knowledge that Olive Lamb Graham questioned the validity of the deed she made to her father, August 25, 1885, or that it was open to question."

The conclusion of the circuit judge was that complainant was entitled to have the deed made by her set aside as against Hosea Lamb, but that the equities of Eugenia Lamb were superior to those of complainant, and, as to the Clark mortgage, there were no equities which would justify a direction that the homestead should be sold first.

We are not able to agree with the conclusion of the circuit judge as to either of these questions. Mrs. Eugenia Lamb testified as to her knowledge of complainant's claim to the land as follows:

"Had you any knowledge of her having any interest in this property at the time you married Mr. Lamb?

"*A.* No, sir.

"*Q.* And after and before you took this mortgage?

"*A.* Well, I just heard a while after. Mr. Lamb never spoke to me about it at all until since the trouble commenced to come. I had heard from different parties

around that there had been something of that kind, but never from Mrs. Graham nor from Mr. Lamb. It came through other parties.

"*Q.* Was there any intention on your part, when you took this mortgage, to defrand Olive out of her rights?

"*A.* No, sir; not one dollar.

"*Q.* Now, you say you heard of this, or heard something about it, from other parties. What was it you heard?

"*A.* Mrs. Methven told me concerning this deed. She said about Olive's mother having the deed, and how Mr. Lamb had got Olive to deed it back to him; and Mr. Graham said that, if he had got hold of Olive before she gave the deed, he would never have let her give the deed back to her father.

"*Q.* Where is Mrs. Methven now?

"*A.* She is dead."

We cannot escape the conclusion that, when Mrs. Eugenia Lamb took her mortgage, she had enough knowledge to put her on inquiry.

As to the Clark mortgage: The first Mrs. Lamb, by including her separate property in a mortgage to secure her husband's debt, did not make that the primary fund out of which the debt should be satisfied. We think the decree should have provided that the amount of the mortgage should, in case of foreclosure, be satisfied by a sale of complainant's lands only in the event that the lands owned by defendant Hosea are insufficient to satisfy the mortgage. The decree will be modified accordingly, and the mortgage of Eugenia Lamb will be declared not to be a lien upon the land in question. Complainant will recover costs against Hosea Lamb and Eugenia Lamb.

The other Justices concurred.

120 581
f140 2373

MIDDAUGH v. MITCHELL.

120 581
147 1466

1. MASTER AND SERVANT—DANGEROUS MACHINERY—ASSUMPTION OF RISK.

   An employé in a sawmill assumed the risk incident to working in the vicinity of a rapidly-revolving shaft having a projecting set-screw, where he had been employed for a long time about the mill, and, only two or three days before being caught on the set-screw, had talked with a fellow-employé regarding the danger of injury from that source.

2. SAME—DIRECTIONS OF MASTER.

   The fact that a servant is directed to work in a place of especial danger does not render the master liable for resulting injuries, where the danger is entirely familiar to him, and the work is directly in the line of his employment.

Error to Wexford; Aldrich, J. Submitted May 9, 1899. Decided July 5, 1899.

Case by Laverne Middaugh, administratrix of the estate of William Middaugh, deceased, against Austin W. Mitchell and William W. Mitchell, for negligently causing the death of plaintiff's intestate. From a judgment for plaintiff, defendants bring error. Reversed.

E. Eugene Haskins and *D. E. McIntyre*, for appellants.

C. C. Chittenden and *E. S. Pratt*, for appellee.

MONTGOMERY, J. The plaintiff recovered a verdict and judgment for an alleged negligent injury to her husband, William Middaugh, resulting in his death. The facts appearing on the trial were that on March 2, 1897, defendants were, and for more than 15 years prior thereto had been, copartners operating an extensive lumber manufacturing plant at Jennings, Missaukee county, Mich. On said day they had in their employ George Moore as super-

intendent, and, among other operatives and employés, Frank Woodcook, Alex. Yandon, and William Middaugh. The latter was employed as roustabout, handy man, or extra man to assist in odd jobs, and take the place of any man laid off temporarily, and had worked all around sawmills for upwards of 15 years. On the date mentioned, early in the afternoon, Woodcook, Yandon, and Middaugh were engaged in placing in position in the lower part of the mill an upright shaft with attached disk at its lower end, which had been previously taken out for repairs. The weight of the shaft and disk appears to have been about 500 pounds, and the disk was about 3 feet in diameter. The work of the mill is all performed on the second floor, and the driving machinery, shafts, pulleys, bearings, etc., are all hung or located below in the ground story of the building. This first or ground story is about 12 feet in height.

This disk and shaft had been brought from the depot by the superintendent and these three men, and placed on the lower floor, under its proper place. At this point Moore was called away temporarily, and left the raising of the disk to be proceeded with in his absence. The shaft and disk were then raised, by means of rope and pulley-blocks, to a scaffold about 7½ feet above the floor, and rested there. This scaffold was constructed by utilizing a "running-board" for its east support, and a 2x8 spiked to two posts about 12 feet west of the running-board for its west support, and then placing three or four loose planks east and west across these two supports, and directly under the position of the shaft and disk when in place. The "running-board" is a stationary plank running north and south, from post to post, lengthwise of the mill, about 7½ feet above the lower floor, and is used to walk on in oiling bearings, shifting belts, and other things which would otherwise require carrying a ladder from place to place. The disk and shaft had been pulled up by means of the rope and blocks between these loose planks, and, when of sufficient height, the loose planks were pushed nearer together, and under

the sides of the disk. In this part of raising the disk, the rope by which Yandon and Middaugh pulled ran from the upper sheave down to the floor on the west side of the running-board. After the disk was rested on the scaffold, Woodcook, who worked on the scaffold, pulled the rope up, and dropped it over and down on the east side of the running-board, and between the ends of the loose planks, which extended over the running-board, to the east, some two feet. One end of this running-board is against the west side of a 12-inch post, and the east end of the north loose cross-plank was some 3 or 4 feet south from this 12-inch post.

On the south side of this post is a box, which bears the end of a 3-inch shaft that has a revolution of about 300 to the minute. The west end of the shaft runs in this box, and, as is usual at the end bearing, a 2-inch collar is secured to the shaft against the east side of the box. The collar is held on the shaft by means of a set-screw, which projects from the collar about seven-eighths of an inch. It revolves in a square corner formed by the south face of the post and the east side of the box. It is seven-eighths of an inch east from the box, and $2\frac{1}{2}$ inches west of the east face of the post, and the front or south line of the box projects out about an inch beyond the periphery of the revolving set-screw. It is 4 feet from the bottom of the shaft down to the floor. This 3-inch shaft formed the north boundary, and the running-board mentioned formed the west boundary, of a clear open space 5 or 6 feet east and west by 10 or 12 feet north and south.

To still further raise the disk, and place the same in position, Yandon and Middaugh took the rope where it had been dropped over the running-board by Woodcook, and proceeded to pull. Middaugh stood with his back to the revolving shaft, and Yandon facing him, both standing near the 12-inch post. Woodcook was on the scaffold to guide the upper end of the disk shaft through a hole in the floor above. Neither Woodcook nor Yandon saw Middaugh at the moment of the accident, as Yandon

was looking back upon the scaffold, and Woodcook's attention was directed to guiding the disk shaft. Yandon felt the rope jerked from his hands; Woodcook felt the north loose cross-plank jerked almost from under him; and both turned, and saw Middaugh wound on the revolving shaft near the 12-inch post. From the injuries thus received, Middaugh died in a few hours.

The lower portion of the mill was lighted by windows and an open door. The disk in question was about 20 feet from one window, about 25 feet from another, and about 15 feet from a large door, where teams drive through. Yandon, who was called as a witness for plaintiff, testified that, when a man first comes into the mill from the outside, he cannot see very good, but he further testified that there was no difficulty in seeing the shaft; it could be plainly seen. "I had no difficulty in seeing objects about the mill down there after I was down there a few minutes. Mr. Middaugh had been under there longer than I had."

The plaintiff offered testimony showing that defendants had rebuilt the mill some two years before the accident, and that in most mills of modern construction the set-screws are either covered or counter-sunk. The plaintiff called Mr. Woodcook as a witness. He testified that, on an occasion a month or two before the accident, deceased had filled the place of day-watchman; that it was his duty as day-watchman to oil the box that the shaft in question ran in; and that witness was unable to see how the deceased could have failed to see the collar and set-screw while doing so. This witness further testified that, a day or two prior to the accident, witness and deceased were working together in the basement of the mill, putting up some bents; that, while at work, a Mr. Trickey, an employè, passed under the shaft on which Middaugh was afterwards caught; that deceased and witness had a conversation about it, as to which the witness testified as follows:

"We talked something about the place being dangerous for a man to dodge under there, for he might get caught.

The set-screw was mentioned. We said it was a dangerous place there; there was a set-screw there, and a man dodging under there might get caught."

It further appeared that deceased was an experienced mill man, having worked in a mill for upwards of 15 years. At the conclusion of the testimony, the defendants' counsel asked the court to charge that there could be no recovery.

The plaintiff's counsel state their position in their brief as follows:

"That, under the proof, it was a question of fact for the jury to pass on as to (1) whether the danger was so apparent that Middaugh must be held to have assumed the risk; (2) whether deceased had prior knowledge of the fact that there was a projecting set-screw on the shaft; (3) whether the deceased was not justified in acting on the suggestion of Woodcook in taking his position and doing his work where he did. And we submit, under the law, that the deceased had a right to assume that the place designated was a safe place, and, if it proved otherwise, the fault would be the fault of the defendants, who were represented by Woodcook."

We are unable to assent to these propositions, in view of the testimony in this case. We do not find it necessary to pass upon the first, inasmuch as we think the second cannot be maintained. The undisputed testimony shows that deceased had for a long time been employed about this mill; that at least on one occasion his duties brought him in a position where he should have discovered the set-screw on the shaft; and that he was, not more than two or three days before, informed of the danger, and his attention specifically called to the set-screw. Under these circumstances, the deceased must be held to have assumed the risk, and, if it was negligence to attempt the work in which deceased was engaged, he was himself guilty of contributory negligence. *Michigan Central R. Co.* v. *Smithson*, 45 Mich. 212; *Brennan* v. *Railroad Co.*, 93 Mich. 156; *Perlick* v. *Wooden-Ware Co.*, 119 Mich.

331; *Goodnow* v. *Emery Mills*, 146 Mass. 261; 1 Bailey, Pers. Inj. § 673 *et seq.*

In support of the proposition that deceased was justified in acting on the suggestion of Woodcook, and in taking his position where he did, plaintiff's counsel cite *Walker* v. *Railway Co.*, 104 Mich. 606; *Chicago, etc., R. Co.* v. *Bayfield*, 37 Mich. 205; *Jones* v. *Railway Co.*, 49 Mich. 573. In each of these cases the servant was directed out of the line of his employment by a superior. In the present case the deceased was directly in the line of his employment, so that, if it be considered that Woodcook, in casting the rope down where he did, invited deceased to take a position dangerously near the shaft, the case presented is not at all analogous to the cases cited; on the contrary, if there was fault in that regard, it was the fault of a fellow-servant. The instruction asked by defendants should have been given.

Judgment reversed, and new trial ordered.

The other Justices concurred.

ELDRIDGE *v.* RICHMOND.

120 586
e122 15

120 586
f124 277

120 586
127 299

120 586
f146 207

120 586
149 [2]230

120 586
153 [2]196

120 586
d155 [2]700

1. TAX SALES—NOTICE—SUFFICIENCY OF PUBLICATION.

The auditor general's petition in a tax proceeding need not be published for 10 days prior to the day fixed for the hearing, in addition to the four weeks required by Act No. 162, Pub. Acts 1895, § 66, although that section requires a contesting party to file objections at least 10 days prior to the day of hearing; it being further provided that objections may be filed within five days after the hearing, if the party was prevented from filing them before without fault on his part.

2. SAME—STATE LANDS—RIGHTS OF PURCHASER.

A purchase of state tax lands is effected when application therefor is made to the auditor general, accompanied by a

deposit of the full amount due; and hence, where this was done prior to the time when Act No. 229, Pub. Acts 1897, went into effect, providing that one thereafter purchasing such lands should have no right to recover the possession thereof without first serving a specified notice upon the original owner, the purchaser was not within the act, although neither his deed nor certificate of purchase issued until after the act had become operative.

Error to Oceana; Russell, J. Submitted January 6, 1899. Decided July 5, 1899.

Ejectment by Minnie B. Eldridge against Edgar D. Richmond and Lydia L. Richmond. From a judgment for defendants, plaintiff brings error. Reversed.

James H. McFarlan, for appellant.

L. M. Hartwick and *Wallace Foote*, for appellees.

GRANT, C. J. Two questions are presented by this record:

1. Under section 66, Act No. 162, Pub. Acts 1895, must the petition in tax proceedings be published for 4 weeks and 10 days next prior to the hearing? The question must be answered in the negative. The language of the statute is that a copy of the petition shall "be published at least once in each week for four successive weeks next prior to the time fixed for the hearing thereof." Such publication was had. The defendants contend that, because another provision of the same section requires a contesting party to file objections at least 10 days prior to the day fixed for the hearing, the notice must be published 4 weeks before this period of 10 days commences; otherwise, one who sees the advertisement on or after its last publication would be deprived of the benefit of the 10-day provision. The statute provides for such a contingency by giving the right to appear and file objections within 5 days after the hearing, if one has been prevented from filing his objections before without any fault on his part.

2. Did plaintiff acquire her tax title to this land after August 29, 1897? On August 30th, Act No. 229 of the Public Acts of 1897 took effect. That act required notice to be served upon the owner of the land before a writ of assistance or other process for the possession of the land could be obtained. That act applied only to sales made after the law went into effect. If purchase was not made until after this law took effect, plaintiff could not maintain her suit. A question of fact is involved, which the learned circuit judge found against the plaintiff. We think he was in error. The tax deed was dated October 11th, and recited the purchase as having been made on the 3d of August. On October 11th a tax certificate was issued to the plaintiff, on the foot of which was written, "Deeded October 11th." At the head of it was written the number of the application, and "Filed August 3, 1897." The auditor general made a report to the county treasurer of state tax lands sold during the month of October. In such report was this description reported as sold to plaintiff. Above her name appeared the letters and figures: "App. 8–3–97. No. 31,093." These words and figures mean "application dated August 3, 1897." The application was made by James H. McFarlan, who subsequently assigned to plaintiff. We think it conclusively appears that application and payment were made on August 3d. This was all that was necessary to complete the purchase. It is urged that the minds of the applicant and the auditor general did not meet until the latter had investigated and determined whether the land was subject to sale. The mind of the auditor general is of no consequence. He is not clothed with any discretion. His act is purely ministerial. The deposit with him of the amount due, and the application, complied with the law, and rendered the purchase complete. The subsequent acts of issuing a certificate, or executing a deed, or both, are mere ministerial acts, necessary to evidence title. The title which the State has becomes absolute by application and payment. The fact that the auditor general reported the sale as in October is not in conflict with the other undisputed facts.

Judgment reversed, and entered in this court for the plaintiff; and, as the case is ejectment, it will be remanded to the court below for further proceedings.

The other Justices concurred.

JOHNSTON *v.* MITCHELL.

1. SCHOOL BOARD — VACANCIES — MANDAMUS — OTHER ADEQUATE REMEDY.

   2 Comp. Laws 1897, § 4747, authorizes the board of trustees of a graded school district to fill vacancies in their number until the next annual meeting, and further provides that, on failure of the board to elect its own officers, they shall be appointed by the board of school inspectors. Section 4668 provides that, in case of a vacancy on the board of an ungraded district, the two remaining officers shall immediately fill such vacancy, and, in case of two vacancies, the remaining officer shall immediately call a meeting of the district to fill the vacancies; and that, in case the vacancies are not so filled within 20 days, the board of school inspectors shall fill them. Sections 4659–4661 make it the duty of any member of the district board to call a special meeting of the district, for the transaction of any special business, on the written request of five legal voters of the district. The concluding section of the act (4774) declares that all of its provisions (section 4639 *et seq.*) shall apply to every school district in the State, unless inconsistent with some special enactment of the legislature. *Held*, that *mandamus* will not lie to compel a trustee of a graded district to meet with his colleagues to fill two vacancies on the board, since there are other adequate remedies; section 4774 having the effect (*it seems*) of making applicable to graded districts the provision of section 4668 relative to the filling of vacancies by the board of school inspectors, and the remedy by special election, which is also rendered applicable, being presumed to be available in such cases where there is no showing that a written request of five legal voters could not be obtained.

2. SAME—COSTS.

   The minority of a school board have no authority to commence an action in its name, and, if they do so, they will be individually responsible for the costs.

Certiorari to Oakland; Smith, J. Submitted June 6, 1899. Decided July 5, 1899.

Mandamus by Alfred Johnston, moderator, and Warren D. Clizbe, director, of school district No. one, fractional, of Bloomfield, Troy, Royal Oak, and Southfield, to compel George H. Mitchell, assessor of said district, to meet with relators for the purpose of filling vacancies on the district board. From an order granting the writ, respondent brings *certiorari*. Reversed.

A. & S. H. Perry, for relators.

Jerome W. Robbins, for respondent.

HOOKER, J. Alfred Johnston is moderator, Warren D. Clizbe director, and George H. Mitchell assessor, of a graded school district. The other two trustees resigned as early as January 5, 1899. Johnston and Clizbe joined in an application for a *mandamus* to compel Mitchell to meet with them and fill the vacancies caused by such resignations, he having refused to do so. Said application was sworn to on February 1, 1899. The circuit court granted the writ, and the case is before us on *certiorari*.

2 Comp. Laws 1897, § 4747, *authorizes* the board of trustees to fill vacancies in their number until the next annual meeting. A similar provision is found in section 4668, which provides for filling such vacancies in districts not graded. It provides that, in case of such vacancy, the two remaining officers *shall immediately* fill such vacancy, and, in case of two vacancies, the remaining officer shall immediately call a meeting of the district to fill the vacancies, and, in case the vacancies are not filled in one of these modes within 20 days, the board of school inspectors shall fill them. It is contended by counsel for the respondent that section 4747 contains a similar provision as to school inspectors; but we think the language of that section restricts the power of school inspectors to the election of the officers of the board. Section 4774 provides:

"All provisions of this act shall apply and be in force in every school district, township, city, and village in this State, except such as may be inconsistent with the direct provisions of some special enactment of the legislature."

This provision has the effect to make section 4668 applicable to graded school districts, and the provision of that section as to school inspectors would be applicable, unless it should be thought that section 4747 is inconsistent with section 4668. We do not so consider it, but, if it were, the other provisions of section 4668 are applicable, and the vacancies could have been filled by the trustees, or at a special election called by the board for the purpose. *People* v. *Board of Education of Detroit*, 18 Mich. 400; *Keweenaw Ass'n* v. *School Dist. No. 1 of Hancock Tp.*, 98 Mich. 442. If it be said that the meeting could not be called, because Mitchell refused to join in a meeting for the purpose, the exigency could have been met under sections 4659, 4660, and 4661. Thus, there is full power in the district to fill such vacancies, either by a special meeting, or by action of the school inspectors, if such provision is applicable to graded districts. The record indicates that the respondent may have carried out the wishes of the district in not participating in an election to fill the vacancies. We are not advised that there would have been any difficulty in obtaining the desired written request of five legal voters of the district for a special meeting to fill these vacancies, or of any reason why the selection by the board would be preferable. It would certainly have been a more expeditious and less expensive way than to attempt to coerce a member of the board. We are of the opinion that this is not a case where there is no other remedy.

It appears to be thought that the petitioners could make the district a party to this proceeding; but the minority of the board had no such authority, and, notwithstanding the fact that they have petitioned as trustees, they have no standing here except as private litigants. It is as though any other voter of the district had instituted the

proceeding, without showing that his personal rights were injured. See *People* v. *Whipple*, 41 Mich. 548.

The order of the circuit court is reversed, and the writ is denied, with costs of both courts against the relators personally. This is not a proceeding by or against the district.

The other Justices concurred.

ATTORNEY GENERAL, *ex rel.* MCCALL, *v.* KIRBY.

ELECTIONS—MISCONDUCT OF INSPECTORS—THROWING OUT VOTE.

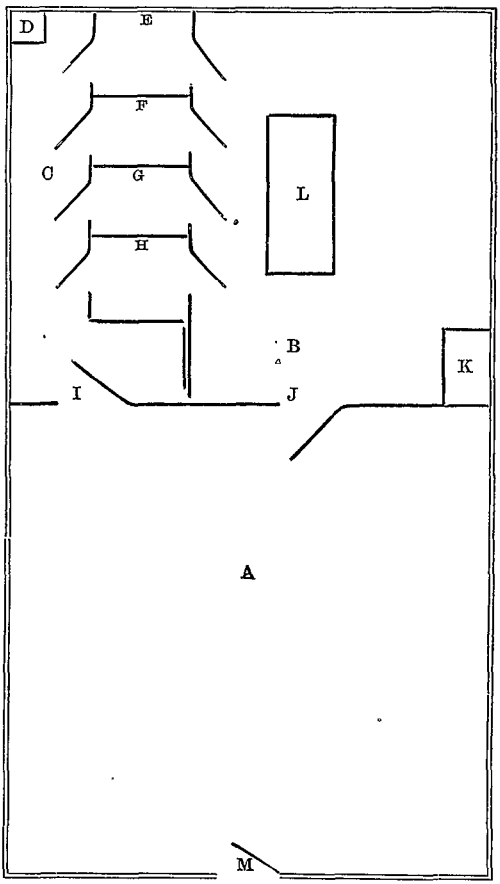
In determining the title to a county office, the vote of a township should be excluded, where it appears that in such township the mandatory provision of the election law requiring the official ballots to be kept in the custody of an inspector was violated by the appointment of an unofficial person as "instructor" to distribute the ballots, and allowing him access to the voters even after they had entered the booths, although the parties acted in good faith and it is not shown that voters were unduly influenced.

Error to Gratiot; Daboll, J. Submitted June 22, 1899. Decided July 5, 1899.

Quo warranto by Horace M. Oren, attorney general, on the relation of Archie McCall, against Julius B. Kirby, to determine the title to the office of prosecuting attorney for the county of Gratiot. From a judgment for respondent, relator brings error. Reversed.

The relator and respondent were candidates for the office of prosecuting attorney at the election held on November 8, 1898, in the county of Gratiot. The county board of canvassers returned that relator received 2,991 votes and the respondent 3,014. This is an information in the nature of a *quo warranto* to test the title to the

office. The relator claims that the returns from the township of Elba should be thrown out. If this were done, the relator is elected. The illegality of the election in that township is based upon the following facts. The following diagram shows the situation of the room where the election was held:



M is the entrance to the room. I and J were gates for the entrance and exit of voters; I being the entrance and

J the exit. E, F, G, and H are the booths; L the table where the inspectors sat; K the place where the challengers sat. The voters entered at I, passed to the left, obtained their ballots from one Kerr, who kept the ballots on a box or table at D, then entered the booths, passed through, deposited their ballots at L, and made their exit at J. B is the room occupied by the inspectors and challengers. In addition to all the officers provided by the statute, the inspectors of election chose this Kerr as an instructor. The oaths of office appear in the record. Mr. Kerr, it appears, took the oath, a copy of which is in the record, but the blank for the designation of his office is not filled. The inspectors, after having the ballots marked as the law provides, gave them, as required, to Mr. Kerr, who took them over, and placed them on the box at D. He took them as wanted, meeting the inspectors at some point in the space marked C, between D and I. It was his custom to ask voters as they entered if they knew how to vote, and, if they desired instruction, he took the ballot, sometimes holding it against the wall, and gave instructions. He had free access to every voter who came in. It is clearly established that he talked with them while in the booths with the doors open, and himself standing in the door of the booth. He was, while talking with the electors, a good share of the time out of the sight of the inspectors and challengers. Several testified that they could hear him talking to the electors, but could not tell what he said. Several voters testified that he showed them on the ballot where to vote for respondent, if they desired to. There is no evidence of attempting to influence voters, unless this be so considered. No protest was made to the action of Kerr during the election, and it appears that Mr. Kerr had filled this position at other elections.

Horace M. Oren, Attorney General (*George P. Stone*, *John T. Mathews*, and *W. A. Bahlke*, of counsel), for appellant.

Kelly S. Searl, *Byron H. Sawyer*, and *W. A. Leet*, for appellee.

GRANT, C. J. (*after stating the facts*). Manifestly, the election law was wholly ignored in the appointment of Mr. Kerr, in intrusting the ballots to him, and permitting him to have free access to the electors after they had passed into the voting precinct, and into the booths themselves. It is urged that the inspectors of election acted in good faith, and supposed they had the right to appoint a man as an instructor of election. It is difficult to understand how intelligent men should reach this conclusion. The law makes no such provision, but makes it the clear duty of one inspector to keep possession of the ballots, and to hand them to the voters, after another inspector has opened the package, and still another has put his initials upon them. It is due to the members of the election board to say that there is no evidence that they acted from corrupt motives. If, however, this conduct can be sustained, and the plain provisions of the law ignored, rascals can very readily make the same plea, and it would be difficult to expose their rascality. These provisions of the law have been held mandatory. *Attorney General* v. *McQuade*, 94 Mich. 439; *Attorney General* v. *Stillson*, 108 Mich. 419. By a reference to the latter case, on page 421, it will appear that the interpreter, an officer provided by the act, was stationed very near to, and in plain sight of, the inspectors, and talked with the voters, as they came in, in a foreign language. It does not appear that there was more evidence of fraud in that case than in this. That case differs from this only in two particulars: *First*, that the conversation between the interpreter and the voters was not in the English language, as it was in this; and, *second*, that the "instructor," as he was called in this case, had a better opportunity to secretly influence electors than did the interpreter in that. If these provisions are mandatory,—and we have so held,—they cannot be evaded by showing that the parties acted in good faith and that voters were not influenced. The law was intended to prevent just such transactions and chances to influence voters, and courts cannot fritter them away by

permitting jurors to find that there was no fraud and that voters were not unduly influenced.

The judgment must be set aside, and one entered for the relator.

The other Justices concurred.

DOXTATOR *v.* CHICAGO & WEST MICHIGAN RAILWAY CO.

RAILROAD COMPANIES — INJURY TO EMPLOYÉ — AMPUTATIONS — DISPOSITION OF FRAGMENTS.

A railroad company is not liable to a widow for failure to deliver to her, after her husband's death, portions of his limbs which were amputated by the company's surgeon because they had been crushed by the cars while he was in the employ of the company, when the operation was performed at a hospital to which he was taken by a policeman in charge of the city ambulance, and the fragments were cremated according to the custom at the hospital, as the company did not assume the obligation, either by its employé who lifted the injured man from the ground, or by the surgeon who amputated his limbs, to deliver the remains, and the whole of them, to his widow, if death should ensue from the injury.

Error to superior court of Grand Rapids; Burlingame, J. Submitted October 7, 1898. Decided July 11, 1899.

Case by Fanny E. Doxtator against the Chicago & West Michigan Railway Company for failure to deliver to plaintiff for burial the entire remains of her deceased husband. From a judgment for plaintiff, defendant brings error. Reversed.

William Alden Smith, for appellant.

McGarry & Belden (*Brown & Adams*, of counsel), for appellee.

MONTGOMERY, J. This case presents a question which has never had the attention of this court, and one which, in some of its aspects, has not been considered by any other court of last resort, so far as we are advised. The plaintiff sues to recover damages on account of having been deprived of the right to give the remains of her deceased husband a Christian burial, and alleges that she was deprived of this right by the wrongful act of the defendant. At the common law there was said to be no property in a dead body, and in one sense this may still be deemed an accurate technical statement; but it has been held in a number of well-considered American cases that the one whose duty it is to care for the body of the deceased is entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way. *Larson* v. *Chase*, 47 Minn. 307 (28 Am. St. Rep. 370); *Foley* v. *Phelps*, (Sup.) 37 N. Y. Supp. 471; *Burney* v. *Children's Hospital*, 169 Mass. 57 (61 Am. St. Rep. 273); 8 Am. & Eng. Enc. Law (2d Ed.), 834. This right is conceded.

Another question, not discussed in the original brief of appellant, although adverted to in its supplemental brief, may be whether, under the facts as claimed by plaintiff, the right of action exists in the widow for the destruction of fragments amputated from the body of her husband during his lifetime, when the evidence discloses the fact that such destruction occurred during the lifetime of the husband. As this question was not at all discussed in the original brief of counsel, we pass it by, and direct our attention to the points raised; and for the understanding of these points a brief statement of the facts is essential.

On the morning of June 2, 1897, Thomas A. Doxtator was working as a switchman with a gang of men in charge of John Dozeman, foreman of the West Side yards of the Chicago & West Michigan Railway Company. At about 6:30 a. m. Doxtator was run over by the cars and fatally injured. His injuries were extensive. His right

leg was crushed from the ankle to the knee. The bone protruded, and the foot hung only by the muscular attachments. The left leg was crushed from the lower third up to about the middle third of the thigh, and the pelvic bones were also broken. Foreman Dozeman was the first to reach Mr. Doxtator, and he called witness Strickland to hold his head while Dozeman called the doctor and the ambulance. Dozeman called Dr. G. K. Johnson, who was at that time chief surgeon for the Chicago & West Michigan Railway Company. He also notified police headquarters to send the ambulance at once, and then notified the company's agent at the Allen-street freight house (Mr. Hatch), who also telephoned to the doctor. Doxtator requested that he should not be taken home, as the shock would kill his wife. He requested to be taken to a Catholic hospital. One witness testified that witness Strickland promised that he should be taken to a Catholic hospital, without naming which one. Strickland, however, testified that he did not remember whether Doxtator so requested or not. The custom of the railway company, as stated by Dr. Johnson, is to take the patient to whichever hospital he prefers. The ambulance arrived about 25 minutes after the accident had occurred. It was in charge of Patrolman John Scobey. While in the ambulance, Doxtator requested to be taken to a Catholic hospital. Patrolman Scobey thought it was nearer to Butterworth Hospital, and so took him to that place, accompanied by Switchman Strickland. Neither Doxtator nor Strickland raised any objection to his so doing.

They reached the hospital at 5 minutes to 7 in the morning. The hospital force called Dr. Lupinski, who, on the arrival of Dr. Wooster, turned the case over to the latter. Dr. Wooster had exclusive control of the case, and was working under a general employment by the Chicago & West Michigan Railway Company. With the assistance of Dr. Lupinski and of Dr. Smith, the house physician of the hospital, he amputated the legs at about 8 o'clock in the morning. From the nature of the case, the doctors

knew that the wound was necessarily fatal. The left leg was taken off near the thigh; the right leg, below the knee. Neither Dr. Lupinski nor Dr. Smith was employed by the railroad company, but Dr. Lupinski assisted in the operation without any special agreement, having been called by the hospital. One Clarence L. Brainard, the orderly of the hospital, attended upon the surgeons, and testified for the plaintiff that he burned the fragments about 9 or 10 o'clock in the morning. He testified that he asked, in the presence of Dr. Lupinski and Dr. Wooster, what he should do with the fragments; that Dr. Lupinski replied, and that he had no instructions from any other physician; that, when he asked Dr. Lupinski what to do with the fragments, Dr. Lupinski inquired what was usually done with such fragments, and, being told by the orderly that they were usually burned, directed the orderly to do as he had been accustomed to do. Dr. Wooster testified that he knew nothing of the disposition of the fragments, and had nothing to do with it; that he gave no instructions whatever regarding them, and did not know of their whereabouts or disposition.

The theory of the plaintiff is that, when the railroad company lifted Doxtator from the ground, it took upon its shoulders a duty, and that duty was to care for him while he should live, and at his death deliver his remains, and the whole of them, over to his wife for burial; that the company did not do this, but, instead, negligently allowed the cremation of the dissevered limbs, and is therefore liable to the widow in damages. It becomes important, therefore, to inquire just what duty the railroad company was under, and just how far it assumed control over the injured man. This question must, in the main, be determined as one of first impression, as no case analogous has been cited, and our research has not been more successful than that of the learned counsel on either side of the case, who are to be commended for the exhaustive examination which they have given the subject. When this accident occurred, the common instincts of humanity forbade that

this injured man be left to lie where he had fallen. His fellow workmen or any stranger would be impelled to minister to him, and the first impulse would be to call a surgeon and an ambulance, and see that he was taken where he could be treated. The yard foreman performed this plain duty, by notifying Dr. Johnson, the surgeon of the road, and calling the ambulance from police headquarters. By doing so, neither the foreman nor the railroad company can be said to have become bailee, or to have assumed such a control over the injured man as to preclude the relatives from assuming charge of the ministrations to him. But by Doxtator's own request he was not taken to his home. The policeman in charge of the ambulance evidently did not look to the yard foreman or any other official for his instructions. It was at his suggestion, and without dissent from Doxtator or his fellow workman, Strickland, that he was taken to Butterworth Hospital, instead of to a Catholic hospital. On arriving at the hospital, the hospital authorities took charge of him and called Dr. Lupinski. Had Dr. Wooster not appeared, could it be successfully contended that those connected with the railroad company had done more than humanity required, or had rendered the company liable for any further neglect of, or injury to, the unfortunate man? To admit such a contention would amount to punishing one for ministering to the comfort of a distressed fellow creature. Such cannot be held to be the obligation of those concerned in removing this unfortunate man to an appropriate place for treatment. They did precisely what they ought to have done, and are to be commended, rather than censured, for so doing.

What, then, was the obligation assumed by Dr. Wooster? He found the patient in an appropriate hospital, with another surgeon in attendance, and, as he says, assumed charge of the case. Dr. Lupinski continued to assist. Did Dr. Wooster, by thus assuming charge of the case, take upon himself, as the agent of the railroad company, the duty of seeing to it that, when death ensued, the body

should be delivered to the widow, or did his duty consist merely of performing such operations as the nature of the case required, leaving it to the attendants at the hospital to make such disposition of the parts amputated as custom warranted? We are of the opinion that the duty assumed by Dr. Wooster was the latter kind, merely, and that neither in purpose nor in fact did he assume to take charge of the dismembered parts. The assumption of the charge of the case was simply assuming charge of the operation, and the operation was performed under the conditions as Dr. Wooster found them. The patient was in a reputable hospital. Dr. Wooster had no knowledge of any direction as to the disposition of the amputated parts, and was not in fault in not assuming and guarding against an unwarranted disposition of them.

Under the testimony, the defendant was entitled to a directed verdict.

Judgment will be reversed, and a new trial ordered.

HOOKER, MOORE, and LONG, JJ., concurred. GRANT, C. J., did not sit.

HARVEY v. DETROIT FIRE & MARINE INSURANCE CO.

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1. INSURANCE — ACTION ON POLICY — LIMITATIONS — SUMMONS.
A claim under a policy of insurance is prosecuted within one year from the date of loss, as required by the terms of the policy, where a summons was taken out within the year, and was properly served before the return day, although it was not placed in the hands of the officer until after the year had expired.

2. MARINE INSURANCE—DATE OF LOSS—STRANDED VESSEL.
The "date of loss," within the meaning of the limitation clause of a policy of marine insurance, is not necessarily the day a stranded vessel, subsequently released, repaired, and abandoned to the underwriters, ran upon the shoal.

3. SAME—RIGHT OF ABANDONMENT—ITEMS OF LOSS.
The cost of removing the cargo from a grounded vessel in order to get it afloat should be considered as part of the loss in determining the amount lost, as decisive of the owner's right to abandon the vessel to the underwriters, and is not an expense "incurred on account of the cargo," within a clause of the policy excluding from the computation of the loss the expenses so incurred.

4. SAME—DECISION TO ABANDON—REASONABLE TIME.
Under a policy of marine insurance providing that the right to abandon shall not exist unless the loss exceeds one-half the valuation expressed in the policy, the owner of a vessel which has been aground, and has been floated by the underwriters, is entitled to a reasonable time in which to gather information and make up his mind as to whether he has, and whether he wishes to exercise, the right.

5. SAME—PROPORTIONATE RISK.
Abandonment to an underwriter of the proportion of a vessel which the amount of risk assumed by his policy bears to the value of the vessel expressed therein is sufficient, under the requirement of the policy that the abandonment convey an unincumbered and perfect title to the subject abandoned

Error to Wayne; Carpenter, J. Submitted January 6, 1899. Decided July 11, 1899.

Assumpsit by Fred C. Harvey against the Detroit Fire & Marine Insurance Company on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Moore & Goff, for appellant.

Wisner & Harvey and *George Gartner*, for appellee.

MOORE, J. This is an appeal by the defendant from a judgment obtained against it by the plaintiff upon an insurance policy issued by defendant. The plaintiff, who resides in Detroit, was the owner of the schooner Penokee, which had a valuation, stated in the policies hereafter mentioned, of $4,050. The plaintiff applied to defendant for insurance. Policies were delivered to him June 10,

1896, insuring the body, tackle, apparel, and other furniture of the schooner Penokee in the following amounts, viz.:

Detroit Fire & Marine Insurance Co., defendant	$1,200
Providence-Washington Insurance Co.	500
St. Paul Fire & Marine Insurance Co.	500
Greenwich Insurance Co.	500
Total	$2,700

October 26, 1896, the schooner stranded on a reef or shoal near Port Maitland, about 45 miles from Buffalo and 235 miles from Detroit. She was loaded with coal, bound to Toledo. The same day the owner and the defendant learned of the disaster, and the plaintiff started an expedition to her relief from Detroit, while the insurance companies started one from Buffalo. Each protested against the other sending an expedition. The plaintiff notified the defendant that he would not share in the expenses of its expedition. The defendant made the same statement in relation to the expedition sent out by the plaintiff. The Buffalo expedition arrived at the schooner first. About 200 tons of coal were taken from the Penokee, after which she was pulled from the shoal and towed to Buffalo, arriving there on the evening of October 30th. She was placed in a dry-dock, and temporary repairs put upon her. She was afterwards permanently repaired by the underwriters, and tendered to plaintiff in March, 1897. December 24, 1896, the plaintiff notified the underwriters that he elected to abandon the schooner to them, as a total constructive loss, and should look to them for the amount of the insurance policies. The valuation of the vessel was fixed by the policy at $4,050. As already stated, she was insured for $2,700. It is the claim of the plaintiff that he was a co-insurer to the amount of $1,350. When he decided to abandon the vessel, he tendered a conveyance to the underwriters of the following interests in the vessel: To the defendant, 24-81; to each of the other three companies, 10-81,—retaining in himself 27-81.

A good many assignments of error are alleged. The case was tried by jury before Judge Carpenter; the judge reserving the right to enter a judgment for defendant later, if he was satisfied that, as a matter of law, he should do so. Afterwards a motion for a new trial was made, which was overruled. The case was very carefully tried, and it will not be necessary to refer to some of the assignments of error, though they have been carefully considered.

The important questions in the case are four in number:

First. Was the claim of plaintiff prosecuted in time?

Second. Was the plaintiff entitled to abandon the vessel as a total constructive loss?

Third. Did plaintiff give notice of his intention to abandon soon enough?

Fourth. Did the plaintiff tender to the underwriters a conveyance of a sufficient interest in the vessel?

The answer to the first question will depend upon the construction to be placed upon the following clauses in the policy:

"Losses shall be payable in sixty days after proof of loss or damage covered by this policy, and of the amount thereof, and of the interest of the insured, shall be made and presented at the office of said company (the amount of the premium or note for premium on this policy, if unpaid, and all other indebtedness due this company, being first deducted).

"It is agreed that this policy shall become void if any other insurance is or shall be made upon the vessel interest hereby insured, which, together with this insurance, shall exceed the sum of twenty-seven hundred dollars.

"It is agreed that all claims under this policy shall be void unless prosecuted within one year from the date of loss."

The proof of loss was made December 24, 1896. This suit was commenced by summons, which was issued October 26, 1897, returnable November 16, 1897, which was placed in the hands of the sheriff November 12th, and was personally served upon the defendant before the return day mentioned therein. It is the contention of the

defendant that, as the summons was not placed in the hands of the sheriff until more than a year after the vessel was stranded, the claim was not prosecuted within one year from the date of loss. The circuit judge construed this clause to permit suit to be brought within a year after the cause of action accrued, and held that the cause of action did not accrue until 60 days after proof of loss was furnished. If the contention of the defendant is true, when did the loss occur? In case of a fire or a death, there is not much trouble in deciding when the loss happened. There is more difficulty in a case of this character. Did the loss occur when the steamer first struck the reef, or next day, or when the hull was run into the dry-dock and the water was pumped out? What is meant by the requirement that the claim shall be prosecuted within one year from the date of loss? Is this the same as a requirement that claimant shall commence his suit within a year? The defendant gives an affirmative answer to the last question, and says the suit was not commenced until the summons was put into the hands of the officer to serve; citing *Howell v. Shepard,* 48 Mich. 472; *First National Bank* v. *Dwight*, 83 Mich. 191; *Peck* v. *Insurance Co.*, 102 Mich. 52; and other cases. None of these cases are directly in point, and, so far as the case of *Peck* v. *Insurance Co.* bears upon the question, it is more favorable to the plaintiff than defendant. In the case at bar the summons was taken out in time, with a proper return day; it was put in the hands of a proper officer for service during its life, and was actually served before the return day. In the cases cited, the writs were either allowed to die, without service, and without being put in the hands of an officer, or were not issued until the statute of limitations had begun to run. What was done here comes within the rule as stated by Justice MONTGOMERY in *Peck* v. *Insurance Co., supra:* "The commencement of suit consists of suing out the summons, and delivering or transmitting it to an officer, with the *bona fide* intention of having it served." I do not understand that not

only must the summons be taken out, but it must be given to an officer and served, before the statute of limitations begins to run, to constitute the commencement of a suit; but it will be sufficient if the summons is taken out before the statute begins to run, with the *bona fide* intention of having it served, and placing it in the hands of an officer and having it served during its life. Angell on Limitations (section 312) says:

"The general rule appears to be, in this country, that at the time of suing out of the writ the action commences; and either when the writ is delivered to the sheriff or to his deputy, or when it is sent to either of them, with a *bona fide* intention to be served upon the defendant, it is considered to have issued."

See *Chicago, etc., R. Co.* v. *Jenkins*, 103 Ill. 588.

In construing what the words in the policy mean, it may be well to consider other provisions of the policy. One of its provisions is, there shall be no liability should the vessel be grounded in certain localities, where the known shallowness of the water is such that the grounding would be likely to occur in navigating that locality. Should the vessel go ashore in such a locality, though the owner would suffer great loss, he would have no claim against the underwriters, and, within the meaning of the policy, there would be no loss. The grounding of a vessel is not sufficient, of itself, to create a liability. It is the getting of her off, the floating her, and getting her to a place of safety, that makes a loss for which there is a liability to pay. Another provision of the policy requires the owner, in case of loss or misfortune, to give the underwriters prompt notice; and the insured is required to do what he can to recover and save the property, submitting his plans to the underwriters. Another provision provides that no partial loss or particular average shall in any case be paid unless it equals 11 per cent. of the valuation. It is evident that the question of loss does not depend upon the vessel going aground, but upon the expense of getting her off and getting her repaired. As we shall see later,

there can be no right of abandonment unless the loss exceeds 50 per cent. of the valuation of the vessel as stated in the policy. Until there is a right of abandonment, there can be no claim for total constructive loss, and this cannot be determined until it is known what the expenses are. Another clause of the policy provides, "Losses shall be payable in sixty days after proof of loss or damage covered by this policy, and of the amount thereof, and of the interest of the insured, shall be made and presented at the office of the company." We do not discover from the policy when this proof of loss must be made. Taking all the other provisions of the policy in connection with this particular provision, it is evident the question when suit must be brought is a difficult one to answer. Intelligent men may differ as to its meaning. The language used in the policy was prepared by the insurance company. Where the language is ambiguous, it is to be construed most strongly against the company. See *Steel* v. *Insurance Co.*, 2 C. C. A. 470, 51 Fed. 722, and the many cases there cited. We think the claim was prosecuted in time. See authorities collated in the case just cited.

The answer to the second question will be determined by construing this clause in the policy:

"The right to abandon as for a constructive total loss shall not exist unless the loss exceeds one-half of the valuation expressed in this policy. In determining the amount of the loss, there shall be deducted therefrom the deductions from repairs provided in this policy; and in no case shall any amount be included, in determining such loss, for which the vessel or the insured would be liable in general average, beyond the vessel's proportion in general average of the cost of recovering and taking her to the port of repair, and the cost of repairs, with such deductions; and, among other things, there shall be excluded from the loss the vessel's proportion of all expenses and sacrifices by jettison, and sacrifices of, or expenses incurred on account of, the cargo, or any part thereof; nor shall detention by the season, or by any other cause, be alleged or allowed as cause for abandonment."

The following portion of this clause had been used in

policies but a short time: "Among other things, there shall be excluded from the loss * * * expenses incurred on account of the cargo, or any part thereof." The adjuster of the company, with his 12 years of experience, testified that he never had been called to adjust a loss where such a clause was in the policy. In wrecking the vessel, 200 tons of coal were taken from her, and transferred to a barge. It is contended by defendant this was "an expense on account of the cargo," and cannot be considered in deciding whether the loss exceeds one-half of the valuation expressed in the policy, so as to give the owner the right to abandon for a constructive total loss. It is claimed by counsel that the policy excludes (1) that proportion of the expenses incurred on account of the cargo which would, under general average, be chargeable to the vessel; (2) all expenses incurred solely on account of the cargo. It is this provision of the policy which is to govern the disposition of the items of expenditure in this case. It is said that, if the expenditures are disposed of upon this basis, the vessel's proportion of the expenses is not sufficient to make its loss exceed one-half the valuation of the vessel, thereby making a constructive total loss. In overruling a motion for a new trial, the learned trial judge disposed of the claim of counsel in these words:

"The most difficult problem in this case is to determine what general average expenses shall be considered. The policy provides, 'and in no case shall any amount be included, in determining such loss, for which the vessel or insured would be liable in general average, beyond the vessel's proportion in general average of the cost of recovering and taking her to the port of repair, and the cost of repairs; * * * and, among other things, there shall be excluded from the loss the vessel's proportion of all expenses and sacrifices by jettison, and sacrifices of, or expenses incurred on account of, the cargo, or any part thereof.' I do not think this language excludes any expense to recover or to get to the place of repair both the vessel and the cargo. Defendant concedes that the expense of pulling the vessel off the shoal should not be excluded. It is clear, though, that at least a part of this expense was

made necessary by the fact that the cargo was on the vessel. I am unable to see on what ground this item of expense can be included, and the expense of lightering the cargo be excluded. The language of the policy, in clear terms, includes the vessel's proportion of recovering and taking her to the port of repair. Does not this clearly indicate that expenditures for the benefit of the vessel and cargo shall be included? The language, 'and, among other things, there shall be excluded * * * all expenses and sacrifices by jettison, and sacrifices of, or expenses incurred on account of, the cargo, or any part thereof,' from its natural import, as well as from its connection with the language just quoted, means expenses incurred solely on account of the cargo. An illustration of this is a charge of $12.55 for towing barge Taylor to unload coal, deducted from the Maytham Tug Line bill. I am satisfied that I erred in excluding the charge for unloading coal. The boat could not receive the needed repairs with the cargo on board."

We are not aided in deciding whether the judge was right or not by any authorities, and the question is not free from doubt. When the vessel went ashore, she was loaded with coal. To release her, it was necessary to remove part of her cargo, that she might float. Can it be said that was an "expense on account of the cargo?" After she reached port, she was leaking badly, and it was necessary to keep a pump running, to prevent her sinking. Had she filled and sunk, great expense would have been involved in raising her. A small tug was used, which was brought to the vessel by the representatives of the underwriters who had an insurance upon the cargo. The record shows it was used for many purposes where the large tug, on account of the depth of water, was not available. She was used in going for provisions for the men who were at work to release the vessel as well as the cargo, and in running lines from the schooner to the lighter and the larger tug. We agree with the trial judge that, while these expenses were incurred because the cargo was in the vessel, they were not simply "expenses on account of the cargo," but were for the benefit of the vessel as well as the cargo.

Was the notice of abandonment in time? The policy does not mention any particular time in which the notice must be given. The owner is entitled to a reasonable time in which to make up his mind, and also to a reasonable time in which to get information so he can act advisedly. The testimony discloses that the insured made frequent inquiries of the underwriters for the amount of the expenses and charges, and that there was delay in obtaining these amounts. The notice of abandonment was given before the permanent repairs were made, and before a contract was given therefor. The trial judge, on the motion for a new trial, held the notice was in time, and based his holding on the case of *King* v. *Walker*, 3 Hurl. & C. 209. We think he did not err in so holding.

The clause of the policy bearing upon the fourth question reads:

"Moreover, no abandonment in any case whatever, even when the right to abandon may exist, shall be held or allowed as effectual or valid unless it shall be in writing, signed by the insured, and delivered to the said company or its authorized agent, nor unless it shall be efficient, if accepted, to convey to and to vest in the said insurance company an unincumbered and perfect title to the subject abandoned. The valuation of said vessel expressed in this policy shall be considered the value in adjusting losses under this policy."

It is claimed by defendant that plaintiff, instead of tendering a conveyance of 24-81, should have made a tender sufficient to convey to and vest in the insurance company an unincumbered and perfect title. Counsel argue, "The insurance covered the whole body of the schooner, and the abandonment should be co-extensive with the subject insured;" citing *The Mary E. Perew*, 15 Blatchf. 58; *The Manitoba*, 30 Fed. 129. The authorities are not free from conflict. If the contention of defendant is true, before plaintiff could make an abandonment which would entitle him to recover of the defendant, he must make a conveyance which would cut off his right to recover from

the other underwriters who had policies on the vessel. It was the opinion of the trial judge that:

"The provision in the policy requires that the abandonment shall be evidenced by a written transfer, which shall convey to and vest in the insurance company an unincumbered and perfect title to the subject abandoned. The 'subject abandoned,' in my judgment, means that part of the property covered by the policy of insurance."

This conclusion is justified by 2 Phil. Ins. § 1490; 2 Arn. Ins. 953, 956, 979; *Rice* v. *Cobb*, 9 Cush. 302; *Phillips* v. *Insurance Co.*, 11 La. Ann. 459; *Merchants', etc., Ins. Co.* v. *Duffield*, 2 Handy, 122; *Cincinnati Ins. Co.* v. *Duffield*, 6 Ohio St. 200 (67 Am. Dec. 339). See *Insurance Co. of North America* v. *Johnson*, 17 C. C. A. 416, 70 Fed. 794; *The Potomac*, 105 U. S. 630.

The judgment is affirmed.

MONTGOMERY and LONG, JJ., concurred. GRANT, C. J., and HOOKER, J., did not sit.

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GORMAN v. BROSSARD.

1. STATUTE OF FRAUDS—CONTRACTS OF BARTER.
   Contracts of barter are regarded, so far as the statute of frauds is concerned, as contracts of sale.

2. SAME—SALE OF CURBSTONE—CONSTRUCTIVE DELIVERY.
   A mere oral agreement on the part of one person to sell, and of another to accept, a quantity of curbstone lying where the seller deposited them after completing a public contract, the buyer agreeing to send for them when desired, is, notwithstanding the bulky nature of the subject-matter, insufficient to constitute a constructive delivery which will satisfy the statute of frauds; a constructive delivery, even, not being allowed to rest in words alone.

3. SAME—PAYMENT.

A mere oral agreement whereby a creditor is to take payment of a debt of $125 in curbstone belonging to his debtor, where no receipt or other evidence is given of the extinguishment of the debt, cannot be sustained, as against the objection that, there being no delivery, it violates the statute of frauds, on the ground that the transaction itself amounts to a payment within the meaning of that statute.

Error to Wayne; Steere, J., presiding. Submitted January 25, 1899. Decided July 11, 1899.

Assumpsit by Charles A. Gorman against Hubert Brossard for goods sold and delivered. From a judgment for defendant, plaintiff brings error. Reversed.

Walter Barlow, for appellant.

Jonas B. Houck and *Robert Parker*, for appellee.

HOOKER, J. The plaintiff shipped a quantity of crossing and curb stone to the defendant, upon his order. The defendant received the stone, and used most of them. Upon receiving the bill, he learned that the shipment exceeded the amount ordered, and he notified the plaintiff that the excess was subject to his order. He used some of the excess, however, and drew the remainder to a vacant place. He paid for all that he used, and refused to pay a draft for $129 for the remainder. The plaintiff brought an action to recover the balance, and appeals from a verdict and judgment for the defendant.

The defendant testified that the plaintiff called upon him in Detroit, and they went together to where the stone were, and that he agreed to accept them in satisfaction of his debt. The plaintiff denied this, and the question was submitted to the jury. The plaintiff claimed that this alleged contract was void under the statute of frauds; the defendant, that it was not, because it was accompanied by a delivery of the stone,—it being contended that the title passed at the time of the agreement. The judge submitted the question to the jury, and permitted them to find that

there was a delivery of the stone on the occasion mentioned. It is alleged that this was error. The stone were in an alley, and were at hand when the alleged arrangement was made. The defendant testified:

"*Q.* Did you go and show it to him?

"*A.* Yes; we started from Mr. Barlow's office, in the Buhl Block, and went up Griswold street, and got on the car, and went up as far as the Western Market, and we got off at Ninth avenue. It was 45 or 50 or 60 feet of curbing that was right by the little office of the board of public works; and, after we examined them, he was satisfied, and we crossed over to where the balance was, across the street, in the alley, where I had some racks—block racks—stored away. There was a pile of cobblestone there in the alley, and Mr. Gorman examined the curbstone I had there,—a fraction over 300 feet that was, including the 50 feet at the Western Market. I told him I would move them over there, and he said he was going to Toledo, and that he would have them shipped there, or send for them himself."

It is said in the brief that the stone were in a public alley when the arrangement was made, but we find no evidence that the alley was public. It seems obvious, from the record, that the defendant accepted all of the stone, notwithstanding his letter, and the case did not go to the jury upon the theory that he did not. By his own testimony it is shown that he used about half of the excess, and that he attempted to turn out what was left in payment, which is inconsistent with a claim that he did not accept them.

It is claimed on behalf of the defendant:

First. That the transaction was in the nature of barter, and not a sale for money, and therefore not within the statute.

Second. If it shall be held to have amounted to a sale, that it was not within the statute, because there was an acceptance and receipt of the property.

The first proposition rests upon a strict construction of the statute, by which its application would be limited to cases of technical sales for money. Counsel cite no cases

in point, and such as we have found do not support their claim. Mr. Browne, in his work on Statute of Frauds (§ 293), says that "contracts of barter are regarded, so far as the statute of frauds is concerned, as contracts of sale." Among the cases cited is *Dowling* v. *McKenney*, 124 Mass. 478, where a contract to exchange a monument for lands was held to be within the statute. See, also, *Kuhns* v. *Gates*, 92 Ind. 66, and *Rutan* v. *Hinchman*, 30 N. J. Law, 255.

The other question is not so easily disposed of. 2 How. Stat. § 6186, provides:

"No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The transaction in question consisted entirely of a conversation. No act was shown, beyond the oral agreement on the one part to give, and upon the other to accept, the stone there present, in satisfaction of the debt. If the stone had not been upon the premises of the vendor or his bailee, but had been upon the lands of a third party, who was not a bailee (*e. g.*, upon public ground, in which the vendor had no special interest), it is said that the "vendor might effect a delivery by putting the goods at the disposal of the vendee, and suffering him to take actual control of them,"—citing Benj. Sales, § 178. In support of this the author cites *Tansley* v. *Turner*, 2 Bing. N. C. 151. But that case does not seem to involve the statute of frauds, because the contract was in writing. The same is true of the case of *Cooper* v. *Bill*, 3 Hurl. & C. 722. Thus, although the author applies these cases to a discussion of "acceptance and receipt" in connection with the statute of frauds, they involved a question of the passing of title under a valid contract. But the

text does not imply that the language of the contract alone is sufficient to constitute an acceptance and receipt. Here the question is whether enough was done to render the contract valid and efficacious to pass title, and the authorities are harmonious that something is necessary beyond a mere oral agreement to sell and to buy.

In *Marsh* v. *Rouse*, 44 N. Y. 647, it was said that, "to take the case out of the statute, the acts of the parties must have been of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer." The case follows *Shindler* v. *Houston*, 1 N. Y. 261 (49 Am. Dec. 316). It was there said:

"As no part of the purchase money was paid by the vendee, the contract above stated was void by the statute of frauds (2 Rev. Stat. p. 136, § 3, subd. 3), unless the buyer 'accepted and received' the whole or a part of the property sold. The object of the statute was not only to guard against the dishonesty of parties and the perjury of witnesses, but against the misunderstanding and mistakes of honest men. If the contract is reduced to writing, and 'subscribed by the parties to be charged thereby,' this object is effectually attained. The writing becomes its own interpreter. Where this is omitted, but the vendee has paid part of the price, or the vendor has delivered and the buyer has accepted a portion or all of the property, upon the strength of the agreement, these acts not only indicate deliberation and confidence upon the part of the contractors, but they furnish unequivocal evidence of the existence of a contract of some sort between them, although its terms and provisions must, after all, depend upon the recollection of witnesses.

"The case before us is destitute of all such collateral evidence. No acts of the party sought to be charged are proved. We are presented with a naked verbal agreement. The declarations relied upon as evidence of a delivery and acceptance constitute a part of the contract, and, of course, are obnoxious to all the evils and every objection against which it was the policy of the law to provide. The acts of part payment, of delivery and acceptance, mentioned in the statute, are something over and beyond the agreement of which they are a part per-

formance, and which they assume as already existing. The entire absence of such evidence distinguishes the present case from all those that have been cited by the counsel for the plaintiff in support of this action: *Chaplin* v. *Rogers*, 1 East, 192; *Jewett* v. *Warren*, 12 Mass. 300 (7 Am. Dec. 74); *Riddle* v. *Varnum*, 20 Pick. 280; *Bates* v. *Conkling*, 10 Wend. 391; 2 Kent, Comm. (4th Ed.) 500, 501. The strong case, from the Pandects, of the column of granite, is not an exception; for it is fairly to be inferred that the consent of the vendor that the purchaser should take possession was subsequent to the sale.

"I am aware that there are cases in which it has been adjudged that, where the articles sold are ponderous, a symbolical or constructive delivery will be equivalent in its legal effect to an actual delivery. The delivery of a key of a warehouse in which goods sold are deposited furnishes an example of this kind. But, to aid the plaintiff, an authority must be shown that a stipulation in the contract of sale for the delivery of the key or other *indicia* of possession will constitute a delivery and acceptance, within the statute. No such case can be found. The entire contract being void by the statute, the stipulation in reference to a constructive delivery would fall with the other provisions. In *Phillips* v. *Bistolli*, 2 Barn. & C. 511, the property was sold by an auctioneer, and delivered to the purchaser, who, after detaining it three or four minutes, handed it back, saying he was mistaken as to the price. The vendor refused to receive the property, and the jury found that the excuse was false in fact. The verdict was set aside; the court saying that, to satisfy the statute, there must be a delivery by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with the intent of taking possession as owner. This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. *Bailey* v. *Ogden*, 3 Johns. 421. Declarations accompanying an act, and explanatory of it, are undoubtedly admissible evidence, as a part of the *res gestæ*. This is all that is established by the modern authorities. *Jewett* v. *Warren*, 12 Mass. 300; *Dutilh* v. *Ritchie*, 1 Dall. 171; *Baldey* v. *Parker*, 2 Barn. & C. 44; *Bailey* v. *Ogden*, 3 Johns. 421."

In the same case, Bronson, J., concurring, said:

"A writing must be made, part of the purchase money must be paid, or the buyer must accept and receive part of the goods. Mere words of contract, unaccompanied by any act, cannot amount to a delivery. To hold otherwise would be repealing the statute. There may be a delivery without handling the property or changing its position. But that is only where the seller does an act by which he relinquishes his dominion over the property, and puts it in the power of the buyer, as by delivering the key of the warehouse in which the goods are deposited, or directing a bailee of the goods to deliver them to the buyer, with the assent of the bailee to hold the property for the new owner. In such case there is, in addition to the words of bargain, an act by which the dominion over the goods is transferred from the seller to the buyer. Here there was no delivery, either actual or symbolical. * * * It is undoubtedly true that it will not always be easy to make an actual delivery of bulky and ponderous articles. But there are other ways of satisfying the statute of frauds. The parties may put their agreement in writing, or the buyer may pay the whole or some part of the purchase money."

Wright, J., in the same case, said:

"The cases of *Elmore* v. *Stone* [1 Taunt. 458] and *Chaplin* v. *Rogers* are the most barren of acts indicating delivery, but these are not authority for the doctrine that words, unaccompanied by acts of the parties, are sufficient to satisfy the statute. Indeed, if any case could be shown which proceeds to that extent, and this court should be inclined to follow it, for all beneficial purposes the law might as well be stricken from our statute book; for it was this species of evidence, so vague and unsatisfactory, and so fruitful of frauds and perjuries, that the legislature aimed to repudiate. So far as I have been able to look into the numerous cases that have arisen under the statute, the controlling principle to be deduced from them is that, when the memorandum is dispensed with, the statute is not satisfied with anything but unequivocal acts of the parties,—not mere words, that are liable to be misunderstood and misconstrued, and dwell only in the imperfect memory of witnesses. The question has been, not whether the words used were sufficiently strong to express the intent of the parties, but whether the acts connected with them, both of seller and buyer, were equivocal or unequivocal. The best-considered cases hold that there

must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the *quantum* or quality of the goods sold. Chit. Cont. 390, and cases cited; Hil. Sales, 135, and cases cited; *Maberley* v. *Sheppard*, 10 Bing. 102; *Acebal* v. *Levy*, Id. 384. But will proof of words alone show a delivery and acceptance, from which consequences like these may be reasonably inferred? Especially if those words relate, not to the question of delivery and acceptance, but to the contract itself? * * * I think not."

See, also, *Rodgers* v. *Phillips*, 40 N. Y. 519; *Young* v. *Blaisdell*, 60 Me. 272.

The case of *Hallenbeck* v. *Cochran*, 20 Hun, 416, is much like the present case. An oral contract for the sale of hay, when the parties were in sight of a part of it, was held within the statute, though the plaintiff said at the time, "The hay is yours," and defendant said, "Yes." The case of *Shindler* v. *Houston*, *supra*, has provoked criticism, but it is not necessary for us to adopt all that is there said. This court has had occasion to consider the *Shindler Case*, and has held that "it supports the only sound view, viz., that words are not enough, and that the statute can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties." *Alderton* v. *Buchoz*, 3 Mich. 329.

But it may be said that the case need not turn upon the question of receipt and acceptance of the goods, because the contract may be valid without delivery, if something is given by way of earnest or part payment. 2 How. Stat. § 6186. We think there is no escape from the conclusion that this was an arrangement for the sale of chattels in consideration of the cancellation of a debt due from the vendor to the vendee. As we have said, nothing occurred except mutual promises,—words, merely,—and the question is whether that was such a payment as comes within the statute. The subject is treated in Browne,

Stat. Frauds, §§ 342, 343. A New York case is quoted, where there was an agreement for novation, but the court held that it was not part payment, but merely an oral agreement to pay, which, like any other promise to pay, was insufficient. *Artcher* v. *Zeh*, 5 Hill, 205. In *Ely* v. *Ormsby*, 12 Barb. 570, decided in 1850, this case was followed. The plaintiff bought a span of horses for $300, which amount was applied, but not indorsed, upon a mortgage which he held against the defendant, the same being on file. In a suit upon the contract it was held void under the statute. It was said that words alone would not answer the requirements of the statute; citing *Artcher* v. *Zeh* and *Shindler* v. *Houston*, hereinbefore referred to. In 1865 the question arose again in the case of *Brabin* v. *Hyde*, 32 N. Y. 523, and it was there said, with the approval of the entire bench, that:

"This seems very plain. The section of the statute employs the words 'purchase money.' But it was said in the case of *Artcher* v. *Zeh*, 5 Hill, 200, that the statute 'must be taken in its spirit to mean anything, or part of anything, given by way of consideration, which is money or money's worth. The object was to have something pass between the parties besides mere words,—some symbol, like earnest money.' The payment may be made in money or property, or in the discharge of an existing debt, in whole or in part, due from the vendor to the purchaser, or the extinguishment of or payment upon a promissory note held by the latter against the former. A mere agreement to apply the purchase money to either of these objects would not be enough, because the contract would still rest in words, and nothing more. The agreement to pay the note or satisfy the debt must be consummated and carried into effect by an act which shall be obligatory upon the purchaser, and enable the vendor to enforce the contract of sale. The note should be delivered up and canceled; or, if the purchase money falls short of complete payment, it should be extinguished by an indorsement made upon it in writing which shall operate effectually as an extinguishment *pro tanto*. And if the purchase money is to be applied to pay an open account, in whole or in part, the creditor and purchaser should part

with some written evidence of such application which shall bind him, and put it into the power of his debtor and vendor to enforce the contract. Without this, or something like this, the contract is a mere collection of words, and the statute evaded."

This language was quoted and followed in 1872 in the case of *Walrath* v. *Richie*, 5 Lans. 362; and *Walrath* v. *Ingles*, 64 Barb. 265, is in accord with the principle. See, also, *Organ* v. *Stewart*, 60 N. Y. 413. The case of *Matthiessen, etc., Refining Co.* v. *McMahon's Adm'r*, 38 N. J. Law, 536, supports the same doctrine, following and approving *Walker* v. *Nussey*, 16 Mees. & W. 302. See, also, *Gaddis* v. *Leeson*, 55 Ill. 83. There is a *dictum* in *Walker* v. *Nussey* that implies that, where the goods sold are to extinguish the debt, it may be considered a payment; but it is plainly at variance with the logic of the cases cited. Had it the force of authority, it would be out of harmony with the great majority of cases.

The testimony in this case not only fails to show that the plaintiff took possession of the stone, but shows that he declined to accept and receive them. The defendant testified that he told the plaintiff that he would move the stone for him, but he did not accept the offer; saying that he was going to Toledo, and that he would have them shipped there, or send for them himself. Nor does it show a payment taking the agreement out of the statute.

We are of the opinion that there was no question for the jury.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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SIMONS v. McDONNELL.

1. MORTGAGES—FORECLOSURE—PERSONAL LIABILITY—PLEADINGS.
   Where a foreclosure bill sets out in full the promissory note accompanying the mortgage in suit, and asks that defendant pay any balance remaining due thereon if the sale of the mortgaged premises should fail to produce sufficient to pay the debt, and that in such case complainant have execution for the balance, a decree declaring defendant personally liable for the payment of the amount found due is within the pleadings.

2. SAME—FORM OF DECREE—DEFICIENCY.
   A decree in foreclosure proceedings finding defendant personally liable for the payment of the amount found due, but not directing the payment of the balance, if any, after sale, is not open to the objection that it constitutes a decree for a deficiency before it is ascertained that a deficiency will exist.

3. SAME—HUSBAND AND WIFE.
   Although a wife joins with her husband in the execution of a note and of an accompanying mortgage, no personal decree can be rendered against her in foreclosure proceedings, where she signed merely to waive her dower, having no other interest in the property.

Appeal from Oakland; Smith, J. Submitted February 9, 1899. Decided July 11, 1899.

Bill by David W. Simons against Henry P. McDonnell, John J. McDonnell, Nelson K. Riddle, Patrick H. Monahan, and their respective wives, to foreclose a mortgage. From a decree for complainant, adjudging the named defendants personally liable for the payment of the debt, they appeal. Affirmed.

Junius Ten Eyck (*Alfred Lucking*, of counsel), for complainant.

Brennan, Donnelly & Van De Mark, for appellants.

LONG, J. This appeal is taken by Henry P. McDonnell, John J. McDonnell, Nelson K. Riddle, and Patrick H. Monahan, four of the defendants, from a decree in a foreclosure case. The other four defendants in the bill are their respective wives. The bill prays:

"And that the said above-named defendants herein pay to your orator any balance that shall remain due to your orator of the principal and interest of said note and indenture of mortgage, if the sale of said mortgaged premises as aforesaid fail to produce sufficient to pay the whole of said mortgage debt and the costs of this suit, and that in such case your orator have execution for the collection of such balance, and the costs thereon, according to the rules and practice of this court."

The mortgage in suit was accompanied by a promissory note signed by all the defendants. This note is set out in the bill as follows:

"$13,000.00. DETROIT, MICH., April 1, 1895.

"For value received, we severally and jointly promise to pay to the order of David W. Simons the principal sum of thirteen thousand dollars ($13,000.00) on or before the 20th day of January in the year nineteen hundred and two, without grace, with interest at the rate of six per cent. per annum from January 20, 1895, payable on the 20th day of July next and semi-annually thereafter until the whole of said principal sum is paid," etc.

The decree of sale recites that:

"There is due to the complainant at this date upon the note and mortgage mentioned and set forth in the bill of complaint, for principal and interest, the sum of fifteen thousand seven hundred and six dollars and fifty-six cents; and that the said defendants, Henry P. McDonnell, John J. McDonnell, Nelson K. Riddle, and Patrick H. Monahan, are personally liable for the payment thereof," etc.

It is contended that the decree finds that the four defendants who bring this appeal are personally liable for the whole amount of the mortgage debt, and therefore for any unpaid balance remaining after the sale of the property to satisfy the mortgage. It is therefore contended:

1. That, under the pleadings, the court had no jurisdiction to enter a personal decree at any time.

2. That the personal liability of the defendants could not be established, at any rate, in the original decree of foreclosure and sale.

3. That, inasmuch as the complainant asked the court to decree that all the defendants pay any balance remaining unpaid upon the sale, the court had no power to enter a decree against any number of the defendants less than all.

We think the averments of the bill as above set out are sufficient to warrant the decree made. The defendants were the mortgagors. The note was signed by all of them, and accompanied the mortgage. The decree fixed the amount due on the note and mortgage. The decree necessarily involved the determination of the amount due. *Haldane* v. *Sweet*, 58 Mich. 431. This the court found to be, by the decree, $15,706.56. The defendants had the right in this proceeding to show that the amount was less, or that there was no personal liability on their part to pay it. These questions are always open in the foreclosure proceedings. *Ransom* v. *Sutherland*, 46 Mich. 492; *Wallace* v. *Field*, 56 Mich. 3.

Counsel for defendants cite section 6702, 2 How. Stat., and claim that under it the court had no power to establish the liability for any balance until on the coming in of the report of sale, and that the court had no authority to enter a decree for deficiency until it should be ascertained that there would be a deficiency. The decree does not direct the payment of any unpaid balance after sale. It simply determines the amount due from the mortgagors on the note and mortgage, and that the defendants named are personally liable for the amount. It is true that in *Vaughan* v. *Black*, 63 Mich. 215, it was held that the personal liability of a party collaterally liable for the payment of a debt secured by a mortgage on real estate could not be absolutely fixed in the original decree of foreclosure. But that is not this case. Here the parties were the mortgagors, and had made the note accompanying the mortgage.

It appears that the wives of the parties appealing had no rights in the property, other than dower, and that they signed the mortgage for the purpose of waiving their dower rights. The court found very properly that they were not liable on the note. It was the note of the husbands, and no personal decree could be rendered against the wives.

The decree of the court below must be affirmed.

The other Justices concurred.

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FRAZEE *v.* STOTT.[1]

MASTER AND SERVANT — LIABILITY FOR INJURY — NEGLIGENCE OF FELLOW-SERVANT.

A mill owner who has furnished an employé with a safe place to work, and with proper machinery and appliances, and who has selected a competent foreman to superintend the mill and competent men to assist about the employment, is not liable for injuries sustained by such employé while operating a roller machine, due to the misplacing of a guideboard by other employés after the latter, by direction of the foreman, had exchanged the rollers in the machine; they being fellow-servants of the injured employé even while engaged in taking out and putting in the rollers.

Error to Wayne; Carpenter, J. Submitted April 20, 1899. Decided July 11, 1899.

Case by Clarence A. Frazee against David Stott for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Defendant owns a flouring mill in the city of Detroit, and is the general manager of his business. Upon the

[1] Rehearing denied September 27, 1899.

floor of the mill are 28 roller machines, called "roller mills," of which one is used for grinding feed and the others for grinding flour. The feed mill is composed of two sets of rollers, one above the other, the upper set of rollers being nearer the front of the mill than the other, which is situated about eight inches below. Two side-boards, slanting inwards, one in front and the other in the rear of the upper set of rollers, and extending below it, were placed so as to carry the feed from the upper set of rollers to the lower. The rollers were made of steel, with corrugated surfaces. These corrugations became dull from use, and about every 10 days it became necessary to remove the rollers for sharpening, and replace them by others. An eccentric rod extended in front of the rollers, and between them. Plaintiff had been employed for five years in flouring mills, three of which had been in roller mills. When plaintiff was employed, the defendant's foreman, Mr. Hargraves, instructed him fully as to the operation of the machine, and he fully understood its mechanism and operation. It required his whole time to run the mill. Plaintiff gave evidence tending to show that the lower edge of the front guideboard was at first above the eccentric rod, leaving a sufficient space between the two for him to insert his hand. One of his duties was to insert his hand to catch the feed as it came from the upper rolls, to see whether the mill was doing proper work. This he was required to do many times daily. This was done by placing the ends of his fingers against the guide-board, and extending his hand under the lower edge a sufficient distance to catch some feed for examination. He had been in the employ of the defendant three weeks doing this work before the accident complained of. During this time the rollers had been twice exchanged. The mill was housed in with wood, and, in order to examine the feed, a door was opened in front of the guideboard. Plaintiff also gave evidence tending to show that, when the rollers were first changed, a small iron rod had been inserted above the eccentric rod for the purpose of strengthening

the woodwork; that the guideboard was at that time lowered so as to rest on that rod, but still leaving room for the insertion of his hand above the eccentric rod; that the rollers had been exchanged the day before the accident; that the front guideboard was then placed so as to rest upon the eccentric rod; that he placed his hand in the usual manner against the guideboard, moved it down and under, and caught his hand between the lower rollers, by means of which all the fingers of that hand were crushed off. The foreman of these mills instructed two other employés, named Enrich and Shafer, to take out the dull rollers and put in the sharp ones. They were chosen for this work because they were more experienced in the work than was the plaintiff, who had nothing to do with making the exchange, and was placed at other work about the mill while the exchange was being made. Enrich and Shafer were engaged in the same room in running the flour mills, whose sets of rollers were not placed one above the other. The negligence alleged is in lowering the guideboard to the eccentric rod, so that, in catching the feed for examination, it brought his hand in dangerous proximity to the lower set of rollers. The change in the guideboard is contested by the defendant, and so is the time of the change of rollers before the accident. The court directed a verdict for the defendant on the ground that Enrich and Shafer were fellow-servants, and, if they were negligent, their negligence is not chargeable to the defendant. A motion for a new trial was made, upon which the learned circuit judge, after a careful examination of the authorities, adhered to his former ruling, and filed an able opinion, giving his reasons.

S. E. Engle, for appellant.

Keena & Lightner, for appellee.

GRANT, C. J. (*after stating the facts*). It appears conceded that plaintiff and Enrich and Shafer were ordinarily fellow-servants, but it is argued that they were not

fellow-servants in taking out and putting in the rollers, and that defendant's duty continued and rested upon him to continually inspect the machine, and that this duty was then the same as though a new machine were being put in place. The following facts are not contested:

1. That the machine was one in common use, was properly constructed, and properly set up.
2. That Enrich and Shafer were competent for the work. (One count in the declaration alleged their incompetency, but this was abandoned upon the trial.)
3. That the machine was in the same condition as when purchased, except the alleged lowering of the guideboard.
4. That Hargraves was a competent foreman to superintend these mills.

Defendant had furnished a safe place, proper machinery and appliances, and competent men to perform the work. Evidently he could not personally superintend all the details of the work. To sustain the contention of the learned counsel for the plaintiff would result in making an employer responsible for every negligent act of his employé, no matter how extensive his business, when such negligent act related to the necessary fixing of machinery, and that, too, when he himself may not be skilled in such things, and has done all that lay in his power, by furnishing good materials, appliances, and skilled and experienced men. It would result in overturning the well-established rule upon the negligence of fellow-servants. The question cannot be determined by the fact that the work to be done requires skill and experience, or that one servant occupies a position of greater responsibility, or is engaged in a different line of employment. The servant, in order to make his employer responsible for his negligent act, must be engaged in work which belongs to the master to superintend. A locomotive engineer of one train and the conductor of another are fellow-servants. So, also, are brakeman and engineer. *Michigan Central R. Co.* v. *Dolan*, 32 Mich. 510; *Conger* v. *Railroad Co.*, 86 Mich. 78. A miner and a timberman are fellow-servants.

Quincy Mining Co. v. *Kitts*, 42 Mich. 34. An engineer and a fireman are fellow-servants. *Henry* v. *Railway Co.*, 49 Mich. 495. Carpenters and other artisans, working in different departments, are fellow-servants. *Hoar* v. *Merritt*, 62 Mich. 386; *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 196 (27 L. R. A. 266). A founder in a blast furnace and a locomotive engineer of the same company are fellow-servants. *Adams* v. *Iron Cliffs Co.*, 78 Mich. 271 (18 Am. St. Rep. 441). A brakeman and a car inspector are fellow-servants. *Dewey* v. *Railway Co.*, 97 Mich. 329 (22 L. R. A. 292, 37 Am. St. Rep. 348). A car loader and a shift boss in a mine are fellow-servants. *Petaja* v. *Mining Co.*, 106 Mich. 463 (32 L. R. A. 435, 58 Am. St. Rep. 505). A fireman and a section man on a railroad are fellow-servants. *Loranger* v. *Railway Co.*, 104 Mich. 80. See, also, *Schroeder* v. *Railroad Co.*, 103 Mich. 213 (29 L. R. A. 321, 50 Am. St. Rep. 354). If a master is not responsible for the negligent act of his servant, a carpenter, in erecting an unsafe scaffolding, upon what principle can defendant be held, in this case, for negligently placing the guideboard? The question has been so thoroughly discussed in the authorities above cited that we refrain from discussing it further.

Judgment affirmed.

The other Justices concurred.

STARMONT v. CUMMINS.

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e127 495

WITNESSES—FEES—OFFICERS OF THE COURT.

Under 2 How. Stat. § 9064, providing that any person attending court as a witness on behalf of the people, upon request of the public prosecutor, or upon a subpœna, or by virtue of any recognizance for that purpose, shall be entitled to certain fees, the officer who makes the arrest and brings the prisoner into court, and who receives his fees therefor, is not entitled to additional fees upon being sworn in the case as a witness.

Certiorari to Ingham; Person, J. Submitted April 18, 1899. Decided July 11, 1899.

Mandamus by Adolph M. Starmont to compel Alva M. Cummins, prosecuting attorney of Ingham county, to countersign a certificate for witness fees. From an order granting the writ, respondent brings *certiorari*. Reversed.

A warrant was issued by a justice of the peace for the arrest of an offender. The warrant contained a clause directing the officer into whose hands it came to subpœna certain witnesses, among whom was relator. It was placed in the hands of relator, who made the arrest and brought the prisoner before the court. Relator gave testimony, and received a certificate for fees as a witness. Respondent, as prosecuting attorney, refused to countersign the same, on the ground that said relator was an officer in attendance upon said court, for which attendance and services he was entitled to compensation, and was not entitled to compensation as a witness in addition thereto. Relator applied to the circuit court, and a *mandamus* was issued, compelling respondent to sign the order.

L. B. & H. M. Gardner, for relator.

Alva M. Cummins, in pro. per.

PER CURIAM. The statute under which relator claims his fees reads as follows: "That whenever any person shall attend any court as a witness in behalf of the people of this State, upon request of the public prosecutor, or upon a subpœna, or by virtue of any recognizance for that purpose, he shall be entitled to the following fees," etc. 2 How. Stat. § 9064. The relator was in court as an officer in charge of a prisoner, and entitled to receive his fees as such officer. The evident purpose of this statute is to compensate a witness to some extent for his loss of time. Most men are engaged in some employment, which they must necessarily leave in obedience to the subpœna of the court. Relator was not subpœnaed as a witness; he had not come as a witness; he had lost no time as a witness. Those who are familiar with criminal trials are aware that the officer making the arrest is frequently sworn as a witness. Is he, under those circumstances, entitled to fees both as an officer and as a witness? No such rule should be adopted, unless the statute clearly provides it. There is nothing in the statute to indicate it. We think the relator is not entitled to both fees. *Com.* v. *Commissioners of Philadelphia Co.*, 6 Bin. 397; *Board of Commissioners of Montgomery Co.* v. *Bromley*, 108 Ind. 158.

Judgment reversed, and judgment entered for the respondent.

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f121	70
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f124	277
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120	631
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144	48

MANN v. CARSON.

1. TAXES—AUDITOR GENERAL'S PETITION—EVIDENCE OF FILING.
   The fact that the auditor general's petition in a tax proceeding, comprising a part of the tax record, and found in the office of the county treasurer, where such record is required to be kept by section 67 of the tax law (Act No. 206, Pub. Acts 1893), is not marked as filed in the office of the county clerk, is immaterial, where the filing of such petition is recited in the order of hearing thereon.

2. SAME—PROOF OF PUBLICATION—SUFFICIENCY.
   An affidavit showing the publication of "the notice of the sale of state tax lands hereto annexed" sufficiently proves the publication of the auditor general's petition, the order of hearing thereon, and the list of delinquent lands in a tax proceeding, where it is found among the files of such proceeding in the county clerk's office, and a printed copy of such petition, order, and list of lands, taken from the newspaper mentioned in such affidavit, is also found among the files, and is the only paper there found to which the affidavit could refer, although such papers are not attached together, and the affidavit is not entitled in any cause.

3. SAME—PUBLICATION IN NEWSPAPER SUPPLEMENT.
   Publication of notice of a tax sale in a supplement to a newspaper is a sufficient publication in the newspaper.

4. SAME—DESCRIPTION OF LANDS—SUFFICIENCY.
   A description of lands in a published tax list as "15 entire" in a column headed "Block," among descriptions in "Clark's Addition to the Village of Chesaning," is sufficient.

5. SAME—MANNER OF ASSESSMENT.
   Under the provision of the tax law that lands shall be assessed "to the owner, if known, and also to the occupant, if any; if the owner be not known, and there be an occupant, then to such occupant,"—the owner of lands occupied by another cannot complain that the assessment was made to the owner alone.

6. SAME—STATE TAX LANDS—RIGHT OF PURCHASE.
   Lands acquired by the State under section 68 of the tax law of 1893, providing that, if the county treasurer shall fail to

offer for sale lands included in the decree, they shall be considered as bid off to the State, are subject to private sale, as state tax lands, under section 84 of the act.

7. SAME—FORM OF CONVEYANCE.

A deed of state tax lands in the form of a quitclaim is sufficient to pass title to the grantee. *Dawson* v. *Peter*, 119 Mich. 274, followed.

8. SAME—ATTEMPTED PAYMENT.

Where the original owner of land held by the State under a sale to it for delinquent taxes applies to the county treasurer to pay all taxes standing against the land, and does pay all taxes which he is advised by that officer are so outstanding, he is entitled to the same relief against a subsequent purchaser of the land from the State as though the taxes for which the land was sold had been paid to the proper officer within the time provided by law; and this though the period of redemption on the sale to the State had expired at the time of such attempted payment.

9. SAME — REMEDIES — CERTIFICATE OF ERROR — WRIT OF ASSISTANCE.

These facts, however, cannot be set up by the landowner to defeat the issuance of a writ of assistance to the holder of the tax title, but resort must be had to one of the remedies prescribed by sections 70 and 98, respectively, of the tax law, *i. e.*, a motion to set aside the sale (unless barred by lapse of time), or an application to the auditor general for a certificate of error.

10. SAME—PROCEDURE.

But the Supreme Court will, in its discretion, defer the issuance of the writ of assistance, to enable the landowner to avail himself of the statutory remedy.

Appeal from Saginaw; Wilber, J. Submitted November 16, 1898. Decided July 11, 1899.

Petition by Mary E. Mann against George W. Carson for a writ of assistance. From an order denying the writ, petitioner appeals. Reversed.

Williams & Wilson, for petitioner.

G. W. Davis, for respondent.

HOOKER, J. Mrs. Mann purchased a parcel of land from the State, the same having been bid in for the State for the taxes of 1891 and 1892. In due season she filed her petition for a writ of assistance. The defendant answered, alleging title, and attacking the validity of the tax proceedings and decrees upon several grounds. The circuit court denied the relief prayed, and the petitioner has appealed.

The answer raises the following points:

1. That the petitions of the auditor general were not filed, and therefore the court did not obtain jurisdiction of the tax proceedings. This applies to the taxes of 1891 and 1892. The precise defect appears to be that the petition attached to the tax record, which seems to have been found in the county treasurer's office, had no filing by the county clerk upon it.
2. That the order of publication was not published as required by law.
3. That no decree was made for the sale of the land in question for the tax of 1892.
4. That on October 21, 1895, the defendant applied at the county treasurer's office for a statement of all taxes against the premises, that he might pay all taxes and charges against them, and was told the amount by a clerk in charge of the office; and that he then and there paid the amount given him, and supposed he had paid all taxes and charges against the land.
5. That the premises were, during 1891 and 1892, in the care and possession of his brother, who had personal property from which the taxes might have been collected had the land been assessed to him, as required by section 6, Act No. 200, Pub. Acts 1891; and respondent believed such taxes had been paid until he received notice of this proceeding.
6. That he had regularly paid all previous and subsequent taxes.
7. That the land was offered but once before it was struck off to the State, and there was no formal bid made for the State.

In support of the first point, counsel for the appellee asserts that, not only was there no filing upon the petitions, but there were no calendar entries in the cause, and the

petitions were not found in the clerk's office, but were produced by the county treasurer, and had no word written upon them to indicate that they had ever been in the office of the clerk. There is evidence in the record that tax petitions were made, because papers purporting to be such were produced, being offered in evidence by counsel for the appellee, with proof that they were produced by the county treasurer. Section 67 of the tax law of 1893 (Act No. 206, Pub. Acts 1893) requires that the tax record—which, under section 61, includes the petition—shall be delivered to the county treasurer immediately after the decree is made; and it is further provided that it shall remain in the treasurer's office, except as needed in the office of the clerk. It therefore appears that the petitions were found in the proper place. It also appears that various papers purporting to belong to such proceedings were found in the county clerk's office, and, among them, orders of publication signed by the judge of the court. These orders recited the fact of the filing of the petitions. We are therefore of the opinion that there is abundant evidence that these petitions were at some time in the county clerk's office; and, in view of the language of the order of publication, we must ascribe the failure to mark them as filed to clerical omission, not fatal to the proceedings. In *Beebe* v. *Morrell*, 76 Mich. 120 (15 Am. St. Rep. 288), it is said that "a paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file."

The next defect pointed out by the answer is that in neither instance was there proper proof of publication of the order. Among the proper files in the clerk's office, a paper was found entitled "Affidavit of Publication." It was signed by one Whiting, and stated that he was the principal clerk for printing and publication of the Weekly Courier-Herald, a newspaper published and circulated in the county of Saginaw; that the notice of the sale of state tax lands thereto annexed had been published in said newspaper once in each week for four successive weeks

previous to the date of sale mentioned in said notice, and gave the dates of the several issues of the paper containing it. No paper was attached to this affidavit, but in the same files there was found a printed copy of the petition of the auditor general, and list of the delinquent lands, and a copy of the order of hearing; these appearing to be printed on what purported to be a supplement to the Courier-Herald. It is claimed first that the affidavit does not show the publication of the delinquent list, but on its face states that the publication of a notice of the sale of state tax lands was what it was intended to prove, and that this was not explained by a reference to the title of any cause. If we cannot say that the presence of the appropriate copy of petition and order in the files raises a presumption that they were originally attached to the affidavit, we must hold that the proceedings were void, under *Benedict* v. *Auditor General*, 104 Mich. 274. If, however, such presumption may be indulged, the language of the affidavit should be read with the aid afforded by the accompanying papers, which would show plainly that the publication referred to was the proper one for these proceedings. The only office of the affidavit is to prove the fact of a proper publication, and when it does this it is sufficient. From these papers, taken together, no one could be misled by the statement that notice of sale of state tax lands was published, and the publication actually made would be evident. A closely analogous question arose in the case of *Spaulding* v. *O'Connor*, 119 Mich. 45. When it is considered that the copy of the supplement found in the files was devoted to a publication of copies of the very papers that appropriately belonged to the affidavit under consideration, and that it had no other use or apparent reason for being there than as part of such affidavit, coupled with the fact that it was the only paper in the files that could have been referred to by that affidavit, and that the separation of such papers by accident or design is easy, we are justified in concluding that they were originally attached, especially where put to-

gether with mucilage, which so corresponded upon the papers as to furnish some support to the claim that they had been stuck together at some time.

The further claim is made that the publication in a supplement was not such a publication in a newspaper as to comply with the law. Newspapers commonly consist of two or more unbound sheets, which are liable to get separated. The designation of one as supplement does not make it less a part of the newspaper. Had that word been omitted, this question would not be here. It strikes us as a most technical objection.

Defendant's third proposition is that no decree was made for the sale of the land in controversy. It is claimed that the list as published for the 1892 tax did not sufficiently describe the premises. The figures and word "15 entire" were printed in a column headed "Block," among descriptions in "Clark's Addition to the Village of Chesaning." We have no doubt of the sufficiency of this description.

It is urged by counsel that the amounts adjudicated against the land were inserted, after the decree was signed, by a clerk in the treasurer's office. No hint of this claim is found, either in the answer or the proof, and we have, therefore, no occasion to pass upon the question.

The fifth ground of defense is that the land should have been assessed to the defendant's brother, who was in possession. The statute referred to in this connection (section 6, Act No. 200, Pub. Acts 1891) contemplates assessment to the owner where known, as in this case.

The next defect mentioned is that on neither occasion of the sale for taxes was the land offered a second time before it was struck off to the State, nor was there a formal bid made for the State. Counsel does not point us to proof that this was not offered a second time before being bid in by the State. But section 68 of the law of 1893 provides that "if, for any reason, the treasurer of any county shall fail to offer the lands lying therein and included in the decree for sale for delinquent taxes thereon, then so many of such lands so included in such decree as shall not be so

offered for sale shall be considered and treated as if bid off to the State by the county treasurer," etc. It is urged that lands acquired under this section are not subject to private sale by the State under the statute, but we are of the opinion that they are.

This covers all questions specifically raised by the answer except the fourth. A further point is made in the brief upon the petitioner's deed. Such deed is in form a quitclaim, and it is said to be insufficient, upon the ground that "it is the universal rule * * * that, where the statute does not prescribe the form of the deed to be used in conveying lands to purchasers at tax sales, such a form of deed must be used as would, at the common law, have conveyed title." Counsel cites in support of this proposition: 2 Blackw. Tax Titles (5th Ed.), § 772; Black, Tax Titles, § 396; *Waldron* v. *McComb*, 1 Hill, 111. This question is settled by the case of *Dawson* v. *Peter*, 119 Mich. 274, which is upon all fours with the present case upon this point.

The fourth claim contained in the answer relates to the alleged application of the defendant to the county treasurer to pay taxes and charges. The evidence upon this subject is confined to the testimony of the defendant. He produced a tax receipt for the taxes of 1894, bearing date October 21, 1895, and his examination proceeded as follows:

"*Q.* At the time you received this receipt, with what object or purpose did you go to the county treasurer's office?

"*A.* I went there to pay the taxes on that piece of property in town 9, or any taxes which might be against me in the county treasurer's office.

"*Q.* How about block 15?

"*A.* Well, I asked about that, and they gave me that tax there with it, and I asked if there was anything more against the block, and they said there was not.

"*Q.* Did you ask for a statement of all the taxes against the block?

"*A.* I asked for all the taxes against the block, and was there ready to pay all the taxes that was against me in the

county, if there was any other at the time when I was there. They said there was no more taxes against me than that receipt covered; and I paid all that they claimed was against me.

"*Mr. Foote:* We offer that in evidence. The object of that is to show that in 1894 he applied to pay the taxes against the lot, and they told him the taxes covered by that receipt were all the taxes unpaid against the lot.

"*The Court:* You knew in 1891 and 1892 you had not paid the taxes for those years?

"*A.* I knew I had an arrangement for a man to pay them, and calculated he had paid them. He had control of the property. He had the means to pay them with, and I supposed they were paid until a short time ago."

He added:

"The one that gave me that receipt was a young man working in the county treasurer's office, and he is not back there any more."

At this time redemption had expired on the sale for the tax of 1891.

My brethren think that this testimony brings the case within the rule laid down in the cases of *Hand* v. *Auditor General*, 112 Mich. 597; *Wood* v. *Bigelow*, 115 Mich. 123; *Hough* v. *Auditor General*, 116 Mich. 663; *Kneeland* v. *Wood*, 117 Mich. 174; *Kneeland* v. *Hyman*, 118 Mich. 56. But we cannot set aside the sale in this proceeding, as we might perhaps do under a motion seasonably made. But we presume that it is now too late for such a motion, and, if there is any remedy open to the defendant, it is probably by proceedings before the auditor general for a certificate of error. While we cannot deny the writ of assistance, we may exercise a discretion in the premises, and defer its issue, to give the defendant an opportunity to make an application to the auditor general, or to the court if that right is not lost by lapse of time.

The order of the circuit court is reversed, and an order will be entered here directing the circuit court to enter an order that a writ of assistance issue at the expiration of 90 days from this date, unless it shall, at or before that time, be

made to appear that the petitioner's deed has been canceled by the auditor general, or that proceedings be pending, in which case it shall be within the power of said court to vacate said order or further stay the issue of said writ, as justice may require. The petitioner will recover costs of this court.

The other Justices concurred.

MILLER v. CHILDS.

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1. RELIGIOUS SOCIETIES — LOANS — AUTHORITY TO EXECUTE NOTE AND MORTGAGE.

   At a parish meeting of an Episcopal church, the vestry submitted a report that it had arranged to purchase lots for a church and rectory, and that the Church Association of Michigan had signified its willingness to advance a certain amount, provided the property should be deeded to the association in trust for the parish, and that interest at 7 per cent. should be paid on the money advanced, and the principal should be paid in $100 installments. The meeting authorized the vestry to carry out the arrangement. *Held*, that the vestry was authorized to give notes for the amount secured.

2. SAME — EQUITY — ASSIGNMENT OF MORTGAGE — FORECLOSURE — DEFICIENCY.

   Where a religious society, through its vestry duly authorized, borrowed money to purchase lots for church purposes, and gave its notes secured by mortgage upon the property, and the mortgagee subsequently assigned to a third person, having accepted from the vestry a new note, given without the knowledge of the society, equity will treat the transaction as an assignment of the original debt and security, and, upon foreclosure of the mortgage, will hold the society for a deficiency.

Appeal from Menominee; Stone, J. Submitted April 5, 1899. Decided July 11, 1899.

Bill by Sidney D. Miller and others, executors of the last will and testament of Helen L. Frue, deceased, against George A. Childs, warden, and others, vestrymen, of Grace Church of Menominee, the Church Association of Michigan, and Grace Church of Menominee, to foreclose a mortgage. From a decree awarding foreclosure, but finding defendant Grace Church not liable for any deficiency, complainants appeal. Modified.

Frederick T. Sibley (*Sawyer & Waite*, of counsel), for complainants.

B. J. Brown, for defendant church.

HOOKER, J. The complainants foreclosed a mortgage which their testatrix received under the following circumstances: Grace Church, in Menominee, contemplated the erection of a rectory, and had negotiations with the Church Association of Michigan in relation thereto. Both are corporations. At a meeting of the parish, the vestry submitted a report that it had arranged to purchase two lots for church and rectory; that the Church Association had signified its willingness to advance such an amount of money, up to the amount of $2,200, as was necessary to complete the payment for the lots and erect a rectory, provided the property should be deeded to that association in trust for the parish, and that interest at 7 per cent. should be paid on the money advanced, and the principal should be paid in $100 installments. The meeting authorized the vestry to carry out the arrangement. Thereupon the deed was made by Grace Church to the Church Association, and a note was given for $900, which was paid, upon the purchase, by the Church Association, which gave its guaranty for payment of the balance of the purchase price. Subsequently the church gave the association another note for $1,300, being the balance of the loan of $2,200, which it received. This money was used in building the rectory. Some weeks after the giving of the second note, at a meeting of the vestry, a communication

was read from the secretary of the Church Association, asking the vestry to sign a note for $2,200, in favor of Helen L. Frue, to take the place of the former notes. This note was executed by the vestry, and reads as follows:

"$2,200. DETROIT, MICHIGAN, 1st January, 1889.

"For value received, we, the undersigned, vestry of Grace Church, Menominee, Michigan, promise to pay to the order of Helen L. Frue, of Detroit, Michigan, the principal sum of twenty-two hundred dollars, on or before the first day of January, eighteen hundred and ninety-four, without grace, with interest at the rate of seven per centum per annum, payable on the first day of July next, and semi-annually thereafter, until the whole of said principal sum is paid; both principal and interest being payable at the office of the Detroit Savings Bank, in Detroit.

"This note is secured by a certain real-estate mortgage, of even date herewith, made by the Church Association of Michigan to said Helen L. Frue, and collateral thereto, the terms and conditions of which are made a part hereto."

It was sent to the secretary, and the Church Association thereupon executed to Helen L. Frue a mortgage for $2,200 upon the premises to secure this note. A deed was thereupon executed and delivered by the Church Association to Grace Church, and was accepted by its vestry, and it continued to occupy the premises for 10 years or more.

No opposition was made to the entry of a decree of foreclosure, but Grace Church contended that it is not liable for any deficiency. A decree for foreclosure and sale was made, but the court refused to hold Grace Church liable for a deficiency, and held that it was not so liable, and the complainants have appealed. It is contended that the parish did not authorize the giving of any note by the vestry, and that there is no evidence that it knew of the giving of the note to Helen L. Frue.

The testimony shows that Grace Church, at a parish meeting, directed its vestry to make a loan from the Church Association of $2,200, at 7 per cent., and to deed to the association, in trust, the lots which it had bought.

This was done, and there is no doubt that this deed was no more than a mortgage. Two notes were given, representing the payments made by the Church Association to the vestry. It does not appear when they were payable, and the defendant Grace Church claims that the vestry had no authority to give them, and it is also claimed that it had no authority to execute the note to Helen L. Frue, which was given to take the place of the notes first given. The effect of the resolution adopted at the meeting was to instruct the vestry to make a loan, and deed the property to the Church Association, and it was impliedly authorized to give the necessary evidence of indebtedness. The deed could not be expected to be adequate, for it would contain no covenant to repay the loan, and therefore would not support a decree for deficiency in case of foreclosure. 1 How. Stat. § 4665.

We are justified in assuming that the church expected the vestry to give some evidence of indebtedness, and it appears to have done so. Whatever we may think of the last question, the fact remains that Grace Church borrowed $2,200 of the Church Association, and gave its trust deed, *i. e.*, mortgage, and two notes, to secure its payment. If no other writing had been made, on foreclosure of such trust deed Grace Church would be liable for the debt; and the fact that another note was afterwards substituted for them, which was unauthorized and void, as the defendant Grace Church contends, would not release the church from the duty of paying the debt, or its liability for the deficiency on foreclosure of the trust deed.

It may be said that the notes originally given were not in conformity to the resolution, which accepted a proposition to have them payable in $100 installments. This point is not made in the brief in behalf of Grace Church, and our attention is not called to any proof that they were not so made payable. The point is made that the resolution did not authorize the giving of any note; but we think otherwise, as already stated.

The Church Association had a right to assign its mort-

gage, and, if the note which it delivered to Helen L. Frue was void, equity will treat the transaction as an assignment of its debt and security. The defendant Grace Church itself has been willing to treat the transaction as binding upon its interest in the land, but apparently seeks to avail itself of a technical point to shift the burden of paying a deficiency upon the Church Association. It is not made clear to us that this effort to saddle a portion of its debt upon another is equitable. The bill alleges all of the facts, and contains a prayer for general relief. We think the complainants were entitled to a decree establishing the obligation of Grace Church, and the decree of the circuit court will be modified in that particular, and affirmed, with costs.

GRANT, C. J., MONTGOMERY and MOORE, JJ., concurred. LONG, J., did not sit.

120	643
f122	152
120	643
123	512
120	643
127	554
120	643
143	627
120	643
149	230

COCKBURN v. AUDITOR GENERAL.

1. TAXES—PURCHASE OF STATE LANDS—NONPAYMENT OF LIENS—VOID DEED.

   Under section 84 of the tax law of 1893, requiring a purchaser of state tax lands to pay all taxes remaining a lien thereon at the time of his purchase, a deed issued without the payment of such a tax is void, even though the tax had not been returned to the office of the auditor general at the time of such purchase. *Hughes* v. *Jordan*, 118 Mich. 27, followed.

2. SAME—CANCELLATION OF DEED—REFUNDING—NEW PURCHASE—MANDAMUS.

   The holder of a deed of state tax land, void for failure to pay a tax constituting a lien upon the land at the time of purchase, is entitled, on application at the office of the auditor general, to have such deed canceled and the amount paid refunded, or instead, if no other rights have intervened, on paying an

amount which, together with that previously paid, will equal the amount due the State and all taxes then a lien upon the land, to have such deed canceled and a new one issued; and, in case the auditor refuses to take such action, *mandamus* will lie to compel him to do so.

Mandamus by George A. Cockburn to compel Roscoe D. Dix, auditor general, to cancel a tax deed and issue a new one. Submitted February 15, 1899. Writ granted July 11, 1899.

James H. McFarlan, for relator.

Bacon & Palmer, amici curiæ.

Horace M. Oren, Attorney General, and *Fred A. Maynard*, ex-Attorney General, for respondent.

Stephen H. Clink, amicus curiæ.

MOORE, J. On February 12, 1898, the petitioner made a written application to the auditor general to purchase the land in question, and paid to the auditor general, with such application, the sum of $236.18. On March 11, 1898, the auditor general executed a deed to the petitioner, conveying the land in question for the taxes of 1894, and issued tax receipts for the taxes of 1895 and 1896. On July 28, 1898, the petitioner, in order to complete the purchase of said land, paid to the auditor general $72.10, the amount of taxes of 1897 assessed upon said land, for which tax the auditor general issued a receipt to him for $71.62, and returned the balance of 48 cents. August 3, 1898, the petitioner made application for the cancellation of the deed and receipts issued to him, and for refunding thereon, and with such application paid to the auditor general the sum of $81.30, and asked that the refunding upon the deed and receipts, and the amount paid with the application of August 3d, be applied to the purchase of the land, and that a new deed issue therefor; which was refused by the auditor general, and *mandamus* is asked for to compel the cancellation of the first deed and the

issue of a new deed on the last application. The auditor general refused to issue this deed on the ground that, as the taxes of 1897 had not been returned to his office, they were not included within the terms of the tax law, and the purchaser was not obliged to pay them as a condition precedent to the issuing of the deed, and that such sale was valid; and, in fact, seeks to have the case of *Hughes* v. *Jordan*, 118 Mich. 27, overruled by this court.

The case of *Hughes* v. *Jordan* has been reargued. We have had the benefit of most excellent briefs by the attorney general and by a number of other able lawyers. We are all agreed that the decision in that case must stand. Under that decision, the deed issued to the petitioner was void, and should be so treated in this proceeding. The amount paid to the auditor general when this deed was issued, supplemented by the payment of $72.10, equaled the amount due the State and the amount of taxes which were then a lien upon the land. The petitioner asked the auditor general to apply these amounts as a payment for the land. If no intervening rights accrued between the dates of these payments, the request should be complied with, and the deed should be issued; and it is so ordered.

The other Justices concurred.

120 646
136 3120

CARD *v.* FOWLER.

1. APPEAL — EVIDENCE — HEARSAY — INCONSISTENT POSITIONS OF COUNSEL.

Counsel for an appellee cannot insist upon the Supreme Court's rejecting, in order to sustain the verdict, hearsay evidence used by them to obtain the verdict in the court below.

2. CHATTEL MORTGAGES — POSSESSION OF MORTGAGEE — CLAIM OF OWNERSHIP—WAIVER OF LIEN.

One taking possession of personal property, claiming absolute ownership, where in fact his rights are those of a mortgagee, does not thereby waive his mortgage lien.

3. SAME—LIABILITY IN TROVER—NECESSITY FOR TENDER.

While a chattel mortgagee who sells sufficient of the property to satisfy his lien may be sued by the mortgagor in trover upon his claiming ownership of and refusing to deliver the remainder of the chattels, no tender in such case being necessary, a claim of absolute ownership of chattels exceeding in value the amount of his lien will not of itself subject him to liability in such an action, without a tender of the amount his due being previously made.

4. WITNESSES—WEIGHT OF EVIDENCE—INSTRUCTIONS.

Though courts are properly reluctant to call attention to the testimony of a particular witness, it is desirable to give some instruction on the weight of evidence where there was but one witness to the transaction in controversy, and his evidence is contradicted by a single witness, much of whose testimony is of a hearsay character.

5. EXECUTORS AND ADMINISTRATORS—AUTHORITY TO SUE.

Authority of an administrator to sue in behalf of the estate was recognized, though nearly four years had elapsed since his appointment, where no plea to the jurisdiction was filed, and no showing was made that the estate had been closed or that the administrator had been discharged.

Error to Hillsdale; Lane, J. Submitted April 21, 1899. Decided July 11, 1899.

Trover by David S. Card, administrator of the estate of

Fremont W. Fowler, deceased, against Frederick Fowler. From a judgment for plaintiff, defendant brings error. Reversed.

Stone & Twiss (*T. E. Barkworth*, of counsel), for appellant.

Corvis M. Barre (*F. A. Lyon* and *Watts, Bean & Smith*, of counsel), for appellee.

HOOKER, J. Frederick Fowler and Fremont Fowler were father and son; and the record indicates that the son, Fremont, was unsuccessful in business, if not profligate, and that for many years he made heavy draughts upon his father's patience and generosity. He was in debt to him as well as to others. He died on February 9, 1891, at his home,—a farm owned by his father. A short time before his death he procured some money from his father. Eli Rogers, the father's brother-in-law, who was present at the interview, testified that the property in question was purchased by Frederick Fowler for $2,000, which was paid by Rogers at Frederick Fowler's request. The administrator attempts to dispute this by alleged statements of Frederick Fowler to the effect that decedent's property was sufficient to more than pay his debts, and that, if there was more than enough to pay him, he would pay other creditors; but the briefs of plaintiff's counsel assert that Frederick Fowler always claimed to be absolute owner of the property, and never claimed to be holding it as mortgagee. A bill of sale was produced, which Rogers said he induced Fremont to give to his father at a time subsequent to the loan, but that Frederick Fowler had nothing to do with that transaction. The only evidence that tended to controvert the testimony of Eli Rogers was given by Kate Fowler, Fremont's widow, upon cross-examination. She was called by the plaintiff to prove that the defendant took the property from the farm after Fremont's death. Upon cross-examination she said:

"I knew at the time he was making this disposition of

this property that he was claiming that he was doing it in accordance with a claim that he had purchased it from my husband. * * * I knew in the fall of 1890 that my husband was in debt. I knew that he got some money from his father during the winter. I knew that he got $1,200. I knew that he got it, by his telling, and by Eli Rogers. * * * I knew my husband made a list of property for the purpose of obtaining the money. I wrote it down myself as he told it to me. * * * I knew Mont. was going to get the money from his father, and I knew he did obtain it. My husband told me that he got the $1,200, and gave a mortgage."

She also testified that she knew where most of the money was paid out by her husband.

The principal question in the case was whether the defendant purchased the property, or took a mortgage upon it for $1,200 or more. It was left to the jury, and it is manifest that they found that the defendant did not purchase the property; for, if they had not, their verdict could not have been in favor of the plaintiff. The claim is made by the counsel for the plaintiff that we should say that there was no evidence tending to show that the defendant had a lien upon the property, and that his defense necessarily rested upon his alleged purchase. That there was a transaction of some sort, there is no room to doubt; and if, as is now claimed by plaintiff's counsel, the testimony of Kate Fowler was hearsay, and should not be considered for that reason, and for the further reason that she should not have been allowed to testify against her husband's administrator, by reason of her being disqualified to testify against the husband without his consent, there would seem to be little, if any, testimony contradicting the defendant's proof. The contention that we should disregard this testimony does not impress us favorably, for it places the plaintiff in the position of using it to obtain a verdict, and insisting upon disregarding it to sustain the verdict. We must say, therefore, that it was proper to submit the question to the jury, and that it conclusively appeared in the case that the defendant had a lien upon

some or all of this property, his claim of ownership having been denied by the jury.

The court was requested to instruct the jury to render a verdict for the defendant. This was upon the theory that, whether he was owner or mortgagee, he had a right to the possession of the property. The court instructed the jury as follows:

"The contention of the plaintiff is that it was a mortgage for $1,200 only, and, if you find that it was a mortgage for that amount only, then I think the defendant would have a right, even though it were not for such an amount as equaled the value of the property, to take possession of the property, under the evidence in this case, and that his possession would not be wrongful, unless he went so far as to deny the right of the estate in that property; and, if he did go so far, notwithstanding he had a mortgage upon the property, as to say or to insist that there was no right left in Fremont W. Fowler, that he had no rights in the property, that his personal representative, the administrator, had no right in the property,—was insisting that he was the owner of it entirely,—then there would be a right of recovery here in the administrator for so much as the value of this property which he was insisting he owned was in excess of the lien which he actually had upon it. And, in determining the amount of that lien, you would figure the interest upon it from the time when it was given up to the present time, at 6 per cent."

It was contended by the plaintiff that the defendant had sold sufficient property to more than pay his claim, and that, therefore, no tender before suit was necessary. If the defendant had sold sufficient to pay his claim, the lien was discharged, and there was no occasion to make a tender; and upon a refusal to deliver the remainder, accompanied by a claim of ownership, trover would lie. In the case of *Brink* v. *Freoff*, 40 Mich. 613, 44 Mich. 69, trover was sustained where, an installment being overdue, more than sufficient property was sold to pay it. *Iler* v. *Baker*, 82 Mich. 226. But in the present case the defendant claimed that the mortgage was not paid by a sale

of the property, and that, until it was paid or tendered, he had a right to the possession, and the court so instructed the jury. Had he stopped there, the defendant would have no cause for complaint; but he did not. They were told further that if, under such circumstances, the defendant claimed to hold as owner, and denied that the plaintiff had any title whatever, there would be a right of recovery for the excess over and above the amount necessary to pay up the mortgage. Counsel for the defendant contend that until the defendant's mortgage was paid or tendered, or he had, through sale of the property, realized sufficient to pay his claim, he had a right to retain the possession; and this seems plain enough, unless, as counsel for the plaintiff contend, his claim of absolute ownership and denial of plaintiff's title deprive him of such right. Plaintiff's counsel assert that such claim should be treated as a waiver of the lien; but we think otherwise. In the cases of *Rall* v. *Cook*, 77 Mich. 681, and *Iler* v. *Baker*, 82 Mich. 230, the right of the mortgagee to receive the amount due him was recognized, notwithstanding such a claim. In the latter case, at least, the claim was made upon the trial, and the question went to the jury, as it did in this case. There is much in this record that tends to support the claim of the defendant, and, though the issue was found against him, if made in good faith, it would be rather severe to require him to lose his entire debt because he had not succeeded in establishing the identical claim made. As we have seen from the cases cited, such a penalty was not imposed in other cases. If the lien was not lost by such claim, it would seem to follow that he had a right to enforce it by taking possession of and selling the property; and, if so, it is hardly consistent to say that an immediate right of replevin or to recover in trover arises because of the claim of ownership.

In *Brink* v. *Freoff*, *supra*, it was held that trover would lie for a wrongful sale of the property, and that a tender was unnecessary, because the sale had put it out of the power of the mortgagee to return the property wrongfully sold. In

Rall v. *Cook*, *supra*, it was said a tender was unnecessary. That case is thought to support plaintiff's theory, and it is said that the property had not been sold, yet the court sustained the action, and held that a tender was unnecessary. It is true that the report fails to show that the property was sold, but the record discloses that the action was brought some four years after the demand, which, taken in connection with the statement in the opinion that "I think the tender would be unimportant, as is pointed out in *Brink* v. *Freoff*, *supra*," would indicate that it had been sold. In that case the statement that a tender was unnecessary was put upon the express ground that, by reason of a sale of the property, it could not be complied with. Again, in *Rall* v. *Cook* the court used this language:

"He knew then that the bill of sale afforded no protection to Cook, but he also knew that Cook had valid liens upon the property, placed thereon by his own act, and that Cook had the right to retain possession under them; and it was as much his duty to make a tender in one case as in the other."

This would indicate that the right to possession was not lost, and that the duty to make a tender would have existed, had it not become unimportant for the reason mentioned. But the matter was set at rest in a later case, written by the same distinguished judge, from which we may infer still more strongly that the property had been sold in the case of *Rall* v. *Cook*. In *Iler* v. *Baker*, 82 Mich. 230, Mr. Justice CHAMPLIN said:

"His position with reference to the property was that of a pledgee or mortgagee in possession. If the testimony of plaintiff was entitled to credence, then there was an extension of time for the payment of the money due to Mr. Baker. But the time was indefinite; and, had he retained possession of the goods, it would have been necessary for the plaintiff both to have made a tender of the amount due, and to have made a demand for the delivery of the property, before he could maintain an action of trover for its conversion. But Baker, being in

possession as pledgee of the property, as the testimony shows, sold sufficient, and more than sufficient, to pay the debt due to him from Iler, in which case he became bailee for Iler of the remainder of the goods, and also it was his duty to pay over the surplus money realized on the sale, over and above the debt due to him, on request; and in such case neither tender nor demand was necessary before bringing action, where the pledgee asserted absolute title to the goods, and denied all right of property in the pledgor to them."

We are of the opinion that the learned circuit judge was not justified in the instruction that trover would lie for property in the lawful possession of the defendant, which he had a right to retain for the satisfaction of his lien. Had a tender of any balance due him been made, the case would be different. Under this instruction the jury may have found for the plaintiff, notwithstanding the possible fact that the mortgage was not fully paid.

Allusion has been made to the character of the testimony in support of the claim that the transaction amounted to a mortgage. The testimony of Rogers clearly showed that the property was purchased by the defendant. There was no other witness to the transaction, and the contrary was made to appear, if at all, by testimony of doubtful admissibility, in the main, because much of it was hearsay. A perusal of the record satisfies us that this was one of the cases where some instruction upon the weight of evidence would have been proper. Counsel presented the following requests:

"4. You are instructed that the uncontroverted testimony of a credible witness ought not to be lightly disregarded, and you have no right to substitute a fanciful hypothesis to account for facts which are explained by direct testimony. Your verdict should be based on the evidence, and that alone; and it is the duty of the jury to harmonize all proven facts, if possible, with the conditions found surrounding the case, and the circumstances proven to have existed at the time of the occurrence."

"6. If the jury believe the testimony of Eli B. Rogers, there can be no further inquiry. The defendant is entitled to a verdict upon that finding."

Judges are properly reluctant to call attention to the testimony of particular witnesses, and doubtless in this instance the trial judge thought the subject sufficiently covered by the charge. We think, however, that it would have been better to have given the fourth request, if not the sixth.

It is contended, further, that the administrator had no authority to commence this action, because nearly four years had elapsed after his appointment. There was no plea to the jurisdiction; nor any showing that the estate had been closed, or that the administrator had been discharged. We have recognized the necessity for the extension of the authority of executors and administrators for a period longer than the statutory one, and their acts at a later date have often been sustained. *Larzelere* v. *Starkweather*, 38 Mich. 96; *Church* v. *Holcomb*, 45 Mich. 37; *Norman* v. *Olney*, 64 Mich. 561; *In re Beniteau*, 88 Mich. 154.

There are other points raised, but, as most of them pertain to the admissibility of testimony of witnesses and the conduct of counsel, we do not discuss them. They raise questions which are governed by rules which should be well understood.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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120 654
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130 503
120 654
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132 503
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JUCHATZ *v.* MICHIGAN ALKALI CO.

MASTER AND SERVANT — INSPECTION OF MACHINERY — ELEVATOR ACCIDENT—DISCERNIBLE DEFECTS.

An employé who is injured by the sudden release of an elevator, due to a defective spring, cannot recover damages from his employer because of the latter's failure to inspect the appliance, where such employé was a constant, and almost the only, user of the elevator, and the mechanism of the same was simple and in plain view, rendering the defect discernible to him had he exercised ordinary care.

Error to Wayne; Donovan, J. Submitted April 19, 1899. Decided July 11, 1899.

Case by August Juchatz against the Michigan Alkali Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Charles C. Stewart (*J. De Lisle Wakely*, of counsel), for appellant.

Edwin F. Conely and *Orla B. Taylor*, for appellee.

MOORE, J. Plaintiff sued defendant to recover for personal injuries received by him while in its employ. He appeals from the judgment of the court below in directing a verdict for defendant.

The record shows plaintiff worked for defendant on a tramway, about 45 or 50 feet high, for nearly or quite eight months. The plaintiff was required to go from the tramway to the ground and return frequently. To do so, he used an open elevator, which was about 2 feet square. A model of the elevator is before us. The upright posts of the elevator were 3 inches by 6 in size. Grooves in the elevator fitted around these upright posts. The posts

were connected at the top by a beam, in which there were pulleys. A rope reached from the top of the elevator to, and passed over, a pulley in about the middle of the overhead beam, and then passed over a pulley near the end of the beam, and to that end of the rope was fastened a heavy iron weight as a counterpoise, which would counterbalance the weight of the car and the person using it. This counterpoise had a groove in the side of it, which fitted around the sides of the upright post. It was not cased in. Reaching from the bottom of the frame below the elevator to the beam at the top was another rope, upon which the person in the elevator pulled, to overcome the small difference between the weight of the counterpoise and the elevator when the person was on it. The uprights of the frame of the elevator were made of oak. Into one of them a notch was cut. Fastened to one of the upright posts between which the elevator ran was an oak dog about a foot long, an inch thick, and a little more than an inch wide. An oak spring about 13 inches long, about an inch wide, about a half inch thick at the top, and much thicker at the bottom, pressed against the side of the oak dog. When the elevator reached the bottom, the oak dog was thrown by the spring into the notch in the frame of the elevator, and kept the elevator at the ground until the dog was released. This dog and spring are also before us. Upon the dog there is a knob, which was pushed by the person using the elevator, to press the dog back. The elevator could not be used except the person using it pressed the dog back, so as to throw it out of the notch. The record discloses that plaintiff, for several months, was in the habit of using the elevator, and was almost the only one who did use it. Upon the day of the accident, he had descended from the tramway, leaving the elevator at the bottom. He procured a pail of water, and, as he stepped partially upon the elevator, it was released without any apparent cause, plaintiff was thrown to one side of the elevator, the counterpoise fell upon him, and he was

severely injured. It is claimed for him that he was entitled to a safe place to work; that it was the duty of the master to inspect the appliance; and that, if it had done so, it would have discovered that the spring had lost elasticity, and was defective; that, as a result thereof, the accident occurred, giving plaintiff a right of action.

It will appear, from what we have already said, that the mechanism which held the elevator in place was a simple contrivance. It was in plain view. The plaintiff used it constantly. He was the last person to use it before the accident occurred. He had the same opportunities to know its condition that any one would have. If it was defective, the plaintiff, if he had exercised the care, prudence, and observation which the employé should use in relation to the machinery he uses, would have seen the defect.

"It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work, where there is danger. He must inform himself. This is the law everywhere." Bailey, Mast. Liab. 159.

See Deer. Neg. § 210; *Pilucki* v. *Spring Works*, 117 Mich. 111; *Lamotte* v. *Boyce*, 105 Mich. 545; *Sakol* v. *Rickel*, 113 Mich. 476; *Soderstrom* v. *Lumber Co.*, 114 Mich. 83.

The accident was an unfortunate one, and greatly to be regretted; but it did not occur under such circumstances as to give plaintiff a cause of action against the defendant.

Judgment is affirmed.

The other Justices concurred

WEIDMAN v. SYMES.

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120 657
157 197

BILLS AND NOTES — FILLING BLANKS AFTER EXECUTION — BONA FIDE HOLDER—LIABILITY OF MAKER.

One who executes a promissory note by filling in all the blanks upon a printed form except the one designed for the rate of interest, which blank is thereafter filled without his knowledge, is liable to a *bona fide* holder without notice of the alteration.

Error to Shiawassee; Smith, J. Submitted April 18, 1899. Decided July 11, 1899.

Assumpsit by William Weidman against George B. Symes on a promissory note. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Selden S. Miner, for appellant.

Watson & Chapman, for appellee.

LONG, J. This case was in this court at the April term, 1898. It is reported in 116 Mich. 619. On the trial of the case in the court below from which that appeal was taken, the defendant had judgment. The case was reversed in this court, and remanded for a new trial. The new trial has been had, and judgment has again passed for defendant, under the direction of the court, and plaintiff brings error.

It appeared that on September 27, 1890, one John McBride borrowed of plaintiff $100, and gave the note in question as security, with the defendant as joint maker. The note was drawn up by defendant, and signed by him, in the Exchange Hotel, in Owosso. He handed it to McBride, who took it to the plaintiff, who was only a short distance away, and received from plaintiff $100. The

defendant testified that, at the time he signed the note, no interest was stated in it. The note was put in evidence, and appears, upon its face, to draw 10 per cent. There were two blank spaces, and one is filled with the words "ten (10) per cent.," and the other with the figures "10," indicating 10 per cent. The plaintiff testified that, when he received the note, these spaces were filled as the note now appears, and that there was nothing on its face to indicate that it had been altered or changed; that, about three months before this suit was commenced, he met the defendant, and informed him that the note had not been paid, when defendant asked him if the interest had been paid, and said he would see McBride in regard to the note; that the interest had been paid upon the note each year until about the time suit was commenced. McBride was not called as a witness. The plaintiff further testified that, on the trial in the justice's court, defendant testified that, when he drew the note and handed it to McBride, he left the interest spaces unfilled, and knew that McBride was to get the money on it from the plaintiff.

At the close of the testimony the plaintiff asked the court to charge the jury:

"In this case, it appears from the undisputed evidence that defendant drew and signed the note in question, except the words 'ten (10) per cent.,' and also the figures '10,' which spaces he permitted to remain in blank; that the note was then handed to the other maker of the note, John McBride, who took it and delivered it to plaintiff, and received the full amount of the note, $100; and that, at the time it was delivered to plaintiff, the blank spaces had been filled by writing in the words 'ten (10) per cent.' and the figures '10.' This being true, the defendant would be guilty of negligence; and, it appearing that the plaintiff did not know that the note had been changed since Symes had signed it,—there being nothing upon the face of said note to indicate that the note had been changed,—the plaintiff would be a *bona fide* holder, and would be entitled to recover the amount of the note at the present time."

This request was refused, and the court directed the

verdict in favor of defendant. Counsel for plaintiff contends that the rule is that, where one delivers a writing containing blank spaces meant to be filled, the transferee, at least in the case of negotiable paper, has implied authority to complete the instrument by filling the blanks, in the way contemplated by the maker, with matter in general conformity to the character of the instrument.

This request should have been given. The rule is laid down by 2 Daniel, Neg. Inst. § 1405, that:

"There is a general principle which pervades the universal law merchant respecting alterations,—a principle necessary to the protection of the innocent and prudent from the negligence and fraud of others. That is that when the drawer of the bill or the maker of the note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it or exciting the suspicions of a careful man, he will be liable upon it to any *bona fide* holder without notice, when the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it. The true principle applicable to such cases is that the party who puts his paper in circulation invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none. * * * The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and, when the inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration."

See, also, *Garrard* v. *Haddan*, 67 Pa. St. 82 (5 Am. Rep. 412); *Visher* v. *Webster*, 8 Cal. 109; *Rainbolt* v. *Eddy*, 34 Iowa, 440 (11 Am. Rep. 152); *Harvey* v. *Smith*, 55 Ill. 224,—all of them holding to the rule laid down in Daniel on Negotiable Instruments.

The note in suit reads, as defendant claims it was drawn and left his hands, as follows:

"Owosso, Sept. 27, 1890.

"On or before one year after date, I promise to pay to

the order of William Weidman one hundred dollars at ——. Value received, with interest at —— per cent. per annum.

[Signed] "JOHN MCBRIDE.
"GEO. B. SYMES."

As the note was produced on the trial, it appeared that the first blank space was filled by words and figures as follows, "Ten (10) per cent.," and the second blank space by the figures "10." The plaintiff may well have been deceived when the note was handed him by McBride with the blank spaces so filled. The defendant was negligent in leaving these spaces blank. The note was a printed one, except the date, date of payment, name of payee, and amount. The rule contended for should have been applied by the court. The learned judge, in his charge to the jury, however, seemed to think that the cases of *Holmes* v. *Trumper*, 22 Mich. 427 (7 Am. Rep. 661), *Miller* v. *Finley*, 26 Mich. 249 (12 Am. Rep. 306), and *Bradley* v. *Mann*, 37 Mich. 1, laid down a different rule. In this the court was in error. In *Holmes* v. *Trumper* there was no blank space left to be filled. The words "10 per cent." were added at the end of the note. In *Miller* v. *Finley* the alteration was by procuring another signer to the note. And in *Bradley* v. *Mann* the words "with interest at 10 per cent." were added at the end of the note, after the words "Value received."

The court was also in error in directing the verdict in favor of defendant. It is true that the defendant testified that these spaces were not filled when the note left his hands, yet there were circumstances surrounding the case from which the jury might find that the defendant was mistaken in this. He knew that McBride was negotiating a loan with the plaintiff, and that this note was given as security for it. When the plaintiff was pressing for payment, it is claimed that he asked if the interest had been paid upon it. If this is correct, it might raise a question in the minds of the jury whether the spaces were not filled at the time the note left defendant's hands, or whether the

filling in of the spaces was not authorized by him. This was a question for the jury, as we held in the former opinion.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

PEOPLE v. TOWNSEND.

1. CRIMINAL LAW—ASSAULT BY SHOOTING—PROVOCATION.

On a prosecution for an assault by shooting, respondent is not entitled to an instruction that the jury may consider, on the question of provocation, the alleged fact that the complaining witness had boasted that he would betray respondent's fiancé, where it conclusively appears that respondent learned all that he knew upon that subject nearly a month before the shooting, and that complainant and he had parted friends the previous night; especially if his own testimony negatives the theory that it was the information in question that moved him to commit the assault.

2. SAME—INFORMATION—INTENT.

A conviction of assault with intent to do great bodily harm less than murder may be had, on proper evidence, under an information charging assault with intent to kill.

Exceptions before judgment from superior court of Grand Rapids; Burlingame, J. Submitted May 3, 1899. Decided July 11, 1899.

Edward L. Townsend was convicted of assault with intent to do great bodily harm, less than the crime of murder. Conviction affirmed.

William F. McKnight and *L. E. Knappen*, for appellant.

Horace M. Oren, Attorney General, and *Frank A. Rodgers*, Prosecuting Attorney, for the people.

MOORE, J. An information was filed against respondent, charging him with an assault upon Charles Hufford with intent to kill and murder. Respondent was convicted of an assault with intent to do great bodily harm, less than the crime of murder. The case is here upon a bill of exceptions before sentence.

The record discloses that respondent, at the time of the commission of the offense, was a little more than 20 years old. Prior to April 28, 1898, he had been paying attentions to Miss H., and they finally became engaged to be married. They had occasional estrangements, though the engagement continued. April 28th respondent left Grand Rapids for a few days. Upon his return he was informed by one Blum that during his absence Charles Hufford and Miss H. had been riding with each other. He claims he was also told that Hufford said his purpose in going with Miss H. was to betray her. Mr. Hufford denied he had ever made such statement. The respondent expostulated with Miss H., and, she says, threatened to shoot Hufford and one Russell. He also had an interview with Hufford, and proposed they should fight a duel, Hufford to have the choice of weapons. Hufford disclaimed any knowledge of the engagement, and he, the respondent, and Blum went to the house of Miss H., and called her to the window, where she says she was asked if they were engaged, and she replied, "Yes." As early as April 28th, Miss H. says, though still engaged to respondent, that she had told him "enough times" she would not marry him. After respondent's return to Grand Rapids, and his expostulating with Miss H., the engagement was broken off. The respondent felt very badly about this, and sought to have it renewed. For the purpose of talking over the engagement, he invited Miss H. to ride with him; and she says, when she told him she would not renew the engagement, he presented her a revolver, and asked her to kill him. He says the engagement at that time was renewed. On the 29th of May, respondent attended the funeral of the father of a friend

of his. After the funeral, he drove to the park. Just before getting there, he passed Miss H., who was with a friend, Miss G., but said nothing to them. Near the entrance of the park, he saw Blum, and inquired of him if he had seen Hufford. Miss H. and her friend continued on to the entrance of the park. Hufford was in the park, with an acquaintance, Miss E. He came to where Miss H. and Miss G. were, and invited them to go into the park and meet Miss E. They accepted the invitation. The respondent's version of what occurred is as follows:

"I think I met Blum at the park before I spoke to Miss H. I have no recollection of asking him about Hufford. All that I did was to pass the time of day with him. I didn't ask any questions, that I remember of. I am sure I didn't. I next saw Miss H., Miss G., and Mr. Hufford as they started to go up the steps towards the pavilion. Hufford was assisting Miss H. The other ladies were going along singly. I walked around awhile. Then I went up in that direction, and saw them as they were about to sit down, or were sitting down. I called Miss H. aside, and asked her if I could speak to her a moment. I wished to ask her if I could spend the afternoon with her. She did not come with me when I asked her to step to one side. She took, I should judge, four or five, six or seven, steps from that place, in a western or northwestern direction, towards the pavilion. After going this distance, she said, 'If you want to say anything to me, you can say it right here.' I think those were the words. I said, 'All right, I will.' At that moment I glanced towards Mr. Hufford, who was at the south end of the bench. I saw him walk around the bench and step towards me. He had his hand—I think it was the left hand—in his hip pocket, and he gave me what I considered a very threatening look. His manner and attitude frightened me somewhat. It looked very strange. I thought that he was going to shoot me. I really believed that. I pulled my revolver and shot at him,—in that direction. When I did so, I still believed he was intending to shoot me. I believe so yet. I had no design of injuring him. I had not, up to that moment, any design of shooting at him or using any violence towards him. I shot because I thought it was the only way to protect myself. I felt bad and nervous and worried, but I am not

what I consider excitable. I would not have fired at him at that time but for that belief that he was going to shoot me. I thought at the time that it was necessary to do that in order to protect myself, and I think so yet. When I saw him fall, I thought perhaps I might have killed him, and I started, not thinking what I was doing, and ran towards the southwest part of the woods."

The testimony of Hufford is that he was standing near the bench which he had procured for the young ladies, with his hand lying on the back of the bench; that he was not advancing towards respondent, and did not put his hand in his pocket, and had no revolver; that, when respondent raised his arm and fired, Hufford flung up his left arm, the bullet passing through it.

Counsel for respondent group the assignments of error as follows:

1. Refusal to submit to the jury certain of respondent's requests relating to the right of self-defense.
2. Refusal to instruct the jury upon respondent's theory of provocation, as reducing the offense to assault and battery.
3. Permitting a conviction for assault with intent to do great bodily harm, less than murder.
4. Permitting the prosecuting attorney to put to respondent and his witnesses improper and prejudicial questions, and to address to the jury improper and prejudicial remarks.

Counsel for respondent presented to the court 52 written requests to charge. Many of them were given just as presented by counsel. The substance of others was given in the general charge. Others of them were refused.

As to the first group of assigned errors: The court charged the jury very fully and fairly as to respondent's right of self-defense, and his right to act upon appearances, even though he was mistaken as to the fact. Each phase of this feature of the case was fully covered.

As to the second group of assigned errors: The court was requested to charge the jury as follows:

"It is claimed on the part of respondent that, a short

time before the assault complained of, respondent had been informed that Hufford was attempting to alienate from respondent the affections of the woman with whom respondent was under engagement to marry, and had boasted of his intention to have sexual intercourse with such woman, and that, at the time of the commission of the assault, respondent was laboring under the influence of passion and excitement produced by such alleged misconduct on the part of Hufford. The seduction of one's wife is regarded in the law the highest provocation which can be given a man. It is for you to determine, under all the evidence in the case, whether the alleged alienation of the affections and the alleged attempted seduction on the part of Hufford of respondent's affianced wife was an adequate and reasonable provocation, sufficient to disturb respondent's passion to an extent which might render an ordinary man, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment."

There were other requests based upon the same theory, and expressing the same idea in different verbiage. Because the court refused to give these requests, it is said he committed error. We cannot agree with counsel in this contention. The record does not disclose any act or language on the part of Hufford that should have led the respondent to believe Miss H. was likely to be betrayed by him. Whatever he had learned as bearing upon that question occurred nearly a month before the shooting. According to his testimony, the anger which resulted from this information had disappeared. In his testimony, he said of Hufford that he had seen him and visited with him the night before the shooting. "We were good friends at that time. Just a short time before that I took him to the opera-house." There was no claim in the testimony of respondent that he did the shooting before "cooling time" had elapsed, and in the heat of passion. His theory was that he thought Hufford was about to shoot him, and would do so unless he shot Hufford. The court very properly refused these requests. Even if the requests were a fair statement of the law,—and we do not express the opinion that they are,—there is no testimony in the

case upon which to base them. *People* v. *Finley*, 38 Mich. 482; *People* v. *Mortimer*, 48 Mich. 37; *People* v. *Durfee*, 62 Mich. 487.

The next group of errors is, "Permitting a conviction for assault with intent to do great bodily harm." It is said the jury should have either convicted of the main offense charged, or of assault and battery, or should have acquitted, and that there was no room for a conviction of an assault with intent to do great bodily harm, less than murder. It is true, the prosecuting attorney, when seeking a conviction of assault with intent to murder, argued to the jury that, under the evidence, they must convict of that offense, or acquit the respondent. That, however, was but the expression of the opinion of counsel as to the effect of the testimony. It was not the opinion of the trial judge, who charged the jury fully, as it was his duty to do, as to what constituted the offense of assault with intent to do great bodily harm, less than the crime of murder, as well as what constituted the main charge and the offense of assault and battery. We have held that, under an information like this, the accused may be convicted of the lesser offense of an assault with intent to do great bodily harm, less than the crime of murder. *People* v. *Prague*, 72 Mich. 178. There was an abundance of testimony from which the jury were warranted in finding the respondent guilty of the offense of which they convicted him.

It would not be profitable to discuss the assignments of error in relation to the admission and rejection of testimony, further than to say that, if the court erred at all, it was error in favor of the respondent, rather than against him. So far as any of the argument of the prosecuting attorney was objectionable, the error was cured by the prompt action of the court. We think the respondent has had a fair trial.

The conviction is affirmed, and the case is remanded to the court below for further proceedings.

The other Justices concurred.

CADOTTE *v.* CADOTTE.

1. DECREES—TIME OF ENFORCEMENT—MODIFICATION.
   While the court has not, after enrollment, power to amend the decree without a rehearing, it retains the power to modify by a subsequent order the time of its enforcement.

2. SAME—EXTENSION OF TIME.
   A showing that defendant's delay in making certain payments to complainant, as provided in a decree of divorce, was due to the latter's failure to furnish a promised abstract of title to the property involved, justifies an order extending the time for making such payments.

3. SAME—MODIFICATION IN SUBSTANCE.
   An order requiring the complainant, who has been granted a decree of divorce, to furnish defendant with an abstract of title to land which he was decreed to turn over to her, is a modification in substance of the original decree containing no such provision.

Appeal from Wayne; Donovan, J. Submitted May 4, 1899. Decided July 11, 1899.

Bill by Frank J. Cadotte against Johanna Cadotte for a divorce. Decree for complainant. From orders extending the time for defendant to make certain payments, denying complainant a writ of assistance, and charging him with the cost of an abstract, complainant appeals. Modified.

James M. Goodell, for complainant.

Howard B. Bloomer, for defendant.

MONTGOMERY, J. This is an appeal from orders of the court made subsequent to the granting of the decree. The decree of the court, dated March 16, 1898, filed May 4, 1898, granted a divorce to complainant on the ground of extreme cruelty. It provided for a division of the prop-

erty of complainant, both real and personal, between the parties, in the following manner: Within 10 days after service upon her of a copy of the decree, the defendant was required to make an inventory of the personal property (which was in her possession), and divide the same into two parcels, and give notice of the same to the solicitor for complainant, and also at the same time give notice to said solicitor of the amount which she would give or take for the one-half interest in the equity of complainant in the real estate. Within five days thereafter, complainant should make his choice of one of the two said parcels of personal property, and also notify defendant, within the same time, of his option to give or take the amount proposed by her for said half interest in said equity in the real estate. In case the defendant should not comply with the above terms within the time limited, the household goods should belong to the defendant, and the real estate to complainant. In case of division of said household goods as provided, defendant should immediately deliver to complainant the parcel selected by him. Should complainant elect to pay defendant for her interest in said equity, she should surrender possession of the real estate within 10 days after payment of the amount to be paid as aforesaid. In case defendant gave notice within 10 days of what she would give or take for the half interest in said equity, and complainant elected to accept the money, the defendant was required to pay such sum within 30 days after complainant made his election to accept the same, and her failure to pay the same within such time should operate as an abandonment of her offer to give or take as aforesaid, and should entitle complainant to have all of said equity, and defendant to have all of the household goods. In such case, if one-half of the household goods had been delivered to complainant, they should be returned to defendant.

May 6, 1898, a copy of decree was served on defendant. May 14th, defendant served lists of two parcels of personal property, and gave notice that she would give or

take $1,000 for the half interest in the equity in the real estate. May 18th, complainant served on defendant notice of acceptance of her offer to give $1,000 for the equity, and selected parcel No. 1 of the personal property. On the same day the personal property was divided, and complainant removed the parcel selected by him. June 20th, the 30-day limitation fixed by the decree for the payment by the defendant of the amount offered by her for complainant's equity having expired on the 17th, and she having failed and neglected to pay the same, complainant caused a tender to be made to defendant of the amount of her lien on said real estate, viz., $961.75, under the decree in cause No. 17,437. She was at the same time requested to state when she would vacate the premises, and where she desired complainant to return the personal property.

June 22d, defendant filed a petition for an order extending the time to pay the $1,000, and requiring complainant to allow certain set-offs, and to furnish an abstract of title of the premises in question. July 13th, Judge Carpenter, before whom said petition was heard, denied the said application of defendant, without prejudice. July 15th, complainant filed a petition for a writ of assistance as against defendant and Ernest Cobb, a tenant under her. July 27th, Judge Donovan, who heard the above application, made an order dismissing the same, and also requiring complainant to furnish an abstract of title, and extended the time for payment of the amount offered by defendant for complainant's interest in the real estate 20 days from the date of the order. August 10th, the opinion of Judge Donovan was filed, authorizing the defendant to deduct $26.80 for the abstract of title procured by her from the $1,000, and allowing her to tender the balance into court. August 11th, an order was made by Judge Donovan granting leave to defendant to make a tender to complainant's solicitor of the amount offered by her, and directing complainant to deliver to defendant a deed of his interest in said premises.

From these orders denying the writ of assistance, ex

tending the time to make payment, and charging complainant with the cost of an abstract, complainant appeals.

It is contended by appellant that the court cannot, after enrollment, alter or amend its decree, and that, therefore, the orders in question were unauthorized. Judge Donovan recognized the general rule contended for. In his opinion he said, "The court's decree to give or take so much for the property, made by Judge Aldrich, can in no way be disturbed, except to aid in executing and performing it, which power we claim to possess." We think Judge Donovan did not mistake the power of the court. While the court has not, after enrollment, power to amend the decree without a rehearing, it retains the power to modify by a subsequent order the time of its enforcement. 5 Enc. Pl. & Prac. 1057, and cases cited in note. The case shows that defendant was entitled to the real estate on payment of $1,000, and there is enough to show that she was delayed in her negotiations for the money by the assurance of complainant's attorney-in-fact that he would furnish an abstract of the property, which he later declined to do. The case was a proper one for an extension of time for performance of the decree. We do not, however, find that the original decree required complainant to furnish an abstract, and think that this requirement was a modification in substance of the decree.

The order will be so modified that the defendant may have 30 days from the entry of the decree in this court to make tender of the $1,000. No costs will be awarded on this appeal.

The other Justices concurred.

REDSON *v.* MICHIGAN CENTRAL RAILROAD CO.

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RAILROAD COMPANIES—HORSES ON TRACK—GROSS NEGLIGENCE.

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One who, while loading logs, permits his horses to remain upon the track in front of an approaching train, under circumstances which render his conduct grossly negligent, should not be permitted, in an action against the company for their killing, to go to the jury upon the theory that the engineer, knowing the danger, willfully ran them down, where there is no definite proof to contradict the engineer's testimony that he acted with all proper caution as soon as the situation became apparent to him.

Error to Ogemaw; Sharpe, J. Submitted May 4, 1899. Decided July 11, 1899.

Case by Claude E. Redson against the Michigan Central Railroad Company for the alleged negligent killing of plaintiff's team of horses. From a judgment for plaintiff, defendant brings error. Reversed.

George L. Alexander, for appellant.

Merrie H. Abbott and *Charles S. Abbott*, for appellee.

GRANT, C. J. The declaration in this case contains five counts, alleging various grounds of negligence. The court disposed of all these in his charge, except one, either on the ground of plaintiff's contributory negligence or that no negligence was shown on the part of defendant. Failure on the part of the engineer to keep a proper lookout was one. The court instructed the jury that, even if this were so, plaintiff was equally negligent in not keeping a proper lookout for the approach of the train, which he knew was then due, and which could have been seen approaching for a distance of over three miles. The failure to give warning by blowing the whistle and ringing the bell was disposed of in the like manner. It was conceded,

however, that the bell was rung automatically. There was no duty to blow the whistle, as this was not a highway as to which the duty is imposed by statute, and the court so held. The whistle was blown, according to the defendant's witnesses, as soon as the danger was discovered. The only dispute is over the distance of the engine when the whistle was blown. The court also correctly instructed the jury that there was no evidence of failure to provide suitable air-brakes, and keep them in proper order. The court very properly instructed the jury that the plaintiff was guilty of contributory negligence, and it might, with propriety, have added that it was negligence of the grossest kind. The question, however, was left to the jury, upon the theory of willful or gross negligence on the part of the defendant.

The authorities do not go to the extent of holding that the mere failure "to exercise due care or the means at hand" is gross negligence, sufficient to justify a recovery, where the plaintiff is guilty of contributory negligence. Plaintiff saw this train coming. He was just in the act of hitching onto a log. Instead of immediately removing his horses, which, it is evident, he had then ample time to do, and taking them out of danger, he ordered the log rolled up onto the car, and, before he could then get his horses removed, both the horses and his partner, Woodworth, in charge of them, were killed. Had injury resulted to the train or to the trainmen, it might just as well have been charged that he (the plaintiff) was guilty of intentional wrong as to charge that the engineer was guilty of it. It would then be gross negligence against gross negligence, willful misconduct against willful misconduct, and intent against intent; and in such case the law leaves both parties where they have placed themselves, and gives recovery to neither. The entire charge upon this point might be sustained under the authorities cited; for the court expressly said to the jury:

"I instruct you, as a matter of law, that by the term 'willful negligence,' or 'gross negligence,' as it is some-

times called, is meant the intentional failure to perform a manifest duty, in reckless disregard to the consequences as affecting the property or life of another. It also implies a thoughtless disregard of consequences, without the exercise of an effort to avoid them. In order to find the defendant guilty of reckless conduct, it must be shown by the plaintiff that the engineer knew the situation and danger, that he realized that there was danger at the time, and that he ran on in spite of that knowledge, and knowing the consequences if he failed to stop."

Under the ruling in this case, the rule of contributory negligence might as well be abolished; for in nearly every case enough testimony would be adduced to permit the jury to say that the engineer might have seen the condition, and by the use of proper means have avoided the accident.

This necessarily leads to a full statement of the facts: All the information conveyed to defendant as to the use of this track by plaintiff, and the method employed by him, comes from a statement made by him to the local agent "that he was going to load these logs upon the cars with horses." The dangerous situation was created entirely by the plaintiff, and the defendant was in no sense responsible. Plaintiff knew of the approach of trains, and that it was his duty to look out for them, and that defendant owed no duty to look out for him or his property until its engineer was in position where he must be held, in law, to have realized the danger, and to have run on regardless of it. When plaintiff's employé and witness Bowers gave notice of the approach of the train, his (plaintiff's) witness and employé Johnson was in the act of chaining the log. Instead of stopping then, and removing the horses, plaintiff gave orders to his partner, Woodworth, in charge of the horses, to pull up the log. This was done. One of the horses was off the track, and the other on, when the engine struck. It is very doubtful if Woodworth heard the notice of the approach of the train given by Bowers, and afterwards repeated by plaintiff, who stood on top of the logs, in plain sight of everything. Plaintiff

himself testifies that possibly Woodworth may not have heard him. Woodworth was killed. If Woodworth did not hear the warning, he was doing the work in the usual way, without any thought of danger. Plaintiff himself testifies that, if the team "had gone straight on about the length of a team, they could have turned to the left, and gotten off the track." I will let plaintiff tell his own story of the transaction:

"*Q.* So, by going a few feet farther south, they could have turned, and gotten off to the right?

"*A.* They could have turned off either way.

"*Q.* They could have turned off to the right by going a few feet south?

"*A.* Yes, if they had—

"*Q.* Yes, sir; but you said they turned around to go back their usual way of work?

"*A.* Yes, sir.

"*Q.* Go up the track?

"*A.* Yes, sir.

"*Q.* Your driver didn't attempt to get them off to the left, nor drive them farther along, and get them off either way?

"*A.* Yes, sir; he did make such an attempt. He stooped down to unhook his chain, and while he stooped down his team was nearly turned around, and before he could get them turned again they had got too far around for him to get them back in time. After they turned around, he didn't have time to turn them again before the train got there."

Another of plaintiff's employès and witnesses testified that, "if the team had been manageable, they might have been got out of the way, as well as Woodworth himself."

Potts, the engineer, whose deposition upon the inquest was introduced by plaintiff, and made a part of his case, testified:

"I saw a team of horses alongside the track. They were near, or in the vicinity of, the track. They were on the right of way. Could not tell what they were doing. Would infer that they were being used in loading cars. I was perhaps five or six hundred feet away when I first noticed them. I saw a man there with the horses at the

same, or about the same, time I saw the horses. I sounded the whistle when I first saw them, and shut off the steam, and applied the air-brakes."

Potts was also sworn upon the trial, and testified as follows:

"Well, we had passed the north end of the switch about two or three hundred feet when I saw this team come from behind the end of the car and turn upon the main track north. Immediately a man ran around them, and tried to back them up, and he could not. He ran around behind them, and I was so close then that there was no stopping. I applied the air-brakes, and sounded the whistle, and shut off the engine immediately, as soon as I saw them."

These statements are corroborated by the fireman.

This railroad ran through a lumber region, and the loading of cars was common in many places along the track, and had been for many years. It was proven beyond controversy that it was the duty of those engaged in this work along the line of the road to look out for and protect themselves against passing trains; that it was not the custom to slow up when seeing persons on or about the track engaged in this work; that no such accident had ever before happened; and that it would be impossible to make schedule time if this course was not pursued. It was the plain duty of plaintiff to keep the track clear, both for his own protection and that of those on board the train. In the face of this testimony, courts are asked to sustain a finding that the engineer saw that the team was unmanageable; that he saw, in time to stop his train, that the accident was inevitable unless he stopped; that he purposely disregarded the danger to his own life, and that of others upon the train,—for it was a passenger train,—and intentionally ran down and killed Mr. Woodworth and the plaintiff's horses. No court should allow such a result, except upon clear and convincing proof. The train might have been derailed, causing loss of life and destruction of property. The conduct which would sus-

tain the verdict in this case would convict the engineer of manslaughter. He was not required to check the speed of his train, or to take means to stop it, until he was chargeable with clear notice that the horses and Woodworth were in danger, and could not get off the track before the engine reached them. The assumed conduct of the engineer, upon which the liability in this case is based, is repugnant to human nature. No one but a man of the most cruel instincts would be guilty of it. There is nothing in this case to show that the engineer did not act with promptness as the situation appeared to him, except the loose testimony of the plaintiff, who testified that he thought steam was shut off when the train was right in front of him, the instant the horses were struck, but he could not tell whether the speed of the train was checked or not; that of Bowers, who testified that steam was not shut off when the train passed him; and that of Florence Russell, that the first whistle she heard was when the train was close to the horses. There was only one horse upon the track. Woodworth was trying to get him off. Just where Woodworth stood does not appear. Who can say at what distance the engineer was bound to recognize the fact that in all probability they could not get off the track before he reached them? Is it not the merest conjecture? There is no testimony to sustain this terrible charge against the engineer of the defendant's train. He acted as he had usually done, and in the light of the situation as it appeared to him. His own preservation would have prompted him to do all in his power to avoid the accident. A jury ought not be permitted to say that his conduct was reckless and intentional, and that he deliberately rushed on, knowing the danger and the consequences.

Defendant was running its train in a lawful manner; at a lawful rate of speed, and was guilty of no act of negligence, unless its engineer was guilty of a willful and deliberate act, for which it is responsible. I cannot yield my approval of a verdict and judgment where the plaintiff himself was guilty of the grossest negligence, and asks a

court and jury to excuse it, and give damages, because the defendant's servant might have seen the danger he was in, and avoided it, and that, too, when the slightest precaution upon his own part would have prevented it. I do not think the case is in any essential particular different from that of *Frost* v. *Railroad Co.*, 96 Mich. 470.

I think the judgment should be reversed, and new trial ordered.

The other Justices concurred.

JASTRZEMBSKI *v.* MARXHAUSEN.

1. NEWSPAPER LIBEL—JUDICIAL PROCEEDINGS—PRIVILEGE.
   Where a newspaper reporter, at the suggestion of an officer at police headquarters, obtains from a wife, who came there to make a complaint against her husband, a repetition of statements made to the officer, and the newspaper publishes the same as facts without further investigation as to whether they are true or false, the publishers cannot defend an action by the husband for libel upon the ground that the article was a report of "judicial proceedings," and therefore privileged.

2. SAME—NOTICE OF JUSTIFICATION—MALICE—MEANING OF WORDS—"EVIDENCE" AND "PROOF."
   "Evidence" and "proof" are not synonymous words: "Evidence" is that which tends to convince; "proof" is that which convinces. Therefore, 2 How. Stat. § 7776, which provides that notice of the truth as a justification in an action for libel, though not maintained by the evidence, "shall not in any case be of itself proof of the malice charged," does not take away from the jury the right to consider whether an unsustained notice of justification may not tend to show malice, when taken in connection with the other facts established.

3. SAME.
   However, the jury should be able to find that there was bad

faith in giving notice of justification before they use that fact as evidence of malice, and an instruction which authorizes a finding of malice upon the notice alone is erroneous.

4. APPEAL—PROLIX RECORD—COSTS.

Where a record of one-half the length of that presented to the Supreme Court would have been ample to cover all the points raised on appeal, the appellant, upon reversal, was allowed to recover only one-half the cost of the record.

Error to Wayne; Hosmer, J. Submitted May 9, 1899. Decided July 11, 1899.

Case by Felix Jastrzembski against August Marxhausen for libel. From a judgment for plaintiff, defendant brings error. Reversed.

This is an action of libel based upon the following article published in the Detroit Abend Post, a German newspaper printed and published in Detroit, of which the defendant is owner:

"ELOPED WITH ANOTHER WOMAN.

"Felix Jastrzembski Leaves Wife and Children in Need.

"The police were notified today that the 24-year old wife of Felix Jastrzembski is living, with four small children, in need and poverty, in the house at number 459 Forest avenue, where her husband, the carpenter Jastrzembski, left her in the lurch a week ago, and ran away with another woman, the 20-year old Agnes Hartung. Agnes boarded at the Jastrzembskis, and the fickle man fell in love with her, without having any regard for his family. Agnes' brother today reported his sister as missing. Where the couple have gone is unknown, though the police will endeavor to find out. Mrs. Jastrzembski found in one of her husband's coat pockets a photograph which represents him and Agnes Hartung as a couple. Here is an opportunity for benevolent-minded women to make an effort, and to ascertain how the abandoned family may be relieved from their sad want, without injuring those who have innocently fallen in want."

With the plea of the general issue the defendant gave notice that he would prove:

(1) "That said article was, in its fair and ordinary significance, true in substance and in fact."

(2) That the statements in the article "were based upon proceedings had in the police court of the city of Detroit, a public court of said city, and had and heard in public, and was a fair, truthful, and unprejudiced account and report of said proceedings had therein, and therefore privileged."

(3) That, at the request of the plaintiff, his version of the affair was published in the newspaper; that, before it was published, it was carefully read over to him, and that he expressed himself fully satisfied with it, and agreed that, if the same should be published in said newspaper, he would be fully vindicated and satisfied, and would settle and discharge defendant of any and all liability; that, at his request, a second article was published in said newspaper. These two articles were published, and are as follows:

"WHAT FELIX JASTRZEMBSKI HAS TO SAY.

"Felix Jastrzembski, of No. 459 Forest avenue, declares that the complaints made by his wife against him are wrong and untrue. He says that he earns $12 per week, $7 of which he had given his wife to keep house. With that amount she did not get along, because she was too extravagant. He had criticised and severely protested against this, and the fight resulted therefrom which caused his wife to make such report to the police. He is an honest man, and never had anything to do with the girl Agnes Hartung; did not know of her whereabouts, nor did it concern him; says that he had worked for Wm. Monroe, on Twenty-Eighth street, truly and regularly every day, and been home every day. Hence, how anybody can claim that he had deserted his wife he could not understand,—a worse lie never existed. The talk of distress was silly, for his wife had enough supply at the house to warrant good living for weeks. The whole matter, Mr. Jastrzembski says, has been prompted and instigated by meanness, because he did not want to indiscriminately feed other people. That was the whole trouble."

Also:

"THE CASE OF FELIX JASTRZEMBSKI ONCE MORE—MORE EXPLANATIONS.

"We have once before shown in our columns that great wrong had been done to young Felix Jastrzembski by his wife, who accused him of desertion and eloping with another one; but we do repeat this today, not merely for the frequent talk arising out of the matter, but owing to the request of the employers of the accused, who have requested us for an honorable explanation, inasmuch as the latter is held in high esteem among his fellow workmen. There was no reason whatever to blacken the man to the police. The wife permitted herself to be led on slippery ice."

Plaintiff obtained a verdict for $500; $400 injury to feelings, and $100 for other damages. No further statement of facts is necessary, except in connection with the points determined.

William Look and *Ira G. Humphrey* (*Elliott G. Stevenson* and *Leo M. Butzel*, of counsel), for appellant.

Charles T. Wilkins and *Oscar M. Springer*, for appellee.

GRANT, C. J. (*after stating the facts*). 1. Was the publication privileged? The publication was not that of the contents of papers filed in the course of judicial proceedings. It was not a report of testimony taken in court. No witnesses had been sworn. The only document filed in the justice's court was a complaint made for nonsupport, and this was not known to the reporters or to defendant. To this document no reference whatever was made in the publication. Plaintiff's wife, her brother, and the brother of Agnes Hartung went to police headquarters, and there related to a police officer the alleged troubles between plaintiff and his wife. The wife had with her a picture of the girl Agnes and her husband, taken together. One Jan Schmedding, a reporter for the Evening News, came to the police officer after the wife and others had made their statements to him. Schmedding testified that the

officer told him that a man and woman had been reported missing; that, if he wanted to get the story, he could find them on the porch; that they were just leaving the building; and that there was a runaway match. In Mr. Schmedding's own language: "I hustled out to the porch, and found Mrs. Jastrzembski, and Mr. Hartung, and a young man who said he was a brother of Mrs. Jastrzembski." Mr. Schmedding questioned the wife and the others, and obtained the picture. Just after this, Mr. Balke, the reporter for the Abend Post, came up, and Mr. Schmedding gave him the details he had derived from the parties, and showed him the picture. Neither made any further investigation as to the truth of the charges, although the reporters knew where the plaintiff lived, and the article was immediately published in the defendant's paper. Mr. Schmedding said, on cross-examination: "The report was that he was missing, and his wife told me that he was missing, and that was all I cared to know." The officer, after stating the reports made to him by this woman through an interpreter, states the interview with Schmedding as follows: "Mr. Schmedding came in just as they were leaving the door,—just going out of the office,—and he says, 'What are those people wanting?' 'Well,' I says, 'they reported a couple eloping;' and I says, 'It is quite a story for you, and they have got a picture.'" Mr. Balke testified that all the information he received before publishing the article was obtained from Mr. Schmedding. The wife charged her husband with criminal intercourse with the girl Agnes, and the police officer advised her to go to the police justice's office. She, and those with her, then went to the office of Justice Whelan, and there made similar statements to those made at police headquarters. The statements there made convinced Mr. Whelan that the charge of adultery would not lie. The wife made a complaint for nonsupport under the disorderly act, and a warrant was issued for the arrest of plaintiff. No reporters were there, and neither the defendant nor any of his employés had any knowledge, at

the time of the publication, of what had occurred at the office of Justice Whelan.

The publication was not privileged. The conversation between the officer and plaintiff's wife was not a judicial investigation. Reports made to police officers charging persons with crime are not privileged communications, and those who publish such reports do so at their peril. Evidently, Schmedding did not rely upon the statements made to him by the officer. He was simply told by him "that these parties had reported a couple eloping." He then hurried to the parties, got their statements, relied upon them as true, and, without any further investigation, the defendant published them. There were no court proceedings upon which to base the question of privilege. The authorities cited by counsel, based upon the publication of court proceedings, do not apply. The statements published were not gathered from any proceedings in court, but the information was obtained from parties entirely outside of any court. The only defense, therefore, that could be made to the publication, was its truthfulness.

2. Did the court err in instructing the jury as follows:

"If the defendant has not succeeded in proving the truth of all the defamatory statements just as charged, the fact that he has again in his plea said that the charges were true may be considered by you in estimating the damages to be awarded to the plaintiff. * * * In estimating the damages to be awarded for the publication of a libelous article, I instruct you that the plea of justification, if not sustained,—that is, a claim, such as is made by the defendant in this case, that the charges in the article are true,—if the truth of those charges is not proved, is a matter which you may have to take in consideration as a cause for increasing the damages to be given to plaintiff."

At the common law, notice of justification, and the failure to sustain it, were evidence of malice, and, by many authorities, conclusive evidence. The rule is so stated in *Huson* v. *Dale*, 19 Mich. 30. The rule was a harsh one, and therefore the legislature provided:

"If the defendant in any action for slander, or for publishing a libel, shall give notice in his justification that the words spoken or published were true, such notice, though not maintained by the evidence, shall not in any case be of itself proof of the malice charged in the declaration." 2 How. Stat. § 7776.

The statute abolished the rule that an unmaintained plea of justification was proof of the malice charged. Counsel treat the word "proof," used in the statute, the same as though it read "evidence." "Proof" is that which convinces; "evidence" is that which tends to convince. We must assume that the legislature used the word in its well-understood definition. "Evidence is the medium of proof; proof is the effect of evidence." *People* v. *Beckwith*, 108 N. Y. 73. That the legislature understood the definition of these two words is apparent from the fact that the law uses both words, and in such connection as to clearly show the distinction between the two. The statute, therefore, did not take away the right of the jury to consider whether an unsustained notice of justification might not be evidence tending to show malice, when taken in connection with the other facts established.

Under the above instruction, however, the jury were permitted to consider the unsustained notice of justification for the purpose of showing malice. The jury might, therefore, have put out of their consideration all the other facts and circumstances, and based a finding of malice and an increase of damages on this fact alone. We think the statute was designed to prevent such a result. The jury ought to be able to find that there was bad faith in giving notice of justification before they use that fact as evidence of malice. *Distin* v. *Rose*, 69 N. Y. 122. It is with some reluctance that I yield my assent to reversal of this case, for the reason that the attention of the court was not called by either counsel to this statute, and no request was made to instruct the jury as to its effect. It is the duty of attorneys to, at least, call the attention of the court to such matters, and to request instructions thereon. It

is impossible for a judge to always keep such matters in his mind.

3. It is urged that the court permitted the jury to give exemplary damages. It would be necessary, perhaps, to discuss this question, if that were the fact. It is a fair inference, from the instructions given, that counsel in their arguments had spoken of exemplary or punitive damages. The judge said to the jury:

"There is no such thing as damage by way of example. There is no such thing in Michigan as a permission upon the part of the jury to add damages to what they find the plaintiff has actually suffered, by way of punishment, by way of example, or for any other purpose."

It is impossible to conclude that the jury were permitted to find exemplary damages.

4. Error is assigned upon the instruction that there was no evidence that plaintiff had run away with Agnes Hartung, or had abandoned or failed to take care of his wife and family. The instruction was correct. There was no evidence to sustain either charge. Plaintiff was at his work as usual; was at his home as usual; came home as usual the night of the publication; and the record is barren of testimony that he failed to provide his wife and family with the support commensurate with his means. There was testimony of undue intimacy with Miss Hartung, but the record is barren of any evidence that they had eloped. An investigation by the reporter would have revealed the facts, and undoubtedly have prevented the publication.

5. Several questions are raised upon the admission and rejection of evidence. We do not consider it important to discuss them. The circuit judge gave a wide latitude to the defendant in inquiring into the relations between plaintiff and his wife, to show his character, and all the circumstances which could go in mitigation of damages. The trial was a long one. The cross-examination of plaintiff covers 60 pages. Nothing was excluded which would tend to show the truth of the charges made.

6. The record in this case contains 344 pages. The bill of exceptions contains everything that happened upon the trial, including many colloquies between counsel, and between counsel and the court. A record of less than one-half the length would have been ample to present all the points raised. We have many times condemned this method of preparing bills of exceptions. It unnecessarily increases the work of the court. Defendant will recover only one-half of cost of record.

Judgment reversed, and new trial ordered.

The other Justices concurred.

STURM *v.* KELLY.

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1. DRAINS—APPLICATION—ESTABLISHMENT—CLEANING OUT.
   An application for the location and establishment of a drain will confer jurisdiction upon the commissioner to clean out an old drain upon the line of the new one, and to utilize it as a portion of the new one, without separate proceedings being taken for that purpose.

2. SAME—RIGHT OF WAY—RELEASE—RAILROAD LANDS.
   The granting by a railroad company of a written license for a drain to cross its right of way, and the erection by it of a culvert under its roadbed for the purpose, is sufficient as a release of the right of way.

3. SAME.
   The release of a right of way for one drain cannot operate as a release for another.

4. SAME—IRREGULARITIES—CORRECTION.
   Under Act No. 254, Pub. Acts 1897, chap. 5, § 3, authorizing the court to direct the county drain commissioner to correct any errors in drain proceedings, and then to proceed as though no errors had been made, proceedings may stand, although the commissioner neglected to obtain from one of the landowners a release of the right of way, upon the commissioner's

accounting for the irregularity and securing the necessary release.

5. SAME—USE OF ESTABLISHED DRAIN—NECESSITY FOR NEW RELEASE.

A drain commissioner may, in establishing a drain, use a drain formerly established, and clean it out, without obtaining a release from abutting owners along the established drain, where such owners will not be damaged by the use of the drain, but, on the contrary, will be materially benefited, and where the dimensions of the old ditch will not be changed.

Error to Bay; Maxwell, J. Submitted May 10, 1899. Decided July 11, 1899.

Certiorari by George M. Sturm to review the action of John A. Kelly, drain commissioner of Bay county, in laying out and establishing a drain. From a judgment sustaining the proceedings, petitioner brings error. Modified and affirmed.

A petition for the location and establishment of a drain three miles in length was presented to the respondent. He made the proper survey, and located and established the drain, but did not follow the exact survey set forth in the application. He located it so as to utilize an old drain or water-course, which he ordered to be cleaned out from a point where the new drain entered it to its terminus. Proceedings were taken in the circuit court for the county of Bay to test the validity of the drain. That order was set aside for the reason that no review of the assessment was held according to law. The court ordered the commissioner to reassess the cost of the construction, cleaning out, and establishing of the drain, and to apportion the benefits, as though no errors had been made. The drain commissioner made a new order, and this proceeding was brought to test the validity of such order. The record presents four questions, stated as follows:

(1) Did the application for the establishing of a drain authorize the drain commissioner to make his order to

clean out an established drain, and carry on further proceedings for that purpose?

(2) Can the drain commissioner make his final order to establish a drain, let contracts, assess a per cent. for benefits, and proceed with the construction of the drain, without obtaining from the owners of land to be taken for that purpose a release for a right of way, or the securing of said right by legal proceedings?

(3) Was the action of the commissioner in making his final order of determination to establish the drain, without first obtaining the right to cross the roadbed of the railroad company in the manner provided by law, legal, and can the commissioner lawfully let contracts, and assess a per cent. of benefits, and proceed with the construction of the drain, before he has secured the right to legally cross the property of the railroad company?

(4) Can the drain commissioner appropriate and use an established drain as the outlet for a new drain to be established, without the consent of the owners of the land on each side of the established drain?

Lyon & Pierce, for appellant.

John E. Kinnane and *Edward E. Anneke*, for appellee.

GRANT, C. J. (*after stating the facts*). 1. The important question is the first one. The petition to the commissioner did not ask for the cleaning out of an established drain, and it is urged that the commissioner obtained no jurisdiction to make this part of the order. The respondent makes the following return upon this point:

"Said established drain is the natural outlet of the waters to be drained by said Behmlander drain which are situated north of the Salzburg road; and there is no feasible outlet for said last-mentioned waters in the direction of Squaconning creek, except through said established drain, without constructing a new drain practically parallel therewith. That a large portion of said established drain, so called, is a creek or natural water-course, and is so classed in the field-notes of the government survey of said land. * * * That the application upon which my said action with reference to said drain is based, while

formally asking for the establishment of a drain as if no drain had ever been established upon this line or any portion thereof, was, in my judgment, sufficient both for the establishment of a drain and as giving jurisdiction and authority to clean out and make use of that portion of a then existing drain or water-course covered by the application, and which greatly lessened the expense and labor required to establish said drain and secure the proper drainage for the lands adjacent thereto. * * * Said petition cannot be reasonably construed to mean, or to have been intended by the signers thereof, that a new drain was to be established between the points aforesaid, and can only be construed to mean that the portion of said drain between the points aforesaid was to be established by cleaning out and making use of the said established drain or water-course. And that said application, in substance and in fact, asked for and gives jurisdiction for doing the work actually done by me in the establishing of said drain as aforesaid, and that said application can only be construed as asking for the establishment of a drain by making a new cut along the line thereof to the point where the established drain, so called, is reached, and cleaning out and improving said established drain so as to conform with the cut so made from that point to the terminus of the drain."

There was no record of the location and establishment of this so-called old drain. Under the return, it was once a natural water-course. We think this point is ruled by *Hauser* v. *Burbank*, 117 Mich. 463. Where a water-course, or a portion of an old drain, becomes a part of a new drain to be established, we do not think that separate proceedings are necessary to be taken for cleaning out the old drain, or that the petition should ask that the old drain be cleaned out. We hold the petition sufficient.

2. The second and third questions may be treated together. The railroad company did not execute a formal release, but it gave a written consent or license for the drain to cross its right of way, and erected a culvert under its roadbed on the line of the grade of the drain for that purpose. This is a sufficient release.

One Meyer owned some land along the drain, petitioned

for the drain, and is the only abutting landowner who did not release his right of way. He had signed a release of right of way for a like drain one year before. Respondent was unable to see him, to procure his signature to a release, and relied upon his willingness to give the same when called for. The release for a right of way for one drain cannot operate as a release for another. The obtaining of releases is essential. *Zabel* v. *Harshman*, 68 Mich. 273. The court, under section 3, chap. 5, Act No. 254, Pub. Acts 1897, is authorized to direct the county drain commissioner to correct any error, and then proceed as though no error had been made. Under this provision, and the return of the respondent, we think it proper to permit the proceedings to stand, upon the respondent's acquiring a release of the right of way from Mr. Meyer.

3. We do not think that a release by the abutting owners along the so-called established drain was essential, in the face of the fact that the return shows that such owners will not be damaged by the use of this drain, but, on the contrary, will be materially benefited, and that the dimensions of the ditch are not changed.

Judgment modified and affirmed.

The other Justices concurred.

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

1. FIRE INSURANCE—BOARD OF AUDITORS—POWERS.
   The charter of a mutual fire-insurance company provided that the auditors living in the county where a loss occurred should investigate the cause of the loss, and, if it should appear that it was not the result of carelessness or any violation of the charter and by-laws, should ascertain the amount of loss, and authorize its payment; and that in case of any disagreement between the auditors and the insured "as to the liability, in whole or in part," arbitrators should be appointed, by whom the "amount of loss" should be determined. *Held*, that the board of auditors was not authorized to determine a question of liability under the policies issued, but only the actual amount of loss sustained.
2. SAME—DENIAL OF LIABILITY—ARBITRATION CLAUSE—WAIVER.
   Where the auditors of a fire-insurance company, authorized merely to determine the amount of loss sustained by an insured, their determination to be final in the absence of a demand for arbitration, found that the insured had been guilty of "evil practice," and on that ground assumed to reject the claim entirely, which finding was adopted by the company, the arbitration clause was waived, and the insured was free to resort to the courts.

Error to Wayne; Frazer, J. Submitted June 6, 1899. Decided July 11, 1899.

Assumpsit by Simeon C. Denton against the Farmers' Mutual Fire Insurance Company of Monroe and Wayne counties on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

This is a suit upon a policy of insurance commenced in justice's court, and appealed to the circuit, where plaintiff recovered a verdict and judgment for $100. The defendant gave notice, with its plea of the general issue, that, under the charter of the defendant, plaintiff was barred

from maintaining an action on the policy, because the auditors of said company had found and decided that the defendant was not liable, and that their finding was conclusive upon the plaintiff. Other defenses were interposed, involving issues of fact, which the jury have decided against the defendant. The question arises upon sections 22 and 23 of the charter, as follows:

"SEC. 22. In case of fire or damage by lightning, the secretary shall notify the auditors living in the county where the loss occurs, and the president, of such loss or damage, within 10 days after the secretary shall be informed in writing by the owner of the property burned or injured, giving the day and hour of such meeting, the place to be at or near the place of the property burned or damaged. They shall then proceed to investigate the cause or origin of such loss or damage, and if it shall appear that it was not the result of carelessness, or in violation of the charter and by-laws of this company, they shall ascertain the amount of loss or damage done by fire or lightning, authorizing the payment of such loss so determined, as in manner hereinafter provided: *Provided*, the insurance on the same is large enough to cover said loss.

"It shall be the duty of the secretary to record such determination, and draw his order, countersigned by the chairman of the board of auditors, on the treasurer for the same: *Provided*, that, where the loss or damage claimed is less than ($100), the secretary and director of the township may examine and determine the amount of loss or damage, and the secretary shall draw his order on the treasurer, countersigned by the director, for the same, payable within sixty days from date thereof; and, in case there is not sufficient money in the treasury to pay the same, the board of directors shall provide for the same by resolution authorizing the proper officers to borrow money for the same.

"SEC. 23. No person shall have claim for more than the amount of his insurance as shall be determined by the board of auditors; but in case of any disagreement between said board and the loser, either as to the liability in whole or in part, said board shall select a suitable and disinterested person, not a member of said company, residing in said counties of Monroe and Wayne, to act as referee;

the loser shall choose another, like situated as above, not his relative, nor an agent of a stock company; and the two referees so chosen, in case of their disagreement, shall select a third of like qualifications of second referee. Said referees so chosen, or, if a third shall be selected, a majority of them, shall determine and decide the amount of the loss, and their decision shall be final; and the reasonable and necessary expense of such reference, to be fixed and determined by such referees, shall be borne and paid by the insured in case the referees shall not award a larger sum than was awarded by the board of auditors, and shall be borne and paid by the company in case such referees shall award a larger sum than that awarded by the auditors. The insured shall be deemed to have accepted the award of the auditors, unless, within ten days after notice of said award, he shall file with the secretary of such company notice in writing that he declines to accept such award, and shall within the same time designate the referee selected by him, and offer to enter into a submission to arbitration as above provided."

On June 2, 1897, the fire occurred. On June 16th the auditors met. Plaintiff appeared, presented his claim against the company, testimony was taken touching the origin of the fire, and an adjournment had without reaching any decision. Whether there was to be a further hearing by the board, and plaintiff was to be notified, are disputed questions. On June 23d the board met, and made a written finding, holding that "this board are of the opinion that said evidence shows evil practice on the part of said claimant, and we therefore reject the claim, and authorize our secretary to so notify said claimant, Simeon Denton, of our action." On July 14th plaintiff tendered arbitration, and named an arbitrator. June 24th the secretary notified plaintiff in writing of this action on the part of the board, and informed him that the company would not pay the same. The court instructed the jury that the refusal to adjust the loss in any way would be a waiver of the terms of the policy in regard to arbitration.

Charles R. Whitman, for appellant.

Edward P. Allen, for appellee.

GRANT, C. J. (*after stating the facts*). The correctness of the instruction depends upon the construction to be given to the terms of the policy. Does the policy clothe the board of auditors with power to determine all questions of liability under the policies issued, or only to determine the amount of loss or damage sustained? If the former be held, as counsel for defendant contends, the case might then be governed by *Raymond* v. *Insurance Co.*, 114 Mich. 386, and authorities there cited. If the latter be held, the arbitration clause was waived, under the well-established rule. 2 Beach, Ins. § 1244; 2 May, Ins. § 496*b*; 2 Bid. Ins. §§ 1174, 1175; *Bailey* v. *Insurance Co.*, 77 Wis. 336; *Western Horse & Cattle Ins. Co.* v. *Putnam*, 20 Neb. 331. Without entering into an extended discussion, we are of the opinion that the sections of the charter above cited do not give to the board of auditors the power to pass upon questions of liability like that in this case, viz., that the plaintiff had intentionally fired his own building. The provisions contemplate a valid loss, and confer upon the auditors only the power to fix the amount. A policy of insurance, under the defenses set up in this case, cannot be valid in part and invalid in part, but there may or may not be any damage. A policy of insurance is usually either valid or void *in toto*. The term, "liability in whole or in part," must be held to refer to the loss or damage. These auditors have no other power than that conferred upon them by the charter. Courts will not read such a power into a charter, and, in the absence of clear and explicit language, will hold that it is not conferred. Sections 22 and 23 give them the authority to determine and decide the amount of the loss, and upon that alone is their decision final, if no arbitration is demanded. It is true that section 22 authorizes the auditors to investigate "the cause or origin" of the fire, but this is only preliminary to determine whether they shall adjudicate the amount of loss. These officers are chosen by the charter to represent the company, and, when they absolutely deny liability, such action waives

all provisions in regard to ascertaining the loss, and leaves the insured free to resort to the courts.

We do not think that any prejudicial error was committed in the admission or rejection of testimony.

Judgment is affirmed.

The other Justices concurred.

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CONLEY *v.* MCMILLAN.

1. TAXES — ENFORCEMENT IN CHANCERY — JURISDICTION — SETTING ASIDE SALE.

The jurisdiction of the court in a proceeding by the auditor general to enforce the payment of delinquent taxes is not defeated by the fact that the collecting officer might have made the amount of the tax out of personal property on the premises, or that the return of such officer to the county treasurer was prematurely made; and hence a sale for such taxes will not be set aside, after confirmation, on either of said grounds.

2. SAME — CONFIRMATION OF SALE — HOW EFFECTED.

The entry of a formal order confirming a tax sale is unnecessary where no objections are filed thereto; it being provided by section 70 of the law of 1893 (Act No. 206, Pub. Acts 1893) that such sales shall stand confirmed, without the entry of any order, unless objections are filed within a specified time.

Appeal from Macomb; Eldredge, J. Submitted January 3, 1899. Decided July 11, 1899.

Petition by Catherine Conley and others against Alexander McMillan and Charles Cannell to set aside a tax sale. From an order granting the prayer of the petition, defendants appeal. Reversed.

Bacon & Palmer, for petitioners.

Dwight N. Lowell, for defendants.

MONTGOMERY, J. This is a petition to set aside a sale of lands for taxes under a decree rendered by the circuit court for the county of Macomb, in chancery. The petition was presented to the court in which the decree was rendered, and the relief prayed was granted. The grounds upon which the relief was afforded were two:

1. That the treasurer failed to resort to personal property on the premises for the collection of the tax.
2. That the warrant for the collection of taxes was returned to the county treasurer on February 26th, instead of March 1st.

The statute (section 42, Act No. 206, Pub. Acts 1893) reads:

"The supervisor shall thereupon prepare a copy of the said assessment roll, with the taxes assessed as hereinbefore provided, and annex thereto a warrant signed by him, commanding the township or city treasurer to collect the several sums mentioned in the last column of such roll, and to retain in his hands the amount receivable by law into the township treasury for the purposes therein specified, and to account for and pay over to the county treasurer the amounts therein specified for State and county purposes, on or before the first day of March next following."

And section 55 is as follows:

"If the township treasurer or other collecting officer shall be unable to collect any of the taxes on his roll, assessed on real property, he shall make a statement of the same, with a full and perfect description of such property as assessed upon said roll, with the several taxes assessed upon each parcel thereof, which statement shall be verified by the affidavit of such treasurer or collector that such taxes remain unpaid, and that he has not, upon diligent inquiry, been able to discover any goods or chattels liable to pay such sums, whereupon he could levy the same."

It is contended by the petitioners that return at the proper date is jurisdictional, and that the return in this case was premature, and hence all subsequent proceedings are invalid. Under the former tax law a premature return was held to deprive the owner of a valuable right, and to

render a sale void. *Bailey* v. *Haywood*, 70 Mich. 188. See, also, *Millard* v. *Hayward*, 107 Mich. 219. The petitioners contend that the case of *Thatcher* v. *Powell*, 6 Wheat. 119, is in principle like this. On the other hand, the reasoning of the contestants is (1) that the statute makes the tax a lien upon the land from December 1st; (2) that the jurisdiction of the court to enforce this lien is obtained on publication of notice; and (3) that any intervening irregularity is not material,—citing *Auditor General* v. *Sparrow*, 116 Mich. 574. The case of *Thatcher* v. *Powell*, *supra*, involved the construction of a very different statute from ours. The return of the sheriff to the court was the basis of jurisdiction. It was held that the absence of the report defeated the jurisdiction. Under our statute, however, the petition of the auditor general, together with proof of proper publication, confers jurisdiction upon the court, and the failure of the collector to make a timely return does not affect the jurisdiction or avoid the lien. In *Auditor General* v. *Sparrow*, *supra*, referring to the force and effect of our statute, Mr. Justice HOOKER said:

"The law proceeds upon the theory of the existence of a claim upon behalf of the State against the property owner for taxes which have not been paid, and cites him into court to answer a bill to enforce this claim against the property taxed. It is not a sufficient answer for him to show that the treasurer would have been a trespasser had he seized personal property, or that he had not demanded payment, or that it might have been collected had he been diligent or brought an action,—all of which, perhaps, are permitted, and possibly directed, by the law. If all of these things should be proved, the fact would remain that the tax was still due and unpaid."

In a supplemental brief the petitioners' counsel state that the sale had not been confirmed when the petition was filed, and that it does not appear by the record that it has ever been confirmed. It is apparent that what is meant by the petitioners' counsel is that no formal order confirming the sale has been entered; but section 70 of the tax law provides that:

"All sales shall stand confirmed, subject to the right of redemption provided for in section seventy-four, unless objections thereto are filed within eight days after the time limited for filing such report, without the entry of an order or further notice."

We find no jurisdictional irregularity, and feel compelled to reverse the order below, and dismiss the petition, with costs.

GRANT, C. J., MOORE and LONG, JJ., concurred. HOOKER, J., did not sit.

WABASH RAILROAD CO. *v.* COMMISSIONER OF RAILROADS.

RAILROADS—INTERLOCKING SWITCH AND SIGNAL SYSTEM AT CROSSINGS—DIVISION OF EXPENSES.

3 How. Stat. § 3301, authorizes the railroad commissioner to require railroad companies to maintain flagmen or gates at crossings of other roads, and provides that the expense thereof shall be borne jointly, in equal proportions, by the two companies. Section 3310, added as an amendment to the same statute, gives like authority with respect to the interlocking switch and signal system, but makes no provision for the apportionment of the expense between the companies. *Held*, that the sections are *in pari materia*, and hence the expense of the interlocking system, when ordered by the commissioner, is to be shared equally by the companies involved.

Mandamus by the Wabash Railroad Company to compel Chase S. Osborn, commissioner of railroads, to vacate an order apportioning between relator and another railroad the expense of an interlocking switch. Submitted June 6, 1899. Writ granted July 11, 1899.

Edward A. Gott, for relator.

Horace M. Oren, Attorney General, for respondent.

MONTGOMERY, J. The line of the relator's road is intersected at Britton, Lenawee county, by the Cincinnati Northern Railway. On the 6th day of April, 1899, the respondent, acting under authority of section 3310, 3 How. Stat., made an order that the two roads construct and maintain an interlocking switch and signal service, and that the expense should be borne three-fourths by the relator and one-fourth by the Cincinnati Northern. This is an application for *mandamus* to require respondent to vacate this order, and enter an order requiring the two companies to bear the expense in equal parts.

Section 3301, 3 How. Stat., is a portion of the act to provide for the appointment of a commissioner of railroads, and define his powers and duties and fix his compensation. This section authorizes the commissioner to require railroad companies to station flagmen at crossings, or maintain gates, and further provides that, when this is done, the expense thereof shall be borne jointly, in equal proportions, by the two companies. By a subsequent amendment, section 3310, 3 How. Stat., was added to the act providing for a commissioner of railroads, etc., and, as it now stands, reads as follows:

"Authority is hereby given to said commissioner, and it shall be his duty, if he shall deem it practicable, to prescribe the use of the interlocking switch and signal system, or some other system that will secure equal safety of the operation of trains of cars, at all crossings and junctions of railroads in this State."

It will be observed that, unless the two sections (3301 and 3310) are to be read together, there is no limitation placed upon the authority of the commissioner as to fixing the proportion of the expense to be borne by each company. The attorney general contends that section 3310 is to be construed independently, and that the commissioner is authorized to fix the proportion in his discretion. It will be seen, however, that no such power is expressly given by this section; nor does this section, in terms, give authority to require the railroads to bear the expense at

all, although it is clear enough that this was expected. The two sections are *in pari materia*. Both relate to provisions for safety at crossings, and should be construed together. Thus construed, the first section fixes the proportion to be borne by each company.

The writ must issue.

The other Justices concurred.

McFADDEN *v.* BRADY.

1. TAX SALES—VALIDITY—WANT OF REPORT.
   A tax sale is rendered void by the failure of the county treasurer to file a report thereof in the office of the county clerk, as required by section 70 of the tax law of 1893.

2. SAME—PRESUMPTIONS.
   The provision of section 99 of the tax law, that no tax, or sale for any tax, shall be rendered invalid by showing that any record, statement, certificate, affidavit, paper, or return cannot be found in the proper office, and, unless the contrary is affirmatively shown, the presumption shall be that such record was made, and such certificate, statement, affidavit, paper, or return was duly made and filed, does not apply to the report of sale required to be filed with the county clerk by the county treasurer.

3. SAME—BILL TO QUIET TITLE—DEFENSES—ATTEMPTED PAYMENT.
   A tax deed cannot be shown to be invalid, on a bill to quiet title by one claiming thereunder, on the ground that the owner attempted to pay the taxes, and was prevented through no fault of his own. *Kneeland* v. *Wood*, 117 Mich. 174, followed.

4. SAME—PROOF OF PUBLICATION—SUFFICIENCY.
   An affidavit showing the publication of a copy of the auditor general's petition in a tax proceeding, and of the order of hearing thereon, for "four successive weeks prior" to the day fixed for the hearing, is insufficient to prove a publication for "four successive weeks *next* prior" to such day, as

required by section 66 of the tax law, where the order was dated 70 days before the day fixed for the hearing.

5. SAME—JURISDICTION—PAROL EVIDENCE.

Under the provision of said section that proof of the publication of such petition and order shall be filed in the office of the county clerk before any final order is made, the filing of such proof is prerequisite to the jurisdiction of the court to enter a decree of sale, and any deficiency therein cannot be supplied by parol.

Appeal from Baraga; Haire, J., presiding. Submitted January 6, 1899. Decided July 11, 1899.

Bill by Charles W. McFadden against Thomas Brady and others to quiet title. From a decree dismissing the bill, complainant appeals. Affirmed.

Chadbourne & Rees, for complainant.

E. J. Mapes, for defendants.

MONTGOMERY, J. Bill to quiet title. Complainant claims under tax deeds based on the sale of 1893 for taxes of 1891, and on the sale of 1894 for taxes of 1892. Defendants own the government title. The case was heard in open court, and the bill of complaint dismissed. The case is brought here on appeal.

1. The tax deed of 1893, for taxes of 1891, was held void for the reason that no report of sale was filed in the office of the county clerk, as required by section 70 of the tax law (Act No. 206, Pub. Acts 1893). This holding is supported by *Millard* v. *Truax*, 99 Mich. 157, and *Jenkinson* v. *Auditor General*, 104 Mich. 34. It is insisted, however, that the court was in error in finding as a fact that no report of sale was filed. The evidence upon this point was that no report was found in the files of the case in the circuit court in chancery. Complainant cites section 99 of the tax law, which provides, "No tax, or sale of property for any tax, shall be rendered or held invalid by showing that any record, statement, certificate,

affidavit, paper, or return cannot be found in the proper office, and, unless the contrary is affirmatively shown, the presumption shall be that such record was made, and such certificate, statement, affidavit, paper, or return was duly made and filed," and contends that, under this section, the absence of the report is no evidence that such a report was not in fact made. This contention cannot be sustained. We think the purpose of reversing the presumption as to records of judicial proceedings is not manifested by these provisions. It will be observed that the report of sale is not specifically mentioned, but the papers mentioned are certificate, affidavit, paper, and return,—such papers as are usual in proceedings preceding the decree. We held in *Benedict* v. *Auditor General*, 104 Mich. 269, that this provision did not apply to the affidavit of publication in the proceeding to adjudicate the tax delinquent. The case is analogous.

2. As to the deed of 1894, for taxes of 1892, the court held the deed invalid, on the ground that the owner had attempted to pay the taxes, and had been prevented through no fault of his own. Complainant contends that this proceeding is not a proper one in which to try this question. We think the contention should be allowed. See *Kneeland* v. *Wood*, 117 Mich. 174.

3. The defendants further contend that, as to the tax of 1892, the proceedings taken in 1894 are invalid, for want of a sufficient affidavit of publication; and, as this point was distinctly made in the court below, we are bound to consider it. The affidavit was as follows:

"STATE OF MICHIGAN, } ss.
County of Baraga. }

"Sylvester Kinney, being duly sworn, deposes and says that he is the publisher of the L'Anse Sentinel, a newspaper published at L'Anse, in the county of Baraga and State of Michigan, and circulating in said county; that he is familiar with the facts herein set forth; and that the order and petition, of which the annexed printed advertisement is a true copy, was duly published in said newspaper once a week for four successive weeks (five publica-

tions) prior to the 2d day of October, A. D. 1894." (Duly sworn to.)

Section 66 of the statute requires publication for four consecutive weeks next prior to the time fixed for hearing. We think it entirely clear that this proof was insufficient. The order which was published was dated 70 days before the day fixed for the hearing. Certainly any four weeks within the two dates would have answered the description given in the affidavit.

An attempt was made to show by parol testimony in this case that the notice was duly published. The statute (section 66) provides that "proof of the publication of the order and petition herein required shall be filed in the office of the county clerk before any final order is made." This clearly manifests a purpose to make the filing of proof of publication a prerequisite to the entry of a decree, and, when the court acted without this evidence of authority, the order was without jurisdiction.

Decree will be affirmed.

The other Justices concurred.

JACKSON *v.* PEOPLE'S SAVINGS BANK.

GARNISHMENT—INTERPLEADED CLAIMANT—BURDEN OF PROOF.

One interpleaded in garnishment proceedings under 3 Comp. Laws 1897, § 10627, as claimant of the fund, has the burden of sustaining his title.

Error to Wayne; Frazer, J. Submitted June 22, 1899. Decided July 11, 1899.

Garnishment proceedings by Archie H. Jackson and Joseph F. Jacobs against the People's Savings Bank, as

garnishee of Herman Marx. Adolph Marx and Herman Marx, copartners as Marx Bros., were interpleaded as claimants. From a judgment for plaintiffs on verdict directed by the court, the garnishee and the claimants bring error. Affirmed.

Keena & Lightner, for appellant bank.

Sloman & Groesbeck, for appellants Marx Bros.

Brennan, Donnelly & Van De Mark (*Selling & Hatch*, of counsel), for appellees.

MONTGOMERY, J. Plaintiffs sought to recover a sum deposited with defendant bank as garnishee of Herman Marx. The disclosure showed a deposit in the name of Marx Bros. Adolph and Herman Marx were cited in, under section 10627, 3 Comp. Laws 1897, to maintain their title to the fund. The sole question we need discuss is whether, under this statute, the burden of proof rests with the claimant in a case of this nature. The statute provides that, upon service being made, such claimant shall be deemed a defendant to the garnishee action, and within 20 days shall answer, setting forth his claim, or any defense which the garnishee might have made. The statute further provides that, in case of default, judgment shall be rendered, which shall conclude any claim on the part of such defendant, and also that the court may direct an issue. The circuit judge was of the opinion that, on an issue thus made up, the claimant has the burden of sustaining his claim. We think this was correct. *Burnham* v. *Insurance Co.*, 119 Mich. 588; *Smith* v. *Barclay*, 54 Minn. 47; *Teichman Commission Co.* v. *American Bank*, 27 Mo. App. 676; 9 Enc. Pl. & Prac. 840. The claimants failed to support their claim to the fund, and the court properly directed a verdict.

Judgment affirmed.

The other Justices concurred.

120 704
121 52

120 704
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130 [1]685

120 704
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120 704
147 [2]686

FIRST BAPTIST CHURCH OF BAY CITY *v.* ROBERTS.

1. EQUITY PRACTICE—OPENING DECREE—AMENDMENT OF PLEADINGS—TAX SALES.

The court has power, on petition, to open a decree on a petition to set aside a tax sale, such decree not having been enrolled, and to permit an amendment of the last-mentioned petition, although the term at which the decree was entered has expired.[1]

2. TAX SALES—VALIDITY OF DECREE.

A tax sale will be set aside on petition where it is shown that the figures in the column of the tax record headed "Amount Decreed against Lands" were inserted by an employé in the office of the county treasurer, after the record had passed from the control of the court. *Morgan* v. *Tweddle*, 119 Mich. 350, followed.

Appeal from Bay; Maxwell, J. Submitted June 7, 1899. Decided July 11, 1899.

Petition by the First Baptist Church of Bay City against Clinton Roberts and George O. Crane to set aside a tax sale. Decree was entered in accordance with the prayer of the petition, after which petitioner filed a second petition, asking that the decree be opened, and the petitioner permitted to amend its original petition. This petition was granted, and an order afterwards entered affirming the former decree. Defendants appeal. Affirmed.

J. L. Stoddard, for petitioner.

Black & Brown, for defendants.

MONTGOMERY, J. This is a petition to set aside a decree entered against the petitioner for taxes assessed upon the general tax roll of 1894. From an order grant-

[1] Upon this point see *Hall* v. *Mann*, 118 Mich. 201, 205.

ing the relief prayed, the respondents, Roberts and Crane, appeal.

After the original petition was filed, an amendment was permitted, setting up that in the decree, when entered, was a blank, under the heading "Amount Decreed against Lands," which was subsequently filled out by an employé in the county treasurer's office; and the evidence introduced in support of the petition fully sustains the allegation, bringing the case within the case of *Morgan* v. *Tweddle*, 119 Mich. 350.

It is objected that, as the term at which the decree was entered had elapsed, an amendment to the petition could not be permitted. The decree had not been enrolled, and a bill of review was not required. We think it was within the power of the court to permit the amendment.

Inasmuch as this error avoids the decree, we need not discuss the other questions raised.

The order appealed from is affirmed.

The other Justices concurred.

INDEX.

ABANDONMENT—See CONTRACTS (2); DEDICATION OF LANDS (5); MARINE INSURANCE.

ABSENT WITNESS—See WITNESSES (7).

ACCESSION—See CONFUSION OF GOODS.

ACCOMPLICES—See CRIMINAL LAW (6).

ACCOUNTING.

1. In fixing the amount due an employé entitled to receive a certain percentage of the net profits, pending actions in tort brought against the employer, in which the damages are unliquidated, and over which the employé has no control, cannot be taken into consideration. *Morrow* v. *Murphy*, 204.

2. In estimating the amount of the profits in which the employé is entitled to share, the employer should not be allowed interest on his investment, where not provided for in the contract. *Id.*

See PRACTICE IN CIRCUIT COURT.

ACTIONS.

1. A judgment for an installment due under a contract whereby defendant agreed to pay plaintiff a specified sum weekly so long as devices invented by plaintiff were used by defendant in his manufactures, in consideration of which plaintiff was to assign patents already obtained and to devote his time to the invention of improvements, is not a bar to an action for installments becoming due after the entry of the judgment; the contract not being a mere contract of service. *Raymond* v. *White*, 165.

2. Where one having a contract from a city to do paving gives a bond, as required by 2 How. Stat. § 8411*b*, to protect parties furnishing labor and material for the improvement, which, however, instead of running to the people, as provided by said section, runs to the city, action thereon must be in the name of the city; section 8411*c*, providing that an action may be brought by those entitled in the name of the people, applying only to an action on such bond as is mentioned in the preceding section. *People, for use of Higley*, v. *Laidlaw*, 358.

3. It is error to require an election of counts in an action based upon fraudulent representations in the sale of corporate stock, where one count is framed on the theory of plaintiff's rescission on learning of the fraud, and his resulting right to

ACTIONS—Continued.

recover the purchase price, and the other, designed to meet a possible failure to establish rescission, seeks damages for the fraud. *Glover* v. *Radford*, 542.

See EXECUTORS AND ADMINISTRATORS (2); SCHOOLS AND SCHOOL DISTRICTS (2); STATUTE OF LIMITATIONS.

ADJOURNMENT OF COURT—See TAXATION (8).

ADVERSE POSSESSION.

1. Where lands dedicated to the use of a religious denomination, after being occupied under the dedication for several years, are deeded away to a party not within the terms of the dedication, the latter cannot join the grantor's occupancy with his own to establish an adverse holding against the owner of the reversion. *Patrick* v. *Young Men's Christian Ass'n of Kalamazoo*, 185.

2. Where, on the death of the owner of premises, one of the heirs, without objection from the others, takes possession under a claim of ownership, and holds the same adversely for the statutory period, a deed from him will vest a good title in the grantee. *McKay* v. *Gardner*, 267.

ADVICE OF COUNSEL—See MALICIOUS PROSECUTION (4–7).

AFFIDAVITS—See TAXATION (13, 29).

AGENCY—See PRINCIPAL AND AGENT.

ALTERATIONS—See BILLS AND NOTES (10); MUNICIPAL CORPORATIONS (9).

AMENDMENTS.

The fact that defendant, who pleaded the general issue to a declaration for personal injuries, requested plaintiff, at the commencement of the trial, to make at that time any amendments to the declaration that were contemplated, and that, notwithstanding such request, plaintiff first asked permission to amend after nearly all the witnesses were sworn, does not make the allowance of the amendment erroneous, where no claim was made by defendant that the amendment was an improper one, or that its allowance at such time entitled him to a continuance. *Arndt* v. *Bourke*, 263.

See EJECTMENT (4); EMINENT DOMAIN (2); EQUITY PRACTICE (5).

APPEAL AND ERROR.

1. The Supreme Court will presume that questions addressed to the discretion of the trial court were honestly decided, and will not interfere unless abuse of discretion clearly appears. *People* v. *Reigel*, 79.

2. Where defendant in ejectment permits the trial to proceed upon an evident understanding that plaintiff's possession under a contract giving the right to such possession is con-

APPEAL AND ERROR—Continued.

ceded, his objection, raised for the first time on appeal, that the proof of possession is insufficient, will not be considered. *Olin* v. *Henderson*, 150.

3. A finding of fact in a chancery case, based upon the conflicting testimony of witnesses examined in open court, will not ordinarily be disturbed on appeal. *Heath* v. *Heath*, 310.

4. A point raised for the first time on appeal will not be considered. *Broughton* v. *Jones*, 462.

5. The exclusion of the testimony of an attorney as to a conversation with his client, upon the objection that it was privileged, will not be reviewed, and the character of the testimony, as privileged or otherwise, determined, where appellant conceded below that the conversation was privileged, and merely asked the witness for a conclusion which in that view was incompetent. *Meeske* v. *Pfenning's Estate*, 474.

6. The Supreme Court, upon affirming a decree dismissing a bill praying for the reformation of a contract so as to show a consideration due from complainant less than the amount stated in the contract, and for an injunction against the prosecution of an action at law to recover the amount therein stated, cannot, for the sake of obviating the necessity of further legal proceedings, enter a money decree for defendant, where the pleadings in the injunction suit are not framed to authorize such relief. *Andrus* v. *Scudder*, 502

7. Counsel for an appellee cannot insist upon the Supreme Court's rejecting, in order to sustain the verdict, hearsay evidence used by them to obtain the verdict in the court below. *Card* v. *Fowler*, 646.

8. Where a record of one-half the length of that presented to the Supreme Court would have been ample to cover all the points raised on appeal, the appellant, upon reversal, was allowed to recover only one-half the cost of the record. *Jastrzembski* v. *Marxhausen*, 678.

See EXECUTORS AND ADMINISTRATORS (1); FRAUDULENT CONVEYANCES (3); INJUNCTION; NEW TRIAL; PROBATE COURTS; TAXATION (21); WRIT AND PROCESS (1).

APPLICATION OF PAYMENTS—See PAYMENTS (1).

ARBITRATION—See INSURANCE (7, 8).

ASSAULT.

A conviction of assault with intent to do great bodily harm less than murder may be had, on proper evidence, under an information charging assault with intent to kill. *People* v. *Townsend*, 661.

See CRIMINAL LAW (7).

ASSIGNMENT OF LEASE—See LANDLORD AND TENANT (1-3).

ASSIGNMENT OF MORTGAGE—See MORTGAGES (6).

ASSUMPTION OF RISK—See MASTER AND SERVANT (2–5).

ATTACHMENT.

1. In 1879 the justice's court act was so amended as to permit the issuance of attachments against foreign corporations (2 How. Stat. § 6831). Sections 6840 and 6841, being parts of the original act, provide for service of the writ either personally or by leaving a copy with the custodian of the property seized. Another statute (2 How. Stat. § 8143) provides that in suits commenced by attachment against a foreign corporation, if personal service is had on any officer, member, clerk, or agent of such corporation within this State, the same proceedings shall be had as in case of an attachment against a natural person. *Held*, that section 8143 is permissive merely, and does not provide an exclusive mode of service, but that service upon a foreign corporation may properly be made in accordance with the provisions of the justices' act. *Davidson* v. *Fox*, 385.

2. A constable's return that the defendant named in a justice's writ of attachment has no last place of residence within the county is not insufficient for failure to certify that he has made diligent search to find a last place of residence. *Id.*

3. A return of substituted service of a justice's writ of attachment, which states that the officer retained the writ in his hands, and "made diligent search" for defendant, during all the time in which personal service might be made, is not open to the objection that it does not show that defendant could not be found, where the return begins with the statement "I * * * am unable to find" the defendant. *Id.*

4. Substituted service of a justice's writ of attachment, made more than six days before the return day of the writ, is valid, where the officer's return shows that he retained the writ and made diligent search for the defendant for the full time required. *Id.* 386.

5. A return of service indorsed by the sheriff on a writ of attachment in the following language: "I served a certified copy of the within writ on A. * * * by delivering the same to A., and * * * I served a certified copy, together with a copy of the inventory, on B.,"—is fairly to be interpreted as denoting service of a copy of the writ, as well as of the inventory, upon B. *Watson* v. *Dingman*, 443.

See WRIT AND PROCESS (2).

ATTORNEY AND CLIENT—See APPEAL AND ERROR (5).

AUDITORS, APPOINTMENT OF—See PRACTICE IN CIRCUIT COURT.

BANKS AND BANKING.

1. The circuit court has jurisdiction, upon a showing by the receiver of an insolvent bank that its assets are insufficient to pay depositors, to ascertain *ex parte* the amount required to meet the deficit, and to direct the institution of proceed-

BANKS AND BANKING—Continued.

ings to enforce the statutory liability of the stockholders. *Foster* v. *Row*, 1.

2. The liability imposed by 3 How. Stat. § 3208e5, upon the stockholders of an insolvent bank for the benefit of its depositors, is not a mere collateral undertaking, or penal in its nature, but is contractual, and immediately enforceable when a deficiency in the other assets is ascertained, without such assets' being first exhausted. *Id.*

3. Article 15, § 3, of the Constitution, which makes the stockholders of every banking association "issuing bank notes" individually liable for "all debts" of the association to the amount of their respective shares, is not contravened by 3 How. Stat. § 3208e5, limiting the liability of stockholders in banks organized under the state banking law to debts due depositors, since that law applies only to banks not of issue. *Id.*

4. The stockholders who are liable are those who are such when the bank becomes insolvent, without reference to the time when the deposits were actually made. *Id.*

5. One who purchases bank stock six months before the bank becomes insolvent, and during such period appears as the registered holder of the stock, cannot avoid responsibility in an action by the receiver to enforce the statutory liability of stockholders, upon the ground that he was induced to purchase the stock through false representations of the bank's officers as to its value. *Id.*

6. A purchaser of bank stock deposited it as collateral with the bank for a loan, with which the stock was purchased; but, on repayment of the loan, the bank having suspended, he refused to take the stock. *Held*, that he was the owner of it, and individually liable, notwithstanding the stock had never been transferred to him on the books of the bank. *Id.* 2.

7. A stockholder in a bank ceases to be liable as such where he sells and delivers his stock, duly assigned, to the cashier of the bank, who directs a credit to be entered on the transferrer's pass-book for the amount of an overdraft equaling the agreed price, although the cashier never pays the bank or registers the stock to himself. *Id.*

8. The fact that a bank was in a failing condition when stock was transferred will not avoid the transfer as an attempt on the part of the transferrer to escape the statutory liability to depositors, where there is nothing to show that he knew of the condition of the bank. *Id.*

9. The burden is on the receiver of an insolvent bank to show that a transfer of stock, made when the bank was in a failing condition, was effected by the transferrer with the fraudulent purpose of avoiding liability as stockholder. *Id.*

10. That the person to whom stock in a failing bank was transferred was a nonresident has no bearing on the good faith of the transfer, nonresident stockholders being, equally with residents, amenable to the banking law. *Id.*

BANKS AND BANKING—Continued.

11. The fact that shares of bank stock are issued transferable on the books of the bank does not impair the right of the holder to pass title to a transferee by assignment and delivery, but it operates merely as a protection to the bank and its patrons by continuing ordinarily the status of the transferrer until the transfer is duly registered. *Id.*

12. Where a responsible stockholder in a failing bank presents his stock to his son, who is not responsible, before the bank passes into the hands of a receiver, and the transfer is duly registered, the donor is relieved from statutory liability as stockholder, unless it appears that he was aware that the bank was insolvent. *Id.*

13. An assignment of a certificate of bank stock, absolute in form, may be shown to be for security merely. *May* v. *Genesee County Savings Bank*, 330.

14. One with whom bank stock had been deposited as collateral notified the cashier of the bank to transfer the stock to him as pledgee. Instead of complying, the cashier issued a new certificate, absolute in form, and entered the transaction as an absolute transfer of the stock. *Held*, that, since it is the bank's record of its stockholders, and not the form of its certificates, that constitutes notice to creditors, and the pledgee was in no way responsible for the erroneous entry, he could not be held liable to depositors upon an assessment as stockholder, under 3 How. Stat. § 3208e5, exempting from such liability those holding stock as collateral. *Id.*

BANKRUPTCY—See TRUSTS AND TRUSTEES (1, 2).

BAR—See ACTIONS (1); FALSE IMPRISONMENT.

BARTER—See STATUTE OF FRAUDS (1).

BICYCLES—See CONTRIBUTORY NEGLIGENCE (1); HIGHWAYS (1).

BILLS AND NOTES.

1. It is no defense to a trading firm's note, taken in good faith, for value, and before maturity, that the partner who issued it applied the money obtained thereby to his own use. *Stevens* v. *McLachlan*, 285.

2. The fact that partnership paper is made payable to a member of the firm is no evidence that it is not a partnership transaction. *Id.*

3. In an action upon notes or drafts issued by a trading partnership, the burden of proof is upon the defendants to show any fraud or lack of authority in the issue of the paper, or that it was not given for partnership purposes. *Id.*

4. When defendants have made such a showing, plaintiff then has the burden of proving that he took the paper in good faith and for a valuable consideration. *Id.*

5. Circumstances sufficient merely to put a cautious man on inquiry are insufficient to charge one taking a partnership note

BILLS AND NOTES—Continued.

from one of the partners with knowledge of the fact that it was given in fraud of the rights of the other partners, but, to have that effect, the circumstances must be such as to show actual bad faith on his part. *Id.*

6. Bad faith on the part of one seeking to enforce against a firm a note given by one of the partners may be established by evidence that he took the note with actual knowledge that it was given for other than partnership purposes. *Id.*

7. The fact that plaintiff had loaned money in other transactions individually to the partner issuing the paper is not evidence to charge him with bad faith; nor does it tend to show a misapplication of the money obtained on the firm note. *Id.* 286.

8. The renewal of the notes of a trading partnership after the holder has been informed by one of the partners that the notes were issued without authority will not impair the holder's right to recover from the firm. *Id.*

9. Where defendant denied plaintiff's ownership of a note sold by plaintiff before maturity, but redeemed, according to plaintiff's testimony, after it went to protest, it was not error to permit the jury to pass upon the question of ownership. *Big Rapids National Bank* v. *Peters*, 518.

10. One who executes a promissory note by filling in all the blanks upon a printed form except the one designed for the rate of interest, which blank is thereafter filled without his knowledge, is liable to a *bona fide* holder without notice of the alteration. *Weidman* v. *Symes*, 657.

See CONSIDERATION; CONTRACTS (1); LIENS (1–3); PARTNERSHIP (2, 3); PRINCIPAL AND SURETY (2); VERDICT.

BOARDS OF SUPERVISORS.

Mandamus will not issue, on relation of the attorney general to compel adjoining counties to rebuild, upon its former site, a bridge over a navigable stream between them, where the legislature, by special act, has authorized a rebuilding upon a different site, concerning which the boards of supervisors of the respective counties are unable to agree. *Attorney General* v. *Boards of Sup'rs of Kalkaska and Antrim Counties*, 357.

See COUNTY TREASURERS.

BONA FIDE PURCHASER—See BILLS AND NOTES; FIXTURES (3); RECORDING LAWS.

BONDS—See ACTIONS (2); INTOXICATING LIQUORS (2, 3).

BOUNDARIES.

1. The field-notes of a United States surveyor upon his survey of the rear concession of a private claim are admissible in evidence in ejectment for land claimed to be a part of the front concession, where the issue is the location of the boundary line between the two concessions, in connection with the

BOUNDARIES—Continued.

field-notes of the front concession by the same surveyor, for the purpose of showing the location of the witness trees, and the fact that, by establishing the line as claimed by the plaintiff, as owner of the front concession, the defendant, as owner of the rear concession, has all the land his patent calls for. *Olin* v. *Henderson*, 149.

2. To establish a boundary line by agreement and acquiescence, not only must there have been an express agreement, and monuments erected and acquiesced in, but a doubt or controversy must have existed as to the true line; otherwise, the statute (2 How. Stat. § 6179) prohibiting the conveyance of real estate by parol renders the agreement inoperative. *Id.* 150.

See EVIDENCE (5).

BRIDGES—See BOARDS OF SUPERVISORS; TRIAL (11, 12)

BROKERS.

1. A broker employed to sell property cannot be at the same time the agent of the purchaser, and entitled to commissions from both parties, unless both principals know that he is acting in such dual capacity. *Friar* v. *Smith*, 411.

2. A broker employed as a mere middleman, not to negotiate a sale or purchase, but simply to bring two parties together, and permit them to make their own bargain, may recover an agreed compensation from either or both, though neither may know that compensation is expected from the other. *Id.*

BUILDING AND LOAN STOCK—See HOMESTEAD.

BURDEN OF PROOF—See BANKS AND BANKING (9); BILLS AND NOTES (3, 4); GARNISHMENT; GIFTS.

CERTIFICATE OF ERROR—See TAXATION (4, 20).

CHATTEL MORTGAGES.

1. One taking possession of personal property, claiming absolute ownership, where in fact his rights are those of a mortgagee, does not thereby waive his mortgage lien. *Card* v. *Fowler*, 646.

2. While a chattel mortgagee who sells sufficient of the property to satisfy his lien may be sued by the mortgagor in trover upon his claiming ownership of and refusing to deliver the remainder of the chattels, no tender in such case being necessary, a claim of absolute ownership of chattels exceeding in value the amount of his lien will not of itself subject him to liability in such an action, without a tender of the amount his due being previously made. *Id.*

See CORPORATIONS (4, 5); TROVER.

CHECKS—See TAXATION (5).

CIRCUIT JUDGES—See ELECTIONS (1).

CITIES AND VILLAGES—See MUNICIPAL CORPORATIONS.

COLLATERAL ATTACK—See EMINENT DOMAIN.

COMMENCEMENT OF SUIT—See INSURANCE (6).

COMMERCIAL PAPER—See BILLS AND NOTES.

COMPROMISE VERDICT—See VERDICT.

CONDEMNATION PROCEEDINGS—See EMINENT DOMAIN.

CONDITIONAL SALE—See FIXTURES (3).

CONDUCT OF COUNSEL—See TRIAL (3-5, 17, 18).

CONFIRMATION OF SALE—See TAXATION (25).

CONFUSION OF GOODS.

The owner of logs which another manufactures into lumber, and in good faith mingles with his property of like kind and equal value, does not acquire title to the whole, but can only claim a proportionate share of the lumber. *Keweenaw Ass'n* v. *O'Niel*, 270.

CONSIDERATION.

A note given by one of several defendants in execution to a co-defendant, to avoid a threatened levy by such co-defendant to enforce the collection of the execution, which such co-defendant has paid, the maker of the note having paid in cash his proportionate share, is without consideration and void. *Thornton* v. *Damm*, 510.

See CONTRACTS (2).

CONSTITUTIONAL LAW.

1. The rule of construction by long and continued usage should be applied cautiously, and only in cases of doubt, to a provision of the Constitution. *Pingree* v. *Auditor General*, 95.

2. Act No. 338, Local Acts 1899, purporting to empower a commission, to be appointed by the common council of the city of Detroit, to acquire for the city, and maintain and operate in its behalf, the system of street railways which lies partly within and partly without the corporate limits, and comprises over 140 miles of track, is void under article 14, § 9, of the Constitution, prohibiting the State from being a party to or interested in any work of internal improvement; the operations contemplated by the act being of sufficient magnitude to constitute internal improvements, and the legislature being powerless to authorize the municipality to do what the State could not itself do. *Attorney General, ex rel. Barbour*, v. *Pingree*, 550.

3. Whether municipal ownership of tracks entirely within the corporate limits might be authorized under the Constitution, —*quære*. *Id.*

See BANKS AND BANKING (3); DISCOVERY; TAXATION (2).

CONSTRUCTIVE DELIVERY—See STATUTE OF FRAUDS (2).

CONSTRUCTIVE NOTICE—See TRIAL (12); VENDOR AND PURCHASER (3).

CONTEMPT.

1. The Supreme Court, though deeming improper certain language used in the briefs of opposing counsel, were not disposed to take further action thereon, where counsel disclaimed, in answer to an order to show cause, any intent to use language which could be construed into a contempt of court. *In re Jones and Clink*, 517.

2. Filing interrogatories, and giving an opportunity to produce witnesses to rebut the showing made by the wife as entitling her to an allowance for expenses of suit pending divorce proceedings, are not prerequisite to a commitment of the husband for contempt in refusing absolutely to obey an order requiring such moneys to be paid. *Ervay* v. *Ervay*, 525.

CONTRACTS.

1. Parol evidence is admissible to show that under a contract between a logger and a sawyer, which was ambiguous in certain of its provisions, it was contemplated that certain notes to be given for the saw bill were to be received in payment of the same. *Germain* v. *Central Lumber Co.*, 61.

2. Plaintiffs' assignor, after entering upon the performance of a contract with defendants for the sale of lumber to be cut from a large tract of land, decided, because of its unprofitableness, to abandon it, and respond in damages, rather than attempt to fulfill it. Defendants desired the completion of the contract, and to that end entered into a new agreement, whereby they were to pay an increased price for the lumber if the contract was faithfully performed. Under this agreement, the contract was carried out by the seller, defendants from time to time giving their acceptances for the lumber at the increased rate. *Held*, that the new contract was based upon a sufficient consideration, and that defendants were bound by it. *Blodgett* v. *Foster*, 392.

3. A contract for the sale of lumber provided that the seller should make monthly statements to the purchaser, showing the quantity and grades of lumber in the yards, and should procure such lumber to be insured, at the joint expense, to a specified percentage of its value. *Held*, that the contract price was to be treated as the value for the purpose of insurance. *Id.*

4. Where one who sold under contract certain lumber to be cut and delivered to the purchaser, finding himself unable, because of litigation, to begin work until some months after the time agreed upon, explained the situation to the purchaser, and the latter thereafter accepted the lumber manufactured under the contract, making no claim, in any of the numerous statements of account submitted by him, for damages for delay, he (the purchaser) will be deemed to have waived the terms of the contract as to time of performance. *Id.*

CONTRACTS—Continued.

5. Where the captain of a yacht is authorized by the owner to discharge subordinates, one whom the captain wrongfully discharges is not obliged, before he can recover for breach of the contract of employment, to seek out the owner and demand the fulfillment of the contract. *Gerardo* v. *Brush*, 405.

6. The fact that an engineer on a yacht, after his wrongful discharge by the captain, made an assault upon the latter, which, had it occurred during the term of his employment, would have justified his discharge, cannot be urged as a cause for the discharge in defense of an action for breach of the contract of employment. *Id.*

See ACCOUNTING; ACTIONS (1, 3); CUSTOM (3); EJECTMENT (1, 2); MUNICIPAL CORPORATIONS (3, 9); PARTNERSHIP (1); PRINCIPAL AND AGENT; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS.

CONTRIBUTION.

The fact that a payment made by a surety, with the consent of his co-surety, in settlément of a claim against them, was by the check of a corporation of which he was an officer, will not affect his right to contribution from the co-surety, where he was charged by the corporation with the amount of the check. *Meeske* v. *Pfenning's Estate*, 474.

See EXECUTION (2).

CONTRIBUTORY NEGLIGENCE.

1. A bicyclist who, upon approaching a railroad crossing with which he is familiar, finds that the first two of the three tracks, which lie eight feet apart, are occupied by lines of freight cars, completely obstructing, in one direction, a view of the third and main track, and who, without dismounting to look and listen, proceeds at a slow rate of speed, and collides with an engine upon the main track, moving, without signals, from the direction in which the view is obstructed, is guilty, as matter of law, of such contributory negligence as will preclude a recovery for the injuries received. *Lau* v. *Lake Shore, etc., R. Co.*, 115.

2. One struck by a hand-car while crossing the main line of a railroad at night, when hand-cars are prohibited by a regulation of the company from being on its main line except in cases of urgent necessity, is not chargeable with contributory negligence because he failed to look out especially for hand-cars, where he exercised the degree of care required in looking out for trains. *Mott* v. *Detroit, etc., R. Co.*, 127.

3. In an action for injuries received in a collision with a hand-car, it is error for the court to modify a requested instruction that "if plaintiff saw the hand-car before he reached the track, and urged his horse across the track in front of the car, then he would be guilty of contributory negligence," by inserting the word "negligently" before "urged." *Id.* 128.

4. A pedestrian is shown to have been guilty of contributory

CONTRIBUTORY NEGLIGENCE—Continued.

negligence, precluding her recovery for injuries sustained from a defective cross-walk, where she testifies that she had in mind the bad condition of the walk when she reached it, that it was light enough for her to see it, and that she knew if she passed over it she must exercise a great deal of care, but took the chance of passing over it in safety; there being a safe way at the side of the walk. *Irion* v. *City of Saginaw*, 295.

5. A person of mature years, familiar with the situation at a street-railway crossing, who went behind a passing car and upon a parallel track, where she was struck by a car approaching from the opposite direction, was guilty of contributory negligence, where the tracks were five feet apart, and there was no obstacle preventing her from seeing the car which caused the injury, had she looked for it after the first car had passed. *McCarthy* v. *Detroit Citizens' St. R. Co.*, 400.

6. A railroad section hand, whose duty it was, under the rules of the company, to be on the lookout for trains, was guilty of contributory negligence, precluding a recovery for injuries sustained by reason of a switch engine's being backed down upon him while he was engaged in cleaning the tracks at a highway crossing, where he saw the engine when it was several hundred feet distant, awaiting a signal to cross, and resumed work with his back towards the engine, without keeping watch upon its movements. *Carlson* v. *Cincinnati, etc., R. Co.*, 481.

See RAILROADS (1, 5).

CORPORATIONS.

1. Lamb, an inventor of knitting machines, assisted in organizing a corporation for the manufacture of knitted goods, principally gloves and mittens, under the name of the Lamb Knit-Goods Company. After acting for some years as its superintendent, he left its employ, and organized, in another town, the Lamb Glove & Mitten Company, and engaged in the manufacture of gloves and mittens on the Lamb machines. The use of the name was sought to be enjoined under 3 How. Stat. § 4161*a*, forbidding a corporation from assuming a name so similar to that of another corporation as to be liable to mislead. It was shown that the business of the corporations was conducted through agents largely, and that the public had in numerous instances been deceived. *Held*, that an injunction should issue. *Lamb Knit-Goods Co.* v. *Lamb Glove & Mitten Co.*, 159.

2. For a fraternal benefit society, organized under 1 How. Stat. §§ 3949–3955, to call in outstanding certificates, cancel the same, discharge existing indebtedness, and proceed to issue certificates not authorized by the organic act, will not work a dissolution of the original corporation, since corporations can be dissolved by their own act only by proceedings under 2 How. Stat. chap. 282. *Calkins* v. *Bump*, 335.

3. Where an assignment of mortgages, executed to a benefit association duly incorporated, is made under the corporate

CORPORATIONS—Continued.

name and seal, the assignee is estopped to claim that, at the time of the assignment, the corporation had been abandoned, and succeeded by a voluntary association. *Id.*

4. A chattel mortgage covering all the property of a corporation, executed under authority given at a special meeting at which only two of the four directors were present, the remaining two not having been notified of the meeting, is invalid. *Broughton* v. *Jones*, 462.

5. A chattel mortgage executed by directors of a corporation without proper authority will not be treated as the act of the stockholders, where it does not appear that the stockholders held any meeting for the purpose of giving the mortgage, or that all of them assented to it. *Id.*

See ATTACHMENT (1); BANKS AND BANKING; TRADE NAMES.

CORPSE—See RAILROADS (4).

COSTS—See APPEAL AND ERROR (8); SCHOOLS AND SCHOOL DISTRICTS (2); TRIAL (6).

COUNSEL, CONDUCT OF—See TRIAL (3-5, 17, 18).

COUNTIES—See BOARDS OF SUPERVISORS; PAUPERS.

COUNTY TREASURERS.

Under 1 How. Stat. § 527, providing that the county treasurer shall receive such compensation as the board of supervisors shall deem reasonable, the compensation need not be fixed at a definite sum in dollars and cents, but prospective office charges may be included in the salary allowed; and this rule is not affected by section 508, providing that the annual salaries of county officers shall be fixed by the board prior to their election, and shall not be increased or diminished during the terms for which they shall be elected. *People* v. *Reigel*, 79.

See TAXATION (26, 27).

COVENANTS—See PARTY WALLS.

CRIMINAL LAW.

1. Legal jeopardy is not involved in grand jury proceedings; beginning only when the accused is placed on trial before a petit jury. *People* v. *Reigel*, 79.

2. On motion to quash an indictment, no objection to the composition of the grand jury is available other than those to which, under the statute (2 How. Stat. §§ 9496, 9497), the accused is limited when held to answer to such jury, viz., that a juror is prosecutor or complainant in a charge against him. *Id.*

3. The objection that a grand jury was procured irregularly, and to the prejudice of the accused, should be addressed to the discretion of the court, which has the same power to set aside

CRIMINAL LAW—Continued.

the proceedings that it has to vacate the verdict of a petit jury. *Id.*

4. Upon the prosecution of a member of a law firm for the embezzlement of the proceeds of a mortgage placed with him for collection, statements made by his copartner some 15 months after the collection is claimed to have been made, that the mortgage was still unpaid and in process of foreclosure, are not admissible as part of the *res gestæ*. *People* v. *McBride*, 166.

5. Nor are such statements admissible against respondent on the ground of agency. *Id.*

6. A person charged with a crime may, in this State, be convicted upon the uncorroborated evidence of an accomplice. *People* v. *Nunn*, 530.

7. On a prosecution for an assault by shooting, respondent is not entitled to an instruction that the jury may consider, on the question of provocation, the alleged fact that the complaining witness had boasted that he would betray respondent's fiancé, where it conclusively appears that respondent learned all that he knew upon that subject nearly a month before the shooting, and that complainant and he had parted friends the previous night; especially if his own testimony negatives the theory that it was the information in question that moved him to commit the assault. *People* v. *Townsend*, 661.

See ASSAULT; GRAND JURY; HOMICIDE; INTOXICATING LIQUORS (1, 4, 5); NEW TRIAL (4).

CROSS-EXAMINATION—See TRIAL (10).

CUSTOM.

1. A custom of charging to the expense account material and labor furnished to the superintendent of a manufacturing concern for his private use will not bind the employer unless he knows of it. *Morrow* v. *Murphy*, 204.

2. In an action by the beneficiary in a life-insurance certificate, where a forfeiture for the nonpayment of an assessment is set up in defense, and the plaintiff claims that such defense was waived by the company in accord with its settled custom to reinstate delinquent members in good health, a statement of the deceased in a talk with the secretary of the company, tending to show the deceased's knowledge of the custom, may be shown by witnesses who overheard it. *Jones* v. *Preferred Bankers' Life Assurance Co.*, 211.

3. Where the seller of lumber permitted plaintiff to make an inspection thereof under the direction of the purchaser, and afterwards paid him one-half of his charges, he may be held for the balance upon proof that by a local custom the seller was required to pay the entire inspection charges in the first instance, although the custom is not specially declared upon; it being merely a matter of evidence to establish the implied contract. *Fish* v. *Crawford Manfg. Co.*, 500.

CUSTOM—Continued.

4. There being some testimony to support a custom, its weight was for the jury. *Id.*

See LIFE INSURANCE (3); TOWNSHIPS.

DAMAGES—See ACCOUNTING (1); MALICIOUS PROSECUTION (3); TROVER (2).

DEAD BODIES—See RAILROADS (4).

DEBTOR AND CREDITOR—See PAYMENTS (1); STATUTE OF FRAUDS (3); TRUSTS AND TRUSTEES (1, 2).

DEDICATION OF LANDS.

1. Where the owner of wild land plats it into village lots, reserving for a public park a tract naturally adapted to that use, and marking it as such upon the plat, and effects sales of the lots by means of pamphlets which refer to the plat, and set forth the existence of the park as an inducement to purchasers, he cannot thereafter defeat the public right because of a lack of the statutory formalities in the dedication, since the proceedings amount to a dedication at the common law. *Conkling* v. *Village of Mackinaw City*, 67.

2. Under such circumstances, it is not necessary that there should be a formal acceptance of the dedication, either before or after the incorporation of the village; the use of the land by the public for the purpose designated being sufficient, especially if the villagers and the grantor make common cause in its improvement. *Id.*

3. A common-law dedication does not convey a fee. *Patrick* v. *Young Men's Christian Ass'n of Kalamazoo*, 185.

4. Where land was marked "church square" on a plat filed by the owner, and a marginal reference stated that it was appropriated to the first four religious denominations erecting buildings thereon, it is evidence as an act *in pais*, though not within the existing statute respecting dedications of land to public purposes, of a dedication at common law to the denominations appropriating the square. *Id.*

5. After a church society had erected a building on a lot dedicated to the use of one of the first four religious denominations forming a society in the town and erecting a building on the lot, it conveyed the lot to a Young Men's Christian Association, which demolished the church building, and erected a building adapted to its own wants. *Held*, an abandonment of the use for which the lot was dedicated, entitling the holders of the reversionary interest to the lot. *Id.* 186.

See ADVERSE POSSESSION (1); PLATS; RELIGIOUS SOCIETIES (1).

DEEDS.

1. A deed of land "subject to all existing * * * timber contracts" is subject to all such contracts, whether recorded or not. *Chicago Lumbering Co.* v. *Powell*, 52.

DEEDS—Continued.

2. And no greater estate than that acquired by such deed can be conveyed by the grantee therein by the addition of the words "of record" to a like clause in a deed executed by him. *Id.*

3. Although, in case of inconsistency between the granting clause and the *habendum* in a deed, the former usually governs, if it clearly appears from the whole instrument that it was the intention of the grantor to enlarge or restrict the granting clause by the *habendum*, the latter will control. *Id.*

4. Thus, the words "subject to all existing timber contracts," contained in the *habendum* clause, constitute a valid limitation upon the estate conveyed. *Id.*

5. A conveyance of a specified portion of a quarter-section of land, with the exception of the "streets and squares" in a village included within it, may, in the absence of other means of interpretation, be construed with reference to a recorded plat made by the grantor, although not alluded to in the deed, and held to except a parcel designated in the plat as a "church square." *Patrick* v. *Young Men's Christian Ass'n of Kalamazoo*, 185.

6. The owners of certain land platted into village lots executed a deed of their interest, excepting, however, from the grant, certain specified lots, and inserting in the deed, after such exception, the following clause: "Together with all the ground intended for streets and public purposes," etc. *Held*, that the clause was a further reservation, and not an additional grant. *Id.*

7. One who conveys to a railroad company for a right of way the natural bed of a creek, and a strip of adjacent land, specifying in the deed that the latter grant is for the unobstructed flow of the diverted waters, "and for no other purpose, except to keep the banks on either side properly piled, planked, and protected from washing," and reserving the right to "cover" the creek, and, when so covered, to use and occupy all space to the line of the railroad right of way, is not restricted to a covering by platform, but may place a shop building over the stream in such way as not to obstruct it; the grantee having an easement merely, which does not affect the grantor's title or possession. *St. Joseph Valley R. Co.* v. *Galligan*, 468.

8. The Supreme Court, agreeing with the circuit judge that the reservation in a deed from complainant to defendant was of the crops "sown" in the fall of 1896, and not, as claimed by defendant, of the crops "I own" in the fall of 1896, affirmed the decree restraining defendant from interfering with complainant's removal of crops sown at such time. *Dean* v. *Andrews*, 492.

See TAXATION (18); VENDOR AND PURCHASER (2).

DEFICIENCY—See MORTGAGES (5, 6).

DEFINITIONS—See WORDS AND PHRASES.

DELIVERY—See STATUTE OF FRAUDS (2, 3).

DESCRIPTIONS—See EMINENT DOMAIN (2); TAXATION (15).

DISCOVERY.

An order requiring a party to a suit to produce for examination by the adverse party all correspondence "which may contain evidence relating to the matters at issue" does not extend to confidential communications which can be of no benefit to the party seeking the production, so as to render it repugnant to the fourth amendment to the Federal Constitution, and to section 26 of article 6 of the State Constitution, prohibiting unreasonable searches and seizures. *Anti Kalsomine Co.* v. *Kent Circuit Judge*, 250.

DISSOLUTION—See CORPORATIONS (2); INJUNCTION.

DIVORCE—See CONTEMPT (2).

DRAINS.

1. An application for the location and establishment of a drain will confer jurisdiction upon the commissioner to clean out an old drain upon the line of the new one, and to utilize it as a portion of the new one, without separate proceedings being taken for that purpose. *Sturm* v. *Kelly*, 685.
2. The granting by a railroad company of a written license for a drain to cross its right of way, and the erection by it of a culvert under its roadbed for the purpose, is sufficient as a release of the right of way. *Id.*
3. The release of a right of way for one drain cannot operate as a release for another. *Id.*
4. Under Act No. 254, Pub. Acts 1897, chap. 5, § 3, authorizing the court to direct the county drain commissioner to correct any errors in drain proceedings, and then to proceed as though no errors had been made, proceedings may stand, although the commissioner neglected to obtain from one of the landowners a release of the right of way, upon the commissioner's accounting for the irregularity and securing the necessary release. *Id.*
5. A drain commissioner may, in establishing a drain, use a drain formerly established, and clean it out, without obtaining a release from abutting owners along the established drain, where such owners will not be damaged by the use of the drain, but, on the contrary, will be materially benefited, and where the dimensions of the old ditch will not be changed. *Id.* 686.

DRUGGISTS—See INTOXICATING LIQUORS (1).

EASEMENTS—See DEEDS (7).

EJECTMENT.

1. One in possession of land under an executory contract of sale may maintain ejectment against a trespasser. *Olin* v. *Henderson*, 150.
2. Under 2 How. Stat. § 7790, providing that plaintiff in eject-

EJECTMENT—Continued.

ment must show a valid subsisting interest in the premises, and the right to recover the possession thereof, and section 7797, providing that the declaration shall state whether plaintiff claims in fee, or for life, or for a term of years, or otherwise, it is sufficient for one in possession under an executory contract of sale to allege title in fee, without setting up the contract. *Id.*

3. Equities existing in favor of plaintiff in ejectment against a co-tenant, who quitclaimed to defendant, cannot be enforced in such suit. *Retan* v. *Sherwood*, 496.

4. It was error to refuse to permit plaintiff in ejectment to amend her declaration, alleging title in fee, to conform with proofs showing clearly that her ownership was of an undivided interest. *Id.*

ELECTION OF COUNTS—See ACTIONS (3).

ELECTIONS.

1. Act No. 125, Pub. Acts 1897, amendatory of an act providing for the election of county boards of canvassers, by section 4 authorizes the board to canvass votes for state and county officers, presidential electors (each year when chosen), members of congress, and members of the legislature. Section 10 provides that any candidate voted for at any election at which state, county, or district officers are voted for, who conceives himself aggrieved on account of any fraud or mistake in the canvass, or in the returns made, may petition for a recount. By section 11, notice of such petition is required to be served on the opposing candidate, personally, or, if he cannot be found, by leaving the same at his residence, 12 hours before its presentation to the board. Section 12 provides that a candidate not receiving a certificate of election may, for errors apparent on the face of the returns, have the same examined and corrected on *certiorari* to the circuit court. *Held*, that a candidate for a state office, such as circuit judge, is not entitled to a recount under the act. *Pound* v. *Board of Canvassers of Wayne Co.*, 181.

2. In determining the title to a county office, the vote of a township should be excluded, where it appears that in such township the mandatory provision of the election law requiring the official ballots to be kept in the custody of an inspector was violated by the appointment of an unofficial person as "instructor" to distribute the ballots, and allowing him access to the voters even after they had entered the booths, although the parties acted in good faith and it is not shown that voters were unduly influenced. *Attorney General, ex rel. McCall*, v. *Kirby*, 592.

EMBEZZLEMENT—See CRIMINAL LAW (4, 5).

EMINENT DOMAIN.

1. The fact that a mortgagee was not made a party to proceedings to condemn land for street purposes does not deprive the court of jurisdiction, so as to open the judgment to collateral

EMINENT DOMAIN—Continued.

attack by property owners assessed for benefits, where there was sufficient land left to pay the mortgage, and the city was in full possession of the street. *Smith* v. *City of Detroit*, 572.

2. Nor is it prerequisite to jurisdiction that the property of each owner be described separately and accurately in the petition, if the owners are in fact notified that their lands are sought to be condemned; 3 How. Stat. § 3064*j*, providing that an amendment may be allowed in the description of property proposed to be taken whenever it will not interfere with the substantial rights of the parties. *Id.*

ENDOWMENT INSURANCE—See MUTUAL BENEFIT ASSOCIATIONS (1).

EQUITY PLEADING—See APPEAL AND ERROR (6); MORTGAGES (4); SPECIFIC PERFORMANCE (1).

EQUITY PRACTICE.

1. Owners of distinct parcels of land affected by the same tax may join in a bill to set it aside as invalid. *Thomas* v. *Auditor General*, 535.

2. While the court has not, after enrollment, power to amend the decree without a rehearing, it retains the power to modify by a subsequent order the time of its enforcement. *Cadotte* v. *Cadotte*, 667.

3. A showing that defendant's delay in making certain payments to complainant, as provided in a decree of divorce, was due to the latter's failure to furnish a promised abstract of title to the property involved, justifies an order extending the time for making such payments. *Id.*

4. An order requiring the complainant, who has been granted a decree of divorce, to furnish defendant with an abstract of title to land which he was decreed to turn over to her, is a modification in substance of the original decree containing no such provision. *Id.*

5. The court has power, on petition, to open a decree on a petition to set aside a tax sale, such decree not having been enrolled, and to permit an amendment of the last-mentioned petition, although the term at which the decree was entered has expired. *First Baptist Church of Bay City* v. *Roberts*, 704.

See CONTEMPT (2); PARTIES; TAXATION (3, 8–10, 20, 25, 28, 30, 31).

ESTATES IN LAND—See DEEDS.

ESTATES OF DECEDENTS—See ADVERSE POSSESSION (2); EXECUTORS AND ADMINISTRATORS; WILLS.

ESTOPPEL—See BANKS AND BANKING (5); CORPORATIONS (3); FIXTURES (3); LANDLORD AND TENANT (4, 5); LIFE INSURANCE (3).

EVICTION—See LANDLORD AND TENANT (6).

EVIDENCE.

1. In an action for personal injuries, exclamations of present suffering by the person injured are admissible, though made by one of mature years to personal friends after commencement of suit, if not made in contemplation of such persons' becoming witnesses at the trial. *Mott* v. *Detroit, etc., R. Co.*, 128.

2. In an action for personal injuries, mortality tables, showing plaintiff's expectancy of life, are inadmissible, where there is no showing that the injuries are permanent. *Id.*

3. In an action on a benefit certificate, where defendant denies that plaintiff sustained the accidental injuries claimed by him, it is error to place before the jury a letter written to the company by plaintiff's attorneys, stating that a certain physician, not called as a witness, diagnosed the plaintiff's illness as due to accident, even though portions of the correspondence are admissible for other purposes. *Phillips* v. *United States Benevolent Society*, 142.

4. Parol evidence as to the contents of a written instrument which has been neither lost nor destroyed is inadmissible, though the instrument itself is outside of the jurisdiction of the court, where proof of its contents can be obtained by deposition. *Id.*

5. Testimony of defendant in ejectment concerning statements made by a United States surveyor when defendant built a fence on what he claimed to be the boundary line of his concession, the true location of which line is the matter in issue, is inadmissible, as hearsay, where plaintiff's grantor, the owner of the adjoining concession, was not present at the interview. *Olin* v. *Henderson*, 149.

6. In a prosecution for the embezzlement of the proceeds of a draft intended to be made payable to the order of respondent in payment of a mortgage which he held for collection, but, by mistake, drawn to the order of another, the draft, indorsed by respondent, is admissible to show respondent's receipt of the funds, in connection with proof that the drawee was apprised by the drawer of his mistake, and directed to pay the draft to respondent, and that such payment was in fact made. *People* v. *McBride*, 166.

7. In an action to recover the price paid for corporate stock, based upon a rescission for fraudulent representations in its sale, it was error to exclude testimony, offered to excuse apparent laches, of one who was elected director subsequent to the sale to plaintiff, as to the steps that led to the discovery of the fraud. *Glover* v. *Radford*, 542.

See APPEAL AND ERROR (5, 7); BOUNDARIES (1); CONTRACTS (1); CRIMINAL LAW (4, 5); CUSTOM (2); FRAUDULENT CONVEYANCES; HIGHWAYS (3); LIBEL AND SLANDER (2, 3, 5, 6); MALICIOUS PROSECUTION; MASTER AND SERVANT (1); NEGLIGENCE; SURVEYS; TRIAL (8, 16); WITNESSES.

EXCLAMATIONS OF PAIN—See EVIDENCE (1).

EXECUTION.

1. Where one of several defendants in execution, under threat of levy on her individual property, gives to plaintiff's attorneys a check for the full amount, with no provision for the money's being in any event returned to her, the transaction amounts to a payment of the execution, even though her attorney testifies that it was distinctly understood that it should not have that effect, but should be deemed a payment merely for the protection of plaintiff's attorneys, the execution to be kept alive and used for defendant's benefit. *Thornton* v. *Damm*, 510.

2. One of several defendants in execution may, after paying the same, recover from his solvent co-defendants their proportionate shares, and no more. *Id.*

See CONSIDERATION; HOMESTEAD.

EXECUTORS AND ADMINISTRATORS.

1. The discretion exercised by the circuit judge in determining whether services rendered by an executor were attended by such unusual difficulties as to entitle him to extra compensation under 3 Comp. Laws 1897, § 9438, will not ordinarily be reviewed. *In re Gallagher's Estate*, 365.

2. Authority of an administrator to sue in behalf of the estate was recognized, though nearly four years had elapsed since his appointment, where no plea to the jurisdiction was filed, and no showing was made that the estate had been closed or that the administrator had been discharged. *Card* v. *Fowler*, 646.

See TRIAL (15).

EXEMPTIONS—See HOMESTEAD.

EXPERT TESTIMONY—See WITNESSES (1, 5).

FAILURE OF TITLE—See VENDOR AND PURCHASER (2).

FALSE IMPRISONMENT.

A satisfied judgment for plaintiff in an action of false imprisonment against the complaining witness, the magistrate, and the constable, in which the declaration alleged the continuance of the imprisonment until a delivery by the constable to the sheriff, is a bar to a subsequent suit against the sheriff, upon substantially the same state of facts, for the continuance of the false imprisonment until the evening of the next day. *Blackman* v. *Simpson*, 377.

See MALICIOUS PROSECUTION.

FEES—See COUNTY TREASURERS; WITNESSES (8).

FELLOW-SERVANTS—See MASTER AND SERVANT (4).

FIELD-NOTES—See BOUNDARIES (1).

FILING, PROOF OF—See TAXATION (12).

FIRE INSURANCE—See INSURANCE.

FIXTURES.

1. An engine rested on a brick foundation, and was inclosed in a frame building in such manner that it could not be removed without taking out a side of the building. In deeds and mortgages it had been treated as a part of the realty. The only testimony tending to show an intention to treat it as personalty was that of the owner, who stated that he "had in mind" the removal of the engine. *Held*, that an information charging an injury to the engine as a malicious injury to personal property was bad. *People* v. *Jones*, 283.

2. The "intent" which is of controlling influence in determining whether a fixture is or is not a part of the realty must relate either to the time of annexation or to some actual or constructive severance. *Id.*

3. A *bona fide* purchaser of land, and of a permanent distillery plant thereon, acquires title to a steam pump attached to the distillery, as against one who sold the pump, knowing it was to be so attached, under a contract providing that title should remain in the seller until payment of the price. *Watson* v. *Alberts*, 508.

FORECLOSURE—See MORTGAGES (4–6).

FOREIGN CORPORATIONS—See ATTACHMENT (1).

FOREIGN STATUTES—See TRUSTS AND TRUSTEES (1, 2).

FRAUD.

One who exchanged city property for a farm cannot have the transaction set aside for misrepresentations as to the cost, value, and productiveness of the land, where he visited the land in company with his father before making the exchange, and apparently relied on the latter's judgment as to its productiveness and value, and afterwards occupied the land for three years without making any complaint. *Buxton* v. *Jones*, 522.

See ACTIONS (3); EVIDENCE (7); GIFTS; REFORMATION OF INSTRUMENTS; STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

1. In trover by one claiming, as purchaser, goods seized by defendant under attachment, notice with the plea that the goods attached belonged to the person claimed to have sold them is sufficient to apprise plaintiff that the *bona fides* of the sale is questioned, and to admit evidence that it was fraudulent. *Ismond* v. *Scougale*, 353.

2. In an action of trover it appeared that one A. purchased a stock of goods, worth from $1,500 to $1,700, upon credit to an amount exceeding $1,300. After a claimed exchange of the goods for real estate owned by plaintiff, defendant attached

FRAUDULENT CONVEYANCES—Continued.

them as the property of A., maintaining that the alleged exchange was a sham to defraud creditors. Plaintiff claimed that a loan to A. of $75, represented by a note given some time previous to the exchange, figured as a part of the consideration. He admitted that the note remained among his papers, that a portion of the land was worth less than $200, and that the residue was mortgaged for $250. *Held*, that evidence that the mortgaged land was worth less than the amount of the incumbrance was admissible, in connection with the other evidence, as bearing on the existence of a fraudulent intent. *Id.*

3. The Supreme Court will not reverse a decree setting aside a conveyance as in fraud of creditors, where the evidence is conflicting, unless it is clearly against the weight of the evidence. *Smead* v. *Rogers*, 441.

GARBAGE—See MUNICIPAL CORPORATIONS (6).

GARNISHMENT.

1. *Burnham* v. *Home Insurance Co.*, 119 Mich. 588, approved. *Burnham* v. *North British, etc., Ins. Co.*, 499.

2. One interpleaded in garnishment proceedings under 3 Comp. Laws 1897, § 10627, as claimant of the fund, has the burden of sustaining his title. *Jackson* v. *People's Savings Bank*, 702.

GIFTS.

Where a son of mature years and business experience obtains from his aged and feeble mother, without consideration, a conveyance of valuable property, which a few weeks before she had devised by a will unsatisfactory to the son, and which, as she had occasionally expressed herself, she had intended to retain control of until her death, and it appears, on a bill to set aside the deed, that she was given no opportunity, before executing the conveyance, to consult with any one except the donee and his immediate family, the burden of showing the good faith of the transaction is upon the donee; especially if the grantor, upon being informed, subsequently, that such a conveyance was of record, repudiated the grant, and claimed that it was represented to her that the paper signed was simply a modification of her will. *Whiteley* v. *Whiteley*, 30.

See BANKS AND BANKING (12).

GRAND JURY.

1. 2 How. Stat. § 7562, which provides for the drawing of grand juries at least 14 days before term, and section 9554, which provides that grand juries "shall not hereafter be drawn," unless upon written order of the judge of the court, filed with the clerk, are not to be construed as limiting the power of the court under 2 How. Stat. § 7578, in relation to the calling of grand juries during term, but, rather, as extending it, by per-

GRAND JURY—Continued.

mitting the judge at chambers to make an order for a grand jury if he thinks one necessary. *People* v. *Reigel*, 78.

2. An order for a grand jury, entered on the journal and signed by the judge of the court, is in substantial compliance with 2 How. Stat. § 9554, requiring such orders to be in writing and filed with the clerk. *Id.*

3. 2 How. Stat. § 7578, providing that when, for any cause, grand jurors have not been summoned, or a sufficient number of qualified jurors fail to appear, the court may order a sufficient number to be drawn and summoned, and direct from which townships or supervisor districts they shall be drawn, does not contemplate that the direction of the locality from which to draw shall only be made after the grand jury has been drawn from the "body of the county" in the first instance, but permits it to be made prior thereto, where grand jurors have not been summoned. *Id.*

See CRIMINAL LAW (1–3).

GROSS NEGLIGENCE—See RAILROADS (5).

GUARDIAN AND WARD.

The fact that a guardian, instead of loaning his ward's money on real estate, deposited it at interest in a savings bank, and permitted it to remain there for more than six months, when the bank became insolvent, is not conclusive, as a matter of law, that he was negligent, so as to charge him with the loss of the fund, where there is evidence that the bank was thought to be stable, and that the guardian had good reasons for not investing elsewhere. *In re Grammel's Estate*, 487.

HABENDUM—See DEEDS (3, 4).

HAY—See WORDS AND PHRASES.

HIGHWAYS.

1. Reasonable care in the construction and maintenance of highways for ordinary vehicles, such as wagons and carriages, is the measure of duty resting upon municipalities and townships under the existing statute (3 How. Stat. § 1446c *et seq.*), and, in the absence of further legislation, the courts will not extend the duty so as to require the highways to be kept safe for bicycles and vehicles of like character. *Leslie* v. *City of Grand Rapids*, 28.

2. Permission to road commissioners to open a highway across timber land provided they make payment for the timber cut by them, the amount of such timber to be estimated by the owner after the line of the road is staked out by the commissioners, gives them no authority to cut trees on the proposed right of way before the owner has had an opportunity to make his estimate. *Keweenaw Ass'n* v. *O'Niel*, 270.

3. The records relating to defective proceedings in laying out a highway, and evidence that it was generally understood in

HIGHWAYS—Continued.

the community that it was a public highway, are admissible to show that a highway had been laid out, and, though not properly laid out, had been used sufficiently long to become a public highway, under 3 How. Stat. § 1315, providing that "all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways." *Gage* v. *Township of Pittsfield*, 436.

4. Where a new highway is opened across a railroad, the township, and not the railroad company, is charged with the duty of keeping in safe condition for public travel that portion of the highway lying within the railroad right of way, but not being a part of the crossing itself nor of the approaches thereto. *Id.* 437.

5. It is no defense to an action by a commissioner of highways for flooding a highway by the erection of a dam across a natural water-course that, owing to the construction of a ditch along the highway by the township authorities, water that otherwise would not have reached defendant's land was projected upon it through such water-course. *Commissioner of Highways of Township of Tittabawassee* v. *Sperling*, 493.

See CONTRIBUTORY NEGLIGENCE (4); TOWNSHIPS; TRIAL (11, 12).

HOMESTEAD.

3 How. Stat. § 3981*p*, which provides that building and loan stock in the hands of a householder, to the amount of $1,000, shall be exempt from levy and sale on execution or attachment, except where the shareholder has "a homestead exempted under the general laws of this State," renders exempt from execution shares held by a member whose only homestead interest is that which he has in property belonging to his wife, and occupied jointly with her. *Morley Bros.* v. *National Loan & Investment Co.*, 171.

See SUBROGATION.

HOMICIDE.

One who induces another, by promise of reward, to lie in wait and commit homicide, is guilty of murder in the first degree, and a jury, in passing upon his guilt, is properly limited to the consideration of that offense. *People* v. *Nunn*, 530.

HUSBAND AND WIFE.

1. A wife, by including her separate property in a mortgage, together with the property of her husband, to secure her husband's debt, does not make it the primary fund out of which the debt should be satisfied, though his property included in the mortgage constituted the homestead. *Graham* v. *Lamb*, 577.

2. Although a wife joins with her husband in the execution of a note and of an accompanying mortgage, no personal decree

HUSBAND AND WIFE—Continued.

can be rendered against her in foreclosure proceedings, where she signed merely to waive her dower, having no other interest in the property. *Simons* v. *McDonnell*, 621.

See HOMESTEAD.

IMPEACHMENT—See WITNESSES (2).

INDIGENT PERSONS—See PAUPERS.

INJUNCTION.

Where, upon an application for *mandamus* to compel a circuit judge to vacate an order dissolving an injunction, the return of the respondent fairly indicates that the merits of the question received consideration, the Supreme Court will not be inclined to interfere with his discretion. *Kelsey* v. *Wayne Circuit Judge*, 457.

INSTALLMENTS—See ACTIONS (1).

INSTRUCTIONS TO JURY—See TRIAL (1, 2, 6, 7, 11-16); WITNESSES (6, 9).

INSURANCE.

1. Waiver of a condition in a fire-insurance policy that it should be void if additional insurance was obtained without having the fact indorsed upon the policy is a question for the jury, where it is contended that early notice of the additional insurance was given to the company's secretary, who, notwithstanding, requested proofs of loss, and permitted the insured to incur expense in obtaining them, without intimating that the policy was void. *Walter* v. *Mutual City & Village Fire Ins. Co.*, 35.

2. A mutual benefit society which, on being notified of a claim for accident benefits, at once denies all liability, thereby waives proofs of loss, and a provision of the membership certificate forbidding suit until three months after such proofs are furnished. *Phillips* v. *United States Benevolent Society*, 142.

3. Where the holder of a benefit certificate, which provided that the company should be notified within five days, with full particulars, in all cases of accident or sickness, fell ill, and notified the company, in accordance with the diagnosis of the attending physician, that he was disabled from neuralgia, against which, under the circumstances of the case, there was no indemnity, and it subsequently developed, upon diagnoses by other physicians, that the original diagnosis was incorrect, and that the illness was due to accidental injuries, and the company was notified within five days after such fact was ascertained,—the notice was sufficient, since the member could not be deprived of benefits, in the absence of a definite provision to th effect, by reason of the mistake of his physician. *Id.*

4. Where an insurance company claims a forfeiture of an insurance certificate for nonpayment of assessments, and re-

INSURANCE—Continued.

fuses absolutely to receive such assessments when payment is offered, the holder is not required actually to produce and tender the money in order to protect his rights. *Jones* v. *Preferred Bankers' Life Assurance Co.*, 212.

5. Where an insured, whose certificate of insurance has lapsed for nonpayment of an assessment, does all that the company requires to procure his reinstatement, and reinstatement is then refused, he may rest there upon his rights, and need not apply at once to the courts for the relief desired. *Id.*

6. A claim under a policy of insurance is prosecuted within one year from the date of loss, as required by the terms of the policy, where a summons was taken out within the year, and was properly served before the return day, although it was not placed in the hands of the officer until after the year had expired. *Harvey* v. *Detroit Fire & Marine Ins. Co.*, 601.

7. The charter of a mutual fire-insurance company provided that the auditors living in the county where a loss occurred should investigate the cause of the loss, and, if it should appear that it was not the result of carelessness or any violation of the charter and by-laws, should ascertain the amount of loss, and authorize its payment; and that in case of any disagreement between the auditors and the insured "as to the liability, in whole or in part," arbitrators should be appointed, by whom the "amount of loss" should be determined. *Held*, that the board of auditors was not authorized to determine a question of liability under the policies issued, but only the actual amount of loss sustained. *Denton* v. *Farmers' Mutual Fire Ins. Co.*, 690.

8. Where the auditors of a fire-insurance company, authorized merely to determine the amount of loss sustained by an insured, their determination to be final in the absence of a demand for arbitration, found that the insured had been guilty of "evil practice," and on that ground assumed to reject the claim entirely, which finding was adopted by the company, the arbitration clause was waived, and the insured was free to resort to the courts. *Id.*

See CONTRACTS (3); LIFE INSURANCE; MARINE INSURANCE; MUTUAL BENEFIT ASSOCIATIONS; TRIAL (1).

INTENT—See FIXTURES (2).

INTEREST—See ACCOUNTING (2); TRUSTS AND TRUSTEES (5); VERDICT.

INTERNAL IMPROVEMENTS—See CONSTITUTIONAL LAW (2, 3)

INTERPLEADER—See GARNISHMENT.

INTOXICATING LIQUORS.

1. Under section 16 of the local option law (3 How. Stat. § 2283b5), providing for the punishment of "any person who himself, or by his clerk, agent, or employé," shall make sales of liquor in any county in which the law is in force,

INTOXICATING LIQUORS—Continued.

unless such sales are made by a druggist or registered pharmacist in compliance with the restrictions imposed by the general law, it is no defense to the prosecution of a druggist for selling to an intoxicated person, in violation of section 3 of the general law (3 How. Stat. § 2283c6), that the sale was made by a clerk in respondent's absence, and contrary to his express instructions. *People* v. *Longwell,* 311.

2. The arbitrary refusal of a village council to accept a liquor bond which complies with the terms of a resolution of the council then in force cannot be sustained under the power to suppress saloons, conferred upon it by Act No. 3, Pub. Acts 1895, chap. 7, § 1, such power being exercisable only by ordinance. *Hawkins* v. *Common Council of Village of Litchfield,* 390.

3. A village council having in good faith, without passing on the sufficiency of the sureties, refused to accept a liquor bond, *mandamus* should merely require the council to examine into their sufficiency, and approve the bond if found sufficient. *Id.*

4. An information for violation of the statute requiring all saloons where intoxicating liquors are sold or kept for sale, "either at wholesale or retail," to be closed on Sunday, need not state whether respondent's saloon was a wholesale or a retail one, the offense and penalty being the same in either case. *People* v. *Talbot,* 486.

5. It is no defense to a prosecution for keeping a saloon open on Sunday that no liquor was sold, or that the only entrance to the living apartments occupied by the respondent was through the rooms used for saloon purposes. *Id.*

See MUNICIPAL CORPORATIONS (2).

JEOPARDY—See CRIMINAL LAW (1).

JOINT TORT FEASORS—See FALSE IMPRISONMENT.

JUDGMENTS—See ACTIONS (1); FALSE IMPRISONMENT; REPLEVIN.

JUDICIAL PROCEEDINGS—See LIBEL AND SLANDER (4)

JURISDICTION—See TAXATION.

JURY—See GRAND JURY.

JURY, QUESTIONS FOR—See BILLS AND NOTES (9); CUSTOM (4); RAILROADS (1); STREET RAILWAYS.

JUSTICES OF THE PEACE—See ATTACHMENT; WRIT AND PROCESS (2).

JUSTIFICATION—See LIBEL AND SLANDER (5, 6).

LACHES—See EVIDENCE (7).

LAND CONTRACTS—See EJECTMENT (1, 2); SPECIFIC PERFORMANCE (1).

LANDLORD AND TENANT.

1. Where a lessee assigns his interest in the whole or a part of the demised premises for the entire term, the assignee succeeds to all the rights and liabilities of the original lessee, becoming holden for the rent according to the terms of the lease. *Darmstaetter* v. *Hoffman*, 48.

2. The assignee's liability, in the absence of a contrary provision in the lease or the assignment, is to the original lessor. *Id.*

3. But where the lease contains a covenant against assignment without the lessor's consent, one who accepts an unauthorized assignment is liable to his assignor for rent, independent of the question whether the latter has paid the same to the lessor. *Id.*

4. Where one in possession of land, the title to which is in himself, accepts, under a mistake of fact, a lease thereof, not under seal, from one not in possession, he is not estopped thereby from showing the facts in contravention of the lessor's claim of title. *Michigan Cent. R. Co.* v. *Bullard*, 416.

5. A person in possession conveyed property, and the vendee accepted a lease, not under seal, from one not in possession. The property, with the outstanding lease, was turned back to the vendor, whom the lessor sued for possession under the lease. *Held*, that, if the conveyance by defendant was of the absolute title, he would be estopped to contest the lease, except so far as the lessee might himself have contested it. *Id.*

6. Where, by act of an employé of the landlord, leased premises are rendered unfit for the purpose for which they were hired, and such condition is aggravated by the landlord's failure properly to make repairs which he assumes to make, the tenant may, after his refusal to restore the premises to a condition adapted to the tenant's needs, treat such conduct as an eviction, and vacate the premises; and this although the tenant himself covenanted to repair. *Adams* v. *Werner* 432.

See RAILROADS (2); TRESPASS (1).

LIBEL AND SLANDER.

1. A statement by a member of a conference called for the election of church trustees, concerning the character of one of the nominees, in response to an inquiry as to why he opposed his election, when made in good faith and without malice, is privileged. *Howard* v. *Dickie*, 238.

2. The fact that the person making the statement had previously notified the pastor that he should oppose the election of the person against whom the statement was directed has no tendency to show malice. *Id.*

3. The falsity of a privileged statement is no evidence of malice, unless accompanied by proof that its author knew it to be untrue. *Id.*

LIBEL AND SLANDER—Continued.

4. Where a newspaper reporter, at the suggestion of an officer at police headquarters, obtains from a wife, who came there to make a complaint against her husband, a repetition of statements made to the officer, and the newspaper publishes the same as facts without further investigation as to whether they are true or false, the publishers cannot defend an action by the husband for libel upon the ground that the article was a report of "judicial proceedings," and therefore privileged. *Jastrzembski* v. *Marxhausen*, 677.

5. "Evidence" and "proof" are not synonymous words: "Evidence" is that which tends to convince; "proof" is that which convinces. Therefore, 2 How. Stat. § 7776, which provides that notice of the truth as a justification in an action for libel, though not maintained by the evidence, "shall not in any case be of itself proof of the malice charged," does not take away from the jury the right to consider whether an unsustained notice of justification may not tend to show malice, when taken in connection with the other facts established. *Id.*

6. However, the jury should be able to find that there was bad faith in giving notice of justification before they use that fact as evidence of malice, and an instruction which authorizes a finding of malice upon the notice alone is erroneous. *Id.*

LICENSE—See HIGHWAYS (2).

LIENS.

1. A sawyer releases his lien by accepting notes in payment of the saw bill. *Germain* v. *Central Lumber Co.*, 61.

2. A sawyer waives his lien by accepting notes for his saw bill, and authorizing the owner of the lumber to sell it to pay the notes. *Id.*

3. A sawyer releasing his lien by accepting notes in payment of his saw bill does not reacquire a lien by renewing the notes. *Id.*

4. Evidence that a sawyer aided a purchaser in locating lumber piled on his dock, pointing out to him specific piles as belonging to the logger from whom the same had been purchased, that he requested the purchaser to remove the same as soon as convenient, and that he assisted the inspector sent by the purchaser to make shipment of certain portions, asserting no lien for the saw bill until after several shipments, and then only when the logger became insolvent, is sufficient to support a finding that the sawyer waived his lien. *Id.*

See REPLEVIN.

LIFE INSURANCE.

1. The secretary of an insurance company, who was its managing officer, informed an insured, who was delinquent in payment of an assessment, and desired to pay the same and be reinstated, that he would have to furnish a health certificate

LIFE INSURANCE—Continued.

from the company's physician, for which he provided the insured with proper blanks, which were properly executed and returned to the secretary. *Held*, that a forfeiture for nonpayment was waived. *Jones* v. *Preferred Bankers' Life Assurance Co.*, 211.

2. The waiver could not be avoided by the secretary's procuring from the physician, without the knowledge of the insured, a supplemental statement that the insured's heart action was somewhat irregular, and he could not recommend him as a good risk. *Id.*

3. Where it is the custom of an insurance company to accept payment of delinquent assessments if members are in good health, it is estopped to claim a forfeiture if a member, relying on the custom, fails to pay an assessment within the time required, and is in good health when he offers payment. *Id.*

See CUSTOM (2); INSURANCE; MUTUAL BENEFIT ASSOCIATIONS; WITNESSES (5).

LIMITATION OF ACTIONS—See STATUTE OF LIMITATIONS.

LIQUOR TRAFFIC—See INTOXICATING LIQUORS.

LOGS AND LOGGING—See CONFUSION OF GOODS.

LOG-LIEN PROCEEDINGS—See WRIT AND PROCESS (2).

MALICE—See LIBEL AND SLANDER.

MALICIOUS INJURY—See FIXTURES (1).

MALICIOUS PROSECUTION.

1. In 1891 a company was formed to take charge of plaintiff's newspaper, and plaintiff was given stock in the company, and made manager of the paper, at a weekly salary. In 1896 defendants, who were stockholders in the company, had plaintiff arrested for the alleged embezzlement of the funds of the company between February, 1895, and May, 1896. Plaintiff claimed that he really owned the paper; that defendants were merely assisting to maintain it, to reflect their political convictions; and that the funds alleged to be misappropriated had been used to pay debts which had been guaranteed by defendants. *Held*, in an action for malicious prosecution and false imprisonment, that plaintiff, on the issue of probable cause, could show his transactions with defendants from the time the company was organized, and was not limited to the period during which the misappropriations were alleged to have occurred. *Bennett* v. *Eddy*, 300.

2. Evidence as to what was done with the company's property after certain mortgages thereon were foreclosed and plaintiff's connection with the paper had ceased, and as to attachment suits commenced against the plaintiff by one of the defendants, was irrelevant, and should have been excluded. *Id.*

MALICIOUS PROSECUTION—Continued.

3. The fact that the plaintiff in an action for malicious prosecution and false imprisonment remained idle after his arrest, during a period when many others were out of employment, cannot be ascribed to the arrest, and made an element of damages, unless there is evidence connecting it therewith. *Id.*

4. Where, in an action for malicious prosecution and false imprisonment, in which defendants deny any connection with the proceedings against plaintiff after stating the facts to the prosecutor, and upon his advice making the complaint, the plaintiff is permitted to show the circumstances attending his arrest in another State, it is error for the court to exclude the testimony of the prosecutor as to the directions given by him to the officer who made the arrest. *Id.* 301.

5. In an action for malicious prosecution and false imprisonment it appeared that, after defendants had consulted the prosecuting attorney about proceeding against plaintiff for embezzlement, an expert bookkeeper was employed to examine plaintiff's books, and report to the prosecutor. *Held*, that the bookkeeper's testimony as to what he learned and what he reported was admissible, as bearing upon the question whether all the material facts were submitted to the prosecuting attorney before the criminal case was commenced. *Id.*

6. Defendants' testimony as to what they told the prosecuting attorney was admissible for the same reason. *Id.*

7. For the same reason, the prosecutor, who was present at the trial and heard all the testimony, should have been permitted to testify whether or not any testimony had been given relating to facts known by defendants and not disclosed to him before the criminal complaint was made. *Id.*

See TRIAL (9).

MANDAMUS—See BOARDS OF SUPERVISORS; INJUNCTION; INTOXICATING LIQUORS (3); MUNICIPAL CORPORATIONS (5); SCHOOLS AND SCHOOL DISTRICTS (1); TAXATION (4, 23); TOWNSHIPS.

MARINE INSURANCE.

1. The "date of loss," within the meaning of the limitation clause of a policy of marine insurance, is not necessarily the day a stranded vessel, subsequently released, repaired, and abandoned to the underwriters, ran upon the shoal. *Harvey* v. *Detroit Fire & Marine Ins. Co.*, 601.

2. The cost of removing the cargo from a grounded vessel in order to get it afloat should be considered as part of the loss in determining the amount lost, as decisive of the owner's right to abandon the vessel to the underwriters, and is not an expense "incurred on account of the cargo," within a clause of the policy excluding from the computation of the loss the expenses so incurred. *Id.* 602.

3. Under a policy of marine insurance providing that the right to abandon shall not exist unless the loss exceeds one-half the

MARINE INSURANCE—Continued.

valuation expressed in the policy, the owner of a vessel which has been aground, and has been floated by the underwriters, is entitled to a reasonable time in which to gather information and make up his mind as to whether he has, and whether he wishes to exercise, the right. *Id.*

4. Abandonment to an underwriter of the proportion of a vessel which the amount of risk assumed by his policy bears to the value of the vessel expressed therein is sufficient, under the requirement of the policy that the abandonment convey an unincumbered and perfect title to the subject abandoned. *Id.*

MASTER AND SERVANT.

1. The foreman of a railroad section crew, whose hand-car collided with a vehicle in which plaintiff was riding, and injured him, cannot bind the company by subsequent admissions of negligence. *Mott* v. *Detroit, etc., R. Co.*, 128.

2. An employé in a sawmill assumed the risk incident to working in the vicinity of a rapidly-revolving shaft having a projecting set-screw, where he had been employed for a long time about the mill, and, only two or three days before being caught on the set-screw, had talked with a fellow-employé regarding the danger of injury from that source. *Middaugh* v. *Mitchell*, 581.

3. The fact that a servant is directed to work in a place of especial danger does not render the master liable for resulting injuries, where the danger is entirely familiar to him, and the work is directly in the line of his employment. *Id.*

4. A mill owner who has furnished an employé with a safe place to work, and with proper machinery and appliances, and who has selected a competent foreman to superintend the mill and competent men to assist about the employment, is not liable for injuries sustained by such employé while operating a roller machine, due to the misplacing of a guideboard by other employés after the latter, by direction of the foreman, had exchanged the rollers in the machine; they being fellow-servants of the injured employé even while engaged in taking out and putting in the rollers. *Frazee* v. *Stott*, 624.

5. An employé who is injured by the sudden release of an elevator, due to a defective spring, cannot recover damages from his employer because of the latter's failure to inspect the appliance, where such employé was a constant, and almost the only, user of the elevator, and the mechanism of the same was simple and in plain view, rendering the defect discernible to him had he exercised ordinary care. *Juchatz* v. *Michigan Alkali Co.*, 654.

See CONTRACTS (5, 6); CONTRIBUTORY NEGLIGENCE (6); CUSTOM (1); PARTNERSHIP (1); RAILROADS (3).

MECHANICS' LIENS—See NOTARIES PUBLIC.

MENTAL COMPETENCY—See MORTGAGES (3).

MISTAKE—See LANDLORD AND TENANT (4).

MONOPOLIES—See MUNICIPAL CORPORATIONS (3).

MORTALITY TABLES—See EVIDENCE (2).

MORTGAGES.

1. A tender of payment of a mortgage by a junior incumbrancer, accompanied by a demand for an assignment, does not extinguish the mortgage. *Schmittdiel* v. *Moore*, 199.

2. In proceedings to foreclose a mortgage, defendant claimed that the mortgage in suit had been satisfied in full by payments which the mortgagee had wrongfully applied to certain other notes and mortgage, the execution of which defendant denied. It appeared that such other notes, which were produced by defendant in court, had been surrendered to him when the payments were made, that he had cut off the signature, and filed the notes with his other papers. While it was shown that defendant was unable to read, or to write other than to sign his name, it appeared that he was methodical in his business, and careful in the matter of taking and preserving receipts. The aggregate of all the payments made by him was $2,500, while the total amount of the mortgage in suit was only $2,000. *Held*, that the improbability of the mortgagor's overpaying his indebtedness $500 without being aware of the fact, and of the mortgagee's surrendering into the possession of the defrauded party notes he had never executed, rendered untenable the theory that the notes and mortgage to which the payments were applied were not executed by the defendant. *Wood* v. *Genett*, 222.

3. A decree for defendant in a suit to set aside a mortgage for the alleged incapacity of the mortgagor was affirmed; there being evidence to show that the mortgagor understood the transaction in question, and that it resulted beneficially to his estate. *Lee* v. *Fiero*, 430.

4. Where a foreclosure bill sets out in full the promissory note accompanying the mortgage in suit, and asks that defendant pay any balance remaining due thereon if the sale of the mortgaged premises should fail to produce sufficient to pay the debt, and that in such case complainant have execution for the balance, a decree declaring defendant personally liable for the payment of the amount found due is within the pleadings. *Simons* v. *McDonnell*, 621.

5. A decree in foreclosure proceedings finding defendant personally liable for the payment of the amount found due, but not directing the payment of the balance, if any, after sale, is not open to the objection that it constitutes a decree for a deficiency before it is ascertained that a deficiency will exist. *Id.*

6. Where a religious society, through its vestry duly authorized, borrowed money to purchase lots for church purposes, and gave its notes secured by mortgage upon the property, and the mortgagee subsequently assigned to a third person, having accepted from the vestry a new note, given without the

MORTGAGES—Continued.

knowledge of the society, equity will treat the transaction as an assignment of the original debt and security, and, upon foreclosure of the mortgage, will hold the society for a deficiency. *Miller* v. *Childs*, 639.

See CHATTEL MORTGAGES; EMINENT DOMAIN (1); HUSBAND AND WIFE; RELIGIOUS SOCIETIES (2); SPECIFIC PERFORMANCE (2); SUBROGATION; TRUSTS AND TRUSTEES (4).

MUNICIPAL CORPORATIONS.

1. An ordinance prohibiting the sale of unsound meat, and providing a penalty for its violation, becomes inoperative on the taking effect of a charter provision authorizing the council to prevent the selling of such meat, and to punish those who "knowingly" sell it; so far, at least, as the ordinance is broader than the charter. *People* v. *Brill*, 42.

2. An ordinance adopted by a city of 8,000 inhabitants, pursuant to authority in the charter to regulate saloons, requiring applicants for a saloon license to pay into the city treasury a license fee of not less than $300 nor more than $500, to furnish a certificate of good character from six reputable citizens, and to give a bond of $2,000, and restricting the saloon district to specified streets, is a valid ordinance. *People* v. *Blom*, 45.

3. The fact that material to be used in the construction of a pavement or other public work is in the hands or under the control of a single dealer, whether by reason of a patent or otherwise, does not preclude the specification of that material in a contract for such improvement to be let on competitive bidding. *Holmes* v. *Common Council of Detroit*, 226.

4. A mayor who employed an attorney to contest an attempted diversion of the public funds by the city council, but incurred no personal liability to compensate the attorney, is not precluded, on the ground of interest, from casting an affirmative deciding vote, where, upon a motion to pay the attorney fees, the vote of the aldermen results in a tie. *Smedley* v. *Kirby*, 253.

5. *Mandamus* to compel a city clerk to issue a warrant in favor of a creditor whose claim has been duly allowed by the council will not be refused because the petition fails to allege that there is money on hand sufficient to pay the same, where the claim of lack of funds has at no time been advanced by the clerk as a reason for withholding the warrant, and it does not in fact appear that the funds are insufficient. *Id.*

6. An ordinance empowering the mayor of a city to license suitable persons as scavengers, and providing, under a penalty for violations, for the carrying on of the business in a specified way, is repealed by a subsequent ordinance covering the same subject-matter, and embracing new provisions placing the collection of garbage under the control of the local board of health, and providing that no license to gather garbage shall be issued by the mayor except on recommendation of such board. *De Lano* v. *Doyle*, 258.

MUNICIPAL CORPORATIONS—Continued.

7. A resolution of a village council stands until modified or repealed. *Hawkins* v. *Common Council of Village of Litchfield*, 390.

8. A city which proceeds, under charter provisions inadequate to confer the power, to construct a bridge over railroad tracks at a street crossing, is liable in damages to the owner of abutting property, the rental value of which is depreciated by the structure. *Phelps* v. *City of Detroit*, 447.

9. Under the charter of the city of Lansing, the common council determines when a public building shall be erected. The board of public works then prepares plans and specifications, and submits them, with an estimate of the cost, to the council. Bids are advertised for, and are reported by the board, with recommendations, to the council, which alone may authorize the execution of a contract. *Held*, that a provision in such a contract that, in case of alterations, a fair valuation of the work added or omitted should be made by the board of public works, and the sum agreed to be paid for the work, according to the original specifications, increased or diminished in accordance therewith, gave the board no authority to bind the city for alterations in an amount in excess of the contract price. *Chittenden* v. *City of Lansing*, 539.

10. Section 61, chap. 7, of the Detroit charter, as amended by Act No. 463, Local Acts 1895, provides that, when any special assessment shall be held invalid by a court of competent jurisdiction, the common council may order a new assessment for the same purpose. An assessment for benefits for the opening of a street was set aside because the resolution of the council apportioning the amounts to be paid by the city and by assessment upon the local assessment district did not declare that the amount so assessed was a just proportion of the amount awarded by the jury. *Held*, that, while the preliminary determination was no part of the "assessment," it was proper for the council to correct the resolution, and order a new assessment based thereon. *Smith* v. *City of Detroit*, 572.

See ACTIONS (2); CONSTITUTIONAL LAW (2, 3); DEDICATION OF LANDS (1, 2); EMINENT DOMAIN; HIGHWAYS (1); INTOXICATING LIQUORS (2, 3); STATUTE OF LIMITATIONS (2).

MURDER—See HOMICIDE.

MUTUAL BENEFIT ASSOCIATIONS.

1. A mutual benefit society, organized under 1 How. Stat. §§ 3949–3955, is not authorized to incorporate in its certificates of membership a provision for the payment of an endowment at a fixed time. *Calkins* v. *Bump*, 336.

2. Members of a mutual benefit association contributed to a common fund, the creation of which was unauthorized by law. The fund was invested in securities, which the association assigned to a trustee for the benefit of certain members, whose certificates had matured. *Held*, that a decree

MUTUAL BENEFIT ASSOCIATIONS—Continued.

setting aside the assignment, and ordering the transfer of the securities to a receiver for distribution among all the members, was proper, since the fund was a trust fund, in which every member who contributed was beneficially interested *pro rata* to the amount of his contribution. *Id.*

See CORPORATIONS (2, 3).

NAMES—See CORPORATIONS (1); TRADE NAMES.

NAVIGABLE STREAMS—See BOARDS OF SUPERVISORS; WATERS.

NEGLIGENCE.

Testimony by various persons as to the condition at different times of a stairway down which the plaintiff fell to her injury is competent, although extending from the day of the accident to a period 10 or 12 days thereafter, where the testimony of each witness supplements that of the others, and tends to show a continuance of the defective condition. *Arndt* v. *Bourke*, 263.

See BILLS AND NOTES (10); CONTRIBUTORY NEGLIGENCE; GUARDIAN AND WARD; HIGHWAYS (1, 4); MASTER AND SERVANT; RAILROADS (1, 3, 5); STREET RAILWAYS; TRIAL (11, 12).

NEGOTIABLE PAPER—See BILLS AND NOTES.

NEWSPAPER SUPPLEMENTS—See TAXATION (14).

NEW TRIAL.

1. The fact that it was impossible to get a copy of the evidence given upon a former trial in time to read from it material evidence upon a second trial is not ground for a new trial, where the same stenographer took the testimony upon both trials, and could have read the portions of evidence desired. *Stevens* v. *McLachlan*, 286.

2. Where no exceptions are taken to an order denying a motion for a new trial, the matter is not open for review. *In re Gallagher's Estate*, 365.

3. Although the trial court, in overruling a motion for a new trial, stated that, in his opinion, the verdict was against the weight of evidence, the Supreme Court will not reverse his decision, if from the whole statement of his reasons for denying the motion, and from the evidence returned, it is not clear that the verdict was against the weight of evidence, or worked an injustice to appellant. *Wheeler* v. *Jenison*, 422.

4. The denial of a motion for a new trial in a criminal case on the ground of newly-discovered evidence, consisting solely of the affidavit of an accomplice to the effect that the testimony given by him upon the trial was false, will not be disturbed on appeal. *People* v. *Nunn*, 530.

NONRESIDENTS—See BANKS AND BANKING (10); TRUSTS AND TRUSTEES (1-3).

NOTARIES PUBLIC.

A notary has no authority to administer an oath where affiant is his copartner, and the matter is one in which the firm is interested. So *held* where the statement of a mechanic's lien in favor of a firm was sworn to before one of the partners. *Smalley* v. *Bodinus*, 363.

NOTICE—See BILLS AND NOTES (2, 5–7); TAXATION (10, 11, 13–15, 29); TRIAL (12); VENDOR AND PURCHASER (1, 3); WRIT AND PROCESS.

NUISANCES—See STATUTE OF LIMITATIONS (2).

OPINIONS—See WITNESSES (1).

ORDINANCES—See INTOXICATING LIQUORS (2); MUNICIPAL CORPORATIONS (1, 2, 6).

PARENT AND CHILD—See GIFTS.

PAROL EVIDENCE—See CONTRACTS (1); EVIDENCE (4).

PARTIES.

The auditor general is not a necessary party to a bill to set aside a township tax. *Thomas* v. *Auditor General*, 535.

See ACTIONS (2); EMINENT DOMAIN (1); EQUITY PRACTICE (1).

PARTNERSHIP.

1. A contract whereby one agrees to superintend and manage the business of another for a specified yearly compensation, together with a certain share of the net profits, does not make the parties partners. *Morrow* v. *Murphy*, 204.

2. A member of a trading partnership has implied power to borrow money for the use of the firm, and to issue firm paper therefor. *Stevens* v. *McLachlan*, 285.

3. One who loans money to a member of a trading partnership, on firm paper, is entitled to assume that the money is borrowed for the use of the firm. *Id.*

See BILLS AND NOTES (1–8); CRIMINAL LAW (4, 5); NOTARIES PUBLIC.

PARTY WALLS.

A party-wall agreement whereby the first party is given the right to build the wall at his own expense, and the second party, his heirs, executors, administrators, or assigns, is given the right to connect with the wall at any time upon payment to the first party, his heirs, executors, administrators, or assigns, of one-half the cost, the parties then to become joint owners, and which expressly provides that the undertaking shall be perpetual, and shall create covenants running with the land, entitles the successor in title of the first party to the payment made on the use of the wall by the second party or his assigns, as against one who claims under an assignment of the agreement. *Adams* v. *Noble*, 545.

PAUPERS.

Under the statute providing for the support of the poor by the public (1 How. Stat. § 1755 *et seq.*), where a family remove from a county in which they have received aid as indigent persons, and make their home in another county, the latter, and not the former, county is chargeable with their subsequent support, unless they were removed or enticed from their former home with a view to casting their support on another county. *Superintendents of Poor of Kalkaska Co.* v. *Superintendents of Poor of Grand Traverse Co.*, 247.

PAYMENTS.

1. A creditor to whom distinct debts are owing may apply payments to either indebtedness, in the absence of a direction by the debtor as to their application. *Wood* v. *Genett*, 222.

2. Where, upon a sale of property under a tax levy, the owner appears by an agent, who, without protest, takes part in the bidding, procures the property to be struck off to him, and, upon the representation that he has not the required funds with him, induces the treasurer to accompany him to the owner's office, where payment is made, such payment will be construed to be voluntary, even though the treasurer is required to give a receipt reciting that the money is "paid under protest after levy." *H. M. Loud & Sons Lumber Co.* v. *Township of Vienna*, 382.

See CONTRACTS (1); CONTRIBUTION; EVIDENCE (6); EXECUTION; LIENS (1, 3); MORTGAGES (1, 2); STATUTE OF FRAUDS (3); TAXATION (5–7, 11, 19, 22, 23, 28); TOWNSHIPS.

PERSONAL INJURIES—See CONTRIBUTORY NEGLIGENCE; EVIDENCE (1, 2); MASTER AND SERVANT; NEGLIGENCE; RAILROADS (1, 3); STREET RAILWAYS.

PHYSICIANS—See WITNESSES (3, 5).

PLATS.

2 Terr. Laws, 577, which provides that an acknowledged and recorded plat, describing lands intended for streets, commons, or "other public uses," shall be deemed a sufficient conveyance to vest the fee in the county, in trust for the purposes expressed, does not apply to land appropriated on a plat to religious denominations, theirs not being a public use, within the meaning of the act. *Patrick* v. *Young Men's Christian Ass'n of Kalamazoo*, 185.

See DEDICATION OF LANDS; DEEDS (5, 6).

PLEADING—See AMENDMENTS; ASSAULT; CUSTOM (3); EJECTMENT (2, 4); FRAUDULENT CONVEYANCES (1); INTOXICATING LIQUORS (4); WATERS.

PLEDGE—See BANKS AND BANKING (13, 14).

POOR PERSONS—See PAUPERS.

POSSESSION OF CHATTELS—See CHATTEL MORTGAGES.

POSSESSION OF LANDS—See ADVERSE POSSESSION; EJECTMENT (1, 2); TRESPASS.

PRACTICAL CONSTRUCTION—See CONSTITUTIONAL LAW (1).

PRACTICE IN CIRCUIT COURT.

The appointment of auditors under 2 How. Stat. § 7386, in cases involving the examination of accounts or of vouchers, is discretionary with the court; but, where such auditors are appointed, no issue should be submitted to the jury until after the account is stated. *Stockman* v. *Michell*, 293.

See ACTIONS (3); AMENDMENTS; GRAND JURY; PROBATE COURTS; TRIAL.

PRACTICE IN SUPREME COURT—See APPEAL AND ERROR; CONTEMPT (1).

PRESUMPTIONS—See TAXATION (27).

PRINCIPAL AND AGENT.

1. The superintendent of a manufacturing company is not, by virtue of his authority as a general agent, empowered to contract with an employé for an interest in the principal's business or its profits. *Deffenbaugh* v. *Jackson Paper Manfg. Co.*, 242.

2. Where the superintendent of a manufacturing company makes an unauthorized contract to compensate an employé with an interest in the profits of the business in addition to a specified salary, the fact that the books of account, kept under the superintendent's direction, show payments to the employé in excess of his salary, has no tendency to show a ratification by the company, in the absence of evidence that it was brought home to the company that the excess was paid as commissions. *Id.*

3. Persons dealing with an agent for collection are chargeable with knowledge that, in the absence of special authority, he can accept nothing but money in payment of debts. *May* v. *Genesee County Savings Bank*, 331.

4. A finding that the captain of a yacht was authorized to bind defendant, the owner, by hiring plaintiff for the season as engineer, is sustained by evidence that defendant's attorney sent to the captain a season's contract, signed by defendant, and containing a blank for the engineer's signature, which contract bore date of about the time that the captain had, to defendant's knowledge, hired plaintiff under a parol agreement, the terms of which were in dispute at the trial, but which plaintiff claimed was for a season's employment. *Gerardo* v. *Brush*, 405.

See BROKERS; CONTRACTS (5); CRIMINAL LAW (5); MASTER AND SERVANT (1); PARTNERSHIP (2); RELIGIOUS SOCIETIES (2).

PRINCIPAL AND SURETY.

1. A surety is not released by an extension of time to the principal debtor, where the remedy against him is expressly reserved by the creditor. *Big Rapids National Bank* v. *Peters*, 518.

2. Evidence that the holder of a promissory note, on granting an extension of time to the principal debtor by accepting a new note, expressly refused to surrender the original note or to discharge the surety thereon, is sufficient to sustain a finding that the remedy against the surety was reserved. *Id.*

See CONTRIBUTION.

PRIVILEGE—See APPEAL AND ERROR (5); LIBEL AND SLANDER (1, 4); WITNESSES (3, 5).

PROBABLE CAUSE—See MALICIOUS PROSECUTION (1).

PROBATE COURTS.

3 How. Stat. § 6782, requiring persons appealing from probate court to file in the circuit court, within 30 days, proof of service on the adverse party of notice of the appeal according to the order of the probate court, and providing that, upon failure to do so, the order appealed from shall stand as though no appeal had been taken, unless the circuit court shall, upon application made within the first 10 days of the succeeding term, reinstate such appeal on a showing that appellant was prevented from perfecting the same by circumstances not under his control,—is mandatory, and, where appellant fails to comply with its provisions, the circuit judge is bound, upon motion, to dismiss the appeal. *Hosey* v. *Ionia Circuit Judge*, 280.

See WRIT AND PROCESS (1).

PROFIT-SHARING—See ACCOUNTING; PARTNERSHIP (1); PRINCIPAL AND AGENT (1, 2).

PROMISSORY NOTES—See BILLS AND NOTES.

PROOF OF PUBLICATION—See TAXATION (13, 29, 30).

PUBLICATION—See TAXATION (10, 13–15, 29, 30).

PUBLIC IMPROVEMENTS—See ACTIONS (2); MUNICIPAL CORPORATIONS (3, 9, 10).

PUBLIC OFFICERS—See COUNTY TREASURERS; ELECTIONS; TOWNSHIPS; WITNESSES (8).

PUBLIC PROPERTY—See DEDICATION OF LANDS (1–3).

QUESTIONS FOR JURY—See BILLS AND NOTES (9); CUSTOM (4); RAILROADS (1); STREET RAILWAYS.

QUIETING TITLE—See TAXATION (28).

QUITCLAIM—See RECORDING LAWS; TAXATION (18); VENDOR AND PURCHASER (2, 3).

RAILROADS.

1. Plaintiff, in attempting, on a foggy night, to drive across a railroad track, was struck by a hand-car, and injured. In an action against the company, he claimed that he stopped his horse, and looked and listened, before passing upon the track, but that no signals were given to indicate the approach of the car. Considerable noise proceeded from an electric power-house near by. Under the rules of the company, the use of hand-cars at night and in foggy weather was forbidden, except in urgent cases. On the night in question, the section men had been detained in moving a track. The men claimed that warning signals were given, and that they ran the car at a rate of speed not exceeding five miles an hour, and did not see plaintiff until they collided with his vehicle. *Held*, proper to submit to the jury the questions of negligence and contributory negligence. *Mott* v. *Detroit, etc., R. Co.*, 127.

2. A lease by a railroad company to a manufacturing company of a portion of its right of way, subject to termination on 60 days' notice, made with a view to affording facilities for furnishing freight to the company, is valid. *Michigan Cent. R. Co.* v. *Bullard*, 416.

3. A railroad company is not liable to a section hand injured by a passing engine while he was cleaning the tracks at a crossing, on the ground of failure to observe a rule requiring a lookout on the footboard of an engine backed across a public highway, as the rule is for the protection of the public, and not of employés. *Carlson* v. *Cincinnati, etc., R. Co.*, 481.

4. A railroad company is not liable to a widow for failure to deliver to her, after her husband's death, portions of his limbs which were amputated by the company's surgeon because they had been crushed by the cars while he was in the employ of the company, when the operation was performed at a hospital to which he was taken by a policeman in charge of the city ambulance, and the fragments were cremated according to the custom at the hospital, as the company did not assume the obligation, either by its employé who lifted the injured man from the ground, or by the surgeon who amputated his limbs, to deliver the remains, and the whole of them, to his widow, if death should ensue from the injury. *Doxtator* v. *Chicago, etc., R. Co.*, 596.

5. One who, while loading logs, permits his horses to remain upon the track in front of an approaching train, under circumstances which render his conduct grossly negligent, should not be permitted, in an action against the company for their killing, to go to the jury upon the theory that the engineer, knowing the danger, willfully ran them down, where there is no definite proof to contradict the engineer's testimony that he acted with all proper caution as soon as the situation became apparent to him. *Redson* v. *Michigan Cent. R. Co.*, 671.

6. 3 How. Stat. § 3301, authorizes the railroad commissioner to require railroad companies to maintain flagmen or gates at crossings of other roads, and provides that the expense thereof shall be borne jointly, in equal proportions, by the

RAILROADS—Continued.

two companies. Section 3310, added as an amendment to the same statute, gives like authority with respect to the interlocking switch and signal system, but makes no provision for the apportionment of the expense between the companies. *Held*, that the sections are *in pari materia*, and hence the expense of the interlocking system, when ordered by the commissioner, is to be shared equally by the companies involved. *Wabash R. Co.* v. *Commissioner of Railroads*, 697.

See CONTRIBUTORY NEGLIGENCE (1-3, 5, 6); DRAINS (2); HIGHWAYS (4); MASTER AND SERVANT (1); STREET RAILWAYS; TRIAL (3).

RATIFICATION—See PRINCIPAL AND AGENT (2).

RECEIVERS—See BANKS AND BANKING (1).

RECORDING LAWS.

The recording of a quitclaim deed by a grantee for value, without notice, does not give priority over a senior warranty deed defectively recorded; a purchaser by quitclaim not being a *bona fide* purchaser within the recording laws (3 Comp. Laws 1897, § 8988). *Beakley* v. *Robert*, 209.

See VENDOR AND PURCHASER (1).

RECOUNT—See ELECTIONS (1).

REFERENCE—See PRACTICE IN CIRCUIT COURT.

REFORMATION OF INSTRUMENTS.

A decree reforming a mortgage so as to cover land claimed by complainant to have been omitted through defendant's fraud, being sustained by the evidence, was affirmed. *Jacobson* v. *Ismond*, 350.

See APPEAL AND ERROR (6).

RELIGIOUS SOCIETIES.

1. A religious society holding lands under a dedication to the use of the denomination it represents cannot transfer the title to a society of a different denomination, or to one that is undenominational. *Patrick* v. *Young Men's Christian Ass'n of Kalamazoo*, 186.

2. At a parish meeting of an Episcopal church, the vestry submitted a report that it had arranged to purchase lots for a church and rectory, and that the Church Association of Michigan had signified its willingness to advance a certain amount, provided the property should be deeded to the association in trust for the parish, and that interest at 7 per cent. should be paid on the money advanced, and the principal should be paid in $100 installments. The meeting authorized the vestry to carry out the arrangement. *Held*, that the vestry was authorized to give notes for the amount secured. *Miller* v. *Childs*, 639.

See ADVERSE POSSESSION (1); DEDICATION OF LANDS (4, 5); LIBEL AND SLANDER (1, 2); PLATS.

RENEWALS—See BILLS AND NOTES (8).

RENT, LIABILITY FOR—See LANDLORD AND TENANT (1-3).

REPEAL OF ORDINANCE—See MUNICIPAL CORPORATIONS (1, 6).

REPLEVIN.

In replevin against a sheriff for goods levied upon as the property of a third person, where the issue as to plaintiff's ownership is found against him, judgment is properly entered for a return of the property, without limitation to the amount of defendant's lien. *Shields* v. *Moody*, 472.

REPORT OF SALE—See TAXATION (26, 27).

REQUESTS TO CHARGE—See TRIAL (1, 2, 13); WITNESSES (6, 9).

RESCISSION—See ACTIONS (3); EVIDENCE (7).

RES GESTÆ—See CRIMINAL LAW (4).

RIGHTS OF WAY—See DEEDS (7); DRAINS (2-4); RAILROADS (2).

SALE—See CUSTOM (3); FIXTURES (3); STATUTE OF FRAUDS; TAXATION.

SALOONS—See INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS (2).

SAWYER'S LIEN—See LIENS.

SCAVENGERS—See MUNICIPAL CORPORATIONS (6).

SCHOOLS AND SCHOOL DISTRICTS.

1. 2 Comp. Laws 1897, § 4747, authorizes the board of trustees of a graded school district to fill vacancies in their number until the next annual meeting, and further provides that, on failure of the board to elect its own officers, they shall be appointed by the board of school inspectors. Section 4668 provides that, in case of a vacancy on the board of an ungraded district, the two remaining officers shall immediately fill such vacancy, and, in case of two vacancies, the remaining officer shall immediately call a meeting of the district to fill the vacancies; and that, in case the vacancies are not so filled within 20 days, the board of school inspectors shall fill them. Sections 4659-4661 make it the duty of any member of the district board to call a special meeting of the district, for the transaction of any special business, on the written request of five legal voters of the district. The concluding section of the act (4774) declares that all of its provisions (section 4639 *et seq.*) shall apply to every school district in the State, unless inconsistent with some special enactment of the legislature. *Held*, that *mandamus* will not lie to compel a trustee of a graded district to meet with his colleagues to fill two vacancies on the board, since there are other adequate remedies; section 4774 having the effect (*it seems*) of making applicable to graded districts the provision of section 4668 relative to the filling of vacancies by the board of school inspectors, and the remedy by special

SCHOOLS AND SCHOOL DISTRICTS—Continued.

election, which is also rendered applicable, being presumed to be available in such cases where there is no showing that a written request of five legal voters could not be obtained. *Johnston* v. *Mitchell*, 589.

2. The minority of a school board have no authority to commence an action in its name, and, if they do so, they will be individually responsible for the costs. *Id.*

SEARCHES AND SEIZURES—See DISCOVERY.

SERVICE OF PROCESS—See WRIT AND PROCESS.

SIDEWALKS—See CONTRIBUTORY NEGLIGENCE (4).

SLANDER—See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

1. 2 How. Stat. § 5727, provides that no instrument intended to operate as a conveyance, made in good faith and upon a valuable consideration, shall be wholly void by reason of a defect in the statutory requisite as to attestation, but that the same may be allowed to operate as an agreement to convey, and may be enforced specifically by suit in equity, subject to the rights of subsequent good-faith purchasers. Complainant's bill contained allegations showing a right to certain timber under a contract not witnessed, defendant's subsequent acquisition of title subject to complainant's right, his denial of complainant's interest, and his threat to destroy it. The bill prayed that defendant be decreed to release his pretended claim, and be enjoined from further asserting it. *Held*, that, in the absence of demurrer, it was sufficient as a bill for specific performance. *Chicago Lumbering Co.* v. *Powell*, 51.

2. The execution of a mortgage in complainant's favor, to secure his support for the remainder of his life, was properly decreed to cover property received by defendant, directly or indirectly, by reason of complainant's discharge of a mortgage, where, although it was contemplated and agreed at the time of the discharge that complainant's support should be secured upon property to be received in exchange for that upon which the discharged mortgage was an incumbrance, defendant, after receiving the former mortgage and its discharge, declined to give any security. *Fletcher* v. *Hagerman*, 466.

SPECIFIC TAXES—See TAXATION (1).

STATUTE OF FRAUDS.

1. Contracts of barter are regarded, so far as the statute of frauds is concerned, as contracts of sale. *Gorman* v. *Brossard*, 611.

2. A mere oral agreement on the part of one person to sell, and of another to accept, a quantity of curbstone lying where the seller deposited them after completing a public contract, the buyer agreeing to send for them when desired, is, notwithstanding the bulky nature of the subject-matter, insufficient

STATUTE OF FRAUDS—Continued.

to constitute a constructive delivery which will satisfy the statute of frauds; a constructive delivery, even, not being allowed to rest in words alone. *Id.*

3. A mere oral agreement whereby a creditor is to take payment of a debt of $125 in curbstone belonging to his debtor, where no receipt or other evidence is given of the extinguishment of the debt, cannot be sustained, as against the objection that, there being no delivery, it violates the statute of frauds, on the ground that the transaction itself amounts to a payment within the meaning of that statute. *Id.* 612.

See BOUNDARIES (2).

STATUTE OF LIMITATIONS.

1. Within six years after one indebted on notes of different dates had promised by letter to pay the creditor "every cent" he owed, he wrote a second letter to the creditor, stating that he would like to fix the matter up by giving a new note, and inquiring as to what sum in cash, in case the creditor should consider a note worthless, he would take to balance all the debtor owed. *Held*, that, under 2 How. Stat. § 8725, the letters operated to keep the cause of action alive, as to all of the notes, for six years from the date of the last letter. *Rumsey* v. *Settle's Estate*, 372.

2. The maintenance by a city of a bridge across railroad tracks, which it was without authority to construct, and which depreciates the rental value of abutting property, is a continuing wrong, for which the property owner may recover his damages arising within the period of limitations, although the right of action for the erection of the structure is barred. *Phelps* v *City of Detroit*, 447.

See ADVERSE POSSESSION; INSURANCE (6).

STATUTES—See CONSTITUTIONAL LAW; TAXATION (11).

STOCKHOLDERS, PERSONAL LIABILITY OF—See BANKS AND BANKING.

STREET RAILWAYS.

An electric car in which plaintiff was the only passenger was boarded while in motion by three disorderly persons, who continued a fight begun on the street. Plaintiff screamed to the conductor to stop the car, and ran to the rear platform, where she fell and was injured. In an action against the company, plaintiff testified that the conductor stood at the front of the car, and paid no attention to her request. A third person, who claimed to have observed the scene from without, testified that the conductor's position was as stated by plaintiff. Defendant introduced testimony tending to show that the conductor was engaged at the time in an attempt to disarm one of the combatants, and that he called to the motorman to stop the car, but the latter was forcibly prevented from doing so. *Held*, that the testimony was in conflict as to whether defend-

STREET RAILWAYS—Continued.

ant's employés used reasonable efforts to protect the plaintiff, and that the question was for the jury. *Cross* v. *Detroit Citizens' St. R. Co.*, 137.

See CONSTITUTIONAL LAW (2, 3); CONTRIBUTORY NEGLIGENCE (5).

STREETS—See EMINENT DOMAIN; HIGHWAYS.

SUBROGATION.

A wife who had fraudulently obtained from her husband, who was incompetent, a conveyance of certain lands, deeded them to a third person, with an understanding that they should be reconveyed at the husband's death. Subsequently, upon a bill filed by the husband's heirs, both conveyances were set aside. The premises, when restored, were incumbered by a mortgage, the proceeds of which had gone to discharge a mortgage for a like amount upon the grantee's homestead. *Held*, that the lien upon the homestead should be revived, and the heirs subrogated to the rights of the original mortgagee. *Markillie* v. *Allen*, 360.

SUBSTITUTED SERVICE—See ATTACHMENT (1–4).

SUNDAY CONTRACTS—See TRIAL (16).

SUPPLEMENTS (NEWSPAPER)—See TAXATION (14).

SURETYSHIP—See PRINCIPAL AND SURETY.

SURVEYS.

One who resurveyed a private claim, bounded in front by a river, testified that, finding no old monument near the river, he started from a fence, which he knew to be "very nearly" correct, and found witness trees on the line between the front and rear concessions (the location of which line was the matter in dispute) at a distance of 46 feet less than indicated in the government survey, which discrepancy, he explained, might be due to the varying height of the water in the river. His survey agreed with the government survey in the number of acres in the rear concession. The jury were instructed that the value of the survey as evidence depended upon the correct location of the starting point. *Held*, that the testimony was not incompetent, nor, in view of the charge, misleading. *Olin* v. *Henderson*, 149.

See BOUNDARIES (1).

TAXATION.

1. The tax provided for by Act No. 168, Pub. Acts 1881 (1 How. Stat. § 1237 *et seq.*), requiring telegraph and telephone companies to pay, in lieu of all other taxes, a tax levied upon an assessment of such lines at their true cash value, is an *ad valorem*, not a specific, tax. *Pingree* v. *Auditor General*, 95.

2. The rate of taxation provided by the act—being the average rate of all general, municipal, and local taxes levied through-

TAXATION—Continued.

out the State during the previous year—is determined in a different way, and is different in amount, from that imposed upon other property bearing the same relation to the State, and the act is therefore obnoxious to article 14, § 11, of the Constitution, which requires uniformity in taxation. *Id.*

3. A decree for the sale of land delinquent for taxes will not be set aside after confirmation of the sale, even though such decree has not been enrolled, on the ground either that the township treasurer failed to make the tax out of personal property, or that his return to the county treasurer was prematurely made, in view of the provision of section 70 of the tax law (Act No. 206, Pub. Acts 1893) that, while the practice with reference to setting aside sales shall be the same, so far as applicable, as in cases of mortgage foreclosure, no sale shall be set aside after confirmation, except in cases where the taxes were paid or the property was exempt from taxation. *Shefferly* v. *Auditor General*, 455.

4. Where a void tax deed has been issued, and the original owner applies to the auditor general for a certificate of error, tendering the full amount of the tax, he is entitled to such certificate, and, if the auditor refuses to issue it, *mandamus* will lie to compel him to do so. *Hubbard* v. *Auditor General*, 505.

5. The fact that the auditor general sees fit to accept a check in payment for state tax lands is not a matter of which the original owner can complain, where the check is afterwards paid; and in such case the payment will be deemed to have been made as of the time of the receipt of the check. *Id.*

6. An applicant to purchase state tax lands, who deposits an amount insufficient to cover all of the descriptions applied for, is not entitled to deeds for the several descriptions in the order named in his application, where there is nothing to indicate that he intended to take a part of the lands if he could not obtain them all. *Id.*

7. Under section 84 of the tax law of 1893 (Act No. 206, Pub. Acts 1893), requiring a purchaser of state tax lands to pay all taxes remaining a lien thereon at the time of his purchase, one who pays a part of the price to the auditor at the time of making his application to purchase, and the balance on a subsequent day, is bound to pay any tax that has become a lien upon the land in the interim, in default of which the deed issued to him is void. *Id.*

8. Under section 66 of the tax law (Act No. 206, Pub. Acts 1893), providing that if it shall be made to appear to the court, within five days after the day fixed for hearing the petition of the auditor general for the sale of delinquent lands, that any person, without fault on his part, has been prevented from filing objections to the tax, additional time may be granted for that purpose, a decree of sale is void as to a landowner who did not appear, where the court finally adjourned on the fourth day after the day fixed for the hearing of the petition. *Youngs* v. *Clark*, 528.

TAXATION—Continued.

9. A tax sale will be set aside at the suit of a landowner who had no actual notice of the proceedings, and who had previously obtained, in a court of competent jurisdiction, what he believed to be a valid decree setting aside the tax. *Thomas* v. *Auditor General*, 535.

10. The auditor general's petition in a tax proceeding need not be published for 10 days prior to the day fixed for the hearing, in addition to the four weeks required by Act No. 162, Pub. Acts 1895, § 66, although that section requires a contesting party to file objections at least 10 days prior to the day of hearing; it being further provided that objections may be filed within five days after the hearing, if the party was prevented from filing them before without fault on his part. *Eldridge* v. *Richmond*, 586.

11. A purchase of state tax lands is effected when application therefor is made to the auditor general, accompanied by a deposit of the full amount due; and hence, where this was done prior to the time when Act No. 229, Pub. Acts 1897, went into effect, providing that one thereafter purchasing such lands should have no right to recover the possession thereof without first serving a specified notice upon the original owner, the purchaser was not within the act, although neither his deed nor certificate of purchase issued until after the act had become operative. *Id.*

12. The fact that the auditor general's petition in a tax proceeding, comprising a part of the tax record, and found in the office of the county treasurer, where such record is required to be kept by section 67 of the tax law (Act No. 206, Pub. Acts 1893), is not marked as filed in the office of the county clerk, is immaterial, where the filing of such petition is recited in the order of hearing thereon. *Mann* v. *Carson*, 631.

13. An affidavit showing the publication of "the notice of the sale of state tax lands hereto annexed" sufficiently proves the publication of the auditor general's petition, the order of hearing thereon, and the list of delinquent lands in a tax proceeding, where it is found among the files of such proceeding in the county clerk's office, and a printed copy of such petition, order, and list of lands, taken from the newspaper mentioned in such affidavit, is also found among the files, and is the only paper there found to which the affidavit could refer, although such papers are not attached together, and the affidavit is not entitled in any cause. *Id.*

14. Publication of notice of a tax sale in a supplement to a newspaper is a sufficient publication in the newspaper. *Id.*

15. A description of lands in a published tax list as "15 entire" in a column headed "Block," among descriptions in "Clark's Addition to the Village of Chesaning," is sufficient. *Id.*

16. Under the provision of the tax law that lands shall be assessed "to the owner, if known, and also to the occupant, if any; if the owner be not known, and there be an occupant, then to such occupant,"—the owner of lands occupied by another cannot complain that the assessment was made to the owner alone. *Id.*

TAXATION—Continued.

17. Lands acquired by the State under section 68 of the tax law of 1893, providing that, if the county treasurer shall fail to offer for sale lands included in the decree, they shall be considered as bid off to the State, are subject to private sale, as state tax lands, under section 84 of the act. *Id.*

18. A deed of state tax lands in the form of a quitclaim is sufficient to pass title to the grantee. *Id.* 632.

19. Where the original owner of land held by the State under a sale to it for delinquent taxes applies to the county treasurer to pay all taxes standing against the land, and does pay all taxes which he is advised by that officer are so outstanding, he is entitled to the same relief against a subsequent purchaser of the land from the State as though the taxes for which the land was sold had been paid to the proper officer within the time provided by law; and this though the period of redemption on the sale to the State had expired at the time of such attempted payment. *Id.*

20. These facts, however, cannot be set up by the landowner to defeat the issuance of a writ of assistance to the holder of the tax title, but resort must be had to one of the remedies prescribed by sections 70 and 98, respectively, of the tax law, *i. e.*, a motion to set aside the sale (unless barred by lapse of time), or an application to the auditor general for a certificate of error. *Id.*

21. But the Supreme Court will, in its discretion, defer the issuance of the writ of assistance, to enable the landowner to avail himself of the statutory remedy. *Id.*

22. Under section 84 of the tax law of 1893, requiring a purchaser of state tax lands to pay all taxes remaining a lien thereon at the time of his purchase, a deed issued without the payment of such a tax is void, even though the tax had not been returned to the office of the auditor general at the time of such purchase. *Cockburn* v. *Auditor General*, 643.

23. The holder of a deed of state tax land, void for failure to pay a tax constituting a lien upon the land at the time of purchase, is entitled, on application at the office of the auditor general, to have such deed canceled and the amount paid refunded, or instead, if no other rights have intervened, on paying an amount which, together with that previously paid, will equal the amount due the State and all taxes then a lien upon the land, to have such deed canceled and a new one issued; and, in case the auditor refuses to take such action, *mandamus* will lie to compel him to do so. *Id.*

24. The jurisdiction of the court in a proceeding by the auditor general to enforce the payment of delinquent taxes is not defeated by the fact that the collecting officer might have made the amount of the tax out of personal property on the premises, or that the return of such officer to the county treasurer was prematurely made; and hence a sale for such taxes will not be set aside, after confirmation, on either of said grounds. *Conley* v. *McMillan*, 694.

TAXATION—Continued.

25. The entry of a formal order confirming a tax sale is unnecessary where no objections are filed thereto; it being provided by section 70 of the law of 1893 (Act No. 206, Pub. Acts 1893) that such sales shall stand confirmed, without the entry of any order, unless objections are filed within a specified time. *Id.*

26. A tax sale is rendered void by the failure of the county treasurer to file a report thereof in the office of the county clerk, as required by section 70 of the tax law of 1893. *McFadden* v. *Brady*, 699.

27. The provision of section 99 of the tax law, that no tax, or sale for any tax, shall be rendered invalid by showing that any record, statement, certificate, affidavit, paper, or return cannot be found in the proper office, and, unless the contrary is affirmatively shown, the presumption shall be that such record was made, and such certificate, statement, affidavit, paper, or return was duly made and filed, does not apply to the report of sale required to be filed with the county clerk by the county treasurer. *Id.*

28. A tax deed cannot be shown to be invalid, on a bill to quiet title by one claiming thereunder, on the ground that the owner attempted to pay the taxes, and was prevented through no fault of his own. *Id.*

29. An affidavit showing the publication of a copy of the auditor general's petition in a tax proceeding, and of the order of hearing thereon, for "four successive weeks prior" to the day fixed for the hearing, is insufficient to prove a publication for "four successive weeks *next* prior" to such day, as required by section 66 of the tax law, where the order was dated 70 days before the day fixed for the hearing. *Id.*

30. Under the provision of said section that proof of the publication of such petition and order shall be filed in the office of the county clerk before any final order is made, the filing of such proof is prerequisite to the jurisdiction of the court to enter a decree of sale, and any deficiency therein cannot be supplied by parol. *Id.* 700.

31. A tax sale will be set aside on petition where it is shown that the figures in the column of the tax record headed "Amount Decreed against Lands" were inserted by an employé in the office of the county treasurer, after the record had passed from the control of the court. *First Baptist Church of Bay City* v. *Roberts*, 704.

See EQUITY PRACTICE (1, 5); MUNICIPAL CORPORATIONS (10); PARTIES; PAYMENTS (2); VENDOR AND PURCHASER (2).

TELEGRAPHS AND TELEPHONES—See TAXATION (1, 2).

TENANCY IN COMMON—See EJECTMENT (3).

TENDER—See CHATTEL MORTGAGES (2); INSURANCE (4); MORTGAGES (1); TROVER (1).

TIMBER—See HIGHWAYS (2).

TITLE TO LANDS—See LANDLORD AND TENANT (4, 5); PLATS.

TITLE TO PERSONALTY—See CONFUSION OF GOODS.

TORTS—See FALSE IMPRISONMENT.

TOWNSHIPS.

3 How. Stat. § 1415, provides that, on the performance of contracts, the commissioner of highways shall make payment therefor by orders upon the township treasurer, which shall be signed by such commissioner and countersigned by the township clerk. Section 1425 provides that the township clerk shall be the clerk of the commissioner of highways, and shall, under his direction, record his proceedings in a suitable book, and shall keep an accurate account of all orders drawn by the commissioner on the township treasurer. The section further provides that all books and papers relating to the business of the commissioner shall be preserved by the clerk in his office. *Held*, that *mandamus* would lie on the relation of the commissioner to compel the clerk to countersign orders drawn upon blanks of a stub book kept in the commissioner's possession, where refusal was based solely on a custom in the particular township of drawing such orders on a stub book kept by the clerk. *Stoddard* v. *Giasson*, 91.

See HIGHWAYS; TRIAL (11, 12).

TRADE NAMES.

1. One Lamb invented a knitting machine, and sold his rights under his patents to a corporation, which carried on the manufacture at first under the name of the Lamb Knitting-Machine Company, and later under the name of the Lamb Manufacturing Company. The Lamb machine was used by the Lamb Knitting Company, a corporation organized by the inventor for the manufacture of knitted goods, which corporation sold its property and business to the Lamb Knit-Goods Company. The last-named corporation employed in its goods a peculiar stitch, which, however, was in common use before such corporation adopted it. The words "Lamb Knit" had come to be generally applied to goods manufactured on the Lamb machines. *Held*, that the Lamb Knit-Goods Company acquired no exclusive right to the use either of the peculiar stitch, or of the word "Lamb," in combination with other words, to designate goods of its manufacture. *Lamb Knit-Goods Co.* v. *Lamb Glove & Mitten Co.*, 159.

2. One Penberthy, the inventor of an appliance for injecting water into steam-boilers, procured the organization of a corporation for the manufacture and sale of the appliance, and, in consideration of a transfer of his patent to the corporation, became the owner of nearly all of its shares of stock. He insisted upon the adoption of "Penberthy Injector Company" as the corporate name, and upon the use of his name on the injectors and in all the advertising, which was very extensive, by virtue of which the name "Penberthy Injector" became

TRADE NAMES—Continued.

everywhere familiar to the trade. After six years, Penberthy disposed of his interests in the corporation, and engaged, in company with former officers and employés of the corporation, in the same vicinity, in the manufacture of injectors under a patent issued to Penberthy covering an appliance of like principle and appearance to that made by the corporation. The firm adopted the name "Lee-Penberthy Manufacturing Company," and used the word "Penberthy" upon its product and in all its advertising. *Held*, that the corporation was entitled to an injunction on the ground of infringement of its trade-name. *Penberthy Injector Co.* v. *Lee*, 174.

See CORPORATIONS (1).

TRESPASS.

1. The possession by a tenant of the portion of the demised premises near a disputed boundary line is not affected by a statement of his landlord to the owner of the adjoining parcel that he "would never use" such portion; and such statement will not support an action of trespass by the adjoining owner against the tenant, who continues in possession of the portion. *Donaldson* v. *Crane*, 369.

2. Where, in an action of trespass *qu. cl.*, the testimony conclusively shows that plaintiff had no actual possession, and that defendant did have such possession, and still has it, the latter is entitled to have verdict directed in his favor. *Id.*

TRIAL.

1. An insurance company cannot complain of a failure to give requested instructions concerning a waiver of conditions sought to be drawn from the actions of the company prior to a loss, where the instructions given made the right to find a waiver at all depend upon subsequent actions. *Walter* v. *Mutual City & Village Fire Ins. Co.*, 35.

2. An instruction pointing out the fact that two witnesses testify contrary to the plaintiff upon a certain matter is properly refused, it being the province of counsel to comment upon such conflict in the evidence. *Id.* 36.

3. In an action against a railroad company for personal injuries, plaintiff's counsel, in his argument to the jury, alluded to reputable physicians, who had testified in defendant's behalf, as "hired servants of masters, engaged to do this kind of work," and stated that "they are paid from their treasury, and go with a pass in their pockets." One of them, named Arnold, was denominated "Benedict" Arnold. *Held*, error. *Mott* v. *Detroit, etc., R. Co.*, 128.

4. It is not error for plaintiff's counsel to state, in his opening address to the jury, that he will be unable to produce a certain material witness, and to give the reason therefor. *Phillips* v. *United States Benevolent Society*, 142.

5. Counsel should not offer, in the presence of the jury, testimony which he knows is incompetent. *Id.*

TRIAL—Continued.

6. In an action of *assumpsit* against a mutual benefit society to recover accident benefits, it is error for the court to call the jury's attention to the fact that a judgment for plaintiff for less than $100 will entitle defendant to costs. *Id.* 143.

7. For the court to read to the jury in his instructions, in an action on a life-insurance certificate, the testimony of one of defendant's witnesses, on which the question of waiver of a forfeiture pleaded in defense mainly depends, does not give it such undue prominence as to require the reversal of a judgment for plaintiff. *Jones* v. *Preferred Bankers' Life Assurance Co.*, 211.

8. In an action for personal injuries, error, if any, in admitting evidence that plaintiff is without means, is harmless, where it was admitted solely in rebuttal of evidence that counsel were to have a share of any judgment recovered as their fee, and where the verdict shows that the jury did not consider it in estimating the damages. *Arndt* v. *Bourke*, 263.

9. Where the theory of the defense in an action for malicious prosecution and false imprisonment included the claim that defendants' connection with plaintiff's arrest was on probable cause and by advice of counsel, it was prejudicial for the court to make a remark at the beginning of the trial, in the presence of the jury, that ignored this claim, and indicated that, if defendants procured plaintiff's arrest, it was conclusive of their liability. *Bennett* v. *Eddy*, 300.

10. For the court arbitrarily to excuse a witness from further cross-examination before counsel, who shows no disposition to abuse the privilege, has had an opportunity to ask him with respect to material matters, is prejudicial error. *Id.* 301.

11. The fact that, in an action against a township for injuries claimed to have resulted from the defective condition of a bridge, which was built over a creek at a height of 3½ feet, was from 12 to 14 feet in width, and constituted but 8 or 10 feet of a country highway, the court recognized, in one portion of his charge, the failure to provide railings for the bridge as a ground of negligence, is not reversible error, where it was followed immediately by instructions which limited the ground upon which plaintiff might recover to the existence of a certain hole in the bridge. *Bratfisch* v. *Township of Mason*, 323.

12. An instruction, in an action against a township for injuries resulting from a defect in a bridge, of which it was claimed the township had constructive notice, that plaintiff could not recover, if the defect had existed only two days, without showing that the township had notice and a reasonable time thereafter to make repairs, is not erroneous as permitting the jury to find actual notice, of which there was no evidence, where the context made it apparent that the court was simply stating a rule of law. *Id.*

13. A judgment for plaintiff will not be reversed because the court added to one of defendant's requests to charge some words

TRIAL—Continued.

of explanation which were not in themselves clear, if from the whole charge it is apparent that the jury must have correctly understood the issues. *Wilder* v. *Sanche*, 345.

14. There is no error in instructing the jury that they should find for plaintiff or defendant, according to their belief in the witnesses, "taking them in sides," if the issues are squarely raised, and the contention of each party finds support only in the testimony of his own witnesses. *Id.*

15. It cannot be presumed that the finding of a jury as to the number of days an executor devoted to the business of the estate would be influenced by the amount of compensation allowed by the statute, and hence an instruction that such allowance is $1.50, instead of $1, per day, though erroneous, will not be deemed to have been prejudicial. *In re Gallagher's Estate*, 365.

16. The admission of testimony as to Sunday negotiations, in an action on a contract, is without prejudice, where the jury are instructed that all testimony tending to establish a Sunday contract is withdrawn from their consideration, and that, to entitle plaintiff to recover, they must find that the contract was made on a week-day. *Wheeler* v. *Jenison*, 422.

17. Remarks in the argument of counsel as to matters outside the record are insufficient ground for reversal of the judgment rendered, where the trial court instructs the jury that such remarks are improper, and they are withdrawn by the counsel uttering them. *Id.*

18. The fact that counsel in his argument, in commenting upon the testimony of a witness and her manner of giving it, draws incorrect inferences, is not ground for reversal. *Id.*

See NEW TRIAL; WITNESSES.

TROVER.

1. A junior mortgagee may maintain trover against a senior mortgagee who converted the security after the junior incumbrancer had tendered him the amount of the senior mortgage. *Schmittdiel* v. *Moore*, 199.

2. The measure of damages in such action, where the property equaled in value both mortgages, is the amount of the junior lien. *Id.*

See CHATTEL MORTGAGES (2); FRAUDULENT CONVEYANCES (1).

TRUSTS AND TRUSTEES.

1. An insolvent in England, having instituted proceedings under the English bankruptcy act for a composition with his creditors, executed, and recorded in this State, a certain deed, which, after reciting a meeting of creditors and the choice of a certain person as trustee, conveyed to such person, "as trustee for the benefit and security of creditors," certain lands situate in this State. *Held*, that resort might be had to the

TRUSTS AND TRUSTEES—Continued.

bankruptcy act to determine the powers conferred on the trustee, although the law itself could have no extraterritorial force. *Chicago Lumbering Co.* v. *Powell*, 51.

2. It appearing that a trustee under the bankruptcy act has power to convey, the deed in question is sustainable in this State under 2 How. Stat. § 5573, subd. 1, as a conveyance creating an express trust to sell lands for the benefit of creditors. *Id.*

3. It is not a delegation of the trust for a nonresident trustee to execute a contract through a resident attorney in fact. *Id.*

4. A trustee is not chargeable with the face value of a mortgage which he discharged for less than such value, where he realized on it the full value of the mortgaged property. *Calkins* v. *Bump*, 336.

5. A trustee who, under mistake of law, pays money to the wrong party, or holds it without investment, awaiting the determination of court as to whom it should be paid, is not chargeable with interest thereon. *Id.*

See GUARDIAN AND WARD; MUTUAL BENEFIT ASSOCIATIONS (2); RELIGIOUS SOCIETIES (1).

UNLIQUIDATED DAMAGES—See ACCOUNTING (1).

USAGE—See CUSTOM.

VACANCIES—See SCHOOLS AND SCHOOL DISTRICTS (1).

VENDOR AND PURCHASER.

1. A purchaser of lands from one of his neighbors, whom he had long known, and who he knew owned no other land in the vicinity, will be held to have had notice of an incumbrance, where it appears that, before purchasing, he went with the vendor to the office of the register of deeds, where he found a mortgage by the vendor indexed as covering other lands in the same section, the record of which he refused to examine, but which in fact was a record of the mortgage on the land in question, and it further appears that, during the negotiations, this mortgage was referred to as being upon the lands covered by the deed. *Farwell* v. *Halladay*, 402.

2. Where the holder of a tax title conveys by quitclaim deed, both parties acting in good faith, believing that the deed conveyed a valid title, the grantee is not entitled to recover back the consideration on a failure of the title. *Thorkildsen* v. *Carpenter*, 419.

3. Knowledge on the part of a wife that her husband, previously married, procured from his daughter, without any consideration, shortly after the latter became of age, a quitclaim deed of property which she had inherited from her mother, is sufficient to put her on inquiry, before accepting a mortgage upon the property, as to the character of the transaction, and will subject her, as mortgagee, to the right of the

VENDOR AND PURCHASER—Continued.

daughter to have the deed set aside on showing that she had no knowledge that the title to the property had descended to her on her mother's death. *Graham* v. *Lamb*, 577.

See DEEDS; EJECTMENT (1, 2); FIXTURES (3); RECORDING LAWS; SPECIFIC PERFORMANCE (1); TAXATION (5–7, 11, 17, 18, 22, 23).

VERDICT.

Defendant cannot complain of a verdict against him, as a compromise, because it does not include interest on the notes in suit. *Big Rapids National Bank* v. *Peters*, 518.

VILLAGES—See MUNICIPAL CORPORATIONS.

WAIVER—See CHATTEL MORTGAGES (1); CONTRACTS (4); INSURANCE (1, 2, 8); LIENS; LIFE INSURANCE; TRIAL (1); WITNESSES (3); WRIT AND PROCESS (2).

WALLS—See PARTY WALLS.

WATERS.

A declaration in an action against a boom company for damages resulting from an overflow of water caused by the stoppage of logs in a navigable stream need not allege that the company was negligent. *Baumgartner* v. *Sturgeon River Boom Co.*, 321.

See BOARDS OF SUPERVISORS; DEEDS (7); HIGHWAYS (5).

WILLS.

1. A testamentary gift, to take effect upon the termination of a life estate in the widow, of a specified sum to "each of the children" of a named daughter, includes not only the children in being at the death of the testator, but those born subsequently during the lifetime of the widow. *McLain* v. *Howald*, 274.

2. A child *en ventre sa mere* at the termination of the life-estate is also entitled to take under the will. *Id.*

WITNESSES.

1. Evidence that a witness has often observed bodies in motion, and has seen horses trot and run, does not render him competent to express an opinion as to the speed of a hand-car seen by him immediately before it struck a vehicle upon a crossing. *Mott* v. *Detroit, etc., R. Co.*, 127.

2. Asking plaintiff's witness in an action for personal injuries, for the purpose of laying a foundation for her impeachment, if, in a conversation with defendant's employé, she did not make a specific statement in conflict with her testimony, does not entitle plaintiff to place before the jury the whole of the conversation referred to, including claimed admissions of negligence on the part of the employé, prejudicial to the defendant. *Id.*

WITNESSES—Continued.

3. A notice to defendant to produce a letter written to him by plaintiff's physician does not justify the admission of privileged communications between plaintiff and his physician over his objection. *Phillips* v. *United States Benevolent Society*, 143.

4. 3 How. Stat. § 7545, as amended by Act No. 121, Pub. Acts 1895, providing that in a suit prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party shall be incompetent to testify to facts equally within decedent's knowledge, excludes such testimony where the suit is prosecuted by a remote grantee of decedent's heirs. *Olin* v. *Henderson*, 150.

5. An insurance certificate provided that it should be void if any of the answers in the application were untrue. The application contained the representation that the applicant had not consulted a physician except for la grippe, when he was attended by a specified physician. Upon the trial of an action on the policy, the physician was called as a witness for defendant, and was asked if he had treated the applicant for any disease of the heart. It appeared that any information possessed by the witness as to the insured's condition was acquired by observation, and from the latter's statements, while witness was acting as his physician. *Held*, that the question was properly excluded, in view of 2 How. Stat. § 7516, rendering inadmissible the testimony of physicians as to information acquired in attending patients, necessary to enable them to prescribe. *Jones* v. *Preferred Bankers' Life Assurance Co.*, 212.

6. A refusal to instruct that, if the jury should believe that a witness has testified falsely or erroneously in any particular, they may disregard his whole testimony, is not erroneous, since the request does not take into consideration the materiality of the testimony, the intention with which it was given, nor the fact of corroboration by other witnesses. *Gerardo* v. *Brush*, 405.

7. The fact that one who was a witness on a former trial is absent from the jurisdiction of the court is sufficiently shown, to admit of his testimony's being read in evidence, by the affidavit of the officer into whose hands a subpœna had been placed for service on the witness, that he was unable to find him in the State, and was informed that he was in a remote State, supplemented by the testimony of the witness' attorney that he had been informed by his client that he was going to such other State, and that he had, within a month previous to the trial, received from him letters postmarked in that State. *Wheeler* v. *Jenison*, 422.

8. Under 2 How. Stat. § 9064, providing that any person attending court as a witness on behalf of the people, upon request of the public prosecutor, or upon a subpœna, or by virtue of any recognizance for that purpose, shall be entitled to certain fees, the officer who makes the arrest and brings the prisoner into court, and who receives his fees therefor, is not entitled to additional fees upon being sworn in the case as a witness. *Starmont* v. *Cummins*, 629.

WITNESSES—Continued.

9. Though courts are properly reluctant to call attention to the testimony of a particular witness, it is desirable to give some instruction on the weight of evidence where there was but one witness to the transaction in controversy, and his evidence is contradicted by a single witness, much of whose testimony is of a hearsay character. *Card* v. *Fowler*, 646.

See TRIAL (2, 3, 7, 10, 14, 18).

WORDS AND PHRASES.

The term "growing hay," used in a declaration alleging damages from an overflow of plaintiff's land, means grass in its growing state, while the term "hay" would cover only that which is cut and dried. *Baumgartner* v. *Sturgeon River Boom Co.*, 321.

WORDS AND PHRASES: "EVIDENCE" AND "PROOF"—See LIBEL AND SLANDER (5).

WRIT AND PROCESS.

1. Where an order allowing an appeal from probate court requires notice to be given to certain persons "by delivering to them a certified copy of said order," personal service upon each is necessary, and service by mail is insufficient. *Hosey* v. *Ionia Circuit Judge*, 280.

2. Where the owner of logs attached in proceedings under the log-lien law appears before the justice on an adjourned day, pleads the general issue, and goes to trial upon the merits, he waives the right to object that service was not made upon him until the return day of the writ. *Fisher* v. *Hardwood Manfg. Co.*, 490.

See ATTACHMENT; INSURANCE (6).

WRITS OF ASSISTANCE—See TAXATION (20, 21).

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