MICHIGAN REPORTS

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IN THE

SUPREME COURT

OF

MICHIGAN

FROM

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ALFRED J. MURPHY AND JAMES PHELAN.

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SUPREME COURT RULE 20.

Within fifteen days after filing and serving such plea replication shall be filed thereto, when such cause shall be deemed to be at issue: *Provided*, that the Court may, on application of either party, permit further pleadings to be filed and grant a reasonable time therefor.

As amended March 27, 1906.

CIRCUIT COURT RULE 58.

Motion for change of venue in any civil cause shall be entered and notice of hearing served within ten days after the cause shall be at issue, unless the moving party shall make it appear to the satisfaction of the court, that the facts upon which the application is based have come to his knowledge after the time above limited, and within ten days previous to such deferred application, and that said party has been diligent in ascertaining the facts upon which said action is based. In causes pending and at issue when this rule shall take effect, said motion shall be entered within twenty days therefrom: *Provided*, that a deferred application may be made upon complying with the terms above prescribed.

Adopted February 16, 1906, to take effect February 20, 1906.

JUNE TERM, 1904.*

McMILLAN *v.* REAUME.[1]

1. STATUTE OF LIMITATIONS—SECOND SUIT FOR SAME CAUSE—MISTAKE OF REMEDY.

   Where plaintiff, before her right of action was barred by the statute of limitations, brought suit in *assumpsit* for fraud in the sale of real estate, which action was defeated on the ground that she had mistaken her form of remedy, and not upon the merits, a second action in tort for the same fraud, begun within one year after the final determination of the former suit, was not barred by the statute. 3 Comp. Laws, § 9738.

2. FRAUD—CONFLICT OF EVIDENCE—QUESTION FOR JURY.

   Where there is a substantial conflict in the evidence upon a question of fraud, it should be submitted to the jury.

3. SAME—MEASURE OF DAMAGES—EXCEPTIONS TO GENERAL RULE.

   In an action for fraud in inducing plaintiff to sell an interest in real estate for less than it was worth, the measure of damages is the difference between what she received and what it was reasonably worth; and, if there is anything in the circumstances of the case to take it out of the general rule, the defendant should call the court's attention to it by a request.

Error to Wayne; Frazer, J. Submitted February 26, 1904. (Docket No. 79.) Decided June 25, 1904.

Case by Josephine Bedier McMillan against Denis J. Reaume, Hiram D. Willmarth, and Jay Fuller for fraud in the sale of real estate. From a judgment for plaintiff, defendants bring error. Affirmed.

The circumstances and facts upon which the present suit is based are sufficiently stated in the three former de-

*Continued from Vol. 136.

[1]Rehearing denied October 27, 1904.

cisions of this court based upon the same transaction. *Bedier* v. *Reaume*, 95 Mich. 518 (55 N. W. 366); *Bedier* v. *Fuller*, 106 Mich. 342 (64 N. W. 331); *Id.*, 116 Mich. 126 (74 N. W. 506). The first suit was brought on the chancery side of the court to set aside the deed given by plaintiff, the complainant in that suit, on the ground of fraud. The bill was dismissed in the court below, and the decree affirmed in this court. Plaintiff then, in the belief that she could waive the tort and sue in *assumpsit*, brought the second suit. The declaration contained a special count and the common counts. The demurrer to the special count was sustained both in the circuit and in this court (106 Mich. 342 [64 N. W. 331]) for the reason that plaintiff could not disaffirm the contract, waive the tort, and maintain *assumpsit* as upon an implied promise for the difference between the amount received and the actual value. Plaintiff then went to trial upon the common counts, and her claim will be found stated in the third case in this court. 116 Mich. 126 (74 N. W. 506). Upon the opening statement in that case by her counsel, the court directed a verdict for defendants upon the ground that she had affirmed the contract, and could not, therefore, recover "as for an implied promise in *assumpsit*." After the determination of the former suit, plaintiff then brought this action of tort, based upon the fraud alleged to have been committed by the defendants upon her in the sale of her interest in her father's estate. She recovered verdict and judgment. Three questions are presented: (1) Is the action barred by the statute of limitations? (2) Was there evidence of fraud to justify the verdict? (3) Was the correct rule of damages submitted to the jury?

John D. Conely (*William C. Stuart*, of counsel), for appellants.

Fred A. Baker, for appellee.

GRANT, J. (*after stating the facts*). 1. The princi-

pal and most important question arises upon the statute of limitations. That portion of the statute applicable to the case is as follows:

"If, in any action duly commenced within the time limited in this chapter and allowed therefor, * * * the writ be abated, or the action otherwise avoided or defeated, * * * for any matter of form, or if, after a verdict for the plaintiff, the judgment shall be arrested, or * * * shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein." 3 Comp. Laws, § 9738.

The only suit determined within one year prior to the commencement of this suit was that upon the common counts, which was determined in May, 1897, and this suit was commenced in April, 1898,—within one year after the final determination of the former suit. This suit was not a determination upon the merits. The merits were not entered upon. The plaintiff and her counsel believed that they could try the merits of the controversy in an action of *assumpsit*, instead of tort. No testimony was taken. After the opening statement, the court held that the plaintiff's suit was planted upon a mistaken view of the law; in other words, plaintiff had mistaken her form of remedy.

We think the statute clearly covers such a case. Our statute of limitations was borrowed from that of Massachusetts. It was said by the supreme court of that State, speaking through Chief Justice Shaw:

"This is a remedial statute, both in its enacting and qualifying clauses, and should have such construction as will best carry into effect the intent of the legislature; * * * and the presumption [of payment] does not arise if the creditor resorts to legal diligence to recover his debt within the time limited."

That court therefore held that, where the first letters of administration were held to be a nullity, and a second suit was commenced within one year after that decision, and

more than six years after the debt accrued, the new suit could be maintained. *Coffin* v. *Cottle*, 16 Pick. 383, 385.

It is not an infrequent occurrence for attorneys to make a mistake in the form of the remedy. Where they have acted in good faith, the statute should be held to apply. So, where an action upon contract was defeated on demurrer to a declaration in a suit at law, a bill in equity was held maintainable under this statute. *Taft* v. *Stow*, 167 Mass. 363 (45 N. E. 752); *Phelps* v. *Wood*, 9 Vt. 399; *Spear* v. *Newell*, 13 Vt. 288.

2. Without entering into details, we think there was sufficient evidence to justify the submission of the question of fraud to the jury. If there was any substantial conflict of evidence, it belonged to the jury; and we think there was.

3. The court instructed the jury that, if they should find for the plaintiff, the measure of damages would be the difference between what the property sold for and what her interest really was; *i. e.*, the difference between what she actually received and what her interest was worth. It is contended that plaintiff knew that her share was worth much more than she received for it, and that, therefore, the true measure of damages would be the difference between what her interest was worth and what she was led to believe it to be worth. While there is evidence that plaintiff knew that, aside from debts, the value of the widow's dower, and expense of litigation, the value of the estate was more than $4,500, yet her claim is based upon the theory that these defendants induced her to believe that $4,500 was all her interest was in fact worth. Furthermore, counsel for the defendants preferred no request for instruction upon this point. The rule laid down by the court is the usual measure of damages. If the defendants contended that there was anything in the peculiar circumstances of this case to bring it without the general rule, it was their duty to call the attention of the court to the matter. We think the instruction correct.

The judgment is affirmed.

The other Justices concurred.

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CLUTE v. EVERHART.

1. COURTS—JURISDICTION—WAIVER.
   Objections to the jurisdiction of the court over the person of defendant are waived by pleading the general issue and going to trial on the merits.[1]

2. REPLEVIN—POSSESSION—QUESTION FOR JURY.
   Where certain turkeys were shown to have been shut up by defendant before the issuance of a writ of replevin therefor, and defendant's testimony tended to show that he had let them out, and that they went towards plaintiff's residence, and plaintiff's testimony tended to show that they never came home, defendant was not entitled to a directed verdict on the ground that the property was not in his possession at the time the writ issued.

3. SAME—WAIVER OF RETURN—DAMAGES.
   A defendant in replevin who was not the owner of the property, nor entitled to its possession, and who waived a return, and defended on the ground that he did not have possession at the time the writ issued, was not entitled to a judgment for its value.

Error to Cass; Carr, J. Submitted April 5, 1904. (Docket No. 127.) Decided June 25, 1904.

Replevin by John Clute against Charles Everhart. From a judgment for plaintiff, defendant brings error. Affirmed.

Walter C. Jones, for appellant.

Cassius M. Eby (*F. W. Knowlen*, of counsel), for appellee.

HOOKER, J. The statement of facts contained in the brief of plaintiff in error (defendant below) alleges that Clute, the plaintiff below, filed an affidavit for the replevin

[1] Act No. 310, Pub. Acts 1905, permits such questions to be reviewed on error after final judgment.

of some turkeys, of the value of $15, with a justice of the peace, on the 11th of November, 1902, but that a proper bond was not filed at that time. The writ was issued, but no return was made. On the return day, November 17th, the defendant moved to dismiss the writ. This was done, and the justice made an order that the property replevied be returned to the defendant. The turkeys taken, viz., nine, were not returned, but remained in the hands of the plaintiff, to whom the officer had delivered them. Defendant states that nine of the turkeys were seized and delivered to the plaintiff, and were never returned to him, and this is not denied in plaintiff's brief. Plaintiff testified that they remained in his possession after such delivery by the officer.

A new affidavit and bond were filed upon the same day, and a writ returnable November 24th was issued. This writ was returned; the return being dated November 17th, being the same day of its issue. Upon the return day, viz., November 24th, the defendant appeared specially and moved to dismiss the suit upon the ground of an improper service; the copy not showing the date of the writ, or the place of its issue, otherwise than in its order for a return. The copy served was attached to the motion, and the date and place of issue were omitted from the blanks therefor.

The docket entry shows that this motion was denied, and that an *alias* writ was issued and served upon the defendant, who was in court; being dated November 24, 1902. This probably means that a copy of the writ issued November 17th was served, as no *alias* writ appears in the record, and in the amended return it is called an *alias* copy of said writ. Judgment was then rendered for the plaintiff, and the defendant took a special appeal to the circuit court. The grounds of the special appeal were:

1. That a true copy of the writ was not served, and therefore that the justice did not acquire jurisdiction in the case.

2. That the justice erred in denying the motion to dismiss.

3. That the court erred in issuing an *alias* writ returnable on the same day that it issued.

4. That, defendant not further appearing, the rendition of judgment by the justice was erroneous.

These points are stated in various ways, but the above is the substance of the irregularities complained of. The justice made no return to the allegations of fact or error contained in the affidavit for special appeal.

In the circuit court the defendant moved to dismiss the writ and to quash the proceedings and assess defendant's damages, and he waived a return of the property. The court found that there was no error in the proceedings before the justice, and overruled the errors on the special appeal. The defendant excepted to this, and four days later the cause was brought on for trial upon the merits before a jury, a verdict and judgment being rendered for the plaintiff, and the case is before us upon a bill of exceptions.

At the opening of the trial the following occurred:

"*Mr. Jones:* In the special appeal, your honor overruling the special appeal and setting the case for trial, and, inasmuch as there has been no plea, I at this time want to file a plea of the general issue, and reserving unto the defendant his rights by exceptions heretofore taken and filed to the court overruling the special appeal."

"PLEA.

[Title of Court and Cause.]

"The above-named defendant, Charles Everhart, comes and demands a trial of the matters set forth in the plaintiff's declaration, reserving unto defendant exceptions heretofore taken in this cause in the court dismissing the defendant's special appeal.

"WALTER C. JONES,
"Attorney for Defendant."

Counsel for the defendant now raises the following questions:

1. The attempted service of the writ did not confer

jurisdiction, and the case should have been dismissed on special appeal.

2. Plaintiff could not maintain replevin for the property which was not in defendant's possession on November 17th, when the writ issued.

3. Plaintiff was not entitled to recover without accounting for the value of the property taken upon the first writ.

4. The plaintiff should not have been allowed to recover, because the title to the turkeys was in another.

5. Verdict should have been directed for the defendant, because the proofs failed to show that the property was in the possession of defendant when the action was commenced.

If it be conceded that the justice acquired no jurisdiction of the defendant, by reason of the defective copy of the writ served, the questions raised by the special appeal were waived by the plea of the general issue interposed at circuit, and the subsequent trial there. *Manhard* v. *Schott*, 37 Mich. 234; *Dailey* v. *Kennedy*, 64 Mich. 208 (31 N. W. 125); *Improved-Match Co.* v. *Insurance Co.*, 122 Mich. 256 (80 N. W. 1088).

Defendant claims that the evidence conclusively shows that nine of the turkeys were in the plaintiff's possession at the time the second writ was issued, and that it as clearly shows that the other four were not in the defendant's possession at that time, and that it was error upon the part of the circuit judge not to direct a verdict for the defendant in accordance with his request, for the reasons:

"1. Because the testimony on the part of plaintiff shows that at the time this action, or the one now before the court, was brought, the property was in possession of the plaintiff, and this action will not lie.

"2. Because there is no evidence in the case that the property in question was ever in the possession of defendant, so far as this case is concerned."

The plaintiff was not entitled to maintain a replevin for property in his own possession, as the nine turkeys were. But this did not entitle the defendant to a verdict, and, unless he is right in his claim as to the four turkeys, the court should not have directed such a verdict. The thirteen

turkeys were shown to have been in defendant's possession previous to the issue of the writ. He testified that he shut up thirteen of them. He offered testimony tending to show that he turned out four of them, and that they went towards the plaintiff's; but they never went home, according to plaintiff's testimony. The question was one for the jury, who found against the defendant. We cannot set aside the verdict upon the ground that a verdict should have been directed for the defendant, for the reason that plaintiff was entitled to go to the jury as to the four turkeys, whether he was as to the nine or not.

The court instructed the jury that the plaintiff could not recover for the nine turkeys, because they were in his own possession at the time the writ issued. The defendant waived a return of the property, and claimed the value. The court left to the jury the question whether the turkeys belonged to him or the plaintiff, and directed them to give him a verdict for the value of such as belonged to him. There would be no justice in giving him a verdict for the value of plaintiff's turkeys upon no other ground than that he did not have possession of them when the suit was begun. There was no substance to the claim that plaintiff could not maintain his suit because the turkeys belonged to his wife. The jury must have found that the plaintiff was the owner and entitled to the possession of this property, and that defendant was not. Under such circumstances, defendant was not entitled to a verdict for the value of plaintiff's property. *Treadwell* v. *Paddock*, 75 Mich. 286 (42 N. W. 820); *Pearl* v. *Garlock*, 61 Mich. 419 (28 N. W. 155, 1 Am. St. Rep. 603).

The judgment is affirmed.

The other Justices concurred.

FRIESENHAN *v.* MAINES.

1. FALSE IMPRISONMENT—LEGAL ARREST—UNLAWFUL DETENTION—TRESPASS AB INITIO.

   An unlawful detention following a lawful arrest by a sheriff does not make him a trespasser *ab initio*, unless the original arrest was made with the intent of being used as a cover for a subsequent wrong.

2. SAME—HABEAS CORPUS—DISCHARGE—RES JUDICATA.

   Where a petition for *habeas corpus* showed that the prisoner had been detained an unreasonable time without an opportunity of giving bail, and made no claim that the arrest was illegal, and no testimony was taken, and no order discharging the prisoner could be found, but it was shown by parol that he had been discharged on the ground of an unreasonable detention, the discharge was not an adjudication that the arrest was illegal.

3. HABEAS CORPUS—DISCHARGE—PAROL EVIDENCE.

   Where no order discharging a prisoner on *habeas corpus* proceedings is found, parol evidence is competent to show the ground on which the discharge was based.

4. SAME—FALSE IMPRISONMENT—EVIDENCE—MITIGATION OF DAMAGES.

   In an action for false imprisonment, plaintiff's subsequent admission of guilt of the charge on which he was arrested is admissible in mitigation of damages, although he was discharged on *habeas corpus* on the ground of an unlawful detention.

5. FALSE IMPRISONMENT—DAMAGES—COSTS OF HABEAS CORPUS PROCEEDINGS.

   In an action for false imprisonment, plaintiff is not entitled to recover attorney fees incurred in *habeas corpus* proceedings for his release, where such proceedings were instituted by his father without his consent, and the attorneys were not employed by him.

6. SAME—TRIAL—ARGUMENT OF COUNSEL.

   Where a confessed seducer brought an action for false imprisonment because he was detained in jail two days without being brought before a magistrate, it was permissible for de-

fendant's counsel to indulge in severe criticism in his argument to the jury.

Error to St. Clair; Law, J. Submitted April 7, 1904. (Docket No. 19.) Decided June 25, 1904.

Case by Joseph Friesenhan against Harrison W. Maines for false imprisonment. From a judgment for plaintiff for nominal damages only, he brings error. Affirmed.

This is an action upon the case for false imprisonment. The essential facts are as follows: On Friday, January 31, 1902, one Mrs. Halliday, who lives in Sanilac county, with her daughter Mrs. Norris, of Port Huron, called on the defendant, who was then the sheriff of St. Clair county. Mrs. Halliday told defendant that she had a daughter who had been keeping company with the plaintiff right along with the intention and promise of marriage; that she was now about to be confined, and for that reason could not come out of the house. Defendant talked with Mrs. Halliday for some time, and she stated that plaintiff had promised to marry this daughter, and she also showed him several letters written by plaintiff to her daughter. Defendant then told these ladies to go to the prosecuting attorney's office, and they went away together. She and her daughter then called upon the assistant prosecuting attorney, Mr. Alex. Moore, Deputy Sheriff Shannon coming into Mr. Moore's private office with them. Mrs. Halliday stated, in substance, to Mr. Moore and Mr. Shannon that Joseph Friesenhan had seduced her daughter Almira, and that she was not in a condition to come to the office by reason of sickness. She produced the letters above mentioned. She stated that she had had a conversation with Joseph Friesenhan about 30 days prior to the time she came to Mr. Moore's office, and that plaintiff had admitted to her that he was the cause of the girl's trouble, and had said that he would right the wrong by marrying the girl. She said he had apparently changed his mind, or was neglect-

ing the girl, and that she had come to Port Huron to protect her daughter. The daughter had been stopping with Mrs. Norris in Port Huron. Mr. Moore thereupon told Deputy Sheriff Shannon that the cause of action as stated was a felony, and that, inasmuch as Mrs. Halliday was here from Sanilac county, it might become known to the plaintiff that she was here, and he might leave, and that he (Moore) wanted him (Shannon) to take plaintiff in charge that night. Deputy Sheriff Shannon then went to Sheriff Maines. This was about 6 p. m. Shannon told the sheriff that young Friesenhan had got a girl in trouble, and that Alex. Moore wanted him to go out and get him at once, as he (Moore) was afraid the plaintiff would hear what was going on, and would get out of the country.

Defendant and Deputy Shannon then drove to the home of plaintiff. Mr. Shannon went in, and brought out plaintiff, and the three rode back to the jail together. On the way back plaintiff wanted to know what they were taking him for. Defendant told him for getting a girl in trouble, and plaintiff answered, "Which one?" Defendant told him it was a girl who used to live in Sanilac county, and plaintiff answered, "Oh, yes, I know; I can fix that matter up if I can see the girl." Mr. Shannon took plaintiff to the jail. The next day Mr. Moore went over to the sheriff's office. Defendant brought plaintiff into the office, and Moore talked the matter over with him. After explaining to plaintiff who he was, and telling him that any statement he might make would be used either for or against him, as he might see fit, he explained the charge which had been brought against him, and asked the plaintiff if he had anything to say about the matter. Plaintiff thereupon stated that he had promised to marry the girl, and that upon said promise he had intercourse with her. He said that he had seduced her in Port Huron about the month of April, and admitted writing the letters. He also stated that he would not marry the girl.

At the time Mrs. Halliday and Mrs. Norris were in Mr. Moore's office, Mr. Moore prepared a complaint and warrant in the name of Mrs. Halliday, and called Justice George to his office to sign the same, but afterwards changed his mind, deciding that it would be better for the girl to make the complaint. He accordingly changed the name, handed the complaint and warrant to Justice George, and requested him to go up to the girl's residence Saturday morning, and take the complaint. This Justice George was unable to do, by reason of his official business, until Monday morning.

On Saturday evening, February 1, 1902, the day after the arrest, Mr. Hovey, one of the attorneys for the plaintiff, went to the office of Justice Wagner, and asked him if he knew anything about the case of the *People* v. *Friesenhan*, to which the latter replied that he did not know anything about it; that no complaint had been made to him, and that he had issued no warrant; that he had been busy in the circuit court, and had turned over all matters to Justice George. Justice George came in at this point, and told them that he had issued no warrant. Justice Wagner then said that he was powerless in the matter. Mr. Hovey agreed with him, but said he could remedy the situation by *habeas corpus*, saying he was sure he had a case to base his *habeas corpus* proceedings upon, and that he would make somebody pay for it.

On Monday morning, February 3d, Mathew Friesenhan, plaintiff's father, petitioned for and obtained a writ of *habeas corpus*. The sheriff answered the writ, a hearing was had, and an order made discharging plaintiff. No testimony was taken at the hearing.

Another complaint was made and another warrant issued, and plaintiff was again arrested. On Thursday evening, February 6, 1902, plaintiff married Almira Halliday. That evening he had a talk with Mr. Alex. Moore, in which he told Mr. Moore that he wanted the marriage to end all the trouble; that the action against the sheriff was not of his instigation, and that he did not

want it, but that it was at the instigation of his father and Mr. Hovey.

Mr. Hovey testified that he paid out for the *habeas corpus* proceedings the sum of $4.13, and that he charged the plaintiff for his services $50. He also testified that he had books of account, had this charged in them, and upon request he brought his books into court, but then refused to produce them. Plaintiff recovered a verdict of six cents.

Hovey & Stockwell, for appellant.

Avery Bros. & Walsh and *Cady & Crandall*, for appellee.

GRANT, J. (*after stating the facts*). There are 52 assignments of error. We will mention and dispose of those we deem of sufficient importance to discuss.

1. The court instructed the jury that the crime of seduction is a felony, and that, under the undisputed evidence, the arrest of the plaintiff by the defendant without a warrant was justifiable, and that the facts placed before defendant justified him in believing that plaintiff was guilty of the crime. That he was in fact guilty is established beyond controversy. The instruction was correct.

Plaintiff, however, contends that, though the arrest was legal, the unlawful detention made defendant a trespasser *ab initio*. The rule invoked has no application to this case. That rule is applied to cases where the legal arrest is used as a cover to subsequent illegal conduct. There is no evidence in this case even tending to show that the arrest was made with any intent to detain plaintiff an unreasonable time, or to do him any other wrong. In such case the legality of the arrest is not tainted by the subsequent illegal detention. *Taylor* v. *Jones*, 42 N. H. 25; *Page* v. *De Puy*, 40 Ill. 506; *Griel* v. *Hunter*, 40 Ala. 542.

2. The court instructed the jury that the discharge of the plaintiff on *habeas corpus* proceedings was a final

adjudication that the detention was illegal. Plaintiff's counsel insist that it also was conclusive that the arrest was illegal. No testimony was taken upon that hearing. The petition of plaintiff's father for the writ of *habeas corpus* averred that two justices of the peace had offices within 100 feet of the jail, and that plaintiff had been detained during that time without bail, and without being brought before a magistrate having authority to admit to bail. No claim is made in the petition that the arrest was illegal. The return of the defendant to the writ stated the circumstances of the arrest. It was also shown by parol evidence—no order of the circuit judge being found—that plaintiff was discharged from custody because he had been detained for an unreasonable length of time. It seems clear that, under these circumstances, the discharge was not and could not have been based upon the illegality of the arrest, and that plaintiff's father did not ask for his discharge upon that ground. It follows that the instruction of the judge was correct. It was also competent to show the reason on which the discharge was based.

3. Plaintiff's subsequent admission of guilt was admissible in mitigation of damages.

4. Error is assigned upon the refusal of the judge to instruct the jury to allow plaintiff as damages the cost of the *habeas corpus* proceedings, amounting to $54.13. The request was properly refused. There was testimony that the plaintiff had no hand in bringing that suit; that it was brought by his father; and that he desired his marriage with the girl to end all litigation growing out of the affair, including this suit. The court instructed the jury that, if the attorneys were employed by plaintiff either expressly or impliedly, they should include those expenses in their verdict. The evidence justified the instruction.

5. Complaint is made that the attorney for the defendant, in his argument to the jury, used language not justifiable by the record. The entire argument of the attorney is printed in the record. We find nothing in it to con-

demn. A confessed seducer was asking damages because he was detained in jail two days without being brought before a magistrate. The occasion and the facts justified severe criticism.

We find no error in the record, and the judgment is affirmed.

The other Justices concurred.

CROPSEY *v.* JOHNSTON.

1. WILLS — POWERS OF TRUSTEE — COLLUSION — INVESTMENT OF TRUST FUNDS.

   A will bequeathing to testator's son $5,000 in cash arising from the former's property, "such as windmill stock or any other source," to be controlled by a trustee for said son, a specified amount, whether arising from dividends on said stock or from money at interest, to be paid to him annually, did not give the trustee, who received the fund in cash, a right to purchase windmill stock from another son, by connivance and collusion with him, at a price in excess of its value.

2. TRUSTS—MISAPPROPRIATION OF FUNDS—PAYMENT OF FUND INTO COURT.

   Where a legatee, entitled to the income of a trust fund, filed a bill against the trustee, making the persons entitled to the principal after the death of the first-named legatee parties, who by their answer consented that the court should appoint some suitable person as trustee, and complainant died pending the suit, which was revived in the name of his executor, it was competent for the court, on finding the trustee guilty of misappropriating the fund, to decree that the fund should be paid into court, subject to a further hearing and adjudication.

Appeal from Kalamazoo; Adams, J. Submitted April 8, 1904. (Docket No. 23.) Decided June 25, 1904.

Bill by Jesse R. Cropsey, executor of the last will and testament of Melvin Williams, deceased, against Frank P. Johnston, trustee, Malcolm B. Williams, and others, for an accounting. From a decree for complainant, the above-named defendants appeal. Affirmed.

Jesse R. Cropsey and *Dallas Boudeman*, for complainant.

A. M. & C. H. Stearns (*William G. Howard*, of counsel), for appellants.

HOOKER, J. The bill in this cause was filed by Melvin Williams, who died pending the litigation, and the proceeding was revived in the name of Cropsey, his executor, and continued in his name.

Melvin Williams was one of several children of Bradley S. Williams, a wealthy resident of Kalamazoo. Melvin Williams, a son, was poor, and a veteran of the Civil War between the United States and the late Southern Confederacy. Bradley S. Williams was owner of a large amount of the capital stock of the Williams Manufacturing Company, a corporation engaged in the manufacture of windmills at Kalamazoo, at the time of his death. He died in 1893, leaving a will, which was duly probated.

It contained the following provisions, viz.:

"*Seventh.* I give, devise, and bequeath to my son Melvin Williams five thousand dollars in cash arising from my property, such as windmill stock or any other source, to be held and controlled by Frank P. Johnston, trustee, for the benefit of said Melvin Williams. I also give and bequeath to my son Melvin Williams all notes and obligations that I hold against him, and the interest accruing from the same, amounting at this date to about $6,300.

"I hereby appoint Frank P. Johnston, of Kalamazoo, Michigan, my trustee for the purpose of handling and taking care of the five thousand dollars which I have hereby devised and bequeathed to my son Melvin Williams. The dividends arising from my windmill stock, or money at interest, he shall pay over and deliver annually to my son Melvin Williams, from year to year, so long as he shall

live, three hundred and fifty dollars, arising from said interest or dividend money, less the cost for doing the business; and at his death the said five thousand dollars I direct shall be by him, the said Frank P. Johnston, trustee, conveyed, assigned, and turned over to Mary Williams, former wife of my son Melvin Williams, and to her children by the said Melvin Williams, namely, Lottie Williams, Burt Williams, Homer Williams, and Maud Williams, so to be held and owned by them share and share alike."

Frank P. Johnston received the sum of $5,000 under the provision, and the bill is filed to compel him to account, and respond for a misappropriation of the fund.

Malcolm B. Williams was a son, and Homer Manvel the executor, of Bradley S. Williams. On May 15, 1894, Homer Manvel, as executor, gave to Johnston, as trustee, a check for $5,000 in payment of the amount provided by the will. Johnston immediately indorsed this check and gave it to Malcolm B. Williams in payment for stock in the windmill company, which the parties now claim that Johnston bought as an investment with the fund, receiving back a small balance of $250. From that time to the death of Melvin Williams, he paid but a fraction of the installments provided by the will to him; claiming that the money was invested in windmill stock, and was not paying dividends. Melvin during this time was in poverty, supported at the Soldiers' Home in California, and appealed to Johnston often for money. The evidence shows that, at the time of this transaction, the windmill business was not doing well, and the conclusion is irresistible that Malcolm took advantage of his brother, with the connivance of Johnston; getting $5,000 in cash, or thereabouts, in exchange for his depreciated stock.

The court found that the purchase of this stock was without authority of law, and void as to Melvin Williams and his family, and it was adjudged that Malcolm B. Williams account for and pay to the complainant, the executor, as the income of the sum of $4,750 (the exact amount paid for the stock), interest thereon at the rate of

6 per cent. per annum from July 15, 1894, to December 5, 1902 (that being the date of the death of Melvin Williams), with interest upon yearly installments after due, less a credit for such sums as had been paid to said Melvin Williams, with interest thereon as aforesaid; the balance found to be due to said complainant being $2,736.98. It was further ordered that the principal sum of $4,750 be paid by Malcolm B. Williams to the register, with interest from December 5, 1902. It was also ordered that defendant Johnston pay similar interest upon the sum of $250 (the remainder of said fund), less fees in said decree determined at $134.58, and to pay to the register said sum of $250, with interest. The disposition of the moneys ordered to be paid to the register was made a subject for further hearing and adjudication. It was further ordered that, upon compliance with the decree by Williams, Johnston should reassign the stock to him. Johnston and Williams have appealed.

Counsel make an elaborate argument in support of the right of Johnston, the trustee, to make the purchase of stock for Melvin, but admit in their brief that, if there was collusion between the appellants to defraud Melvin, there would be a liability, unless barred by laches or the statute of limitations. We are unable to construe this will in accord with defendants' contention. It provided for a legacy in cash, and contemplated the sale of windmill stock, of which the testator had considerable, or other property, if necessary. He endeavored to assure the payment of a $350 annual income to Melvin, whether it should arise from interest or dividend money. From this it is urged that he must have contemplated that the trustee would purchase windmill stock with the fund, and he did this; paying more than the stock was appraised at, instead of letting Melvin have stock from the estate at the inventory price. If it be conceded that the trustee might have used the fund by investing in stocks of any kind, we are of the opinion that the evidence indicates undue thrift on the part of Malcolm, and that, by permitting him to unload a

large block of stock upon his brother at an exorbitant price, Johnston was a participant in the wrong. Both had an intimate knowledge of the affairs of the company, and were in a position to anticipate the inevitable consequence of depreciation. We think advantage was taken of this brother, and that the decree is a just one, and that, under the circumstances of this case and the state of the record, there is no occasion to discuss the questions of laches and statute of limitations.

It is claimed that the original complainant was not interested in the disposition of the principal of the fund, and that the court should not have made a decree regarding it. Assuming that the appeal properly raises this question, we think the bill and the answers of the parties who claim to be entitled to this fund justify the court in taking this fund into its custody for such disposition as law and justice may require, and for such persons as may show their right to it, under the prayers of the consent of these parties, who are, apparently without dispute, to be the residuary legatees.

The decree is affirmed, with costs.

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

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148 118

SMITH *v.* JACKSON & BATTLE CREEK TRACTION CO.

1. HIGHWAYS—STREET RAILWAYS—ADDITIONAL SERVITUDE.
   The use of the highways by street-railway companies is a legitimate use of the highways, and does not create an additional servitude.

2. STATE AND TERRITORIAL ROADS — LEGISLATIVE CONTROL — STREET RAILWAYS.
   The legislature has control over State and Territorial roads, and may authorize the construction of street railways over them.

3. SAME—TOWNSHIP BOARDS—HIGHWAY COMMISSIONERS.

The provisions of 2 Comp. Laws, § 6446, authorizing the construction of street railways over the streets and highways of any township upon such terms and conditions as may be agreed upon by the company and the township board, are broad enough to include State and Territorial roads, and it is unnecessary to obtain the consent of the highway commissioner to the construction of a street railway over such roads.

Appeal from Calhoun; Hopkins, J. Submitted April 8, 1904. (Docket No. 193.) Decided June 25, 1904.

Bill by David A. Smith, highway commissioner of Marengo township, against the Jackson & Battle Creek Traction Company, to enjoin the maintenance of an electric railway. From an order sustaining a demurrer to the bill, complainant appeals. Affirmed.

The following are the allegations and prayer of the bill filed in this case:

1. That complainant is the present highway commissioner, and has been highway commissioner since April 14, 1902, and that he has custody, charge, and control of all State and Territorial roads running through the township.

2. That the defendant is a Michigan corporation (not stating under what particular law it is incorporated).

3. That on July 18, 1901, the township board granted a franchise to William A. Foote, his associates, assigns, etc. The proceedings of that board are set up, and show that all the members of the board were present, and that the resolution granting the permission was unanimously adopted. The permission is set up at length, and grants the right to construct and operate a street railway in and through such of the highways and public places of the township of Marengo as may be necessary in building a certain line. Section 2 of the original ordinance provides that, where the track was laid in the highway, it should be laid as near as possible to the outside line of the highway. It also provides that the construction of the railway shall be under the supervision of the highway commissioner. Section 4 provides for the use of electric

power. Section 5 provides that cars shall be stopped at all convenient points.

4. Section 1 of the grant of permission was afterwards, and on October 3, 1901, at a meeting of the township board, at which all the members of the board were present, and by a vote of a majority of the board, amended so as to provide that, commencing at a point in the east limits of the city of Marshall, the road should run along the center of State street, or the Territorial Road, across the west part of section 30, to the point where the Duck Lake Road intersects. By the amendment the grantee was also permitted to build the railway on a private right of way adjacent to the road, and for that purpose to cross any intersecting highways.

5. That the grantee and his associates proceeded to organize themselves into a corporation under the style of the Calhoun County Railway Company, and use the powers, privileges, and authority granted by the township board.

6. That they graded and constructed their roadbed along the route as set forth in the amended franchise.

7. That the franchise granted by the township board purports to grant authority to construct and operate a street railway in and along the center of the Territorial Road from the east limits of Marshall across the west part of section 30, and then along the north side of the road to the east line of the township.

8. That the Territorial Road mentioned was laid out and established by the Territory of Michigan previous to her admission as a State.

9. That no application was ever made to complainant or to the board of supervisors of Calhoun county for permission to build the road over the route specified, nor was any such permission granted by complainant or by the board of supervisors.

10. That, under the laws of Michigan, the town board of the township of Marengo has no jurisdiction of State and Territorial roads, and that the grant of a franchise to construct, etc., a street railway in the highway known as the "Territorial Road" was without authority, and a mere nullity, and conferred no right on the grantee; that the township board was usurping the jurisdiction and authority vested in the highway commissioner.

11. That the electric railway, as constructed along the center of the Territorial Road across the west part of sec-

tion 30, has rendered the highway dangerous and unsafe for travel; that the road is only of the width of —— feet, and is one of the principal thoroughfares leading into the city of Marshall; and that the railway, running through the center of the highway without any rights therein, is a great menace to the safety of the residents of the township of Marengo and others, and damages complainant, as highway commissioner, to the amount of $1,000.

12. That the complainant has requested said Foote and said Calhoun County Railway Company to abandon the franchise granted by the town board, and to make application to the proper authorities for the granting of such franchise, and has furnished them, through his solicitors, a law brief on the validity of the franchise.

13. Shows a conveyance of the rights of the Calhoun County Railway Company to the defendant in this suit.

14. That, unless restrained, the defendant will continue to run and operate its railroad in and along the Territorial Road, and the same will be a continuous nuisance to complainant as highway commissioner, and will cause continuous and irreparable injury.

The prayer for relief is that the franchise granted by the township board may be set aside and declared null and void, and delivered up to the court to be canceled; that the defendant be perpetually enjoined from maintaining any electric or other railway in, upon, through, or across any part of the Territorial Road within the township of Marengo.

To this bill the defendant demurred for the following reasons:

1. That it does not appear that the said defendant and the said Calhoun County Railway Company are or were not corporations organized under chapter 168 of the Compiled Laws of 1897.

2. That it does not appear that the consent and authority of the highway commissioner of the township of Marengo for the construction and maintenance of the railway mentioned in said bill of complaint has not been expressly granted and conferred on said William A. Foote and on the Calhoun County Railway Company, in said bill mentioned.

3. That it appears by the said bill of complaint that due

power and authority has been granted to the said William A. Foote, the Calhoun County Railway Company, and the defendant herein for the construction, maintenance, and operation of the railway mentioned in said bill of complaint.

4. That it does not appear how or in what manner the construction of said railway has rendered the highway dangerous and unsafe for travel, or how or in what manner the said complainant or the residents of Marengo have been damaged to the amount of $1,000, or in any amount.

5. That the said bill of complaint does not set forth such facts and circumstances as entitle the complainant to the relief prayed for in said bill of complaint.

6. That the said bill of complaint does not set forth any such facts and circumstances as entitle the said complainant, in his capacity as highway commissioner or otherwise, to any relief in this court.

The court sustained the demurrer.

Hatch & Page, for complainant.

Mechem & Bailey, for defendant.

GRANT, J. (*after stating the facts*). While the bill does not allege the act under which the defendant was organized, we must assume that it was organized under chapter 168 of the Compiled Laws of 1897, being an act to provide for the formation of street-railway companies. That act provides that any company may construct and maintain a street railway in and along the streets and highways of any township upon such terms and conditions as may be agreed upon by the company and the township board. 2 Comp. Laws, § 6446. Under this authority of the legislature, the township board and the company agreed upon terms, a franchise was granted, the road constructed and in operation when this bill was filed. The bill does not set up any facts tending to establish the construction and use of the road along the highway in question as a nuisance in fact. The use of public highways by street-railway companies is now recognized as a legitimate use of the highways, and does not create an ad-

ditional servitude. *Austin* v. *Railway*, 134 Mich. 149 (96 N. W. 35), and authorities there cited. There is no claim in the bill or in the briefs of counsel that the defendant's railway is constructed in any other than a legitimate and proper manner, or that it obstructs travel upon the highway, or that it is not beneficial to the public in affording commodious and expeditious means of travel. The sole claim of the complainant is that, because the defendant did not procure the consent of the highway commissioner of the township, therefore the existence of the road is a nuisance *per se*.

The franchises granted to the defendant evidently provided for the construction of its road along this short piece of the Territorial highway within the township limits. There is no allegation that additional expense is caused to the township or to the highway commissioner, in the care and control of the highway, on account of the construction and use of the street railway. The bill alleges that it was to be constructed under the supervision of the highway commissioner. It is to be presumed that the highway commissioner did his duty, and supervised the construction of the road in accordance with the terms of the franchise. Now, after the road has been so constructed under the supervision of the commissioner, and at very great expense, he seeks to virtually destroy it, and that, too, without showing that the public is in any way injured or the way obstructed. Such a proceeding would be most inequitable and unjust. We deem it unnecessary to enter into a discussion of the powers of the highway commissioner and of the board of supervisors over these Territorial roads. Neither is it necessary to determine whether the complainant is now estopped to complain by reason of the assent of his predecessor in office. It is sufficient to a determination of the case to say that the legislature has control over the State and Territorial roads, and may authorize the construction of street railways over them. It has so authorized the construction of these railways along the highways of the

townships upon such terms and conditions as the township and the company may agree upon. We think the authority thus conferred is broad enough to include the State and Territorial roads within the territory of the township, and for whose condition the township is responsible. The highway commissioner has nothing whatever to do with the granting of these franchises. No power in connection therewith is imposed upon him by statute. His sole power is to see that the roads are opened and kept in repair in the same manner as township roads. 2 Comp. Laws, § 4067. If the highway is obstructed to the detriment of the traveling public, he undoubtedly is the proper person to complain, and to take steps to remove or prevent the obstruction. Beyond this power, he has none other.

Decree of the court below is affirmed, with costs.

The other Justices concurred.

BIGELOW *v.* STEARNS.

COVENANTS—TAXES—GUARANTY OF PAYMENT.

Defendants conveyed by warranty deed to plaintiff's intestate land against which there were outstanding tax liens. Defendants' grantor, recognizing his liability for the taxes, deeded to the intestate a house upon which there was a mortgage, as security for the payment of the taxes. The rents of the house were absorbed in interest, repairs, and taxes. Subsequently the house was conveyed to the mortgagee, and plaintiff realized nothing from it. The intestate, at the time such security was taken, also secured from defendants a written guaranty that the taxes should be paid in any event. *Held*, that the evidence justified the direction of a verdict for plaintiff, in an action to recover the amount of the taxes.

Error to Wayne; Donovan, J. Submitted April 12, 1904. (Docket No. 35.) Decided June 25, 1904.

Assumpsit by Ida H. Bigelow, administratrix of the estate of Lewis Bigelow, deceased, against Samuel Stearns and others, for the breach of a covenant against incumbrances. From a judgment for plaintiff on verdict directed by the court, defendants bring error. Affirmed.

Jay Fuller, for appellants.

William S. Thomas, for appellee.

HOOKER, J. The defendants, being owners as tenants in common of certain premises, sold and conveyed them to plaintiff's intestate by warranty deed. It was afterwards ascertained that there were outstanding tax claims against them, and the plaintiff's intestate, Mr. Bigelow, called upon the defendants to take care of them. They recognized the justice of this. They had purchased the property from one Holcomb, and they, together with Bigelow, had an interview with him. He appears to have recognized his liability for the taxes, and agreed to fix it for defendants. Several interviews were had between Bigelow and Holcomb. An arrangement was finally made whereby Holcomb made a bargain under the terms of which he was to deed to Bigelow a house, subject to a mortgage of $4,800, taking a contract back that if he (Holcomb) should pay the taxes, amounting to $416, he should deed the property back. Bigelow collected rents from the property, but they were absorbed by repairs, taxes, assessments, etc. Plaintiff or her intestate was obliged to pay the taxes referred to. The property, not paying the interest on the mortgage, was conveyed to the mortgagee, and plaintiff never realized anything from it.

At or about the time the security was taken, the defendants executed Exhibit I, reading as follows:

"*Whereas*, Stearns Bros. have deeded to Louis Bigelow Lot 1 and N. ½ L. 4 on Fourth ave.; and *whereas*, there are unpaid taxes of 1891 and 1892 of $416, which belongs to Henry W. Holcomb to pay, and he, being unable to pay same, has given a deed to Louis Bigelow to secure same,

of property on Greenwood avenue; but in any event we, Stearns Brothers, will guarantee that said taxes are paid and Bigelow shall suffer no loss.

"Also that the barn on property we deed stands all on the land deeded.

"STEARNS BROS.,
"Per ISAAC STEARNS."

A verdict was directed for the plaintiff, and we think the testimony in the cause justified such direction.

The other Justices concurred.

KOPS BROS. CO. *v.* SMITH.

1. SALES—BONA FIDE PURCHASER—CONSIDERATION—INDEBTEDNESS.
One who takes goods in payment of a past-due indebtedness will not be protected against a defect in the title of his vendor on the ground that he is a *bona fide* purchaser.

2. SAME—AGENCY—CREDIT.
In the absence of authority conferred, or a valid usage, an agent cannot sell property on credit.

3. SAME—FRAUD—EVIDENCE.
Plaintiff consigned pianos to its agent for sale on commission to persons desiring to use them in their homes. The agent sold them on credit, without security, to an insolvent trader, who two days later transferred them to defendant in part payment of an indebtedness. Plaintiff's name was on the pianos. The agent and trader attempted to conceal from plaintiff the fact that defendant had them. In replevin for the pianos, *held*, that there was sufficient evidence of fraud to justify the submission of the question to the jury.

Error to Wayne; Frazer, J. Submitted April 14, 1904. (Docket No. 62.) Decided June 25, 1904.

Replevin by Kops Brothers Company against Stephen B. Smith, doing business as S. B. Smith & Co. From a

judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

The plaintiff in this case is a corporation of the State of Illinois, and carrying on the business of selling pianos, with head offices in the city of New York and a branch office in the city of Chicago. D. S. Horwitz was traveling agent for the plaintiff. His duties were selling pianos, appointing agents, and selling pianos to dealers. While in Carson City, Mich., about the month of August, 1901, he met one Louis J. Morey, who at some time previous had been employed selling pianos by one J. T. McGinn, a dealer at St. Louis, Mich. After some negotiations with said Morey, Mr. Horwitz agreed to consign some pianos to him, Morey signing the contracts therefor.

On October 7th, Morey made an arrangement with McGinn to sell him one of the pianos, which Morey said he had shipped to Alma with the intention of selling it. The trade was consummated, and McGinn gave plaintiff his note on four months' time. About a week afterwards, Morey and McGinn entered into an agreement by which Morey was to work for McGinn, and transfer the other two pianos, which had been consigned by the plaintiff, to McGinn, taking McGinn's notes therefor on six months' time. Morey forwarded these notes to plaintiff, assuring it that they were perfectly good. The plaintiff refused to accept the notes, returning them to Morey, who continued to try and have plaintiff accept the notes upon his assurance that they were good. Plaintiff each time returned the notes with a demand for cash according to the terms of the contract.

J. T. McGinn had been selling pianos for defendant for several years, and at this time, after returning to Mr. Smith all the pianos he then had that he received from him, was indebted to defendant in the sum of $1,180. On the 16th day of October—two days after McGinn had received the pianos in question from Morey—he (McGinn) transferred the pianos, together with organs, a horse, notes

received on pianos, and his own note, secured by a chattel mortgage on his household effects, to defendant in settlement of his (McGinn's) account with said defendant.

Mr. Horwitz, representative of plaintiff, called on Morey, and together they called on McGinn. McGinn did not tell what he had done with the pianos, but spoke as though he intended paying for them. After some discussion McGinn agreed to give his note, but refused to sign the note prepared by Mr. Horwitz. Morey, who was present when the transfer took place from McGinn to defendant, and at this time in the employ of McGinn, did not acquaint Mr. Horwitz with the facts and circumstances. Mr. Horwitz learned that the pianos had been shipped to Detroit, where he went, and found two of the pianos in the possession of defendant. Mr. Horwitz made a demand for the pianos. The defendant refused to give them up, claiming he had bought them, and plaintiff brought an action in replevin to recover the same.

The agreement between plaintiff and Morey was as follows:

"Received of Kops Brothers Company, Chicago, Ill., on consignment, one Kops Bros. Style 4, Mahogany, No. 46,472, for sale for the account of said company, or its assigns, in the sum of $185. And I hereby agree to remit forthwith to the Kops Brothers Company, or its assigns, at its Chicago office, the proceeds of the sale of said instrument in cash in the above specified sum. It is understood that I hold the above-described instrument subject to the order of the Kops Brothers Company, or its assigns, free of expense, charges, or costs to it of any kind whatever.

"I hereby guarantee the said Kops Brothers Company against loss or damage of any kind on said instrument while in my possession or in my charge.

"In making sale of said instrument I agree that my compensation and commission hereunder shall be the sum at which I may sell same in excess of $185."

The court directed a verdict for the defendant.

Charles R. Robertson, for appellant.

Fred H. Aldrich, for appellee.

GRANT, J. (*after stating the facts*). If there was an infirmity of title to the pianos in the hands of McGinn, defendant could not be considered a *bona fide* purchaser, as he gave no new consideration for the purchase. The sole consideration for the transfer was a past-due indebtedness. *Vincent* v. *Hansen*, 113 Mich. 173 (71 N. W. 488); *Schloss* v. *Feltus*, 103 Mich. 525 (61 N. W. 797, 36 L. R. A. 161). The only question, therefore, is, Was there evidence of fraud on the part of McGinn and Morey in the sale and transfer of this property? The goods were consigned by plaintiff to Morey for sale. Until sold by Morey, the title remained in plaintiff. When a piano was sold by Morey, as between plaintiff and him the transaction was for cash, and Morey was under obligation to remit cash therefor. In the absence of authority conferred, or a valid usage, an agent cannot sell property on credit; the sale must be for cash. Mechem, Agency, § 353; *Burks* v. *Hubbard*, 69 Ala. 379.

Whether, under the contract, Morey was authorized to sell upon credit, we need not determine. It made no difference to plaintiff whether Morey sold for cash or credit, if Morey paid cash on making a sale. McGinn was in the same business as Morey, and received pianos from defendant for sale. They were consigned to him for sale on what defendant termed "consignment contracts," but the precise terms and conditions are not stated. It is a common method of carrying on business in property of this character. The sales by Morey to McGinn were not made in the usual course of trade by Morey. Morey received the pianos for sale to customers who desired to purchase for their own home use. Instead he sold them on long terms to an insolvent trader in the same business, without any security, or any attempt to protect plaintiff. McGinn was in debt to his employer to the amount of $1,180, and could not pay. The name of plaintiff as maker was upon these pianos. Whether the circumstances were sufficient to put McGinn upon inquiry as to Morey's authority to sell to him was a question for

the jury to consider in determining the question of fraud. Morey knew that plaintiff was under no obligation to take McGinn's notes, and that it was entitled to receive cash. Within two days after the alleged transfer by Morey to McGinn, McGinn turned the property over to defendant in part payment of his indebtedness. Without entering into details, the conduct of Morey and McGinn, when plaintiff's agent attempted to ascertain where this property was, and to get it back, showed an intent to deceive the plaintiff. We think there was sufficient evidence of fraud to justify the submission of the question to the jury. If the transaction was fraudulent, then the plaintiff was entitled to recover. If fraudulent, defendant's claim against McGinn is the same that it was before the transfer to him. Neither law nor justice permits a creditor to be paid with goods which his debtor has obtained by such fraud as will vitiate the title between the original vendor and vendee.

The judgment is reversed, and new trial ordered.

The other Justices concurred.

SHANE *v.* SHEARSMITH'S ESTATE.

1. ESTATES OF DECEDENTS—COMPENSATION FOR SERVICES—EVIDENCE.

   Statements by a person, since deceased, to the effect that plaintiff, who was in his employ, understood that he was to be rewarded in the end, that he (deceased) had promised to leave the business with plaintiff, and that plaintiff knew well enough what he was working for, are sufficient to justify a finding that decedent agreed to compensate plaintiff for his services by leaving him the business.

2. SAME—CLAIMS—BREACH OF CONTRACT—DAMAGES.

   The failure of a person to compensate an employé for his services by leaving, at his death, a business to the employé, as

had been agreed upon, entitles the employé to recover the value of his services as a claim against the estate.

3. MASTER AND SERVANT—MONTHLY PAYMENTS OF WAGES—EVIDENCE.

The acceptance of a certain sum at regular monthly periods for services is not conclusive that the amounts received were in full compensation for the services.

4. SAME—EXTRA COMPENSATION—INSTRUCTIONS.

Where, on the trial of a suit against an estate for a balance due as wages, the court charged the jury that "an express agreement must be found before any additional compensation can be given," it was unnecessary to give a request that "the fact that the business of decedent increased under claimant's management is no evidence that deceased promised to pay claimant more than the wages he was receiving."

5. SAME—VALUE OF SERVICES—HARMLESS ERROR.

The admission of incompetent testimony as to the value of claimant's services was not reversible error, where there was competent testimony, and the jury could not have rendered a smaller verdict under the evidence.

Error to Sanilac; Beach, J. Submitted April 12, 1904. (Docket No. 31.) Decided June 25, 1904.

Riorison Shane presented a claim against the estate of John Shearsmith, deceased, for services rendered. The claim was allowed by the commissioners, and defendant appealed to the circuit court. From a judgment there for claimant, defendant brings error. Affirmed.

Avery & Walsh and *John S. Crandell*, for appellant.

W. H. Witt and *W. H. Burgess*, for appellee.

CARPENTER, J. For several years before the death of deceased, plaintiff had been in his employ, engaged in managing a hardware and furniture store at Brown City, in this State. During this time he was paid wages,—part of the time $30 per month, and part of the time $35 per month. It is plaintiff's claim that his services were worth much more than he received; that they were rendered

under an express contract between decedent and himself that he should receive additional compensation by bequest in decedent's will, or by some interest in his business before he died; and that, as this additional compensation was never paid, he is entitled to recover the extra value of his services. This claim was presented to the commissioners on claims. They allowed the same at the sum of $1,000. An appeal was taken to the circuit court, where the case was tried before a jury, and a verdict and judgment obtained by plaintiff for $500.

The principal ground upon which it is contended that the judgment should be reversed is that there was no evidence which justified the jury in finding that the alleged express contract was in fact made. There was testimony that decedent stated that he could "hardly get along" without Shane, "* * * but he [Shane] understands that he is to be rewarded in the end; * * *" that he was "fortunate" in having "a good shopkeeper, as Mr. Shane is, here, and a good buyer and a good seller; * * *" that he "had promised to leave the hardware with Mr. Shane, or with Riorison. * * * Riorison keeps things up in good shape, because he knows well enough what he is working for." One would infer from this testimony that decedent recognized the great value of plaintiff's services, and had agreed to compensate him by leaving him the hardware. The failure to perform that contract entitles plaintiff to recover in this suit. See *In re Williams' Estate*, 106 Mich. 503 (64 N. W. 490), and cases there cited.

It is contended that a verdict should have been directed for the defendant estate because it conclusively appeared that plaintiff accepted the amounts paid him as full compensation for his services. The jury might infer from the testimony introduced on the part of the plaintiff that, when plaintiff received pay for his services, he did so under the agreement that he should receive additional compensation under the contract heretofore referred to. In other words,

the inference might well be drawn that the money paid to plaintiff was not in full compensation for his services.

Defendant preferred this and other similar requests:

"The mere fact that the business of deceased did increase is no evidence that the deceased promised to pay claimant anything more than the wages he was receiving."

We think the court sufficiently covered the points presented by these requests when he charged the jury that "an express agreement must be found before any additional compensation can be given."

It is contended by defendant that some of the testimony introduced by plaintiff to prove that his services were worth more than the amount paid him was incompetent, and improperly admitted. Assuming this contention to be sound, it nevertheless does not constitute reversible error, because plaintiff did introduce competent testimony on this issue which was not controverted by defendant, and the jury could not, according to this testimony, have rendered a smaller verdict than they did. In short, it is clear from the record that defendant was not harmed by the introduction of the evidence under consideration.

We do not think that the record shows any reversible error, or that there is any other question that demands discussion.

The judgment is therefore affirmed, with costs.

The other Justices concurred.

BROWN v. FOSTER.

1. PARTNERSHIP—AUTHORITY OF PARTNER—CONTRACTS.
   A member of a partnership engaged in selling farm implements, and in the sale of threshing machines on commission, who, by the articles of copartnership, was to have charge of the "canvassing part of the business," the other members to

"look after the buying and selling of stock," could, by reason of his general authority as a partner, bind the firm to an agreement with the owner of machinery that it should not be delivered to a purchaser until the purchase price was secured.

2. SAME—GOODS ON CONSIGNMENT—CONVERSION.

Where a threshing machine received by a partnership to be sold on commission was delivered to a purchaser in violation of the terms of the agreement under which they received it, and was subsequently taken into possession by one of the firm, his possession was the possession of the firm, and its wrongful delivery by him to another was a conversion by the firm.

3. SALE—RATIFICATION—CONVERSION.

A wrongful sale by defendants of a machine consigned to them by plaintiffs for sale on commission was not ratified by conduct indicating a willingness to let the sale stand if defendants would pay plaintiffs the value of the machine less their commissions.

4. SAME.

Defendants, having received from plaintiffs a threshing machine for sale on commission, without authority sold it to a person on condition that it should prove satisfactory. It not being satisfactory, plaintiffs offered the purchaser to exchange another machine for it, but the offer was not accepted. *Held*, that such offer was not a ratification of the sale.

5. TORTS—WAIVER—ASSUMPSIT—BAILMENTS.

Where a bailee, without authority from the owner, turned the property over to another under an agreement that, if it should prove satisfactory, such person would buy it, the owner could waive the tort, and sue the bailee on the common counts in *assumpsit* for its value.

Error to Emmet; Shepherd, J. Submitted April 15, 1904. (Docket No. 70.) Decided June 25, 1904.

Assumpsit by Frank E. Brown and John Sehler, copartners as Brown & Sehler, against Frank F. Foster, Cornelius Burke, and William H. Coon, copartners as the Harbor Springs Implement Company, to recover the value of chattels converted. From a judgment for defendants, plaintiffs bring error. Reversed.

Ward & Brown, for appellants.

Wade B. Smith and *Halstead & Halstead*, for appellees.

CARPENTER, J. This case was tried by the court without a jury. A finding of facts was made, and judgment rendered for defendants. We state such of said facts as are necessary to a disposition of the legal questions involved.

Plaintiffs are copartners engaged in the business of selling machinery at Grand Rapids, Mich. Defendants were copartners engaged in selling farm implements at Harbor Springs, Mich., under the firm name of the Harbor Springs Implement Company. Their business was the sale of farm implements, but it did not include the buying and selling of threshing machines, and no such machines were in fact sold except on commission. Some time after the formation of the partnership, plaintiffs stated to defendants that they would pay 20 per cent. commission if the defendants would procure a customer to whom they could sell a threshing outfit. The articles of copartnership between defendants contained this clause:

"The said W. H. Coon is to give his undivided time and attention to the said business, and is to have general charge of the canvassing part of said business. The said Frank F. Foster and Cornelius Burke are to look after the buying and selling of stock, to the keeping of the books of account, and the store work generally."

Before the transaction hereinafter set forth, defendant Foster notified plaintiff Brown of the substance of the foregoing clause.

On the 24th of August, 1900, defendant Coon and one Frank Gillespie met plaintiff Brown at Grand Rapids. Said plaintiffs and said Frank Gillespie, who acted for himself and assumed to act for his father, John Gillespie, entered into a written agreement whereby plaintiffs sold and said Gillespie purchased a steam threshing outfit for $650; $100 cash (which had been deposited with defend-

ants), and the payment of the balance to be secured by a mortgage upon certain chattels and a mortgage on the home farm of John Gillespie. Said Frank Gillespie signed the name of "John Gillespie Sons," but he had no authority whatever to bind his father, John, by this agreement. Said Coon, in the name of the defendant partnership, signed a writing guaranteeing "the settlement for said machinery just as agreed by the son." It was verbally agreed at this time between plaintiffs, defendant Coon, and Frank Gillespie that said Coon should go with said Gillespie to Beaver Island, where the latter lived, and procure the signatures to the necessary papers, and complete the settlement agreed upon, before the machinery should be shipped to Beaver Island from Harbor Springs. Notes and mortgages were prepared in accordance with this contract, and the notes and chattel mortgage signed by Frank Gillespie, and a real-estate mortgage was prepared to be executed by John Gillespie and wife on John's home farm, and all of these securities were delivered to defendant Coon to be taken to Beaver Island to obtain execution thereof by John Gillespie and wife. The machinery was immediately shipped by railway to Harbor Springs, billed, "Frank and John Gillespie." Frank Gillespie took the machinery from the railway company at Harbor Springs (Coon advancing from defendants' funds money to pay the freight), and carried the same to Beaver Island. John Gillespie, however, refused to carry out the proposed arrangement. Defendant Coon soon afterwards arrived at Beaver Island, and, upon learning of John Gillespie's refusal, assumed charge of the machinery. Assuming to act for plaintiffs, and without authority, he turned the same over to one Gallagher, under the arrangement that, if the power proved satisfactory, Gallagher should purchase the same for $600. Gallagher paid $80 to apply on his purchase, and used the threshing outfit during that season, but the power proved unsatisfactory, and the sale to him never has been consummated, though the machinery continues to remain in his possession.

The learned trial judge gave judgment for the defendants on the ground that the plaintiffs were not entitled to recover under their declaration, and also on the ground that the acts and dealings of Coon with Gallagher created no liability enforceable against defendants Foster and Burke. We will examine each of these questions separately, and in inverse order.

First. Was the partnership composed of the three defendants responsible for Coon's action in turning the machinery over to Gallagher? We think the verbal agreement made between defendant Coon, as the representative of his partnership, the plaintiffs, and Frank Gillespie, that the machinery should not be shipped from Harbor Springs to Beaver Island until the securities were obtained, created an obligation binding upon the defendant partnership. Though the business of the copartnership did not include the buying and selling of threshing machines, it is a necessary inference from the findings that those were sold on commission. While the articles of copartnership gave defendant Coon "the general charge of the canvass ing part of said business," and made it the duties of defendants Foster and Burke "to look after the buying and selling of stock," we cannot presume that the general authority of the defendant Coon, as a copartner, was not sufficient to authorize him to make arrangements respecting threshing machines to be sold on commission. He had, in our judgment, as the representative of the defendant partnership, sufficient authority to agree with the owner of goods to be sold on commission that they should not be delivered to a purchaser until payment of the purchase price was secured. If it were otherwise, proper arrangements between owners of goods and agents who sell on commission could not be made. Is the rule changed by the circumstance that the outfit in question was shipped in the name of the Gillespies? I do not think so. By verbal arrangement between defendant Coon, Frank Gillespie, and the plaintiffs, Coon had authority to keep the threshing machine in Harbor Springs until this settlement

was made. It is true this agreement was not in writing, but I know no provision of law that requires it to be in writing. The Gillespies recognized his authority, and, acting upon it, as he was justified in doing, Coon assumed to control and did obtain the possession of the machinery. Nor can it be said that because Coon permitted the machinery to be taken to Beaver Island contrary to this arrangement, and later took possession of it there, he was not acting under this authority. He had violated this agreement by permitting Gillespie to take the machinery to the Island, and when he retook possession of the machinery he was taking a step which he was in duty bound to take to protect plaintiffs from the consequences of that violation.

Was this possession of defendant Coon the possession of the defendant partnership? I think we are bound to conclude that it was the intent of this arrangement to obligate the defendant partnership, and not simply defendant Coon, to assume possession of the machinery if the Gillespies failed to make the agreed settlement. And, as we have aready indicated, defendant Coon had authority to bind the defendant partnership by such arrangement. We must conclude, therefore, that when Coon took possession of the machinery, on the failure of the Gillespies to furnish the agreed security, his possession was the possession of the defendant partnership. His delivery of the machinery to Gallagher was the wrongful conversion by defendants of plaintiffs' property.

It is insisted that plaintiffs cannot recover because they, by their conduct, ratified the contemplated sale to Gallagher. There is certainly no finding of fact that they ratified said sale, but it is insisted that their failure to promptly disaffirm the contract made in their names amounts to a ratification. The most that can be said of that conduct is that it indicates their willingness to let the sale to Gallagher stand if the defendants would pay them the value of the machinery less their commissions. Surely, defendants have no right to say that this conduct amounts to a ratification.

It is also contended that an offer on the part of the plaintiffs, made on the 27th of October, to exchange with Gallagher another engine for the one he had received, amounted to a ratification. We think it clear that plaintiffs made this proposition hoping to satisfy Gallagher, and to induce him to complete his contemplated purchase. Gallagher did not accept plaintiffs' proposition, and the sale was not concluded. No one had a right to understand that this proposition was intended to ratify Coon's sale to Gallagher. If it is true that by this proposition plaintiffs indicated that the property had ceased to be theirs, that position is consistent with their present claim, which is that defendants' action in delivering the property to Gallagher amounted to a conversion.

The suggestion is also made that the action, being brought on the common counts in *assumpsit*, amounts to a ratification of the sale by Coon to Gallagher, because plaintiffs cannot recover on the common counts except on the theory of such ratification. Our conclusion, as hereinafter stated, that plaintiffs can waive defendants' conversion, and recover on the common counts, is a sufficient answer of this contention.

Can plaintiffs waive this tort, and maintain an action of *assumpsit?* If they can, they can recover under the declaration in this case, for the common counts in *assumpsit* are a part of their declaration. When the machinery was delivered to Gallagher, it was in defendants' possession as agents or bailees of plaintiffs. We think it is settled that, under these circumstances, the owner of the property may waive the tort and recover on the common counts in *assumpsit*. See *Newman* v. *Olney*, 118 Mich. 545 (77 N. W. 9); *Tuttle* v. *Campbell*, 74 Mich. 652 (42 N. W. 384, 16 Am. St. Rep. 652).

We think the parties, by their correspondence, have fixed $600 as the value of the threshing outfit, and that defendants are entitled to 20 per cent. of this as commission.

We conclude, therefore, that the judgment of the circuit court should be reversed, and that the plaintiffs are entitled to a judgment of $480, with legal interest thereon since September 8, 1900, the date of the sale to Gallagher.

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

MAYNARD *v.* REYNOLDS.

1. TRESPASS—CUTTING TREES—HIGHWAY—TITLE.
   Where plaintiff brought an action for trespass in cutting trees located in the highway, he could recover only by proving title to the land on which the trees stood.

2. SAME—PLEADING—GENERAL ISSUE.
   A plea of the general issue in justice's court, without the notice and bond prescribed by 1 Comp. Laws, §§ 782–786, to a declaration in trespass averring that defendant cut and carried away trees owned by and standing "on the land of" plaintiff, does not admit title in plaintiff. GRANT, J., and MOORE, C. J., dissenting.

Error to Newaygo; Palmer, J. Submitted April 13, 1904. (Docket No. 54.) Decided June 25, 1904.

Trespass *quare clausum fregit* by Romie Maynard against Wells S. Reynolds. From a judgment for defendant, plaintiff brings error. Affirmed.

E. L. Gray, for appellant.

W. D. Fuller, for appellee.

CARPENTER, J. Plaintiff brought this action of trespass in justice's court to recover, under section 11204 of the Compiled Laws of 1897, treble damages from defend-

ant for cutting down and carrying off certain pine trees standing on his land. His testimony proved that these trees were located in the highway. Plaintiff could recover only by proving title to the lands on which the trees stood, unless the title was admitted by the defendant. See *Ostrom* v. *Potter*, 71 Mich. 44 (38 N. W. 670); *Orris* v. *Kempton*, 105 Mich. 229 (63 N. W. 68). The defendant insisted that the pleadings did not admit title in plaintiff, that the justice had no right to determine the question of title, and that it was made his duty, by section 787 of the Compiled Laws of 1897, to at once certify the cause to the circuit court. See *Ostrom* v. *Potter* and *Orris* v. *Kempton*, *supra*. This the justice declined to do, but proceeded to try the case, and rendered judgment in favor of the plaintiff. Defendant brought the cause to the circuit court by *certiorari*, and there defendant's contention was upheld, and the judgment rendered by the justice was reversed. Plaintiff brings the case to this court, contending that the circuit court erred. It is obvious that the title to land was in question, unless that title was admitted by the defendant. See *Ostrom* v. *Potter* and *Orris* v. *Kempton*, *supra*. The only question, then, is, Did defendant admit plaintiff's title to the land?

According to section 786 of the Compiled Laws of 1897, "any claim of title to lands made by the plaintiff in his declaration * * * shall be deemed to be admitted by the defendant," unless he files a bond, and pays fees, costs, etc. As the defendant in this case did not file a bond and pay fees and costs, we must hold that he admitted plaintiff's title, if that claim was made in plaintiff's declaration. Was that claim made? The claim in plaintiff's declaration is that defendant "did cut down and carry off, without the leave of said plaintiff, the owner thereof, two pine trees of great value * * * then and there being and standing * * * on the land of the said plaintiff." The statute under consideration was adopted by our legislature from the State of New York.

In *Ehle* v. *Quackenboss*, 6 Hill, 537, it was construed in that State. It was there held:

"The term 'title,' as used in the statute, does not embrace the fact of possession, nor any right founded on possession of land. * * * It is synonymous with the right of possession."

This decision, and the construction the statute there received, were approved in *Vandoozer* v. *Dayton*, 45 Mich., at page 250 (7 N. W. 814). And, in accordance with this principle, we have held that, if the claim set up in plaintiff's declaration is one which can be proved by possession, the declaration contains no claim of title, within the meaning of the statute. See *Ostrom* v. *Potter* and *Orris* v. *Kempton*, *supra*.

The averment in the declaration in question that the trees were standing "on the land of the said plaintiff" could be established by proving plaintiff's possession of the land. This averment is not, therefore, a claim of title. Indeed, it does not materially differ from the averment in *Ostrom* v. *Potter*, *supra*. There the premises were described as "the close of the plaintiff." Neither does it materially differ from the averment in *Orris* v. *Kempton*, *supra*. There it was averred that the defendant broke and entered "the lands and premises of the said plaintiff."

It is contended, however, that the averment respecting the ownership of the trees is a sufficient claim of title to the lands to bring the case under the statute. To this I cannot assent. I think a fair construction of this averment is this: That plaintiff owned the trees because they stood "on the land of the said plaintiff;" that is, on land in his possession. And if the trees did stand on land in plaintiff's possession, he had a right to recover damages for their destruction. See *Hoffman* v. *Harrington*, 44 Mich., at page 185 (6 N. W. 225). The question is not what title plaintiff claimed in the trees standing on the land, but what title he claimed in the land on which they stood. When defendant was called upon, as he was, to

determine what title plaintiff claimed to the land, he had a right to rely upon what plaintiff stated in his declaration respecting that title. He could not be expected to suppose that it was plaintiff's intent to enlarge his claim of title to the land by his claim respecting the ownership of the trees growing thereon. In other words, defendant had a right to act upon the assumption that the only title plaintiff asserted to the land was possession.

The suggestion is made in plaintiff's brief "that the title to real estate" did not "arise, because, as soon as the trees were severed from the land, they became personal property." The answer to this suggestion is that the only cause of action asserted by plaintiff is that of cutting down and carrying off certain pine trees. The gravamen of plaintiff's complaint is a trespass to his land.

It is also suggested that the form of the declaration is taken from Tiffany's Justice Guide, p. 639. It is true that the author of this excellent work suggested this form of declaration, and it is a proper form in the ordinary case where plaintiff is in possession of the lands from which trees are cut and carried away. I am unable to find any evidence that, in suggesting this form, the author intended that it should be used where the plaintiff desired to obtain the advantages of section 786, 1 Comp. Laws, by asserting a claim of title to the land upon which the trees stood. In my judgment, it is clearly inappropriate in such a case.

I think that the judgment of the circuit court should be affirmed.

MONTGOMERY and HOOKER, JJ., concurred with CARPENTER, J.

GRANT, J. (*dissenting*). Plaintiff brought an action of trespass *quare clausum fregit* against the defendant, and in his declaration alleged that the defendant did cut down and carry away, without the leave of plaintiff, the owner thereof, two pine trees (alleging value) then and

there being and standing as shade and ornamental trees on the land of the plaintiff (describing it), and claiming three times the amount of damages sustained, under section 11204, 3 Comp. Laws. The summons was returnable July 26th. The justice of the peace returned to the circuit court that the parties appeared on that day; that the above declaration was filed; that the defendant pleaded the general issue, and the case was adjourned until August 9th; that on August 9th the parties appeared, and defendant made a motion that the cause be referred to the circuit court, because title to the land would come in question; that defendant, without producing any bond or paying any costs, left the trial; that plaintiff produced proof, and the justice rendered a judgment for plaintiff for $50. In the amended return the justice certified that, after said motion was made, the attorney for the defendant stated that plaintiff might swear one Anderson, a surveyor; that said Anderson was sworn, and cross-examined by defendant's attorney; that plaintiff, Maynard, was sworn, and testified, without objection, that he was the owner and in possession of the land upon which the trees were cut; that other witnesses were sworn to the same effect; that defendant's attorney then filed a writing with the justice setting forth that title to the land came in question, and demanded that the proceedings should be certified to the circuit court for trial, and then left the court-room without entering any plea or notice or tendering any bond or paying costs. Application was made for a third return by the justice, and the justice returned that the trees, according to the testimony of Surveyor Anderson, were about 12 feet from the center line of the highway, and on the land of the plaintiff. The case was removed to the circuit court by writ of *certiorari*, and the judgment reversed.

The sole question is, Should the justice have certified the case to the circuit court for trial, for the reason that title to land was in issue? An action of trespass lies where shade trees are unlawfully cut in the highway opposite the

owner of the land. *Stretch* v. *Village of Cassopolis*, 125 Mich. 167 (84 N. W. 51, 51 L. R. A. 345, 84 Am. St. Rep. 567). The court below evidently reversed the judgment in the justice's court in reliance upon *Ostrom* v. *Potter*, 71 Mich. 44 (38 N. W. 670), and *Orris* v. *Kempton*, 105 Mich. 229 (63 N. W. 68), and held that the declaration did not allege ownership. In *Ostrom* v. *Potter* the premises were described simply as "the close of the plaintiff." It contained no allegation of ownership. In *Orris* v. *Kempton* the declaration charged that the defendant "broke and entered the lands and premises of the said plaintiff." There is no allegation in either of those cases of ownership. In this case the declaration alleges the ownership of the trees "being and standing as shade and ornamental trees on the land of the said plaintiff." We think this was a sufficient allegation of ownership. It is in compliance with the form prescribed by Tiffany. Tiffany's Justice Guide, p. 639, form No. 159. The plea of the general issue admitted the title alleged in the declaration, and therefore the only issues were the trespass and the damages. *Keyser* v. *Sutherland*, 59 Mich. 455, 465 (26 N. W. 865).

The judgment of the circuit court should be reversed, and the judgment of the justice's court affirmed, with costs to the plaintiff of the circuit and Supreme courts.

MOORE, C. J., concurred with GRANT, J.

BEEBE *v.* COMMISSIONER OF STATE LAND OFFICE.

TAX HOMESTEAD LANDS—COMMISSIONER OF LAND OFFICE—CERTIFICATE—MANDAMUS.

Section 131 of the general tax law (Act No. 141, Pub. Acts 1901), requiring the commissioner of the State land office to issue a certificate showing a homestead entry only when, "in his judgment, the application is made in good faith," vests in the commissioner a discretion that will not be reviewed on mandamus.

Mandamus by William C. Beebe to compel Edwin A. Wildey, commissioner of the State land office, to issue a certificate showing a homestead entry. Submitted June 7, 1904. (Calendar No. 20,165.) Writ denied June 25, 1904.

H. K. Gustin, for relator.

E. Stenberg (*Charles W. McGill*, of counsel), for respondent.

MONTGOMERY, J. The relator asks a mandamus to compel the respondent to grant a certificate showing a homestead entry by relator of certain land in town 32 N., range 9 E. The petition avers that the lands had been open to entry as homestead lands for more than three years; that, after this time had elapsed, the auditor general received an application from one Oakes to purchase the land; that, acting under the provisions of section 131 of the general tax law, as amended by Act No. 107, Pub. Acts 1899, and Act No. 141, Pub. Acts 1901, the commissioner directed an appraisal of the land; and that pending such appraisal, and before the purchase by Oakes was finally consummated, the relator's application was made. Relator contends that, by the terms of the section cited, an application to homestead lands takes precedence over

any incompleted sale, even though a regular application to purchase has been made, and the commissioner has taken steps to determine the value by appraisement. This construction is controverted.

We find it unnecessary to decide this question. The return of the commissioner shows that he was satisfied that the application to homestead these lands was not made in good faith; that the lands are not fit for a homestead. The statute (section 131) requires the commissioner to issue the certificate only when, "in his judgment, the application is made in good faith." This vests in the commissioner the power to determine the question of the good faith of the application, and vests him with a discretion which will not be reviewed on mandamus. Mechem, Public Officers, § 945; *The Secretary* v. *McGarrahan*, 9 Wall. 298.

The writ is denied, with costs.

The other Justices concurred.

GRINKY v. WAYNE PROBATE JUDGE.

1. INSANE PERSONS — CERTIFICATE OF PHYSICIANS — PROBATE COURTS.

   A probate judge will not be required to proceed under Act No. 217, Pub. Acts 1903, and determine the sanity of an alleged insane person, where the two physicians appointed by him to make an examination of the alleged lunatic have not certified to her insanity.

2. CONSTITUTIONAL LAW—INSANE PERSONS—VESTED RIGHTS.

   Said act is not unconstitutional in that it makes the order of the probate court depend upon the certificate of nonjudicial persons, as the requirement amounts to nothing more than a rule of evidence which does not deprive the alleged insane person of vested rights, but safeguards those rights.

3. SAME—VESTED RIGHTS.

No one can have a vested right to have another sent to an insane asylum.

4. SAME—TITLE TO ACT.

The provision of Act No. 217, Pub. Acts 1903, requiring the certificate of two physicians that an alleged insane person is insane, is sufficiently expressed in the title of the act, viz.: "To revise and consolidate the laws organizing asylums * * * and to provide for the apprehension of persons believed to be insane, and for their care and custody."

5. SAME—KEEPERS OF ASYLUMS—JUDICIAL POWERS.

The provision in said act that keepers of asylums cannot hold patients "except upon certificates of insanity and an order for admission" does not confer judicial powers on them.

Certiorari to Wayne; Mandell, J. Submitted June 14, 1904. (Calendar No. 20,546.) Decided June 25, 1904.

Mandamus by Joseph Grinky to compel Edgar O. Durfee, probate judge of Wayne county, to proceed to a hearing on a petition for the admission of an alleged insane person to an asylum. From an order denying the writ, relator brings certiorari. Affirmed.

Henry F. Chipman, for relator.

Ira A. Lieghley, for respondent.

CARPENTER, J. Certiorari to review mandamus proceedings.

April 5, 1904, relator petitioned respondent for an order admitting his wife, Celia Grinky, to an insane asylum. Respondent thereupon set April 8, 1904, at 3 o'clock in the afternoon, for hearing said application. At the time set for hearing respondent refused to proceed with the same, because two reputable physicians, appointed by him to examine said Celia Grinky, had reported that she was not insane. One of these reports was not in precise statutory form, but, as it cannot be considered a certificate of insanity, its formal character was, in our judgment, as shown

by this opinion, immaterial. Relator thereupon instituted these proceedings in the Wayne circuit court for the purpose of obtaining a mandamus compelling respondent to proceed to a hearing on said petition. An order to show cause was issued, a hearing had, and the mandamus denied.

The correctness of that decision, which we are asked to review, depends upon the construction and effect of Act No. 217 of the Public Acts of 1903.

Section 16 of that act made it the duty of the respondent, upon the filing of the relator's petition, "to fix a day for the hearing thereof," and "appoint two reputable physicians to make the required examination of the alleged insane person, whose certificate shall be filed with the court on or before such hearing."

Section 14 of said act provides:

"No person who is a resident of this State shall be held as a public or private patient in any asylum, public or private, or in any institution, home, or retreat for the care or treatment of the insane, except upon certificates of insanity and an order for admission, as hereinafter provided."

Section 15 provides:

"Certificates of insanity must be made by two reputable physicians, under oath, appointed by the probate court of the county where such alleged insane person resides, or is an inhabitant, to conduct the examination."

It is urged by the relator that, notwithstanding the language above quoted, section 16 of the act makes it the duty of the judge of probate, even though the physicians appointed by him certify to sanity, to himself determine that question. We cannot assent to this construction. Under such circumstances a finding of insanity by the probate judge would be a mere idle formality, for without the physicians' certificate of insanity the patient could not be held by the asylum authorities. The language of section 16 does not indicate the legislative intent to compel the probate court to make an adjudication which would

be altogether meaningless. On the contrary, the language in that section, above quoted, requiring the certificate "to be filed with the court on or before such hearing," and the fact that the form of the order therein set forth shall contain a recital of the "filing the certificates of two legally qualified physicians," indicates to us that the legislature intended that the probate judge should not proceed when said physicians certify to sanity. It is alleged that the statute so construed is unconstitutional, because:

(*a*) The authority of the probate court to make an order for the admission of an alleged insane person to an asylum cannot constitutionally be made to depend upon a certificate made by nonjudicial persons. I think the most that can be made of this objection is that the legislature has prescribed a certain rule of evidence, viz., it prohibited the making of the order in question unless a certain kind of proof is adduced. The authority of the legislature to prescribe this rule might be denied if it deprived any person of a vested right. See dissenting opinion of Justice GRANT in *Crane* v. *Waldron*, 133 Mich. 76 (94 N. W. 594). The rule in question certainly does not deprive the alleged insane person of a vested right, for it tends to safeguard her rights. It deprives no one else of a vested right, because it cannot be conceived that any one has a vested right to have another committed to an insane asylum. In our judgment, the constitutional objection under consideration is not well taken.

(*b*) It is contended that the provision under consideration is unconstitutional, because its object is not expressed in the title of the act, as required by section 20, art. 4, of our Constitution. It is argued that the provision in question changes the rule of evidence, makes the authority of the probate court depend upon the certificate of nonjudicial persons, and that these objects are not stated in the title of the act. The title of the act is:

"To revise and consolidate the laws organizing asylums for the insane and to regulate the care, management, and

use thereof, and to provide for the apprehension of persons believed to be insane, and for their care and custody."

In our judgment, the object of the legislation in question was "for the apprehension of persons believed to be insane, their care and custody." The object was, therefore, correctly stated in the title of the act. The legislature was not required to state in the title the precise manner in which it intended to effect this object. See *People* v. *Insurance Co.*, 19 Mich. 398.

Nor can we agree with counsel for relator that the legislation in question confers upon keepers of asylums judicial powers because it prohibits their holding a patient "except upon certificates of insanity and an order for admission."

In our judgment, the order of the circuit court should be affirmed.

The other Justices concurred.

HUNTER *v.* VILLAGE OF DURAND.

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1. MUNICIPAL CORPORATIONS—PERSONAL INJURIES—VERIFICATION OF CLAIM—WAIVER.

Failure of plaintiff to verify a claim, presented to a village council for injuries due to a defective sidewalk, was waived where the village council, without objection to the lack of verification, referred it to an investigation committee, who subjected the plaintiff to a painful physical examination.

2. PLEADING—PERFORMANCE—WAIVER.

Under a declaration alleging performance of a statutory requirement that a claim against a village shall be verified, evidence of waiver is admissible.

3. MUNICIPAL CORPORATIONS—PERSONAL INJURIES—SIDEWALKS—CONTRIBUTORY NEGLIGENCE.

Where plaintiff testified that he knew of a defect in a sidewalk several weeks before he was injured thereon, and that

he knew repairs had been recently made in the vicinity, defendant's motion for a directed verdict, on the ground that plaintiff's negligence contributed to the injury, was properly denied, as the jury might find that plaintiff had a right to believe, and did believe, that the defect had been remedied.

4. SAME—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE.
A request, in an action for personal injuries, which implies an obligation on plaintiff's part to exercise more than ordinary diligence, is properly refused.

5. SAME—DEFECTIVE SIDEWALK—NOTICE—NEGLIGENCE.
Evidence that an unsafe hole in a sidewalk has been in existence for two or three months, and that it was obvious to persons passing over it, justifies the jury in finding that the municipality was negligent.

6. TRIAL—REQUESTS TO CHARGE—IMPROPER ASSUMPTIONS.
Requests to charge, which assume disputed facts or the existence of evidence not in the record, are properly refused.

7. APPEAL AND ERROR—THEORY URGED BELOW.
Where defendant contends for his theory on an unfounded assumption as to the evidence, it is not error for the court to fail to perceive that the same theory was sound on a proper assumption.

8. TRIAL—INSTRUCTIONS—DAMAGES—AGGRAVATION OF INJURY.
Where, in an action for personal injuries, the court gave defendant's request that plaintiff could not recover for the aggravation of an existing disease, it was not error to add, as a reason for the ruling, that no such claim was made in the declaration.

9. DAMAGES—PERSONAL INJURIES—AGGRAVATION OF DISEASE.
The fact that plaintiff was suffering from disease, at the time of an injury, will not prevent a recovery for pains and injuries caused solely by the accident, although he was more susceptible to suffering because of other ailments.

10. INTOXICATION—EVIDENCE—EFFECT ON INJURIES.
In an action for personal injuries, it was proper to exclude evidence of habitual intoxication of the plaintiff, offered on the ground that it would account for his physical ailments, until it was shown that such intoxication could have some effect in producing the injuries for which suit was brought.

Error to Shiawassee; Smith, J. Submitted April 13, 1904. (Docket No. 55.) Decided June 25, 1904.

Case by James Hunter against the village of Durand for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Byron P. Hicks (*Albert L. Chandler*, of counsel), for appellant.

Rowland M. Connor, for appellee.

CARPENTER, J. On the evening of October 30, 1898, plaintiff claims that he received injuries by a fall on a defective sidewalk in defendant village. He brought this suit to recover compensation, and secured a verdict and judgment in the court below. Defendant asks us to reverse that judgment for various reasons.

1. It is contended that a verdict should have been directed for defendant because plaintiff did not give the notice required by sections 2754, 2775, 1 Comp. Laws. Plaintiff did on the 28th of November, 1898, give the defendant a notice which in all respects complied with the law, except that it was not verified, as this court has held, in *Griswold* v. *City of Ludington*, 116 Mich. 401 (74 N. W. 663), it should be. The question arises whether the evidence does not prove that defendant waived this lack of verification. When the notice was received, none of defendant's officials objected to the lack of verification, and its common council appointed an investigation committee, empowered "to incur such expenses in such investigation of the injuries sustained by said Hunter as they may think proper;" and on the following day, November 29th, expert physicians employed by said committee subjected plaintiff to a very painful physical examination. We are bound to say that this constituted a waiver of the want of verification. See *Lindley* v. *City of Detroit*, 131 Mich. 8 (90 N. W. 665); *Holtham* v. *City of Detroit*, 135 Mich. 17 (98 N. W. 754). Under these views, the circuit judge might very properly have instructed the jury to find that the undisputed facts proved a waiver. It is therefore unnecessary to determine whether

he erred in admitting testimony or in charging the jury respecting that question.

Neither can we accede to the legal proposition that evidence of waiver is inadmissible under a declaration alleging performance. *Dean* v. *Crall*, 98 Mich. 591 (57 N. W. 813, 39 Am. St. Rep. 571); *Levy* v. *Insurance Co.*, 10 W. Va. 560 (27 Am. Rep. 598); *West Rockingham Mut. Fire-Ins. Co.* v. *Sheets*, 26 Grat. 854.

2. It is contended that the court should have directed a verdict for the defendant on the ground that plaintiff was guilty of contributory negligence. This contention is based upon the fact that it appears by plaintiff's testimony that he knew of the existence of this defect several weeks before his injury. We cannot assume from this testimony that plaintiff believed at the time of his injury that this defect continued to exist. Indeed, we are bound to assume from his testimony that he believed it did not. He knew that repairs had recently been made in its vicinity, and the jury were clearly warranted by his testimony in finding that he had a right to believe, and did believe, this defect to have been remedied. Under the decisions of this court, the question of plaintiff's negligence was one for the jury. *Whoram* v. *Township of Argentine*, 112 Mich. 20 (70 N. W. 341); *Urtel* v. *City of Flint*, 122 Mich. 65 (80 N. W. 991); *Dundas* v. *City of Lansing*, 75 Mich. 499 (42 N. W. 1011, 5 L. R. A. 143, 13 Am. St. Rep. 457); *McEvoy* v. *City of Sault Ste. Marie*, 136 Mich. 172 (98 N. W. 1006); and *Belyea* v. *City of Port Huron*, 136 Mich. 504 (99 N. W. 740).

In this connection we will notice certain assignments of error respecting the charge of the court on the subject of contributory negligence. The court denied defendant's request that "if plaintiff was guilty of any act, or the omission of any act, which in itself was negligence, and contributed to the injury received, it would make no difference how slight the negligence may be, if it contributed to the result, it defeats recovery."

In *Benedict* v. *City of Port Huron*, 124 Mich., at pages 605, 606 (83 N. W. 616), this court refused to reverse a judgment where the trial judge used the above language, saying:

"The language quoted from the charge might, under some authorities, be objectionable if standing alone; but, in connection with the remainder of the charge, it is clear that want of ordinary care was made the test of contributory negligence."

It is thus made clear that the request under consideration is not legally exact. It implies an obligation on plaintiff's part to exercise more than ordinary diligence. There was no error in denying this request, and in charging the jury as the trial court did:

"The plaintiff will not yet be entitled to recover unless he has shown to you by a preponderance of the evidence that his own negligence did not contribute to his injury. If the plaintiff herein, by the exercise of reasonable and ordinary care, under the circumstances, might have avoided the consequences of defendant's negligence, but did not, he cannot recover."

Defendant preferred other requests on the subject of contributory negligence, which the court properly refused. These requests either improperly assumed that plaintiff's eyesight was defective, or that he had knowledge of the existence of the defect at the time of his injury, or they were opposed to the principle heretofore stated that the circumstance that the plaintiff supposed the walk to have been repaired made the question of his negligence one for the jury.

3. Defendant claims that there was no evidence of negligence which justified the submission of the case to the jury. There was evidence that this hole had been in existence for two or three months, and that it was obvious to passers-by. This evidence clearly justified the jury in finding that the existence of the hole was generally known, and that defendant was negligent. See the decision of *Pearl* v. *Township of Benton*, 136 Mich. 697 (100 N. W. 188).

The charge respecting defendant's negligence was a clear and correct statement of the law. It was not inconsistent with our decision in *Thomas* v. *City of Flint*, 123 Mich. 10 (81 N. W. 936, 47 L. R. A. 499). There it was held that a municipality was not liable because it was negligently ignorant of a latent defect. The defect complained of in this case was not a latent one. It was a patent and obvious one.

Defendant complains because the court refused to give certain of its requests bearing on its claim that it was not guilty of negligence. One of these requests improperly assumed that there was evidence that defendant had no notice of the existence of this defect until the morning of plaintiff's injury. This request was properly refused.

The court refused to give this request preferred by defendant:

"If you believe from the testimony that Edward Barrett repaired the sidewalk in front of lot 1 of block 16 of the Durand Land Company's Second Addition to the village of Durand on the 25th day of October, 1898, and put the same in a condition reasonably safe and convenient for public travel thereon, and that it was subsequently broken down at the place where plaintiff claims to have fallen, I charge you, as a matter of law, there being no evidence of actual notice in this case to defendant, that the time was too short for the law to presume notice from the lapse of time, and therefore plaintiff cannot recover."

This request is based upon the assumption that there was testimony that Barrett put the walk in question in a condition reasonably safe and convenient for travel on the 25th of October, 1898. There was no such testimony. The testimony referred to indicated that Barrett did not repair this walk; that he did nothing to it; that he did repair a walk 75 or 100 feet distant, and noticed that this walk was not out of repair. It is possible that this testimony would have justified a finding that the walk in question was broken down between October 25th and October 30th, and perhaps, under such a finding, the rule of law is as stated in the request. But we decline to consider

these questions. They are not presented by this record. Defendant's counsel saw fit to contend for this theory upon an unfounded assumption. We cannot hold that it was erroneous for the court to fail to perceive that the same theory was sound on a proper assumption. It may not be improper in this connection to say that it is doubtful if the defendant was prejudiced by the failure of the court to submit the case to the jury on this theory. It is morally certain that the verdict of the jury was rendered upon the ground that the defect in the walk had existed for a long time before plaintiff's injury.

4. The court charged the jury, as requested by defendant, that if, by reason of the accident, an existing disease was aggravated, plaintiff could not recover therefor. Complaint is made because the court added to this charge, "Because no such claim is made by plaintiff in his declaration." We do not think this remark improper. It was a correct statement of the ground upon which the request was preferred and given. We can understand why a trial court should desire that a jury should understand the reason for what otherwise might appear to be a doubtful ruling.

Neither was it improper for the court to add to defendant's request under consideration:

"The fact that plaintiff, at the time he claims to have received the injury in question, was suffering from other ailments or disease, will not alone prevent a recovery by plaintiff for the pains and suffering and other injuries caused solely by and resulting from the accident, although he was more susceptible to suffering because of other ailments or disease."

5. Defendant complains because he was not permitted to show that plaintiff was in the habit of getting intoxicated. It is his claim that this evidence, if admitted, would have accounted for many physical ailments which plaintiff now claims resulted from his injury. There was no testimony in the case to indicate that the use of intoxicating liquors could have any effect in producing those

injuries, and, when the testimony under consideration was objected to, the court said:

"Until you have shown * * * that the question of intoxication cuts some figure on the injury that it is claimed occurred October 30, 1898, I sustain the objection."

This ruling was correct, and indicated the proper course to be pursued if defendant wished to introduce the testimony in question.

We do not think that defendant's brief points out any reversible error, nor do we think that any of the other errors relied upon demand discussion.

The judgment is affirmed.

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

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HOFFMAN *v.* SILVERTHORN.

1. JUDGMENTS—MANDAMUS—RES JUDICATA—DISMISSAL.
The denial of a mandamus is res judicata if the court passes upon the merits, but not if the writ was denied because no case was made which appealed to the discretionary power of the court, or because the relator had a manifest legal remedy, or because mandamus was not a proper remedy.

2. APPEAL AND ERROR—GROUNDS OF DECISION—OPINION.
On error, the Supreme Court will consider only the evidence presented to the lower court, and will not resort to the recollection of the justices to determine the grounds on which a mandamus was denied, no written opinion being filed.

3. JUDGMENT—RES JUDICATA—BURDEN OF PROOF.
Where several issues are presented, and a general judgment is rendered, the party asserting that a particular issue was determined by the judgment has the burden of proving it.

4. TAXATION—STATE TAX LANDS—RECITALS IN DEED—CONCLUSIVENESS.
A recital in a deed issued by the auditor general that a former

deed was erroneously released is, at most, but evidence of the fact, and is not conclusive.

5. SAME—MANDAMUS—DISMISSAL—RES JUDICATA.
Where there is no evidence before the court to show that, in denying a mandamus, the court passed upon the merits, such proceedings are not res judicata.

6. APPEAL AND ERROR—FINDINGS OF FACT—CONCLUSIVENESS.
The findings of fact in a trial before the court without a jury are conclusive on error to the Supreme Court.

7. SAME—FINDINGS OF FACT—CONCLUSIVENESS.
The Supreme Court cannot, from statements in counsel's brief, draw any inference of fact opposed to the findings of the trial judge.

8. TAXATION—STATE TAX LANDS—APPLICATION TO PURCHASE—DEPOSIT.
An application to purchase land bid in by the State for taxes, which is not accompanied by a sufficient deposit, does not give the purchaser any right to a deed.

9. SAME—INSUFFICIENT DEPOSIT—INTEREST.
An application to the auditor general for the purchase of State tax land must be accompanied by a sufficient deposit, and if it is not sufficient, and the applicant makes up the amount at a later date, he must also deposit sufficient to pay the interest to such later date.

10. SAME—ERROR IN COMPUTATION—VOID DEED.
A deed of State tax land for a less sum than was due the State, because of an error in computation by the auditor general's office, is void as against the owner of the original title. *Clippinger* v. *Auditor General*, 135 Mich. 1, distinguished.

11. SAME—STATE TAX LAND—RELEASE TO STATE—RESALE.
Where the purchaser of State tax land releases his interest to the State, it is the duty of the auditor general to convey the land to the original owner, who has made a complete application which is still pending, rather than to redeed it to the purchaser on his original application.

12. PARTIES—ERRONEOUS JOINDER—ESTOPPEL TO OBJECT.
Plaintiff, who himself brings in a party defendant, has no right to insist that such defendant should not have been made a party.

Error to Marquette; Stone, J. Submitted April 21, 1904. (Docket No. 133.) Decided June 25, 1904.

Ejectment by Frank Hoffman against George Silverthorn and Perry F. Powers, auditor general. There was judgment for plaintiff, and defendants bring error. Affirmed.

Charles A. Blair, Attorney General (*Charles W. McGill*, of counsel), for appellants.

Ball & Ball, for appellee.

CARPENTER, J. This is an action of ejectment. It was tried by the court below without a jury, who made a finding of facts, and rendered judgment for the plaintiff. We state such of said facts as are necessary to an understanding and disposition of the legal questions raised on this appeal:

"Said Frank Hoffman is the owner in fee simple of" the lands in controversy, "having acquired the original or government title thereto. Said lands were duly assessed for taxes in the years 1892, 1893, and 1894, and, the same having remained delinquent, were included in the auditor general's petition for said several years, and were duly bid off to the State. * * *

"On August 27, 1897, said lands being held as State tax lands by the State of Michigan, the defendant George Silverthorn applied to purchase said lands, together with a number of other descriptions of lands held by the State as State tax lands and on State bids, but on said date did not deposit enough money to purchase the entire list of lands so applied for."

On October 25th said Silverthorn deposited a sufficient sum to more than complete the purchase and payment of the taxes on the lands described in said list. The auditor general computed interest on said purchase, not to October 25, 1897, when the deposit was made sufficient, but to August 27, 1897, when the application was made, and returned the surplus, which was much more than sufficient to make good the error of computation, to said Silverthorn, and on the 8th day of November, 1897, issued a State tax

land deed conveying the land in controversy to said Silverthorn.

On the 23d of July, 1902, plaintiff applied to the auditor general to cancel said sale to Silverthorn on the ground of the above-described error in computation, and at the same time himself applied to pay and purchase the same, and deposited a sum of money more than sufficient to pay all taxes legally chargeable against said lands, with interest thereon. August 15, 1902, while the foregoing application of plaintiff was pending and undetermined, "said Silverthorn released to said auditor general all his right, title, or claim under and by virtue of the purchase of said lands for the taxes of 1892, 1893, 1894, 1895, and 1896," which release was duly recorded August 16, 1902, in the office of the proper register of deeds.

The trial court finds as a fact that "on the recording * * * and delivery of said release * * * the State of Michigan reacquired all the title which it had originally acquired by the sales for such delinquent taxes."

September 10, 1902, the auditor general refused to cancel the said sale to Silverthorn, and rejected the application of plaintiff to purchase said lands, and on November 22, 1902, issued new State tax land deeds to Silverthorn. These deeds purported to be issued under the application of Silverthorn made on August 27, 1897. They were issued for the consideration which would have been due that date, and they contained the recital: "This deed is executed to take the place of a deed issued from this office on the eighth day of November, 1897, and erroneously released on the fifteenth day of August, 1902."

March 23, 1903, plaintiff renewed his application for the cancellation of said original sale to Silverthorn on the same ground on which the former application was based, and at the same time made a sufficient deposit, and asked to himself purchase said lands and pay all the taxes thereon. This application was also denied. Thereupon plaintiff, as relator, instituted mandamus proceedings in this court against said auditor general, as respondent. An or-

der to show cause was issued, and the application was denied May 18, 1903, without any written opinion being filed. Plaintiff did not in his petition for a mandamus make any reference to the release of Silverthorn to the auditor general, and the new deeds of November 22, 1902, because he had no knowledge of the same until the hearing of this case. And as these facts were, for some reason unknown to the court, not stated in respondent's answer, they were not considered in denying the mandamus.

Defendants ask the court to reverse the judgment rendered on these findings for two reasons: *First*, the mandamus proceedings in this court are res judicata; *second*, the deed to Silverthorn is not defective. We will consider each of these questions separately.

1. Are the mandamus proceedings res judicata? If the decision in the mandamus proceedings was made upon the merits, we think that decision would be decisive between the parties to that proceeding and their privies. *Weed* v. *Mirick*, 62 Mich. 414 (29 N. W. 78). It does not follow, because the mandamus was denied, that the court passed upon the merits of plaintiff's application. That mandamus may have been denied because no case was made that appealed to the discretionary power of the court, because relator had a manifest legal remedy of which he could not be deprived, or because mandamus was not the proper remedy. If the mandamus was denied for either of these reasons, no authority need be cited to the proposition that that decision was not res judicata. Though the members of this court might ascertain by consulting their own recollections the precise ground upon which that decision proceeded, it is obvious to the slightest reflection that such a course cannot be adopted. We are bound to proceed, in determining this case, on legal grounds. We can avail ourselves of no evidence which was not presented to the lower court. We cannot, therefore, consider as evidence of our determination the statement relating thereto and hereafter quoted—even if such a statement affords evidence—contained in our opinion in *Clippinger* v. *Audi-*

tor General, 135 Mich. 1 (97 N. W. 53), for that opinion was filed November 9, 1903, while this case was decided in the lower court September 29, 1903. The question for our determination is this: Did the trial judge correctly determine this issue, on the evidence before him, and on the facts which he might judicially know?

There are authorities which hold that when there are several issues presented, and a general judgment rendered, it will be presumed that all issues were decided in favor of the prevailing party. See *Rhoads* v. *City of Metropolis*, 144 Ill. 580 (33 N. E. 1092, 36 Am. St. Rep. 468); *Day* v. *Vallette*, 25 Ind. 42 (87 Am. Dec. 353); *People* v. *Stephens*, 51 How. Prac. 235; *White* v. *Simonds*, 33 Vt. 178 (78 Am. Dec. 620); *Hall* v. *Zeller*, 17 Or. 381 (21 Pac. 192). But the better authority, in our judgment, is opposed to this doctrine, and casts upon the party asserting that such a judgment determined a particular issue the burden of proving it. See *Russell* v. *Place*, 94 U. S. 606; *Littlefield* v. *Huntress*, 106 Mass. 121; *Solly* v. *Clayton*, 12 Colo. 30 (20 Pac. 351); *Linton* v. *Crosby*, 61 Iowa, 293 (16 N. W. 113); *Garrott* v. *Johnson*, 11 Gill & J. (Md.) 173 (35 Am. Dec. 272); *Bergeron* v. *Richardott*, 55 Wis. 129 (12 N. W. 384). See, also, *Ryer* v. *Atwater*, 4 Day (Conn.), 431. As there was no evidence before the lower court tending to prove upon what ground the decision was made, that court correctly decided that the mandamus proceedings were not res judicata.

2. Was the deed to Silverthorn void? Defendants' counsel contend that Silverthorn executed this release by reason of a mistaken notion of the validity of his deed, that the auditor general refused to accept it, and that, legally speaking, the release never became effectual. The finding of facts prevents our agreeing with this contention. It is true that the deeds of November 22, 1902, contain a recital that the former deed was erroneously released; but this was, at most, no more than evidence of a fact. Though this evidence might have justified a finding of an

erroneous release, no such finding was in fact made. On the contrary, the court found, as heretofore stated, that by the recording and delivery of the release the State reacquired the title. We are bound by this finding. See *Cragin* v. *Gardner*, 64 Mich. 399 (31 N. W. 206); *Bateman* v. *Blaisdell*, 83 Mich. 357 (47 N. W. 223); *First National Bank* v. *Walker*, 115 Mich. 434 (73 N. W. 378); *Darling Milling Co.* v. *Chapman*, 131 Mich. 684 (92 N. W. 352).

To illustrate the claim of mistake, defendants' counsel have printed in their brief the correspondence—not put in evidence in the court below—between the auditor general and Silverthorn respecting said release. It is doubtful if a fair construction of that correspondence supports defendants' contention that the release never became effectual. But we will not undertake to determine this question, for it is clear that we cannot, from statements in counsel's brief, draw any inference of fact opposed to the findings of the trial judge. We are bound, therefore, to assume that the title was effectually transferred to the State by Silverthorn, on the 15th of August, 1902.

Could this title be conveyed by the auditor general to Silverthorn on his application of August 27, 1897? That application gave him no right to a deed, because it was not accompanied by a sufficient deposit; and it did not become a complete application until October 25, 1897, when the deposit was made adequate. *Hubbard* v. *Auditor General*, 120 Mich. 505 (79 N. W. 979). When the application was completed, it was the duty of the applicant, under section 84 of the tax law (section 3907, 1 Comp. Laws, as amended by Act No. 262 of the Public Acts of 1899), to pay interest on the amount "at the rate of one per cent. per month or fraction thereof, from the first day of the month in which such lands were bid off to the State." This clearly required the payment of interest to the date when the application became complete. We have held that "the auditor general has no authority, under section 84, to sell and deed State lands, except upon receiv-

ing the price required by law, and this the purchaser is bound to know." See *Hughes* v. *Jordan*, 118 Mich., at pages 29 and 30 (76 N. W. 134); *Detroit Fire & Marine Ins. Co.* v. *Wood*, 118 Mich. 31 (76 N. W. 136); *Wilkin* v. *Keith*, 121 Mich. 66 (79 N. W. 887); *Hall* v. *Mann*, 122 Mich. 13 (80 N. W. 789).

We have held that, notwithstanding such an improper computation as was made in this case, the tax liens would be discharged if they were acquired by the owner of the land. See *Clippinger* v. *Auditor General*, 135 Mich. 1 (97 N. W. 53). But the record in this case presents a different question. In the *Clippinger Case* it was held that the failure of the auditor general to make a correct computation could not be asserted to defeat the owner's title. There we said:

"It would be a reproach to the law to hold that under these circumstances an owner can be deprived of his property through no fault of his own, but through a mistake of an officer of the law."

Here we are asked to hold—what is an entirely different proposition—that the owner cannot sustain his title by asserting that an officer of the law made a mistake. We are asked to hold that though the computation was incorrect, and the State thereby failed to receive the price to which it was entitled, nevertheless the title was acquired by Silverthorn. In support of this contention, defendant's counsel rely upon the statement in the *Clippinger Case* "that the failure to figure interest correctly was settled against the contention of the relator by the recent unreported case of *Hoffman* v. *Auditor General*." It is claimed that this reference to our decision in the mandamus proceedings heretofore referred to indicates a holding that Silverthorn's title was unaffected by the error in computation. If that decision, by reason of this language, is susceptible of that construction, we think we should take this early opportunity to correct it. Owing to this error of computation, Silverthorn had not "paid the price required by law," and because of this, under the decisions above cited, his deed was void. Nor is it a sufficient ex-

cuse that a State official erred in his computation. The purchaser was bound to know the law, and we are bound to assume that he himself could make a correct computation. In so holding, we do not impose upon him any greater obligation than rests upon him under our former decisions. See *Hughes* v. *Jordan*, supra.

The deeds of November 22, 1902, are void on another ground. Silverthorn's release of August 15, 1902, as heretofore stated, revested the State with the title which it originally had. It was a release of all that Silverthorn acquired under his application of August 27, 1897. There is nothing in the record from which we can infer that Silverthorn renewed that application, or made another. At that time, then, the only application under which the auditor general had a right to sell these lands was that of plaintiff, which at this time was pending, and supported by a proper deposit. See *Wilkin* v. *Keith* and *Hall* v. *Mann*, supra. It was therefore the duty of the auditor general to recognize plaintiff's application, and to deed the land to him, and not to Silverthorn.

Plaintiff contends that the auditor general should not have been made a party defendant. No such contention is made by the defendants. As plaintiff has no right to insist upon this contention, having himself made the auditor general a party defendant, we decline to consider that question. No costs, however, will be awarded against the auditor general.

To avoid any misapprehension, we deem it proper to state that we do not determine that this record shows plaintiff to have such a legal title as to justify his maintaining an action of ejectment. That question was not raised by the defendants, and we do not deem it our duty to raise it. This case should not, therefore, be considered an authority on that proposition.

Judgment is affirmed, with costs against defendant Silverthorn.

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

NEWBERRY *v.* BUNDA.

1. TRESPASS—TRIMMING TREES—BOUNDARY.
   The branches of a tree projecting over a boundary line may not be cut beyond the division line by the adjoining proprietor without license.
2. SAME—LICENSE—LINE FENCES.
   One building a portion of a line fence by agreement with the adjoining proprietor has an implied license to trim trees to such an extent as is necessary to the construction of the fence.
3. SAME—LINE FENCES—QUESTION OF FACT.
   Whether it was necessary to the building of a line fence, to cut back overhanging branches close to the body of a tree standing three feet from the line, is a question of fact. HOOKER, J., dissenting.
4. EVIDENCE—OPINIONS AND CONCLUSIONS.
   It was not prejudicial error to ask a witness if it was necessary, in lining out a fence, to cut out the overhanging branches of a large tree, where the witness understood the inquiry was whether a person could sight through along the line without cutting out the branches.

Error to Lapeer; Smith, J. Submitted January 6, 1904. (Docket No. 12.) Decided July 7, 1904.

Trespass quare clausum fregit by Selden Newberry against William Bunda. There was judgment for defendant, and plaintiff brings error. Affirmed.

Herbert W. Smith, for appellant.

Elmer Shumar (*Stickney & Reed*, of counsel), for appellee.

MONTGOMERY, J. This is an action of trespass for cutting down two small apple trees on the line between the plaintiff and defendant, and for cutting limbs off another tree standing about three feet from the line and

on plaintiff's land. The testimony was conflicting as to the exact location of the small trees, but it is fairly inferable that the jury found that they were upon defendant's land. The case in this court turns upon the question whether the plaintiff's rights as to the larger tree were properly guarded by the trial court.

The facts as to this tree are that the tree stood about three feet from the line, the limbs extending over upon defendant's land. The defendant cut the limbs off close to the body of the tree, and undoubtedly exceeded his rights, as defined in *Hickey* v. *Railroad Co.*, 96 Mich. 498 (55 N. W. 989, 21 L. R. A. 729, 35 Am. St. Rep. 621), unless he was acting under a license from plaintiff. Defendant claimed, and the jury found, a license. It was not claimed that there was an express license, but it was insisted that the defendant was fully within an implied license, as the cutting of these limbs was essential to the performance of the work of rebuilding a portion of the line fence, which it was agreed between the plaintiff and defendant that the latter should build. The full line of the fence between the two properties was 15 rods. It was agreed that defendant should rebuild the east half of the distance. The tree stood a short distance west of that portion of the fence which defendant was by his agreement required to build. It was claimed, however, that it was necessary, in order to fix the line upon which his fence was to be located, to line through on the line of the old fence from end to end, and that in order to do this it was necessary to cut the small brush which had grown up, and also the limbs from this tree.

It is a general rule that a license to do a particular thing carries with it, by implication, the right to do those things necessary to be done in order to avail the licensee of his rights under the license. 2 Waterman on Trespass, § 786.

The plaintiff contends that the court should have directed a verdict for the reason that, as a matter of law, it should be held that the cutting of these branches was not

necessary to the work of rebuilding this fence. We think, however, that it was a question for the jury, and properly submitted.

Objection was made to questions put to witnesses, asking whether it was necessary, in lining out the fence, to cut out the brush and limbs of the large tree. It is doubtful whether the circuit judge understood that the objection now urged was covered by the general objection of incompetency and immateriality, but we think it manifest that the witnesses understood that the inquiry was whether a person could sight through along the line without cutting out these branches. Their answers so indicate, and this inquiry was, we think, proper.

The other questions need not be separately discussed.

We discover no prejudicial error, and the judgment is affirmed.

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

HOOKER, J. (*dissenting*). I do not concur in the view that an arrangement whereby the defendant was to build a line fence between the lands of the parties carried with it a license to cut the limbs of trees sufficiently to enable the builder to sight through from one end of the line to the other. We may take judicial notice that the line could have been established without it, and there is no presumption of an intention to give such a license inferable from the testimony. Even if there were, it would extend no farther than absolutely necessary, and to cut three or four feet from the line would be excessive.

The judgment should be reversed, and a new trial ordered.

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BOARD OF SUPERVISORS OF SAGINAW CO. *v.* HUBINGER.

1. STATUTES—REPEALS BY IMPLICATION—COUNTY ROADS.
   The provisions of Act No. 335, Local Acts 1901, amending Act No. 419, Local Acts 1899, relating to a system of county roads for Saginaw county, are inconsistent with the provisions of sections 26 and 27, Act No. 230, Pub. Acts 1895, providing for a township road system, and therefore repeal by implication the last-named act so far as it applies to Saginaw county.

2. SAME—REPEALS—PRESUMPTIONS.
   The presumption is against making a statute irrepealable.

3. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—MUNICIPAL CORPORATIONS.
   A township cannot claim that an act of the legislature, exempting such townships from taxation for county road systems as shall establish a township road system, constitutes a contract, the obligations of which a subsequent legislature cannot impair by repealing the act, as the municipality is but a government agency.

Certiorari to Saginaw; Snow, J. Submitted February 2, 1904. (Calendar No. 20,351.) Decided July 7, 1904.

Mandamus by the board of supervisors of Saginaw county to compel John G. Hubinger, as supervisor of Frankenmuth township, to spread certain county road taxes upon the rolls of said township. From an order denying the writ, relator brings certiorari. Reversed.

John F. O'Keefe (*James H. Davitt*, of counsel), for relator.

Ferdinand Brucker and *Fred L. Travers*, for respondent.

MOORE, C. J. Application was made in the court below for mandamus to compel the respondent, John G.

Hubinger, as supervisor of the township of Frankenmuth, in Saginaw county, to spread upon the rolls of his township certain county road taxes, as ordered by the board of supervisors under the authority of Act No. 419 of the Local Acts of 1899, as amended by Act No. 335 of the Local Acts of 1901. The circuit judge declined to issue the writ. This is certiorari to review his action.

It is the claim of the respondent that it had a township road system, making Act No. 419, Local Acts 1899, as amended by Act No. 335, Local Acts 1901, inapplicable to it.

Act No. 230, Pub. Acts 1895, has the following provisions: Section 26 of this amendment provides:

"That any township in any county in the State, except Marquette, * * * where the board of supervisors refuse to submit the question of adopting the county road system, or where the question has been submitted and it has failed to carry, may submit the question of a township system of roads in the same manner and by the same proceedings as is prescribed for the county road system, by substituting the words township board for board of supervisors, and township clerk for county clerk, and township roads for county roads."

Section 26 also provides:

"That the township board of any township adopting such road system shall, by resolution to be entered of record, designate the roads and bridges within such township to be built or maintained under such road system, and shall determine the amount of tax to be raised in such township for each year for that purpose."

Section 27 provides:

"That any township that shall adopt the provisions of the act, and shall raise money and build roads in good faith, shall not, without their consent by a two-thirds vote, be liable to any tax for a county road system, should the county in which said township is situated afterwards adopt the county road system."

It is claimed by respondent that its system of roads is governed by these provisions, and that these provisions

are not repealed by the local act of 1899. It is conceded they are not repealed in direct terms, and it is also conceded repeals by implication are not favored, but it is insisted the provisions of the local act are inconsistent with the provisions of the earlier act, and thereby repeal it.

We have already quoted from the earlier act, which the township claims should govern its highway system. The local act and its amendments already mentioned relate to Saginaw county alone. They are too long to insert here, but a reference to section 24, Act No. 335, Local Acts 1901, and sections 25, 26, 27, and 28 of Act No. 419, Local Acts 1899, will show provisions in relation to the control of the roads in the county, their improvement, and the raising of the funds to pay therefor, that are inconsistent with the idea that the township of Frankenmuth may control its own roads. There is no provision in the local acts that Frankenmuth shall be exempt from its provisions. We think it follows that the provisions of the entire act are repealed by implication. See 23 Am. & Eng. Enc. Law (1st Ed.), 479; *Morrison* v. *Kent*, 135 Mich. 38 (97 N. W. 45); *People* v. *Bussell*, 59 Mich. 104 (26 N. W. 306); *People* v. *Furman*, 85 Mich. 110 (48 N. W. 169); *Attorney General* v. *Parsell*, 100 Mich. 170 (58 N. W. 839); *Porter* v. *Edwards*, 114 Mich. 640 (72 N. W. 614); *Graham* v. *Muskegon County Clerk*, 116 Mich. 571 (74 N. W. 729); *Attorney General* v. *Commissioner of Railroads*, 117 Mich. 477 (76 N. W. 69).

It is claimed that, as the township acted under the legislation of 1895, it constituted a contract, which could not by subsequent legislation be impaired without doing violence to section 10, art. 1, of the Federal Constitution, and section 43, art. 4, of the State Constitution.

The presumption is against making a statute irrepealable. Black on Inter. of Laws, § 51, and authorities cited; Cooley, Const. (6th Ed.) p. 146.

We have examined the authorities cited by counsel for respondent in support of their proposition, but none of them relate to legislative action of the character involved.

here. In the sixth edition of Cooley on Constitutional Limitations, p. 331, where there is a discussion relating to laws which impair the obligation of contracts, it is said:

"But can these laws be regarded as contracts between the State and the officers and corporations who are, or the citizens of the State who expect to be, benefited by their passage, so as to preclude their being repealed? On these points it would seem that there could be no difficulty. When the State employs officers or creates municipal corporations as the mere agencies of government, it must have the power to discontinue the agency whenever it comes to be regarded as no longer important. The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government. * * *

"And although municipal corporations, as respects the property which they hold, control, and manage, for the benefit of their citizens, are governed by the same rules and subject to the same liabilities as individuals, yet this property, so far as it has been derived from the State, or obtained by the exercise of the ordinary powers of government, must be held subject to control by the State, but under the restriction only that it is not to be appropriated to uses foreign to those for which it has been acquired. And the franchises conferred upon such a corporation for the benefit of its citizens must be liable to be resumed at any time by that authority which may mold the corporate powers at its will, or even revoke them altogether. The greater power will comprehend the less."

See, also, the long note at the bottom of page 333 for a further discussion of the question.

The case of *New Orleans* v. *Waterworks Co.*, 142 U. S. 79 (12 Sup. Ct. 142), is an instructive one. In that case it was claimed by the city that legislation had been passed which impaired the obligation of contracts.

In disposing of the case, Justice Brown used the following language:

"The city, being a municipal corporation and the creature of the State legislature, does not stand in a position to claim the benefit of the constitutional provision in ques-

tion, since its charter can be amended, changed, or even abolished at the will of the legislature. In the *Dartmouth College Case*, 4 Wheat. 518, 660, 661, in which the inviolability of private charters was first asserted by this court, a distinction is taken, in the opinion of Mr. Justice Washington, between corporations for public government and those for private charity; and it is said that the first, being for public advantage, are to be governed according to the law of the land, and that such a corporation may be controlled, and its constitution altered and amended, by the government, in such manner as the public interest may require.

"'Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it; the trustees or governors of the corporation being merely the trustees for the public, the cestui que trust of the foundation.'

"Mr. Justice Story was also of opinion (page 694) that 'corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control.'

"In the case of *Town of East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 533, 534, the constitutionality of an act of the legislature discontinuing a ferry, the franchise of which for more than 100 years had belonged to the town of Hartford, and subsequently to that of East Hartford, was drawn in question. It was claimed by the town that the State had impaired the obligation of its contract, but it was held that:

"'The parties to this grant did not, by their charter, stand in the attitude toward each other of making a contract by it such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and the public municipal and political corporations on the other. * * * The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature. * * * Hence, generally, the doings between them and the legislature are in the nature of legislation, rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.'

"So, in *Laramie County Com'rs* v. *Albany County*

Com'rs, 92 U. S. 307, 311, it was held that the legislature had power to diminish or enlarge the area of a county whenever the public convenience or necessity required.

"'Institutions of the kind,' said Mr. Justice Clifford, 'whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not, and cannot be, any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact.'

"So, in the recent case of *Williamson* v. *New Jersey*, 130 U. S. 189, 199 (9 Sup. Ct. 453), it was held that the power of taxation on the part of a municipal corporation is not private property or a vested right of property in its hands, but the conferring of such power is an exercise by the legislature of a public and governmental power, which cannot be imparted in perpetuity, and is always subject to revocation, modification, and control, and is not the subject of contract.

"Said Mr. Justice Blatchford:

"'We are clearly of opinion that such a grant of the power of taxation by the legislature of a State does not form such a contract between the State and the township as is within the protection of the provision of the Constitution of the United States which forbids the passage by a State of a law impairing the obligation of contracts.'

"At the last term of this court, in the case of *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334 (11 Sup. Ct. 790), it was held—the Chief Justice speaking for the court—that an executive agency created by a State for the purpose of improving public highways, and empowered to assess the cost of its improvements upon adjoining lands, and to purchase such lands as were delinquent in the payment of the assessment, did not by such purchase acquire a contract right in the land so bought, which the State could not modify without violating the provisions of the Constitution of the United States. But further citations of authorities upon this point are unnecessary. They are full and conclusive to the point that the municipality, being a mere agent of the State, stands, in its governmental or public character, in no contract relation with its sov-

ereign, at whose pleasure its charter may be amended, changed, or revoked without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. In this case the city has no more right to claim an immunity for its contract with the waterworks company than it would have had if such contract had been made directly with the State. The State, having authorized such contract, might revoke or modify it at its pleasure."

Applying this reasoning to the case at bar, we have no difficulty in reaching the conclusion that the local acts were not unconstitutional. The other questions raised have been examined, but we do not deem it necessary to discuss them.

The supervisor of Frankenmuth should have obeyed the instruction of the board of supervisors to spread the tax upon the roll, and it is so ordered.

The other Justices concurred.

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HARRISON *v.* DETROIT, YPSILANTI, ANN ARBOR & JACKSON RAILWAY.

1. MASTER AND SERVANT—ASSUMPTION OF RISK.

An employé assumes the risk of all such dangers incident to the employment as he knows to exist or should acquaint himself with.

2. SAME — STREET RAILWAYS — ASSUMPTION OF RISK — ELECTRIC SHOCK.

A motorman, killed by an electric shock due to a trolley pole coming in contact with a high-tension wire while he was removing it from its socket, assumed the risk, where it appeared that, from the length of his employment, he must have known the danger from the high-tension wire, and that the wire was within reach of the trolley pole if removed from the socket, and it was not necessary that the company should instruct

him that electricity would arc if the end of the pole should come within one-half inch of the high-tension wire.

Error to Washtenaw; Kinne, J. Submitted February 4, 1904. (Docket No. 82.) Decided July 7, 1904.

Case by Phila Harrison, administratrix of the estate of Herbert J. Harrison, deceased, against the Detroit, Ypsilanti, Ann Arbor & Jackson Railway for the alleged negligent killing of plaintiff's intestate. There was judgment for plaintiff, and defendant brings error. Reversed.

Corliss, Andrus, Leete & Joslyn, for appellant.

A. J. Sawyer & Son, for appellee.

MONTGOMERY, J. This action is brought by the plaintiff, as administratrix of the estate of Herbert J. Harrison, deceased, who met his death while employed by the defendant as motorman on its electric car. The principal question discussed in this court is whether there was evidence tending to show culpable neglect on the part of the defendant, and whether there was contributory negligence on the part of the deceased and his co-employés, and whether the deceased assumed the risk of the conditions of the employment as they existed. For an understanding of the case a full statement of facts is essential, and we adopt the statement given by the counsel for the defendant, with such slight variations as the record makes essential:

For some years the defendant company operated an electric railway between Ann Arbor and Detroit by what may be termed the "direct trolley current system," and plaintiff's employment began while this current was used. Later the defendant acquired the necessary right of way from Ann Arbor to the city of Jackson. In order to operate an electric line for that distance it was at least commercially necessary to install a new system of transmitting

electric power or current along the line, which is known as the "high-tension system."

This system is a method of generating at the power house a large volume or current of electricity, but with a comparatively low voltage, and converting it into a small current or volume with an exceedingly high voltage, and carrying it out along the line on small wires to be taken off at different points called "substations." At these substations the current is reconverted into the large volume again, with a pressure adjusted to the requirements of the trolley wire. The method of transmission of the current may be likened somewhat to transmitting water through pipes. If, for instance, the water passing through a four-inch pipe is to be sent through an inch pipe, the current or pressure in a small pipe must be many times greater than in the large pipe. If the pressure in the small pipe is greater than can be used at the other end, then it can be discharged in a four-inch pipe, when the current or pressure would be brought back to what it is in the four-inch pipe at the other end, less the friction. From the foregoing it will be seen that no more actual power, or even pressure, is used to propel cars than would be used by the direct trolley current. In fact, the same direct trolley current is used as before, but the surplus power carried along the line in a different form and manner until it is necessary to use it on the trolley wire.

The ordinary mode of transmission of high potential currents is by what is called the "multiphase system." Technically, this consists of "the use of two or more alternating currents of equal period, but differing in phase." "Differing in phase" means that the two alternations or current waves do not come together, but one after or at a different time from the other. The three-phase system is used by the defendant. Three wires are strung along in the form of an equilateral triangle, each substation being fed from a set of these wires. Theoretically, in each of these triangular sets of wires, one of them at any given moment of time is dead, but, as it is so only for an infin-

itesimal part of a second, it is for all practical purposes very much alive at all times and dangerous, carrying a voltage of upwards of 22,000. To establish this system it was necessary to set a new line of poles. The high-tension wires were carried on two cross-arms, one above the other, the longer one being at the top, carrying four of these small wires, and the lower one carrying two. These six wires formed two triangles, with one of the points of each downward.

Below these cross-arms on the same pole is an arm long enough to extend a little past the center of the railway track, so as to carry suspended from it two trolley wires 6 inches apart and 18½ feet above the rails. The northerly trolley wire is used by the cars going west, and the southerly by the cars going east. From the poles to the center of the track it was 6 feet 4½ inches. The trolley arm, therefore, would have to be some 3 or 4 inches longer in order to carry the farther trolley wire. The lowest high-tension wires are between 26 and 27 feet above the rail, and between 4 and 5 feet to the side of the center of the track. The poles carrying these wires and trolley arms were 35-foot poles as a rule, except in places where, to avoid trees and buildings, it became necessary to carry the high-tension wires higher to avoid contact. The undisputed testimony is that the 35-foot pole is the standard height for carrying high-tension wires in suburban railway construction.

In August, 1901, the reorganization of the line was begun. The work of stringing the wires commenced about the middle of November of that year, and was completed about the middle of February following, but a portion of the high-tension system was put in operation January 12, 1902, being something over a month before the entire work was completed. While the work of setting new poles and stringing the high-tension wires was going on, the defendant also reorganized its power house, and built its substations, and put in the new machinery and appliances for generating and handling the high potential currents as

well as the necessary transformers and converters. The entire work was done by Westinghouse, Church, Kerr & Co., under the supervision of its superintendent, Mr. Charles Riley. It is not believed that there will be any dispute over the matters contained in this preliminary statement, nor that it will be necessary to go further into the details of construction in order to give a correct understanding of the general conditions of the railway at the time of the accident which is the origin of this suit.

Herbert J. Harrison began work for the defendant in September, 1900, first as conductor, then as a motorman, on the Ann Arbor city line, on which he remained for about a year. During nearly all of that period, if not all of it, he lived at Inkster, Wayne county, and most of the time went to Ann Arbor in the morning and returned in the evening, riding both ways over defendant's main line. While thus going back and forth he asked for and obtained permission to ride with the motorman, and received from him instructions in the operation of the large suburban cars. It is a conceded fact that he thus became a competent motorman. It should also be said that Mr. Harrison was a man of good habits and careful in the management of matters put in his charge.

Mr. Harrison began operating suburban cars on the main line from Detroit to Jackson some time after August 7, 1901, which was the time he left the Ann Arbor city line. It may have been immediately afterwards, as there is no evidence of his laying off. This would be about the time the work of laying out the new system began. He thus had an opportunity of daily observing the work of setting the poles and stringing the wires as it progressed. Moreover, the general headquarters of the road are at Ypsilanti. The power house at Ypsilanti was a general rendezvous of the conductors and motormen, where the work of reconstructing the system and the coming installation of the high-tension current was a matter of daily discussion and inquiry by them. Mr. Harrison was very frequently there, and made many inquiries of Mr. Riley,

superintendent of construction, about the new system. He asked how high the voltage was to be, and other similar and most natural questions for one who was to use the current. Under the old system it was usual, if the trolley wire was down on the track, to pass a rope around it to pull it off, or to take a piece of dry board and push it away. Harrison asked Riley if it would be safe to put a rope around a high-tension wire. Riley said, "No; keep away from it." It was a matter of common knowledge among all the employés that the current was dangerous, and that they should use the utmost care to prevent making a contact with the high-tension wires. Harrison himself warned one of the men to be very careful.

The trolley poles in use on defendant's line are 11½ feet long. Each of defendant's cars carries an extra trolley pole lashed to the top of the car, to be used in case the one in use becomes disabled. One of the duties of the men operating the car is to climb on the top of the car to change the trolley pole whenever it becomes necessary, and this is one of the duties about which they are instructed. All the men were well informed of and understood the danger of contact with a high potential current, and were warned to "avoid in every way possible from getting a shock."

On the night of March 11, 1902, at about 9 o'clock in the evening, car No. 6 was coming east from Jackson in charge of Henry W. Pullen, conductor, and Herbert J. Harrison, motorman. About three miles west of Chelsea, the trolley jumped from the wire twice. Then Pullen gave a signal to Harrison to come back and see what was the trouble. He did so, and discovered that the wheel or trolley would not revolve. The night was dark, and it had been raining hard, so it was decided to run to Chelsea before changing the trolley. When they arrived there they climbed upon the car to change poles. The pole which had been in use was allowed to stand nearly upright, and Pullen took hold of it while Harrison loosened the burrs or nuts which held the pole in the socket. It is customary to first loosen the pole, and then both persons lift it out,

and both take hold of the new one and place it in the socket. On this occasion Harrison loosened the burrs until Pullen said he thought it would come out. Harrison said, "Wait a minute," and then straightened up and took hold of the trolley. They both lifted, but could not get it out. Harrison said, "I will have to loosen it a little more," and proceeded to do so. Pullen still had hold of the pole, and was twisting it and lifting, and said again, "It is loose enough now, Herby," and, without waiting for Harrison to help him, he lifted it, and he said, "It gave way all at once; it just shot right up." Then there was a flash, and that was all Pullen could remember of the transaction.

The socket is a part of the revolving stand on the top of the car. It has a very strong spring attachment which will cause the trolley pole to stand upright, or nearly so, when the trolley is taken off the wire. In removing the trolley pole the trolley stand is left so that the pole can swing back lengthwise of the car. When in that position there is no possible way of making the pole swing sidewise while it remains in the socket. While the trolley pole is standing up, it is quite close to the trolley wire. It does not reach as high as the lowest high-tension wire, and it is between 4 and 5 feet to the side of it. It cannot be brought nearer any of the high-tension wires until taken out of the socket. The trolley stand has a ground connection, so that in removing the trolley pole care must be taken not to make contact with the trolley stand and at the same time with the trolley pole after the latter is removed from the socket. If such a contact be made, then if the trolley pole touches either the trolley wire or the high-tension wires a dangerous, and perhaps fatal, shock will be received.

It was the claim of the plaintiff, and the testimony was such as to warrant a finding of fact by the jury, that the trolley pole came in contact with the high-tension wires, and by this means the death of Harrison was caused.

It appears from the measurements which the defendant

presented in the case that, when the trolley stand was revolved so that the trolley pole would run at right angles with the car, the trolley could be raised within 1 foot 6½ inches of the nearest high-tension wire, which was between 4 and 5 feet to the side of the center of the car. The lowest high-tension wire is between 6 and 7 feet higher than the trolley wire, which is 5 feet 11 inches above the running board, which is on top and the highest part of the car. It was shown that the distance from the trolley to the nearest high-tension wire is fully as great on the defendant's road as that of any other road in the country. The overhead construction of the road is fully as good, if not better, than any other seen by the witness Riley, who is personally familiar with over 50 electric railways using the high-tension system. The same witness also testified that the distance the poles were set from the center of the track is the standard set. Another expert, Alfred C. Marshall, who is chief engineer of the Rapid Railway System, stated that the 35-foot pole is the approved standard. There was no proof offered tending to show a faulty construction of any kind, nor was it claimed that there is any overhead construction anywhere in the country where the distance between the high-tension wires and trolley is greater.

In our view of the case, the question of first importance is whether the deceased assumed the risk of the conditions as they existed. The general rule upon the subject of assumed risk is too well settled in this State to make it necessary to quote from the decided cases at any great length. The employé is, as matter of law, held to have assumed the risk of all such dangers incident to the employment as he knows to exist or should have acquainted himself with. *Michigan Cent. R. Co.* v. *Smithson*, 45 Mich. 221 (7 N. W. 791); *Ragon* v. *Railway Co.*, 97 Mich. 265 (56 N. W. 612, 37 Am. St. Rep. 336); *Balhoff* v. *Railroad Co.*, 106 Mich. 606 (65 N. W. 592); *Bauer* v. *Foundry Co.*, 132 Mich. 537 (94 N. W. 9); *Bradburn* v. *Railway Co.*, 134 Mich. 575 (96 N. W. 929).

The rule is recognized by plaintiff's counsel, but it is contended that in the present case the plaintiff should not be held to have assumed the risk, for the reason that Harrison was not informed that the high-tension wire came within one foot and six inches of the end of the trolley pole when placed on a direct line from the trolley stand, and that the trolley pole was therefore in danger of coming in contact with the high-tension wire while the attempt was being made to remove the pole; that it was not shown that Harrison was instructed or knew that it was dangerous to remove the trolley pole on the side of the car towards the high-tension wire; that he was not instructed that, if the trolley pole came within one-half inch of the high-tension wire, electricity would arc.

Were instructions of this character essential before it be said that the deceased assumed the risk? He knew of the fact that contact between the trolley pole and the high-tension wire would be exceedingly dangerous. Indeed, contact between the pole and the trolley wire with a pole removed from the socket was dangerous only in less degree. He certainly knew that this wire was near enough to be reached by the trolley pole upon its being removed from the socket. Knowing, as he did, of the high voltage in the conducting wires, it would seem obvious that during the term of his employment he should have noticed that they were near enough to come in contact with this pole if the pole was directed toward them. The occasion for special instruction that this pole of 11½ feet in length would reach that distance in whatever direction it was extended is not manifest. And that the distance from the car to the high-tension wire could be as easily estimated by deceased and his co-employés as by any alter ego of the defendant is equally manifest. This being so, it would be understood by him, as well before any instruction in that regard as after, that if this trolley pole was removed in the manner in which it was on this occasion it was likely to, or at least might, come in contact with this high-tension wire. It is undoubted that, knowing this, he knew

that any such contact was almost sudden death to one in whose hands the trolley pole was at the time. It seems clear to us, therefore, that the danger was obvious, and that it was one assumed by the deceased.

The suggestion that he did not have knowledge that electricity would arc is of little force. The testimony shows that electricity arcs when a conductor like the trolley pole in question in this case is brought either in contact with the high-tension wire or within half an inch of it. If the case were one in which in the performance of the duty of the employé it became necessary for him to bring this conducting trolley pole within half an inch of the high-tension wire in the ordinary discharge of his duty, a different question might be presented. But the suggestion that he might make nice calculations as to carrying this pole within half an inch of this dangerous current, but would be guilty of negligence himself, or at least held to have assumed the risk, if the pole came in actual contact with the wire, is without force.

Plaintiff's counsel cite us, as sustaining their contention that this was a case for instruction, *Smith* v. *Car Works*, 60 Mich. 501 (27 N. W. 662, 1 Am. St. Rep. 542); *Ribich* v. *Smelting Co.*, 123 Mich. 401 (82 N. W. 279, 48 L. R. A. 649, 81 Am. St. Rep. 215); *Walker* v. *Railway Co.*, 104 Mich. 606 (62 N. W. 1032). In the *Smith* and *Ribich Cases* the duty which was neglected by the master was that of notifying the employé of a latent danger which consisted of properties of substances with which he was bound to deal, which might be unknown to an ordinary workman. In the present case the properties of this high-tension wire were unquestionably known to the deceased. No further instruction was required as to that. The contention of plaintiff gets down to this: That he should have been told the precise location of this wire with reference to the top of the car, and that the wire could be reached by a pole of the length of the trolley pole. These facts were open to his observation and to the observation of every employé who passed over this road. The case of

Walker v. *Railway Co.*, supra, was one in which the danger to the injured party arose out of a want of knowledge of conditions which were not obvious.

In the present case we think the danger was obvious and it was assumed, and upon this ground a verdict should have been directed for the defendant. We find it unnecessary to discuss the other questions in the case.

The judgment will be reversed, and new trial ordered.

The other Justices concurred.

PEOPLE *v.* NAGLE.

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1. CRIMINAL LAW—LARCENY—EVIDENCE—RES GESTÆ.
   On a prosecution for stealing property from a barn in the night-time, evidence that other articles than those described in the information were taken from the barn at the same time and found in his possession, is admissible as res gestæ.
2. LARCENY—INTENT—OTHER OFFENSES.
   On a prosecution for entering a barn with intent to commit larceny, evidence of other larcenies committed by respondent is admissible as bearing upon his intent.[1]

Error to Berrien; Coolidge, J. Submitted February 26, 1904. (Docket No. 198.) Decided July 7, 1904.

Jacob Nagle was convicted of larceny and sentenced to imprisonment for five years in the State prison at Jackson. Affirmed.

Ralph W. Shauman and *James O'Hara*, for appellant.

Charles A. Blair, Attorney General, and *Ira W. Riford*, Prosecuting Attorney, for the people.

[1] As to evidence of other crime in criminal case, see note to *People* v. *Molineux*, (N. Y.) 62 L. R. A. 193.

MOORE, C. J. The respondent was convicted of an offense charged in the information as follows:

"That Jacob Nagle heretofore, to wit, on the 29th day of July, in the year one thousand nine hundred and two, at the county of Berrien, aforesaid, in the night-time of said day, the barn of one James Marshall, then and there situate, did then and there enter without breaking, with intent then and there to commit the crime of larceny therein, and one bridle of the value of two dollars and fifty cents, and one neck-yoke of the value of one dollar, and one pair of breast straps of the value of one dollar, and one pair of rubber boots of the value of two dollars, in all of the value of six dollars and fifty cents, of the goods and chattels of the said James Marshall, in the said barn then and there being, then and there did steal, take, and carry away, contrary to the form of the statute."

The case is brought here by error. No testimony was offered on the part of the respondent. The testimony disclosed that the articles named in the information were in the barn of Mr. Marshall at night, and were not there in the morning; that about 10 days thereafter they were found concealed, with a large quantity of other property which had been stolen, upon the premises of the respondent, who lived a short distance from Mr. Marshall. The neck-yoke had been painted another color. When questioned about the property, the respondent stated to the officer he had bought them.

Early in the trial the following occurred:

"*Q.* I call your attention to this wagon pole.

"*Mr. Sterling:* If that is alleged in the information, it is all right. Otherwise we object to it.

"*The Court:* Is it alleged?

"*Mr. Shauman:* No; I don't see it.

"*Mr. Sterling:* Nothing alleged about a wagon pole.

"*Mr. Riford:* That is true, but we have got a right to show it for the purpose of showing intent.

"*The Court:* I don't think you have arrived at that place yet.

"*Mr. Riford:* Very well; pass it for the present.

"*Mr. Shauman:* Do I understand your honor to rule the presence of the articles in here is not objectionable?

"*The Court:* I don't know anything about those articles at all. When the testimony comes up, I will know about them, perhaps. I saw some men bring them in, but I don't know anything about them. Of course, if you have any objection to more than one article being produced at a time, perhaps the rest of them can be taken out.

"*Mr. Shauman:* No; give me an exception to the ruling."

Still later the following occurred:

"*Mr. Shauman:* I believe the people have rested. I want to call attention again, to get it into the record, that this stuff is again in the court-room, and ask to have removed all of the stuff except what is alleged in the information. (The same objection as was raised before.) This crosscut saw, scoop shovel, and two or three things not alleged in the information, I ask to have removed.

"*The Court:* I think the goods may be removed, except what is alleged. (Goods referred to removed out of the court-room.)"

The prosecution was allowed to show that a wagon pole was taken from Mr. Marshall's barn upon the night in question, and found in the possession of the respondent at the time the other things were found, when the following occurred:

"*The Court:* So far as stealing something else belonging to other parties is concerned, your objection may be good, but it is simply this: Witness can testify to other property of his being there at the same time he found those. That I haven't any doubt about.

"*Mr. Shauman:* Note an exception.

"*Q.* I want to call your attention to this pole.

"*The Court:* The jury cannot convict this defendant for stealing anything that is not alleged."

Still later the following occurred:

"*Q.* Did you have a search warrant?

"*A.* Yes, sir.

"*Q.* What other stuff did you find in the barn?

"*Mr. Shauman:* I object to the question.

"*The Court:* Yes, I think perhaps the objection is good. I have limited it to the property which was proved

or claimed to be owned by the complaining witness. Of course, whatever the defendant said in regard to property there is admissible.

"*Q.* Did you see a bridle with lines to it in the corncrib?

"*A.* Yes, sir.

"*Q.* Who was present?

"*A.* At that time?

"*Q.* Yes.

"*A.* Mr. Neely, Mr. Marshall, Mr. Wheaton; I think, Mr. Murdoch. There was a number there by that time. I did not open the corncrib until after I had sent Mr. Neely with a team to get the different parties that had lost stolen property, and to get them there before I opened—started in a systematic search; but while they was gone, while he was gone getting those other witnesses, other parties that had lost—

"*Mr. Shauman*: Wait. I object to this testimony, and move it be stricken out. What is it for?

"*The Court:* At the present time I do not see the necessity of it. The question is proper. The other part may be stricken out."

The prosecutor asked the witness no other question. The attorney for the respondent at once began the cross-examination, as follows:

"*Q.* Mr. Pearl, what was the crowd doing there that Sunday?

"*A.* There was a great deal of excitement there.

"*Q.* Why?

"*A.* Because there had been a lot of stolen property found.

"*Q.* How do you know it was stolen?

"*A.* It had been identified by between 30 and 40 different people.

"*Q.* Did you see it stolen?

"*A.* No, sir.

"*Q.* How do you know it was stolen?

"*A.* I found it in this man's possession, and it had been identified by different people."

The cross-examination was continued at great length, and showed in detail what was found on the premises of respondent, and the various persons who claimed to own it.

Error is assigned because some of the stolen articles were permitted to be in the court-room during the progress of the trial. In view of the offer of the judge to have them removed, and produced one at a time, and the reply of counsel, we deem it unnecessary to pass upon the question.

Error is assigned because testimony of the finding of stolen property in the possession of respondent was allowed. The court had confined the prosecutor to proof of articles taken from the barn of Mr. Marshall upon the night when the property described in the information was taken. We have no doubt this testimony was admissible as part of the res gestæ, even though some of the articles were not described in the information. After this ruling of the court, the attorney for the respondent brought out, upon the cross-examination, the fact that many stolen articles were found in the possession of the respondent. Under these circumstances we do not deem it necessary to discuss the assignment of error upon this branch of the case.

Counsel for respondent presented three requests to charge, all of which were refused, except as covered by the general charge. The first of the requests asked the court to direct a verdict of not guilty of the main offense charged. The other requests are as follows:

"In considering the testimony, the jury are not at liberty to consider any testimony of other larcenies than that alleged in the information in this case, as any evidence of the larceny so alleged, or as making it more probable that the larceny for which the respondent is being tried was committed by him. The respondent is on trial only for the offense charged in the information, and he can be convicted only upon the evidence of the offense so charged, and not upon evidence of some other offense.

"I charge you that, in arriving at your verdict as to the guilt or innocence of the respondent upon the main offense alleged in the information, you have no right to consider any testimony as to any other offense than the one charged."

In his general charge the judge said in part as follows:

"According to the contention, gentlemen, in this case, and according to the case as it is presented before you, the only question is whether this barn was entered in the night-time or not. Now, by the word or phrase 'night-time' we usually mean that period of the 24 hours when a person's features cannot be easily discerned or readily discerned. In this definition the light of the moon is excluded; the light of the moon has nothing to do with it. * * *

"No technical rule can be laid down for you to be governed by. In some States statutes have been enacted with reference to this question. In England, for instance, by statute, night means from nine o'clock at night until six o'clock in the morning; in the State of Massachusetts, by statute, night means from one hour after sunset to one hour before sunrise; and in some localities night is meant from sunset to sunrise. But I do not lay down any technical rule. I simply lay down this general rule: That it is that period of the 24 hours in which a person's features cannot be readily discerned. * * *

"Now, in this case you are to use your common sense. From all the evidence and from all the circumstances which have been developed upon the trial you are to say whether there is any reasonable doubt of those goods having been taken or this barn entered during the night-time. If you have any reasonable doubt with reference to the matter, then, gentlemen, you should not convict. If you have no reasonable doubt with reference to this defendant having entered the barn in the night-time, why, then it becomes your duty to convict. * * *

"Now, gentlemen, if you find that this defendant is not guilty of entering the barn in the night-time, you can still convict of simple larceny; that is, of larceny of property of the value of less than $25. I mean to say that, if you find the defendant is not guilty of entering the barn in the night-time, you then have the power to find this defendant guilty of simple larceny. * * *

"So, in this case there are three verdicts: One of acquittal; one guilty of entering the barn, or guilty of the charge contained in the information; or, third, guilty of larceny. Either one of these three verdicts you can bring in if the evidence appears to you to warrant."

Error is assigned upon the refusal to give respondent's requests. In the course of the trial the court had repeat-

edly told the jury that respondent could be convicted only of the offense charged in the information. There was no claim made that testimony of other larcenies could be considered except upon question of intent. The respondent could not be convicted of the main offense charged without the people proving beyond a reasonable doubt that respondent entered the barn with intent to commit the crime of larceny. As bearing upon the question of intent, we think the jury might consider the testimony. *People* v. *Henssler*, 48 Mich. 49 (11 N. W. 804); *People* v. *Wakely*, 62 Mich. 297 (28 N. W. 871); *People* v. *Hawkins*, 106 Mich. 479 (64 N. W. 736); *People* v. *Ascher*, 126 Mich. 637 (86 N. W. 140).

We do not find any reversible error.

Judgment is affirmed.

The other Justices concurred.

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THOMPSON *v.* CITY OF WEST BAY CITY.

1. MUNICIPAL CORPORATIONS—DUTY TO CONSTRUCT SIDEWALKS.
   The city charter of West Bay City, providing that owners and occupants of adjacent property shall build, rebuild, and maintain sidewalks, that the council may, by a two-thirds vote, pay such part of the expenses as it deems advisable, and that the building, rebuilding, and repairing shall be done under the direction of the common council, does not make it the duty of the city to construct sidewalks.

2. SAME—SIDEWALKS—NEGLIGENCE OF CONTRACTOR—LIABILITY OF CITY.
   A city is not liable for an injury due to the negligence of a contractor in improperly constructing a barrier to prevent people walking on a new cement sidewalk, where the duty of building the sidewalk was not imposed by law upon the city.

3. SAME—SIDEWALK ORDINANCE—NEGLIGENCE OF CONTRACTOR—LIABILITY OF CITY.
   An ordinance requiring the work of building sidewalks to be

done under the supervision of the city engineer, and obligating the city to pay one-third of the cost, does not make the city responsible for the negligence of one building a sidewalk under a contract with the owner of the adjacent land, where the charter makes it the duty of the owner of the land to build the sidewalk.

4. SAME—OBSTRUCTIONS—LIABILITY OF CITY.

A city charter, requiring the council to see that all ordinances relating to the keeping of sidewalks free from ice, snow, and obstructions are strictly enforced, does not make the city liable for the negligence of a contractor in erecting a barrier across a sidewalk, when the contractor is employed by the owner of the adjacent property to build the sidewalk.

5. HIGHWAYS—SAFE CONDITION—MUNICIPAL LIABILITY—CONTRACTOR.

1 Comp. Laws, § 3441, making it the duty of a municipality to keep its streets in a condition reasonably safe and fit for travel, makes it liable only for its own negligence or the negligence of some one for whose conduct it is legally responsible, and not for the negligence of a contractor who is not its agent, nor engaged in performing a duty imposed by law upon the municipality.

Error to Bay; Shepard, J. Submitted March 16, 1904. (Docket No. 134.) Decided July 7, 1904.

Case by Martha J. Thompson against the city of West Bay City for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

S. G. Houghton, for appellant.

Fred W. De Foe, for appellee.

CARPENTER, J. This is a suit for personal injuries. On the evening of October 26, 1902, plaintiff was injured by falling over an alleged improperly constructed barrier on Elm street, in said defendant city. This barrier was placed across the sidewalk to guard a newly constructed cement walk. The walk was constructed and the barrier erected by one William Green, under a contract with Israel Nontais, the owner of the adja-

cent property. Some time early in the preceding September, defendant had notified Nontais to construct this sidewalk. Nontais thereupon, on the 15th of September, applied for and received permission from defendant's common council to build the walk. This permission was granted under an ordinance passed by defendant which required the work to be done under the supervision of the city engineer, and obligated the city to pay one-third of its cost.

The case was submitted to the jury upon the theory that defendant was responsible for the neglect of the contractor to properly guard the walk. The jury rendered a verdict for the plaintiff. Defendant asks us to reverse that judgment. The important question in the case is whether the trial court was right in holding defendant responsible for the negligence of the contractor in erecting an unsafe barrier. In entering upon this inquiry, it is important to bear in mind the precise question involved. Plaintiff received the injury, not from a defect in the walk, but from an unsafe barrier. The question involved is not whether the city is under an obligation to put its sidewalks in a condition reasonably safe for travel after knowledge or notice of their unsafety. It is not whether the city was under an obligation to see that the contractor constructing this walk made a walk reasonably safe for travel. It is this: Is the city answerable for the neglect of the contractor, not merely in building the walk, but in performing incidental duties connected with the work? If the contractor, in building this sidewalk, was performing a duty imposed by law upon defendant, there would be little difficulty in sustaining the ruling of the trial court. See *City of Detroit* v. *Corey*, 9 Mich. 165 (80 Am. Dec. 78); *Southwell* v. *City of Detroit*, 74 Mich. 438 (42 N. W. 118); *Baker* v. *City of Grand Rapids*, 111 Mich. 447 (69 N. W. 740); *Monje* v. *City of Grand Rapids*, 122 Mich. 645 (81 N. W. 574); *Beattie* v. *City of Detroit*, 129 Mich. 20 (88 N. W. 71). But we cannot say that the duty of constructing this walk legally devolved upon the defendant municipality. The law governing the matter

is contained in chapter 23 of defendant's charter. See Act No. 442, Local Acts 1897. By this act, defendant is given authority, not to itself build sidewalks, except in the contingencies hereafter mentioned, but to require the owners and occupants of adjacent property "to build, rebuild, and maintain" them, "the expense thereof to be paid by such owner or occupant; or the council may, by two-thirds vote of all the aldermen elect, pay such part of the expenses of building * * * as they may deem proper. * * * The building, repairing, and rebuilding of all sidewalks * * * shall be done under the direction of the common council of the city." Only in the event of the owner's failure is authority given to defendant to build such walk at the owner's expense, though the chapter contains a provision that "the council may, by two-thirds vote of all the aldermen elect, provide by ordinance for the rebuilding, maintaining, and keeping in repair of all sidewalks within the city, * * * and pay the expense thereof from the general street fund." This latter provision is inapplicable, for two reasons:

(*a*) While it authorized defendant, under certain circumstances, to *rebuild* sidewalks, it did not authorize it to do what was being done in this case—to *build* them. The statute, for some reason, clearly distinguishes between building and rebuilding sidewalks.

(*b*) Even if this provision permitted—as it did not—defendant to build sidewalks, it could have no bearing upon its responsibility in a case like this, where it had not elected to proceed under it. Defendant could not proceed under this provision without paying the expenses of the improvement from the general street fund. If it determined, as it did in this case, that the walk should be built at the expense of the adjacent owner, it would be unreasonable to hold that the city's responsibility was increased by the circumstance that it might at its own expense have done the work.

Did the enactment of the ordinance change the relation created by the charter between the defendant and the contractor? The ordinance makes it unlawful for a sidewalk to be constructed without first obtaining the permission and consent of defendant's council, and provides that no sidewalk shall be built except as provided by the ordinance or directed by the council. This in no way changed the legal relation between the contractor who built the sidewalk and the defendant. For section 2 of chapter 23 of defendant's charter requires sidewalks to be built "of such width, materials, and manner of construction, and within such time, as the council shall by ordinance or resolution prescribe." It cannot possibly be maintained that defendant became responsible for the contractor's negligence because it chose, as it had a statutory right to choose, to contribute a portion of the expense of constructing the walk. Nor is defendant responsible because it supervised the work of construction. In doing this, it was only performing an obligation imposed upon it by the express language of its charter, requiring the building of all sidewalks to be done under the direction of its common council.

Section 4 of said chapter 23 makes it the duty of defendant's council "to see that all ordinances and resolutions relating to the building, rebuilding, and repairing of sidewalks * * * and the keeping of the same free from ice and snow and from all obstruction * * * are strictly enforced." While it may be contended that this language imposed a duty to exercise care in supervising the building of sidewalks, it is obvious that it falls far short of making the municipality an insurer of the diligence of a third person, to whom the law gives authority to build them. It might very properly be held that the city is responsible for any negligence in supervising the contractor, but the question involved in this case, as heretofore stated, does not relate to its responsibility for such negligence, but it is whether it is responsible for all negligence of the contractor whose work is thus supervised. If defendant was responsible for the contractor's

negligence to build a safe barrier, an extraordinary obligation rested upon it. The contractor was neither its agent nor servant. It had no voice in his selection. He was performing a duty which the law devolved, not upon defendant, but upon a third person. Defendant intrusted him with no authority. No contract relations existed between him and defendant. If, under these circumstances, defendant is responsible for the contractor's negligence, there is a responsibility which can be discharged by no such general supervision of the work as will insure results. Defendant can discharge this obligation only by having a representative constantly on the ground, not merely supervising but directing every detail of the work. If there is such an obligation, it must be imposed, not by reason, but by some statutory enactment.

Defendant's responsibility depends upon the proper construction of Act No. 264 of the Public Acts of 1887 (chapter 91, 1 Comp. Laws). By section 1 of said act (section 3441, 1 Comp. Laws), a municipality is responsible for—

"Bodily injury upon any of the public highways or streets in this State by reason of neglect to keep such public highways or streets and * * * sidewalks * * * on the same, in reasonable repair and in condition reasonably safe and fit for travel."

And it is provided by section 2 of said act (section 3442, 1 Comp. Laws):

"That in all actions brought under this act it must be shown that such township, village, or city has had reasonable time and opportunity after knowledge by or notice to such township, village, or city that such highways, streets, * * * or sidewalks * * * have become unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein after such knowledge or notice."

This language makes it clear that a municipality is liable only for its own negligence, or for the negligence of some one for whose conduct it is legally responsible. It is clearly not legally responsible for the conduct of a con-

tractor who is not its agent or its servant, nor engaged in performing a duty imposed by law upon it. The cases of *City of Detroit* v. *Corey*, 9 Mich. 165 (80 Am. Dec. 78); *Southwell* v. *City of Detroit*, 74 Mich. 438 (42 N. W. 118); *Baker* v. *City of Grand Rapids*, 111 Mich. 447 (69 N. W. 740); *Monje* v. *City of Grand Rapids*, 122 Mich. 645 (81 N. W. 574); and *Beattie* v. *City of Detroit*, 129 Mich. 20 (88 N. W. 71)—have no application. In those cases the municipality was held liable for the negligence of a contractor who was performing a duty imposed by law on the defendant municipality. This holding accords with the principles of justice, even though the municipality was compelled to let the contract to the lowest bidder, for it could protect itself from the consequences of the contractor's negligence by a bond. That it could not do in the case at bar. Neither is the case governed by *Hayes* v. *City of West Bay City*, 91 Mich. 418 (51 N. W. 1067). There the city voluntarily chose to permit a building to be moved through its streets under the supervision of its marshal, who had notice that it was being moved in a negligent manner. The responsibility of the city was based on the negligence of its marshal, and not on the negligence of the contractor.

There are authorities which hold a municipality responsible for all negligence of one who, acting under its license, is doing an act which endangers the safety of travelers on a highway. See *District of Columbia* v. *Woodbury*, 136 U. S., at page 464 (10 Sup. Ct. 990); *Mayor, etc., of Savannah* v. *Donnelly*, 71 Ga. 258; *Russell* v. *Inhabitants of Town of Columbia*, 74 Mo. 480 (41 Am. Rep. 325). The doctrine of these cases has been disapproved. See *Masterton* v. *Village of Mt. Vernon*, 58 N. Y. 391; *City of Warsaw* v. *Dunlap*, 112 Ind. 576 (11 N. E. 623, 14 N. E. 568); *Borough of Susquehanna Depot* v. *Simmons*, 112 Pa. St. 385 (5 Atl. 434); *City of Denver* v. *Sherret*, 88 Fed. 226, 31 C. C. A. 499. And we think it inconsistent with the decisions of this court. See *Fisher* v. *Thirkell*, 21 Mich. 1 (4 Am. Rep. 422); *McArthur* v.

City of Saginaw, 58 Mich. 357 (25 N. W. 313, 55 Am. Rep. 687); *McEvoy* v. *City of Sault Ste. Marie*, 136 Mich. 172 (98 N. W. 1006). Even if that doctrine were sound, it would not be applicable to the case at bar. It is based upon the ground that the city has voluntarily granted a license. In the case at bar it has done no more than to permit a person to do an act which he was legally authorized to do.

Plaintiff's counsel cites many authorities from other States. Many of them hold that, notwithstanding the obligation of the adjacent owner to build a walk, the municipality is responsible to a person injured by reason of its being in a defective condition. See *City of Keokuk* v. *Independent District of Keokuk*, 53 Iowa, 352 (5 N. W. 503, 36 Am. Rep. 226); *City of Rochester* v. *Campbell*, 123 N. Y. 405 (25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760); *Russell* v. *Village of Canastota*, 98 N. Y. 496; *Flynn* v. *Canton Company of Baltimore*, 40 Md. 312 (17 Am. Rep. 603); *City of Hartford* v. *Talcott*, 48 Conn. 525 (40 Am. Rep. 189); *Noonan* v. *City of Stillwater*, 33 Minn. 198 (22 N. W. 444, 53 Am. Rep. 23); *Toutloff* v. *City of Green Bay*, 91 Wis. 490 (65 N. W. 168). These cases are in accord with our own decision in *Lynch* v. *Hubbard*, 101 Mich. 43 (59 N. W. 443), and throw no light upon the question under discussion. In *Davis* v. *City of Omaha*, 47 Neb. 836 (66 N. W. 859), it was stated, rather than held, that under its charter the defendant city was responsible for the negligence of a lot owner building a sidewalk. But the statute there in question did not, as does the statute governing this case, make it the duty of the lot owner to build the sidewalks adjoining his property.

We conclude, therefore, that the court erred in holding defendant responsible for the negligence of the contractor. If a city is liable in a case of this character, its liability must rest upon the ground that it has been guilty of negligence in failing to put a sidewalk in a proper condition for travel after it has had the statutory knowledge or notice

of its unsafe condition. We cannot, as urged by plaintiff, affirm this case upon the ground that defendant neglected this duty. We could not do that unless the evidence proved defendant's negligence as a matter of law. We go as far as we are justified, and farther than defendant would concede, in saying that the evidence proves that defendant knew that the walk was being constructed. We could not say that it proves that defendant knew that the walk was guarded by unsafe barriers. It cannot be held, as a matter of law, that this evidence justifies a court in directing a verdict for the plaintiff, without assenting to the proposition that due diligence on the part of a municipality requires it, after knowledge that a walk is being constructed, to itself guard said walk by proper barriers. This proposition is equivalent to declaring that it is negligence for the municipality in such a case to assume that the person building the walk will perform the duty which requires him to properly guard it. In short, the right to direct a verdict under such circumstances rests upon the ground which, as we have already shown, is in our opinion unsound, that defendant is responsible for the negligence of the person building the walk.

We will not, on this record, undertake to determine what will constitute sufficient evidence to warrant the jury in finding defendant responsible under the theory which, according to this opinion, will prevail on another trial. It is not even certain that such determination would be materially helpful, since we cannot assume that plaintiff's case, when presented upon the proper ground, will not, by the introduction of other testimony, differ materially from that shown by the present record.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

NIPIGON TRANSIT CO. *v.* SMYTHE.

CONTRACTS—AGENT'S AUTHORITY.

The seller of wood wrote the buyer to find out what he could get a boat to deliver it for. The buyer replied that the boat Westford would carry it for a certain price, which was satisfactory to the seller, and the arrangement was made that the boat should go when the wood was ready. The agent of the boat, thinking it could not go at the time agreed upon, notified the buyer's bookkeeper that he could send another vessel, the Hayward. The seller was informed by wire that the latter boat could be sent, and not noticing the name of the boat, answered by wire to send the boat. The Hayward for some reason did not go, and the agent arranged with the buyer's bookkeeper that the steamer Ford should carry the wood. *Held*, (1) that the minds of the parties did not meet on any contract regarding the Ford, (2) that the buyer's bookkeeper was not authorized by the seller to engage the boat unconditionally.

Error to Wayne; Donovan, J. Submitted April 6, 1904. (Docket No. 17.) Decided July 7, 1904.

Assumpsit by the Nipigon Transit Company against W. R. Smythe for an alleged breach of contract to transport certain wood. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Reversed.

Howard B. Bloomer, for appellant.

Wilkinson, Post & Oxtoby, for appellee.

HOOKER, J. The Nipigon Transit Company, plaintiff, owner of a steamer named "J. C. Ford," recovered a verdict and judgment for damages growing out of an alleged breach of contract, under which the Ford was sent to Thessalon, Ontario, for a cargo, which defendant failed to furnish. The defendant brings error, claiming that the

testimony in the case did not establish a contract relation, and that the court should have directed a verdict for the defendant. Other points are also involved.

The plaintiff states that the facts were undisputed, and therefore it was the court's duty to direct a verdict, in which the defendant concurs, but claims that it was directed for the wrong party. The defendant, Smythe, contracted to furnish and deliver at Detroit, to the Detroit Sulphite Fiber Company, several hundred cords of pulp wood. This had to be transported by boat from Thessalon. On July 12, 1902, defendant wrote the sulphite company to ascertain what it could get the wood taken down for, not, as counsel for plaintiff state in their brief, "to secure a vessel for him." Lindsay, the treasurer of the sulphite company, saw Parker, of the Parker Chartering Company, brokers, who offered the steamers Westford and Monitor to carry the wood at $2.25 per cord. On July 15th Lindsay wrote Smythe, saying:

"According to your request, I saw this a. m. the Parker Chartering Co. in relation to boats to bring your wood down. They proposed to let us have the propeller Westford and its consort, he said they would carry between them 400 cds. In two trips this would probably bring all the wood you have up there including what we have left over. The frt. they name is $2.25 per cd. They claim the expense of loading is much greater than it was formerly, I tried to induce them to make the frt. $2.00 but did not succeed. Capt. Humphrey runs the above named boats and would be a good man to work with you."

This was acceptable to Mr. Smythe, and it was arranged that the boats should go to Thessalon when the wood should be ready. Humphrey, the captain, wrote Smythe that he would be ready to load about August 11th, and Smythe wired in reply that he feared it would be impossible to load then, and confirmed telegram by letter to Humphrey, then at Algoma Mills, saying that he had some time before written the sulphite company that he could not load before August 15th. On August 14th Humphrey wired again, inquiring when he would load, and Smythe replied,

"Aug. 24, sure." This reply was sent August 16th. Meantime Humphrey had telegraphed Parker that the wood would not be ready for three weeks, and asked what else he had for him. This was about August 9th, and Humphrey stated that he expected to fill in the time until the wood should be ready, but, receiving no orders, he proceeded to Thessalon, arriving there on August 16th or 17th. Parker, taking it for granted that Humphrey would not be able to take the wood at the time mentioned, informed Harris, the bookkeeper of the suphite fiber company (Lindsay being absent) that he could send the Hayward, and Harris telegraphed on the 19th to Smythe, who lived at a distance of several miles from Thessalon (his business of loading there being in charge of one Barrett), and was ignorant of Humphrey's movements, that:

"Hayward can be up on 23d. Where will she load? Answer immediately."

Smythe, not noting the name to be different from Westford, replied on the 20th:

"Telegram rec'd. Send vessel to Thessalon."

About the time that Smythe's last telegram reached Detroit, plaintiff's representative telephoned Parker from Port Huron, asking if he had anything to load the Ford with, and Parker gave him the charter for this wood, and notified Mr. Harris, who said he "would take the Ford, and would notify Smythe that she was coming." Parker replied that, "if he heard nothing to the contrary, the Ford would leave Port Huron at 6 p. m. that night." Harris wired Smythe, in the name of the fiber company, that the Ford, capacity 400 cords, would be at Thessalon on Friday night. Smythe was absent, and did not receive the telegram until late in the evening of August 21st, before which time the Ford had left Port Huron, and she arrived at Thessalon about the same time that he received the message. August 22d Capt. Morrison, of the Ford, wired Smythe:

"Steamer Ford arrived here last night. Wire orders at once."

Smythe at once wired back:

"I never chartered your boat. Who sent you? And what are you after? Mistake somewhere, am writing."

He wrote confirming telegram, and that he had some wood, but that Westford and consort were to carry it, and that he could not let him load it unless under the distinct understanding that he was chartered by the Detroit Sulphite Fiber Company to carry the wood, as he thought there must be a blunder somewhere, for he had only the day before received a message that Westford would be there "tonight," and told him to "see Barrett." Morrison replied, "Barrett not home," etc. Considerable correspondence followed, and Morrison remained there some days, trying to get some of the wood that he might hold for demurrage, under the instruction of his superior.

At the time of the Ford's arrival the Westford had been loading for two days, though Smythe did not know it. The Ford finally left on August 30th with a two-thirds load secured from other parties.

The court closed his charge as follows:

"Gentlemen, it is not necessary to use a great many words in this case. Find out, when you go to your jury-room, in the language as stated to you, which one of these innocent parties—for they were both candid about it—which one of the innocent persons enabled the loss to happen, and charge him with it."

He afterward directed a verdict for the plaintiff. The jury returned a verdict for $700 in favor of the plaintiff.

We see no reason for doubting that all of these parties acted in the best of faith. The sulphite fiber company made arrangement for the Westford and consort on behalf of defendant, which he ratified. The confusion that resulted was due, first, to a misunderstanding between Humphrey (captain of the Westford) and Parker, his broker, who then proposed sending the Hayward, and

Harris wired defendant that the "Hayward could be up on 23d. Where will she load?" It is quite evident that the defendant did not note the fact that this was another boat than the one contracted for, but, be that as it may, the Hayward was not sent. On the contrary, Parker found another boat that he could send, and Harris agreed with him that he would wire Smythe that she was coming, and Parker then stated that, unless he heard to the contrary, the Ford would leave Port Huron at 6 o'clock. The main question in the case is whether the court should have instructed the jury that this action of Harris in chartering the Ford was within his authority, or whether it was a question for the jury. The request made of Lindsay in the first instance was to "find out what he could get wood taken down for." Harris subsequently wrote a letter, which indicates that, in pursuance of an understanding had between Lindsay and Smythe, it was acceptable to the latter to have the Westford and consort engaged, and that Harris, acting under Lindsay's instruction, had engaged them. No other authority was ever given by defendant to either Lindsay or Harris to engage any other boat, unless it is to be inferred from his answer to the telegram about the Hayward. Had the Hayward gone, the case would have presented a different question. As it is, it may be said that Harris might naturally infer that Smythe's answer justified the sending of some other vessel if the Hayward could not be had. It is clear that none of the parties could have understood that Smythe intended to have another vessel sent, unless those agreed upon—i. e., the Westford and consort—should fail him. He was not in a position to know about that, while Parker should have been, and doubtless supposed that he did know. If it be conceded that Smythe understood from the telegram (which is improbable) that another vessel than the two contracted for was to be sent, he had a right to suppose that it was because Parker had found it inconvenient or impossible to send the Westford and consort. The testimony shows that the Ford was sent under a mis-

understanding, and that the minds of the parties did not meet upon any contract regarding her, nor is there any substance to the claim that Harris was authorized to engage her unconditionally under the circumstances.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

DETROIT REAL ESTATE INVESTMENT CO. *v.* WAYNE CIRCUIT JUDGE.

1. HIGHWAYS AND STREETS—VACATION—JURISDICTION—COURTS.
   The courts and the common council of Detroit have concurrent jurisdiction in vacating streets.
2. SAME—VACATION OF STREETS—CONDITIONS.
   A city council may refuse to vacate a street except upon a specified condition.
3. SAME—COURTS—COMMON COUNCIL—RES ADJUDICATA.
   When a common council has acted upon a petition for the vacation of a street, the parties cannot begin another proceeding for the same purpose in the courts, unless there is some change in the circumstances to justify it.

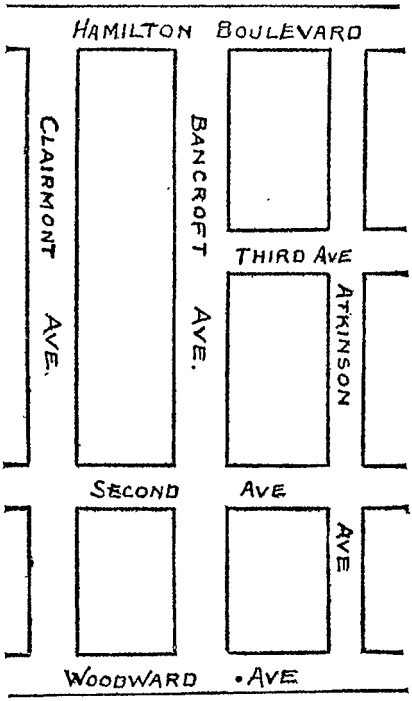
Mandamus by the Detroit Real Estate Investment Company, Limited, and others, to compel Robert E. Frazer, circuit judge of Wayne county, to hear an application for the vacation of a street. Submitted April 12, 1904. (Calendar No. 20,467.) Writ denied July 7, 1904.

George W. Radford, for relators.

A. B. Hall, for respondent.

HOOKER, J. The annexed plat shows the ground affected by the original application, which was a petition addressed to the circuit court for the county of Wayne to vacate Bancroft avenue, in the city of Detroit.

This petition came on to be heard in the circuit court, and the petitioners were in attendance with witnesses, prepared to make proof in support of their petition. Counsel for the city stated orally to the court that the common



council of said city had, some time before the filing of this petition, passed a resolution vacating said Bancroft avenue upon certain conditions, and thereupon the court adjourned the hearing, and at a later date filed an opinion, of which the following is a copy:

"IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE, IN CHANCERY.

"Petition of the Detroit Real Estate and Investment Company, Limited, Kate D. Allen, and George W. Radford for Vacating Bancroft Avenue.

"The claim in this petition is that Bancroft avenue ought to be vacated, for certain reasons. It appears to my satis-

faction that this matter has already been presented to the common council, and that they ordered that Bancroft avenue, upon certain conditions, might be vacated. The law, as I understand it, permits a circuit court to interfere with the proceedings, and even set them aside, and act upon its own opinion as to the true merits of the case. I am satisfied that the conditions imposed by the common council are correct, and ought to be complied with, and I decline to interfere with their proceedings. I think that the determination of the common council is correct, and ought to be enforced.

"R. E. FRAZER,
"Circuit Judge.

"Feb. 5, 1904."

Thereupon the petitioners applied to this court for a mandamus to compel the circuit judge to proceed and hear the application upon the proofs offered by petitioners, and such other proofs as should be offered. The answer of the circuit judge states that—

"The petition filed herein under section 3376, 1 Comp. Laws, was denied for the reason that the granting or denying of such petition, in my opinion, lies in the discretion of the circuit court, and as the charter of the city of Detroit gives co-ordinate jurisdiction to the common council of the city of Detroit in the matter of vacating streets, and as the said common council had already passed upon this very question, it was not deemed advisable to interfere with the disposition of this case by that body."

It seems to be conceded that the council and the courts have concurrent jurisdiction in the matter of vacating streets. The council has acted in this case, and made an order, which still stands. Waples' Proceedings in Rem, § 111. It is said that this order is conditional, and therefore void, but we think otherwise. The city had been to expense in connection with this street. It had paved one or more intersections, and, we understand, had caused a sewer to be constructed, which is now a part of its sewer system. How much the general public might be incommoded by the vacation of the street does not appear, but, in a way, the inhabitants generally are affected by changes,

as they are in the uniformity and directness of streets. Proceedings to vacate streets are proceedings in rem, and, if the petitioners in this case were not signers of the application to the council, they were doubtless in a situation to be bound by the action of the council. At all events, we have been pointed to nothing which indicates that the proceedings of the council were irregular, except that it imposed a condition upon the granting of the petition. We think it might lawfully do this, and, having acted, dissatisfied parties are not at liberty to begin another proceeding, and enforce repeated consideration of the question, either before the council or in the courts. If action can be again invoked, it must be under a showing of such a change in circumstances as will justify it, for new reasons. It is said that the condition imposed by the council cannot be performed, because the petitioners did not own the land required. The council might, in its discretion, have refused to vacate the street, and, if this action be considered to amount to a denial of the petition, this proceeding should not have been instituted. We think the condition not necessarily beyond its power. It had a right to look after its sewers and the investment that it had made in street pavements, and perhaps the extension of Third avenue and the alley mentioned. In view of the fact that Bancroft avenue should be replaced by an alley, embracing part of its territory, it was manifestly proper that the council should be asked to take action, regarding which ordinarily a court has no authority, unless it be by way of imposing a condition.

The statute authorizing the vacation of plats by courts of justice has been construed to confer the power to vacate streets. This is perhaps anomalous, for such power is generally confided to the municipal authorities, whose action in such cases is discretionary. See cases cited in 27 Am. & Eng. Enc. Law (2d Ed.), 114, and note 7. We have indicated in the *Case of Albers*, 113 Mich. 642 (71 N. W. 1110), that the proceeding is not technically an action or suit, but a statutory one, and its determination

must ordinarily, as in the case of action by the council, involve the discretionary consideration of public interests, and can seldom, if ever, rest on a claim of private right, to the exclusion of other considerations.

There was enough before the circuit court to justify his refusal to proceed in this matter.

The writ is denied.

The other Justices concurred.

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McKENZIE *v.* MICHIGAN CENTRAL RAILROAD CO.

1. CARRIERS—LIVE STOCK—DELAY IN TRANSPORTATION.
   A railroad company is not chargeable with the common-law liability of a common carrier in the transportation of live stock, and is bound only to carry the same with reasonable dispatch.

2. SAME—LIVE STOCK—ASSUMPTION OF RISK.
   Shippers of live stock assume the risk of unavoidable accidents and delays.

3. SAME—LIVE STOCK—CARE TAKER—OPPORTUNITY TO FEED—NEGLIGENCE.
   Where the shipper of live stock sent a care taker with them, and he made no request of the railroad company for an opportunity to water and feed them, in the absence of a special agreement, the company is not liable for neglect to afford such an opportunity.

Error to Shiawassee; Smith, J. Submitted April 12, 1904. (Docket No. 44.) Decided July 7, 1904.

Assumpsit by George McKenzie against the Michigan Central Railroad Company for an alleged breach of a contract to transport certain live stock. There was judgment for plaintiff, and defendant brings error. Reversed.

July 2, 1902, plaintiff shipped a car load of cattle, sheep, calves, and hogs from Chesaning and Owosso. The destination was Detroit. The car left Owosso at 3 p. m., arriving at Jackson at 8:30 p. m., over the Saginaw division of defendant's road. When the train containing plaintiff's car reached Jackson, a through freight train from Chicago, known as "No. 58," containing a full complement of 60 cars, was ready to leave for Detroit. It was held back to permit a regular passenger to precede it. It left Jackson at 9:37 p. m., and arrived at Dexter at 12:36 a. m. In accordance with the rule and custom of defendant, an extra train of live stock coming into Jackson from different divisions of the road was made up for shipments east. It consisted of 13 cars, and left Jackson July 3d at 1:45 a. m. Heavy rains fell during the night, and caused several washouts in the vicinity of Chelsea and Dexter, rendering the tracks temporarily impassable. Gangs of men were promptly placed to repair the washouts as soon as possible; the west-bound track being first repaired. The repairs to the east-bound track were not completed until about 8 p. m. of the same day. Transfers from the west-bound track were made over the east-bound track as rapidly as possible. No. 58 left Dexter at 12:42 p. m. The train containing plaintiff's car left between 2 and 3 p. m. the same day, arriving in the Detroit stockyards about 8 p. m. Plaintiff, alleging negligence on the part of the defendant, sued, and recovered damages.

Clarence D. Clark, for appellant.

Watson & Chapman, for appellee.

GRANT, J. (*after stating the facts*). 1. The evidence establishes beyond controversy that the defendant exercised due diligence in repairing its road and in moving the blockaded trains upon the east and west of the washouts as soon as the track was repaired. The defendant was therefore not responsible for the delay, and was guilty of no negligence in this regard. The defendant was not

chargeable with the common-law liability of a common carrier, and was bound only to transport the stock with reasonable dispatch. *Heller* v. *Railway Co.*, 109 Mich. 53 (66 N. W. 667, 63 Am. St. Rep. 541).

2. Plaintiff sent a care taker with the stock. He made no request for an opportunity to water and feed them. The defendant had not contracted to do so. Defendant was not chargeable with the neglect to afford an opportunity to feed and water them until it was requested by the care taker so to do and had refused. But, if it had been impossible to feed and water them, the defendant would not have been liable. Shippers of live stock assume the risk of unavoidable accidents and delays. *Heller* v. *Railway Co.*, supra; *Hengstler* v. *Railroad Co.*, 125 Mich. 530 (84 N. W. 1067).

Reversed, and new trial ordered.

The other Justices concurred.

OLK *v.* SHUGARS.

CONVEYANCES—UNDUE INFLUENCE—BREACH OF CONDITIONS.

A decree setting aside a deed for breach of condition and as having been obtained through undue influence, *held* to have been justified by the evidence.

Appeal from Van Buren; Carr, J. Submitted April 13, 1904. (Docket No. 51.) Decided July 7, 1904.

Bill by Mathias Olk against Ervin B. Shugars and Frances E. Shugars to set aside a deed. From a decree for complainant, defendants appeal. Affirmed.

Thomas J. Cavanaugh, for complainant.

Barnard & Lewis, for defendants.

HOOKER, J. The complainant, a man of advanced age, deeded his property to the defendants, upon an undertaking on their part to support him. They resided on the place at the time. When the trouble arose between them, they complied with his demand to leave the place. Thereupon the complainant filed the bill to set aside the deed, upon the ground of undue influence and other grounds.

It is not clear that the defendants are alone to blame for the disagreement, but we are of the opinion that they did not live up to the spirit, if they did to the letter, of their promise, and we agree with the circuit judge that they solicited this conveyance persistently and unseasonably. He saw and heard the witnesses, and we think the case one which justifies his conclusions.

The decree is affirmed, with costs.

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

THURKETTLE v. FROST.

1. EVIDENCE—POSSESSION OF LAND—TITLE TO BUILDINGS.
   Where plaintiff claims that he purchased the right to occupy land at the time that he bought the buildings thereon, the bill of sale to plaintiff's vendor and the chattel mortgage back are admissible to show that he had no title to the land, and that his purchase was with knowledge that the buildings had always been treated as personal property.

2. MALICIOUS PROSECUTION—ADVICE OF COUNSEL—QUESTION OF FACT.
   Where defendant, in an action for malicious prosecution, based upon an arrest in proceedings to compel him to keep the peace, claimed the advice of counsel constituted a defense, it was proper to refuse to direct a verdict in his favor, as it was for the jury to determine whether he truly stated the facts to counsel, and whether he was actually in fear that the

plaintiff would execute his threat if he was not restrained by legal proceedings.

3. SAME—PROBABLE CAUSE—ADVICE OF COUNSEL—WITHHOLDING FACTS.

In an action for malicious prosecution, the jury, in determining the question of probable cause, may consider all the facts and circumstances concerning the dispute between the parties, whether the defendant fully and fairly stated all the facts to his counsel and acted in good faith on his advice, and whether he willfully withheld any material fact from the justice in making the complaint.

4. SAME—REPUTATION OF DEFENDANT.

In an action for malicious prosecution, plaintiff's previous good reputation is admissible as bearing upon the question of probable cause.

5. SAME—MALICE—EVIDENCE.

The fact that the defendant had other land which he might use than that from which he was trying to evict the plaintiff is inadmissible to show malice.

Error to Kent; Wolcott, J. Submitted April 15, 1904. (Docket No. 71.) Decided July 7, 1904.

Case by Henry Thurkettle against Shepherd P. Frost for malicious prosecution. There was judgment for plaintiff, and defendant brings error. Reversed.

Crane, Norris & Drew, for appellant.

Smedley & Corwin, for appellee.

HOOKER, J. For many years a private ferry was maintained across Grand river. The first ferryman was one John Everhard, and in 1884 he obtained a license from the highway commissioner to build a habitation in the highway, at the river bank. Everhard sold his ferry and house to Rosegrant, and Rosegrant sold to Meyer, who gave back to Rosegrant a chattel mortgage upon the house and other property, including some outbuildings, boats, etc. Meyer sold to the plaintiff, no writings being given, and yielded possession to him in the year 1900.

He lived in the house from that time until the disagreement which led to this action arose. Smedley, plaintiff's counsel, became the owner of the chattel mortgage in the meantime.

The Allendale Timber Company owned 800 acres of land lying on the bank of the river, both north and south of the highway referred to. They purchased in 1898. The buildings occupied by the plaintiff were upon this land, only 2½ feet of the house being within the limits of the highway. The Allendale Timber Company was engaged in logging operations at this place, the defendant being its manager. The highway extends to the river at the point where the ferry landing was established, on its west bank. The ground sloped upward from the river, forming a side hill, upon which were plaintiff's house and other buildings. The house was almost 5 rods from the river, which runs approximately north and south at that point, and the outbuildings were about 38 feet south of the house.

At the time plaintiff purchased the ferry, it was agreed by his vendor that the contract price should be $500 less if he should have to move to the other side of the river. He was fully advised of the true ownership of the land, and made no claim of ownership. It is not clear, however, that he knew that the house did not stand wholly within the highway. Plaintiff bought the ferry in October, 1900, and previous to that time the timber company had built a dock extending from the highway south a distance of 150 feet. It was between the buildings and the river. There was also a logging railroad and a team road; one branch of the railroad being close to the west side of the buildings, thus bringing the buildings between the railroad and the dock. The defendant desired to use the ground upon which the buildings stood for a banking place for logs, and asked plaintiff to move his buildings. This he refused to do, claiming a right to remain there. The defendant told him that he should put his men on the next morning to grade the hill for the purpose. A Mr. Childs, who was in

his employ, and generally had charge of such operations, was with him at the time of this talk. The plaintiff replied that he should stop them if they came, and, being asked how, replied, "With cold lead." The men did not appear to do the grading, but upon the next day, acting under advice of counsel, defendant began summary proceedings to recover possession of the land, and also made a complaint, upon which a warrant was issued for the plaintiff's arrest, under the statute providing for recognizances to keep the peace. After his arrest this proceeding was dismissed, at the suggestion of the prosecuting attorney, upon the ground of irregularity in the proceedings. The summary proceedings case was tried, and a verdict and judgment rendered against the plaintiff in this case, and the buildings have been removed, and defendant is in possession of the premises.

At some stage of the proceedings after the dismissal of the surety proceedings, the plaintiff began this action against the defendant, charging him with false imprisonment and malicious prosecution. He recovered a judgment for $275 on the malicious prosecution count, and the defendant has brought error.

It was the plaintiff's claim that the institution of the proceedings to bind plaintiff over to keep the peace was a malicious and unwarranted prosecution and persecution, intended to harass the plaintiff and make his occupancy uncomfortable, and thus drive him into yielding his rights. In contravention of this claim, the defendant sought to show that the plaintiff knew that his house was upon the premises of the defendant, and that he never claimed to own the land where the buildings stood; that he was not only without any paper title to the land, but that his purchase of the house was with knowledge that it had always been treated as personal property. To support this defense, the defendant offered in evidence the bill of sale given from Rosegrant to Meyer, and the chattel mortgage given by Meyer to him, and these were excluded by the court upon the ground that these papers would throw

no light upon the case, and the admission that the buildings were personal property. Counsel coupled with his admission the statement that plaintiff purchased the right to occupy the dwelling house and its appurtenances purely as a dwelling as long as he was a ferryman; not claiming any title to the real estate, but purely the right to occupy and use it as long as he stayed there as ferryman. It is said by defendant's counsel that there is nothing in the bill of sale that implies any such right or understanding. An inspection of the bill of sale satisfies us of this. There is nothing in it that indicates an attempt to convey any tenancy in land, or an understanding by the purchaser that he was acquiring such. It is obvious from this record that the plaintiff had no title nor right to possession of any part of the premises, unless it be such part of the house as stood in the highway; and, whether a landowner can be bound by a license by the highway commissioner to another to build and occupy a dwelling in the highway in front of his premises, we do not decide.

It is plainly deducible from the record that the only excuse for plaintiff's refusal to vacate this land was his alleged claim that he supposed he had a right to stay, under his purchase, which both he and his counsel asserted. Anything tending to show that he did not suppose so in good faith was admissible, as it would bear upon the question of damages, if nothing more, and defendant was not bound to be satisfied with the admission as made. It is clear from the record that plaintiff was a trespasser, and that a claim of adverse possession has no foundation in the testimony. He and his vendors were not shown to have occupied adversely, and such occupation as they had was not exclusive. It does not follow that the question of the plaintiff's good faith should have been taken from the jury, as defendant's counsel insist, but the testimony offered should have gone to the jury.

Was the refusal of the court to instruct the jury to render a verdict for the defendant, on the ground that probable cause was shown, error? According to the defend-

ant's testimony, he stated to his counsel and to the justice exactly what occurred at the time the threat was made. Plaintiff testified that he said that he would stop defendant's men with cold lead if they should attempt to grade the hill. Neither testified that he made a personal threat against Childs in any other way. The justice wrote the complaint, and alleged a threat to shoot Childs. It was signed by defendant, who then left, and the justice afterwards issued the warrant and caused it to be served. The defect in the proceedings upon which the proceeding was dismissed was the failure of the justice to examine the complainant under oath, as the statute requires, and manifestly the defendant was not to be blamed for this. Plaintiff's counsel say that the threat was a conditional one, and also was not a threat to shoot any one, but to use cold lead, and that it was not a threat to shoot Childs, in any event. We have little hesitancy in saying that a threat to stop one with cold lead is a threat to shoot him. The authorities are not agreed that a threat to shoot one if he shall attempt a lawful act does not justify the charge of a threat to shoot him, and, while the plaintiff did not make his threat a specific threat against Childs, if the defendant stated the exact facts to counsel and the justice, he is not responsible for the action of the justice in framing his complaint, and making it allege a threat to shoot Childs; it appearing that Childs would have been the one to undertake the work, and the threat being to shoot such as should do so. It is claimed that the witnesses do not agree as to what took place at the time of making the threat, and, if they did, we think that, under the proof, it was for the jury to determine whether the defendant did truly state what occurred. Again, it was for the jury to determine from all the circumstances whether the defendant was actually in fear that the plaintiff would execute his threat, for, if he was not, and the proceeding was instituted for purposes other than a bona fide attempt to prevent a breach of the peace, the complaint was malicious. See Tiff. Crim. Law, 295. It was therefore not

error to refuse to direct a verdict for the defendant, or to refuse to instruct the jury that the advice of Albert Crane constituted probable cause. We think that counsel are wrong in saying that there is no testimony controverting the claim of good faith on defendant's part.

In this connection we may add that it was proper for the court to charge the jury that—

"In determining this question of probable cause you can consider all the facts and circumstances as shown by the evidence, so far as they throw any light upon that question—the dispute between the parties as to the right to the use of this land, the circumstances under which the threat was made, whether it had before been made to Mr. Childs, the language used by Mr. Thurkettle in making the threat, whether the defendant fully and fairly stated all the facts, and what Mr. Frost said to his attorneys, and acted in good faith on Mr. Crane's advice, and whether he willfully withheld any material fact from the justice in making the complaint."

We are of the opinion that the court did not err in admitting evidence of plaintiff's previous good reputation. It had a bearing upon the question of probable cause. The great weight of authority sustains the ruling, as will be seen by the citations in plaintiff's brief: *Bacon* v. *Towne*, 4 Cush. 217; *McIntire* v. *Levering*, 148 Mass. 546 (20 N. E. 191, 2 L. R. A. 517, 12 Am. St. Rep. 594); *Woodworth* v. *Mills*, 61 Wis. 44 (20 N. W. 728, 50 Am. Rep. 135); *Shannon* v. *Spencer*, 1 Blackf. (2d Ed.) 526; *Oliver* v. *Pate*, 43 Ind. 132; *Blizzard* v. *Hays*, 46 Ind. 166 (15 Am. Rep. 291); *Coleman* v. *Heurich*, 2 Mackey, 189; *Israel* v. *Brooks*, 23 Ill. 575; *Ross* v. *Innis*, 35 Ill. 487 (85 Am. Dec. 373); *Rosenkrans* v. *Barker*, 115 Ill. 331 (3 N. E. 93, 56 Am. Rep. 169); *Olson* v. *Tvete*, 46 Minn. 225 (48 N. W. 914); *San Antonio, etc., R. Co.* v. *Griffin*, 20 Tex. Civ. App. 91 (48 S. W. 542); *Scott* v. *Fletcher*, 1 Overt. 488; *Barron* v. *Mason*, 31 Vt. 189; *Funk* v. *Amor*, 4 Ohio Cir. Ct. R. 271; *Brand* v. *Hinchman*, 68 Mich. 602 (36 N. W. 664, 13 Am. St. Rep. 362).

Testimony was admitted tending to show that the de-

fendant had other places to pile its logs, and it is urged that this unnecessary insistence that plaintiff move his house was evidence from which malice might be inferred. The plaintiff had no right to occupy this ground, and the defendant's right to evict him was not dependent upon its necessity for the immediate use of the premises. The question was immaterial to the issue, and no legitimate foundation for an argument that it implied malice.

We are constrained to reverse the judgment and direct a new trial.

The other Justices concurred.

DUNNING *v.* GAIGE.

MORTGAGES—REDEMPTION—SURETY—WANT OF EQUITY.

Complainant's husband purchased a lot subject to a mortgage which he assumed and agreed to pay. Defendant was an indorser upon the note secured by the mortgage. Upon foreclosure sale, complainant gave a mortgage upon her land to secure the deficiency and $700 borrowed money. This mortgage was also foreclosed and the land purchased by defendant. Complainant sought to redeem upon the payment of the $700 and interest, claiming that by the sale of her property the defendant's debt was paid by her and she should be subrogated to the mortgagee's claim against defendant. *Held*, that she was surety for her husband whose duty it was to pay the debt, and her bill was without equity.

Appeal from Wayne; Hosmer, J. Submitted April 14, 1904. (Docket No. 58.) Decided July 7, 1904.

Bill by Anna L. Dunning against Joseph M. Gaige to redeem from the foreclosure of a certain mortgage. From a decree dismissing the bill, complainant appeals. Affirmed.

John J. Speed, for complainant.

Elbridge F. Bacon, for defendant.

HOOKER, J. On May 29, 1885, Mary E. Gaige gave to Mary E. Barnard a note and mortgage for $7,000 on what we will call the "Canfield Lot." The note was indorsed by her husband, Joseph M. Gaige. On March 19, 1892, Mary E. Gaige sold the Canfield lot to William H. Dunning, and he assumed and agreed to pay the $7,000 mortgage. October 4, 1892, William H. Dunning sold this property to Isabella F. Nall, who agreed to assume and pay this mortgage. On December 29, 1896, Mary E. Barnard brought a suit to foreclose this mortgage, and on May 25,1898, a decree for the sale of the land was entered, and it was further adjudicated that defendants Mary E. Gaige and Joseph M. Gaige were liable for the mortgage debt, and for any deficiency that should be reported, as sureties for William H. Dunning and Isabella F. Nall, and that they should pay to Joseph M. and Mary E. Gaige any sum or sums that they should be required to pay upon said mortgage debt or deficiency. On August 19, 1898, the property was sold to Joseph M. Gaige for $4,019.93. At the time said decree was entered, William H. Dunning was owner of the land involved in this suit, which may be called the "Joy Lot," said to be worth several thousand dollars. There was a mortgage upon it for $700. Seven days after the report of a deficiency was made, he deeded this property to his wife, Anna L. Dunning, the complainant in this case.

On the 3d of September, 1898, Mr. and Mrs. Dunning gave their promissory note to Mrs. Barnard for $4,747.85. Seven hundred dollars of this sum was money loaned by Mrs. Barnard to Mrs. Dunning, and was used to pay the existing mortgage upon the Joy lot. The remainder was to secure the payment of the deficiency reported upon the foreclosure of the Canfield mortgage, which William H. Dunning had agreed to pay. Mrs. Barnard foreclosed

the Joy mortgage, and Joseph M. Gaige bid in the property at the sale on October 4, 1901, for $5,812.47, and the sale was duly confirmed. Three days before the expiration of the time for redemption, Mrs. Dunning filed the bill in this cause, and an injunction was issued restraining defendant from taking any proceedings to obtain possession of the premises under the commissioner's deed. The bill asks that complainant be permitted to redeem on payment of the $700 borrowed money and interest, claiming that, by the sale of her property on foreclosure, Gaige's debt was paid by her, and that she is entitled to be subrogated to Mrs. Barnard's claim against Gaige.

We think that the bare statement of the facts in this case shows the want of equity in the complainant's claim. As surety for her husband, whose duty it was (as between himself and Gaige) to pay this debt, she has paid the same. She now seeks to make Gaige reimburse her. That she has a valid claim against her husband, if not against Isabella Nall, is perhaps true.

The decree is affirmed, with costs.

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

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HOPPER *v.* LIVINGSTON PROBATE JUDGE.

MANDAMUS—PROBATE ORDER—APPEALS.

An order of the probate court, denying a petition to compel a guardian to account, is appealable under 1 Comp. Laws, § 669, and hence cannot be reviewed on mandamus.

Certiorari to Livingston; Smith, J. Submitted April 19, 1904. (Calendar No. 20,345.) Decided July 7, 1904.

Mandamus by George Hopper to compel Eugene A.

Stowe, probate judge of Livingston county, to vacate an order denying a petition for an accounting. From an order granting the writ, respondent brings certiorari. Reversed.

Shields & Shields, for relator.

William P. Van Winkle, *Louis E. Howlett*, and *Rollin H. Person*, for respondent.

PER CURIAM. In May, 1871, Hiram Hopper was appointed guardian for George Hopper by the probate court for the county of Livingston. George Hopper reached his majority in the month of January, 1883. On September 24, 1903, he petitioned the probate court for an accounting by his guardian. A citation was issued, and the guardian filed an answer, in which he stated that he had settled with his ward after he became of age, and also alleged the statute of limitations, and petitioner's laches in asking for an account, as defenses. The matter was heard by the probate court, and the prayer of the petition was denied.

The order recites the following findings, i. e.:

"(*a*) That the said Hiram Hopper was appointed guardian in the year 1871, and various sums of money and other property came into his hands as such guardian.

"(*b*) That the records and files show that no account, either annual or final, was ever filed.

"(*c*) That no receipt for settlement with ward was ever filed, and no discharge of record ever entered.

"(*d*) That ward became of age in the year 1883.

"(*e*) That the last paper filed in the cause before the present proceeding was in the year 1881.

"(*f*) That the said guardian claims by his answer full settlement and discharge, and neglects and refuses to render any further account.

"(*g*) That by reason of the great lapse of time since the said ward became of age, the petitioner is not entitled to any further order in said matter.

"(*h*) It is therefore ordered that the prayer of the petition be, and the same is hereby, denied, as to any further order."

Thereupon the petitioner filed in the circuit court an application for a mandamus, asking that the probate judge be required to vacate said order, and enter another order, requiring said guardian to file a full, complete, and accurate account of his receipts and expenditures in the matter of his ward's estate. The probate judge filed an answer to said petition, in which he alleged that said George Hopper is the son of Hiram Hopper, said guardian, and is 42 years old, and that he continued to reside in Livingston county for more than 3 years after reaching his majority. He admitted the proceedings already stated, and alleged that an opportunity to offer proof of any matters stated in the petition filed in said probate court was afforded petitioner at the hearing, but no proof was offered by petitioner or his counsel; that no claim was made at that time that there had been any concealment in reference to his cause of action, or that he had been under any disability. At the hearing in the circuit court, the mandamus was granted, substantially as prayed, and the respondent has brought the cause to this court by writ of certiorari.

We are constrained to hold that the order of the probate judge was an appealable order, and was not, therefore, reviewable upon mandamus. The order was within the statute. 1 Comp. Laws, § 669. See *Goss* v. *Stone*, 63 Mich. 319 (29 N. W. 735); *Barry* v. *Briggs*, 22 Mich. 201; *Reed* v. *St. Clair Circuit Judge*, 122 Mich. 153 (80 N. W. 985); *Michigan Mut. Fire-Ins. Co.* v. *Wayne Circuit Judge*, 112 Mich. 270 (70 N. W. 582); *Corby* v. *Wayne Probate Judge*, 96 Mich. 11 (55 N. W. 386); *Grady* v. *Hughes*, 64 Mich. 545 (31 N. W. 438); *Hitchcock* v. *Genesee Probate Judge*, 99 Mich. 128 (57 N. W. 1097); *Mardian* v. *Wayne Circuit Judge*, 118 Mich. 353 (76 N. W. 497); *Devine* v. *Wayne Circuit Judge*, 118 Mich. 354 (76 N. W. 1134); *Freud* v. *Saginaw Circuit Judge*, 125 Mich. 671 (85 N. W. 193), and cases cited; *Cattermole* v. *Ionia Circuit Judge*, 136 Mich. 274 (99 N. W. 1).

The order of the circuit court is reversed.

PEOPLE v. FARRELL.

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1. HOMICIDE—SELF-DEFENSE—EVIDENCE—DECLARATIONS OF DECEASED.

Where, on a trial for murder, the respondent claimed the killing was in self-defense, it was permissible for the people to show that the deceased said, as he approached respondent and was within four or five feet of him, that he intended to bid respondent "Good night."

2. CRIMINAL LAW—EVIDENCE—OTHER OFFENSE.

On a trial for murder, testimony by the sheriff that a conversation with respondent, immediately after the shooting, occurred in a saloon, was not inadmissible because it showed a violation of the liquor law requiring saloons to be closed after 10 o'clock.

3. SAME.

Where respondent, on his trial for murder, testified to a difficulty with the deceased on the Sunday prior to the shooting, it was proper to show, on his cross-examination, that such difficulty occurred in a saloon, though it proved that he had violated the liquor law.

4. SAME—SELF-DEFENSE.

Testimony on behalf of the people, on a murder trial, that the respondent had drawn a revolver on other persons before he shot the deceased, was admissible, as it would tend to lessen the credit given to his claim of self-defense, although it tended to prove the respondent guilty of a statutory offense.

5. HOMICIDE—EVIDENCE—CHARACTER OF DECEASED.

A respondent, on trial for murder, cannot show that deceased at one time committed a specific act of violence not observed by the respondent, though he may have been informed of it before the killing of deceased.

6. CRIMINAL LAW—OBJECTIONS TO TESTIMONY—SUFFICIENCY.

An objection to the testimony of a physician that a wound caused death, on the ground that there is nothing in the record that qualifies it and makes it competent, does not raise the question that the physician was not shown to have the qualifications required by 2 Comp. Laws, § 5280, to enable him to practice medicine.

7. SAME—EVIDENCE—HEARSAY—CAUSE OF DEATH.
Testimony of a physician that he learned, not from observation but from information, that deceased did not have proper care, is hearsay, and has no tendency to prove the deceased died from improper care.

8. SAME—INSTRUCTIONS—REQUESTS—DEFENDANT'S THEORY.
Where respondent's requests to charge are correct and proper, for the court, on giving them, to state that they present his theory of the case, is prejudicial error, as it indicates that the jury are not bound to follow them.

Error to Missaukee; Chittenden, J. Submitted April 21, 1904. (Docket No. 187.) Decided July 7, 1904.

John H. Farrell was convicted of manslaughter and sentenced to imprisonment in the State prison at Jackson. Reversed.

Charles A. Withey and *William F. McKnight*, for appellant.

F. O. Gaffney, Prosecuting Attorney, for the people.

CARPENTER, J. On the 2d of June, 1903, respondent was tending bar in a hotel in the village of Stittsville, Missaukee county, in this State. He refused to sell one George Temple liquor on credit. Temple undertook to get behind the bar and help himself, and respondent drove him away by threatening to shoot him with a revolver. Temple and the other inmates of the barroom then went into an adjoining office, and respondent commenced to close the doors between the two rooms. While in this act, Temple approached, and respondent shot him. On June 9th Temple died from the effect of this wound. Respondent was tried on a charge of murder, and convicted of manslaughter. Temple, when partly under the influence of liquor, as he was at this time, was in fact, and was known to respondent to be, a quarrelsome man, who had committed other assaults. The testimony was conflicting as to whether Temple threatened to inflict bodily harm upon respondent. Respondent and others testified that he

did, and it was the claim of respondent that he shot Temple because he feared his life was in danger.

The people were permitted to prove that Temple stated as he approached respondent, just before he was shot, that he intended to bid respondent "Good night." We think this testimony was properly admitted. According to the testimony of witness Gorthy, respondent was then only four or five feet away, and could, therefore, have heard Temple's statement.

The people were also permitted to prove a conversation between respondent and the deputy sheriff, in the saloon, shortly after the occurrence. In this conversation, respondent stated that he shot Temple, and that he was justified in doing it, and that he was "not excited a bit." It is not claimed that this testimony was not properly admitted, but the contention was made that it was improper for the witness to be permitted to say that it occurred in the saloon, since that justified the argument subsequently made that the law compelling the saloon to be closed at 10 o'clock was thereby violated. This point was not well taken. The testimony of the witness would have been incomplete, had he not stated where the conversation occurred.

On respondent's direct examination, he testified to a difficulty with Temple on the Sunday prior to the shooting. Complaint is made because the people, on respondent's cross-examination, were permitted to show that this difficulty on Sunday occurred in the saloon. There is no merit in this complaint. Having testified to this episode, the people certainly had a right to cross-examine respondent concerning it, though the cross-examination proved, as it did, that he had violated another law. See *People* v. *Gray*, 135 Mich. 542 (98 N. W. 261).

On cross-examination of respondent, the people were permitted to prove that he had drawn a revolver on other persons before he shot Temple. This testimony tended to prove respondent guilty of a statutory offense. Section 11509, 3 Comp. Laws. It would have a natural ten-

dency to lessen the credit the jury would give to his testimony that he shot on this occasion because he feared that otherwise he would lose his life, and was therefore admissible. See *People* v. *Gray*, supra.

The trial court held that respondent could not show that deceased on one occasion held up the officials of a railroad train, even though respondent had been informed of this occurrence before he shot the deceased.

When a person is charged with murder for killing an assailant, he may show, for the purpose of proving that he believed his life in imminent peril, that deceased was a man of high temper and quarrelsome disposition, and known by him to be such. See *Hurd* v. *People*, 25 Mich., at page 418; *Brownell* v. *People*, 38 Mich. 732. He may also, for the same purpose, show specific acts of violence within his own knowledge or coming under his own observation. See *People* v. *Harris*, 95 Mich. 87 (54 N. W. 648).

But it is well settled that it is not admissible to show specific acts of violence committed by deceased upon third persons, in no wise connected with nor observed by the accused, on the ground that such matter is too remote, and, if proof were admitted, so, also, would repelling evidence, and the side issues thus raised would be as numerous as the offenses imputed to the deceased. See *Alexander* v. *Commonwealth*, 195 Pa. St. 1; *Dupree* v. *State*, 33 Ala. 380 (73 Am. Dec. 422); *McKenna* v. *People*, 18 Hun, 580; *Fitzhugh* v. *State*, 81 Tenn. 258; *State* v. *Elkins*, 63 Mo. 165; and *Thomas* v. *People*, 67 N. Y. 218.

In *People* v. *Dowd*, 127 Mich., at page 143 (86 N. W. 546), the above principle was approved by this court. An examination of the record shows that the excluded testimony in that case, as in the case at bar, was accompanied by a proposition to prove that respondent had heard of the specific act of violence under consideration. If the excluded testimony had related merely to what the respondent had heard of the occurrence in question, we should hesitate to say that it was not admissible. See *People* v.

Harris, supra; *Boyle* v. *State*, 105 Ind. 469 (5 N. E. 203, 55 Am. Rep. 218). But the excluded testimony related not to the information respecting the occurrence which had reached respondent; it related to the specific act of violence itself, and, under the authority of *People* v. *Dowd*, supra, it was properly excluded.

The people swore as witnesses two physicians, whose testimony tended to prove that the wound inflicted by respondent caused Temple's death. It is contended that this testimony was improperly admitted, because it was not made to appear that these physicians had the qualifications required by section 5280, 2 Comp. Laws. We are bound to say that this point was not made in the court below. It is true, this testimony was objected to on the ground that it was "incompetent as the record stands;" and when the court asked, "For what reason do you claim this is incompetent at this time?" counsel replied, "Because there is nothing on this record that qualifies it and makes it competent; and it is after the fact, also." It is scarcely necessary to say that this form of objection did not apprise the trial court of the point now insisted upon, and therefore we decline to consider it.

It is claimed that the testimony proved, or at least warranted the inference, that Temple's death was not caused by the wound inflicted upon him by respondent, but that it resulted from improper care of his attendants, and that therefore the trial court should have directed his acquittal, or at least have charged the jury that they might find him guilty of an assault with an intent to commit murder. It is a sufficient answer to this claim to say that there was no competent evidence that Temple's death was caused by improper care. It is true, the attending physician testified that he learned of such improper care. But it is apparent that he learned this, not by observation, but from information. It is scarcely necessary to say that this was hearsay testimony, and should not have been regarded.

Complaint is made of the argument of the prosecuting attorney to the jury. We cannot say that some of the

statements contained in this argument did not go beyond the bounds of legitimate discussion, though we are not at all certain that they constitute reversible error under the circumstances of this case. We refrain from further consideration of these points, in the belief that we have said enough to furnish all proper aid for a new trial.

In charging the jury, the court said:

"The defendant has requested the court to charge you on the law of the case, and his attorneys have drawn and presented requests embodying their theory of the case, and I will read their requests now, so the jury may understand their theory."

The court then read a long request of defendant, stating his claim of the facts, and then continued:

"I charge you that this is the theory of the defendant in his defense in this case, and that you have heard the testimony along that line. I simply read these as the requests of the defendant to charge, and as their theory of the case."

The court then read many requests of defendant, most, if not all, of which contained a correct statement of the law applicable to the case. The question raised by the claim of respondent under discussion is whether the court did not commit error, to respondent's prejudice, in saying that these requests were given as *respondent's theory* of the case. If the court had merely said respondent's statement of facts respecting which the testimony was in conflict was his theory of the case, it would have been entirely proper. But the jury would naturally infer from the language of the court, and presumably did infer, that they were to consider the requests of law preferred by respondent as his theory of the case. Respondent had a right to have these requests given as the law to govern the jury in their deliberations. To say that these requests of law, which were correct and proper, were respondent's theory, naturally indicated to the jury that they were not legally bound to regard them. We must therefore hold that this statement was prejudicial to respondent.

We do not think that respondent has any occasion to complain of any other error in the record, nor that any other complaint demands discussion.

The conviction must be set aside, and a new trial ordered.

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

PEOPLE v. CONGDON.

137 133
156 1644

1. INTOXICATING LIQUORS—DRUGGISTS—UNLAWFUL SALE.
   A druggist, who habitually sells intoxicating liquors as a beverage, may be prosecuted under the local option act or general liquor law for keeping a place where intoxicating liquors are sold unlawfully.

2. CRIMINAL LAW—INTOXICATING LIQUORS—TESTIMONY—BILL OF PARTICULARS.
   In a prosecution for keeping a place where intoxicating liquors are sold unlawfully, the prosecutor is not bound to furnish a bill of particulars of the testimony upon which he relies.

Exceptions before judgment from Van Buren; Carr, J. Submitted April 21, 1904. (Docket No. 1.) Decided July 7, 1904.

J. L. Congdon was convicted of violating the local option law. Affirmed.

Thomas J. Cavanaugh and *Cook & Donovan*, for appellant.

Charles A. Blair, Attorney General, and *David Anderson*, Prosecuting Attorney, for the people.

HOOKER, J. The impression seems to exist in the minds of some of the profession that one who professes to

keep a drug store, giving a bond as a druggist, may, to all intents and purposes, keep a saloon, or habitually sell liquor as a beverage, without being liable, under the local option act or general liquor law for keeping a place where intoxicating liquor is sold as a beverage unlawfully. This is a misapprehension, as we have repeatedly shown by decided cases. *Anderson* v. *Van Buren Circuit Judge*, 130 Mich. 697 (90 N. W. 692); *People* v. *Remus*, 135 Mich. 629 (98 N. W. 397); *People* v. *Robinson*, 135 Mich. 511 (98 N. W. 12); *People* v. *Shuler*, 136 Mich. 161 (98 N. W. 986).

We know of no case that holds that, where one is charged with the statutory offense of keeping a place where intoxicating liquors are sold as a beverage, the prosecutor is obliged to furnish a bill of particulars of the testimony upon which he will rely to prove the charge. See *People* v. *Remus*, supra; *People* v. *McKinney*, 10 Mich. 54, 92.

We think it unnecessary to allude to other questions, all of which are covered by our decisions.

The judgment is affirmed.

The other Justices concurred.

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137 134
140 582

GRIMM *v.* SECRETARY OF STATE.

1. STATUTES—TITLE TO ACT—PURPOSE OF LAW.

The title of Act No. 232 of the Public Acts of 1903, i. e., "to revise and consolidate the laws providing for the incorporation of manufacturing and mercantile companies," etc., sufficiently indicates the purpose of the law to repeal existing laws covering the same subjects.

2. SAME.

Act No. 232 of the Public Acts of 1903 was designed to provide a general law, under which the corporations named in it

might be organized and brought under one general rule, instead of incorporating them under several laws as they were required to do before the act became a law, and as such embraces but one object.

Mandamus by Arthur A. Grimm to compel Fred M. Warner, secretary of State, to receive and file certain articles of association under chapter 191 of the Compiled Laws of 1897. Submitted June 7, 1904. (Calendar No. 20,502.) Writ denied July 7, 1904.

Mechem & Bailey and *Alfred J. Mills*, for relator.

Charles A. Blair, Attorney General (*Paul H. King*, of counsel), for respondent.

MOORE, C. J. The following statement is taken from the brief of counsel for petitioner:

"The petitioner and his associates caused to be prepared and executed articles of association for the incorporation of an electric-light company under and in compliance with the provisions of chapter 191 of the Compiled Laws of this State, and presented same to the secretary of State for filing, accompanied by the necessary fees. The secretary of State declined to receive and file the articles of association, insisting that chapter 191 of the Compiled Laws of 1897 had been repealed by Act No. 232 of the Public Acts of 1903."

This proceeding is taken to compel the secretary of State to receive and file the articles of association.

The title of Act No. 232 of the Public Acts of 1903 reads:

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

Section 1 of the act is as follows:

"Any three or more persons desiring to become incorporated for the purpose of carrying on any manufacturing or mercantile business, or any union of the two, or for buying, selling, and breeding cattle, sheep, and horses, or other live stock, or for engaging in maritime commerce, or navigation, or for the purchasing, holding, and dealing in real estate, or for conducting a warehouse and storage business, or for erecting and owning buildings to be occupied, or leased, for dwelling houses, halls, or business purposes, or for the production and supplying of gas and electricity for lighting, fuel, or other purposes, or for printing, publishing, and book making, or for carrying on any other lawful business, except such as are excluded by section 36 of this act, may, by complying with the provisions of this act, with their successors and assigns, become a body politic and corporate."

Section 37 of the act provides:

"This act shall include and apply to all corporations provided for in the following statutes: Chapter 158, 181, 182, 183, 185, 188, 190, 191, and 192 of the Compiled Laws of 1897, as amended, and in addition, shall repeal all other acts and parts of acts inconsistent with the provisions of this act. * * *"

Chapter 158, originally passed in 1885 (Pub. Acts 1885, Act No. 154), is entitled "Stock Breeding Associations." Chapter 181, originally passed in 1867 (Laws 1867, Act No. 24), is entitled "Corporations for Commerce or Navigation." Chapter 182, originally passed in 1877 (Pub. Acts 1877, Act No. 207), is entitled "Land Companies." Chapter 183, originally passed in 1867 (Laws 1867, Act No. 26), is entitled "Warehouse Companies." Chapter 185, originally passed in 1887 (Pub. Acts 1887, Act No. 70), is entitled "Associations for Constructing and Leasing Buildings." Chapter 188, originally passed in 1885 (Pub. Acts 1885, Act No. 232), is entitled "Manufacturing Companies." Chapter 190, originally passed in 1855 (Laws 1855, Act No. 109), is entitled "Gas-Light Companies." Chapter 191, originally passed in 1881 (Pub. Acts 1881, Act No. 70), is entitled "Electric-Light Companies." Chapter 192, originally passed in 1861 (Laws

1861, Act No. 97), is entitled "Associations for Printing Books, Newspapers, and Other Publications."

Counsel insist Act No. 232 of the Public Acts of 1903 is unconstitutional: (*a*) The title does not reasonably announce the object of the law; (*b*) the object of the law is not a single one, consistent with its general purpose.

They say the purpose of the Constitution is:

"To prevent the legislature and the people from being misled by the title of a law and the use of deceptive titles as a cover for vicious legislation, and to prevent the practice of bringing together into one bill, for corrupt purposes, subjects diverse and dissimilar in their nature, and having no necessary connection with each other, and to prevent surprise, logrolling, or fraud in legislation by means of provisions in bills of which the titles give no intimation. *People* v. *Mahaney*, 13 Mich. 481; *In re City of New York*, 57 App. Div. 166 (68 N. Y. Supp. 196); 26 Am. & Eng. Enc. Law (2d Ed.), p. 572, and cases cited in note 3. Within this statement of the law, the title * * * is unconstitutional.

"This contention is supported and illustrated by *Lewis* v. *Dunne*, 55 L. R. A. 833 (134 Cal. 291, 66 Pac. 478, 86 Am. St. Rep. 257), and the exhaustive notes thereto."

They also cite other cases.

It is said:

"The title to this act does not fairly express the general subject of the law, nor does it contain provisions for the proper means and instrumentalities which will or may facilitate the accomplishment and enforcement of the purposes it is intended to express. *People* v. *Mahaney*, 13 Mich. 481.

"The repealing section is neither expressed in nor suggested by the title, nor is it cognate or germane to the subject covered by the act, and could not reasonably be looked for or anticipated under its title. *Blades* v. *Board of Water Com'rs of Detroit*, 122 Mich. 366 (81 N. W. 271); *City of Lansing* v. *Board of State Auditors*, 111 Mich. 327 (69 N. W. 723); *Northwestern Manfg. Co.* v. *Wayne Circuit Judge*, 58 Mich. 381 (25 N. W. 372, 55 Am. Rep. 693)."

It is claimed that no one, from reading the title, could anticipate the repeal of the laws mentioned in section 37.

Does the title reasonably announce the object of the law? It, in express terms, states its purpose to be to "revise and consolidate the laws providing for the incorporation of manufacturing and mercantile companies," etc. We think this language indicates an intention to include in the act control over the incorporation of the companies, and that the title does reasonably indicate the purpose of the law. See *Attorney General* v. *Parsell*, 100 Mich. 170 (58 N. W. 839); *Graham* v. *Muskegon County Clerk*, 116 Mich. 571 (74 N. W. 729); Cooley, Const. Lim. (6th Ed.) 174.

Is the object of the law a single one, which is consistent with its general purpose?

In *People* v. *Mahaney*, 13 Mich. 481, Justice COOLEY, speaking for the court, said:

"But it is insisted that the whole law is unconstitutional and void, because in violation of section 20 of article 4 of the Constitution, which provides that 'no law shall embrace more than one object, which shall be expressed in its title.' The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the State. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the Constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when

required to pass upon it. See *Board of Sup'rs of Ramsey Co.* v. *Heenan*, 2 Minn. 336.

"But this purpose is fully accomplished when the law has but one general object, which is fairly indicated by its title. To require that every end and means necessary to the accomplishment of this general object should be provided for by a separate act relating to that alone would not only be senseless, but would actually render legislation impossible."

See *Connecticut Mutual Life-Ins. Co.* v. *State Treasurer*, 31 Mich. 6, and cases there cited; *People* v. *Bradley*, 36 Mich. 447; *Attorney General* v. *Weimer*, 59 Mich. 580 (26 N. W. 773); *People* v. *Phippin*, 70 Mich. 6 (37 N. W. 888); *Soukup* v. *Van Dyke*, 109 Mich. 679 (67 N. W. 911), and the cases there cited.

We think the purpose of the act was to provide a general law under which the corporations named in it might be organized and brought under one general rule, instead of incorporating under several laws, as they were required to do before the act became a law.

We conclude the law is a valid one, and decline to issue the writ as prayed.

The other Justices concurred.

FLEMING v. OTTAWA PROBATE JUDGE.

1. APPEAL AND ERROR — PROBATE COURT — BONDS — ADMINISTRATOR.

   Act No. 92, Pub. Acts 1901, providing that a party, appealing from an order of the probate judge, shall give a bond to the adverse party to secure the payment of damages and costs if the case shall not be reversed, and in case an administrator appeals from the allowance of his account, to secure the payment of the amount found due, does not require an administrator, appealing from an order removing him, to give a bond securing anything more than the costs that might be awarded to the adverse party by the appellate court.

2. SAME—BONDS—MANDAMUS.

Where a probate judge, on entering an order removing an administrator, fixed the penalty of the bond for an appeal from such order in an unwarranted amount, and upon the theory that it should be sufficient to secure payment of any sum found due the estate upon an accounting, it was not necessary for the administrator to present a proper bond to the probate judge before applying to the circuit court for a writ of mandamus to compel him to fix a proper penalty for the bond.

Certiorari to Ottawa; Padgham, J. Submitted June 7, 1904. (Calendar No. 20,533.) Decided July 7, 1904.

Mandamus by R. Andrew Fleming, administrator de bonis non of the estate of Thomas W. Ferry, deceased, to compel Edward P. Kirby, probate judge of Ottawa county, to approve a bond on an appeal from an order removing relator as administrator. From an order granting the writ, respondent brings certiorari. Affirmed.

George A. Farr, for relator.

Butterfield & Keeney and *Walter I. Lillie*, for respondent.

MONTGOMERY, J. The relator has been acting as administrator de bonis non of the estate of Thomas W. Ferry under an order of the probate court dated December 31, 1901. On September 18, 1903, certain of the heirs of Thomas W. Ferry petitioned the probate court for the removal of relator on the grounds: *First*, it was claimed that no petition was filed for his appointment, and that, therefore, there was no jurisdiction to make the appointment in the first instance; and, *second*, that relator was unsuitable to administer the trust.

On a hearing the probate judge removed relator on the first-named ground, and on entering the order announced that he would approve a bond in the sum of $500,000 if relator desired to appeal from this decision. Relator applied for mandamus to compel the respondent to approve

a bond in the sum of $200. On a hearing in the circuit it was directed that a mandamus issue requiring respondent to approve a bond, with penalty and sureties to be approved by him, but excluding the idea that the bond should be in such sum as would protect the estate.

The meritorious question is whether the bond required under section 670, 1 Comp. Laws, as amended by Act No. 92, Pub. Acts 1901, should be construed as requiring, in a case like the present, security for anything more than the costs awarded to the adverse party in the appellate court. The section originally read:

"The party appealing shall at the time of filing notice thereof file with the judge of probate a bond to the adverse party, in such penalty, with such surety or sureties as the judge of probate shall approve, conditioned for the diligent prosecution of such appeal, and the payment of all such damages and costs as shall be awarded against him in case he shall fail to obtain a reversal of the decision so appealed from."

The amendment of 1901 added the following:

"And in case any person appeals from the allowance and findings of the court upon the examination of his account as executor, administrator, guardian, or trustee, the court may, in its discretion, fix the penalty of the bond in such sum as will cover the amount found due by the probate court upon examination of such account, in which case the bond and sureties thereon shall be liable to the amount of such bond for the amount found due by the probate court or the appellate court, upon the final determination of such appeal, including the costs and damages awarded by such appellate court."

It will be seen that this amendment does not apply to the present case. It will also be noted that the bond required in a case like the present is to run to the adverse party, who may be one of many heirs. Was it intended that such bond should furnish security to the estate, or to all of those interested, that the estate will be duly administered and not wasted? We think not. In a case like the present the administrator is presumed to have given an

adequate bond to the probate judge to secure the due execution of his trust. The only purpose of the bond on appeal is to secure the payment of such sum as may be *awarded* to the adverse party on the appeal. It is, we think, clear that the court could not, on such an appeal, award to the appellee, who is or may be one of the numerous heirs, the amount of any claimed devastavit.

The case of *Com.* v. *Judges of Orphans' Court*, 10 Pa. St. 37, relied upon by respondent, is distinguishable. Under the Pennsylvania statute the security required is a recognizance presumptively in form running to the judges of the court, and is not limited in terms to securing an award to the adverse party.

It is contended that the relator was not entitled to the order for the reason that no bond had been presented to the probate judge for approval, but we agree with the circuit judge that this was, under the circumstances of this case, unnecessary. The statute contemplates that the probate judge will fix the penalty. This he did, and at an unwarranted figure, and upon an erroneous conception of the law. It is not clear how the relator could have proceeded further. It would have been idle, if not contemptuous, to present a bond in any other penalty.

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

The other Justices concurred.

TURNER *v.* DETROIT SOUTHERN RAILROAD CO.

1. MASTER AND SERVANT—PERSONAL INJURIES—SAFE APPLIANCES—RAILROAD COMPANIES.

A railroad company was not negligent, in using a step which was in common use, without evidence that it was so dangerous that an ordinarily prudent employer would discard it, although it projected 15 inches beyond the side of the car.

2. SAME—CARS—PROJECTING STEPS.

Where steps, projecting 15 inches beyond the cars, but not so far as the widest portions of the engines, had been used on defendant's railroad for four years, and also on other roads, without injuring anyone, defendant was not negligent in failing to apprehend that the steps would strike some one standing near the track.

3. SAME—NEGLIGENCE—DANGER TO EMPLOYÉS.

The fact that a railroad tie, which had been left by a fellow-servant of the plaintiff too near the track, was struck by a projecting step on a car and thrown against the plaintiff, affords no evidence that defendant should have apprehended danger to its employés from such projecting steps.

Error to Lenawee; Chester, J. Submitted June 9, 1904. (Docket No. 1.). Decided July 7, 1904.

Case by Ernest W. Turner against the Detroit Southern Railroad Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Dickinson, Stevenson, Cullen, Warren & Butzel, for appellant.

Fellows & Chandler, for appellee.

CARPENTER, J. In October, 1901, plaintiff was a section man in defendant's employ. The gang of which he was a member was engaged in taking out old ties and replacing them with new. The projecting step of a caboose on a passing train hit one of the new ties strewn along the track, and threw it with great force against plaintiff, who was standing near the passing train, and seriously injured him. He brought this suit to recover compensation, claiming that defendant was negligent in permitting said step to project so far from the caboose. The issue was submitted to a jury, who rendered a verdict in favor of plaintiff. We are asked to reverse the judgment in plaintiff's favor upon several grounds, but, in our judgment, we need to consider but one: Was there

any evidence that defendant was negligent in permitting the step in question to project from the caboose?

Defendant had four cabooses with projecting steps precisely like that in question. These cabooses were built over box freight cars, with doors at either end and at the sides. To enable the train crew to conveniently get in and out, steps made of strap iron, mortised to the sill, with the lower ends bent outward supporting a plank step, were suspended at the sides. This lower step was 20 inches below the floor of the car, and, according to plaintiff's testimony, projected 15 inches beyond the side. These cabooses had been used by defendant during the construction of its road and ever afterwards—for four years or more—and plaintiff's injury was the first known injury or accident resulting from their use. The cabooses passed back and forth over the road in daily use, and were generally known to the men in its employ. They were not, however, known to the plaintiff, who had been in defendant's employ but 10 days. The same or similar type of cabooses with the projecting steps were in use by the Cincinnati, Hamilton & Dayton Railroad, the Louisville & Nashville Railroad, the Lake Erie & Western Railroad, and the Detroit, Toledo & Milwaukee branch of the Lake Shore & Michigan Southern Railroad. Undisputed testimony proves that parts of the smallest engines used on the defendant's road projected farther than did these steps. It was shown that the Wabash Railroad—the only road upon which defendant had had prior experience—and the main line of the Lake Shore & Michigan Southern Railroad had no cabooses with such steps. One witness, a Mr. Bray, who had been a master car builder, testified that he considered the construction improper; but his only objections to it are that the step might be knocked off by a bridge or other structure along the tracks, or might injure some one "standing close to the track, or something like that." The fact that these cabooses had been run this way for four years without accident is proof—if proof be needed—that the projecting step did not come in con-

tact with bridges or other structures on defendant's road. And surely a railroad company is under no obligation to assume that persons will stand within 15 inches of a passing train, especially when it is shown that parts of the locomotive, which we must presume to be properly constructed, projected more than 15 inches. It cannot, therefore, be contended that defendant was negligent because it made no provision for the protection of such persons.

The jury were not warranted in finding negligence from the use of a projecting step which it may be said, on this record, was in common use, without evidence that it was so dangerous that an ordinarily prudent employer would discard it. See *Grand Rapids, etc., R. Co.* v. *Judson*, 34 Mich. 506. The fact that parts of the locomotive projected farther than these steps compels us to say, as we have already indicated, that defendant was not negligent in failing to apprehend that the steps would strike some person standing near the track. No lesson from its own experience—and defendant had a right to place great reliance on this experience (see *La Pierre* v. *Railway Co.*, 99 Mich., at pages 214, 215 [58 N. W. 60])—or, so far as this record shows, from the experience of others, had taught defendant that these projecting steps were dangerous, for, until plaintiff was injured, their use had occasioned no injury.

There is no evidence, then, in this record, from which it may be inferred that defendant should have apprehended danger to its employés from these projecting steps, unless the injury to plaintiff affords such evidence. It cannot be argued that the injury to plaintiff affords evidence that defendant should have apprehended that the projecting steps directly endangered the safety of its employés, for plaintiff was not directly injured by the step. He was injured because the step threw against him a tie, which, through the negligence of his fellow-servants, was left too near the track. We think it cannot be seriously contended that defendant was negligent in failing to foresee and guard against so improbable a contingency.

"It is a mistake for one to take his stand after an accident and impute responsibility from a view thus obtained. It is nearly always easy, after an accident has happened, to see how it could have been avoided." 1 Bailey's Personal Injuries Relating to Master and Servant, § 112, citing *Burke* v. *Witherbee*, 98 N. Y. 562.

In our judgment, the only negligence shown on this record is that of the fellow-servant who placed the tie too near the track; and it follows, therefore, that the trial court erred in refusing to direct a verdict for the defendant.

Judgment reversed, and a new trial granted.

The other Justices concurred.

VAN DERLYN *v.* MACK.

1. ADOPTION—INHERITANCE.
   The provisions of 3 Comp. Laws, § 8780, for the adoption of children, do not make such children heirs of the kindred of the persons adopting them.[1]
2. EQUITY—WILLS—CONSTRUCTION—HEIRSHIP.
   Where, if a certain person had a right to inherit from a testator, the construction of the will was necessary, a court of equity, having obtained jurisdiction for that purpose, may determine the question of heirship.
3. COSTS—SUITS BY EXECUTORS.
   Where one having no interest in an estate makes a claim as heir, and the executor brings suit to determine the rights of the claimant, he is entitled to recover the costs.

Appeal from Jackson; Peck, J. Submitted June 14, 1904. (Docket No. 17.) Decided July 7, 1904.

Bill by Nelson Van Derlyn, individually and as executor

[1] As to legal status of adopted child, see note to *Warren* v. *Prescott*, (Mo.) 17 L. R. A. 435.

of the last will and testament of John Van Derlyn, deceased, and Alfred Van Derlyn against Lillie May Mack, an infant, by John F. Mack, guardian ad litem, to construe said will and codicil thereto, and to determine the legatees thereunder. From an order overruling a demurrer to the bill, defendant appeals. Affirmed.

Parkinson & Campbell and *Charles E. Townsend*, for complainants.

Pringle & Hewett, for defendant.

HOOKER, J. Lillie May Mack was adopted, under the provisions of the statute (3 Comp. Laws, § 8776 *et seq.*), in the year 1895, by John F. Mack and his wife, Mahala J. Mack. She was not of kin to either of these persons. Mahala J. Mack had four brothers, viz., James, Alfred, John, and Nelson Van Derlyn.

John Van Derlyn made a will September 25, 1901, in which he left his property to his three brothers, and mentioned his sister as having previously died without issue. On February 14, 1903, he made a codicil to the will, revoking all provisions in his will in favor of his brother James.

A question arises as to the effect of this codicil; i. e., should the other two brothers take the share bequeathed to James in the first will, or did the codicil leave it subject to distribution under the statute? Lillie May Mack bases her claim upon the latter view, and a claim that she is entitled to inherit a portion of the same through representation of her mother by adoption, Mahala J. Mack, testator's sister.

The bill was filed by Nelson Van Derlyn, individually and as executor of John Van Derlyn, and Alfred Van Derlyn. In its prayer they asked (1) that it be decreed that Lillie May Mack is not an heir at law of John Van Derlyn, or a distributee in any of the personal estate of the deceased; (2) that the will and codicil be construed; (3) that it be decreed that the complainants are the sole dev-

isees and owners of all of said estate; (4) that the title be declared free and clear from any claim on her part.

The bill was demurred to, and, the demurrer being overruled, the defendant has appealed.

The statute (3 Comp. Laws, § 8780) provides:

"Such judge of probate with whom such instrument is filed, shall thereupon make an investigation, and if he shall be satisfied as to the good moral character, and the ability to support and educate such child, and of the suitableness of the home of the person or persons adopting said child, he shall make an order to be entered on the journal of the probate court that such person or persons do stand in the place of a parent or parents to such child, and in case a change of name is desired, that the name of such child be changed to such name as shall be designated in said instrument for that purpose. Whereupon such child shall, in case of a change of name thereafter be known and called by said new name, and the person or persons so adopting such child, shall thereupon stand in the place of a parent or parents to such child in law, and be liable to all the duties and entitled to all the rights of parents thereto, and such child shall thereupon become and be an heir at law of such person or persons, the same as if he or she were in fact the child of such person or persons."

The power to inherit from Mahala J. Mack is given by this statute, and that is as far as the statute goes. It does not say that she shall be the heir of Mahala J. Mack's kindred, nor that she may inherit from them by the right of representation of Mahala J. Mack. We cannot extend the statute by construction. We see nothing in it to lead to the belief that it was the legislative intention to permit one to adopt heirs for third persons.

It is claimed that there are many decisions which sustain the claim of Lillie May Mack, although counsel concede that there are others which deny it. It will be found, however, that there is not much inharmony in the cases, when the varying statutes of different States are considered; and we are satisfied that most, if not all, of the cases can be reconciled with the view above indicated, if

proper allowances are made for the differences in statutes. Thus in Massachusetts the statute provides that:

"A child so adopted shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock; except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." Gen. Stat. 1860, chap. 110, § 7.

In the case of *Sewall* v. *Roberts*, 115 Mass. 276, the Massachusetts court properly held that the exceptions in the statute aided in the interpretation, and perhaps broadened it—a doctrine that is also enunciated in *Glascott* v. *Bragg*, 111 Wis. 605 (87 N. W. 853, 56 L. R. A. 258), and *Warren* v. *Prescott*, 84 Me. 483 (24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370). See, also, *Hilpire* v. *Claude*, 109 Iowa, 159 (80 N. W. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524). Also the cases of *Flannigan* v. *Howard*, 200 Ill. 396 (65 N. E. 782, 59 L. R. A. 664, 93 Am. St. Rep. 201), and *Hartwell* v. *Tefft*, 19 R. I. 644 (35 Atl. 882, 34 L. R. A. 500), both of which States have statutes similar to that of Massachusetts. See, also, *Vidal* v. *Commagere*, 13 La. Ann. 516, for a broad construction of a statute of this kind, following the rule of the civil law.

The foregoing cases are for the most part justified by the respective statutes, and therefore do not militate against another construction of a statute, which, while it makes an adopted child the heir of the persons adopting him, contains nothing to indicate that he may inherit the property of others, which never has descended to those adopting him. In the construction of such statutes the following authorities are in point:

In *Barnhizel* v. *Ferrell*, 47 Ind. 335, it was held that, by adopting a child, he was not made the heir of his foster brother, under the statute of Indiana. See *In re Estate of Sunderland*, 60 Iowa, 736 (13 N. W. 655).

In *Power* v. *Hafley*, 85 Ky. 676 (4 S. W. 685), the court said:

"In reaching the conclusion that one, by adopting another, may make that other his own heir, with full capacity to inherit his estate, and that the children of the adopted may also inherit from him, we do not wish to be understood as deciding that the adopting parent can make the adopted child the heir of other people, so as to entitle such child to inherit property that does not come directly from the adopting parent. The case at bar does not involve that question, and we prefer to reserve any expression of opinion thereon until the question actually arises."

In *Meader* v. *Archer*, 65 N. H. 215 (23 Atl. 521), the Massachusetts act was interpreted, and the court said:

"Holt's mother outlived him, and owned the land at the time of her death, and the plaintiffs are her next of kin. The defendant is Holt's adopted son. As Holt had no title, the land did not go to the defendant as Holt's heir. By the law of the defendant's adoption, he could inherit property which Holt 'could have devised by will.' This land Holt could not have devised. By the same law, 'as to the succession to property,' the defendant stands, 'in regard to the legal descendants, but to no other of the kindred of' Holt, in the same position as if he were Holt's son. This does not make him an heir of Holt's mother. No objection being made in argument to the form of action, the question of procedure has not been considered."

In *Helms* v. *Elliott*, 89 Tenn. 448 (14 S. W. 930, 10 L. R. A. 535), the Tennessee court said:

"As between the adopting parent and the adopted child, the statute declares in the plainest terms that the adopted child shall, by the act of adoption, acquire all the rights of a child born to such parent. The adopted child becomes entitled to the same protection and support as if born the child of the adopting parent, and is given the capacity of inheriting or succeeding to the estate of the adopting parent as heir or next of kin. The adopting parent assumes the same parental obligations to the adopted child as if such child were born to such parent, and the adopted child is clothed with the same rights in the estate of the adopting

parent as an heir or next of kin. This is the full measure of the benefits conferred upon the adopted child. No claims are given upon any one except the adopting parent. No property rights are conferred except in the estate of such parent.

"It is contended that the legal status of the adopted child is the same as that of the child born in lawful wedlock, and that, as a consequence, the same rights of heir and next of kin exist in the one case as in the other, not only as to the parent, but as to all other persons. This position is sound in part only. So far as the parental obligations and the estate of the adopting parent are concerned, it is well taken, but beyond that it is not tenable. As to the estates of other persons than the adopting parent, the law of adoption fixes no right in the adopted child. It is only as to the adopting parent that the adopted child is made 'heir or next of kin' by the statute. By the adoption, Anderson Lewis, the adopted son, became vested with all the rights of heir and next of kin of Louie Lewis, the adopting father, but he was not thereby made the heir and next of kin of the children born to Louie Lewis. As to them he occupied the same relation in law after the adoption as before—that of a stranger in blood. * * *

"The strict legal meaning of the phrase 'next of kin' is 'next or nearest in blood.' In ascertaining who the next of kin is, the law follows the line of consanguinity. Such is the general rule of the common law. It is the same in this State under our general statute of distribution. It is so in every case unless there be an express statutory exception. In the law of adoption, such an exception is made, but, as we have already seen, it applies alone to the estate of the adopting parent. The law of adoption arbitrarily establishes for the adopted child the relation of heir and next of kin to the adopting parent, but it does not establish such a relation to the descendants of the adopting parent. As to them and their estates, the adopted child stands in no other relation than that existing before the act of adoption."

In *Moore* v. *Moore's Estate*, 35 Vt. 98, where the statute constituted an adopted child an heir at law "in as full and perfect a manner as if born to the adopting parents in lawful wedlock," it was held that the statute did not make the child, by representation, an heir of the brother of its mother by adoption, although she would be an heir if liv-

ing. See, also, *Delano* v. *Bruerton*, 148 Mass. 619 (20 N. E. 308, 2 L. R. A. 698); *Keegan* v. *Geraghty*, 101 Ill. 26.

We think these cases are conclusive of the question, as already indicated, and that Lillie May Mack has no interest in this estate.

Whether or not it would have been proper to file a bill merely to adjudicate upon Lillie May Mack's claim of heirship, it would be necessary to construe the will and codicil if her right to inherit from John Van Derlyn should be sustained, and in such case the complainants might file a bill for that purpose. This they did, and, having jurisdiction for that purpose, we may decide the other question.

This disposition of that question makes it unnecessary to pass upon other questions, except that of costs, which counsel for the appellant ask us to impose upon the estate. We see no occasion to do this. The friends of Lillie May Mack saw fit to claim for her a share of an estate in which she has no interest. To impose costs upon the estate is an indirect way of making the true owners of the property pay them, which ought not to be required. On the contrary, they are entitled to costs.

The decree overruling the demurrer is affirmed, with costs.

The other Justices concurred.

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PRESTON NATIONAL BANK *v.* WAYNE CIRCUIT JUDGE.

1. COURT RULES—CONSTRUCTION.
   By the re-enactment of a rule of court the construction which has been placed upon the same language by the court is also adopted.

2. SAME—DISCOVERY OF BOOKS AND PAPERS.
   Circuit Court Rule No. 50, providing that a party may be com-

pelled to produce and discover all such books, papers, and documents as may be necessary to enable the party applying for such discovery to prepare for the trial of the cause, does not authorize the court to compel the production of a party's books until the moving party shows his inability to compel production by a subpœna duces tecum.

Mandamus by the Preston National Bank to compel Morse Rohnert, circuit judge of Wayne county, to vacate an order for discovery. Submitted October 6, 1903. (Calendar No. 20,173.) Writ granted July 16, 1904.

Geer & Williams and *H. R. Martin*, for relator.

Bowen, Douglas, Whiting & Murfin, for respondent.

MONTGOMERY, J. The receiver of the City Savings Bank brought an action in the circuit court for the county of Wayne to recover a balance of a deposit with the Preston National Bank. The Preston National Bank gave notice that it would set off as against this claim a check for $100,000 drawn on the City Savings Bank by F. C. Andrews, and certified by the teller of the savings bank. The plaintiff filed an affidavit that such check was not certified by one authorized to do so, and, on this state of the pleadings, asked for an order for inspection of the books of the defendant. The petition, as amended, set out that, to enable plaintiff to prepare for trial, it was necessary that access be had to, and an examination be made of, certain books of defendant. It averred, on information and belief, that the defendant did not receive the check on behalf of the City Savings Bank, but for the sole benefit of F. C. Andrews; that the City Savings Bank was not at the time indebted to F. C. Andrews; that defendant knew, or had reason to believe, that the alleged certification was invalid, and that said check was received, not for a present and valuable consideration, but for the sole benefit of F. C. Andrews; that plaintiff was advised and believed that the books of defendant would show, or tend to show,

the facts and circumstances of the entire transaction. Upon this petition an order was made that the defendant produce for inspection all bank registers, books of account, discount books, records of daily offerings of notes or security for discount, draft books, vouchers, canceled drafts and checks, agreements or written instruments, clearing-house outgoing and incoming sheets and reports, collateral registers, and all other books and papers referring to, or covering the period of time from January 1, 1899, to February 15, 1902, and all other books and papers containing any entry or reference to any transaction between said defendant and said Frank C. Andrews—all as far as they relate directly or indirectly to the matters at issue, or to matters leading up to the matters at issue. Relator applies to this court for a mandamus requiring respondent to vacate this order.

The order below was made under the authority of Circuit Court Rule No. 50, adopted July 19, 1901. Subdivision "*d*" of this rule is the only provision applicable, and reads as follows:

"After issue joined in any action either party may be compelled to produce and discover all such books, papers, and documents as may be necessary to enable the party applying for such discovery to prepare for the trial of the cause." 124 Mich. xxxviii.

The contentions of relator are that the rule does not justify the order of the circuit judge, and that, if the rule should be construed as broad enough in its terms to authorize the order, it is in violation of section 26, art. 6, of the State Constitution, protecting citizens from unreasonable search of papers and possessions. By reference to the old court rules, it will be seen that the subdivision of Rule 50 above quoted is a literal copy of paragraph 4 of Rule 40, in force before the adoption of the revised rules. While Rule 40 was in force the case of *Cummer* v. *Kent Circuit Judge*, 38 Mich. 351, was decided. Under well-recognized rules, the present rule, being a re-enactment of the former, must be held to have been adopted with the

construction which had been placed upon the same language by the court. In *Cummer's Case* it was held that, before the production of an adversary's books could be compelled, it was incumbent upon the moving party to show his inability to compel production by supœna duces tecum. That case is decisive of the present. The circuit judge relied upon the two cases of *Eddy* v. *Bay Circuit Judge*, 114 Mich. 668 (72 N. W. 890), and *Anti-Kalsomine Co.* v. *Kent Circuit Judge*, 120 Mich. 250 (79 N. W. 186). The first of these cases was ruled upon the distinct ground that the custodian of the books and papers sought was a trustee of the moving party. The case was not rested upon this rule. Indeed, there was then no rule in force relating to the subject. The decision rested upon the common law. The case of *Anti-Kalsomine Co.* v. *Kent Circuit Judge* was likewise a case in which a trust relation existed, as is shown by a reference to *Church* v. *Anti-Kalsomine Co.*, 118 Mich. 219 (76 N. W. 383), where the contract between the parties is set out. It was not the purpose to overturn the dicision in *Cummer's Case* by readopting this rule.

The order in the present case was not authorized, and mandamus must issue.

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

THICK *v.* WASHER.

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MALICIOUS PROSECUTION — PROBABLE CAUSE — CONVICTION — REVERSAL.

In an action for malicious prosecution, the fact that the plaintiff was convicted in the criminal proceedings, is conclusive proof of probable cause, unless the conviction was procured by false or fraudulent testimony or other unlawful means, al-

though the judgment was subsequently reversed by a higher court and the plaintiff acquitted and discharged.

Error to Lapeer; Smith, J. Submitted October 8, 1903. (Docket No. 24.) Decided July 16, 1904.

Case by John Thick against Doctor M. Washer and David V. Yerex for malicious prosecution. There was judgment for plaintiff, and defendants bring error. Reversed.

Elmer Shumar (*Geer, Williams & Halpin*, of counsel), for appellants.

Henry H. Smith, for appellee.

HOOKER, J. David Yerex and D. M. Washer were respectively president and marshal of the village of Imlay City. John Thick was an omnibus driver carrying passengers to a fair. An ordinance required all resident omnibus drivers to pay a license fee of $1 per day, and nonresidents $3 per day, for the privilege. Thick was arrested upon a warrant, issued upon complaint of Washer, for violating this ordinance, and this complaint was made upon the request of the president, Mr. Yerex, who gave him a bond of indemnity against damages. Thick had refused to pay the license, and apparently the village officers and he had been in a controversy over the validity of the ordinance for some time, because of Thick's claim that it was void, and his refusal to pay. The marshal and president had been informed by the village attorney that he had not much faith in it, and there is testimony that another attorney had given a similar opinion. Defendants claim that a third lawyer had given his opinion that it was valid, and that the suit was brought to test the question and enforce the ordinance, if it could be enforced, in the belief that it was valid. The defendant was not locked up, but reported before the justice, gave bond and went to trial, and was convicted. Upon the trial no

serious effort was made to secure his discharge, i. e., his counsel contented himself with moving his discharge upon the ground that the ordinance was void. Thick testified upon the trial in the present case that he, Thick, "wanted the marshal to lock him up" when arrested, and that upon the trial his counsel wanted the justice to find him guilty, and told him (Thick) so, and this was apparently without protest. On the appeal the ordinance was held invalid, and the conviction was reversed. Thick then began this action for malicious prosecution, and recovered a verdict and judgment for $85 and costs. The defendants, Yerex and Washer, have appealed. They complain of the following rulings: (1) That a request to direct a verdict for defendant was refused. (2) That the court erred in leaving the question of malice to the jury, for the reason that there was no evidence of malice. (3) In restricting counsel to an argument on the question of malice. (4) Error in the charge on the subject of damages. (5) Discussion of the evidence in the charge.

The cause is ruled by the case of *Phillips* v. *Village of Kalamazoo*, 53 Mich. 33 (18 N. W. 547), and *Holmes* v. *Horger*, 96 Mich. 410 (56 N. W. 3). These cases sustain the general rule that "a conviction in criminal proceedings is conclusive proof of probable cause, unless procured by false or fraudulent testimony or other unlawful means," and "the rule applies, although the judgment of conviction was subsequently reversed by a higher court, and the plaintiff acquitted and discharged." See cases cited in 19 Am. & Eng. Enc. Law (2d Ed.), pp. 666, 667. Facts constituting this cause an exception to the rule were neither alleged nor proven.

The judgment is reversed, and no new trial ordered.

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

PEIRSON *v.* McNEAL.

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1. WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEASED PERSON.

In a suit by an executrix to set aside an assignment of certain mortgages by the deceased to the defendant, the testimony of the defendant as to the delivery of the assignments by the deceased to her is equally within the knowledge of the deceased and inadmissible. 3 Comp. Laws, § 10212.

2. MORTGAGES—ASSIGNMENTS—DELIVERY.

In an action to set aside assignments of certain mortgages, evidence reviewed, and *held* to sustain a finding that the assignments had been delivered to the assignee prior to the assignor's death. GRANT, J., dissenting.

3. WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEASED PERSON.

Where testator devised his entire property to his wife, and appointed her executrix, a suit brought by her as executrix to set aside assignments of certain mortgages on the theory that the mortgages equitably belonged to her, was an action for her personal benefit, and not for the benefit of the estate and hence, she being the real party in interest, was precluded by 3 Comp. Laws, § 10212, from testifying to facts equally within the knowledge of her deceased husband.

4. EXECUTORS AND ADMINISTRATORS—CLAIM OF EQUITABLE LIEN —ISSUES.

A claim for an equitable lien upon a house and lot for the purchase money or a portion thereof, furnished by complainant in her individual capacity, cannot be litigated in a suit by her as executrix of her husband's will, although her husband purchased the property with her money and took the title in the name of the defendant.

Appeal from Lenawee; Chester, J. Submitted November 4, 1903. (Docket No. 78.) Decided July 16, 1904.

Bill by Harriet A. Peirson, executrix of the last will and testament of Levi R. Peirson, deceased, against Myrtie M. McNeal, Corvis M. Barre, Chauncey F. Cook, and

others, to set aside a deed and the assignment of certain mortgages. From a decree dismissing the bill, complainant appeals. Affirmed.

Fellows & Chandler, for complainant.

James S. Galloway and *Thomas E. Barkworth*, for defendants Barre and Cook.

CARPENTER, J. This is a suit in chancery to set aside the transfer of two mortgages from complainant's testator to the first-named defendant. There is also a claim, which will be discussed at the conclusion of this opinion, that complainant, in her individual capacity, is entitled to an equitable lien on certain real estate. The original bill was filed by complainant, the widow of said Levi R. Peirson, deceased, in her individual capacity. It sought relief on the ground that the moneys invested in the mortgages belonged to her. Afterwards the will of said Levi R. Peirson, whereby he devised to complainant all his property and appointed her executrix, was admitted to probate. Thereupon her bill was amended, and a decree sought on the ground that these mortgages still belong to the testator's estate. The trial court dismissed complainant's bill. She appeals to this court, and asks a decree "so that these two mortgages should stand in the name of the estate; then, by operation of the will, they would, after the settlement of the estate, come to Mrs. Peirson."

Complainant contends that she is entitled to this decree on one of two grounds: *First*, that the assignments were never delivered; *second*, that, if they were delivered, no consideration was paid for them, that they equitably belong to complainant, and that they should be decreed to belong to the estate in order that complainant's equitable right to them may be enforced. We will discuss these claims separately.

First. Were the assignments ever delivered? One of these assignments was dated September 5, 1898, and the other December 14, 1898. Mr. Peirson died in a hospital

in Columbus, Ohio, January 13, 1899. He had gone to that hospital, accompanied by Miss McNeal, December 19, 1898. The papers were not placed on record until January 16, 1899, three days after Mr. Peirson died. Complainant contends that these assignments were never delivered, and were in Mr. Peirson's possession at the time he died. The trial judge, who heard the witnesses, found against this contention; and in my judgment the evidence that these assignments were delivered just before the deceased and Miss McNeal went to Columbus is convincing. Without considering the testimony of Miss McNeal, which I think is inadmissible under the statute (section 10212, 3 Comp. Laws), we have the testimony of her mother and sister that they saw the papers—not merely the envelope containing them—in her custody in December, 1898. We have the testimony of her cousin, Seth McNeal, an attorney, that Mr. Peirson told him on the 15th of December, 1898, that he had given Myrtie about $7,000 (the aggregate of the mortgages and other property was just about $7,000). We have the testimony of Albert Price that on the 16th of December, 1898, Mr. Peirson told him that he had assigned these two mortgages to Myrtie. It is true that this witness says:

"The impression I got from what he said to me was that he had made these papers—these assignments—and fixed his property over with the intention of it taking effect at his death."

Notwithstanding this statement, I think Mr. Peirson—who was a lawyer, and knew the meaning of the words he used—correctly stated the facts when he told the witness, as the witness testifies, "he had made a disposition of his property; that he had assigned the mortgages to Myrtie." It is conclusively established that Mr. Peirson intended that after his death these mortgages should belong to Miss McNeal. He did not intend to transfer them by a will or any instrument to take effect after his death. He intended to transfer them directly to her by delivery. He was a lawyer, and presumably he knew that, to effect-

uate his intent, this delivery should be made while he was living. Nor can it be urged that his sudden death prevented his carrying out his intention. Before he left for Columbus, he apprehended death. It was because of that apprehension that he desired witness Price to understand what he had done. It is difficult to believe that under such circumstances he omitted to make a delivery of these papers. The testimony above referred to is therefore in entire harmony with the probabilities.

I do not think that the charge should be made that the testimony of the mother and sister of Miss McNeal was introduced out of place. Of course, it was introduced, as it should have been, after complainant had closed her testimony in chief. I do not understand from the record that it was introduced after complainant had closed her rebutting testimony. The notion that it was so introduced I think results from the fact that complainant swore some witnesses, who testified to value, just before the testimony under consideration was introduced, and before defendants had rested. We are asked to discredit this testimony because the papers were not recorded until January 16th, because Mr. Peirson was in control of the subject of the first assignment on the 12th of November, and because one witness—Mr. Ransom J. Eaton—testifies to two conversations with Miss McNeal in which she admitted to him that the mortgages were never delivered. The fact that these assignments, delivered just before and in anticipation of Mr. Peirson's death, were not placed on record until after his death—an event which occurred in less than a month after the papers were delivered—is to my mind a circumstance of no particular significance. The fact that Mr. Peirson claimed to be in possession of one of these mortgages on the 12th of November is entirely consistent with the evidence that he parted with his interest in that mortgage by delivering, in December, an assignment executed in September. Miss McNeal denies under oath that she made the admission to Mr. Eaton, and in this she is corroborated in part by the testimony of her

cousin, Mr. Seth D. McNeal. We are not compelled to choose between the alternative (*a*) of believing Mr. Eaton, or (*b*) of declaring that he has committed perjury. It is, to my mind, altogether more probable that he is mistaken in his recollection of what Miss McNeal said than it is that the other witnesses were mistaken, and that the trial judge was mistaken in crediting their testimony.

Second. Nor do I think that complainant can prevail on the ground that these mortgages are equitably hers. The only testimony in the case which justifies the conclusion that these mortgages equitably belong to complainant is her own testimony. In giving that testimony complainant testified to matters clearly within the knowledge of her testator. On the theory that this property is equitably hers, complainant is seeking a decree, not for the benefit of the estate, but for her own benefit. She attacks the transaction between her testator and Miss McNeal, not on the ground that the testator's estate is damaged, but solely on the ground that her interest in the estate is damaged. It is clear, therefore, that if complainant can recover on the ground that she is the equitable owner of the property, and that her equities entitle the estate to recover what otherwise it could not recover, she is the real party in interest. See *Bachelder* v. *Brown*, 47 Mich. 366 (11 N. W. 200). Complainant is, in the language of the statute (section 10212, 3 Comp. Laws), "the opposite party" to Miss McNeal, who is (see *Ripley* v. *Seligman*, 88 Mich., at page 189 [50 N. W. 143]) an assignee of the deceased. Complainant's testimony is therefore inadmissible under said section. See *Bachelder* v. *Brown*, supra.

I do not understand that complainant asks relief upon the ground that she has established her charge in the bill that these assignments were procured by undue influence. To avoid any misapprehension, we deem it proper to say that, in our judgment, that charge is not established.

We now come to the consideration of the claim referred to at the commencement of this opinion—that complain-

ant, in her individual capacity, is entitled to a lien on certain real estate. In 1896, complainant's husband, Mr. Peirson, purchased a house and lot for Miss McNeal. The title was taken in her name, and she has had the use of the property since that time. It is claimed that all, or at least a portion, of the purchase money belonged to complainant, and for that reason an equitable lien should be declared in her favor. We regard this suit—and in so doing we construe the amended bill as claimed by complainant—as a suit brought by her as executrix of her husband's estate. As such executrix she can obtain relief only for the estate's grievances. She has no right to litigate in such a suit a matter like that now under consideration, in which the estate has no interest. If the claim is well grounded—which we neither affirm nor deny—it should be the subject of a suit brought by her in her individual capacity.

We are not called upon to determine the propriety of the relations which existed between Mr. Peirson and Miss McNeal, for it is clear that the impropriety of those relations, if they were improper, would not, as a matter of law, defeat the latter's title to the mortgages in question.

In my judgment, the decree of the circuit court should be affirmed, with costs.

MOORE, C. J., MONTGOMERY and HOOKER, JJ., concurred with CARPENTER, J.

GRANT, J. (*dissenting*). Complainant and Mr. Peirson were married September 17, 1857. She was then a young widow, possessed of some means, and he was in the mercantile business in Hudson, Mich. He failed in 1859, studied law, and entered upon the practice of the profession at Hudson in 1862. He occupied rooms for his office in a building owned by his wife. His business was small, largely confined to office work. The only data of the extent of his business is found in his account books for the years 1895, 1896, 1897, and 1898. In 1895 it amounted to $1,085.24, and decreased steadily until in 1898 it

amounted to $747.63. In September, 1892, he took into his office as clerk the defendant Myrtie M. McNeal, a young woman then about 22 years of age. She was neither a stenographer nor a typewriter. She had taught district school some, for which she had received $5 per week. She remained in his employ until his death, January 13, 1899. Mr. and Mrs. Peirson had no children. Mr. Peirson died in a hospital in Columbus, Ohio. Miss McNeal was with him. His wife was at her home in Hudson, and remained at her home, evidently by his wish. When he knew that he must die, he did not desire that she should be summoned. On January 16th, after his death, Miss McNeal placed upon record the assignments of two mortgages—one known as the "McCullen mortgage," the assignment being dated and acknowledged September 5, 1898; the other known as the "Duesler mortgage," the assignment of which bears date December 14, 1898. The consideration of the first assignment is "one dollar * * * to me in hand paid by my adopted daughter, Myrtie M. McNeal, * * * and the further consideration of wages owing to her for her past services, and the further consideration of kind acts and faithful and trusty services as clerk in my law office for the years past, and the further consideration that she has agreed to remain in such clerkship relations and such services, the same as she has in the past, so long as I live, if she outlives me, party of the second part." The second assignment recites a consideration of "one dollar * * * for valuable services rendered, * * * and further consideration or agreement, by said party of the second part, to remain with me, and assist me in my business so long as I shall live; and in appreciation of her many good qualities and her uniform kindness to me." In 1896 Mr. Peirson purchased a house and lot for Miss McNeal, for which he paid $1,100, and the title was taken in her name, possession given, and she received the use of it from that time. Soon after the death of Mr. Peirson, Mrs. Peirson learned of the assignments of these mortgages, and thereupon, on January 25th, filed the origi-

nal bill of complaint to set aside these assignments and the deed. Notice of lis pendens was duly filed the following morning. On January 25, 1899, Miss McNeal assigned these mortgages to the defendant Barre, and on the following day he assigned them to the defendant Cook. The amount of principal and interest was then $5,478. Upon learning of these assignments, the complainant amended her bill by permission of the court, making Barre and Cook defendants. Mr. Peirson left a will, which was subsequently admitted to probate, and by his will his wife was made the sole legatee and executrix. Her amended bill was filed in her name as executrix. Answers were duly filed, proofs taken, and complainant's bill dismissed. Further statement of the facts, so far as essential, will be made in connection with the points discussed.

1. The original bill was filed by complainant in her individual capacity, alleging in brief that Mr. Peirson had taken and used her money and property, had received all the rents and profits of the building in Hudson owned by her, and in which he had an office, without having paid any rent; that he had rendered no account of the same; that in 1865 they made mutual wills in settlement of their property affairs, by which she left all her property to him should she die first, and he left all his property to her should he die first; and that the moneys invested in these mortgages and land were hers, and in equity belonged to her. The amended bill filed by her as executrix is upon the theory that these mortgages belong to Mr. Peirson's estate, that the assignments were void, that neither the assignments nor the mortgages were ever delivered to Miss McNeal, that she had been fully paid for her services, and that the deed and assignments were obtained through undue influence. It is urged on behalf of the defense that the amended bill cannot be maintained, for the reason that this is in fact a contest between Mrs. Peirson and Miss McNeal as to the validity of the transfers to the latter, and that that is the theory of the amended as well as the original bill. I cannot concur in this view. The notes and

mortgages collateral to them were personal property, and the title thereto was in Mr. Peirson's estate. An administration was necessary before they could be distributed under the will and title thereto pass to his heirs or legatees. His executrix was therefore the proper party to test the validity of these transfers. Should they be set aside, the property then passes to the estate (1) to pay the debts, and (2) to be distributed under the will. I am therefore constrained to hold that the amended bill is properly planted by the executrix. The suit then becomes one by the estate against the defendants, and the testimony of Miss McNeal as to her arrangements with Mr. Peirson, the deceased, is inadmissible under the statute.

2. Aside from the fact of the assignments and the deed, her case depends almost entirely upon her own testimony. It is unnecessary to fully enter into the details of the relations existing between Mr. Peirson and Miss McNeal. The conclusion I have reached is that soon after she entered into his services he transferred his affections from his wife to her. He was infatuated with her, and evidently she had great control over him. Soon after she entered the office he furnished a back room, which had been before used only as a storeroom, with carpet, bed lounge, furniture, and liquors. In 1897 he took her to Massachusetts, leaving his wife at home. She went to Adrian the day before, and met him upon the train the next day. In Massachusetts he introduced her as his adopted daughter. Mr. Peirson once took into his office a young attorney, without pay, to study, and assist him some in his business. Miss McNeal left the office in a few days, and refused to return until the young man was discharged, although it is not claimed that he was guilty of any impropriety towards her. Mr. Peirson apologized to the young man, and explained that he could not get along without Miss McNeal, and the young attorney was promptly discharged. That he paid her for her services promptly is not denied. Her only claim is that he promised to do something for her at his death, and that, therefore, she worked for small

wages. The disinterested testimony is that Mr. Peirson paid her every week, and that she told one disinterested witness that he paid her $10 a week. According to her own testimony, she was no more to him than a clerk; and yet, under her own figures, she is to receive, if these assignments be sustained, the sum of $7,237 for a little more than six years' work. And according to the testimony on the part of complainant she will receive $9,872. At the hospital in Columbus, shortly before he died, he said to his nurse, "I couldn't live without my Myrtie," and when asked by the nurse if he did not wish to see his wife, he replied, "No." When he went to Columbus, in December, Miss McNeal, by previous arrangement, went to Adrian the day before, and met him on the train. At the hospital he introduced her as his daughter, and while she was there she was recognized by all as Miss Peirson, and signed her name as Miss Peirson. They occupied adjoining rooms, with folding doors between. Human nature will permit of but one conclusion when a man leaves his wife at home and travels with his female typewriter, introducing her as his daughter. Service rendered by her in a financial way cannot account for the transfer of this large amount of property to her. It can only be accounted for upon the existence of improper relations, and the facts justify such a conclusion, and no other. This brings us to the question, Were these notes, mortgages, and assignments delivered to Miss McNeal? Neither was delivered when it was signed and acknowledged. No one was present when it is claimed they were delivered, except Miss McNeal and Mr. Peirson. Miss McNeal's mouth is closed by the death of Mr. Peirson. With her testimony excluded, the only evidence of delivery is the fact that the papers were in her possession after his death, and the testimony of her cousin and attorney, Seth McNeal, her sister, and her mother. Seth McNeal testified that he saw the mortgages on the Sunday afternoon after the return from Columbus; that Myrtie gave the key to him, and he went to her room and

got the mortgages. The mother testified that a short time before Miss McNeal went to Columbus she brought home some papers, laid them on the stand, afterwards went upstairs, put them in the drawer, gave the key to her sister, Nellie, and told her to take care of them. "She didn't say what they were; only that they were valuable papers." She further testified that she saw them at Christmas, and looked at them a little. On cross-examination she testified:

"All I know about it is that Myrtie brought in some papers, left them on the stand, and said they were valuable papers. She didn't say what they were, or where she got them, or anything about them. She left them there until she retired that night, and took them upstairs and locked them up. That is all I know about it. I had one in my hands—the Duesler mortgage. I just took it up and looked at it, and just saw Julia Duesler's name."

Her sister testified that Miss McNeal brought some papers home a few days before she went to Columbus; said nothing as to what they were; that when she went to Columbus she gave witness the key, and told her to take care of them while she was gone; that there were two envelopes; that the writing on them said they were mortgages. Both witnesses identified the envelopes, and the witness Nellie testified that she "took the papers out to see what the envelopes contained," but when she did this does not clearly appear. Opposed to this is the testimony of one Ransom J. Eaton, who was a personal and life-long friend of Mr. Peirson. Mr. Eaton was an undertaker, and Mr. Peirson had expressed to him a wish that when he died he should take charge of his funeral. After Miss McNeal had been in the hospital some days with Mr. Peirson at Columbus, she returned home to Hudson. Meanwhile Mr. Peirson became worse, and was evidently nearing the end of life. Mrs. Peirson received a telegram from Dr. S. P. Hartman, superintendent of the hospital, directed to Miss M. Peirson, saying: "Your father growing weaker rapidly. Come to him at once." Mrs. Peir-

son sent this telegram to Mr. Eaton. Mr. Eaton went to Mr. Peirson's office, where he found Miss McNeal, and told her that he was going down after Mr. Peirson, and would like to know what shape Mr. Peirson's things were in down there. He testified that she told him:

"There was money and valuable papers in the trunk, and that she was pretty busy just then, and that she wished I would make up my mind to go. She said she wished I would go. She said there was something like six hundred dollars and valuable papers. At that time she did not tell me whose they were. I said, 'I will see Mrs. Peirson, and, if she is willing I should go, I will see you again in this matter, and let you know.' She said, 'Very good.' At that time she didn't make any claim that these valuable papers were hers."

After this interview Mr. Eaton went to see Mrs. Peirson, who would not consent to his going, because it was unseemly to send an undertaker there before he was dead. Thursday morning following Mr. Eaton again saw Miss McNeal, and she said to him:

"That there were $300 she had deposited with Dr. Hartman, and she said in the trunk there was a couple of mortgages that belonged to her that had never been delivered. She wished that I would go down there myself and see to it, and get those and give them to her. She said she felt that somebody ought to be there to look after them, and it was too bad to see Mr. Peirson die in that way, and it was too bad to see this money and papers going that way, and she wished I would go. I said, 'Myrtie, can't you go?' She said, 'No, I cannot.' This was about nine o'clock."

Miss McNeal admits having had conversations at these times with Mr. Eaton; denies the material facts testified to by him, but admits the immaterial. At 2:20 that afternoon Miss McNeal, accompanied by Seth McNeal, her cousin and attorney, left for Columbus. They arrived at the hospital during the night; but Mr. Peirson was unconscious, and so remained until his death, the next morning. On receiving a telegram of his death, Mr. Eaton left for

Columbus, arriving there about 9 o'clock Friday night. He went to the hospital the next morning, and found Miss McNeal and her cousin there. She had possession of Mr. Peirson's effects. A question arose about turning them over to Mr. Eaton upon a written order from Mrs. Peirson, which he had. After a consultation between Miss McNeal and her attorney, she consented to turn them over. Upon doing so, Mr. Eaton testified:

"She said, 'That is all, except those two mortgages or bequests that I told you about in Hudson, which had not been delivered to me; but,' she said, 'those I cannot give you. They are mine.'"

Mr. Eaton is an entirely disinterested witness. There is no room to say that he is mistaken. Either Miss McNeal said what Mr. Eaton testified to, or else he is a perjurer. No motive can be found for his committing the crime of perjury. It follows that, if his testimony is believed, these mortgages and assignments were not delivered.

It is also a matter of some significance that the sister and mother were not called as witnesses until about the close of a long hearing, after the complainant had closed her testimony in chief, the defendants had closed their testimony in chief, and the complainant had closed her rebuttal. It could not well have escaped the attention of Miss McNeal and her counsel that it was essential for her to prove actual delivery. The facts testified to by her mother and sister, and their importance, must have been known to her, if not to her counsel. It is, in my judgment, much more reasonable to say that the mother and sister were mistaken as to the time when they saw these papers in the possession of Myrtie than to say that Mr. Eaton was mistaken, or had testified falsely.

But there are other indicia of nondelivery. They were not recorded during Mr. Peirson's lifetime, but were promptly recorded after his death, being put upon record the very day of the funeral, upon the return of Miss McNeal from Columbus. No reason is shown or suggested

why, if delivered, she should not have placed them at once upon record.

On November 12—more than two months after the date and acknowledgment of the assignment of the McCullen mortgage—Mr. Peirson wrote to Mr. McCullen, stating that there would be $141 interest due February 1, 1899, and offering to take $100 if he would pay the interest in full up to that date, and to make him and his wife a present of the $41, and that he would then have no more interest to pay until February 1, 1900. Nothing was said in the letter about having assigned the mortgage. Mr. McCullen afterwards called on Mr. Peirson, and in a conversation Mr. Peirson said that "he intended to give her [Miss McNeal] that property, if nothing happened, when he died." Mr. Duesler testified to a conversation with Mr. Peirson a few days—not over 10—before Mr. Peirson went to Columbus. Mr. Duesler then paid Mr. Peirson the interest due on the mortgage. Mr. Duesler testified that Mr. Peirson said "he had transferred, or was going to transfer, the mortgage to her [Miss McNeal], and for us to deal with her as with him, after he was dead." On cross-examination he testified:

"It is my best recollection that Mr. Peirson said we should deal with her after his death. It is my recollection those are the very words."

Miss McNeal did not notify either of the mortgagors that she owned, or claimed to own, either mortgage, until after Mr. Peirson's death. According to the testimony of one Albert Price, a witness for the defendants, Mr. Peirson, anticipating trouble after his death, called Mr. Price into his office December 16, 1898, to talk with him, and have him observe his mental condition. In this conversation Mr. Peirson told Mr. Price that he wanted to do something for Miss McNeal, and spoke about the mortgages he had assigned to her. Mr. Price testified:

"He didn't tell me that he had delivered any papers, or anything of the kind, but he was making calculations, in

case he should go away, or should die, to leave these papers in this shape. * * * My impression that I got from what he said to me was that he had made these assignments, and fixed his property over with the intention of taking effect at his death."

He further testified that he inferred from the conversation that he had not passed any of the papers over to Miss McNeal. That he did not intend to deliver them at the time he signed and acknowledged them is apparent from the fact that he did not then deliver them, and that he retained them, under the testimony of her own witnesses, until just before he left his home for Columbus. It is, in my judgment, entirely consistent with the character and actions of Mr. Peirson, as delineated upon this record, to hold that he did not intend to part with these mortgages and the income therefrom so long as there was any possibility that he would live to control and use them. I think he took them with him to Columbus, intending to deliver them to Miss McNeal whenever he should think death was approaching. I prefer to believe the disinterested testimony of Mr. Eaton, sustained as it is by circumstances, rather than the interested testimony of Miss McNeal's mother, sister, and cousin. I therefore conclude that these mortgages and assignments were never delivered. He left them undelivered in his trunk, and she took them without any authority or right. In doing so she obtained no title.

3. Were the defendants Barre and Cook bona fide holders? Both received the Duesler note and mortgage and the assignment after they became due. They therefore took no better title than their transferror, Miss McNeal, had. 1 Dan. on Negot. Inst. § 782; *Fisher* v. *Leland*, 4 Cush. 456 (50 Am. Dec. 805). In that case Chief Justice Shaw said:

"Where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. * * * Although it does not give the indorser notice of any specific matter of defense, such as set-off, payment, or *fraudulent acquisition*, yet it puts him on inquiry."

Tiedeman says:

"It can also be shown against the indorsee of overdue paper that he claims title through a thief or finder, or from a bankrupt." Tiedeman on Com. Pap. § 295.

It follows that defendants Barre and Cook obtained no title to this note and mortgage, and that the title thereto is in the estate. They are therefore payable to complainant as executrix of her husband's will.

4. Was Mr. Barre a bona fide holder of the McCullen mortgage, which was not then due? Miss McNeal and her cousin anticipated that the title to these notes and mortgages would be contested, and therefore determined to dispose of them, and place them, if possible, beyond the reach of complainant. She testified, "I was afraid of being sued, and I sold them to get them out of my hands." They evidently did not consider it safe to attempt to negotiate them in Hudson, and therefore went to Hillsdale on the 25th of January, with a view to dispose of them. Mr. McNeal had talked with Mr. Barre the day before in regard to them. The two went to Mr. Barre's office, and, according to their testimony, she at once offered them to him for $4,000. He offered $3,500. They compromised upon $3,750, a discount of about $1,700. Mr. Barre left his check for this amount with his partner, with the understanding that he (Mr. Barre) should go to Adrian, the county seat, examine the title and assignments, and if he found everything satisfactory, he was to telephone that he would take them, or go back on the fast mail late in the afternoon. He went to Adrian, examined the title and assignments, and telephoned his partner to give the check and take the papers. Mr. Barre had no money in bank to meet the check, but, as he testified, expected to hypothecate other mortgages of his own in order to raise the money. Miss McNeal did not get the check cashed, and on the following day, according to agreement, went with her cousin to Mr. Barre's office in Hillsdale. Mr. Barre went to the office of Mr. Galloway, an attorney, and of-

fered the mortgages to him. Mr. Galloway said Mr. Cook wanted, or would buy, some mortgages. Mr. Barre and Mr. Galloway spent nearly the whole forenoon, according to Mr. Galloway's testimony, in examining the abstract and the assignments. As Mr. Cook was passing the office of Mr. Galloway, they called him in. Mr. Cook knew nothing of the value of the lands or the responsibility of the mortgagors, but told Mr. Galloway that if he said they were all right he would take them. Mr. Barre offered a discount of $150, saying that he got some little discount himself. Mr. Barre's check was never cashed. It was surrendered to him, and Miss McNeal was paid out of the moneys received by Barre from Cook. Under these conditions Mr. Cook paid $5,328 to Mr. Barre, and out of the amount due her he (Barre) retained $500, as he testified, "for the purpose of securing her attendance as a witness in the case." The sale and transfer to Mr. Barre were not consummated until he paid the money to Miss McNeal late in the afternoon of the 26th, and of course not until after or at the same time the transfer from Barre to Cook was made and the money paid, for he paid her with the money received from Cook. Meanwhile the bill in this case and notice lis pendens had been filed. Mr. Barre knew of the relations existing between Miss McNeal and Mr. Peirson. These relations had been fully exposed in a lawsuit in which Mr. Peirson and Miss McNeal were witnesses and Mr. Barre an attorney. He had examined the assignments of Peirson to Miss McNeal. He testified that he knew that these securities were "gilt-edged," and that such securities were much in demand at their face value, they bearing 6 per cent. The parties were attempting to negotiate them among strangers, and away from the home of the makers, payee, and assignee. Simultaneous with his purchase he sold them at a discount of $150. It is a just inference that he did not wish to retain in himself the title to these gilt-edged investments. An offer to sell gilt-edged commercial paper at two-thirds its actual value is sufficient to put a man upon inquiry.

"The price at which the paper is offered may amount prima facie to notice, and create the presumption of bad faith in the purchaser. If a person were to offer a fine horse for sale for five cents, the very nature of the offer would warn the purchaser that he acted at his peril. And so, if the amount which the holder offers to take for a negotiable instrument is totally insignificant as compared to its face value, it might be, under the circumstances, implied notice that there was something wrong about it; and if he took it without inquiry he should not be protected. There is no conflict between this view and the cases which hold that gross negligence will not of itself be sufficient to impeach the holder's or purchaser's title. This is not merely gross negligence, but may be regarded as willful or fraudulent blindness, and abstinence from inquiry, so great as to amount to evidence of bad faith. For it is the obvious suggestion of reason that a bona fide owner would not throw away his property for a mere song, and that the purchaser acted in bad faith when he acquired it for comparatively nothing." 1 Dan. Negot. Inst. § 777*a*.

In *Strong* v. *Jackson*, 123 Mass. 60 (25 Am. Rep. 19), a note and mortgage were assigned to one Jackson as collateral security for the note of one Kingsley to enable him to borrow money from Jackson. The note and mortgage and Kingsley's note were delivered to Jackson. Jackson assigned the mortgage to one bank to secure a debt of his own. He subsequently transferred the note to which the mortgage was collateral to another bank as collateral security for a loan made by him at that bank. It was held that the taker of either the mortgage or the note took according to the true title of the one who transferred it, and that, therefore, the second bank took no title, and did not take the note in the ordinary course of business without notice.

In *Canajoharie Nat. Bank* v. *Diefendorf*, 123 N. Y. 191 (25 N. E. 402, 10 L. R. A. 676), the plaintiff bank took two notes of $1,000 each, made by a farmer living six miles from the bank, from a stranger, at a discount greater than the lawful interest. The bank made no inquiries, but "studiously refrained from acquiring any information as to the circumstances under which such an

indebtedness was incurred." The notes were obtained by fraud from the defendant. The court held that the notes could not be said, as a matter of law, to have been acquired in good faith and in the "usual course of business," and the question was properly left to the jury.

In *Smith* v. *Jansen*, 12 Neb. 125 (10 N. W. 537, 41 Am. Rep. 761), plaintiff purchased notes aggregating $100 for $30. It was held that he was not a bona fide purchaser, and did not take the paper in the usual course of trade.

In *Hall* v. *Wilson*, 16 Barb. 548, an employé stole a promissory note, made by his employer, for $120, payable to U. or bearer, intending to subsequently deliver it upon obtaining the money. It was placed by the maker in his desk, whence it was stolen. The employé sold it to one Bigelow for $115. Before it became due, Bigelow transferred it to plaintiff. It was held that the plaintiff could not recover, the note never having had a legal inception for want of delivery, and not having been taken for a full and fair consideration and in the usual course of business.

Where a note and mortgage were given by a father for $3,000 to lawyers to defend his two sons charged with murder, and the lawyers transferred the note and mortgage to a third party, who brought suit, and the purchaser knew that the sons had been arrested on the charge of murder, that the attorneys had appeared at the preliminary hearing, that they were not indicted, and that the note was executed while they were in jail, it was held that the circumstances were sufficient to put the purchaser of the note and mortgage upon inquiry as to the consideration. *Shirk* v. *Neible*, 156 Ind. 66 (59 N. E. 281).

So, where a bank purchased the notes of farmers from a stranger at a large discount, it was held that the circumstances were sufficient to put the purchaser upon inquiry as to the validity of the notes. *Auten* v. *Gruner*, 90 Ill. 300; Eaton & Gilbert on Com. Pap. 370. See, also, *Wisconsin Yearly Meeting of Freewill Baptists* v. *Babler*, 115 Wis. 289 (91 N. W. 678).

"Guilty knowledge and willful ignorance alike involve the result of bad faith." *Murray* v. *Lardner*, 2 Wall. 121.

"Bad faith is predicated upon a variety of circumstances; some of them slight in character, and others of more significance. * * * A perfectly upright, honest man might sell a bond which had been stolen, and the explanation might prevent even the taint of wrong on his part, while the explanation, although falling far short of proof of actual guilt, might leave upon the mind an apprehension that he either directly or impliedly connived at the wrong, or, at least, that he was willing to deal in securities and keep his eyes and ears closed so that he should not ascertain the real truth." *Dutchess County Mut. Ins. Co.* v. *Hachfield*, 73 N. Y. 228.

Where a note is lost or stolen, or fraudulently put into circulation, plaintiff must show that he came lawfully and fairly by it. *Vallett* v. *Parker*, 6 Wend. 615.

It is often difficult to obtain positive evidence of bad faith. The bona fides of the transaction must be determined from the circumstances surrounding each particular case. *Goodrich* v. *McDonald*, 77 Mich. 486 (43 N. W. 1019). There is no uncertainty in the law. The difficulty lies solely in applying the facts to the law. I am of opinion that Mr. Barre had sufficient knowledge of the transaction to place him beyond the pale of a bona fide holder of this note and mortgage, and is liable to the estate for the amount thereof.

5. Was Mr. Cook a bona fide purchaser and holder of this mortgage?

"A bona fide holder for value of negotiable paper is one who has acquired title in the usual course of business, for a valuable consideration, in good faith, from one capable of transferring it, or from one in possession of the paper with an apparent right to transfer it, and without notice or knowledge of defenses or circumstances which should put him on inquiry." 7 Cyc. 924.

The above is a good general definition of the term "bona fide holder for value." The authorities are there well collated.

It is a well-established rule both in England and America that where one purchases for valuable consideration commercial paper in the usual course of trade, transferable by delivery and not due, which has been lost or stolen or fraudulently transferred, he acquires complete title thereto. 2 Parsons on Notes & Bills, 279; 7 Albany L. J. 385; *Kuhns* v. *Gettysburg Nat. Bank*, 68 Pa. St. 445; *Davis* v. *Seeley*, 71 Mich. 209 (38 N. W. 901); *Chapman* v. *Remington*, 80 Mich. 552 (46 N. W. 34); *Goodrich* v. *McDonald*, supra. Mr. Cook was a banker and investor. Mr. Galloway was his attorney. There is no evidence tending to show that either had any actual knowledge of the relation that had existed between Mr. Peirson and Miss McNeal, or that she had in fact acquired no title to the note and mortgage by reason of nondelivery. Gross negligence may be itself evidence of bad faith, but is not of itself bad faith, nor sufficient to defeat the title to commercial paper where one has paid full and valuable consideration therefor. Had Mr. Cook knowledge of the language of the assignment from Peirson to Miss McNeal, this alone would not have been sufficient to justify the conclusion that he acted in bad faith in the purchase of the paper. The title to the paper did not depend upon Miss McNeal's performing her agreement as to future service. *Kinkel* v. *Harper*, 7 Colo. App. 45 (42 Pac. 173). If Mr. Peirson had executed these assignments by actual delivery, and Miss McNeal had transferred them to a bona fide holder, Mr. Peirson's only remedy would have been an action upon her contract for a breach thereof. I am therefore constrained to hold that Mr. Cook was a bona fide holder, and obtained full title to the McCullen note and mortgage.

6. The circuit judge dismissed the bill as to the deed on the ground of laches on the part of the complainant. I do not think she was guilty of laches. The ground of the ruling is that she should have commenced her action before. I do not think she was under obligation to precipitate a conflict during her husband's life, or to increase

her domestic unhappiness by instituting suit. No one has been prejudiced by the delay; on the contrary, the defendant McNeal has gained by it, because she had the use of the property. The consideration for the deed given by Mrs. Sharr, as grantor, to Miss McNeal, was paid by Mr. Peirson, who gave his check to Mrs. Sharr for $552.78. The balance was paid in cash, furnished by Mr. Peirson to Miss McNeal. The money so paid was unquestionably received on a mortgage owned by Mrs. Peirson, which Mr. Peirson persuaded her to assign. The assignee of the mortgage paid the money to Mr. Peirson. He turned it over to Miss McNeal to take to the bank. It was never deposited. The estate of Mr. Peirson is not interested in the money which Mr. Peirson thus misappropriated. If it be granted that the money was a gift, Mr. Peirson could not have repudiated it for that reason. He had a right to give away his own property. We do not think the record establishes the fact that the check drawn by him was not drawn upon his own individual funds. If complainant has any lien upon the land because her money was fraudulently used in making the purchase, that is a matter which affects complainant individually, and does not authorize her to maintain a suit in the name of the estate to set the deed aside.

Decree should be reversed, and decree entered in this court for the complainant in accordance with this opinion, with costs of both courts.

PEIRSON *v.* PEIRSON.

MORTGAGES—FORECLOSURE—PAYMENT—ESTOPPEL.

In a suit to enjoin the foreclosure of a mortgage, evidence reviewed and *held* that, by some arrangement between the mortgagee and her son, the mortgagor, the debt was regarded as paid and she was estopped to assert its existence as to one who advanced money upon the strength of her representation to him that it was paid.

Cross-appeals from Lenawee; Chester, J. Submitted January 12, 1904. (Docket No. 12.) Decided July 16, 1904.

Bill by Electa W. Peirson against Clemenza E. Peirson, Ellen Britton and Edwin F. Wells to restrain the foreclosure of a mortgage. From a decree for defendants, complainant and defendant Peirson appeal. Reversed.

The object of the bill in this case is to restrain the foreclosure by advertisement of a mortgage for $3,900, executed by Eugene D. Peirson and his wife, the complainant, on a block in the city of Hudson, to the defendant Clemenza, the mother of Eugene. Complainant and her husband were married in 1881. Her father lived in Albion, N. Y. Owing to his ill-treatment, they separated, and she returned to her father's home in August, 1899. Accompanying the mortgage was a note executed by Eugene to his mother. The mortgage was dated November 30, 1892, and not recorded until December 7, 1899. The husband of Clemenza and the father of Eugene owned the property in question. He left a will by which he bequeathed two-fifths thereof to his wife, Clemenza, and one-fifth to each of his children, the son, Eugene, and two daughters. Eugene subsequently bought the interests of his mother and sisters, and the mortgage in question was

given to secure the amount of the purchase price due his mother. On September 5, 1896, Eugene executed a deed of this property to his wife, the complainant, which deed was recorded September 8th. It was a warranty deed against all incumbrances except three mortgages, neither of which was that of the defendant Clemenza. This deed was executed under the following circumstances: Soon after their marriage, the complainant, at the request of her husband, went to her father, and borrowed $1,000, giving her note for it. This money was loaned to Eugene. This note was renewed from year to year, and at the date of the deed amounted to $2,619.18. In 1888 complainant borrowed from her father another $1,000, for which both she and her husband gave a note. This note was renewed yearly, and at the date of the deed amounted to $1,726.02. About the time the deed was executed, complainant, at the request of Eugene, asked her father for more money. Mr. Warner, her father, went to Hudson, and it was then arranged that he would advance $550; that Eugene should execute a deed to complainant; and that his note should at the same time be surrendered, and he discharged therefrom. This was done, and complainant executed to her father notes for the sums above mentioned. Before consummating the arrangement, Mr. Warner, desiring to know the condition of the title, and after seeing the mortgagees mentioned in the deed to make an arrangement for an extension of time, told defendant Clemenza what he was about to do. She expressed her satisfaction. He asked her if she had any claim upon the property, to which she replied, "I have not; I have been all paid off." Relying upon this statement, the arrangement was consummated, and the deed executed. Soon after the record of this deed the creditors of Eugene filed a judgment creditors' bill against him and the complainant, charging that the deed was void as to creditors. In that suit Clemenza was a witness, and swore positively that her mortgage had been paid by Eugene. The creditors were defeated, and the deed held valid. An

assignment of the mortgage was made by defendant Clemenza to defendant Wells February 5, 1900, and recorded May 31, 1900. Mr. Wells was Clemenza's brother, lived in California, and had no knowledge of the assignment. It was made without any consideration, and for the sole purpose of having the foreclosure proceedings take place in his name. Foreclosure proceedings were then commenced by advertising in a newspaper in the city of Adrian, rather than in the city of Hudson, where the parties resided. Upon learning of this, complainant promptly filed this bill. Eugene was the moving spirit in these transactions. The deposition of Clemenza was taken, and she testified that complainant and her husband induced her to falsely swear upon the hearing in the judgment creditors' suit that her mortgage was fully paid. She testified upon this hearing that no part of it had ever been paid, although nine payments of $16 each and one of $15 were indorsed upon the note. Complainant positively denied making any request to her to give such testimony. Eugene was not a witness. Clemenza admits that Eugene requested her to keep the mortgage from the record, and requested her to give the false testimony as to its payment. There is some testimony corroborating the witness Clemenza as to her conversation with the complainant. The defendant Britton loaned to defendant Clemenza some money, and this mortgage was assigned to her as collateral security in addition to another mortgage. The circuit judge entered a decree for the defendant for the full amount of her mortgage and interest thereon from the date of the deed, giving a prior lien for the $550, the amount which Mr. Warner paid for his daughter at the time of the execution of the deed.

S. E. Filkins and *Watts, Smith & Baldwin*, for complainant.

Fellows & Chandler, for defendants.

GRANT, J. (*after stating the facts*). Two questions

are involved: (1) Was the mortgage in fact paid in whole or in part? (2) If not so paid, is defendant Clemenza estopped, by her testimony in the chancery suit and her statements to Mr. Warner, to now assert nonpayment?

We feel compelled to reach a different conclusion from that reached by the learned circuit judge, except that we concur with his conclusion that Eugene D. Peirson was guilty of fraud upon Mr. Warner. The judge found that "Warner should have his action against him [Eugene] for fraud." This would be a worthless remedy, as Eugene is financially worthless. When complainant, at the request of her husband, went to her father in New York, just before the execution of the deed, to obtain more money from him, he came to Hudson to find out how matters stood. There were three mortgages upon the property, the principal of which was $6,400. He evidently thought that the property was not worth sufficient to justify further advance in addition to what he had already loaned his daughter for her husband. With this in view, he with his daughter went to Clemenza to ascertain if she had any claim. This was natural, inasmuch as she had been one of the owners of the property, and had deeded it to her son. She told him, and also complainant, that the mortgage was paid. Relying upon this, Mr. Warner advanced more money to Eugene for his daughter as one consideration for the deed, and as a further consideration his obligation upon the note was canceled, and complainant alone became the debtor of her father for the entire amounts. Under the influence of her son, in whom she unfortunately trusted, and in order to assist him to obtain more money from Mr. Warner through his wife, defendant Clemenza made this representation. All parties were then friendly, and so remained until long after the termination of the suit brought by the creditors. Again upon that suit she testified positively that her mortgage was paid. It was not recorded. Complainant testified that she borrowed the money and gave her notes in the belief that the mortgage was paid, as represented to her by defendant

Clemenza. Her son had undoubtedly paid her some. He had money which he might have used in payment. The judge found that he had paid the interest to the date of the deed, though there is no more evidence that he paid the interest than there is that he paid the principal. Clemenza swears that she was never paid anything, notwithstanding the several small indorsements upon the note. Under these circumstances, and the little confidence that can be placed in one who deliberately acknowledges to having committed perjury, and as well in those who have connived at it, we think it just to assume that her statement to Mr. Warner and her testimony in the creditors' suit was true, and that in some way and by some arrangement between her and her son, the mortgage was regarded by her as paid, and that she is now estopped to assert its existence.

The decree is reversed, and decree entered for complainant, with the costs of both courts.

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

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137 184
137 645

HILLMAN *v.* DETROIT UNITED RAILWAY.

1. TRIAL—ARGUMENT OF COUNSEL—PREJUDICE.
   The argument of counsel to the jury, in an action against a street railway for personal injuries, in which he urged that the jury should not defeat the honest claim of a poor man, by the lies and perjury resorted to by a corporation, and censured the defendant for making a motion to take the case from the jury, was improper.

2. APPEAL AND ERROR—CURE OF ERROR—ARGUMENT.
   The mischief of such an argument, when persisted in by the counsel, was not cured by the admonition of the court.

Error to Wayne; Mandell, J. Submitted January 12, 1904. (Docket No. 14.) Decided July 16, 1904.

Case by Samuel Hillman against the Detroit United Railway for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Brennan, Donnelly & Van De Mark and *Henry L. Lyster*, for appellant.

William E. Fenwick (*A. B. Hall*, of counsel), for appellee.

MOORE, C. J. The plaintiff recovered a judgment against the defendant company for personal injuries received while crossing its track. The case is brought here by writ of error.

It is the claim of plaintiff he was driving north on Randolph street, which is a north and south street, toward Congress street, which is an east and west street, with a double street-car track upon it; that before he attempted to cross the track he looked both ways, and, seeing no car, started across the tracks, and got nearly across when the rear part of the rear wheel of his wagon was struck by the fender of the car. The plaintiff sustained a fracture of the hip.

It is contended by the defendant that the plaintiff's allegations of negligence have not been sustained, and also that plaintiff was guilty of contributory negligence, and cannot recover, and that a verdict should have been directed in favor of defendant. The testimony upon both of these propositions was conflicting. The accident happened near the county building. The jury were taken to the place of the accident. We think the testimony presented questions of fact for the jury which were left to it under proper instructions.

Error is assigned in relation to the argument of counsel for plaintiff. Counsel say, if the argument was improper, it was cured by the action of the trial judge. One of the

counsel for plaintiff made an argument some of which ought not to have been made. He was told by the judge his argument was not proper, and finally was cautioned by the court as follows:

"*The Court:* If you have a meritorious case, I think you are jeopardizing it by an argument of that kind, and I think it my duty to you—perhaps because you are in the heat of argument, and I have done it myself—when you will say things you ought not to say, to call your attention to the matter; and I will say to this jury that in this suit, if the plaintiff is entitled to compensation, he is entitled to full compensation, and he is not entitled to anything because the defendant's motorman was either a wise man or a fool, a cruel or a tender-hearted man. That has nothing to do with the elements of damage in this case, and I think counsel better pursue a different line of argument."

This counsel heeded the admonition, but the counsel who followed him did not, and said, among other things:

"Are you gentlemen to be influenced by such testimony as this? Are you to defeat the honest claim of a poor man, who comes before you for justice, by a corporation that will resort to such lies and perjury to maintain their case in this court"—to which defendant excepted.

"I say that the people of the city of Detroit and county of Wayne are looking to the juries of this court to see that justice is done. You men must stand in between this man and injustice. They have made a motion to take it away from your consideration. They did not want you to trouble with this case.

"*Mr. Lyster:* Now, I take an exception to this remark.

"*Mr. Hall:* Take it, then; take it.

"*The Court:* An exception will be noted.

"*Mr. Lyster:* I think counsel should be reprimanded by the court.

"*Mr. Hall:* I repeat it. It is on record in this case that they have made a motion to take this case from the jury. Why did they want to take it from the jury?

"*The Court:* Wait a moment. They have a perfect right to do that.

"*Mr. Hall:* Certainly, they have a right to do that.

"*The Court:* The same as you have a right to request

that certain charges be granted. Nothing can be imputed from that.

"*Mr. Hall:* Nothing can be imputed, your honor, except that they did not want it to go to the jury"—to which the defendant excepted.

"*The Court:* They have a perfect and legal right in this court always to make this request.

"*Mr. Hall:* I repeat to you, gentlemen of the jury, that we wanted this case to go before you. We have the utmost confidence in the absolute integrity and honesty of twelve of you men, and if we had not had we would not have let you sit on this panel. We have selected you men as your names were drawn from the box because from what we knew or what we have been able to learn of you twelve men we are willing to trust an honest case in the hands of twelve honest men, and we now come to you and appeal to you to analyze this testimony, and see whether you can pick a single flaw in the testimony of this plaintiff or any of his witnesses."

Other objectionable statements were made, which it is not necessary to set out here. The argument was an improper one to make, within the repeated rulings of this court. *Tunnicliffe* v. *Railway Co.*, 107 Mich. 261 (65 N. W. 226); *Britton* v. *Railroad Co.*, 118 Mich 491 (76 N. W. 1043); *Selby* v. *Railway Co.*, 122 Mich. 311 (81 N. W. 106).

One cannot read the record without being impressed with the idea that the trial judge got tired of trying to keep counsel within the rules, and that counsel was not willing to acquiesce in the admonitions and suggestions of the court. The mischief done by the improper argument of counsel was not cured by the judge.

Judgment is reversed, and new trial ordered.

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

137 188
f156 393

A. M. TODD CO. *v.* FARMERS' MUTUAL FIRE-INSURANCE COMPANY OF ALLEGAN AND OTTAWA COUNTIES.

1. FIRE INSURANCE—ADDITIONAL INSURANCE—WAIVER.
   In an action on a fire-insurance policy, defended on the ground that additional insurance had been procured contrary to the conditions of the policy, evidence reviewed and *held* insufficient to warrant a jury in finding that the secretary of the company consented to the additional insurance.

2. SAME—ADDITIONAL INSURANCE—AGENT—WAIVER.
   The fact that the soliciting agent of a mutual fire-insurance company, three or four years after forwarding an application to the company, assisted the insured in procuring other insurance, does not constitute a waiver of a condition in the mutual policy prohibiting the procurement of additional insurance.

3. SAME—BREACH OF CONDITION—VOID OR VOIDABLE.
   Breach by the insured of a condition prohibiting the procurement of additional insurance renders the policy not merely voidable, but void.

4. SAME—COLLECTION OF ASSESSMENTS—BREACH OF CONDITION—WAIVER.
   The collection of assessments on a mutual fire-insurance policy, without knowledge that there has been a breach of condition by procuring additional insurance, does not constitute a waiver.

5. SAME—BREACH OF CONDITION—VOID POLICY.
   Section 5180, 2 Comp. Laws, providing that no policy of fire insurance shall be declared void for breach of condition, unless the loss occurred during the breach or by reason of the breach, does not apply to the breach of a condition against procuring additional insurance, where the loss occurred while the additional insurance was in force.

Error to Allegan; Padgham, J. Submitted February 3, 1904. (Docket No. 67.) Decided July 16, 1904.

Assumpsit by the A. M. Todd Company, Limited, against the Farmers' Mutual Fire-Insurance Company of

Allegan and Ottawa Counties on a policy of insurance. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Howard & Howard, for appellant.

C. R. Wilkes, for appellee.

MOORE, C. J. This is an action brought upon an insurance policy issued by the defendant to Albert M. Todd. Prior to the issuing of the policy in question, Mr. Todd held a policy in the company. Mr. Todd wanted some additional insurance, and a new policy was issued, which is the policy in question. On or about January 1, 1902, the plaintiff company was organized, and became the owner of the property covered by the insurance. Albert M. Todd assigned his interest in said policy to it on the 13th day of January, 1902, and the same was approved by the secretary of the defendant company. On the 10th day of July, 1902, a fire occurred, which destroyed the hay and grain and farm implements covered by the policy. The hay and grain were insured for $500, live stock and farm implements for $2,100. No live stock was injured by the fire. On the back of the insurance policy in question are printed the by-laws and charter of the company. Part of section 17 reads as follows:

"This entire policy, unless otherwise by an agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether void or not, on the property covered in whole or in part by this policy."

Mr. Todd later procured other insurance on the hay, grain, and farm products, but no indorsement was made thereof on the policy. The circuit judge directed a verdict in favor of defendant. The case is brought here by writ of error.

It is the contention of plaintiff that the provision against additional insurance was waived—*First*, by the consent thereto of the secretary of the company; *second*, by the

act of Mr. Dun, a solicitor of the defendant company, who procured the additional insurance; and, *third*, by making and collecting assessments of Mr. Todd after the additional insurance, and keeping the same. The first two of these claims is based upon Mr. Todd's testimony, which reads as follows:

"I built the large barn spoken of in 1900, after the policy of insurance involved in this case was issued. After I had it practically completed, Mr. Dun, the gentleman who acted for the defendant company in taking some of the increase insurance for said company as represented by the increase certificates attached to the policy in suit, came to see me, either by my appointment or his own suggestion, I cannot recall which. At any rate, he came with a view of insuring the barn. The barn had cost me $14,000 to build, and I wanted to get $10,000 of insurance on it. Mr. Dun said he did not think the company would take any such amount as that, because their policy was not to place too much in any one risk. I asked him to take it up with the company. He said he would, and would advise me how much they would take. He conferred with Mr. Hicks, the secretary of the company, and told me that the largest amount that the company thought that they could reasonably take would be $3,000. That they would insure either the barn or its contents, or both, to the amount of $3,000, but they did not wish to take more than $3,000 on any one piece of property. They had at that time a little over $18,000 on all the properties on my farm, and they were willing to take $3,000 more on this property. I told Mr. Dun that this would not be adequate, because it would be less than one-fourth the cost of the barn, and that we also had cattle we wanted to insure. We had something like 400 head of cattle, and also farm implements. Mr. Dun came afterwards, and said he had some talk with Mr. Hicks, and he was consulting with the Kent, Allegan & Ottawa Company to see if together they would take $5,000—that is, divide it so that each would take $2,500 apiece. I said that was all right. If they could arrange it to take an adequate amount, I would be glad to have them. But finally he advised me that that fell through for some reason or other; that it was not accomplished. So I telephoned to Mr. Hicks, and asked him if they really couldn't, in view of the fact of my other insur-

ance that I had already on many pieces of property, take more than $3,000. He said 'No;' that would be the limit that they could take on any one piece of property. I said, 'If that is the case, I will have to take out the insurance on the barn in stock companies.' He says, 'That is all right for you to do so, because we can't take more than $3,000.' So I said, 'All right, I will take it out in the stock companies,' and I told Mr. Dun about this, and he says, 'All right, I will write you up in the stock companies.' Mr. Dun was at that time solicitor for the defendant company. So I said 'All right, I would just as leave give you the insurance as anybody, if you will take it.' He says, 'I can write you up that in a stock company.' So I made out the application, and Mr. Dun arranged with me for insurance through Mr. Updyke's agency here in Allegan. We took out some insurance in the Updyke agency, some in Mr. Rankin's agency, and some in Mr. Garrett's agency; amounting in all to about $19,000.

"*Q.* What did you say to Mr. Hicks about wanting more insurance on the contents of the barn?

"*A.* Well, I said like this: That we ought to have probably $9,000 or $10,000 on the barn and $9,000 or $10,000 on the live stock, and perhaps $3,000 or $4,000 on the contents; and he said they could not insure it for so large an amount; that $3,000 was about all that they would insure it for. So I told him I would have to insure it in stock companies. I cannot recollect whether he suggested I insure it in stock companies or not, but, at any rate, he assented to it. In taking out the insurance in stock companies, I took out additional insurance on the hay, grain, and farm products. I took out the first insurance in stock companies September 28, 1900. These policies run for three years. Two policies taken out on that day. The next policy, I think, was taken out October 3, 1900. Each one of the stock companies had a certain amount on the barn, a certain amount on the hay, grain, and farm products, certain amounts on the cottage near by, and on some other property. The next insurance was taken out in stock companies January 15, 1901; March 3, 1901, March 22, 1901, March 25, 1901, June 4, 1901. That comprises them all. I took out ten policies in stock companies."

In the applications he made for insurance in the stock companies spoken of by Mr. Todd in his testimony, he answered certain questions in his own handwriting, and

to the question, "What amount of other insurance, if any, is there now on the property, and in what company or companies?" he answered, "None." Mr. Hicks' testimony as to his talk with Mr. Todd is as follows:

"During these negotiations I had a talk with Mr. Todd himself over the telephone. Mr. Todd called me over the phone. I answered, and talked with him regarding the $3,000. He suggested that was a very small amount, and asked me if in case we placed the $3,000, if that would permit him to place other insurance; and I told him our company could not accept concurrent insurance under any circumstances. That is the conversation Mr. Todd refers to. That ended the effort to get insurance in our company on the barn or its contents. Our company refused to take any insurance at all on the contents of the barn. * * * Nothing was said by me to Mr. Todd that he had taken out, or was going to take out, additional insurance upon any property insured in our company. I never knew of it, or saw any intimation of it, until after the fire."

Putting the most favorable construction possible upon this testimony, we do not think the jury would be warranted in finding that Mr. Todd informed Mr. Hicks he wanted concurrent insurance upon property upon which he then had an insurance, and that Mr. Hicks consented that he might obtain it. This makes it unnecessary to express any opinion upon what would be the legal effect of Mr. Hicks' consenting to the proposed insurance.

Did what was done by Mr. Dun operate as a waiver? The record discloses that he was a soliciting agent, and had no authority to write policies. It is claimed he had acted in that capacity some time prior to December, 1897, the date of the policy in question, when some of the insurance was obtained under the old policy. His testimony is:

"My duties were to make a survey of the property, and submit applications for insurance to the secretary. I have no authority to write policies. That was all done by the secretary. I was merely a soliciting agent, as I understand it; agent for the secretary; and held my position at his pleasure, and made my reports to him. I knew of

Mr. Todd building the barn in 1900. At that time I knew that he was insured in the defendant company. I supposed he was because I had taken applications for him.

"*Q.* Did you at that time know anything about the amount of insurance, or what property was covered by his insurance in the defendant company?

"*A.* I knew what had been, but whether I did at that time or not I cannot recollect. I presume not, though, because my duties ceased usually when I took the application and submitted it and got the policy. I paid no attention to it afterwards."

There is no testimony in the case that his duties were other than as stated by him. He further testified that when the new barn was built Mr. Todd wanted $10,000 insurance on it, and, after taking the matter up with the company, they refused to accept it, and he so informed Mr. Todd. Mr. Dun obtained through Mr. Updyke's agency the insurance in the stock companies, and testified he did not understand the defendant company had any insurance upon the property covered by the policies of the stock companies. He said:

"Mr. Todd didn't directly or indirectly ask me for the consent of the Mutual Company for concurrent insurance upon the property that was insured by Mr. Updyke's agency. He never mentioned it to me, and I had no knowledge that it was property that this company had any insurance on. I first heard that Mr. Todd claimed the Mutual Company was carrying insurance upon the property that had been insured through the stock companies from the secretary, after the fire."

What we have said as to the effect of this testimony in relation to Mr. Hicks will apply equally to Mr. Dun. It is said, however, that as Mr. Dun obtained the insurance under the old policy, he must be presumed to know what it covered, and by obtaining the policies in the stock companies he thereby waived the provisions of the policy, and the company is bound thereby. It would be a violent presumption to suppose that Mr. Dun would know what property of Mr. Todd's was covered by insurance when the new insurance was taken because he had taken his appli-

cation as a soliciting agent and forwarded it to the company three or four years before. It would be carrying the doctrine of waiver further than we have ever seen it stated to say that, because a soliciting agent had taken and forwarded an application for insurance, and three or four years later had assisted in procuring insurance in other companies than the defendant company, about which act of the agent the defendant company had no knowledge, that these acts operated as a waiver. See 16 Am. & Eng. Enc. Law (2d Ed.), p. 944; *Goldin* v. *Assurance Co.*, 46 Minn. 471 (49 N. W. 246); *Queen Ins. Co.* v. *Young*, 86 Ala. 424 (5 South. 116, 11 Am. St. Rep. 51); *Sugg* v. *Insurance Co.*, 98 N. C. 143 (3 S. E. 732).

Was there a waiver because of collecting and retaining the assessments? Some of the policies in the stock companies were taken out as early as September, 1900; others in the summer of 1901. One assessment was collected in October, 1900, and one in October, 1901. We have already seen the company had no knowledge of the additional insurance until after the fire. No demand has ever been made for a return of the assessments which were paid, and the company has never refused to return them. The cases cited by counsel which he claims establish a waiver are, generally, cases where the assessments were collected after knowledge of the breach of the contract and before the loss occurred. In the others the case does not turn upon the matter of assessments. It has frequently been held by this court that the breach of such a condition as this renders the policy not voidable simply, but wholly void. See *Cronin* v. *Fire Ass'n*, 123 Mich. 277 (82 N. W. 45), and the many cases there cited. When this loss occurred the company had no knowledge of a breach of the policy, and, according to the cases just mentioned, at that time the policy was void. When the company learned of the additional insurance, it disclaimed any liability. The plaintiff has not been led to do any act or incur any expense because of what defendant has failed to do in relation to the assessments. The case of *Shelden* v.

Insurance Co., 124 Mich. 303 (82 N. W. 1068), has some bearing upon the questions involved. See, also, *Boyer* v. *Insurance Co.*, 124 Mich. 455 (83 N. W. 124, 83 Am. St. Rep. 338). We do not think the failure to return the assessments operated as a waiver.

It is said, "We have a statute which we submit has a considerable bearing on this case," citing section 5180, 2 Comp. Laws. As this loss occurred during the breach of the condition in the policy, the statute does not help the plaintiff.

Judgment is affirmed.

The other Justices concurred.

VILLAGE OF CHELSEA *v.* HOLMES.

137 195
141 532

TAXATION—WARRANT—SUITS TO COLLECT TAXES.

Section 2871, 1 Comp. Laws, providing that suit may be brought by a village for the collection of taxes on personal property whenever the treasurer of the village shall be unable to collect the tax, permits such action to be brought during the life of the tax warrant.

Error to Washtenaw; Kinne, J. Submitted February 4, 1904. (Docket No. 80.) Decided July 16, 1904.

Assumpsit by the village of Chelsea against Harmon S. Holmes, Edward Vogel, Ernest R. Dancer, and Dallas H. Wurster, copartners as the H. S. Holmes Mercantile Company, for the taxes of 1901. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Reversed.

H. D. Witherell (*Cavanaugh & Wedemeyer*, of counsel), for appellant.

A. J. Sawyer & Son (*F. F. Freeman* and *B. B. Turnbull*, of counsel), for appellees.

MOORE, C. J. The defendant company was assessed $15,000. Its assessment was increased by the board of review to $30,000. It was doing business in the plaintiff village, and had, and continued to have, a stock of goods therein. The assessment roll was put in the hands of the village treasurer, who made some attempt to collect the tax. He wrote Mr. Holmes several times, requesting its payment. He also made a personal demand upon Mr. Holmes, who refused to pay the tax. He consulted an attorney, and claims he was advised the tax could not be collected. It is the claim of the plaintiff that the treasurer did not consult the village attorney, but consulted the attorney of the defendant, and that Mr. Holmes was the treasurer's bondsman. On October 26th the treasurer returned the tax uncollected. The council directed that this suit be brought to collect the tax.

The defendant claims there are so many irregularities in the assessment roll that it is invalid, and also claims the treasurer might have collected the tax by levying upon the property of the defendant during the lifetime of the warrant. Counsel were agreed that the question involved was one of law, which the judge ought to decide. The circuit judge was of the opinion the tax was valid, but expressed himself as in doubt about the law of the case. He concluded that it was the duty of the treasurer to collect the tax under his warrant, and, as he had failed to do so, this suit could not be maintained, and directed a verdict in favor of defendant.

We agree with the circuit judge that, if there are any irregularities in the assessment, they are cured by section 3922, 1 Comp. Laws. The other question involves a construction of sections 2868, 2871, 1 Comp. Laws, which read:

"SEC. 2868. In case any person shall neglect or refuse to pay any tax imposed upon any real or personal property belonging to him, as aforesaid, the treasurer shall levy the same by distress and sale of the goods and chattels of the said person liable to pay the same, wherever such goods and chattels may be found, either in said village or elsewhere, in the county where such village is located; or in any adjoining county, first giving public notice of such sale in the manner and for the time required by law in case of such sales made by township treasurers, and for such purpose and for the collection of the taxes aforesaid, the treasurer may bring suit therefor, and shall have all the powers and perform the like duties, so far as applicable, as are conferred upon or required of township treasurers, in the collection of taxes levied in townships."

"SEC. 2871. Whenever the treasurer shall be unable to collect any tax assessed upon personal property in the village it shall be lawful for the treasurer of the village to bring suit, in the name of the village, for the recovery thereof, against the person or persons against whom the tax was assessed, before any court of competent jurisdiction, and to take and use all lawful means provided by law for the collection of debts to enforce the payment of such tax; and in such cases all the provisions of law applicable to suits and the evidence therein, brought by township treasurers in the name of their township for such purposes, shall apply."

Counsel for defendant insist the treasurer might have made the tax by virture of his warrant, and until the remedy by warrant has been exhausted the village could not authorize the bringing of this suit; citing a number of cases. We think the cases are not conclusive.

In *Staley* v. *Township of Columbus*, 36 Mich. 38, the township treasurer received certain highway orders as payment, and returned the taxes as paid. The court held they were in law paid, and that it was a private controversy between the treasurer and the taxpayer.

In *McCallum* v. *Township of Bethany*, 42 Mich. 457 (4 N. W. 164), there was no return that the personal tax was unpaid. The court said:

"The failure, therefore, to show the return of the taxes

unpaid, was fatal to the recovery. Upon a new trial it is probable this defect will be remedied."

In *City of Detroit* v. *Jepp*, 52 Mich. 458 (18 N. W. 217), it was said by Justice CAMPBELL that the only question involved was whether, under the charter of Detroit as it existed prior to 1881, suit could be brought for unpaid personal taxes.

In *Township of Laketon* v. *Akeley*, 74 Mich. 695 (42 N. W. 165), the question was whether Mr. Akeley could be sued for taxes assessed against the Roscommon Lumber Company.

In *Township of Port Huron* v. *Potts*, 78 Mich. 435 (44 N. W. 289), it was held there was a clear failure of the township treasurer to make such a return as the law required before suit was brought. It will be seen that in none of them was the question raised here at issue.

The case most in point is *Village of Sturgis* v. *Flanders*, 97 Mich. 546 (56 N. W. 934), where the provisions of law are almost identical with the sections we have quoted. It was held suit could be maintained for the personal tax. Chief Justice HOOKER, in speaking for the court, said:

"Section 2952, 1 How. Stat., providing for the collection of personal taxes by action after the return of the warrant, is in harmony with the general tax law. See 1 How. Stat. § 1049. If section 2939 is to be construed as contended by plaintiff's counsel, section 2952 confers no additional authority, and is practically meaningless. We cannot agree with counsel in the proposition that section 2939 does not authorize an action for taxes during the life of the warrant. The cases cited were brought under a statute which, like section 2952, only authorized such proceedings after the return of the warrant, and for personal taxes. The decisions are based upon the limitation in the statute as to the time of bringing actions for taxes. The remark of the court that it was unnecessary, for the reason that the warrant was as good as an execution, was unnecessary, and can be considered, at most, as a plausible reason for such limitation. But in section 2939 the legislature has given to the marshal authority to bring an

action for the purpose of aiding distress and sale, and for the collection of the tax. Unless we are to hold that this section was incorporated merely to include the taxes on real estate, or to give the right to an action during the life of the warrant, it adds nothing to section 2952. If it were intended merely to put taxes upon real estate after the return of the warrant upon the same footing with personal taxes, a word added to section 2952 would have accomplished it; and, as we cannot treat it as meaningless, we must conclude that its purpose was to permit the bringing of an action during the life of the warrant. And we think there may have been reason why this power should have been given to the marshal. Villages differ from townships in the character of the inhabitants and property. Transfers of property are much more frequent, and the probability of change of ownership after assessment is greater. A warrant may be effective where property can be seized within a county, but it is impotent to reach it in another county, while an execution from a court of record may reach property anywhere in the State, and, if an action may be brought early, the collection of the tax may be facilitated. We agree with the learned circuit judge that this provision, section 2939, confers the right of action for the collection of real and personal taxes during the lifetime of the warrant, and that section 2952 is intended to authorize actions after the return of the warrant, and applies only to personal taxes."

We think a verdict should have been directed for plaintiff for the full amount of the tax, and interest thereon.

Judgment is reversed, and a new trial granted.

The other Justices concurred.

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McKEE *v.* CITY OF GRAND RAPIDS.

1. WATERS—OBSTRUCTIONS—LACHES.
   Where obstructions to the natural flow of water in a stream have been permitted to remain over 15 years, a riparian owner's remedy for their removal is barred by the statute of limitations and by laches.

2. EQUITY—INJUNCTION—ESTOPPEL.
   One who makes a mere protest, and waits until an expensive improvement is completed, cannot invoke the aid of a court of equity to undo the expensive work.

3. SAME—RELIEF IMPRACTICABLE.
   Equity will not grant relief which, under the evidence, is wholly impracticable.

4. WATER—RIPARIAN OWNERS—NUISANCE.
   A city cannot divert water from one side of the river, to the injury of a riparian owner, into a channel on the opposite side, for the purpose of abating a nuisance in such channel, where there is another practicable way which will not damage landowners.

5. NUISANCE—PUBLIC HEALTH—PRIVATE INJURY.
   A private person can only maintain a bill to abate a nuisance to the public health when the nuisance causes special damage to him as a private person, separate from that done to the public.

Appeal from superior court of Grand Rapids; Newnham, J. Submitted February 25, 1904. (Docket No. 53.) Decided July 16, 1904.

Bill by James H. McKee and others against the city of Grand Rapids to abate an alleged nuisance. From a decree dismissing the bill, complainants appeal. Affirmed.

The issues in this case are well stated in the opinion of the court below as follows:

"In the original bill of complaint it is claimed that the complainants J. H. McKee and James Landon McKee

are the owners in fee simple of certain property which adjoins the said steamboat channel, and that by virtue of their possessing the title to said premises they have riparian rights in said channel. The property which the said James H. McKee and James Landon McKee own is in what is known as 'Ellsworth's Addition to the City of Grand Rapids,' in blocks 23, 24, 25, and 26, the same being situated between the steamboat channel and the west side of what is now known as 'Market Street.' The complainant Albert M. Henry does not own any property in fee simple, but has interests in the said property to the extent of a contract made with the other complainants, whereby they were to convey to him an undivided one-fourth interest in said premises.

"The complainants also claim in the bill of complaint that what is known as 'Island No. 3,' and which is now known to the people of Grand Rapids as the 'Market Site,' was nothing but a sandbar or an island, which was often covered by the waters of said stream, and that they are entitled to the soil to the middle of Grand river, including portions of said Island No. 3.

"It is claimed that in 1832, and for many years thereafter, there was a channel about 200 feet in width between what is known as 'Island No. 3' and the easterly bank of the said steamboat channel, upon which said complainants' property abuts, and that this was the natural channel forming the means of navigating Grand river from below up past the premises of the said complainants; and they also allege that it is still a navigable stream, and that the same has been and still is used for the purpose of navigation.

"It is claimed that between what is known as 'Island No. 3' and what was then known as 'Island No. 5' there was a distinct channel, connecting this steamboat channel with Grand river, and that the flow of water was sufficient to cleanse the said channel, and to keep it free from all impurities; and that somewhere about 1871 certain parties caused a dam or embankment to be built connecting Island No. 2 with the east bank of said Grand river, thereby cutting off and diverting the flow of water which flowed through the east or steamboat channel, but that the said east channel, or said steamboat channel, still remained the deeper channel, and that it was still connected with the river by the open channel between Island No. 5 and Island No. 3.

"It is claimed also on the part of the complainants that about 1871 the said east channel was dredged near what was known as the 'head of the channel,' and also the foot of Island No. 5, and that a turning basin was made sufficient for the passage and accommodation of steamers plying upon said river; that in so dredging an embankment was made by the dirt which was thrown up, which partially cut off the flow of water through the said steamboat channel.

"It is also claimed that there was still an open channel between the two islands, which operated to prevent the stagnation of water in the so-called 'steamboat channel,' but that whatever benefit was derived from it was nullified by a trunk sewer which emptied into Grand river at the head of Island No. 5, and other sewers which emptied into the river; that the current carried the contents of these sewers down the east shore of the river, and through this steamboat channel; that about 1878 it is claimed by the complainants that the said city constructed a sluiceway, but that the nuisance still continued, and continued from that time on until 1897; that the flow of water through said sluiceway would have been sufficient to prevent the stagnation but for the pollution of said channel by the sewers aforesaid; that in 1897 the city of Grand Rapids purchased Island No. 3, and built a solid roadway of earth to said Island No. 3 across the head of said steamboat channel, and that it also filled up the northerly end of the turning basin of the steamboat channel with earth for a distance of 300 feet farther south than was necessary for the roadway; that this was done without the consent of the complainants; that this filling entirely shut off the flow of water from the westerly channel of Grand river into and through the steamboat channel, and that now the said channel is in such a condition that it is a menace to the public health, and that in consequence thereof the property of the said complainants has been rendered practically uninhabitable, and its use for business or residence purposes wholly prevented; that by the action of the city of Grand Rapids in cutting off the flow of water in said channel and polluting the waters thereof the use of said channel for the purpose of navigation has been impaired and destroyed; that the premises of the said complainants were suitable for the erection of docks and warehouses for the purposes of navigation and for the construction of business blocks and dwelling houses, and that the said

premises in consequence have been greatly lessened in rental value, and the sale of the same has been prevented, and that they have been damaged in the sum of $30,000; and the complainants ask for a decree of this court declaring the condition of said channel to be a nuisance, and that the said complainants are entitled to have said nuisance abated, and that the defendants may be required to remove the roadbed, the market site approach, and all obstructions between Islands No. 5 and No. 3, and to remove the earth, gravel, and other material which it is claimed has been dumped and deposited in said steamboat channel, and that it be required to reopen the said channel so as to permit and restore the flow of water of Grand river therein, not polluted with sewage; and that the defendant, as soon as the channel is opened, be restrained from further polluting the waters, by emptying its aforesaid sewers therein, and that an accounting be taken of the damages which complainants have suffered, and that a reasonable amount, not to exceed $30,000, be made to the complainants for the damages which they have sustained, and that the defendant be decreed to pay the same.

"Defendant, in its answer, denies many of the allegations of the bill, and states that Island No. 3 is the property of the city, and that it has complete title thereto; that the said channel filling, which was done in 1871, was done with the consent of the then holders of the property, through whom complainants derived their title; that they acquiesced and consented thereto, and that no objection was made prior to the filing of the bill.

"It denies that there was an open channel at the time of the city's purchase, or even prior thereto, that prevented the stagnation of waters, or that the sewage emptied above had any deleterious effect upon the waters of the channel, and that when said sewer was constructed at Fulton street, years ago, it was constructed without remonstrance on the part of the complainants; that Grand river has been used as a source of drainage by the city for 50 years and upwards; that the filling of the slip by the city made the channel no more objectionable than it was before, and that the channel at the foot of Island No. 3 has not been navigable for 10 years and upwards; that, if there was any pollution in 1896, and for some years before, it was such pollution as arose from water-closets on the east bank of said channel, some of which were owned by the complainants; that the city has not permitted any one to dump

anything into the steamboat channel that would be injurious to its waters, and defendant alleges that most of the property owners, outside of the complainants, in the vicinity, desire the steamboat channel to be filled; that the said steamboat channel is not now recognized as a navigable stream; that the navigation became less and less, and that now the same has practically been abandoned, to such an extent that the government of the United States has not required, in the bridge which is now being constructed across Grand river, to have a draw in any part except the main channel, or what is known as the west channel of Grand river."

After the original bill was filed the defendant commenced the erection of a bridge over the river at the foot of Wealthy avenue. Complainants then filed a supplemental bill, alleging that the defendant intended to make a solid fill at that point, and praying that the defendant be enjoined from filling said channel at that point, and that it be required to remove the earth and gravel which had already been dumped into the channel. Answer and replication were duly filed to the supplemental bill.

Upon the issues thus framed a large number of witnesses were sworn, whose testimony extends over 600 pages. Proofs were taken in open court, and the court made the following finding of facts:

"That prior to 1871 the so-called 'steamboat channel' was used more for navigation than what is known as the 'main channel;' that it extended along the east bank of the river for quite a distance beyond even the head of what is known as 'Island No. 5,' and which did lie to the north of Island No. 3; that in 1871 said channel was closed at the foot of Island No. 2 by a dam, which was constructed between that and the east bank of the river; that in that construction the city of Grand Rapids had no hand as a property owner, or in any other way; that the same was done without remonstrance on the part of any one, so that the only flow from Grand river through into the channel was through a small raceway between Island No. 5 and Island No. 3; that in 1878 the city, in order to make a larger flow, placed a sluiceway there, which remained until the filling by the city in 1897; that in 1895 the city bought what is known as 'Island No. 3,' and in

1897 filled up the head of the channel, so that there was no communication in any shape or way between the main body of Grand river and this channel in question.

"I find the facts to be, also, that for many years the navigation of Grand river had gradually lessened until about 1893, when it was practically abandoned, with the exception of occasionally a boat or two running for a very short time up and down the river; that said east channel was becoming of less and less importance as a navigable arm of Grand river, and that the same, for all practicable purposes, had been abandoned as far as navigation is concerned; that also the waters of the east channel, as they are at present, and as they have been for many years, by reason of its pollution and stagnation, have been a menace to the public health, and are a nuisance that should be abated.

"I find that the action of the city in filling up the head of the channel did not increase the nuisance over what existed before; that, on the other hand, from the evidence in the case, the nuisance was lessened, and that whatever pollution there is of the waters comes not from anything which is carried into it from above, but from the stagnation of the water, and the stuff and material which have been thrown into it by the adjacent property owners, and the excrements and drainings from the water-closets which have been situated on the bank.

"I find that the nuisance caused by the pollution of the water has existed from 1878 at least until 1897; for a period of over 15 years, during which time the city had no interest other than that of whatever supervision it had the right to have by virtue of its powers as a municipality.

"I find it to be a fact, from the evidence in the case, that the only way in which to abate the nuisance would be to entirely fill up the channel.

"I find the facts also to be that the said Island No. 3 has become very valuable property, in consequence of the improvements which have been made by the city of Grand Rapids since the purchase of the same, by the erection of valuable plants thereon, and the use of the said property as a market site for the city of Grand Rapids; that such action of the city has largely increased the value of the property.

"I find that the property of the said complainants is of more value at the present time than it was at the time that they purchased it; that the said property has not depreciated in rental value, or for the purpose of sale, in conse-

quence of the nuisance which it is alleged exists there, or through any action on the part of the city of Grand Rapids. There is no evidence in the case which shows that the complainants will ever derive any more rental or revenues from docks in use or to be erected, as the use of the river for navigation purposes has declined to such an extent as precludes any such idea."

In accordance with the above finding the court entered a decree the material parts of which are as follows:

"That the steamboat channel was filled across from the head of Island No. 3 by private parties, without the intervention of the defendant, about the year 1871. That with the exception of extremely high water, the only water flowing through the same subsequently thereto was through slips cut through private property over to the main channel of the river, one in 1878 and one in 1892, which were insufficient to materially affect the water within the channel. That the said east channel was at one time navigable, but gradually the use of it for such purposes became less and less to such an extent that practically for several years it has ceased to be a navigable body of water.

"That on account of the stagnation of the water, and the drainage from the shore, and more or less dumping, it has become, to a certain extent, a general nuisance. That the action of the city in filling up at the head of the channel in 1897, or thereabouts, did not increase the nuisance or objectionable character of the channel, but, on the other hand, tended to relieve the objectionable features of such channel, and improved the surrounding property. That the objectionable condition of the steamboat channel for a period of upwards of twenty years prior to the purchase of the island and the filling of the same at the head thereof has continued to exist, aside from the fact that it was relieved to a certain extent by the filling made by the city.

"That the improvements made by the city on Island No. 3 on the westerly side of the steamboat channel, and at the head thereof, have tended to increase and did increase the value of property in that vicinity, including the property of complainants, and the property of complainants has not depreciated in rental value for any reason of which complaint is made.

"That complainants stand upon the same footing as

other parties in the neighborhood, so far as any injury that may have been sustained on account of the condition of the waters of the steamboat channel, and they have not suffered any special injury different from that of the general public. That complainants were not damaged by the conduct of the defendant in any way. That the steamboat channel is not a navigable body of water in the ordinary sense of the term, and is a nuisance, the removal of which can only be done effectually by the filling of the same.

"It is therefore ordered, adjudged, and decreed that the original bill of complaint filed herein be, and the same is hereby, dismissed.

"It is further ordered, adjudged, and decreed that the defendant be and it is hereby required, in the construction of the bridge at Wealthy avenue, at the point of its crossing the steamboat channel, to so construct the same that there be left an open space in the steamboat channel at such point at least 10 feet above the surface of the water at ordinary stages, and of a width of 30 feet, temporarily; but no draw is required to be made therein.

"The decree of this court shall not be prejudicial to the right of the city to have the said steamboat channel declared a nuisance, and to abate the same by the filling thereof in the manner provided by law."

An understanding of the situation can perhaps better be obtained from the map hereto attached (p. 208).

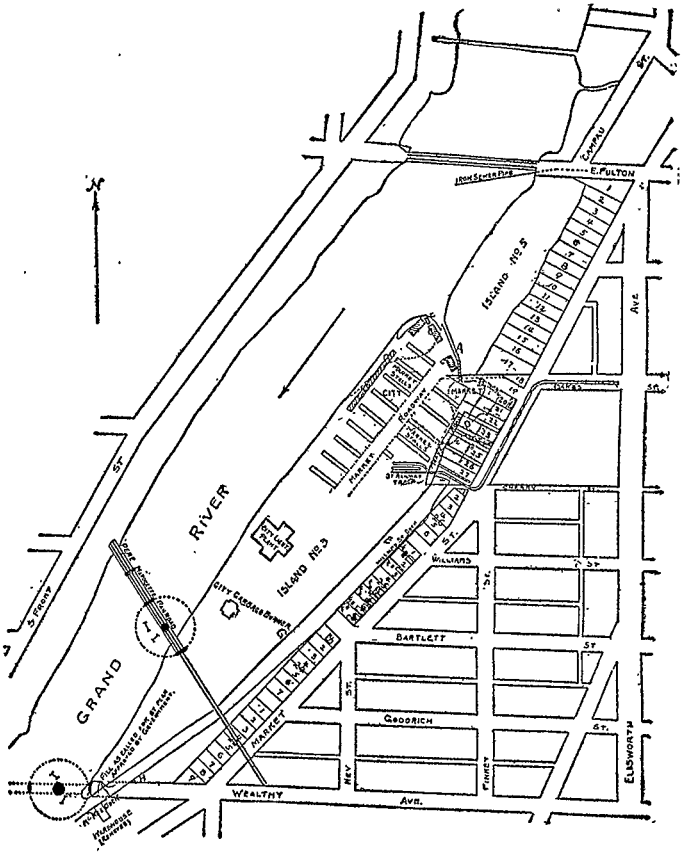
Burlingame, Belden & Orton and *William E. Grove* (*Knappen, Kleinhans & Knappen*, of counsel), for complainants.

Moses Taggart (*Ganson Taggart* and *S. W. Barker*, of counsel), for defendant.

Grant, J. (*after stating the facts*). The issues in this case are those of fact, rather than law. Counsel for complainants in their brief say:

"We assert that the city of Grand Rapids created and maintained this nuisance by emptying sewage at first directly into this channel, and afterwards by negligently permitting it to flow through the sluiceway into the channel; and also by the improper dumping of garbage and

filth along the bank of the channel. We also complain of its action in filling and causing or permitting to be filled in portions of the east channel, including the turning basin. If the defendant did not thus cause and create this nuisance, then complainants have no cause of action.



A, sluice from the steamboat channel to river.

B, Oak street fill of 1896.

C, C, sheds and restaurant.

D, filled turning basin.

E, the old dock torn away six or seven years ago.

F, F, F, part of the houses and closets on the bank.

H, few feet of dock of McKee's north of Wealthy avenue.

I, I, draws in railroad bridge and Wealthy avenue approved by the United States government. Crossing of channel at Wealthy avenue shows fill authorized by United States government.

and there is no necessity to discuss any abstract questions of law."

There are some issues of fact upon which the evidence is in conflict. Upon others there is a substantial agreement.

1. There were originally five islands in Grand river below the rapids. Islands numbered 1, 2, and 5 were above Island No. 3. Island No. 5 was called by the surveyors "Low Willow Isle." Their location can be seen upon a map found in the opinion in case of *Butler* v. *Railroad Co.*, 85 Mich., at page 252 (48 N. W. 569, 24 Am. St. Rep. 84). There was one well-defined natural channel east of these islands. About 31 or 32 years ago this channel between Islands Nos. 1 and 2 and the east bank of the river was filled with earth by the owners of the islands and the lands on the east bank. This filling completely closed that channel of the river, and a considerable portion of the business part of the city of Grand Rapids is built upon this land so made, and upon these islands. This, of course, prevented the flowage of water through the channel. For this the city was in no wise responsible. All remedy, either at law or in equity, for such action, is now barred by the statute of limitations and by laches. This action on the part of the property holders left no flowage of water from the main channel of the river into what is known as the "eastern channel," except that which flowed between Islands Nos. 3 and 5. There was little current between them except in cases of high water.

The court below found that this eastern channel had for more than 30 years been a nuisance. To this nuisance various parties contributed, as hereinafter stated. The action of the elements has also contributed to it by rains and floods, which washed the refuse deposited upon the surface of the lands adjoining into the channel. The fact, also, that the river is lower now in the summer than it was 25 or 30 years ago is another element increasing the nuisance.

In 1871 private parties interested in the use of the eastern channel as a waterway for commerce dredged the channel, and also dredged out a basin at the head of Island No. 3, so that boats coming up the channel could turn around. In constructing this basin the earth was excavated and thrown out, and an embankment made across the head of the channel. A small sluiceway, consisting of an iron pipe, was put in under the embankment for the purpose of admitting the water from above. The closing of the channel between Islands Nos. 1 and 2 and the main land and the erection of this embankment across the channel at the head of Island No. 3 substantially shut off all the current that would naturally flow from the main river into this channel. The water in the channel below naturally became stagnant. Complaints were made of noxious odors, and from that time, as appears by the records and proceedings of the common council, it has been a constant source of discussion, and various efforts have been made to abate the nuisance, which proved abortive. Various parties naturally made this channel a dumping ground, even against the orders and instructions of the city, and against notices posted along the channel banks.

Upon the complainants' property and other adjoining lands are situated some dwelling houses, in the rear of which, and near the bank of the channel, are water-closets or privies, which consist of a hole in the ground and boards upon the outside, with large cracks between. In times of high water some of these privies stand in the water. All agree that the general reputation of the neighborhood is bad. Garbage and slops were thrown out upon the ground, which would be washed into the channel by the rains. The seepage and flowage from these closets contributed to the nuisance. The boats which were used in the channel also were daily depositing offensive material.

The complainants desired, and the board of health advised, the construction of a sluice, instead of this small one, which was of little or no use; and in 1878 the city

constructed such sluice. It did not carry water at the low stages of the summer in sufficient quantities to remedy the evil. Much of the time it carried little, if any, water. It is claimed that the sewage from the sewer pipes above flowed down through this sluice into the channel, and contributed to the nuisance. We agree with the finding of the circuit judge that there was not sufficient offensive material which came through this sluice from the sewers to cause the nuisance. Other cities and villages above the defendant city also emptied their sewage into the river, and there is good reason for the testimony of one witness, who stated that there was no longer pure water in the river during the low stages. The sewers were emptied into the river at the usual distance from the bank. Finally, in order to remedy the evil, some of the sewers were carried out near the center of the river. Originally, some of the sewers emptied into the eastern channel, but this was some years ago, and there is no reason to believe that this contributes now to the nuisance. The floods in the spring and fall flushed this channel out sufficiently to carry with it all offensive matter. The trouble evidently is in the low stages of water in the summer, when stagnant water becomes unhealthful without the addition of offensive matter.

The city is not responsible for closing the channel between Islands Nos. 1 and 2 and the main land; neither is it responsible for the embankment at the head of the basin, which cut off all the current there was between Islands Nos. 3 and 5. We find no substantial foundation for the claim that the city has created the nuisance. If these complainants or their grantors desired to prevent these obstructions to the natural flow of water, they should have proceeded against those who caused them. Their remedy is now barred by the statute of limitations and by laches, no matter whether these obstructions were made by private parties or by the city.

We think the evidence fails to sustain the complainants' allegation that the city has deposited upon Island No. 3

garbage which contributed in any appreciable amount to the impurities of the water of the channel. The city constructed an incinerator, where it burns all its refuse which can be burned. The more offensive, which cannot well be burned, is taken to the foot of the island, and dumped into the main channel. If any offensive matter has occasionally been dumped into the channel, it has been against the express orders of the city. The city cannot be held liable for this entire nuisance, even if on a few occasions one of its employés has violated its instructions.

2. As against the city the complainants are not now entitled to the gracious writ of injunction to compel the city to undo what it has done. The purchase of the island, the intention to connect it with the main land and to close up the sluiceway, and the progress of all these important and extensive improvements were known to the complainants. They contented themselves with a mere protest at some stage of the proceedings. Two courses were then open to them: (1) To file a bill in equity to enjoin the work on the ground that it would increase the nuisance already existing, and cause them irreparable damages; (2) to wait until the work was done, and bring an action at law for damage. They waited. Equity will not now lend its aid to a party to compel an expensive work to be undone which the party might, by planting a bill in equity in reasonable season, have prevented. 16 Am. & Eng. Enc. Law (2d Ed.), pp. 356, 357; *Traphagen* v. *Mayor, etc., of Jersey City*, 29 N. J. Eq. 206; *City of Logansport* v. *Uhl*, 99 Ind. 531 (50 Am. Rep. 109); *Griffin* v. *Railroad*, 70 Ga. 164; 1 Spelling on Injunc. and Other Ext. Rem. § 26; *Edwards* v. *Mining Co.*, 38 Mich. 46 (31 Am. Rep. 301). See, also, *Clifton Iron Co.* v. *Dye*, 87 Ala. 468 (6 South. 192).

A mere protest under such circumstances will not open the door of equity to parties who thus delay in seeking its aid. 16 Am. & Eng. Enc. Law (2d Ed.), p. 357; *Easton* v. *Railroad Co.*, 24 N. J. Eq. 50; Kerr on Injunc. (4th Ed.) p. 138. When these complainants chose to content them-

selves with the simple protest, and then to stand by in silence, and see these extensive and valuable improvements progress, they estopped themselves to any remedy by injunction.

3. Another reason why the relief sought cannot be granted is that it is, under the evidence in this case, wholly impracticable. An engineer, one of the complainants' witnesses, testified that, to be effectual, the channel into the river should be as wide as the eastern channel, and as deep as the bed of the river. Another testified that pure water could only be obtained by running the channel into or near the middle of the main river. Whether sufficient water at low stages in the summer, when it is most needed, could be obtained, may be questionable. If it could what effect would such a channel have upon the volume of water in the river? To be effective, it must necessarily divert from the river more water than naturally ran through the original channel between Islands Nos. 3 and 5. The restoration of the sluice, or even the original channel, or their equivalent, would not abate the nuisance. It is not at all certain that the diversion of the volume of water necessary to abate the nuisance would not result in injury to the inhabitants on the west side. Has the city, or have the inhabitants on the east side, the right to divert the water to the injury of those upon the west side, even though the water so diverted would abate a nuisance to the health of the city upon the east side? This question must be answered in the negative; especially when, as herein shown, there is another sure and practicable way to abate the nuisance, and one which will not only cause no damage to the landowners, but will increase the value of their lands. All that the complainants, in any event, would be entitled to as against the city, would be the restoration of the volume and current of water equal to that which ran through the original sluice between Islands Nos. 3 and 5; and as against all would be entitled only to that which originally ran through the original channel between those islands. The question of abating the nuisance as a

menace to the public health is not now before us for discussion. Complainants, as a part of the general public, cannot maintain a suit upon that ground. Only when the nuisance causes special damage to a private person, separate and apart from that done to the public, can he maintain a suit to abate it. The city is not responsible for the embankment made in 1871, and cannot be compelled to remove it. The city did not thereby stop the flow of water. It cannot, therefore, be compelled to restore it. It can only be compelled, in any event, to restore what it took away. As the complainants desired, and as the board of health advised, the city undertook to increase the flow of water, not for the benefit of the defendant, but for the benefit of the public health. The experiment made in good faith by the advice of those upon whom the city had a right to rely proved a failure, and in 1896 the city closed it up; thereby, as is clearly established by the evidence, adding value to the complainants' lands. Even if the city were under any obligation to restore the channel, it is now, for the reasons above stated, impracticable and of doubtful propriety.

4. We agree with the conclusion reached by the court below that as a highway of commerce this eastern channel is now useless, and will ever remain so. There is not the remotest probability that the United States will ever dredge it out so as to make it a commercial channel, and certainly no private parties ever will, in view of the fact that the United States has now recognized the channel upon the west side of the island as the commercial channel; and if it ever improves any it will improve that. It has already recognized this channel by ordering draws in the bridges upon the west of the island, and refusing to require them over the eastern channel. Commerce and the general public will be as well accommodated on the west side of the island as they can be upon the east, and probably better. Not only would the channel itself have to be dredged to be useful for commercial purposes, but it would be necessary to divert the water of the river into it.

in sufficient quantities to purify it. No witness has expressed a belief that this will ever be done. It follows from what has been said above that the only practicable way to abate this nuisance is to fill the channel. Upon this there is also a substantial agreement of the witnesses. It is probably the only safe and effective way. Complainants' lands are already increased in value by the purchase of this island and the extensive improvements put upon it. It is unquestionable, and virtually admitted by the complainants themselves, that the filling of the channel will increase the value of their property, and add to it land which, under the present conditions, is of virtually no value. There is evidence that one of the complainants signed a petition to have this channel filled. Another testified as follows:

"*Q.* Don't you think, under the condition this property is in down there now, and with the present policy of the government not to have any draw in the east channel, that it would be worth more with the old channel filled up?

"*A.* There is no question about it at all.

"*Q.* Or that it would be worth more than it would be with any little artificial channel, such as existed at any time within the last thirty years?

"*A.* If things were returned, and a pure stream of water was flowing through there, I should rather have it in that shape than the present state and have to fill the land.

"*Q.* There was no pure stream of water flowing through this little artificial sluiceway from the river, was there?

"*A.* No, sir; but there should be.

"*Q.* I am speaking of it as it existed for the last thirty years. Taking into consideration the little artificial sluice that was there, the land is worth more filled up, now that the government has abandoned it as a navigable stream of water?

"*A.* I answered it two or three times that if it is to stay as it is now it is worthless.

"*Q.* If it stays as it was with that little channel that carried sewage into it, it is not worth much?

"*A.* No, sir.

"*Q.* You have in contemplation a large channel through

there that would bring pure water, such as has not existed for thirty years?

"*A.* Not necessarily.

"*Q.* It would have to bring pure water to be of value?

"*A.* Yes, sir; but I don't think it would be a very large channel.

"*Q.* It would take a very different channel from any that was made by the city, wouldn't it?

"*A.* I am not an engineer. I could not say as to that."

We have already stated what the complainants' engineer testified to in regard to the channel. Under this state of facts the complainants' cause is without equity. If the present condition of the channel is a menace to the public health, the law provides a remedy for its abatement. With that question we, however, now have nothing to do. It is sufficient to say that for the reasons above stated the complainants are not entitled to any relief in equity. The bridge, as proposed by the decree, permits the passage of all the boats which now have occasion to use the channel. The defendant not having appealed, that decree stands, and the defendant can proceed with the construction of the bridge in accordance therewith.

The decree is affirmed, with costs.

The other Justices concurred.

PEOPLE *v.* MUSTE.

HOMICIDE—INSANITY—INSTRUCTIONS.

Where, on a trial for murder, there is some evidence tending to establish insanity, it is error to refuse a request that, if respondent was laboring under such a defect of mind and reason as not to know the nature and quality of the acts he was doing, and incapable of forming a criminal intent, he should be acquitted, and that it was incumbent upon the people to prove beyond a reasonable doubt that he had the capacity to form an intent to commit the crime.

Error to superior court of Grand Rapids; Newnham, J. Submitted February 26, 1904. (Docket No. 203.) Decided July 16, 1904.

John E. Muste was convicted of murder in the second degree and sentenced to life imprisonment in the State prison at Jackson. Reversed.

Dunham & Malcolm, for appellant.

William B. Brown, Prosecuting Attorney, for the people.

MOORE, C. J. Respondent was convicted of murder in the second degree. He has brought the case here by writ of error.

On the night of June 8, 1903, the respondent shot and killed one Albert Schultz. It was the claim on the part of the people: That the respondent had been in the saloon business, and in April, 1903, made application to the city council for a renewal of his saloon license. That said application was denied. The application was renewed, and came up for final determination on June 8th, when it was again rejected. Charles A. Hilton was a member of the license committee, which committee reported adversely to the allowance of the applications. That respondent believed the rejection of his first application was due to the influence of said Hilton. That, before respondent's second application was acted upon, he told several persons that, if it was not allowed, he would kill Alderman Hilton, and that he went to the council for the purpose of learning its action thereon; taking with him from his house a loaded revolver, with which to kill Alderman Hilton if this application was refused. It was refused. Respondent followed Alderman Hilton, who was in company with Albert Schultz, from the city hall to near the corner of Bridge and Ionia streets, in said city, where respondent accosted Alderman Hilton, calling him vile names, and finally at-

tacked him, and attempted to pull the revolver from his pocket. That Alderman Hilton, seeing this attempt, caught hold of respondent, and tried to prevent him getting the revolver, and, in the scuffle, that he and the respondent both fell to ground. That Alderman Hilton got away from respondent, and started to run, and that respondent fired his revolver, intending to shoot Alderman Hilton. That instead, he shot Albert Schultz, who died from the effect thereof. That respondent premeditated and attempted the killing of Alderman Hilton, and, in such attempt, shot and killed Albert Schultz, and that such act was murder.

Respondent claims that he had the revolver for a proper purpose; that in the controversy Hilton struck him and got on top of him; that Hilton then got up; that respondent was stunned; that it was dark; that he feared another attack from Alderman Hilton, and that, without any idea as to what he was doing, took the revolver from his pocket and fired while on his knees; that the first he remembered that he had a revolver was when he heard its report; that as a matter of fact he fired four times, but this he did not know until he was afterwards told by an official that four shots had been fired; that his head and face were cut and bleeding; that blood was running from his nostrils; that he was so hurt and injured that he was not conscious of the act of firing, except that he remembered hearing the report of his pistol; that when he left the house that night he had no intention of taking the revolver to the council meeting; that he never threatened to shoot and kill Alderman Hilton; that he never blamed him for any action of his as a member of the license committee; that he was upon friendly terms with Alderman Hilton; that he did not at any time intend to inflict any injury upon Alderman Hilton, and never intended to shoot him; that he had no intention of shooting Schultz or Alderman Hilton, or of shooting in the direction of either, or of inflicting upon either bodily injury of any kind.

He interposed two defenses: *First*, that of temporary

or emotional insanity; and, *second*, that the homicide in question was the result of temporary excitement of respondent, by which the control of his reason was lost, caused by a fierce and vicious attack upon and injury to him by Charles A. Hilton.

The first group of assignments of error relate to the exclusion of testimony. As to many of these, exceptions were not taken; counsel apparently acquiescing in the rulings of the court, and framing other questions, so they were not objectionable. We shall not discuss those assignments of error.

Other of these assignments of error relate to the striking out of testimony bearing upon the subject of insanity. Counsel are not agreed as to what was stricken out, and the record is ambiguous. In view of our conclusion which we shall express later, it is not necessary to decide what was stricken out.

Among other requests, the court was asked to charge the jury as follows:

"(23) If you find that the respondent on the night of the shooting was laboring under such a defect of mind and reason as not to know the nature and quality of the acts he was doing, and was incapable of forming a criminal intent, he cannot be convicted of the offense charged.

"(24) If, from all the evidence in this case, you are not convinced beyond a reasonable doubt that on the night of the shooting the respondent was of sound mind and discretion, and was capable of forming a criminal intent, you should acquit.

"(25) It is incumbent upon the people to prove beyond a reasonable doubt the criminal intent with which the fatal shot was fired, and the respondent's mental capacity for forming an intent to commit the alleged crime. If, from all the evidence in the case, you cannot say you have a moral certainty that on the night of the shooting the respondent's mind and discretion was sufficient for him to form a rational intent to kill, then respondent's guilt has not been proved to you beyond a reasonable doubt, and you should acquit."

He refused to give these requests, and failed to charge

the jury upon that subject. This is said to be error. Counsel for the people says the requests were properly refused, because there was no testimony upon which to base them. This involves a question of fact. It would not be profitable to insert the testimony here, but an examination of the record discloses that there was some testimony which tended to support the theory of the respondent upon this branch of the case, and it should have been submitted to the jury.

The only portion of the charge which we deem so objectionable as to call for reversal is disposed of in what is said above.

The conviction is set aside, and a new trial ordered.

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

LOESER *v.* JORGENSON.

1. CHATTEL MORTGAGES—RECORDING—ACTUAL NOTICE.
   A chattel mortgagee cannot complain of a charge that the mortgage was valid against one who had actual notice of its existence, though filed in the wrong township.

2. SAVING QUESTIONS FOR REVIEW—EVIDENCE—OBJECTIONS.
   One cannot urge on error that certain evidence was not admissible under the pleadings, unless such objection was made on the trial.

3. DOMICILE—EVIDENCE—STATEMENTS—RELEVANCY.
   Where the place of residence of a person, not a party to the suit, is at issue, testimony by the supervisor that such person claimed a homestead in the township, and made and delivered to him a statement of his taxable property in the township, is relevant to the issue.

4. SAME—RESIDENCE—INTENT—VOTING.
   Testimony that the mortgagor of chattles registered as a voter in a certain township the day after the mortgage was given,

and three days later voted there, tends to show his intent, and is therefore admissible on the question of his residence.

Error to Crawford; Sharpe, J. Submitted March 16, 1904. (Docket No. 115.) Decided July 16, 1904.

Trover by Leo Loeser, Ferdinand Loeser, and Solomon Loeser, copartners as Loeser Brothers, against Walmar Jorgenson and George F. Owen. There was judgment for defendants, and plaintiffs bring error. Affirmed.

William D. Totten and *J. L. Boyd*, for appellants.

Main J. Connine and *Ward B. Connine*, for appellees.

MOORE, C. J. November 2, 1900, Bert Wilcox gave a chattel mortgage to plaintiffs for $350, which was filed on the same day in the township of Grayling. Afterwards defendant Jorgenson obtained a judgment and execution against Wilcox, which execution was delivered to defendant Owen, who levied upon and sold the property covered by the chattel mortgage. Plaintiffs made a demand for the property or the proceeds. Suit was brought, and the case was tried by a jury, which rendered a verdict in favor of defendants. The case is brought here by writ of error.

It was the claim of plaintiffs that the residence of Wilcox was in Grayling, and that the mortgage was properly filed, and gave them a lien ahead of that of the defendants. It was the claim of defendants that Wilcox was not a resident of Grayling when the mortgage was given, but was a resident of Maple Forest, and that the chattel mortgage was not properly filed. It was the claim of defendant Jorgenson that before extending credit to Wilcox he was told by him that this property was unincumbered, and that Wilcox offered to give him security, and that Jorgenson had no knowledge of the mortgage until after the credit was given. Wilcox and his wife were both sworn

as witnesses on the part of plaintiffs, and testified their residence was in Grayling, and that Jorgenson was told of the mortgage before the credit was extended.

Counsel for plaintiffs say the following questions are involved:

"(1) Whether Wilcox resided in Grayling township or in Maple Forest township on that date; and (2) whether the defendant Jorgenson knew of the mortgage before he extended credit to Wilcox; and (3) whether the court below erred (*a*) in his rulings on the admission of evidence, (*b*) in his charge to the jury, (*c*) in overruling plaintiffs' motion for a new trial."

As to the first of these questions, the jury were told by the judge that, if Wilcox resided in Grayling when the mortgage was given, plaintiffs were entitled to recover. As to the second question, the jury were told:

"If you find that part of Wilcox's debt to Jorgenson was extended after Jorgenson knew of the mortgage to the plaintiffs, then the verdict here will be for the plaintiffs. * * * And this brings us to the second question—as to whether or not Jorgenson, at the time he furnished these goods to Wilcox, had notice that Loeser Bros. held a mortgage upon this property. The object of the filing of a chattel mortgage, you can see, was to give every one notice who chooses to go and examine the records of the township clerk's office where a man lives, and see whether or not his goods are incumbered. If, however, actual personal notice is brought to the man that some one else holds a mortgage upon personal property, why, that is just as efficacious, as far as giving him notice is concerned, as filing. And if you find that Wilcox told Jorgenson, while he was getting this credit, and before all of these goods were furnished, that this mortgage existed to Loeser Bros., then, if Jorgenson furnished goods after that, then he couldn't complain that he did not know of the Loeser Bros.' mortgage."

We think these were questions of fact, and were properly submitted to the jury.

Was there error in the admission of evidence? The plea gave notice that Wilcox was a resident of Maple Forest when the mortgage was given. Evidence was intro-

duced showing that Wilcox claimed to be a resident in 1897 of Presque Isle county, and registered and voted there, and continued to reside there until the spring of 1899. Counsel say it is elementary that the evidence should correspond to the plea, and that this testimony should have been rejected. Counsel, in his opening statement to the jury, claimed Wilcox was a resident of Grayling, and had been for years. There was no suggestion in the objection that it was not admissible under the pleadings. We think that objection cannot now be urged.

It was the claim of the plaintiffs that, though Wilcox was living with his family in Maple Forest, he was there temporarily to do lumbering, and that his actual residence was in Grayling. Defendants were allowed to show that Wilcox told the supervisor in the spring of 1900 that he had a homestead in Maple Forest, and that he made and delivered to the supervisor a statement of his taxable property in that township. The objection was that the testimony was irrelevant and incompetent. None of it was objected to as being hearsay. We think the testimony bore upon the issue.

Testimony was introduced showing that Wilcox appeared before the registration board of Maple Forest November 3d, the next day after the mortgage was given, and claimed he was a resident of that township, entitled to vote; that he was registered on the 3d and voted on the 6th of November. It is said this was error, because anything Wilcox said or did after the mortgage was filed, November 2d, was immaterial. We cannot agree with counsel. The question of residence is largely a question of intent. The contemporaneous acts of parties throw light upon what they intend. We think this testimony was competent.

It is said the court should have granted plaintiffs a new trial because the verdict was contrary to the charge of the court, the law, and the weight of evidence. In refusing the motion for a new trial, the judge found to the contrary of each of these contentions. We have already stated

enough from the record to show a sharp conflict in the testimony. The case was submitted to the jury under a clear and careful charge. There was testimony which, if believed, justified the verdict.

Judgment is affirmed.

The other Justices concurred.

TOWNSHIP OF ONEIDA *v.* ALLEN.

1. EQUITY — PARTIES — TOWNSHIPS — CEMETERIES — BOARD OF HEALTH.

   A township is a proper complainant in a suit in equity to enforce rights pertaining to lands purchased by the board of health for a cemetery under the provisions of 2 Comp. Laws, §§ 4414, 4415.

2. SAME—PARTIES—OBJECTION—AMENDMENTS.

   An objection that the township board of health is a necessary party to a suit by the township to enforce rights relative to a cemetery, and has not been joined, should be timely made, and the court may permit an amendment therefor if necessary.

3. EASEMENTS—PRIVATE WAYS—USE BY OWNER OF THE FEE.

   The owner of the fee, over which a private way passes, has a right to use the way for any purpose not inconsistent with the right of the owner of the easement.

4. SAME—PRESCRIPTION—DEDICATION.

   Where a strip of land, dedicated as an approach to a cemetery, has been used by defendant and his grantors, for more than 15 years, as a private way to his adjoining farm, and it does not appear that the original dedication intended to exclude such use, the defendant's continued use of the approach will not be enjoined.

Appeal from Eaton; Smith, J. Submitted April 5, 1904. (Docket No. 4.) Decided July 16, 1904.

Bill by the township of Oneida against Charles G.

Allen to restrain the use of an approach to a cemetery as a farm lane. From a decree for complainant, defendant appeals. Reversed and bill dismissed.

George E. & M. A. Nichols and *Clarke & Latting*, for complainant.

J. L. Sutherland (*Black & Reasoner*, of counsel), for defendant.

MONTGOMERY, J. The bill in this case was filed to restrain the defendant from using an approach to a cemetery for the purpose of drawing hay, grain, or other products over it, or driving his stock over it, or using the approach as a farm lane.

It appears that about the year 1839 one James Nixon dedicated to the public a cemetery lot consisting of one-half acre of ground, which extended from a point two rods from his northern line southerly, and was eight by ten rods in dimension. At the same time Nixon and his adjoining neighbor, Daniel Monroe, each dedicated a two-rod strip, extending from an existing highway westerly to the westerly limits of the cemetery lot, as an approach to such cemetery. No written conveyance was made of either description until 1887, when James Nixon conveyed the one-half acre description to the board of health of complainant. The defendant had succeeded to the title of Nixon in the farm which includes the fee to the two-rod strip dedicated in connection with the Monroe strip, and claims and has exercised the right to use the strip in question for the purpose of reaching the rear of his farm. The township authorities, desiring to improve the cemetery and approach, and believing the use made of the latter by the defendant to be detrimental to the improvements contemplated, on his refusal to refrain from such use, filed the present bill. On the hearing below an injunction was issued, and defendant appeals.

Numerous questions not going to the merits are discussed, but in the view which we take of the case the only one

of these preliminary questions which need be referred to is the contention that complainant is not a proper party, and that the suit should be in the name of the board of health of the township. The statute (2 Comp. Laws, §§ 4414, 4415) authorizes the board of health to purchase lands for cemetery purposes and hold the same in trust for the township. In a suit in equity to enforce rights arising out of such holding the township is a proper party. If the board of health should have been joined, objection for failure to do so should be timely. In the present case the question is first raised in this court. See *Snook* v. *Pearsall*, 95 Mich. 534 (55 N. W. 459). In such a case the absent party may be brought in by amendment if necessary. Id. But as we are of opinion that on the merits the bill cannot be sustained, we discover no occasion for directing an amendment in this case.

It appeared on the trial that at one time there had been surveyed a highway which embraced the four-rod strip in question and extended westerly some distance, and that later that portion lying westerly of the strip in question was discontinued.

The circuit judge, in treating of this subject, said:

"The approach has been used by the general public to reach the cemetery, and also to reach a way which is claimed to have been a public highway, having its starting point at the west end of the approach to this cemetery. Whether this was a public highway or not, is, in my judgment, of but little account, because it has been long since discontinued and closed up, and whether this highway was legally laid out, and had its starting point from the north and south highway lying east of the cemetery or not, is, in my judgment, of but little value, because, before this highway is claimed to have been laid out, the approach to the cemetery had been dedicated, accepted, and used as such, and I do not think it could be converted into a public highway in the way it is claimed it was done."

We do not find it necessary to hold that the strip in question became a public highway, but the fact that it was

used for many years as a way without objection, so far as appears, and the fact that the approach, when dedicated, was carried past the cemetery at the customary width of four rods, is of some significance as indicating the intent with which the original dedication was made, and whether it was made with a view of excluding the owner of the fee from such use of the property as the defendant and his grantors have since made. It is clear to us upon the whole testimony that the defendant and his grantors have made use of this way for more than the statutory period, and that the original dedication was not intended to exclude such use. Defendant and his grantors had the right to use the way in question for any purpose not inconsistent with the right of the owner of the easement. *Harvey* v. *Crane*, 85 Mich. 316 (48 N. W. 582, 12 L. R. A. 601); 2 Dillon, Mun. Corp. (4th Ed.) § 633. In determining whether such use as defendant has made is or is not inconsistent with the dedication, it would seem clear that the court should consider what such dedication was, and the limitations placed upon it by the acts of the parties, as well as their interpretation of such dedication for these many years. If the case be so viewed, we can reach no other conclusion than that the defendant has the right to the use which he has made of the way in question.

The bill will be dismissed, with costs of both courts.

The other Justices concurred.

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MALONE *v.* DANFORTH.

1. MORTGAGES—DEED AS SECURITY—EQUITY.

Complainant, being the owner of the equity of redemption of certain premises, agreed to convey them to defendant, if the latter would advance money sufficient to redeem, and allow him to repurchase within two years upon payment of advances, interest, and expenses. Defendant was authorized to sell

within two years, deduct from proceeds of sale his advances, interest, and expenses, and account to complainant for the balance. Thereafter the complainant conveyed by warranty deed to defendant's wife subject to the mortgage. *Held*, that the transaction should be treated as a mortgage and complainant's right to repurchase did not lapse at the end of two years.

2. EQUITY—MAXIMS—USURY.

One who comes into equity to have a deed and contract declared to be a mortgage must be prepared to do equity, and will be required to pay legal interest although the contract rate was usurious.

Appeal from Berrien; Coolidge, J. Submitted April 5, 1904. (Docket No. 9.) Decided July 16, 1904.

Bill by George J. Malone, by Cora Malone Smith, guardian, against Erskine Danforth, Flora A. Danforth, and Herbert M. Danforth to have certain conveyances declared mortgages. From the decree rendered, all parties appeal. Modified and affirmed.

O'Hara & O'Hara and *G. M. Valentine*, for complainant.

Harris S. Whitney and *Gore & Harvey*, for defendants.

MONTGOMERY, J. On June 24, 1899, complainant, the estate of Rachel Malone, deceased, and the defendant Erskine Danforth, acting for himself and Flora A. Danforth, entered into an agreement as follows:

"*Whereas*, that certain tract of land situated in the township of St. Joseph, county of Berrien, and State of Michigan, described as follows, to wit: That certain parcel of land described in a warranty deed dated June 9, 1886, wherein Rachel Malone is party of the first part, and George Julius Malone is party of the second part, recorded in the office of the register of deeds for Berrien county, November 11, 1886, in liber 82 of deeds, on page 208, except 10 acres sold to John Jacobson, and also described in the mortgage hereinafter referred to, was on

June 24, 1898, sold at mortgagee's sale to William R. Lyon, mortgagee, and the amount required to redeem said land from said sale is the sum of $904.25; and

"*Whereas*, said lands were sold June 27, 1898, at mortgagee's sale under a mortgage dated March 12, 1897, for the principal sum of $2,000.00, said mortgage being a first lien on said premises; and

"*Whereas*, said last-described mortgage is controlled by William R. Lyon, and the amount required to redeem therefrom June 27, 1899, will be the sum of $2,418.67; and

"*Whereas*, the estate of Rachel Malone, deceased, owns a third mortgage on said premises for the principal sum of $600, together with interest thereon:

"*Now, therefore*, Erskine Danforth, of Benton Harbor, Michigan, agent for Flora A. Danforth and George J. Malone, of St. Joseph, Michigan, and the Estate of Rachel Malone, deceased, contracts and agrees as follows, to wit: In consideration of Erskine Danforth advancing the money, to wit, $3,322.92, necessary to redeem said lands from said foreclosure sales, the other parties hereto agree that said Danforth may redeem said lands and become the absolute owner of the fee thereof; and

"*Whereas*, the actual value of said lands is agreed to be in excess of $6,000.00, said Danforth agrees with the other parties hereto, and does hereby covenant, to sell said lands to said parties on the following terms, viz.: The sum of $3,322.92 together with 8 per cent. interest thereon for two years, and in addition to said principal and interest, all expenses of said Danforth in the premises, together with $2.00 per day for the time spent by said Danforth in the care of said premises and this contract; and said Danforth does further agree to execute or cause to be executed and delivered to said other parties, or their purchasers, a good and sufficient deed of said premises upon the payment to him of the sums aforesaid within two years from the date hereof.

"And said George J. Malone agrees with and to said estate of Rachel Malone, deceased, in consideration of the latter joining in this contract, and the amount due said estate on its said mortgage upon said premises, to pay said third mortgage together with the interest due thereon out of the first moneys realized from a sale of said premises within said two years after the payment of the sums due by the terms of this agreement to Erskine Danforth.

"And said Erskine Danforth is hereby granted the ab-

solute right in his own discretion within two years from date hereof, to sell said premises for such sum as he sees fit regardless of the rights of the other parties hereunder, but in the event of a sale of said lands by said Danforth, it is agreed that after the payment of the sums due him by the terms of this agreement he shall account for the balance, if there be a balance, over and above his claims aforesaid of the purchase price of said lands, as follows: He shall first pay the amount due the estate of Rachel Malone, deceased, and all the remainder after such payment shall be paid to George J. Malone."

At this time complainant was the owner of the equity of redemption in the land described, which was worth, as the evidence would indicate, about $7,000. He was without other means, and was a profligate and an habitual drunkard. On the 5th of July, 1899, upon no new consideration, complainant made a warranty deed to Flora A. Danforth, subject to the mortgages named in the original agreement. Danforth has also fortified his title by purchasing, in the names of his son and daughter, respectively, certain tax titles and the Malone estate mortgage.

The property not having been sold within the two years named, the defendants insist that complainant's right to repurchase has lapsed, and that the agreement between the parties was an optional contract only. Complainant files this bill, asking that these conveyances be decreed to constitute an equitable mortgage, and praying that the lands be sold, and any residue over and above the amount due to the defendants be paid over to him.

The questions involved are mainly questions of fact; the principal question being what the parties intended by the agreement of June 24, 1899. We are convinced that, so far as complainant was capable of forming any intent, his purpose was to place this property in Danforth's hands as security for the advance made, and that equity should treat the transaction as a mortgage. See *Sowles* v. *Wilcox*, 127 Mich. 166 (86 N. W. 689); *Carveth* v. *Winegar*, 133 Mich. 34 (94 N. W. 381); *Campbell* v. *Dearborn*, 109

Mass. 130 (12 Am. Rep. 671). The court below so decreed, and granted redemption.

The complainant, having appealed, protests against the allowance of interest on the moneys advanced, on the ground that the contract was usurious. This contention cannot prevail. The contract is not in its terms a mortgage. The complainant seeks to have a court of equity declare it such, and, in asking aid, he should be prepared to do equity. The court below decreed simple interest, and this order is affirmed.

We think the amount fixed by the circuit judge by way of allowances for services was just and fair, and his computation is in all respects approved, with the exception of an error in computation of interest on the principal item. As we compute the interest, the total due on this item as of date May 24, 1903, is $4,103.80, instead of $4,080.29, as stated in the decree, and the total due at that date is $4,958.39, instead of $4,934.78, as decreed.

As so modified, the decree will stand affirmed. No costs will be awarded in this court.

The other Justices concurred.

THURSTON v. DETROIT UNITED RAILWAY.

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1. CARRIERS—INJURY TO PASSENGERS—BURDEN OF PROOF.
In an action by a passenger against a carrier for personal injuries, the burden of proof rests upon plaintiff to show negligence.

2. SAME—NEGLIGENCE OF RAILWAY—NEGLIGENCE OF THIRD PERSON.
In an action by a passenger against a street-railway company, for personal injuries received in a collision between the defendant's car and a wagon, the plaintiff is entitled to recover if the motorman was negligent, although the driver of the wagon was also negligent.

3. SAME—NEGLIGENCE—MOTORMAN—CONTROL OF CAR.

Where, in an action by a passenger against a street-railway company for injuries received in a collision between defendant's car and a wagon, the evidence showed that the car was going down grade at a high rate of speed, that the horses and wagon approached the track when the car was about 200 feet distant, and that the horses were on the track when the car was 40 feet distant, the question of whether the motorman used due care in bringing his car under control, after seeing the wagon approaching the track, was one of fact.

Error to Wayne; Donovan, J. Submitted April 7, 1904. (Docket No. 18.) Decided July 16, 1904.

Case by Douglas A. Thurston against the Detroit United Railway for personal injuries. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

Tarsney & Fitzpatrick (*R. I. Lawson*, of counsel), for appellant.

Corliss, Andrus, Leete & Joslyn (*Paul B. Moody*, of counsel), for appellee.

MONTGOMERY, J. This action was brought to recover for injuries sustained by plaintiff while a passenger in one of defendant's cars. The injury resulted from a collision of the car with a heavy ice wagon at the intersection of Beaubien and Montcalm streets. The negligence counted on was running the car at too high a speed, and failure to have or bring the car under control, so as to prevent the collision. The circuit judge, at the close of the plaintiff's testimony, on motion of defendant, directed a verdict in its favor. The plaintiff brings error.

It is contended that the law requires of carriers of passengers a high degree of care, and that the presumption of negligence obtains in case of an injury to a passenger. The two propositions are not dependent. In this State the rule has long been settled that, even in an action by a

passenger, the burden of proof rests upon the plaintiff to show negligence. *Mitchell* v. *Railway Co.*, 51 Mich. 236 (16 N. W. 388, 47 Am. Rep. 566); *Werbowlsky* v. *Railway Co.*, 86 Mich. 236 (48 N. W. 1097, 24 Am. St. Rep. 120); *Bradley* v. *Railway Co.*, 94 Mich. 35 (53 N. W. 915); *Gardner* v. *Railway Co.*, 99 Mich. 182 (58 N. W. 49).

The case of *Stoody* v. *Railway Co.*, 124 Mich. 420 (83 N. W. 26), goes no further than to lay down the rule that an inference of negligence may be drawn from the fact of an injury, and other facts out of the ordinary, in a given case.

The question in the present case is whether there was evidence from which the jury might infer that the motorman was negligent in failing to bring his car under control, so as to prevent a collision. It is not such a case as would be presented if the driver of the ice wagon had tried to recover for injuries received. In such a case there would be no difficulty in saying, on this record, that such recovery would be barred by the contributory negligence of the driver. In the present case, however, the plaintiff establishes a right to recover if the motorman was negligent, even though the driver of the ice wagon (a stranger to plaintiff in every sense) was also negligent. In determining the question whether there was evidence of negligence for the jury to consider, we must accept the version most strongly tending to support plaintiff's claim. There was testimony given by a witness who was at Columbia street at the time of the collision. Columbia street is next below Montcalm, and High street next above. There is a slight down grade from High street to Montcalm. The witness in question testified that the distance from High street to Montcalm is about 225 to 230 feet; that his attention was first attracted to the car when at High street; that the horses attached to the ice wagon had not then appeared, but that as the car was just past High street the horses appeared in the street and approached the track on a trot; that when the horses were on the track the car was still

about 40 feet away, and that the car struck the front wheels of the ice wagon in the collision; that the car was running very fast. Under this testimony, we are of the opinion that it was competent for the jury to decide whether the motorman used due and proper effort to bring his car under control after seeing the driver approaching the track.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

BROWN *v.* KNOP.

1. JUSTICES OF THE PEACE—SUMMONS—JOINT DEFENDANTS—ALIAS WRITS.

   Under 1 Comp. Laws, § 720, providing that when suit is brought upon contract against two or more joint defendants, one of whom shall not be found in the county where suit is brought, the justice shall, within four days from the return day of the writ, issue one or more alias writs of summons, it is not necessary that the officer's return should state that he had used due diligence to obtain personal service, and that, being unable to find the defendant, he had left a copy of the summons at his last place of abode.

2. SAME—ADJOURNMENTS—JURISDICTION.

   A plaintiff in justice's court may adjourn the case without waiting an hour for the defendant to appear.

3. SAME—JURISDICTION—AUTHORITY OF AGENT—PRESUMPTIONS—CERTIORARI.

   On certiorari to a justice's court, it will be presumed that the agent of the plaintiff, in the absence of the defendant, proved his authority to appear, if there is no showing in plaintiff's application or in the return of the justice to the contrary.

4. TIME—COMPUTATION.

   It is a general rule that when an act is to be done within a

certain number of days from a day, the day of the date is excluded.

5. SAME—ALIAS WRITS—JUSTICES' COURTS.

1 Comp. Laws, § 720, providing for the issuing of alias writs of summons in certain cases in justices' courts, "within four days from the return of the writ," authorizes an alias to issue on the return day of the writ. *Reed* v. *Parker*, 134 Mich. 68 (95 N. W. 979), distinguished.

Error to Charlevoix; Mayne, J. Submitted April 12, 1904. (Docket No. 33.) Decided July 16, 1904; motion for rehearing submitted September 21, 1904; denied November 9, 1904.

Assumpsit in justice's court by Frank E. Brown and John Sehler, copartners as Brown & Sehler, against William Knop and Lewis Martin on promissory notes. There was judgment for plaintiffs, and defendants brought certiorari in the circuit court. There was judgment for defendants at the circuit, and plaintiffs bring error. Reversed.

This case was commenced in a justice's court for the county of Charlevoix, at the request of one Merriman, agent for plaintiffs. The summons directed the defendants to appear before said justice at his office in the township of Boyne Valley on May 20, 1902, at 2 o'clock in the afternoon. The deputy sheriff made return of the summons that he had served it personally on defendant Knop, and that "Lewis Martin, the defendant, not being found, the within summons was not served on him." On the return day Merriman appeared as agent for the plaintiffs. Defendants did not appear, and the justice, at request of plaintiffs, adjourned the case to May 28th, at 2 o'clock p. m., for the purpose of issuing an alias summons. The justice then issued an alias summons against both defendants, requiring them to appear before him May 28, 1902. Upon the back of this alias the justice indorsed that the defendant Knop had been served with process. The

officer returned this summons with the indorsement that, defendant Martin not being found in the county, it was not served. Plaintiffs appeared upon the return day by their agent, Merriman, at the appointed time, and declared orally upon all the common counts in assumpsit, and especially upon six promissory notes, describing them, executed by the defendants. The defendants did not appear, and, after waiting an hour, plaintiffs introduced their evidence through their agent, Merriman, and the justice rendered a judgment of $300. The defendants removed the case by certiorari to the circuit court for the county of Charlevoix, insisting that the justice had no jurisdiction to render judgment.

The defects alleged are:

(1) That the officer did not return to the original summons that he used due diligence to obtain personal service upon defendant Martin, or that said Martin had no last place of abode within said county, or that he left a copy of said summons at his last place of abode.

(2) That the justice lost jurisdiction by adjourning the case from the 20th to the 28th of May.

(3) That the agent, Merriman, did not prove his authority to act for the plaintiffs.

(4) That the justice did not wait an hour on the return day of the summons before adjourning the case.

The circuit court reversed the judgment of the justice, and the case is now before us for review.

J. M. Harris, for appellants.

A. B. Nicholas and *E. N. Clink*, for appellees.

GRANT, J. (*after stating the facts*). 1. It was not essential to the jurisdiction of the justice that the officer's return should state that he had used due diligence to obtain personal service, and that, being unable to find the defendant Martin, he had left a copy of the summons at his last place of abode. The statute (section 720, 1 Comp. Laws) provides that when suit is brought upon contract or obligation against two or more joint defendants, one of

whom shall not be found in the county where suit is brought, the justice may "at any time within four days from the return day of the writ by which such action was commenced, issue one or more alias writs of summons," etc. The statute will be found in full in *Reed* v. *Parker*, 134 Mich. 68 (95 N. W. 979). This statute does not require a copy of the writ to be left at the defendant's place of abode if he is not found within the county. Those cases based upon statutes containing such requirements do not apply. Such are *Segar* v. *Lumber Co.*, 81 Mich. 344 (45 N. W. 982); *Adams* v. *Abram*, 38 Mich. 302.

In *Brooks* v. *McIntyre*, 4 Mich. 316, under a statute similar to section 720, the return of the officer was the same as in this case, non est inventus, and was held to authorize a judgment joint in form against all the defendants. See, also, *Gunzberg* v. *Miller*, 39 Mich. 80; *Fogg* v. *Child*, 13 Barb. 246.

2. The justice was under no obligation to wait an hour for the appearance of the defendant before adjourning the case for the purpose of issuing an alias summons. The statute (section 836, 1 Comp. Laws) providing for a judgment of nonsuit in case the plaintiff shall fail to appear within an hour after the process was returnable, and the extension of that statute, by judicial construction, to a defendant (*Talbot* v. *Kuhn*, 89 Mich. 30 [50 N. W. 791, 28 Am. St. Rep. 273]), does not apply to cases of adjournment, but only when final judgment is to be taken.

3. The justice made no return as to whether Mr. Merriman gave evidence of his authority to appear as the agent for the plaintiffs. It was incumbent upon the defendants, in applying for the writ of certiorari, to show that no evidence of such authority was produced, and to require a return of the justice thereon. In the absence of such showing and a return, it will be presumed that authority was proved. *Marquette, etc., Rolling Mill Co.* v. *Morgan*, 41 Mich. 296 (1 N. W. 1045); *Township of Fruitport* v. *Muskegon Circuit Judge*. 90 Mich. 20 (51 N. W. 109).

4. No error was committed by the justice in issuing an alias summons upon the return day of the writ. Counsel for the defendants insist that the alias summons must be issued within four days before the return day of the writ, excluding the day specified for the return. Whether the statute means four days before the return or four days thereafter, it is unnecessary to decide. The return was made upon the hour and day named—the usual practice—and the request for an alias summons and for the adjournment of the cause and the issuing of the summons were simultaneous acts. It is the general rule that when an act is to be done within a certain number of days from a day, the day of the date is excluded. *Inhabitants of Seekonk* v. *Inhabitants of Rehoboth*, 8 Cush. 371. It was said in *Cornell* v. *Moulton*, 3 Denio, 12, that when the question had arisen under rules of practice, the first day was generally excluded; but that in the construction of statutes the decisions had not been uniform either in England or America. It was said in *Cromelien* v. *Brink*, 29 Pa. St. 522: "The man who undertakes to reconcile the English decisions on the legal computation of time will find himself employed in an arduous work." This remark is quoted by the federal court in *Merritt* v. *Ona*, 44 Fed. 369 (11 L. R. A. 724), and the federal court say, "The remark may be applied with equal truth to the American decisions." It was said in *Lester* v. *Garland*, 15 Ves. 248, that there is no settled general rule as applied to statutes, and that the day of the event in a given case must be excluded or included, as may be most conducive to the beneficial operation of the act. 1 Wood on Lim. § 54. The purpose of this statute was to facilitate actions against joint defendants. The judgment is not conclusive against one not served. At the common law all defendants must be served. The execution issued under this statute must show the names of the defendants who were not served and do not appear. Their property cannot be seized under the writ. If the plaintiff desires to secure a service upon the other joint defendants, he must procure an adjournment under this

statute, and have an alias summons issued. The defendant served might naturally desire to have his codefendant brought in, and he has the right to appear at any time before judgment is rendered. *Ralston* v. *Chapin*, 49 Mich. 274 (13 N. W. 588). There is no reason in taking out an alias summons until it is determined whether the defendant not served will appear. We think the fair construction of this act is that the plaintiffs were entitled to an alias summons on the return day of the writ, and that that day should be counted as one of the four within which it might issue.

5. It seems to be contended by counsel for the defendants that the court lost jurisdiction to render judgment against the defendant Knop under the recent case of *Reed* v. *Parker*, 134 Mich. 68 (95 N. W. 979). The record in that case differs from the one in this in several important particulars. The record in that case did not show that the action was upon a joint contract or obligation, while in this it does. In that case the record shows that the defendant not served was out of the county, but did not show in what county such defendant was to be found, or that the alias summons, as required by law, was directed to the sheriff or constable of the county where he might have been found. Neither did it show that the justice indorsed on the alias which defendant had been served in the county where the suit was commenced. In this case such indorsement was made upon the alias, and it was issued upon a return non est inventus, and directed to the sheriff of the same county where the suit was commenced, and no service was made of the alias summons for the reason that defendant Martin was not found within that county. At the common law in actions ex contractu on joint obligations all the defendants must be served with process. The statute was aimed at two classes of cases—one where one or more of the defendants resided out of the jurisdiction, and presumably would not be found within it; and, second, where one or more shall not be found within the jurisdiction, though they may reside

within it. In the *Reed Case* the defendant not served resided without the jurisdiction. In this case the defendant not served was not found by the officer, and he so returned. Upon such a return the justice may issue an alias to the sheriff or proper officer of the same county, and continue the cause. This was done, as the justice's docket and return show. This was a full compliance with the statute. The *Reed Case* has no application to this.

The judgment of the court below is reversed, and that of the justice's court affirmed, with the costs of all courts to the plaintiffs.

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

ON MOTION FOR REHEARING.

PER CURIAM. We are asked to grant a rehearing in this case on the ground that in attempting to distinguish this case from *Reed* v. *Parker*, 134 Mich. 68 (95 N. W. 979), we erroneously assumed that the alias summons was delivered to the sheriff of the county of Charlevoix, whereas it was in fact delivered to the sheriff of the county of Emmet. This error does not affect the reasoning, in our opinion. This case is distinguished from *Reed* v. *Parker*, supra, by the circumstance that the trial court, in adjourning the case and in issuing the alias summons, assumed, and had a right to assume,—this is shown by the direction in the alias, not by the return, subsequently indorsed thereon,—that the defendant not served would be found within the county in which the court was held. In other words, the record in the case at bar shows an adjournment to enable service to be made in the home county, while in *Reed* v. *Parker*, supra, the record shows an adjournment to enable service to be made in another county.

Application for rehearing denied.

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RODGERS v. LAMB'S ESTATE.

1. LIMITATION OF ACTIONS—ESTATES OF DECEDENTS—WORK AND LABOR.

   A claim against an estate for work and labor for a period of ten years, terminating more that six years before the death of the deceased, and not shown to be a mutual, open account, is barred by the statute of limitations.

2. SAME—SUBSEQUENT PROMISE.

   A promise by an employer, after the termination of the service, to convey land at her death in payment of the services, does not interrupt the running of the statute of limitations on the claim for labor.

3. STATUTE OF FRAUDS—ORAL AGREEMENT TO CONVEY LAND.

   A verbal agreement to convey lands in payment for services previously rendered is invalid under the statute of frauds, and void for all purposes.

Error to Gratiot; Stone, J. Submitted April 12, 1904. (Docket No. 38.) Decided July 16, 1904.

C. Arthur Rodgers presented a claim against the estate of Caroline R. Lamb, deceased, for services rendered. The claim was allowed in part by the commissioners, and defendant appealed to the circuit court. There was judgment for defendant on a verdict directed by the court, and claimant brings error. Affirmed.

A. G. Shepard and *Searl & Monfort*, for appellant.

O. G. Tuttle, *Lewis Severance*, and *W. A. Norton*, for appellee.

MONTGOMERY, J. Caroline Lamb died intestate March 24, 1901, leaving an estate consisting of 220 acres of land, which she had occupied with her husband for some years. Claimant is a nephew of deceased, and went to live with her in 1885, when he was 15 years old. During his minor-

ity he was clothed and schooled by deceased and her husband, working on the farm during the summer months and whenever he was not in school. After he was 21 he attended school a few months, but, with this exception, continued to work on the farm as theretofore until the summer of 1894, when he went to Missouri, where he worked several months; returning to decedent's farm in April, 1895. He remained at the farm during the summer of 1895, was married in the fall, and brought his wife to the farm, where she was paid $1 per week for her services. In March, 1896, claimant and his wife left, and engaged in the laundry business. They returned for a visit in 1899, and remained there four months; the claimant working on the farm as usual. At the end of this period they again left to engage in the laundry business.

On the last day for filing claims before commissioners, the claimant filed a claim "for work and labor performed for Caroline Lamb, deceased, from April 1, 1885, to the first day of March, 1895, $2,200." After an adjournment of the hearing until a later date, the claimant, without any order of court, presented a claim for services in 1899 of $80. Again, on the trial of the appeal in the circuit, claimant asked leave to amend his first claim so as to extend it to April, 1896. This amendment was refused by the circuit judge on the ground that it would enlarge the claim made before the commissioners to include a period of later service. No error is assigned upon this ruling, and we are unable to see any impropriety in it if it were challenged.

On the hearing before commissioners the claim for services in 1899 was wholly disallowed, and claimant took no appeal from this action. It will be seen, therefore, that the only claim that the circuit court had to pass upon is that described in the original claim, i. e., for services between 1885 and March 1, 1895. The circuit judge directed a verdict for the estate, mainly on the ground that no contract, express or implied, to pay for the services charged for, had been shown. The counsel for the estate also,

made the point in the court below that the claim was barred by the statute of limitations.

The case made by claimant was certainly not very convincing. The testimony resembles very closely in its character that discussed in *Decker* v. *Kanous' Estate*, 129 Mich. 147 (88 N. W. 398). There was no proof of a direct promise to pay, except as hereinafter referred to. There was testimony that the deceased frequently expressed an intention of doing something for complainant, but never in his presence, except as hereafter stated. These expressions of Mrs. Lamb were all quite as consistent with the purpose of preferring complainant over other heirs, as with the idea that any legal liability rested upon her. Complainant's wife did, however, testify that, after claimant and herself were married, claimant "wanted to buy this eighty. She [referring to decedent] said: 'No; you can't have it now, but you must have it when I am done with it, for your work.'" Later in the case witness was recalled, and testified as follows:

"*Q.* Mrs. Rodgers, you testified about hearing a conversation between yourself and your husband and Mrs. Lamb, wherein Mrs. Lamb told your husband, in substance, if I remember correctly, that she intended to deed this north eighty acres of land of the farm to him to pay for his work?

"*A.* Yes, sir.

"*Q.* When was that conversation?

"*A.* It was a little while before we left there, in March.

"*Q.* Of 1890?

"*A.* 1896 it would be. We came there in November, 1895, and left in 1896.

"*Q.* Do you know, of your own knowledge, after that conversation took place, whether Mr. Rodgers did do some work for Mrs. Lamb?

"*A.* Yes, sir; he kept right on working up until the time we left.

"*Q.* What reply did your husband make to her?

"*A.* He said, 'All right.'"

Passing by the discrepancy between these statements, there may be enough in the latter to indicate an admission

on the part of decedent of an obligation to pay. But if we assume that there was a scintilla of evidence to carry the case to the jury, we see no escape from holding that the claim is barred by the statute of limitations. There was no evidence of a mutual, open account. *In re Hiscock's Estate*, 79 Mich. 537 (44 N. W. 947).

The account of claimant was not for continuous services, as there was an interruption in 1895, and again in 1896. It is contended, however, that where services are rendered, with an agreement to compensate them out of the employer's estate, the statute of limitations will not begin to run until the death of the employer. This is clearly so, and is no more than saying that a demand may not be sued upon until due, but this does not aid the claimant in the present case. When the conversation above detailed occurred, the services had been fully performed; and, if they were rendered upon a mutual understanding that they were to be paid for, the claimant was then entitled to bring suit to recover for them. The proposition which Mrs. Lamb then made, according to the revised testimony of Mrs. Rodgers, was to *deed* the north 80 to him. This is the one proposition to which he assented, so far as the testimony shows, and this did not constitute an agreement to postpone his claim until her death, nor for any definite time. More than this, it was a contract not valid under the statute of frauds, and void for all purposes. *Scott* v. *Bush*, 26 Mich. 418 (12 Am. Rep. 311).

Judgment will be affirmed, with costs.

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

BOARD OF WATER COMMISSIONERS OF DETROIT *v.* BOARD OF EDUCATION OF DETROIT.

MUNICIPAL CORPORATIONS—MUNICIPAL BOARDS—WATER.

The board of water commissioners of the city of Detroit, required by the charter of the city to "furnish a full supply of water for public and private use in said city," is entitled to receive pay for furnishing water to the board of education of Detroit, as the latter is a distinct entity although coextensive with the city. Act No. 90, Laws 1853.

Error to Wayne; Rohnert, J. Submitted April 12, 1904. (Docket No. 47.) Decided July 16, 1904.

Assumpsit by the board of water commissioners of the city of Detroit against the board of education of the city of Detroit for water furnished. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

John W. McGrath, for appellant.

P. J. M. Hally, for appellee.

MONTGOMERY, J. The question in this case is whether, under the act of 1853 (Laws 1853, Act No. 90), establishing a water board, and under the amendments to that act, the plaintiff is entitled to receive pay for water furnished to the school board. The circuit judge, while of the opinion that, as a matter of right and justice, this question should be answered in the affirmative, concluded that this court had, in effect, decided the question the other way in *Board of Water Com'rs of Detroit* v. *Railway Co.*, 131 Mich. 1 (90 N. W. 657, 91 N. W. 171), and directed a verdict for the defendant. The case cited above was construed by the circuit judge as holding that the board of water commissioners was not authorized to exact pay for

water used for public purposes of any kind. So construed, the case would be inconsistent with *City of Detroit* v. *Board of Water Com'rs*, 108 Mich. 496 (66 N. W. 377, 31 L. R. A. 463), and *Board of Water Com'rs of Detroit* v. *Commissioners of Parks and Boulevards*, 126 Mich. 459 (85 N. W. 1132). The authority of each of these cases was recognized in *Board of Water Com'rs of Detroit* v. *Railway Co.* That case was determined under the view that the terms of section 8 of the act in question plainly implied that water used for street sprinkling purposes should be supplied by the water board.

It was stated by Chief Justice HOOKER:

"From the reading of section 8 we may reasonably understand that the water board, and not the council, is charged with the duty of locating fire hydrants and jets for public purposes. The council cannot control this. The same may be said of the hydrants for public use. These are evidently intended for the use of the individual as contradistinguished from the jets or fire hydrants, which are for the corporate use for general public purposes, such as fire, flushing sewers, street washing and sprinkling. A limitation is put upon the power of the water board as to hydrants for public use, and the board is not given power to erect fountains, except with the consent of the council. It would seem that the responsibility for the erection and maintenance of all of these things is wholly upon the board, except as limited by the requirement as to fountains. It is discretionary with them when and where these things shall be, and when they shall be discontinued or removed, but, while continued, the expense falls upon the board."

It will be seen that this comes far short of holding that any board of the city, or even the common council, may demand free water for any public use desired. The defendant, while coextensive with the city, is a distinct entity, and stands, with reference to free water, on no better ground than the house of correction. The case is ruled by *City of Detroit* v. *Board of Water Com'rs*, 108 Mich. 494 (66 N. W. 377, 31 L. R. A. 463).

Judgment reversed, and a new trial ordered.

The other Justices concurred.

LEGGETT v. CITY OF DETROIT.[1]

1. EMINENT DOMAIN—CONTRACTS TO RELINQUISH.
   A contract, whereby a municipality relinquishes its right to exercise the power of eminent domain, is void as being against public policy.
2. MUNICIPAL CORPORATIONS—DEEDS—RELEASES FROM FUTURE ASSESSMENTS.
   A condition subsequent in a deed to a city that the grantor shall be released from future assessments for opening streets is void.
3. DEDICATION—STREETS.
   Where a landowner conveyed land to a city for streets, by a deed containing a condition that certain parcels of land retained by him should be exempt from assessments for opening streets, and afterward dedicated a plat showing the land conveyed as streets, and recognized his dedication by the sale of lots, the right of the public to the streets was established.
4. EQUITY—PRACTICE—BILL OF REVIEW—ANSWER—WAIVER.
   Answering to an original bill in the nature of a bill of review filed by a person not a party to the suit, waives the right to appeal from the order permitting such bill to be filed.

Appeal from Wayne; Donovan, J. Submitted April 13, 1904. (Docket No. 49.) Decided July 16, 1904.

Bill by John W. Leggett against the city of Detroit to set aside a deed. From a decree for complainant, defendant appeals; and from an order allowing Albert U. Widman to file a bill in the nature of a bill of review, complainant appeals. Decree reversed, and appeal of complainant dismissed.

Bowen, Douglas, Whiting & Murfin, for complainant.

Timothy E. Tarsney (*John W. McGrath*, of counsel), for defendant.

Corliss, Andrus, Leete & Joslyn, for intervening petitioner.

[1]Rehearing denied December 22, 1904.

HOOKER, J. Virginia avenue, in Detroit, extends westerly from Woodward avenue. Complainant, Leggett, and others owned land extending from Woodward avenue to Hamilton Boulevard, and some years ago platted the same, calling the plat the "Peerless Addition." Virginia avenue was then in existence. The Peerless Addition lies upon both sides of it. At that time Second and Third avenues had not been opened as far north as Virginia avenue; some, if not all, of those streets, being opened only to a point some blocks south of Virginia avenue. Leggett and his associates made a deed of the lands belonging to them, which would be required for the purpose in case these streets should be extended through the proposed Peerless Addition, and sent it, with the following letter, to the common council:

"March 21st, 1903.

"TO THE HON. THE COMMON COUNCIL.

"*Gentlemen:* The undersigned herewith respectfully submit a deed of a strip of land for your street purposes and respectfully ask its acceptance by your honorable body.

[Signed] "FRANK E. SNOW,
"JOHN W. LEGGETT,
"JOSEPH C. HOUGH,
"By B. W. WHITING,
"Their Attorney in Fact."

The matter was referred to a committee, and the deed, in a modified form, was subsequently accepted. This was a quitclaim deed of such land, and contained a statement that the remaining property—

"Shall forever be excluded from any and all assessment districts which may hereafter be made to defray the expenses of opening and condemning such portions of Crawford street, sometimes called Hamilton Boulevard, Second avenue, and Third avenue, or any or either of them, or extension or extensions thereof, as are not now opened. The condition of this deed being that if said last above-mentioned described property is hereafter assessed or included in any assessment district for the purpose of defraying the expense of opening and condemning the now unopened portions of Crawford street, Second avenue, and

Third avenue, or extension or extensions thereof, or any or either of them, then and in that event, and on the happening thereof, the premises hereby conveyed shall each and all of them immediately and at once revert to and again become the property of the said first parties, their representatives or assigns, together with all and singular the hereditaments and appurtenances thereto belonging or in any wise appertaining. To have and to hold the said above-described premises to the said party of the second part, and to its successors, to the sole and only proper use, benefit, and behoof of the said party of the second part, and its successors, forever; subject to the restrictions above contained."

The deed was made in March, 1893, and is alleged to have described the premises subject to reversion, as the undivided one-third of the lands in dispute. Subsequently steps were taken by the city to open one or more of said streets, and, after buying the interests of his associates, Leggett filed the original bill in this cause. That bill prayed the reformation of the deed by striking out the words "one-third" in the description in the reversionary clause, and the conveying of the proposed opening of the street. A demurrer to this bill was filed upon the grounds (1) that the city had no authority to contract an exemption from a special assessment of this kind; (2) if made, it had no authority to perform such contract; (3) that the complainant was chargeable with laches. Upon hearing this demurrer was sustained. An amended bill was then filed. This bill prayed that the deed be set aside, and that complainant be decreed to be the owner of the land conveyed thereby. An answer was filed, and hearing had. The court decreed that the agreement was an unlawful one; that the deed conveyed no title to the city, which title still remained in complainant. This decree was dated January 12, 1903, and the calendar entries state that it was signed, filed, and entered on February 10, 1903, and that complainant's costs were taxed on April 3, 1903. On July 7, 1903, Albert U. Widman applied for leave to file a bill in the nature of a bill of review, claiming to be a purchaser from one Ferguson—who purchased from com-

plainant—of a lot fronting on Virginia avenue and Second avenue; that said lot would be seriously injured by the vacation of said Second street under said decree; and that the decree was erroneous. The petition alleged further that a new and confirmatory deed of the land was executed, delivered, and recorded, conveying the title of certain persons interested in said land to the city of Detroit, subsequent to the making of the assessment upon complainant's property for the opening of Second avenue, complained of in his bill. Other reasons were stated, which need not be set forth. This petition was heard and granted on July 14, 1903. On July 17th the city filed a claim of appeal from the decree, and on July 24th complainant filed a claim of appeal from the order allowing the bill of review to be filed, and on July 25th proof of service of notice of the last-mentioned claim of appeal was filed. August 11th case was settled and filed, and it was returned to this court on September 22d.

Counsel for complainant assert that the order permitting a bill in the nature of a bill of review to be filed was improper, for the reason that Widman was not a party to the original bill. On the other hand, petitioner's counsel maintain that a bill in the *nature* of a bill of review stands on a different footing from a bill of review, and may be filed, on leave granted, by one interested in and affected by the decree, although not a party to the suit. The principal questions in the case relate to the controversy between complainant and the city over the deed. This is a different case from that of *Coit* v. *City of Grand Rapids*, 115 Mich. 493 (73 N. W. 811). In that case the city contracted for land upon which to build an outlet for a sewer. In doing so it was not acting in the capacity of a State agency, but rather in its corporate capacity, for the benefit of its inhabitants, as contradistinguished from the public of the State at large. The giving of this deed was perhaps preliminary to the filing of a plat of the Peerless Addition, which plat shows Second and Third streets and Hamilton Boulevard as streets. This plat is not before us, but

it is stated that the plat "contains no reservation," and the dedication "describes the property platted by metes and bounds," and the street and avenues "as deeded and accepted by the common council." Our understanding is that this was recorded soon after the acceptance of the deed, though the bill states that it was platted on or about February 17, 1893, while the proof shows that the deed was accepted on April 4, 1893.

In the present case the most that can be claimed is that, in anticipation of a possible extension of certain streets, the council accepted a quitclaim deed of land contingently necessary upon a condition subsequent, to the effect that the land should revert if an assessment should be made against the grantors' land for the expense of any future opening of these streets to the north or south. It is not clear when the city then attempted to open these streets, but apparently it was several years after it accepted the deed. Meantime the complainant has sold lots by his plat to 15 or 16 persons. The evidence shows that this deed contains a condition, which, if performed, requires the city to exempt complainant's property from assessment for the specified purpose.

The case has been argued upon the theory that the city had attempted to make such an undertaking as the consideration for the deed. We have held that the right of eminent domain cannot be bartered away, and that contracts to do so by the legislature or any agencies of the State are ineffectual and void, as being against public policy. It was so held in *Re Opening of First Street*, 66 Mich. 42 (33 N. W. 15), where a city had promised a railroad company immunity from the opening of streets across its property. The case was discussed in *Woodmere Cemetery* v. *Roulo*, 104 Mich. 600 (62 N. W. 1010); *Wabash R. Co.* v. *Defiance*, 167 U. S. 102 (17 Sup. Ct. 748). We consider that proposition elementary, and do not cite other authorities. In the present case the city has not agreed that it will not take any of this particular property by virtue of the power of eminent domain. It has, how-

ever, accepted a deed upon condition that, should it do so, it will omit this property from assessment districts, and will relieve it from contribution to the expense thereof. In the opening of streets a city acts as an agency of government. In that respect the case differs from the case of *Coit* v. *City of Grand Rapids*, 115 Mich. 502 (73 N. W. 811), where, as already said, it was providing for a sewer, which is a matter of municipal interest, rather than of general public or State interest. In performing the functions of such agency, it has no private or municipal interest, and it has no power except such as is prescribed. It is given no authority to say that a given parcel of land shall never be taken as a highway, nor has it authority to agree that some or all lands which would be benefited by the establishment of a highway shall have immunity from contribution. The statute requires it to establish an assessment district, which must include all lands benefited. It cannot do less. If it can agree to omit one parcel, it may omit many. It cannot determine in advance the amount of benefits chargeable to one or more such parcels, for the law says that is for a jury.

In this case it was necessary to take land through several blocks, paying adequate compensation. If such taking involved the removal of buildings, or the disturbing of large business interests, the damages would be correspondingly large, while the benefits thereto might be small. In such case such damages would necessarily be chargeable upon other lands in the assessment district, of which complainant's lands, consisting of many valuable lots, might form an important part. If they are exempt by reason of this alleged contract, the burden must of necessity fall with undue weight upon the remaining lands within the district. It would only be necessary to make enough such contracts to exempt the entire assessment district, thereby depriving the council of any power to condemn land, for want of a source from which to compensate the owners of the land to be condemned. Properly and lawfully dis-

tributing the burden is as much a part of the duty of the city as the exercise of the power of taking the property.

It is not clear that it could exercise the power at all if it can be said to have deprived itself of the power to make a statutory assessment district by absolving a considerable portion of the property actually benefited from liability to contribute. It may be that by deeding land this entire addition has been paid its full and just share of the cost of opening the street, but we cannot know this. Neither can the common council know it until the benefits have been determined in the method provided by law. The effect of action by the common council cannot be to deprive future councils of power in the premises. See *Wabash R. Co.* v. *Defiance*, 167 U. S. 100 (17 Sup. Ct. 752). It was there said:

"While municipalities, when authorized so to do, doubtless have the power to make certain contracts with respect to the use of their streets, which are obligatory upon them (*New Orleans Gas Co.* v. *Light Co.*, 115 U. S. 650 [6 Sup. Ct. 252]; *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674 [6 Sup. Ct. 273]; *City Railway Co.* v. *Railroad Co.*, 166 U. S. 557 [17 Sup. Ct. 653]; *City of Indianapolis* v. *Coke Co.*, 66 Ind. 396; *City of Indianapolis* v. *Trust Co.*, 140 Ind. 107 [39 N. E. 433]), the general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions. These bodies exercise only such powers as are delegated to them by the sovereign legislative body of the State. Such powers, however, are personal to the municipalities themselves, and, being conferred for the benefit of the whole people, in the absence of authority to that effect, cannot be bestowed by contract, or otherwise, upon individuals or corporations in such manner as to be beyond revocation."

Another suggestion in this connection is this: We have learned that the legislature may exercise the power of eminent domain, although it shall have previously delegated it. If so, will it be claimed that this action of the council has deprived it of power in the premises to impose

the burden upon the property benefited. See *Woodmere Cemetery* v. *Roulo*, 104 Mich. 602 (62 N. W. 1010); *Township of Harrison* v. *Board of Sup'rs of Schoolcraft Co.*, 117 Mich. 217 (75 N. W. 456). We are of the opinion that a contract such as is sought to be inferred from this condition is not within the authority conferred upon the city, and that the case is distinguishable from *Coit* v. *Grand Rapids*, supra, in the important particular mentioned; this city not, as in that case, acquiring property for its own (in a sense) private purposes.

It remains to inquire whether the public right is nevertheless forfeited by the failure of the city to comply with the condition which the grantor saw fit to insert in his deed. This was not a condition precedent, the performance of which was essential to the vesting of the title in the city in trust for the public. If it were, it would do no more than to make the deed void. In that event he, as well as others, was chargeable with notice of the fact, as he is presumed to know the law. The delivery of this deed was followed by the record of a plat, in which we understand that these streets were shown, and in which it was asserted that they had been deeded to and accepted by the city. This was a publication to the world of an intention to dedicate to the public these lands for streets—a purpose which we do not discover to be stated in the deed, nor fairly inferable from it. The evidence shows that complainant has recognized this dedication in his sales, and we think it effective to establish a public right. This view of the case renders it unnecessary to discuss other points, except to say that we think that complainant has no standing in this court in his attempted appeal from the order in the case of Widman. From the understanding that we get of it, that was an original bill in the nature of a bill of review, filed by leave of court. Answer was filed, and the case was at issue. If this was done before the appeal was attempted, the right was waived, if it would otherwise have existed. We think, however, that the order was not appealable. *Maxfield* v. *Freeman*, 39 Mich. 64;

Beecher v. *Rolling Mill Co.*, 40 Mich. 308; Jennison, Chancery Practice, 213.

The decree is reversed, and bill dismissed, with costs of both courts, as to the city. The appeal is dismissed as to petitioner, Widman, with costs.

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

HUDSON v. COLUMBIAN TRANSFER CO.

1. WAREHOUSEMEN—BREACH OF CONTRACT—DAMAGE BY FIRE—INSURANCE.

   Defendant, a warehouseman, agreed to store plaintiff's goods in a certain building and the plaintiff had them insured as located in said building. The warehouseman, however, placed them in another building, where they were destroyed by fire. *Held*, in an action to recover their value, that it was immaterial whether or not they would have been damaged if stored in the building agreed upon.

2. CONTRACTS—INTERPRETATION—UNDERSTANDING.

   The meeting of minds, which is necessary to the formation of a contract, is determined by the expressed intentions of the parties, which may be wholly at variance with their secret intentions or understanding.

3. WAREHOUSEMEN—LIABILITY FOR LOSS OF GOODS.

   A warehouseman, who stores goods in a different building from that agreed upon, is liable to the owner in case of their loss by fire.

Error to Kent; Perkins, J. Submitted April 15, 1904. (Docket No. 46.) Decided July 16, 1904.

Assumpsit by Horace A. Hudson against the Columbian Transfer Company for the value of goods destroyed by fire while stored in defendant's warehouse. There was

judgment for plaintiff, and defendant brings error. Affirmed.

Hatch & Wilson, for appellant.

Smedley & Corwin, for appellee.

MONTGOMERY, J. This action is brought to recover the value of goods stored with the defendant as warehouseman, and destroyed by fire. The record contains 38 assignments of error, but, when the facts are stated as evidently found by the jury, the case lies within a narrow compass.

The parties are not quite agreed in their statement of the case, but an examination of the record convinces us that there was ample testimony tending to show that defendant, in March, 1901, contracted and used for storage the building known as 21 and 23 Campau street, in the city of Grand Rapids, and also controlled the fourth floor of an adjoining building, known as the Hopson-Haftencamp building.

In March, 1901, plaintiff made a contract to store the goods in question with defendant for hire, on the fourth floor of the building known as 21 and 23 Campau street. This statement is denied, but the question was submitted to the jury, and found in favor of the plaintiff. The plaintiff thereupon took out insurance on his goods as located in the building known as 21 and 23 Campau street, but whether this fact was communicated to the defendant is a matter of dispute; and, as this question was not submitted to the jury, the plaintiff's rights are to be determined upon the assumption that notice of the insurance was not given. The goods were taken from plaintiff's house, and were stored by defendant not in the building known as 21 and 23 Campau street, but in the Hopson-Haftencamp building, where, without negligence on the part of defendant, they were destroyed by fire. The circuit judge charged the jury that, if the contract was as claimed by plaintiff, he was entitled to recover, but that, if not satisfied by a

fair preponderance of evidence that such an agreement was made, there could be no recovery.

Complaint is made of the failure to present certain special questions to the jury. Two of these questions relate to whether the goods would have been damaged if they had been stored in the place agreed upon, and the probable extent of such damage. Clearly, if defendant is liable at all, the answers to these questions could not have affected the recovery, for, as to any damage which the goods would have sustained if stored in the place agreed upon, the plaintiff had secured indemnity by insurance, which was lost by defendant's breach of contract.

The other questions asked for the defendant's understanding of the agreement, and were preferred upon the theory that, as the minds of the parties must have met, the defendant's failure of understanding would answer plaintiff's claim of a contract. This is a fallacy. What is meant by "meeting of minds" is the agreement reached by the parties and expressed. As is well said in *Brewington* v. *Mesker*, 51 Mo. App. 348:

"The meeting of the minds which is essential to the formation of a contract is not determined by the secret intentions of the parties, but by their expressed intention, which may be wholly at variance with the former."

See, also, 9 Cyc. 244, 578; *Browne* v. *Hare*, 3 H. & N. 484.

The question, then, is whether, under the facts as found by the jury, the plaintiff was entitled to recover. We think this question should be answered in the affirmative. The theory of the plaintiff's case is that the defendant broke its contract of bailment, and subjected the property to a risk never contemplated by plaintiff, nor assumed or assented to by him. In such a case the rule is general that the bailee assumes the risk of the destruction of the property. The defendant was guilty of a technical conversion of plaintiff's property. See Lawson on Bailments, § 20; *Martin* v. *Cuthbertson*, 64 N. C. 328; *Lane* v.

Cameron, 38 Wis. 603. A case precisely in point is that of *Lilley* v. *Doubleday*, L. R. 7 Q. B. Div. 510, which case is cited with approval in *Bradley* v. *Cunningham*, 61 Conn. 485 (23 Atl. 932, 15 L. R. A. 679), and followed in *Line* v. *Mills*, 12 Ind. App. 100 (39 N. E. 870).

The other questions presented have been examined, but do not, we think, require further discussion. We discover no error in the case.

Judgment affirmed.

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

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SIPES *v.* MICHIGAN STARCH CO.

1. MASTER AND SERVANT—NEGLIGENCE—FELLOW-SERVANT.
   A jury have a right to infer that directions, given by one servant to another in the presence of the master, who makes no comment, are approved by him.

2. SAME—NEGLIGENCE—SET SCREWS.
   Failure to cover and properly guard set screws, which the factory inspector has ordered covered, is evidence of negligence. 2 Comp. Laws, § 5349.

3. SAME—ASSUMPTION OF RISK—STATUTORY DUTY.
   As the assumption of risk is the result of a contract of employment, and the employer cannot legally contract to violate a statute, the servant does not assume the risk due to an omission of a statutory duty on the part of the employer.

4. SAME—KNOWLEDGE OF SERVANT.
   It cannot be said, as a matter of law, that a servant should have known of that which could not lawfully exist.

5. PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—SET SCREWS.
   Where a servant was injured by an exposed set screw in a revolving shaft, which, according to some of the testimony, he could not have seen in the dim light, and which had been left exposed in violation of a statutory duty, and he had

been directed by a fellow-servant, in the presence of the vice-principal, to stand in a position where his clothes could be caught by the set screw, a refusal to direct a verdict for the defendant on the ground of contributory negligence was proper.[1]

Error to Grand Traverse; Mayne, J. Submitted April 14, 1904. (Docket No. 59.) Decided July 16, 1904.

Case by George H. Sipes against the Michigan Starch Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Foster (*Bowen, Douglas, Whiting & Murfin*, of counsel), for appellant.

Pratt & Davis (*Russell C. Ostrander*, of counsel), for appellee.

MONTGOMERY, J. This is an action of trespass on the case, brought by the plaintiff against the Michigan Starch Company, a corporation, to recover damages for personal injury received in defendant's factory on September 25, 1902.

The plaintiff is 52 years of age, and had been 35 years a carpenter and joiner. Some time prior to the time of his injury he was employed by the defendant company as a carpenter, and to do such work as might be required in the repairing of the factory. The defendant's factory is a three-story brick, built with a basement under the entire factory, in which some of the machinery is located. The place where the plaintiff was injured is at the west end of the factory, and about 12 feet from the north wall. It is a corn elevator, used to convey corn from the basement to the third floor of the factory. There is one shaft running north and south and another running east and west. The end of the north and south shaft rested on a pillow-block, or "bridge tree," so called. The east and west

[1] For right of servant to recover for injuries caused by projecting screws in shafts and other moving machinery, see note to *Ford* v. *Mt. Tom Sulphite Pulp Co.*, (Mass.) 48 L. R. A. 96.

shaft was about 4 to 4½ feet above the north and south shaft. Where the north and south shaft rested on the pillow-block was a coupling or collar, which was fastened to the shaft with a set screw extending, and just north of this coupling about two feet was the boot into which the shaft ran, which was used for the purpose of carrying the grain from the basement up. On the upper shaft was a pulley and belt. The north and south shaft on which the plaintiff was hurt was about 30 inches from the floor, which would be the distance from the basement floor to the top of the bridge tree. The bridge tree was built of timbers running north and south and east and west. The largest piece is an 8 x 8, 3 feet 2 inches long; the next is a 6 x 6, which is 2 feet 2 inches long; and the top piece is 1½ x 6, which is about 14 inches long. On the north side of the elevator was a ladder going from the basement floor to the main floor of the building, on which a man could work to adjust the pulley. The north and south shaft, on which the plaintiff was injured, is a slow revolving shaft, making about 30 revolutions per minute. The plaintiff stood upon the top of the bridge tree with the shaft revolving between his feet from east to west. He was facing the north, working at a pulley that was about four feet up from the bridge tree on which the plaintiff was standing, and was right abreast of him. The set screw caught him on the inside of the bottom of his overalls and twisted and injured him. He got upon the bridge tree and took the position that Mr. Parish had occupied. He saw the shaft revolving, but observed nothing else. The set screw extended about three-fourths of an inch. He saw the shaft revolving, and supposed that he was far enough away from it. He did not look to see if his clothes were coming in contact with the revolving shaft. He did not make any examination whatever to see if there were any danger by occupying the position upon the bridge tree. Electric lights had been put in the plant for use when necessary, but while the plant was undergoing repairs workmen with the plaintiff tore out the electric wires. The set screws in the

factory were ordered covered by the deputy factory inspector, William Mummery, on the 11th day of July, 1902. Notice was given to Mr. Bauer, president of the company, who ordered the set screws throughout the factory covered. There was testimony that the set screws in the factory and the one in question were covered immediately after the notice was given, but the cover had been knocked off this one. Plaintiff offered some testimony tending to show that the set screws were never covered. The plaintiff recovered, and the defendant brings error.

The points relied upon are that the plaintiff assumed the risk; that, in any view, he was guilty of contributory negligence; and in this connection that the negligence of Parish in directing plaintiff to stand upon the bridge to perform his work was the negligence of a fellow-servant. The last suggestion was embodied in defendant's fourth request, in which the court was asked to charge that Parish was a fellow-servant, and concluded with a request for a directed verdict. The instruction asked was faulty in ignoring the fact that Falkner, who was apparently the alter ego of the defendant, was present when the direction of Mr. Parish was given, and made no comment. From this the jury would have the right to infer that the method of doing this work resorted to by Parish and the plaintiff was not disapproved by the management.

The negligence of defendant, if any, consisted in leaving the set scew uncovered. Defendant's counsel cite cases to sustain their contention that it is not negligence to leave a set screw exposed and to omit to warn an employé of its presence. There are numerous cases in which set screws are referred to as in common use, and in which it is held that their presence cannot be made the basis of an action of negligence; and, if it were not for our statute, and the action shown to have been taken under it, these cases might be deemed controlling. But the legislature of this State, in recognition of the danger to employés and others from exposed set screws, has enacted that set screws shall be properly guarded when deemed necessary

by the factory inspector. 2 Comp. Laws, § 5349. In the case of defendant's factory this had been deemed necessary, and the set screws ordered covered. The testimony is conflicting as to whether the one in question had ever been covered, but, if it had been, the covering had not been kept in place, but it had been exposed for considerable time before the injury to plaintiff. It will hardly do to say that the neglect of a statutory duty imposed for the protection of workmen is no evidence of negligence. See *Marino* v. *Lehmaier*, 173 N. Y. 530 (66 N. E. 572, 61 L. R. A. 811).

Did the plaintiff assume the risk? In the well-considered case of *Narramore* v. *Railway Co.*, 37 C. C. A. 500, 96 Fed. 298 (48 L. R. A. 68), Judge Taft deals with the question of the assumption by a servant of the risk resulting from a neglect of a statutory duty by the master in his accustomed thorough and exhaustive manner. The conclusion reached (and which we approve) is that, as the assumption of risk is the result of a contract of employment, and as the master could not legally contract to violate a statute, he is not in a position to assert, as against the servant, the doctrine of assumption of risk, even in case the omission of such statutory duty on his part is known to the servant. Whatever effect knowledge possessed by the servant of a breach of statutory duty may have upon the question of contributory negligence, it seems that upon reason and authority it cannot result from such knowledge that he assumed the resulting risk. In the present case it does not appear that the plaintiff had knowledge of the neglect of duty on the part of the defendant. He testifies that at this day the usual way of protecting set screws is to countersink them, so that it appears that he did not know of any projecting set screws; nor could it be said as matter of law that he should have known of what could not lawfully exist. See *Jones* v. *Railroad Co.*, 127 Mich. 198 (86 N. W. 838).

Was he, then, guilty of contributory negligence in taking the position he did upon this bridge tree? If the in-

jury had resulted from a danger which was open to view, and which he was bound to look out for, there would be no difficulty in saying that he was guilty of negligence as matter of law; but the only danger which he in fact saw was the revolving shaft. There was testimony from which the jury might have found that in the dim light he could not have seen the set screw. He followed Parish to this position. The alter ego of his employer stood by and witnessed his direction to take the position which he took. And while neither fact may be conclusive in his favor, these circumstances may be legitimately considered in determining the question whether he acted as a man of ordinary prudence would under such circumstances. *Lake Superior Iron Co.* v. *Erickson*, 39 Mich. 492–500 (33 Am. Rep. 423); *Burnside* v. *Manufacturing Co.*, 121 Mich. 115 (79 N. W. 1108). We think the question was one for the jury.

The other questions discussed have been considered, but do not call for further discussion. No error is found.

The judgment will be affirmed.

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

BUHRER v. BALDWIN.

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1. COUNTIES—ACTIONS—PARTIES—COUNTY TREASURER.
   Suit is properly brought in the name of the county treasurer, for the use and benefit of the county, to recover upon a guaranty of payment of money deposited in a bank by a former treasurer for the county.

2. GUARANTY—COUNTY FUNDS—DEPOSIT IN BANK.
   One who guarantees the payment of county funds, to be deposited in an unincorporated bank, is liable to the county therefor, although the contract to deposit in such bank was prohibited by statute and void.

3. PARTIES—COUNTIES—BOARD OF AUDITORS.
The board of auditors of Wayne county was not a necessary party to a suit, brought in the name of the county treasurer, for the benefit of the county, upon a guaranty of payment of money deposited in an unincorporated bank, in pursuance of a contract entered into by the county treasurer and the board of auditors of the county with such bank.

4. BONDS—OBLIGEE—COUNTY TREASURER.
Where a statute required that a bond should be made to the county to secure the repayment of money deposited by the treasurer in a bank, a written guaranty of payment, under seal, indorsed on a contract by a bank to the county treasurer and board of auditors of the county, is a substantial compliance with the statute.

5. SAME—COMMON-LAW OBLIGATION.
Such bond may be supported as a common-law obligation, though it does not strictly conform to the statute.

6. GUARANTY—ACCEPTANCE—NOTICE.
Where a contract of guaranty recites a consideration, no notice of acceptance is necessary in order to bind the guarantor.

7. SAME—RELEASE OF GUARANTOR—TRANSFER OF CREDIT.
Where a county treasurer gave a check for the amount due the county from a bank to his successor, who deposited the check in the same bank, the transaction was not such a payment as would release one who had guaranteed the payment of the fund.

Error to Wayne; Frazer J. Submitted April 8, 1904. (Docket No. 26.) Decided July 16, 1904.

Assumpsit by Charles A. Buhrer, treasurer of Wayne county, for the use and benefit of said county, against Stephen Baldwin, Jesse H. Farwell, and Merrill B. Mills on a contract of guaranty. There was judgment for plaintiff on a verdict directed by the court, and defendants bring error. Affirmed.

Tarsney & Fitzpatrick, for appellant Baldwin.

F. H. & G. L. Canfield, for appellants Farwell and Mills.

Ormond F. Hunt, Prosecuting Attorney (*C. D. Joslyn*, of counsel), for appellee.

CARPENTER, J. August 20, 1895, Alexander I. McLeod, county treasurer of Wayne county, the board of auditors of said county, and A. Ives & Sons, a copartnership engaged in the business of banking in the city of Detroit, entered into a written agreement whereby said A. Ives & Sons agreed to "receive and safely keep all such surplus funds of the county of Wayne as may be offered or deposited by the treasurer and board of auditors of said county, and to reimburse and pay the same to said treasurer or his successor in office, or whoever may be lawfully entitled to receive the same, whenever called for, and to pay interest on said surplus funds * * * at the rate of 3½ per cent. per annum, to be computed on daily balances." On the same day the defendants signed a writing guaranteeing "the full payment of any and all sums and balances which may become due to the treasurer of the county of Wayne or his successor in office upon or by virtue of the above and foregoing agreement, according to the terms and conditions thereof."

At the expiration of the term of office of said Alexander I. McLeod there was a balance in the hands of said A. Ives & Sons, deposited by virtue of the foregoing agreement, of $5,630. A check for this amount was given by said McLeod to plaintiff, his successor in office. Plaintiff, instead of having the check cashed, passed the same to his credit as county treasurer on the books of said A. Ives & Sons, who, about 15 months thereafter, became insolvent. This suit is brought to obtain this balance by enforcing the contract of guaranty. It is brought in the name of the county treasurer, "for the use and benefit of the county of Wayne," by the prosecuting attorney of said county. Plaintiff recovered verdict and judgment in the court below. Defendants seek to reverse that judgment, for several reasons.

1. It is insisted that the suit cannot be maintained in the name of the county treasurer. We think this objection is answered by *Berrien County Treasurer* v. *Bunbury*, 45 Mich. 79 (7 N. W. 704).

2. It is insisted that no action can be maintained on the writing signed by defendants, because it was executed in violation of law. The law in question is Act No. 393 of the Local Acts of 1879, § 1. This act made it—

"The duty of the county treasurer of the county of Wayne to deposit daily his entire receipts from all sources, and all moneys, drafts, or checks on hand, to the credit of the county of Wayne, in such bank or banks, incorporated under the laws of this State or the United States, as may be designated by the treasurer and the board of auditors of said county as the depository of the funds of the county."

The act makes it a felony for the county treasurer to violate its provisions. It is contended that as A. Ives & Sons was a partnership, the deposit in question in its bank was prohibited and made a felony by this statute, and that, as a consequence, the undertaking of the defendants was an illegal contract, which cannot be enforced. If this suit is to be regarded as the personal suit of the county treasurer, who has violated the statute, there would be great force in this contention. It is earnestly insisted that the court should so regard it; and it is said that, if this action should fail, the county will lose nothing, since it is fully indemnified by the bond of the county treasurer. We cannot regard this suit as the personal suit of the county treasurer. The form of the declaration, the prosecution of the suit by the prosecuting attorney, the objection already discussed and disposed of, all indicate that it is a suit by the county to recover its money. The fact, if it be a fact, that the people of the county of Wayne have double security for this money, is a circumstance of no legal importance. If they are so secured, the officials of that county, and not this court, have the right to determine to which security they will first resort. They have determined to resort to the obligation of defendants. Nor does this record enable us to say with certainty that the sureties on the treasurer's bond are now responsible. It cannot, therefore, be said that the county will not lose its money if defeated in the present action.

Assuming this suit to be the suit of the county to recover the money illegally deposited with A. Ives & Sons, does the statute prevent the enforcement of the contract? Did the legislature, in enacting the statute of 1879, intend that those who agreed to make good a loss to the people, caused by a violation of that law, should be released from their contract? No such legislative intent is expressly declared in the statute. Shall it be inferred? The learned trial judge, in speaking of the statute, said:

"It simply means that this was a protection to the money of the people * * * against the county treasurer depositing it in a place that the lawmakers deemed insecure. * * * This statute was not enacted for the purpose of preventing the county getting back their money. * * * It seems to me it would be a very unreasonable interpretation of the statute" to hold, "because a public officer violates the law, and does an act that he has no right to do, that therefore the people lose their money."

This reasoning, in our judgment, is sound, and is sustained by authority. In *Deming* v. *State*, 23 Ind. 416, suit was brought to foreclose a mortgage securing the payment of school funds. These funds were loaned on property which was subject to a prior incumbrance, in violation of law, requiring such money to be loaned on unincumbered property. In opposition to the suit it was contended that the mortgage was void, and could not be enforced. This defense was declared untenable, and the reasoning of the court so thoroughly covers this case that we insert it in this opinion:

"These provisions [the statutory provisions respecting loaning on incumbered land] defining the duty of the auditor were obviously intended as safeguards for the preservation of the fund. Their whole tenor indicates a careful purpose of the legislature to make every loan secure beyond any contingency. This, too, was unquestionably the only object sought to be attained. Should we hold that the mortgage is void because the auditor chose to disregard that provision of the statute which required him to make no loan upon lands incumbered, we should

defeat the very object of the law, and enable the party who had obtained the loan by taxing the good nature of the auditor to pocket the money obtained, without being required to refund it. And this, too, it may be, not at the expense of the auditor or his sureties; for after the lapse of ten years his official bond may furnish no indemnity whatever, and the school fund must sustain a loss which its owners, the inhabitants of the township, had no power to prevent. Their agent, the auditor, * * * might thus by design squander their fund at his pleasure. Every instinct of justice revolts at the proposition, and the conscience is at once shocked by the claim of exemption made by the borrower upon such a pretext. * * * The general rule of law that a contract prohibited by statute is void is familiar, and we do not lose sight of it. It is a wholesome rule in every case where it is properly applicable. The general doctrine as to such contracts is that the courts will not enforce them, nor aid in the recovery of money paid in pursuance of their terms; but parties who have contracted in violation of law will be left without remedy whenever they are in pari delicto. The plain reason and purpose of the rule commends it to every enlightened judgment. It is to secure obedience to the statute which has forbidden the thing to be done, and thereby aid in accomplishing the legislative intention. Thus the violation of public law is often punished, and thereby obedience to it secured. But the rule is properly applied only where the reason upon which it is founded exists. 'The law ceases with the reason thereof,' and it is a grave error to regard it as a merely arbitrary rule, applicable to all contracts which are prohibited by statute. It is generally applicable, because the thing prohibited is usually immoral, or against public policy. Gaming contracts, contracts made on the Sabbath, contracts of champerty and maintenance, and many others of like nature might be mentioned as examples. But sometimes contracts are prohibited for the mere protection of one of the parties against an undue advantage which the other party is supposed to possess over him. In such cases the parties are not regarded as being equally guilty, and so the rule is not deemed applicable, though both have violated the law."

In *Scotten* v. *State*, 51 Ind. 52, school funds had been loaned upon a promissory note upon which appellant was

surety, contrary to a statute which required such loans to be "secured by mortgage upon real estate." It was held that, under the authority of *Deming* v. *State*, supra, the note was enforceable against appellant as well as his principal. See, also, *National Bank* v. *Matthews*, 98 U. S. 621; *In re Burt*, 12 Blatchf. 252 (Fed. Cas. 2,209); *Lester* v. *Howard Bank*, 33 Md. 558 (3 Am. Rep. 211); *Savings Bank of San Diego Co.* v. *Burns*, 104 Cal. 473 (38 Pac. 102); *Brittan* v. *Oakland Bank of Savings*, 124 Cal. 282 (57 Pac. 84, 71 Am. St. Rep. 58); *Bibb* v. *Miller*, 74 Ky. 306.

3. It is insisted that the board of auditors of Wayne county was a necessary party to this suit. While the board of auditors was a party to the original contract, the money was to be paid to the county treasurer, and the writing signed by defendants contains no reference to the board of auditors, but guarantees "the full payment of any and all sums and balances * * * to the treasurer of the county of Wayne or his successor in office." We do not think the board of auditors should have been joined as plaintiff for a breach of this contract. See *Sprague* v. *Wells*, 47 Minn. 504 (50 N. W. 535).

4. It is insisted that defendant's obligation does not comply with the statute heretofore cited (Act No. 393 of the Local Acts of 1879), which provides that "said bonds shall be made to the county" (Id. § 2). As already indicated in this opinion, the bond does run to the county treasurer for the county. This we think a substantial compliance with the statute. See *Tevis* v. *Randall*, 6 Cal. 632 (65 Am. Dec. 547). It may also be said that this bond may be supported as a common-law obligation, though it does not technically conform to the statute. See *County of Bay* v. *Brock*, 44 Mich. 45 (6 N. W. 101).

5. It is insisted that defendants are not bound by their guaranty, because they have never been notified of its acceptance. We think the true theory upon which guarantors are entitled to notice of acceptance is that their undertaking is a mere offer, and does not become a binding

contract until such notice. See *Davis* v. *Wells*, 104 U. S. 159. It results from this theory that guarantors are entitled to notice of acceptance only when their undertaking can be construed to be an offer of guaranty. When, however, that undertaking recites a consideration, though, as in this case, that consideration is merely nominal, conclusive evidence is furnished that the guaranty has been made with the assent of the obligee, communicated to the guarantors; and in such cases notice of acceptance is unnecessary. See *Davis* v. *Wells*, 104 U. S., at page 167; *Davis Sewing Machine Co.* v. *Richards*, 115 U. S., at page 527 (6 Sup. Ct. 173); *Taylor* v. *John A. Tolman Co.*, 47 Ill. App. 264; *Lawrence* v. *McCalmont*, 2 How. (U. S.) 426; *De Cremer* v. *Anderson*, 113 Mich., at page 580 (71 N. W. 1090).

6. It is claimed that the contract was performed, and the defendants released from their obligation, by the delivery of the check of Treasurer McLeod to Treasurer Buhrer, and his redeposit of the same with A. Ives & Sons. Really this amounted to no more than a transfer of credit from the outgoing to the incoming treasurer on the books of A. Ives & Sons. This transaction, according to the authorities cited in defendants' brief, did amount to a payment by the former treasurer to his successor. But it was in no sense a payment by A. Ives & Sons of the balance due from them "to the treasurer of the county of Wayne or his successor in office."

It results from these views that the judgment of the court below should be affirmed, with costs.

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

HARDEN v. CITY OF JACKSON.

MUNICIPAL CORPORATIONS—PERSONAL INJURIES—DEFECTIVE SIDEWALKS.

A city is not liable for injuries to a person, received by a fall caused by his cane going through a crack between two planks with decayed edges, where the walk was in a reasonably safe condition for persons not using canes.

Error to Jackson; Peck, J. Submitted June 9, 1904. (Docket No. 4.) Decided July 16, 1904.

Case by Thomas Harden against the city of Jackson for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Albert O. Reece (*John W. Miner*, of counsel), for appellant.

Richard Price, for appellee.

HOOKER, J. The plaintiff was injured by a fall upon a sidewalk upon the main street in the city of Jackson, in front of a hardware store. This walk was made of plank nearly two inches thick, and had been down some years. It had been broken in spots, and there was evidence that there had been some decay, and that the walk had been repaired in several places, both by putting in new in place of broken planks, and by nailing sheet iron or boards over broken or decayed places. The evidence is suggestive of diligence in the matter of repairs, and it was also shown that the walk was inspected a few days before the accident, which occurred in the following way: The plaintiff walked with a crutch and cane. At a point where the walk was laid over an area, the cane suddenly went through the walk, letting the plaintiff fall. He testifies as follows about the transaction:

"I was standing in front of Crone & McGraw's hardware store—the east window—and the car came down and stopped in front of the Hibbard House, and I started, going to take it; and as I started I put my cane forward, and, when I bore on my cane on the boards, I went right through, and the cane went down. I was walking with a cane and a crutch—the cane in my right hand, and the crutch under my left arm. I always put the cane ahead of my foot, then made my step. * * * When the cane went through the walk I was shocked, I went through so quickly. I didn't know anything at all, and, the first thing I knew, Mr. Weatherwax came out and lifted me up. I was almost picked up as soon as I was down. One man handed me my crutch, and another man my cane, and as he picked up my cane I saw a hole or dozy spot in the walk; and that is the last I saw of Main street for ten months. The cane was through a hole, and hanging on the walk, and the hole was the size of the end of the cane. The wood around it was kind of dozy, I should say. That is the only thing I could tell. * * * I did not know before I placed my cane on this weak spot that it would let me through. This walk was on the north side of Main street, and the place where I fell was opposite the junction of Main and Francis streets. The walk there was very bad. I should say it was dangerous, because there were holes there. It was patched with tin or iron and with extra pieces of wood. I could not remember how long this piece of walk was down. My place of business was right upstairs opposite this piece of walk. It had been patched since it was put down. There was a new walk put down there originally by Mr. Bader. It was an old walk—probably been down ten or twelve or fourteen years. It had been patched because there were holes there and dangerous places. The planks had broken out between each other. There were several rotten places. I should think the holes were occasioned by rot. There were strips of tin put in some places, probably two or three or four inches wide. I have seen pieces of iron put there, three or four inches wide, to cover over cracks. It had been in this general condition, with holes, rotten places, and patches, for several years. * * * There was no hole where I put my cane before I put my cane there. When the man handed me the cane, he pulled the cane right out, and there was a hole just the size of the cane—right there in the dozy spot."

On cross-examination he said:

"I could not look to see where I put my cane all the time.

"*Q.* Now, if you hadn't been going to the car, Mr. Harden, do you think there was anything about the character of that spot that would have attracted your attention as you passed by?

"*A.* No, sir; I don't know that there was anything that would have attracted my attention.

"*Q.* You looked at this spot after you pulled your cane out?

"*A.* I could not help but see it. I didn't pull my cane out. Another man pulled it out and handed it to me. I saw the spot after the cane was pulled out. There was a round hole in it, the size of the largest part of the cane. I fell with my whole weight on the cane. The hole was between two boards. All I could see of it there was the round hole. The last I ever saw of that spot was when I left there that night.

"*Q.* You claim that there was nothing else about that place that would have attracted your attention, even if you had not been hurrying for the car?

"*A.* I don't think it would.

"*The Court:* Were there two planks and boards came close together?

"*A.* They came close together, but there was a dozy spot, I should think about that long (indicating about eighteen inches), between the two boards—part on one and part on the other.

"*Q.* Now, in walking with your crutch and cane, when you came over on your cane you threw your full weight on it, did you not?

"*A.* Yes, sir. I am sure I looked at the exact spot, because I saw them pull the cane out. I don't know who it was that pulled the cane out."

This is a fair sample of other testimony which may be said fairly to indicate that this was an old walk, which was being made to do service by such repairs as were from time to time necessary.

It is contended that, even if the edges of the two planks between which the plaintiff's cane passed were beginning to rot, it was not observable from above, and the defect was therefore a latent one; and, in support of this conten-

tion, counsel cite the fact that no witness testified to noticing any decay before the accident. It appears that the planks were in a condition at that place reasonably safe for persons' feet, and that the accident became possible only by reason of the fact that plaintiff depended upon a cane for support, which is said to be not such ordinary use as the walk is provided for. Upon plaintiff's part, counsel urge that, while comparatively few lean on canes or are supported by crutches, the aged and infirm have done so from time immemorial, and that it is one phase of ordinary travel, for which walks are provided, and a walk that has cracks wide enough for a cane to go through, or spots weak enough to give way under a cane, is, within the statute, a walk not in good condition and reasonably fit and safe for travel.

Sidewalks of plank are in common use. We may take judicial notice of the material and mode of construction ordinarily adopted, as well as the methods and period of use. We know that they are often made of cheap lumber, and that they begin to deteriorate early. If laid tight when put down, the boards soon shrink and cracks open. The edges of the boards, being of the sappy portion of the timber, get dozy and begin to decay a long time before the heart is affected. Knots shrink and drop out, leaving knot holes. It is not to be expected that a sidewalk will be taken up and relaid as soon as the cracks open, and the edges of the board show signs of decay, or knot holes appear. To do this would make board walks the most extravagant kind of walks. Where they are built of heavy plank, what has been said applies with greater force. The undisputed proof in this case shows that this walk was kept in repair by mending. That is a proper custom, for in no other way can the reasonable life of a walk be secured. There is no proof of a serious decay in the walk at the place where the cane went through. If it was visible at all, it was, at most, a dozy place, clearly shown not to be dangerous to the ordinary pedestrian. There is no doubt that the legislature authorized sidewalks for

the use of the lame and aged, as well as for the able-bodied and young, but we know that the former classes should, and usually do, use greater care than the latter find necessary. A man walking on crutches knows the common method of building sidewalks. He knows that the edges of boards decay and knots drop out, and instinctively he learns to avoid putting his crutches in holes or cracks. We think it is not negligence for a city to use its plank walks, although they have cracks and knot holes through which a cane or crutch would go, acting upon the expectation that the traveler must know that they are practically unavoidable, and are common to all sidewalks, long before they are sufficiently worn to justify pulling them up and building anew. The city has a right, in the maintenance of its walks, to expect a reasonable degree of care from all persons; and, when its walks are safe for the ordinarily prudent use, there is no negligence. If there were no walks the pedestrian might still fall, and the crutches of the infirm go down in holes made by animals, or in soft places. An accident from such a cause would be a casualty. So, too, there may be casualties upon walks. The cities are not insurers of those who walk on sidewalks, and, even though injured without negligence on their part, the same is no more than a casualty, if the walk is as good as such person has a right to expect. Such is this accident. As in cases of snow and ice, there is a limit to the duty of the municipality. *Bigelow* v. *City of Kalamazoo*, 97 Mich. 121 (56 N. W. 339); *Weisse* v. *City of Detroit*, 105 Mich. 482 (63 N. W. 423); *Leslie* v. *City of Grand Rapids*, 120 Mich. 28 (78 N. W. 885); *Jackson* v. *City of Lansing*, 121 Mich. 279 (80 N. W. 8); *Lee* v. *City of Port Huron*, 128 Mich. 536 (87 N. W. 637, 55 L. R. A. 308). We are of the opinion that a walk should not be said to be unfit and not reasonably safe for travel when a cane will go through the cracks, even if dozy edges of the planks are what make it possible.

The judgment is reversed, and no new trial ordered.

The other Justices concurred.

CITY OF ST. JOSEPH *v.* VAIL.

TAXATION—SUITS BY CITY—WARDS.

Under 1 Comp. Laws, § 3863, providing that taxes shall become a debt to the township, ward, or city from the persons to whom they are assessed, a suit should be brought by the city and not the ward to recover taxes assessed in a ward for city purposes and made collectible by the city treasurer, although each ward has a supervisor and a separate tax roll.

Error to Berrien, Coolidge, J. Submitted June 10, 1904. (Docket No. 151.) Decided July 16, 1904.

Assumpsit by the city of St. Joseph against Leona F. Vail for taxes. There was judgment for plaintiff, and defendant brings error. Affirmed.

James O'Hara, for appellant.

N. A. Hamilton, for appellee.

HOOKER, J. A tax of $162.47 was assessed against the defendant on the tax roll of the Third ward of the city of St. Joseph. She refused to pay the tax, and the city brought an action in its own name, as plaintiff, to recover said tax. A verdict and judgment being rendered for the city, the defendant has brought error; contending that the tax is by statute made due to the ward, and not the city, and therefore the city cannot recover.

Counsel bases his contention upon section 3863, 1 Comp. Laws, which provides:

"(3863). SEC. 40. The taxes thus assessed shall become at once a debt to the township, ward, or city from the persons to whom they are assessed."

In St. Joseph each ward has a tax roll, and it is argued that this is a debt due to the ward. It is not claimed that there is any method by which the ward can collect this

tax, either by suit or otherwise. On the contrary, it seems to be admitted that it cannot. There is nothing to indicate that it has power to expend or otherwise dispose of the money if it could collect it. The city treasurer collects the taxes, and the law directs what disposition shall be made of them; i. e., for city purposes. Clearly this money does not belong to, and this tax is not a debt to, the ward. Whether there are places where wards may be said to be entitled to sue under this statute, we cannot say, though it is within legislative power to create such. In this case these taxes were a debt due to the city, and the action was properly brought.

Judgment affirmed.

The other Justices concurred.

MOWRY v. MOWRY.

1. CONVEYANCES — INCUMBRANCES—PURCHASE PRICE—PAROL EVIDENCE.
   An agreement by the grantee in a deed to pay a mortgage on the land may be shown by parol.

2. EQUITY—REMEDY AT LAW—MORTGAGES.
   Where complainant had conveyed a portion of his premises to defendant, in consideration that defendant would pay a mortgage, covering the land conveyed as well as other land retained by the grantor, a suit at law, to recover damages of the grantee for failure to pay the mortgage, would not afford an adequate remedy, as the complainant had a right to have the premises conveyed to the grantee first sold on a foreclosure of the mortgage.

Appeal from Branch; Yaple, J. Submitted June 10, 1904. (Docket No. 8.) Decided July 16, 1904.

Bill by William P. Mowry against Charles A. Mowry,

Hannah Mowry, and others to compel the foreclosure of a mortgage. From a decree for complainant, defendants Mowry appeal. Affirmed.

H. H. Barlow and *Burt E. Barlow*, for complainant.

Newberry & Humphrey and *Palmer & Palmer*, for appellants.

CARPENTER, J. March 30, 1885, complainant conveyed by warranty deed two tracts of land—one containing 160 acres, and one containing 79 acres—to his son, the first-named defendant. There was inserted in this deed immediately after the description of the land, the following clause: "Subject to all mortgages or claims that may be against said described land at this date." At that time the 160-acre tract was incumbered by a purchase-money mortgage securing the payment of $2,000. This mortgage also covered 80 acres of the home farm of complainant. Complainant filed this bill against his son and Hannah, his son's wife, and the other defendants, who are the owners of said mortgages, alleging the foregoing facts, and that his said son, the defendant, in consideration of said conveyance, agreed to pay said mortgage, and prayed that said mortgage be foreclosed, and that said 160-acre tract of land so conveyed to his son be first sold to satisfy the decree.

Defendants Willis H. and Mary A. Alden, who own the mortgage under consideration, do not appeal. We have, therefore, no occasion to determine whether or not the mortgagor has the right to compel a mortgagee to foreclose his mortgage.

Defendants Charles A. and Hannah Mowry, who do appeal, insist that defendant Charles did not agree to pay said mortgage. This was a question of fact, upon which the testimony was conflicting. The learned trial judge, who heard that testimony in open court, decided that he did. We think this decision correct. *Strohauer* v. *Voltz*, 42 Mich. 444 (4 N. W. 161), and *Canfield* v. *Shear*, 49

Mich. 313 (13 N. W. 605), are authorities for the proposition—if such authorities are needed—that it was competent to show by parol testimony that this agreement was made.

We cannot agree with defendants' contention that complainant had an adequate remedy at law. It is true that, if he had waited until his property had been taken upon the foreclosure of the mortgage, he could have recovered compensation by a suit at law. See *Strohauer* v. *Voltz*, 42 Mich. 444 (4 N. W. 161). But inasmuch as he had a right, unless the assertion of that right prejudices the mortgagee (and in this case it is to be presumed that it does not), to have the property conveyed to defendant first sold to pay the mortgage, to the end that he may preserve his own property (see *Cooper* v. *Bigly*, 13 Mich. 463), the remedy at law was inadequate.

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

The other Justices concurred.

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137 279
140 360

BERNARD *v.* PITTSBURG COAL CO.

1. MASTER AND SERVANT — PERSONAL INJURIES—DEFECTIVE MACHINERY—FELLOW-SERVANT—CAUSE OF INJURY.

   Where, in an action for injuries to a servant due to alleged defective machinery, plaintiff testified that the brake attached to a steam hoist gave way and that he heard the teeth rubbing against the foot brake, defendant is not entitled to a directed verdict because plaintiff testified, on cross-examination, that the engineer's taking his "foot off released the brake," where it appeared from the evidence that, if certain notches in the brake bar had performed their intended office, the brake would not have been released when the engineer took his foot off.

2. SAME—EVIDENCE—CONTRADICTORY STATEMENTS.

   Plaintiff's testimony, on direct examination, that the brake

"gave way," was not destroyed by his cross-examination to the effect that the engineer evidently put his foot down and caused the brake to move, and that was what caused the machinery to move, where it appeared, from further cross-examination, that the plaintiff did not intend to testify that the engineer loosened the brake after he had set it.

3. SAME—CONTRIBUTORY NEGLIGENCE—DIRECTION OF SUPERIOR.
The court will not direct a verdict for defendant on the ground that the plaintiff, a fireman, was negligent in obeying the directions of his superior fellow-servant, an engineer, in oiling a derrick chain, although there was a safer method than the one chosen by the engineer.

4. SAME—CONTRIBUTORY NEGLIGENCE—REMOTE CONTINGENCY.
Plaintiff was not negligent, in not closing the doors of a derrick to guard against the contingency of a fall, which was so remote that no ordinary man could have foreseen it.

5. SAME—ASSUMPTION OF RISK—KNOWLEDGE—DEFECTIVE MACHINERY.
A servant does not assume the risk of a defect in machinery of which he has no knowledge and of which he is not bound to know as a matter of law.

6. SAME—EVIDENCE—DEFECTIVE MACHINERY—SUBSEQUENT CONDITION.
A brake bar is admissible in evidence for the purpose of showing the method of its operation, without evidence to show that it was in the same condition as when the plaintiff was injured by reason of an alleged defect in it.

7. SAME.
It is not competent to show how a brake bar worked a year after the accident, where it appears that it had a new catch plate and was therefore a different appliance.

8. SAME—DECLARATION AS EVIDENCE—ADMISSIONS—LETTER TO COUNSEL.
Where defendant introduced in evidence the original declaration, which had been amended, for the purpose of showing the plaintiff was not injured in the manner claimed at the trial, it was competent for the plaintiff to introduce a letter, written by him to his counsel at the time the suit was commenced, to show that he did not make the admission in the original declaration.

9. TRIAL—INSTRUCTIONS—ISSUES—ERROR.
A charge that the only issue in the case was one of defective machinery was not error, where it appeared from the entire

charge that the jury could not have understood from such statement that they should disregard any of the defendant's claims.

10. INFANTS—PARTIES—AMENDMENTS—ERROR.

A suit, commenced by a minor by his next friend, may be prosecuted by the minor on his arriving at his majority by amending the record, but a judgment in his favor will not be reversed for failure to amend, unless such failure was prejudicial to the defendant.

Error to Chippewa; Steere, J. Submitted June 15, 1904. (Docket No. 26.) Decided July 16, 1904.

Case by Frank Bernard, Jr., an infant, by his next friend, against the Pittsburg Coal Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

E. S. B. Sutton (*Warner & Sullivan*, of counsel), for appellant.

John W. Shine (*M. F. McDonald*, of counsel), for appellee.

CARPENTER, J. Plaintiff was a fireman on a steam, movable derrick at De Tour, Mich., in defendant's employ. The derrick moved on a high trestle 20 feet above the dock, and elevated coal to a still higher trestle, from which it was loaded into vessels for fuel. On the 23d day of June, 1900, plaintiff sustained the injuries which occasioned this suit.

According to plaintiff's testimony, he was injured while assisting the engineer, his superior, in putting in its place on a revolving drum on the derrick the hoisting chain, which had been detached for the purpose of oiling in a barrel of oil which stood on the dock underneath. To raise the chain and bring it to its proper place it was attached to a rope which was coiled two or three times around the revolving drum. As the drum revolved, the chain was drawn toward it, the plantiff holding the loose

end of the rope to prevent its slipping. Connected with this drum was a brake which prevented its revolution when properly applied. The engineer applied this brake by placing his foot on a lever. Upon one side of the bar of the brake were notches to fit into a catch plate and hold the brake in position, and thus prevent the revolution of the drum when the engineer, having applied the brake, removed his foot. As the end of the chain to which the rope was attached reached him, the engineer shut off the steam, thus stopping the revolution of the drum. He then applied the brake, removed his foot—presumably expecting that the notches on the brake bar would hold the brake in place—and attempted to attach the chain to the drum. In consequence of a defect—the notches on the side of the brake bar being worn—the brake slipped from its place, the heavy weight of the chain caused the drum to revolve, and violently jerked the rope in plaintiff's hands and threw him to the dock underneath, thereby occasioning his serious injury.

The issue was submitted to a jury, and resulted in a verdict and judgment for the plaintiff. We are asked to reverse that judgment upon several grounds.

It is contended that the court should have directed a verdict for the defendant on the ground that plaintiff's testimony shows that his injury resulted, not from defendant's negligence in providing an unsafe brake, but from the negligence of the engineer in handling that brake. On direct examination plaintiff testified that the brake "gave way;" that he "heard the teeth rubbing against the foot brake." But it is claimed that this testimony is to be disregarded because on cross-examination he testified that the engineer's taking his "foot off released the brake." Unless it must be inferred from this testimony that the brake did not give way, a court cannot say that the jury shall not credit plaintiff's testimony given on direct examination that it did. It does not follow that, because the brake was released when the engineer removed his foot, the defective notches on the brake bar did not

occasion the brake to slip from its position. When the engineer's foot was on it, the brake was held in place by his weight, aided by the notches on the brake bar fitting into the catch plate. Because the notches in their defective condition did not hold the brake, it was technically true that when the engineer removed his foot the brake was released, though it is also true that it would not have been released had the notches performed their intended office. We cannot say, therefore, that the jury were bound to infer from this testimony, as defendant contends, that the engineer was not using these notches at all to keep the brake in place.

It is also urged that plaintiff's testimony given on direct examination is destroyed by the following portion of his cross-examination:

"*Q.* And he [the engineer] evidently put his foot down, and caused that brake to move, and that is what caused the machinery to move?
"*A.* Yes, sir."

That the plaintiff did not intend by this answer to deliberately testify that after the brake had been set the engineer went and loosened it, is shown by the following quotation from the cross-examination which immediately followed:

"*Q.* If he hadn't put his foot on it, you would not have had the accident?
"*A.* Yes, sir.
"*Q.* And as he disengaged this brake—you understand, loosened it?
"*A.* Yes, sir.
"*Q.* That set the drum rolling?
"*A.* When he set the brake?
"*Q.* I say when he unfastened the brake, that would set the drum rolling, turning?
"*A.* I don't quite understand you."

The subject of the cross-examination was then changed. A court would invade the province of a jury if it should say that because of testimony of this character, given on

cross-examination, no credit whatever can be given to what the witness had testified on direct examination.

It appears from the testimony that there was a safer method of oiling the chain than the one adopted on this occasion, and that, if the doors of the derrick had been shut, plaintiff would not have fallen to the dock. It is urged that plaintiff cannot recover, because he was guilty of contributory negligence in participating in this unsafe method, and in not closing the doors. We cannot assent to this contention. The engineer—plaintiff's fellow-servant and superior—and not plaintiff, chose this method. The case must be much clearer than this to justify our saying that, as a matter of law, an employé is guilty of contributory negligence in obeying the directions of such a superior. See *Chicago, etc., R. Co.* v. *Bayfield*, 37 Mich. 205, 210.

Nor can it be said that plaintiff, as a matter of law, was negligent in not closing the doors to guard against the contingency of his falling from the derrick. That contingency was so remote that no ordinary man could have foreseen it.

It is also urged that plaintiff had previous knowledge of the defect. By this we assume it to be claimed that plaintiff assumed the risk. According to plaintiff's testimony, he did not know of the defect in question, nor can it be said as a matter of law that he had occasion to know it. We cannot, therefore, say that he assumed the risk. See *Corbett* v. *American Screen Door Co.*, 133 Mich. 669 (95 N. W. 737).

It is contended that the court erred in admitting in evidence the brake bar in question without evidence that its condition at the time of the trial in 1902 was the same as it was in 1900, and also in not permitting defendant to show how the appliance operated the year after plaintiff was injured. We do not understand that this brake bar was offered in evidence for the purpose of showing the particular defect which it is claimed occasioned plaintiff's injury. Indeed, its offer was coupled with testimony showing that the catch plate was a different one. We as-

sume that the brake was produced in order that the jury might understand the method of its operation more clearly than they could from the words of any witness. We think it was admissible for this purpose. We think, too, that the court correctly refused to permit defendant to show the way this appliance operated the following year, because at that time it had a new catch plate and was therefore a different appliance.

Plaintiff's first declaration in this case charged that the injury to plaintiff occurred when the chain was being lowered. Before the suit came to trial, the declaration was amended to conform to plaintiff's claim, as heretofore stated. It was the position of defendant, testified to by its witnesses, that plaintiff was actually injured when the chain was being lowered. To support this claim defendant introduced in evidence, against plaintiff's objection, the original declaration. For the purpose of proving that he was not responsible for the alleged mistake in the declaration, plaintiff was permitted to introduce in evidence a letter in which the circumstance of the injury was set forth substantially as claimed in this suit, written by him to his counsel about the time suit was commenced. It is contended that the court erred in admitting this letter in evidence. When defendant used the original declaration as an admission made by plaintiff—and its right to do so is doubtful (see *Smith* v. *Davidson*, 41 Fed. 172; *Holland* v. *Rogers*, 33 Ark. 251; *Mecham* v. *McKay*, 37 Cal. 154; *Vogel* v. *D. M. Osborne & Co.*, 32 Minn. 167 [20 N. W. 129]; *Corbett* v. *Clough*, 8 S. Dak. 176 [65 N. W. 1074])—it seems to me clear that plaintiff had a right to prove that he did not make the admission. It follows that there was no error in the ruling under consideration. See *Stewart* v. *People*, 23 Mich. 73 (9 Am. Rep. 78); *Eherenkrook* v. *Webber*, 100 Mich. 321 (60 N. W. 761).

Complaint is made because the court said in his charge to the jury that the only issue in the case was one of defective machinery. The reading of the entire charge makes it clear that the jury could not have understood

from this statement, as contended by defendant, that they should disregard any of its claims. On the contrary, the effect of this statement was to prevent a verdict for plaintiff, unless the jury found that his injury resulted from defective machinery. The charge was a clear statement of the rules of law applicable in the case and carefully guarded defendant's rights.

When this suit was commenced, plaintiff was a minor, and it was brought in his name by his father as next friend. When the trial occurred plaintiff had reached his majority, and it is insisted that the suit cannot be prosecuted under the original declaration. It is well settled that plaintiff, on arriving at his majority, may, if he elects, prosecute a suit commenced when he was a minor by his next friend. See *Tucker* v. *Wilson*, 68 Miss. 693 (9 South. 898); *Clements* v. *Ramsey*, 4 S. W. 311, 9 Ky. Law Rep. 172; *Reed* v. *Lane*, 96 Iowa, 454 (65 N. W. 380); *Lasseter* v. *Simpson*, 78 Ga. 61 (3 S. E. 243); *Sims* v. *Renwick*, 25 Ga. 58; *Holmes* v. *Adkins*, 2 Ind. 398; *Shuttlesworth* v. *Hughey*, 6 Rich. Law (S. C.), 329 (60 Am. Dec. 130). It seems proper in such a case by a formal amendment of the record to show that the suit is prosecuted by plaintiff himself. This may be done either by striking out the name of the next friend (see *Sims* v. *Renwick; Lasseter* v. *Simpson*, supra), or by a suggestion of record that plaintiff has attained his full age (see *Shuttlesworth* v. *Hughey; Clements* v. *Ramsey*, supra). We should not, however, reverse a judgment for a failure to make such an amendment, which it seems may be made as a matter of course (see *Clements* v. *Ramsey*, supra), unless that failure was in some manner prejudicial to defendant. As the record stands, it indicates that the next friend, and not plaintiff himself, is responsible for any costs that might be awarded defendant. See *Holmes* v. *Adkins*, supra. If, therefore, defendant had prevailed in this suit, it might possibly have contended that its right to collect its costs from plaintiff was prejudiced by the failure to make the amendment under consideration, though it is probable that

in that case its rights would have been protected by an amendment nunc pro tunc. But, as plaintiff recovered judgment and costs, we are unable to see how defendant was in any manner prejudiced.

We do not think that the record contains any error, or that any other complaint of the defendant demands discussion.

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

The other Justices concurred.

KWIECINSKI v. NEWMAN'S ESTATE.

1. WITNESSES — MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.
   A physician is a competent witness to prove the value of items appearing in his books which had been admitted in evidence without objection, in a proceeding by him to recover from the estate of a deceased person the value of medical attendance and services rendered the decedent.

2. EVIDENCE — PHYSICIANS — SERVICES.
   The fact that a physician treated other persons than the deceased in the same house is irrelevant in a suit to recover for his services.

3. WITNESSES — CROSS-EXAMINATION — MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.
   A party who introduces testimony equally within the knowledge of a deceased person cannot complain because the opposite party examines the witness further upon the subject.

Error to Wayne; Brooke, J. Submitted June 15, 1904. (Docket No. 11.) Decided July 16, 1904.

Wenceslaus K. Kwiecinski presented a claim against the estate of Teresa Newman, deceased, for medical services. The claim was disallowed by the commissioners,

and claimant appealed to the circuit court where there was judgment for claimant, and defendant brings error. Affirmed.

Sumner Collins and *Stanton Clarke*, for appellant.

Ira A. Leighley, for appellee.

HOOKER, J. The appellee is a physician, and filed a claim against the estate of Teresa Newman for medical attendance furnished to her. The claim, which was disallowed by the commissioners, was sustained, in part, at circuit, and defendant has appealed.

The deceased was a housekeeper at the rectory of a Father Vanden Driesse, in Detroit, and died there November 21, 1901, and many of the services were rendered at the rectory. To establish his claim, the books of account of the plaintiff were introduced without objection. There was other evidence that he attended her professionally.

The plaintiff was asked the following questions, viz.:

"The entries on pages 148, 149, 150, and 151 (marked Exhibit 1) were made by me in the regular course of my business on the dates that they bear in the book, and the account as shown in those pages is the account of Teresa Newman. (Exhibit 1 offered in evidence.)

"*Q.* Were the charges made reasonable charges for the services performed and medicine delivered to her?

"*A.* Yes, sir.

"*Mr. Collins:* I object to that, under the statute—whether there were medicines delivered to her.

"*Q.* For services performed?

"*Mr. Collins:* I object to that.

"*Mr. Leighley:* That is not equally within her knowledge. Even if she were alive, she could not swear as to the value of the services, unless she is proven to be an expert.

"*The Court:* I will take an answer to the question. (Defendant excepts.)

"*Q.* If they were delivered to her, and the services were rendered to her.

"*A.* Yes."

We think the plaintiff was competent to testify to the value of the items proved by the book, and that such was the purpose and effect of his testimony. It would be hypercritical to reverse the case on this ground, especially in view of the colloquy given above.

The court refused to permit defendant to show upon cross-examination of plaintiff that plaintiff treated Fr. Vanden Driesse or others at the rectory during the period covered by this bill. It was immaterial, and, if true (and we think it appears in the case), it would have no tendency to discredit the books or plaintiff's claim.

It is unnecessary to allude to other questions, further than to say that the defendant introduced plaintiff's testimony about the receipt, thus opening the door to further examination by his counsel upon a subject equally within the knowledge of deceased. *In re Bennett's Estate*, 52 Mich. 419 (18 N. W. 195); *Lilley* v. *Insurance Co.*, 92 Mich. 159 (52 N. W. 631); *Beardslee* v. *Reeves*, 76 Mich. 661 (43 N. W. 677).

The judgment is affirmed.

The other Justices concurred.

SCHLOSS *v.* SCHLOSS.

LANDLORD AND TENANT—DESTRUCTION OF BUILDING—EVICTION—RENT.

Entry by the lessor upon the rented premises, for the purpose of repairing a building damaged by fire, and from which the lessee has removed, does not amount to an eviction which will relieve the lessee from paying rent during the repairs, where the lessee retains the key, suggests certain changes in the building, and moves into it after its completion.

Error to Wayne; Frazer, J. Submitted June 15, 1904. (Docket No. 27.) Decided July 16, 1904.

Assumpsit by Emanuel Schloss against Albert W. Schloss and Murray Schloss, copartners as Schloss Brothers, for rent. There was judgment for plaintiff on a verdict directed by the court, and defendants bring error. Affirmed.

Bernard B. Selling, for appellants.

Dickinson, Stevenson, Cullen, Warren & Butzel, for appellee.

HOOKER, J. The defendants leased certain premises—i. e., a store building—for a term of years, and entered into possession. A few months after, the building was rendered untenantable by fire, and the defendants moved out, but retained the key. The plaintiff entered soon after, and began the reconstruction of the building, without saying anything upon the subject to the defendants at the time, though they were cognizant of the facts, and, a few weeks later, requested certain changes in the building. After its completion, defendants moved in, and have remained there since, paying the rent monthly, as provided by the lease. This action was brought upon the lease to recover the rent for the period that defendants were out of the building. The plaintiff recovered, and defendants appeal; claiming that the conduct of plaintiff was an eviction, which relieved them from payment of the rent during that period. The parties appear to agree that the destruction of the building did not relieve defendants from their covenant to pay rent. The circuit judge found an implied assent to plaintiff's entry, which precludes the theory of an eviction. Although the defendants were not consulted before plaintiff's entry, they kept the key, and acquiesced in what he did. We think the conclusion of the circuit judge justified by the proofs.

The judgment is affirmed.

The other Justices concurred.

137 291
141 697

WHEELER *v.* BOARD OF CONTROL OF STATE PUBLIC SCHOOL.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—RIGHT TO BE SUED—STATE INSTITUTIONS.

A statute, taking from the board of control of the State public school the right to sue and be sued, does not impair the obligation of contracts previously made with the board.

Error to Branch; Yaple, J. Submitted June 16, 1904. (Docket No. 125.) Decided July 16, 1904.

Assumpsit by John A. Wheeler and Joseph A. Pitkin, copartners as Wheeler & Pitkin, against the board of control of the State public school upon a contract for installing a steam heating plant. Defendant had judgment on a plea in abatement, and plaintiffs bring error. Affirmed.

Osborn & Mills, for appellants.

Charles A. Blair, Attorney General (*Charles W. McGill*, of counsel), for appellee.

GRANT, J. Plaintiffs brought suit against the defendant upon a contract for installing a heating plant in the State public school at Coldwater. At the time the contract was made the statute provided:

"The members of said board shall constitute a body corporate under the name and style of the Board of Control of the State Public School with the right of suing and being sued, of making and using a common seal and altering it at pleasure." 1 Comp. Laws, § 2021.

In May, 1903, prior to the commencement of this suit, the legislature took away from this board of control its corporate powers, thereby repealing the provision authorizing it to sue and be sued. Act No. 143, Pub. Acts 1903. The defendant filed a special plea in abatement, to which

the plaintiffs demurred. The demurrer was overruled, and the plea sustained. The right to sue and be sued conferred upon the board by the original act did not form a part of the contract. The State may grant the right to bring suit against it, and it may at any time take that right away, without impairing the obligation of its contracts. *Beers* v. *Arkansas*, 20 How. 529; *Board of Public Works* v. *Gannt*, 76 Va. 455; *Ex parte Alabama*, 52 Ala. 231 (23 Am. Rep. 567); *Board of Sup'rs of Sanilac Co.* v. *Auditor General*, 68 Mich. 659 (36 N. W. 794).

Judgment is affirmed.

The other Justices concurred.

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137 292
141 380
d141 382

137 292
f151 70
d151 133

137 292
156 683

HARRIS *v.* RORABACK.

DEEDS—CONDITIONS SUBSEQUENT—BUILDINGS.

Where a deed contained a condition that the grantee, his heirs and assigns, would not occupy the premises except for one dwelling house on each lot, a subsequent grantee may be enjoined from erecting a two-story building designed for a dwelling in each story.

Appeal from Wayne; Rohnert, J. Submitted June 14, 1904. (Docket No. 16.) Decided July 16, 1904.

Bill by Albert S. Harris and others against Edwin C. Roraback and another to restrain the erection of a dwelling. From a decree for complainants, defendants appeal. Affirmed.

William P. Corbett (*Henry C. Walters*, of counsel), for complainants.

William F. McCorkle, for defendants.

CARPENTER, J. The parties to this suit are owners of lots on Woodland avenue, in the city of Detroit. The platters of this property placed in their conveyance of defendants' property, which ran to defendants' immediate grantor, the following restriction: "That the said second party, his heirs and assigns, will not occupy said premises except for one dwelling house to each lot." A similar restriction was placed in the conveyance of the property owned by complainants, and in all the conveyances on said avenue except one, and the owner of that excepted lot has complied with the restriction. Defendants have planned and started to build on their lot a two-story building, designed for two dwellings—one to occupy the ground floor, and one the second floor—each of which has a separate entrance and a separate cellar. Complainants contend that this structure is forbidden by the above-quoted language in the deed, and they bring this suit to enjoin its erection. They obtained a decree in the court below, and defendants have appealed to this court.

The decision of this case depends upon the proper construction of the restriction in the deed. We cannot agree with defendants that the force of this language is in any way impaired by the fact that the land contract which preceded the deed contained the words "a dwelling house," instead of the words "one dwelling house." If these two expressions have the same meaning, the land contract cuts no figure in this case. If they have different meanings, there is nothing to indicate that full force shall not be given to the language of the deed, which was the last expression of the parties. In my judgment, we can safely construe the restriction from its own language, and without looking outside that language. While there is authority for saying that, in construing this language, we should resolve doubts in favor of the defendants (see *Stone* v. *Pillsbury*, 167 Mass., at page 337 [45 N. E. 768], and authorities there cited), it is none the less our duty to give said language its obvious meaning. We are to construe the language in accordance with the intention of the par-

ties to the deed. In construing it, we should not assume that the restriction was inserted solely for the benefit of the grantor. The purpose of the restriction is to benefit not merely the grantor, but every owner of property and every resident on the street. Such a restriction assures purchasers that property will be devoted in a specified manner to residence purposes, and has a tendency to increase its value. And we think it not improper to say that it may fairly be inferred in the case at bar that this restriction and its general observance have increased the value of defendants' property.

In ascertaining the intention of the parties to the deed containing this restriction, we obtain, in our judgment, little aid by discussing defendants' contention, with which we do not agree, that "one" refers to "house," and not to "dwelling." We obtain infinitely more aid by looking at the sentence as a whole, and thus determining its obvious meaning. When the parties agreed not to occupy said premises, "except for one dwelling house," they obviously intended to agree, and they did therefore agree, that no building should be thereon erected which could not be described as one dwelling house. In the sense in which words are ordinarily used—and we must presume these words to be used in that sense—a building planned and designed for two or more dwellings cannot properly be described as one dwelling house. I think we are bound to hold that by the language in question the parties to this deed intended that no house except one planned and designed for a single dwelling should be erected. The case of *Gillis* v. *Bailey*, 21 N. H. 149, is an authority which supports our conclusion. *Hutchinson* v. *Ulrich*, 145 Ill. 336 (34 N. E. 556, 21 L. R. A. 391), relied upon by defendants, is opposed to this decision. It appeared in that case that, at the time the deed containing the restriction in question was made, flats or apartment houses like that which defendants were seeking to erect had been erected and were then in common use within a short distance of the lots purchased by defendants. This circumstance,

which was given great, if not controlling, weight, distinguishes that case from the one before us, for here no such buildings had been erected in the vicinity at the time the deed containing the restriction was made.

The case of *Stone* v. *Pillsbury*, 167 Mass. 332 (45 N. E. 768), also relied upon by defendants, is more clearly distinguishable. It was there decided that a building designed and planned as the residence of a single family might, without any change either in its exterior or interior, while used as a residence for a single family, also be used as a gold-cure sanitarium, without violating a restriction like the one in question. No such question is involved in this case. The question here is not how a building planned and designed as the residence of a single family shall be subsequently used, but it is whether a building designed and planned for two separate residences is properly described as one dwelling house. As already stated, we think it is clear that it is not.

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

The other Justices concurred.

BURKE v. BURKE.

DIVORCE—ALIMONY.

Evidence examined and *held* that the amount of alimony awarded by the circuit court on granting a divorce was proper.

Cross-appeals from Kalamazoo; Adams, J. Submitted June 15, 1904. (Docket No. 21.) Decided July 16, 1904.

Bill by Eola L. Burke against John H. Burke for a divorce. From the decree rendered, both parties appeal. Affirmed.

N. H. Stewart, for complainant.

L. N. Burke (*Dallas Boudeman*, of counsel), for defendant.

CARPENTER, J. From a decree granting complainant a divorce and alimony, both parties appeal. The single question raised by the appeal—and that is purely a question of fact—is whether the amount of alimony awarded was proper. It is sufficient to say that an examination of the testimony convinces us that neither party has a just right to complain of that award.

The decree of the circuit court will therefore be affirmed. Complainant will recover her taxable costs, less the amount already awarded for her disbursements.

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

FARNSWORTH *v.* FRASER.

137 296
138 662
137 296
145 228

1. BILLS AND NOTES—CONSIDERATION—MORAL OBLIGATION.
   Where decedent induced claimant to remove from his farm and reside with her by a promise that she would see that he did not lose by it, and the change in residence proved unsatisfactory to her, whereupon she agreed with him that she was under a legal obligation to compensate him for his loss incurred in moving, and gave him her note therefor, such satisfaction of his claim was an adequate consideration for the note.

2. SAME—VALUE OF CONSIDERATION.
   It was not necessary that a claimant should show that the value of the consideration was equal to the face of the note, it being sufficient to show the parties agreed it was of that value.

3. SAME—PARTIAL FAILURE OF CONSIDERATION.
   Where there was no evidence that the consideration of a note

was worth less than its face value, it was not error to refuse to submit to the jury the question of a partial failure of consideration.

4. SAME—WANT OF CONSIDERATION—BURDEN OF PROOF.
The duty of introducing proof to show want of consideration for the note of a decedent is on the administrator, but he does not have the burden of proving by a preponderance of testimony that there was no consideration.

5. SAME—INVITED ERROR.
Where the court, at the request of defendant, an administrator, charged the jury that the fact that the deceased signed the note would not authorize a recovery provided that the defendant showed the note was given without consideration, the defendant cannot complain of a further charge that the burden of showing there was no consideration for the note rested on the defendant.

6. EXECUTORS AND ADMINISTRATORS — ADMISSIONS — RULES OF PRACTICE.
While an administrator may not admit a liability against the estate, he must, in the trial of a case, be bound by the rules of law which regulate the practice in court.

7. TRIAL—ARGUMENTS—TWO COUNSEL—HARMLESS ERROR.
It was not prejudicial error to refuse to permit one of defendant's counsel to argue a particular question to the jury, where the other counsel was subsequently permitted to argue the question, and it did not appear that the question was not fully argued, or that the defendant asked to have the particular counsel argue it.

8. NEW TRIAL—MISCONDUCT OF JURY.
A new trial will not be granted because the jury took less than five minutes to reach a verdict.

Error to Ingham; Wiest, J. Submitted June 16, 1904. (Docket No. 30.) Decided July 16, 1904.

Asa Farnsworth presented a claim against the estate of Lucy M. F. Seely, deceased, for the amount of a promissory note, which was allowed by the commissioners. The administrator, William A. Fraser, appealed to the circuit court, where there was judgment for the claimant, and the administrator brings error. Affirmed.

William A. Fraser (*Black & Reasoner*, of counsel), in pro. per.

White & Cramton, for appellee.

CARPENTER, J. Claimant presented against the estate of Lucy M. F. Seely a negotiable promissory note purporting to be signed by decedent, dated September 23, 1893, whereby she promised to pay Asa Farnsworth or bearer the sum of $500, with interest, on or before three years from date. It was contended that deceased did not sign this note, and that the note was given without consideration. Both of these issues were submitted to the jury, who rendered a verdict for the claimant. We are asked to reverse the judgment for several reasons.

1. It is insisted that the testimony shows that the note was given without consideration, and that, therefore, a verdict should have been directed for the defendant. The testimony respecting the consideration of the note is this: In January, 1893, claimant was living on his farm in the county of Lapeer. Decedent wrote him:

"Rent your farm, and come and live with me for a year and try it. * * * I will give you all you can make and pay you what you think is right, two dollars a week, if that will do. * * * If you think favorably of this, you can say you do and come out here and make arrangements."

Subsequently claimant visited decedent, and made some arrangements; precisely what, we do not know, as the claimant was not sworn as a witness, his testimony respecting such arrangement being inadmissible (section 10212, 3 Comp. Laws), and no writing evidencing said arrangement is produced. He then returned to his home in Lapeer, rented his farm for three years, sold his effects at auction, and on the 15th of March, 1893, moved to decedent's farm near Mason, Ingham county. The decedent, Mrs. Seely, resided in claimant's family, and matters did not move smoothly. About July 1, 1893, according

to the testimony of claimant's wife, claimant said to decedent:

"'Aunt Lucy, things are not going here to please you,' and she said 'she didn't know as she said anything.' He says, 'You act as though you were dissatisfied, and I am very sorry, for I made a great sacrifice to come out here to try and please you, and it is anything but pleasant for us, and it seems to be very unpleasant for you;' and he said 'it is quite a damage to me.' She spoke up and said, 'What is the damage?' My husband [claimant] says, 'I would not have sold my stuff, and rented my farm, and come here, leaving everything.' He says, '$500 would not make me good.' And she says, 'I will pay it.' * * * That was all I heard. * * * We moved back to our farm March 16, 1894. * * * I first saw this note in the spring of 1894. * * * I understood from my husband, when he told me of the note, that it was for what we had lost in moving there by letting our farm."

It may be inferred from this testimony that the note was given in satisfaction of any claim that claimant might have against deceased for compensation for his loss in removing from his farm in Lapeer county to her farm in Ingham county.

It is contended that decedent, by the letter heretofore quoted, at most only morally obligated herself to compensate claimant for this loss, and that this moral obligation furnished no consideration for the promise evidenced by her note. It may be that, if it were left to a court to construe the language of said letter, the conclusion might be that decedent had not legally obligated herself to make such compensation. But under the circumstances of this case I do not think that the question depends upon the court's construction of that letter. By executing the note in suit decedent admitted that her promise was supported by a legal consideration. See *Rood* v. *Jones*, 1 Doug. (Mich.) 193. I think, too, it may be inferred from the testimony above quoted that both decedent and claimant conceived that the former was under, not merely a moral obligation, but a legal obligation, to compensate the latter

for his loss. They may have agreed that the language, "I will not let you lose if I can help it," contained in the letter, imposed upon decedent a legal obligation to make such compensation. If they did, thereby agreeing, as they had a right to agree, upon the construction of this language, a court—certainly in a case as doubtful as this—will accept that construction. See *District of Columbia* v. *Gallaher*, 124 U. S. 505 (8 Sup. Ct. 585); *Childers* v. *First National Bank of Jeffersonville*, 147 Ind. 430 (46 N. E. 825); and numerous other authorities cited in the 9th Cyclopedia of Law and Procedure, p. 589. According to that construction, it is clear that the satisfaction of claimant's claim was an adequate consideration for the note. See *Kennedy* v. *Shaw*, 43 Mich. 359 (5 N. W. 396).

It may also be said that the precise arrangement under which claimant moved from his farm in Lapeer county to decedent's farm in Ingham county is not shown by the testimony, but it was known both to claimant and to decedent. It may be that that arrangement legally obligated decedent to compensate claimant for the loss under consideration. As it may be inferred that decedent, by the execution of the note, admitted that she was under a legal obligation to compensate claimant for that loss, we cannot say that the jury were not warranted in inferring that the terms of this arrangement imposed that obligation upon her.

Neither is it true, as defendant contends, that the claimant was bound to show that the value of his claim was $500. It was sufficient for him to prove that he and decedent agreed that that was its value.

Nor did the trial court err, as defendant contends, in refusing to submit to the jury the question of partial failure of consideration, for there was no evidence that the consideration—the claim of claimant for compensation—was worth less than $500.

2. It is contended that the court erred in charging the jury that "the burden of showing that * * * there was no consideration for the giving of the paper" rested

upon the defendant. We shall not stop to inquire whether by this the court meant that the *duty of introducing testimony* to show want of consideration, after the note had been properly put in evidence, rested upon defendant, in which event the instruction was correct (see *Rood* v. *Jones*, supra; *Young* v. *Shepard's Estate*, 124 Mich. 522 [83 N. W. 403]), or whether he meant that the duty rested upon defendant to prove *by a preponderance of testimony* that there was no consideration, in which event the instruction was wrong (see *Manistee National Bank* v. *Seymour*, 64 Mich. 73, 74 [31 N. W. 140]). (The phrase "burden of proof" is often used in these different senses. See Thayer's Preliminary Treatise on Evidence, p. 355.) Assuming that the trial court used the phrase in the latter sense—and only in that event was the charge erroneous—we are bound to say that defendant cannot ask that the judgment be reversed on that ground. He requested the court to charge and the court did charge "that, if the jury shall find from the evidence that the deceased did actually sign the note, this in itself will not authorize him to recover, provided that the defendant shows from the evidence that the note was given without consideration." This request certainly indicates just as clearly as did the charge of the court that the burden to prove want of consideration by a preponderance of testimony rested upon defendant. This was the only request touching the subject preferred by defendant. If, therefore, the charge under consideration was erroneous, the error was due to the fact that the trial court adopted the theory urged by defendant. Appellant cannot ask a reversal for such an error, if error it was. See *Adkin* v. *Pillen*, 136 Mich. 682 (100 N. W. 176).

Defendant urges that the foregoing principle has no application to this case, because this is a suit against an estate, and that the defendant administrator "could not have agreed that the burden of proving consideration for the notes could be shifted from the claimant to the estate." The question under consideration is not whether the ad-

ministrator can agree to assume the burden of proof which rested upon the opposite party; the question is whether in trying his suit he must regard the rules of law which regulate the practice in court. We think it settled that he must. See *Barbier* v. *Young*, 115 Mich. 100 (72 N. W. 1096).

3. Defendant was represented in the court below by two counsel, each of whom argued the case before the jury. The court refused to permit the counsel who made the first argument to discuss the question of want of consideration for the note, because he was then of the opinion that there was no evidence tending to prove want of consideration. Afterward the court reconsidered this ruling, and permitted this issue to be argued to the jury by the other counsel for the defendant, as well as by counsel for claimant. It is urged that this was error. The only way in which this ruling injuriously affected defendant was to prevent a particular counsel from arguing this question when he was making his opening argument. We do not think this constituted reversible error. We cannot infer from the record before us that the question was not fully argued. We cannot say that defendant was prejudiced because he was denied the right of having it argued by a particular counsel, because he did not—as he should have done had he desired that privilege—ask for it when the trial court decided to submit the question to the jury.

4. It is contended that the trial court should have granted a new trial because it took the jury less than five minutes to reach a verdict. In disposing of this question the trial judge used the following language, which we approve:

"If the jurors were unanimous in opinion, and ascertained that fact, as they must have done to return a verdict, then there was no necessity for them to remain any longer in their room. Discussion among them was only necessary in case of a difference of opinion, and they are rather to be commended for their promptness than condemned."

No other question demands consideration.

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

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

PEOPLE *v.* POSSING.

137 303
156 1239

1. CRIMINAL LAW — INTOXICATING LIQUORS — SUNDAY CLOSING — ACTS OF AGENTS.
   In a prosecution for keeping a saloon open on Sunday, it is no defense that the saloon was opened by respondent's bartender without authority and contrary to his instructions.

2. INTOXICATING LIQUORS—INFORMATION—LANGUAGE OF STATUTE.
   An information in the language of the statute for violating the liquor law is sufficient.

3. INDICTMENTS AND INFORMATIONS—VARIANCE—SUNDAY CLOSING —ACTS OF AGENTS.
   Evidence that respondent's saloon was kept open by his agent was not at variance with an information charging, in the language of the statute, that he "did not then and there keep his saloon closed, but, on the contrary, he did then and there keep his said saloon open," as respondent was held responsible, not for the act of his agent in opening, but for his own neglect to keep it closed.

Exceptions before judgment from Leelanaw; Mayne, J. Submitted June 17, 1904. (Docket No. 190.) Decided July 16, 1904.

Joseph Possing was convicted of violating the liquor law. Affirmed.

A. F. Bunting, for appellant.

C. L. Dayton, Prosecuting Attorney, for the people.

CARPENTER, J. Respondent is a saloon keeper. He

was convicted of keeping his saloon open on Sunday, August 10, 1902. He contends that a verdict should have been directed in his favor, because his bartender opened the saloon without authority and contrary to his instructions. *People* v. *Lundell*, 136 Mich. 303 (99 N. W. 12), *People* v. *Roby*, 52 Mich. 577 (18 N. W. 365, 50 Am. Rep. 270), and *People* v. *Welch*, 71 Mich. 552 (39 N. W. 747, 1 L. R. A. 385), are authorities against this contention.

It is also contended that there was a variance between the information—which charged that respondent "did not then and there keep his saloon closed, but, on the contrary, he, the said Joseph Possing, did then and there keep his saloon open"—and the evidence, which shows that the saloon was kept open, not by respondent personally, but by his bartender, his agent. This contention cannot prevail. The information is in the language of the statute (section 5395, 2 Comp. Laws), and is therefore sufficient. See Tiffany's Criminal Law (4th Ed.), 463. The statute, as we have held (see *People* v. *Lundell*, supra), "imposes upon the keeper of a bar or saloon the affirmative duty to see that it is closed, * * * and that the neglect of this duty is an offense." The theory of the law as thus shown is that the respondent is held criminally responsible, not for the act of his agent in opening the saloon, but for his own neglect to keep it closed.

The conviction is affirmed.

The other Justices concurred.

137 305
f153 1 35

LOCKWOOD v. TENNANT.

137 305
f156 1479

1. MASTER AND SERVANT — INJURIES TO SERVANT — FELLOW-SERVANTS.

   If, without fault on his part, an employé is injured, he may recover against the master who is negligent, even though the negligence of a fellow-servant contribute to the injury.

2. SAME—APPLIANCES AND PLACES TO WORK—SAFETY — MASTER'S DUTY.

   The master is not obliged to make his premises perfectly safe, and furnish the best material, but his duty is discharged if he make the premises reasonably safe.

3. SAME—DEFECTIVE SCAFFOLD MATERIAL.

   The furnishing by a master of inch instead of two inch planks for a scaffold is not of itself negligent, where enough are furnished, and the scaffold may be made reasonably safe by doubling them.

4. SAME—SUBSTITUTING NEW MATERIAL—MASTER'S DUTY.

   Where, on complaint being made, the master orders such material as is on hand for scaffolding to be used until suitable material can be procured, and afterwards furnishes suitable material, he is not obliged to specifically order its substitution in order to relieve himself of liability.

Error to Saginaw; Beach, J. Submitted January 5, 1904. (Docket No. 4). Decided July 27, 1904.

Case by Mary A. Lockwood, administratrix of the estate of Charles W. Lockwood, deceased, against James H. Tennant for the negligent killing of plaintiff's intestate. There was judgment for defendant, and plaintiff brings error. Affirmed.

Weadock & Purcell, for appellant.

Keena & Lightner, for appellee.

MOORE, C. J. The plaintiff sues as the administratrix of the estate of Charles W. Lockwood, her husband, who

died from injuries received as a result of a fall from a high scaffold while in the employ of defendant, who had a contract to do the mason work on a large building to be used as a beet sugar factory. The case was tried by a jury, who returned a verdict in favor of defendant. The case is brought here by writ of error.

Upon the day of the accident, several hundred men were at work building scaffolds, and tearing down others, placing steam pipes and machinery, building walls, and many other things incidental to the construction of a large manufacturing plant. It was the claim of plaintiff that her intestate had been employed for about 11 days prior to the accident in and about the beet sheds and boiler room, as a common laborer. That up to a few hours prior to the accident, he had never been upon the scaffolds or runways in the building, and had no experience in that sort of work; that, in pursuit of his work, he had occasion to go from a higher platform to a lower runway, made of two planks, two inches thick, and an inch board; that the board broke, and Mr. Lockwood received injuries which resulted in his death; that the inch boards were unsuitable for the purpose for which they were used; that the defendant directed their use with full knowledge of the danger; that sufficient two-inch planks, suitable for such purpose, were not provided at the time of the construction of this runway. This defendant denies, and maintains that after the construction of the runway, and before the accident, sufficient two-inch planks were at hand, which could have been utilized in replacing the inch boards referred to. He also claims that, if the boards which were at hand had been properly used, the board would not have broken. Defendant also claims that no part of the runway broke, but that plaintiff stepped outside of the runway and fell.

The plaintiff's claim as to the direction of the master to use the boards, and his knowledge of their unsuitability, is based upon the following testimony:

"I says, 'Mr. Tennant, we ought to have some plank here,' I says, 'to use instead of these boards.' 'Well,' he

said, 'we will get a car load,' he said; 'they will be here in a couple more days.' Well, in a couple of days they hadn't come, and then I spoke to him again, and then they got a couple of wagon loads from some mill.

"*Q.* Was that sufficient to go on constructing the scaffold?

"*A.* No; wasn't enough.

"*Q.* Did you have any subsequent conversation in reference to it?

"*A.* Yes, sir.

"*Q.* To the one-inch boards?

"*A.* Yes; I did.

"*Q.* How long was that before Mr. Lockwood's death?

"*A.* I should say about a month.

"*Q.* What did he say to you then?

"*A.* He said he would get some more plank.

"*Q.* What did you say to him about the insufficiency?

"*A.* I went to see him, and I said: 'There isn't plank enough. We have got to use these boards, and they're liable to break.' And he said to use them until we got some plank.

"*Q.* What did you say, if anything, about men likely to be injured on these boards?

"*A.* I said the boards were liable to break through, and he said the boards would hold."

No assignments of error are made upon the introduction or rejection of evidence. They all relate to the charge of the court, and to his failure to charge as requested.

The plaintiff claims the master must use due care in furnishing proper materials, and whether he did so is a question for the jury, under proper instructions; citing many cases. This claim is conceded by defendant, but he insists, *first*, that, under plaintiff's own showing, defendant met this requirement, and a verdict should have been directed in his favor; and, *second*, that, conceding there was a question for the jury, it was properly submitted to them. It is not necessary to decide whether a verdict should have been directed for defendant, as the judge submitted the case to the jury.

Complaint is made of the following and other portions of the charge of a similar nature:

"If you are satisfied from the evidence in this case that inch boards could have been used in constructing the runway, and the same would have been safe and proper, and Albright and the others failed to place two boards where they only placed one, then, if you find that it would have been safe to construct the runway in this way, and they failed to do it, then the plaintiff cannot recover. This is a question of fact for you to consider with the rest of the testimony in saying whether it is sufficient or not."

It is urged that this is, in effect, saying that, though the master supply unsuitable and defective material, he may be relieved of liability if, by some other manner of use than the usual way of using suitable material, the unsuitable material may be made safe.

It is claimed by the plaintiff, and it may be conceded, that it has been repeatedly held in this State that if, without fault on his part, an employé is injured, he may recover against the master who is negligent, even though the negligence of a fellow-servant contribute to the injury. See *Hunn* v. *Railroad Co.*, 78 Mich. 513 (44 N. W. 502, 7 L. R. A. 500), and the many cases there cited. See, also, *McDonald* v. *Railroad Co.*, 108 Mich. 7 (65 N. W. 597), and cases cited therein; *Cone* v. *Railroad Co.*, 81 N. Y. 206 (37 Am. Rep. 491). We think, however, this is not a case for the application of that doctrine. It has been repeatedly held that the master is not obliged to make his premises perfectly safe and furnish the best material, but his duty is discharged if he make the premises reasonably safe. *Ragon* v. *Railway Co.*, 97 Mich. 265 (56 N. W. 612, 37 Am. St. Rep. 336); *Lamotte* v. *Boyce*, 105 Mich. 548 (63 N. W. 517). While we all understand that two-inch planks are better material for the erection of such scaffolds as were used here, we do not think it can be said that if, by the use of two or more boards in the place of one plank, the scaffold would be made reasonably safe, still there would be liability on the part of the employer.

After the jury had been out for a time, it came in, and several inquiries were made of the judge. Some of his

answers have been covered by what we have already said. It was the claim of defendant that on the morning of the day of the accident there were plenty of planks on hand and unused. A juror inquired if it was the duty of the contractor to replace the boards with planks, and the judge said:

"In that view of the case, it is the duty of the parties to use the material that they had, and, if Mr. Albright and the other men there constructing the platform failed to use the plank that they had then in constructing this platform after it was constructed with boards, and they knew that fact, that it was constructed with boards, and they failed to use the planks they had on hand on the day of the accident, or just before the accident, when they could have used them, then the contractor is not liable."

This is said to be error. The only witness who testified that the alter ego directed the use of the boards stated that he was told "to use them until we got some plank." This being so, we think the judge was right in his answer to the question of the juror.

Judgment is affirmed.

The other Justices concurred.

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WOLCOTT *v.* CONNECTICUT GENERAL LIFE-INSURANCE CO.

1. INSANE PERSONS—CONVEYANCES—VALIDITY.
A conveyance by an insane person not under guardianship is not absolutely void, but merely voidable.

2. SAME—RATIFICATION—EVIDENCE.
Evidence examined and *held* to show that an assignment of a land contract by a lunatic was ratified by him after his restoration to reason.

Appeal from Jackson; Peck, J. Submitted January 12, 1904. (Docket No. 16.) Decided July 27, 1904.

Bill by Thomas C. Wolcott against the Connecticut General Life-Insurance Company, Edwin W. Abbott, and others, to set aside certain conveyances, and for an accounting. From a decree for complainant, defendants insurance company and Abbott appeal. Reversed.

William E. Ware and *James A. Parkinson*, for complainant.

Wilson & Cobb, for defendant company.

Tarsney & Fitzpatrick, for defendants Abbott.

MOORE, C. J. This is an appeal from the decree of the circuit court for the county of Jackson, in chancery.

On the 18th of September, 1895, the Connecticut General Life-Insurance Company entered into an executory contract for the sale and conveyance to Thomas C. Wolcott of certain lands. The consideration was to be the sum of $2,600. Appellee went into possession at or about the date of the contract. On the 21st day of January, 1899, complainant was adjudged by the probate court to be insane. The following day he was committed to the asylum, where he remained until the 19th day of April, 1899, when he was discharged as cured. On the 23d day of August, 1899, he was returned to the asylum, and remained there until the 2d day of April, 1900, when he was again discharged, and returned to his family. He paid during the three years that he was in possession of the premises under the contract but $50 on the principal.

On March 2, 1899, appellee's wife, Carrie G. Wolcott, in company with an attorney, went to Kalamazoo, and secured from complainant an assignment of his interest in the contract; and at the same time, and as a part of the same instrument, he consented that the insurance company might convey the premises to the said Carrie G. Wolcott. On or about the 27th day of March, 1899, the insurance company conveyed the premises to her, and at the same time took back her purchase-money mortgage to se-

cure the sum of $1,600, being the balance of the actual consideration. Her deed and mortgage were promptly put on record. No record was made of the original contract with appellee, nor of his assignment to his wife.

During the period of appellee's first incarceration, and from the time of his first return to about the 20th of August, 1899, appellee's wife and family, consisting of one son, resided on the premises. When appellee was released from the asylum on the 19th of April, 1899, he returned to his family, and resided with them until on or about the 20th of August, 1899, when his wife leased the premises for three years to the defendant Charles Pickett. After the leasing of the premises, appellee and his wife and boy removed to a farm belonging to one of appellee's brothers, in Eaton county.

The defendants Abbott, residents of the city of Detroit, became the purchasers of the Jackson county lands on the 6th day of February, 1900, under a warranty deed from Carrie G. Wolcott; the consideration being the sum of $3,000, $1,600 of which was the mortgage from Carrie G. Wolcott to the insurance company, which the Abbotts assumed and agreed to pay. On or about the 1st of September, 1901, the bill in this case was filed by Thomas C. Wolcott to set aside the assignment of March 2, 1899, the deed and mortgage from Carrie G. Wolcott to the insurance company, the deed from Carrie G. Wolcott to the Abbotts, and the lease from Carrie G. Wolcott to the defendant Charles Pickett—all upon the ground of Wolcott's mental incapacity at the time of the making of the assignment of the land contract to his wife. The relations of appellee and his wife not being congenial, they separated on or about the 1st day of April, 1901, and on the 29th day of October, 1901, articles of separation were executed by them, which will be referred to later in this opinion. Defaults were taken against the defendants Carrie G. Wolcott and Pickett for nonappearance. The other defendants answered. Proofs were taken in open court, excepting the testimony of several witnesses which was taken by

deposition, and read upon the hearing. A decree was entered in favor of complainant. The insurance company and the Abbotts have each taken appeals.

Counsel for the Abbotts say the questions arising on this record may, for the purposes of argument, be conveniently grouped under three heads:

1. Was Thomas C. Wolcott of sufficient mental capacity to understandingly execute the assignment of March 2, 1899?
2. Has he approved and ratified the transaction?
3. Did the defendants Abbott have actual knowledge of complainant's interest in the lands, or were they put upon inquiry?

The defendant insurance company contends, in addition to the foregoing:

First. That the complainant was not insane at the time he executed the assignment, in the sense that he was incapacitated for business; that long before this transaction took place, and at a time when there was no question as to his sanity, it was arranged between himself and wife and brother William V. Wolcott that the title to the farm in question should be placed in the wife's name, and the execution of the assignment was but the consummation of this arrangement.

Second. That the making of the assignment, whereby the title to the farm was placed in the wife, was a transaction in the interest of complainant, and for that reason not void, regardless of the question of complainant's insanity.

In our view of the case we deem it necessary to discuss but two questions: *First.* Was the assignment by the complainant to his wife void, or simply voidable? *Second.* If voidable, has he ratified it?

No guardian was appointed for complainant, though it has already appeared he had been adjudged insane at an earlier date than the assignment. As to the first of these questions, it must be conceded, the authorities are not harmonious. The case of *Riley* v. *Carter*, 76 Md. 581 (19 L. R. A. 489, 35 Am. St. Rep. 443), is a well-considered

case. Justice Roberts, speaking for the court, said in part:

"In this case a serious question attaches to the right to assign, which involves the right of a lunatic to execute a deed. The pleadings in the cause concede that Johns H. R. Nicholson at the time of the execution of the two deeds was non compos mentis. It is contended on the part of the appellants that *Owing's Case*, 1 Bland, 390, and *Corrie's Case*, 2 Bland, 490, have determined that the deed of a lunatic is not voidable, but absolutely void; and they cite *Dexter* v. *Hall*, 15 Wall. 9, as affirming the doctrine of those cases. But we cannot concur in this view, nor has this court ever so decided. The Supreme Court, in passing upon the questions under consideration in *Dexter* v. *Hall*, did not have before them the validity of a deed of conveyance, but of a power of attorney. Infants and lunatics stand very much upon the same plane, so far as courts of equity are concerned, and it has been universally held that the power of attorney of an infant is absolutely void; and so the Supreme Court, in *Dexter* v. *Hall*, held that the power of attorney of a lunatic was void, and rested their decision on the analogy existing between the rights of infants and those of lunatics, and say:

"'In fact, we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable.'

"This they could not have said respecting deeds of conveyance, as the reports of the State court contain numerous decisions affirming the view that the deed of a lunatic is not void, but only voidable. The firm of J. J. Nicholson & Sons had been for a long series of years engaged in the business of banking in the city of Baltimore. A member of the firm having died, a dissolution of the partnership was the consequence. Business complications soon followed, and, for the purpose of settling up the affairs of the firm, the surviving partner executed the deeds in question. In this State it has never been doubted that a debtor in failing or embarrassed circumstances had the right to execute a deed of trust for the benefit of creditors, when he dedicated all his property and estate to the payment of his debts. The question of a lunatic's authority, under certain circumstances, to execute a valid deed, has on more than one occasion received judicial interpretation by this

court. In *Evans* v. *Horan*, 52 Md. 610, this court, speaking through the late Justice Miller, said:

"'The exact question which the record presents is this: Is a deed of bargain and sale of real estate, made upon a valuable consideration, duly acknowledged, and duly enrolled or recorded under our registry acts, void, or merely voidable, by reason of the fact that at the time it was executed the grantor was non compos mentis? Without advancing or at all sanctioning the broad doctrine that every act of a lunatic or infant is voidable, and not void, we are of opinion that the deed in question does not belong to that class which the law deems absolutely void. This we think has been established as the law of this State, whatever may be the conflict of authority elsewhere. We refer to the cases of *Key* v. *Davis*, 1 Md. 32, and *Chew* v. *Bank of Baltimore*, 14 Md. 299, and the reasoning and authorities cited and relied on by the court in these decisions. The cases of *Wait* v. *Maxwell*, 5 Pick. 217 (16 Am. Dec. 391), *Jackson* v. *Gumaer*, 2 Cow. 552, and *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. 236 (19 Am. Dec. 71), are directly in point. Many other more recent decisions of the State courts to the same effect might be cited, but it is unnecessary, inasmuch as we consider the decisions of our predecessors as having settled the law of Maryland on this subject. A few brief quotations from the opinion in *Key* v. *Davis* will show the grounds upon which the doctrine is rested, and how cautiously it is guarded and limited.

"'"In England," say the court, "it appears to be well settled as it is in this country, where the common law has not been abrogated by statutory enactments, that the feoffment of a lunatic or idiot, in person, is only voidable, and not void. The reason assigned for this is that the solemnity and formalities attendant upon livery of seisin, together with the necessary participation of others in the act, and its notoriety, presupposes that the incapacity of the party was not apparent."

"'For this reference is made, among other authorities, to the case of *Thompson* v. *Leach*, Carth. 435. The court then adds:

"'"In this State it has been adjudged by the court of appeals, in *Matthews* v. *Ward*, 10 Gill & J. 443, that livery of seisin has been abolished, and that enrollment is equivalent to it and has been substituted in its place. Indeed, the act of 1766 provides for recording deeds of feoffment, as well as other deeds, and the act of 1715 declares that livery shall not be necessary where a deed is enrolled. The propriety of this decision, and the results to which it leads, no one can controvert. If the acquiescence of those whose presence and participation, which are necessary to constitute a good livery of seisin, are sufficient to rescue the act of the lunatic from the presumption of being totally void, much more ought the attestation of the magistrates who took the acknowledgment, and the clerk's certificate of enrollment, which accompanies the deed of bargain and sale of the present day, have a similar effect. From this doctrine it

would seem to follow, as a necessary consequence, that in this State the deed of bargain and sale of a lunatic, where it has been executed with all the usual formalities required by law, and duly enrolled, would in any case, like a feoffment in person, be only voidable, and not void."

"The view adopted by this court is in accordance with the generally accepted doctrine of numerous decisions of other States. *Riggan* v. *Green*, 80 N. C. 236 (30 Am. Rep. 77); *Miles* v. *Lingerman*, 24 Ind. 387; *Wait* v. *Maxwell*, 5 Pick. 217 (16 Am. Dec. 391); *Hovey* v. *Hobson*, 53 Me. 451 (89 Am. Dec. 705); *Dennett* v. *Dennett*, 44 N. H. 538 (84 Am. Dec. 97); *Eaton* v. *Eaton*, 37 N. J. Law, 108 (18 Am. Rep. 716); *Blakeley* v. *Blakeley*, 33 N. J. Eq. 508; *Snowden* v. *Dunlavey*, 11 Pa. St. 525; *Ingraham* v. *Baldwin*, 9 N. Y. 45; *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. 236 (19 Am. Dec. 71); *Fitzgerald* v. *Reed*, 9 Smedes & M. 94; *Allis* v. *Billings*, 6 Metc. 415 (39 Am. Dec. 744); *Allen* v. *Berryhill*, 27 Iowa, 540 (1 Am. Rep. 309); *Elston* v. *Jasper*, 45 Tex. 409; 1 Chitty, Cont. (11th Am. Ed.) 188; 1 Parsons, Cont. 384, 385."

In a note to 19 L. R. A. 489, it is said:

"It is the settled law in nearly all American courts that the deed of a lunatic who has not been placed under guardianship is not absolutely void, but merely voidable. *Hovey* v. *Hobson*, 53 Me. 451 (89 Am. Dec. 705); *Hovey* v. *Chase*, 52 Me. 304 (83 Am. Dec. 514); *Arnold* v. *Richmond Iron Works*, 1 Gray, 434; *Wait* v. *Maxwell*, 5 Pick. 217 (16 Am. Dec. 391); *Allis* v. *Billings*, 6 Metc. 415 (39 Am. Dec. 744); *Howe* v. *Howe*, 99 Mass. 98; *Seaver* v. *Phelps*, 11 Pick. 304 (22 Am. Dec. 372); *Den* v. *Moore*, 5 N. J. Law, 470; *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. 245 (19 Am. Dec. 71); *Gribben* v. *Maxwell*, 34 Kan. 8 (7 Pac. 584, 55 Am. Rep. 233); *Riggan* v. *Green*, 80 N. C. 236 (30 Am. Rep. 77); *In re Desilver's Estate*, 5 Rawle, 111 (28 Am. Dec. 645); *Yauger* v. *Skinner*, 14 N. J. Eq. 389; *Copenrath* v. *Kienby*, 83 Ind. 18; *Freed* v. *Brown*, 55 Ind. 310; *Crouse* v. *Holman*, 19 Ind. 30; *Somers* v. *Pumphrey*, 24 Ind. 231; *Fay* v. *Burditt*, 81 Ind. 433 (42 Am. Rep. 142); *Schuff* v. *Ransom*, 79 Ind. 458; *Musselman* v. *Cravens*, 47 Ind. 1; *Boyer* v. *Berryman*, 123 Ind. 451 (24 N. E. 249); *Jackson* v. *Gumaer*, 2 Cow. 552; *Ingraham* v. *Baldwin*, 9 N. Y. 45; *Key* v. *Davis*, 1 Md. 32; *Eaton* v. *Eaton*, 37 N. J. Law, 108

(18 Am. Rep. 716); *Pearson* v. *Cox*, 71 Tex. 246 (9 S. W. 124, 10 Am. St. Rep. 740); *Canfield* v. *Fairbanks*, 63 Barb. 461; *Cook* v. *Parker*, 4 Phila. 265."

See, also, sections 395, 396, Buswell on Insanity.

Counsel for complainant insist the assignment was void, and cite *Rogers* v. *Blackwell*, 49 Mich. 192 (13 N. W. 512). It is true, the case decides that Blackwell's deed was void, but at the time the bill of complaint was filed Mr. Blackwell was dead. It does not appear that after making the deed he recovered his reason, but it does appear from the opinion that there was no act of his at any time ratifying this conveyance. In disposing of the case, it was said:

"It is next claimed that the deed from Blackwell to his wife was not void, but voidable; that such conveyances are on the same footing as those of infants. It is undoubtedly true that, had Blackwell recovered his reason, he might have so conducted himself as to have given force and effect to the deed as a valid conveyance. And so he clearly could have taken the requisite steps to have it declared a nullity."

Clearly recognizing, as we think, the doctrine that the deed of an insane man is voidable, but not void.

In the case of *Moran* v. *Moran*, 106 Mich. 8 (63 N. W. 989, 58 Am. St. Rep. 462), Justice LONG, speaking for the court, said:

"The sole reason for avoiding the deed is that, at the time it was given, the plaintiff was incompetent to make it. No guardian had been appointed over him at that time, and none was appointed until 1887. As a record title, the deed of defendant is perfect; but plaintiff's counsel insists that, while a court of equity might set aside the deed, yet the question is one which is triable in a court of law, before a jury, as well. We cannot agree with this contention. The record shows conclusively that no adjudication was had upon the incompetency of the plaintiff until after the deed had been executed. The deed was not, therefore, absolutely void, but voidable. *Wait* v. *Maxwell*, 5 Pick. 217 (16 Am. Dec. 391); *Ingraham* v. *Baldwin*, 9 N. Y. 45; *Carrier* v. *Sears*, 4 Allen, 336 (81

Am. Dec. 707); *Hallett* v. *Oakes*, 1 Cush. 296; *Chew* v. *Bank of Baltimore*, 14 Md. 299; *Hovey* v. *Hobson*, 53 Me. 453 (89 Am. Dec. 705); *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. 236 (19 Am. Dec. 71); *Nichol* v. *Thomas*, 53 Ind. 42; *Eaton* v. *Eaton* 37 N. J. Law, 108 (18 Am. Rep. 716)."

We think the assignment was voidable.

Has the complainant ratified the assignment? At this point we desire to suggest what we deem to be somewhat significant—that, though this bill is filed by the complainant, who is still conducting the litigation, and must possess much information in relation to the important questions involved, he was not a witness in the case. He did not see fit to contradict any of the testimony to which we shall refer later. He was discharged from the asylum as cured April 2, 1900, when he returned to his family. The record shows that he knew he had made the assignment of his interest in the contract to his wife, and of the deed from the insurance company to her. He did not bring this suit until September, 1901. We cannot set out all the testimony, but refer to some of it. Mr. Pringle testified that he had a talk with complainant in April, a little over a month after the assignment was executed, in which the complainant talked fully of the assignment, and that it was all explained to him; that he acted on his own judgment; that his brother wanted him to put it in his wife's name, and offered to advance the money to save the farm, and he thought it the best thing to be done. Mr. Hewett substantiates this testimony. The Mr. Wolcott who advanced the money which was paid to the insurance company when the deed was made was dead when this case was commenced.

Mr. Charles Pickett testified that:

"Complainant and his wife came over to my house to get me to enter into the lease. Complainant said at that time that everything belonged to his wife—even the personal property on the farm. As far as I could see, he was perfectly rational at that time. Have known him since he came onto the farm in 1895. He was just as sane at

that time as he ever was since I have known him. * * * He remained on the farm until August 10, 1899. Up to that time he appeared all right. I saw nothing out of the way with him. They had, before I went there, made arrangements to leave the place and go to Onondaga. The complainant stated at the time the lease was made that the property had been conveyed to his wife. When Mr. Hewett came down to prepare the lease, complainant took part in the negotiations with reference to the lease. When there was any dispute with reference to the lease, the complainant came in as a third man."

He told Mr. Pickett, during the negotiations leading up to the making of the lease, "that he wanted the lease drawn up with the privilege of selling it, because they wanted to get rid of it as soon as they could. Said he was going to Onondaga. His brother was going to give him that place, or going to let him live there." After the lease was made, he did what he told Pickett they intended to do—moved to the brother's farm, in Onondaga. Mr. Hewett, who went to the farm to prepare the Pickett lease, testified in relation to the preparation of such paper:

"I talked with Mr. and Mrs. Wolcott some, with Fred, and with Mr. Pickett—not very much with the latter. Mr. Wolcott seemed to do most of the talking with Mr. Pickett, and would report what the arrangements were—what Mr. Pickett wanted. * * * Mr. Wolcott appeared to be interested in the matter. He made suggestions with reference to how the lease should be drawn. * * * I discovered nothing in his talk or manner indicating that he was in any way irrational. His suggestions and talk with reference to the matter and the drawing of the lease were pertinent and intelligent."

Mrs. Pickett corroborated the testimony of her husband. Mrs. Wolcott received in the neighborhood of $1,000 in money. It appears from the testimony of the son that much of it was used on the farm in Eaton county for the support of the family, including the complainant, and for expenses, and that some of it was paid to complainant. After this bill was filed, and on October 29, 1901, an agreement in writing was drawn, signed by complainant

and his wife, in which it was agreed, among other things, as follows:

"Now, therefore, on account of such separation and disagreement, it is hereby mutually agreed, by and between the parties hereto, that said Thomas C. Wolcott does hereby release the said Carrie G. Wolcott from any and all claims or demands, either at law or in equity, which he may now have or hereafter may have against said Carrie G. Wolcott, and the said Carrie G. Wolcott does hereby release and relinquish to the said Thomas C. Wolcott, any and all claims or demands which she now has or may hereafter have as the wife of the said Thomas C. Wolcott, in any lands heretofore or hereafter purchased or owned by him, or any personal estate which he has or may hereafter acquire, and does also release him from all obligations to maintain and support her while she remains his wife."

Without going further into the details, we think the evidence abundant to show ratification.

The decree is reversed, and one will be entered here dismissing the bill of complaint, with costs of both courts.

The other Justices concurred.

BEATTIE v. CITY OF DETROIT.[1]

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1. HIGHWAYS AND STREETS—SAFETY—INJURY TO PEDESTRIAN—DUTY OF MUNICIPALITY.

Where a street undergoing repairs by a contractor is left open for travel, the city must see that it is and remains reasonably safe for travel, notwithstanding the effect of storms that may reasonably and ordinarily be expected at that season of the year.

2. SAME—NOTICE OF CLAIM FOR INJURY.

Evidence examined and *held* to show that notice of claim for injury was served upon the corporation counsel.

[1] Rehearing denied October 27, 1904.

3. INSTRUCTIONS—CONSTRUCTION AS WHOLE.
In order to determine whether an instruction is misleading, the charge must be considered as a whole.

4. DAMAGES—PERSONAL INJURY—FUTURE SURGICAL OPERATION.
Plaintiff in a personal injury case may recover for the expense and pain attendant upon a future surgical operation if under the evidence one is deemed necessary to effect a cure.

Error to Wayne; Mandell, J. Submitted January 13, 1904. (Docket No. 30.) Decided July 27, 1904.

Case by Annie Beattie against the city of Detroit for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

P. J. M. Hally and *A. B. Hall* (*T. E. Tarsney*, of counsel), for appellant.

Orla B. Taylor, for appellee.

MOORE, C. J. This action was brought to recover damages for injuries sustained by reason of the unsafe condition of the street at the corner of Jefferson and Field avenues on the evening of July 26, 1901. There is a street-car track upon Field avenue, over which the cars of the cross-town line are operated, the cars coming from the north and turning westerly on Jefferson avenue. The usual and ordinary place for stopping the cars to let off passengers was upon Field avenue, just before the cars turned westerly. For some time prior to the night of the accident, the portion of Field avenue between the west track and the west curb had been in process of repavement with cedar blocks upon concrete foundation. The method of laying this pavement is as follows: After excavating to the proper depth, the concrete is laid. Upon this is placed a thin cushion of sand, upon which round cedar blocks, from four to nine inches in diameter, are placed. A binder course of gravel is then thoroughly tamped into the interstices between the blocks, and hot tar is poured over the gravel. The tamping is to make them solid, so that the blocks won't raise.

The tar is supposed to stop the water going through, and hold the blocks together. The work is completed by a top dressing of sand. For several days the work had been progressing in a southerly direction toward Jefferson avenue, and on the day preceding the night of the accident, according to the witnesses for defendant, the blocks were all laid, up to the line of the asphalt pavement on Jefferson avenue. On account of a street-car parade, which was to start from near this point that evening, the blocks were laid temporarily; the contractor not having gravel enough to complete the last 10 or 15 feet. It was the claim of plaintiff, and is not seriously disputed, that this portion, 10 or 15 feet from the corner, was not tamped, the gravel and the tar were not in, and the top dressing was not on; that no attempt was made to barricade the street and prevent travel over this unfinished pavement—on the contrary, travel was invited; that no lights were placed there to guard the place.

The plaintiff, accompanied by her son, aged six years, arrived at the corner in question, upon a cross-town car, shortly before 12 o'clock at night. The car stopped at the usual place, and plaintiff alighted, carrying her child in her arms. The car immediately started forward, and proceeded down Jefferson avenue. It was the claim of plaintiff that the pavement looked all right; that the car passed on, and she was left in total darkness; that she started toward the westerly curb, but her feet became tangled in the blocks, which were all afloat because of a rain which had fallen earlier in the evening, and she stumbled and fell, sustaining serious injuries. The claim of plaintiff is the defendant was guilty of negligence in leaving the paving in this incomplete condition, so that a dangerous condition of the street was inevitable in case of rain, the weather being threatening, and in not providing proper lights and barricades to protect the public from the danger. The case was submitted to the jury, and a verdict rendered for plaintiff. The case is brought here by writ of error.

The counsel for appellant discuss five propositions:

1. The storm and condition of the highway.
2. Service of notice on the corporation counsel.
3. The sufficiency of the notice.
4. Damages and the mortality table.
5. Operation and cost of operation.

For convenience, we will consider these in the same order.

Counsel for the city insist that the rule requiring either actual or constructive notice of a defective street, in order to hold the defendant liable, has not been met. His position, quoting his own language, is:

"The statute permitting this class of actions does not contemplate that a pavement of any particular character shall be laid, but only that it shall be reasonably fit and safe for travel. While it is admitted that the pavement, for the space of ten or fifteen feet, had not been finished as it was intended to permanently remain, yet it had been laid for the very purpose of accommodating the crowd that was expected to be drawn by this street-car parade. These being the conditions, we insist that, before the city can be held liable for any damages resulting from an accident caused by any subsequent defect in this street, that it must have had actual notice, as the time was too short, under all decisions, for constructive notice." Citing *Wakeham* v. *Township of St. Clair*, 91 Mich. 15 (51 N. W. 696), and other cases.

An examination of the cases cited shows they relate to finished roadways in which a defect afterwards occurred, except *Beattie* v. *City of Detroit*, 129 Mich. 20 (88 N. W. 71), where temporary plank bridges were used. In that case the city was held liable for the negligence of the contractor. Justice HOOKER, speaking for the court, said:

"The law imposes upon the city the duty of keeping its ways in a condition reasonably safe for public travel. Necessarily there must be times when they cannot be in good condition—as when they are undergoing repairs—and at such times travelvers must heed the obvious dangers. But the city is not absolved from all care and responsibility at such times, nor can it absolve itself by turning the highway over to a contractor. As between it and the public, it must see that such portion of the way as

is open for use—at least where it is so under the terms of its contract with the contractor—is kept in a condition reasonably safe under the circumstances; and, if it should be kept open under the contract, it should see that the contract is performed in that respect. In other words, a city cannot, by merely contracting with somebody that he will keep the street in a condition reasonably safe (whether the contract specifies the method or not), relieve itself from the statutory liability, and impose it upon another. Thus a contractor may promise to keep a trench fenced, or signal lamps in it at night, and do neither. One injured in consequence is not without remedy against the city, for the statutory responsibility rests there. *Pettengill* v. *City of Yonkers*, 116 N. Y. 558 (22 N. E. 1095, 15 Am. St. Rep. 442); *Monje* v. *City of Grand Rapids*, 122 Mich. 645 (81 N. W. 574); *Baker* v. *City of Grand Rapids*, 111 Mich. 447 (69 N. W. 740); 2 Dill. Mun. Corp. § 1027, and note; *City of Detroit* v. *Corey*, 9 Mich. 165 (80 Am. Dec. 78); *Southwell* v. *City of Detroit*, 74 Mich. 438 (42 N. W. 118)."

In order to suspend the duty imposed by statute to keep its streets which are open to public travel in good repair for that purpose, a city, while grading and paving a street under the power conferred by its charter, must close to public travel that portion thereby rendered unfit or unsafe. *Southwell* v. *City of Detroit*, 74 Mich. 438 (42 N. W. 118); *Alexander* v. *City of Big Rapids*, 76 Mich. 282 (42 N. W. 1071); *Walker* v. *City of Ann Arbor*, 111 Mich. 1 (69 N. W. 87).

Upon this branch of the case the judge charged the jury:

"If the city of Detroit left the street at 6 o'clock in the evening in a condition that was proper and fit to be traveled over by horses, bicycles, wagons, and such, at that time, it does not necessarily follow that it was left in a reasonably safe condition. Something more, in my opinion, is required of the city. The city is required to leave that street in such condition that it will remain in the condition in which it was put; that is, if it was put in a condition at 6 o'clock reasonably safe and fit for public travel at that time, then the further duty falls upon the city to consider what the elements are, and to consider what is

likely to occur during the night; and they are required by law, in my opinion, to put it in such a condition that it will stand or withstand the elements or conditions that might reasonably and ordinarily be expected at that season of the year. So, gentlemen of the jury, the principal fact in this case left for you to determine is, Did the city leave that street in a condition in which it would be expected it would remain in a condition that was reasonably safe? Did they do all that prudence and foresight would demand of them? In other words, if the rain and storms that might be expected, if you believe that they might be expected at that time of the year, would put that street out of repair and render it dangerous, then, gentlemen of the jury, in my opinion, negligence would be chargeable against the city; but if you find that a storm of unusual severity, or a storm that might not be expected under ordinary circumstances and conditions at that time of the year, came up, then it is something human foresight cannot see or prevent, and that would be an extraordinary visitation of the elements, and the city of Detroit would not be, in such a case, chargeable with negligence."

We think this a proper instruction, under the facts disclosed by the record.

The service of notice and its sufficiency may be considered together. The accident occurred July 26, 1901. The statute (Detroit Charter 1895, Act No. 463, Local Acts 1895, § 46) provides that "notice shall be given in writing within three months from the time of such injury, to the head of the law department or to his chief assistant." The corporation counsel is the head of the law department of the city. At the time of the accident, Mr. Tarsney was corporation counsel. On August 3, 1901, Conely & Taylor wrote the following letter to Mr. Tarsney, addressing him in his official capacity, as corporation counsel:

"On the evening of July 26, 1901, Mrs. Annie Beattie, No. 30 Garland avenue, was injured at the corner of Field and Jefferson avenues, and we expect to file a claim for damages on her behalf against the city. We are waiting to determine the exact extent of her injury, as we do not wish to ask for any more than she is fairly entitled to, if the city is liable. I am informed this morning that her injury is more serious than we anticipated at first, and

thought possibly you would like to have her examined by your own physician. You are at liberty to do so if you desire."

This letter was placed in the hands of the office boy, Matthew Murphy, for delivery at Mr. Tarsney's office. Murphy swears that he knew the location of Mr. Tarsney's office, and that he delivered the letters at his office, and, while he could not swear to the delivery of a specific letter, that none were ever given to him to deliver that he did not deliver.

On October 14, 1901, another letter was addressed and delivered in a similar manner to Mr. Tarsney's office. This letter read as follows:

"We desire to again call your attention to the accident to Mrs. Annie Beattie to which we called your attention on the 3rd day of August, 1901. The accident occurred at the corner of Field and Jefferson avenues on July 26, 1901, at about 11 o'clock p. m. The cause of the injury was the unsafe and improper condition of the street and the absence of warning lights and signals. Mrs. Beattie suffered a very severe injury to the spine and is otherwise injured internally. Her physician states that the injury is probably of a permanent nature."

Mr. Taylor's testimony is that, from the day of the delivery of these letters to the office boy, they were never seen by him until delivered to him upon the trial by Assistant Corporation Counsel Hally. No one from the office of the corporation counsel testifies they were not received. It is a presumption under such proof, that the notices were received by the corporation counsel. But this is not all. The record of the proceedings of the common council, under date of October 15th, shows that the petition was received, and referred to the committee on claims and accounts. Mr. Taylor also testified—and this is not disputed—that, after the petition was presented to the common council, he was told by the clerk, and also by Mr. Hally, that he would be notified when the committee would take up the claim; that he afterwards was notified in writing; that he appeared before the committee, and Mr. Hally also

appeared before it, representing the corporation counsel's office, and the plaintiff and two or three witnesses were sworn. In March the committee to whom the claim was referred reported to the common council, among other things:

"We beg leave to report that we have carefully considered same, and, after listening to the testimony of the claimants, as well as that of several witnesses, and after consultation with the corporation counsel, have come to the conclusion that there is no legal liability against the city in either case. We therefore recommend that the prayers of the petitioners be denied."

This report was adopted by the council—all indicating the receipt of the notice in proper time.

Did the court err in his charge as to the effect of the mortality tables and in relation to damages? Complaint is made of the following:

"She is also entitled to compensation for all of the pain and suffering which she has endured since the time of the accident, and that she is likely to endure in the future. In considering these questions, you have a right to consider her age. At the time of the injury, she was 36 years of age, and, in accordance with the mortality tables of the State of Michigan, she has an expectancy of life of 31 years and upwards. In computing the amount which she would earn during that period, it is your duty to give her the present worth or value of what she would earn."

It is said:

"The charge allows the jury to assess damages for pain and suffering which the plaintiff 'may endure hereafter,' and for the loss of time 'as the evidence convinces you she will be likely to suffer hereafter.' The rule is that the alleged permanent disability, in order to be a ground for damages, must be one that is reasonably certain to result from the injury complained of."

The testimony of the plaintiff and her father was that previous to the accident she was in perfect health. There was also testimony that the injury was a permanent one. No request was made that the court should give a fuller

charge as to the use to be made of the mortality tables, or what constituted present worth or value. This portion of the charge should be considered in connection with what followed it. The jurors were instructed:

"I might add that, in computing the damages that a person is entitled to for pain and suffering, the law has no standard by which to go. It is left to the sound judgment and discretion of the jury. It is not an arbitrary power left to the jury, to be exercised arbitrarily. * * * You have no right to award anything in the nature of punishment. You must try and make the person injured through the negligence of the defendant whole, so far as money consideration can do so, but you should give nothing further than compensation."

Taking the charge as a whole, we do not think the jurors were misled. See *Bailey* v. *City of Centerville*, 108 Iowa, 20 (78 N. W. 831). As to the use of the mortality table, see *Nelson* v. *Railway Co.*, 104 Mich. 582 (62 N. W. 993).

Testimony was allowed to be given as to the cost of an operation. The judge charged the jury that she was entitled to compensation "for the pain she may suffer from an operation, if an operation is deemed necessary." It is said this is error, because whether an operation is necessary is purely a matter of judgment. At best, it is a conclusion as to what is the best thing to be done. Counsel say:

"Nature in many instances may be able to assert itself and become master. Health may be regained and strength may return without an operation. The patient might continue to refuse to submit to an operation. The experience of ordinary individuals proves that there are in this world any number of physical cowards, and this mental temperament of the individual might forever prevent the patient consenting to the physician's plan. So that the giving of damages for the pain incident to an operation, or for pain which would result from an operation, is clearly the giving of damages which rests in an uncertainty, and for a consequence which is not reasonably certain to follow an injury sustained. It is a mere speculation, for which damages cannot be given."

The physician who gave testimony for the plaintiff was of the opinion that the injury would not yield to medical treatment, and, without surgical treatment, would remain as it is. Dr. Weber, who examined the plaintiff, and was a witness for the city, though he did not agree with the witnesses of the plaintiff as to what caused the condition the woman was in, testified:

"This condition that I find in this woman will last forever if she never has anything done in the way of treatment. An operation will cure it.

"*Q.* All these operations are serious, are they not?

"*A.* Laceration of the neck of the womb is considered a slight operation. I never knew of a case terminating seriously or fatally."

He agreed with the witnesses for the plaintiff as to what the cost of an operation would be.

In 1 Joyce on Damages, § 196, it is said:

"It may in some cases of injury be necessary to perform a surgical operation in order to effect a cure. Where such an operation is required in order to give relief or to bring about a cure, and it is attended with slight inconvenience and no danger, it is held that if a person, under such circumstances, refuses to submit to an operation, there can be no recovery of damages attributable to such failure."

In *Blate* v. *Railroad Co.*, 44 App. Div. 163 (60 N. Y. Supp. 732), it is said:

"It is quite evident that the damages which were given by the jury were based, in a very considerable amount, upon this rupture. The evidence of surgeons was given not only as to the existence of the rupture as the result of this accident, but also as to the probability of its cure if the plaintiff would submit to a surgical operation. The defendant's expert testified that such an operation would almost certainly result in a cure; but the physicians sworn on behalf of the plaintiff, while admitting that such an operation would probably result in a cure, said that it was by no means certain. It was stated by the plaintiff's witnesses that such an operation would be dangerous to life, but the expert surgeon sworn on behalf of the defendant said it was not now really dangerous to life, although six or eight

years ago it was considered a dangerous operation. In view of that condition of the evidence, the defendant insisted that it was the duty of the plaintiff to submit to an operation, which would be practically certain to result in a cure, and, because he did not do so, he was not entitled to recover damages for a permanent or continuing rupture. On that branch of the case the learned trial justice charged the jury:

"'Something has been said to you regarding the possibility of the plaintiff having had a radical cure effected by submitting himself to a surgical operation. I charge you upon that subject that a person who has been injured by an accident of this kind is bound to use the usual and reasonable remedies which are appropriate to alleviate or cure such an accident as he has suffered. He is not permitted to increase and enhance the damages which he has suffered by negligently or carelessly or willfully permitting his condition to get worse than it would be if properly treated. At the same time, no man is bound, for the purpose of reducing the amount of damages which he may be entitled to recover from a person who has done him wrong—no man is bound to submit himself to a surgical operation which may, even in the remotest degree, be an operation attended with danger. That is a matter which he must determine for himself; and if he, through apprehension, or for any other cause, has determined that he will not submit himself to such an operation, the defendant is not entitled to take advantage of his failure to do so. At the same time, you are to take into consideration, determining the amount of injury which this man has suffered, and the permanency of his injury, all the testimony that you have heard from the experts upon the subject of the possibility of curing a disease of this kind by a surgical operation, and the slight inconvenience which is said to result from such operation in most cases.'

"To this charge as an entirety an exception was taken. Counsel for the defendant insists that the charge was erroneous, but he made no request to the court to modify it, or to charge more fully upon any proposition contained in it, so that, if the propositions charged are correct, defendant cannot complain that the court should have charged more fully in regard to them. The rule of damages in such cases is not at all doubtful. It is that the party who claims to have suffered damage by the tort of another party is bound to use reasonable and proper efforts to make the damage as small as practicable, and that he is not entitled to recover for any damage which by the use

of such efforts might have been avoided, because they are not to be regarded as the natural result of the tort. 8 Am. & Eng. Enc. Law (2d Ed.), p. 605. The question in every case is whether the plaintiff has used such means as were at hand to reduce his damages as a reasonably prudent man would have used. It cannot be said, as a matter of law, that he is bound to use any particular means or to do any particular thing, unless that thing is one which would necessarily result in reducing the damage, and which a reasonable and prudent man would use. If in any given case it appears that the particular means which may be used to effect a cure would or might cause greater injury or produce serious results, quite clearly the injured person would not be called upon, as a matter of law, to take the chances of suffering more serious injury or death for the purpose of reducing the damage. While the person who inflicts the damage has the right to say that sure and safe means to diminish the evil results of the accident, if any such exist, must be used, yet that is the extent of his right. Whether further means should be resorted to is for the plaintiff to determine. In making that determination the plaintiff has the right to consider the nature of the means used to effect a cure, and a possible or probable effect upon himself. He has to determine for himself whether he is to resort to those means in view of those considerations. In any given case it may be that the treatment which is given to the plaintiff is not the best that could be devised, but the plaintiff is not the less entitled to his damages on that account, if, in taking that treatment, he has consulted such a physician as a reasonably prudent man would consult. The jury, in getting at the damages, are to say not only what they are, but whether the means used by the plaintiff to reduce the damages were such as an ordinarily prudent man would use. They cannot say that he should or should not have taken the advice of any particular physician, nor that he should have obtained any particular kind of treatment. As to that, he must himself be the judge. But when he has determined what treatment to take, it will yet be for the jury to say if, in making that determination, he used the means that a reasonably prudent man would take to cure himself of his injury. If he did, he is entitled to recover for his damages as they are presented to the jury. If he did not, and the jury can say that some other treatment would have brought about a cure, and that treatment was one that a reasonably prudent

man would have submitted to, then they must say that he has not used the care which a reasonably prudent man would use to reduce the damages, and must take that into consideration in reaching their verdict. That is what was substantially said to them by the learned trial justice. The law lays down no hard and fast rule as to the duty of the plaintiff under such circumstances. Whether an operation for his ailment, which might endanger his life in any degree, must be submitted to, is a question which the law cannot answer; nor does it lie in the mouth of a jury to say that the plaintiff should or should not do any particular thing. They are concerned simply with the affairs presented to them at the trial, and whether the damages then appearing to exist are the natural and probable result of the injuries, diminished by the efforts for a cure which a reasonably prudent man would have made."

See, also, *Bailey* v. *City of Centerville*, 108 Iowa, 20 (78 N. W. 831).

The case was carefully tried, and, we think, is free from reversible error. Judgment is affirmed.

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

DECKER v. WIDDICOMB.

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147 47

1. BROKERS—COMMISSIONS—UNDISCLOSED PRINCIPAL.

By completing the sale to a customer first introduced by plaintiff, a real-estate broker, to whom defendant had given authority to find a purchaser, after notice that the broker will claim commissions in case of sale to that customer, defendant becomes liable for plaintiff's commissions, though the negotiations that culminate in sale are begun by an agent of the purchaser who does not at first disclose his principal.[1]

[1] As to when real-estate broker is considered as the procuring cause of a sale effected, see note to *Hoadley* v. *Savings Bank*, (Conn.) 44 L. R. A. 132.

2. SAME—ACTION FOR COMMISSIONS—EVIDENCE.

In an action for broker's commissions, a newspaper advertisement, published by plaintiff, is admissible as showing what was done by plaintiff in pursuance of his contract to sell the property.

Error to Kent; Perkins, J. Submitted January 14, 1904. (Docket No. 40.) Decided July 27, 1904.

Assumpsit by Peter W. Decker and Fred R. Jean, copartners as Decker & Jean, against John Widdicomb for commissions on the sale of certain real estate. There was judgment for plaintiffs, and defendant brings error. Affirmed.

Knappen, Kleinhans & Knappen, for appellant.

Smedley & Corwin, for appellees.

MOORE, C. J. Plaintiffs are real-estate men. They sued defendant to recover commissions amounting to $212.50. The case was tried by a jury, which rendered a verdict for that amount. The case is brought here by writ of error. The errors relied upon are a failure to direct a verdict because:

1. The undisputed evidence shows that the agency upon which plaintiffs relied was a special one for the sale of a certain amount of property to Mr. Wilcox at a certain price, and that plaintiffs did not succeed in carrying out their part of the contract.

2. The undisputed evidence shows that the agency was terminated before the property was sold to Mr. Doty, and after the failure of plaintiffs to carry out their part of the contract.

3. The undisputed evidence shows that the defendant sold to Mr. Doty without knowledge that he was acting for any one else in the transaction. That he was secretly acting for Wilcox was therefore immaterial.

The other error relied upon is the admission by the trial court of a newspaper advertisement reading as follows:

"100 feet near the corner of College and East Fulton; a very choice situation for a choice home."

In support of the first proposition, counsel cite Mechem on Agency, § 611; *Antisdel* v. *Canfield*, 119 Mich. 236 (77 N. W. 944), and other cases. In support of the second proposition counsel cite Mechem on Agency, § 210; *Heaton* v. *Edwards*, 90 Mich. 500 (51 N. W. 544); *Antisdel* v. *Canfield*, 119 Mich. 229 (77 N. W. 944), and other cases. As to the third proposition counsel cite Mechem on Agency, § 112.

The trial judge, in his charge to the jury, after stating the claims of the parties to the litigation, charged them, among other things:

"There are three questions of fact which I will submit for your consideration under the evidence in this case: *First.* Was there a contract, as the plaintiffs claim? If you find that there was, then, *second*, Was that contract terminated before the sale of this land, as the defendant claims? If you find that there was a contract, and that it was not terminated, or not terminated at the time of this sale, then, *third*, Were the plaintiffs the procuring cause of this sale? The other question that is raised by the claims of the parties, and which is not included in the questions which I will submit for your determination, is the one in relation to whether or not the sale was to Mr. Doty. As to that question, the fact that the defendant, after he discovered that Mr. Doty was acting for and in behalf of Mr. Wilcox, continued his negotiations and completed the sale to Mr. Wilcox, must be construed as a ratification on the part of the defendant of Mr. Doty's agency for Mr. Wilcox, and I so instruct you. So that phase of the question is out of the case, so far as it bears upon the question as to whether the sale was to Mr. Doty alone or to Mr. Wilcox. Unless you are satisfied by a fair preponderance of the evidence that the contract of agency for the sale of the land was entered into, as the plaintiffs claim, the plaintiffs cannot recover, and your verdict must be 'No cause of action.' If you are satisfied that such an agreement was made, then consider the next question: Was it terminated, as the defendant claims? Now, there can be no doubt as to the right of the defendant to terminate this agency, if any was so created, at any time he chose. The question for you to determine is, under the evidence in this case, Was it terminated? If it was, and you so find, the plaintiffs cannot recover, and your verdict

must be for the defendant. 'If you are satisfied that there was a contract, as the plaintiffs claim, and that it was never terminated, then consider the question as to whether the plaintiffs were the procuring cause of this sale to Mr. Wilcox; that is, Were they the moving cause in the transaction? Was it through their efforts that the sale was made? Were they the ones who set on foot the negotiations which eventually resulted in the defendant's selling the property to Mr. Wilcox? * * * Should you not be satisfied upon each of the questions named, your verdict must be for the defendant, 'No cause of action.' I will read the defendant's tenth request:

"'Defendant claims that he made no contract with plaintiffs to pay them commission, but understood that he was dealing with plaintiffs as the agents for Mr. Wilcox.' If you find this to be the fact, your verdict will be 'No cause of action.'"

Counsel for plaintiffs insist counsel for defendant are in error in their first three propositions; that, instead of the testimony being undisputed as to each of those propositions, there is a sharp conflict in it, and that the judge very properly left the questions of fact to the jury, under *Heaton* v. *Edwards*, 90 Mich. 500 (51 N. W. 544), *Wood* v. *Wells*, 103 Mich. 320 (61 N. W. 503), and *Brooks* v. *Leathers*, 112 Mich. 463 (70 N. W. 1099). It would profit no one to insert the evidence here. The defendant denied he ever agreed to pay commissions, and insisted he supposed plaintiffs would get their commission from Mr. Wilcox, if a sale was made to him. An examination of the record satisfies us the plaintiffs made a prima facie case, and that the trial judge would have erred had he taken the case from the jury.

It is insisted the sale was made to Mr. Doty before any knowledge came to defendant that he was acting for Mr. Wilcox, and that this is a complete defense, and that the court erred in his instruction to the jury upon that branch of the case. The record discloses that when the price was agreed upon Mr. Widdicomb signed with his initials a brief memorandum of the transaction, and it is said there can be no doubt such a contract could be enforced by Doty.

The memorandum did not show to whom the deed was to run. The record discloses that Mr. Doty did not seek to enforce the contract, but before the deed was made informed defendant he was acting for Mr. Wilcox, and that at least two weeks before the deed was made to Mr. Wilcox the defendant was informed plaintiffs would claim their commissions. After this information came to him, he joined in making a deed to Mr. Wilcox. The newspaper advertisement was competent as showing in part what was done by plaintiffs in pursuance of what they claimed they were expected to do.

Judgment is affirmed.

The other Justices concurred.

NEWLAND *v.* FIRST BAPTIST CHURCH SOCIETY OF BELLEVUE.

1. REFORMATION OF INSTRUMENTS—MISTAKE OF SCRIVENER.
   Equity has power to correct a written conveyance so as to carry out the intention of the grantor where a mistake has been made by the scrivener.

2. EVIDENCE—PRESUMPTIONS—ERASURES IN CONVEYANCES.
   Where nothing suspicious appears on the face of a deed beyond the fact that an erasure is manifest, the presumption commonly is that the alteration was made before the deed was executed.

3. REFORMATION OF INSTRUMENTS—MISTAKE OF SCRIVENER—EVIDENCE.
   Evidence examined and *held* sufficient to support a finding that the grantor in a deed intended to convey a life estate only, and that the deed failed of such purpose by mistake of the scrivener.

Appeal from Eaton; Smith, J. Submitted February 2, 1904. (Docket No. 60.) Decided July 27, 1904.

Bill by Charles A. Newland and others against the First Baptist Church Society of Bellevue and another to reform and set aside certain deeds. From a decree for complainants, defendant church society appeals. Affirmed.

Thomas Sullivan, for complainants.

J. M. & J. L. Powers, for appellant.

MOORE, C. J. This is a litigation between the First Baptist Church Society on the one side and the other parties to the case, who are the heirs of Albert M. Newland, deceased. June 6, 1885, Albert M. Newland and wife made to his daughter, M. Helen Newland, a conveyance of 50 acres of land, "the said party of the second part to have possession of the above granted premises on the death of both of the parties of the first part." The consideration was stated to be "the sum of one dollar and the interest of the party of the second part in the estate of the parties of the first part." The scrivener, in making the conveyance, used a short form of warranty deed. We have the original before us. In it the words "and assigns" are erased in the two places where they appear in the deed by having a broad pen mark run through them. This deed was recorded in the office of the register of deeds May 3, 1894. The record in the office of the register shows the words "and assigns," where they first appear in the deed, have the pen run through them, but it was not run through them where they last appear in the deed. Mr. Albert M. Newland died in August, 1894, and his widow in the following February. April 26, 1899, M. Helen Newland conveyed the premises by warranty deed to the First Baptist Church Society, reserving a life estate to herself. The consideration named was $1.

The complainants filed their bill of complaint, claiming:

First: That the deed from Albert M. Newland and Martha A. Newland to M. Helen Newland created only a life estate in her, that being the purpose and intention of the grantors; and that the scrivener, believing that he

was carrying out that purpose and intention, struck out the words "and assigns," and that the paper drafted, through the mistake of the scrivener, does not properly express the purpose and intention of the grantors in making it.

Second. That the deed made by M. Helen Newland is void for the following reasons: (*a*) That M. Helen Newland had no estate in fee to convey. (*b*) That the said M. Helen Newland was incompetent at the time the said deed was made and executed, and was not of sufficient mental capacity to make and execute a deed. (*c*) That the deed was procured through fraud and undue influence.

The case was tried in open court. The record contains nearly 450 pages. The circuit judge filed his conclusions in writing. He was of the opinion he would not be justified in setting aside the deed on either the ground of incompetency or undue influence, but he did set it aside because he was "satisfied from the proof in the case that it was the intention of her father to convey to her only a life estate, and that the conveyance to her, with the light thrown on it by the proof in the case, only gives her that." The case is brought here by appeal.

The important question in the case is one of fact: Did Mr. and Mrs. Newland intend to convey to their daughter a title in fee to the land, reserving to themselves a life estate, or did they intend to give to her simply a life estate to the land? Counsel for the defendant make a very elaborate legal argument as to the effect of the conveyance should it be found that the words "and assigns" were stricken out when the complainants claim it was done, but we do not think that discussion is germane to the question involved. The right of a court of equity to correct a written conveyance so as to carry out the intention of the grantor, where a mistake has been made by the scrivener, is well established. 1 Story, Eq. Jur. (12 Ed.) §§ 153–155; *Canedy* v. *Marcy*, 13 Gray, 373; 15 Am. & Eng. Enc. Law, p. 673. Was there a mistake made? This is a troublesome question. It is insisted upon the part of the defendant that Mr. Newland made conveyances to his other children

of their proportion of his real estate, reserving to himself and wife a life interest therein, and that when he made this deed to his daughter he intended to convey a title in fee, subject to a life interest for himself and wife. It is their further claim that when Miss Newland made her deed to the church society the pastor of the church, the attorney who drew the deed, Mr. Sweet, and others saw the deed from her father to her, and that they did not see that the words "and assigns" were stricken out of the deed, and that they would have been likely to have observed it if it had been done. It is their further claim that Miss Newland retained the deed given to her by her father, and that after her death some person, whose interest it was to do so, drew a pen through the words "and assigns" in the deed—they having possession thereof—and that the same thing was done with the record in the office of the register of deeds. On the other hand, there is considerable testimony that Mr. Newland, after he made the deed, told several parties that his daughter could not convey any title to the land. There is testimony of several witnesses who claim to have seen the deed with the erasures before it was recorded. The scrivener says the erasures were made by him at the time he prepared the deed. Speaking of Mr. Newland and the drafting of the deed, he testified:

"He said he wished that she should be provided for if she should outlive him, and talked with me about the way to do it. I suggested a will. He objected, but wished me to make a deed to her in such a way that she could not dispose of it—dispose of the property which he designed to convey to her for her support. * * *

"*Q.* In pursuance of that conversation, with the purpose of carrying out his desire, you drew this paper marked Exhibit A?

"*A.* I did.

"*Q.* I call your attention to the fact that in the first clause, where the word 'assigns' appears, it seems to have been erased, and also lower down in the deed, in the second clause, that the word 'assigns' appears to be erased. I ask you if you erased those words at the time you drew the deed?

"*A.* I am sure that I did, in accordance with his wish.

"*Q.* Was it your intention and his understanding that by erasing the word 'assigns' that it restricted her title to a life estate in the premises?

"*A.* It was. After this deed was drafted, it was signed by the parties, and acknowledged, and carried away by Mr. Newland. * * * My memory is clear, and it is my recollection that he wanted to give her this property for and during the term of her natural life in such a way she could not deed it away or dispose of it."

This testimony was not substantially weakened by the cross-examination. This witness seems to be a man of character and standing, his business being that of a banker. The presumption commonly is, where nothing suspicious appears on the face of the deed beyond the fact that an erasure is manifest, that the alteration was made before the deed was executed. 1 Cooley, Black. Com. (4th Ed.) 682, note, and cases cited; *Munroe* v. *Eastman*, 31 Mich. 283; *Sirrine* v. *Briggs*, 31 Mich. 443, and the cases there cited. This presumption is supplemented by the testimony to which we have called attention. If these erasures were not made by the scrivener, as testified to by him, then some one has committed the grave offense of forgery, and has followed that act by changing a public record. The trial judge saw and heard the witnesses. We think his estimate of the character and weight of the testimony is fully justified by the record.

The decree is affirmed, with costs of this court.

The other Justices concurred.

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CRANSON *v.* SNYDER.[1]

1. SURFACE WATERS—DOMINANT ESTATE—RIGHTS.
The lower and servient estate must receive the surface waters which flow naturally from the dominant estate.[2]

2. SAME—IMPROVEMENT OF LAND.
The husbandman may improve his farm by filling up sag holes, pools, and basins to prevent water accumulating or remaining thereon, although the result is to cause the water to flow upon the land of an adjoining owner.

3. SAME—ARTIFICIAL DRAINS.
A landowner cannot, by artificial drains or ditches, collect waters from natural receptacles and cast them in a body upon the land of an adjoining owner.

4. SAME—CULTIVATION.
A landowner is entitled to cultivate his land in the manner usual in good husbandry, though the result may be to leave furrows which will cause the water to move off more rapidly than it would were the land in its natural state.

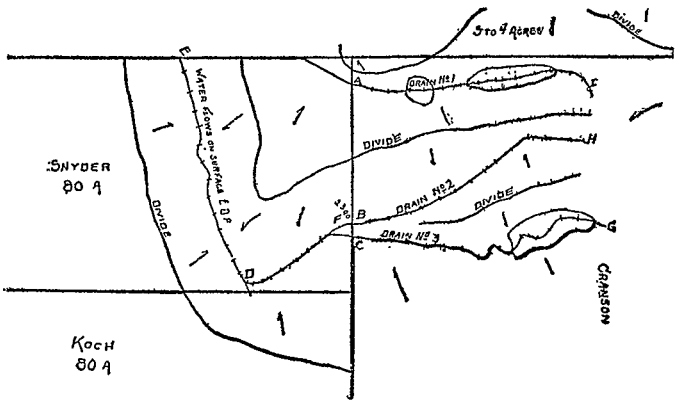
5. SAME — DRAINS — PRESCRIPTION — RIGHT TO MAINTAIN AND REPAIR.
Complainant, who has acquired a prescriptive right to maintain tile ditches and drains over defendant's land by defendant permitting them to exist and cast water on his land for 20 years, is entitled to maintain them and to enter on defendant's land for the purpose of repairing or relaying them with tile of no greater capacity than that originally laid.

Appeal from Washtenaw; Kinne, J. Submitted February 5, 1904. (Docket No. 93.) Decided July 27, 1904.

Bill by Edgar Cranson against Gardner W. Snyder to restrain the obstruction of certain tile drains. From a decree for complainant for less than the relief prayed for, he appeals. Affirmed.

[1] Rehearing denied October 27, 1904.
[2] For rights as to surface waters, see note to *Gray* v. *McWilliams*, (Cal.) 21 L. R. A. 593.

Complainant and defendant are farmers owning adjoining lands. Complainant owns the upper or dominant estate; defendant, the lower or servient estate. Complainant had three tile drains extending from his land into that of the defendant. In the latter part of 1902, defendant closed up the mouth of these tiles where they emptied upon his land, and the complainant filed this bill to restrain the maintenance of this obstruction. The location of the drains and of the lands, and the questions involved, will be better understood by an examination of the following map:



Between drains No. 1 and 2 is a natural divide, as shown by the plat. Between the upper part of drains Nos. 2 and 3 is another divide. The arrows upon the map indicate the natural flowage of the surface water towards the drains. The profile of drain No. 2 shows that it extends a distance of 3,600 feet, with a fall of 40 feet, which is practically continuous and uniform; being about 1 foot to every 90 feet. The profile of drain No. 3 shows, commencing at the head, that for the first 150 feet there is a fall of 1 foot; that for the next 300 feet there is no fall, and then a rise in the next 50 feet of 7 inches; and that from the apex of that rise to the mouth, a distance of 1,000 feet, there is a continuous and uniform fall of about 11 feet. The depression near the upper end of drain No. 3

is about 400 feet wide and 7 inches deep. The drains follow the natural depression in the land. After crossing the boundary line, the water naturally flows to point D, and thence westerly to point E. The slope across the defendant's land is 15 or 16 inches to the 100 feet. Complainant had maintained drains Nos. 2 and 3 with 3-inch horseshoe tile since 1865. In the year 1895 he supplanted drain No. 2 with 4-inch round tile for 30 rods from the south end, and 3-inch tile for the remainder of the distance; and drain No. 3 in 1896 with 6-inch round tile for 40 rods from the south, and 3-inch tile the remainder of the distance. Complainant and his grantors had for more than 30 years cultivated this land, and open furrows had, to some extent, facilitated the flow of the surface water.

The case was heard upon pleadings and proofs. The learned circuit judge found that the complainant had acquired a right by prescription to maintain drain No. 1. From this the defendant has not appealed. It was also established by the proofs that the complainant acquired a right by prescription to maintain drains Nos. 2 and 3 with 3-inch horseshoe tile. As to these the circuit judge found that—

"Complainant had no right to construct drains and lay tile through his lands in such a manner as will cause the surface water thereon to flow in larger quantities or more rapidly upon the lands of the defendant, or to so drain or tile his lands that surface water which would otherwise evaporate or sink into the soil shall be facilitated and caused to pass along and flow upon the lands of the defendant. In other words, I do not think that the defendant is bound to receive any surface water from the complainant which would not naturally flow from the lands of the complainant, were the same in a natural state, and not changed by husbandry. * * * It follows, therefore, that as to drains Nos. 2 and 3 the claims of the complainant cannot be sustained; that, in removing the old tile of three inches in size, and substituting or placing thereon a four and a six inch tile, he exceeded his own rights; and, if the defendant embanked upon his own land against this increased flowage, he did that of which the complainant

cannot complain, until the rights of the parties are placed in statu quo. When the complainant shall have restored the drainage as originally made upon his lands, the defendant should not obstruct the natural flowage of the surface water from the lands of the complainant upon the lands of the defendant, either by embankment or the filling of natural watercourses. The parties to the suit should be governed by the well-recognized maxim, 'Sic utere tuo ut alienum non lædas.'"

The court below dismissed the bill as to the obstructions to drains Nos. 2 and 3.

B. M. Thompson and *W. D. Harriman*, for complainant.

Alex. T. Hurst (*Cavanaugh & Wedemeyer*, of counsel), for defendant.

GRANT, J. (*after stating the facts*). The case involves only surface water. The rights of the owners of dominant and servient estates are well settled in this State, and there is no occasion to refer to authorities elsewhere. They have not been in unison upon the question of surface water. Justice CAMPBELL, in *Boyd* v. *Conklin*, 54 Mich. 583 (20 N. W. 595, 52 Am. Rep. 831), entered into a learned and exhaustive discussion of the subject. It was there held that the lower and servient estate must receive the surface waters which flow naturally from the dominant estate. This case was followed in *Gregory* v. *Bush*, 64 Mich. 37 (31 N. W. 90, 8 Am. St. Rep. 797). It was there held that the husbandman might improve his farm by filling up sag holes, pools, and basins to prevent water accumulating or remaining therein, although the result would be to cause the water to flow upon the land of the adjoining owner. It was also held that he could not by artificial drains or ditches collect waters from these receptacles and cast them in a body upon the adjoining land. These cases were cited and approved in *Leidlein* v. *Meyer*, 95 Mich. 586 (55 N. W. 367). It was also there held that, where the owner of the lower

estate permits a ditch or drain to exist for 20 years and cast the water upon his land, the right to maintain the ditch was acquired by prescription.

Complainant has acquired the prescriptive right to maintain the old horseshoe tile ditches, and may relay them or their equivalent in round tile. In addition, complainant is entitled to cultivate his land in the manner usual in good husbandry, although the result may be to leave furrows which will cause the surface water to pass off more rapidly than it would were the land in its natural state. This was held to be the husbandman's right in a case where a sag had been cultivated for 20 years, and the water had been turned therefrom by a furrow into a ravine. It was held that the complainant cannot complain of such drainage in the natural and usual course of husbandry. *Gregory* v. *Bush*, 64 Mich. 42 (31 N. W. 90, 8 Am. St. Rep. 797).

There is no evidence in this case from which it can be determined that a three-inch round tile will carry more water than the old three-inch horseshoe tile did, or that it will increase the rapidity of the flow. Manifestly a four-inch and a six-inch tile will carry more water, and carry it more rapidly, than a round or horseshoe three-inch tile. It is conceded that the purpose of putting in the larger tile was to carry the water off more rapidly, and that it accomplishes the purpose. We think it is clear, from the cases above cited, that the owner of a dominant estate has not the right to collect the water upon his land by means of drains or ditches and empty it in a body upon the servient estate. Complainant, therefore, in doing this, exceeded his right acquired by prescription, and his right to drainage in the usual course of good husbandry.

Complainant had maintained for more than 20 years a tile drain extending upon and emptying into the lands of defendant. He was entitled to maintain this drain, and to enter upon the defendant's lands to relay it. When the new drain was laid, complainant, by defendant's permission, entered upon his land, and made gradual slopes

on the sides of the shallow gully through which the water ran from the drain. For 6 years defendant made no complaint of injury to his land. In the summer of 1892 the rainfall was excessive and torrential. The most of the water, as it fell, would find its way speedily from the surface of the complainant's land to that of defendant. It is very doubtful whether the larger tile increased the flow of water to such an extent as to increase the damage. The damage, in any event, is insignificant. Under these circumstances, no costs were awarded to defendant by the court below. Defendant will recover the costs of this court.

Decree affirmed.

The other Justices concurred.

DUBAY v. KELLY.

1. COVENANTS—ACTION FOR BREACH—DAMAGES—EVIDENCE.
   In an action for breach of covenant of seisin, evidence of the costs taxed against plaintiff in an ejectment suit to recover a part of the land which defendant had been notified, but had failed, to take charge of, was admissible notwithstanding the abolition of the common-law remedy of voucher in real actions by 3 Comp. Laws, § 11198.

2. SAME—PAROL EVIDENCE TO VARY DEED.
   In an action for breach of covenant of seisin in a deed to a lot of land described by reference to a recorded plat, evidence that before plaintiff obtained the deed he was on the ground, and noticed that the fences did not seem to be on the lines shown by the plat, to which he called defendant's attention, who represented that as soon as the grain was cut he would have the fences moved to the true line, was not objectionable as an attempt to contradict the deed by parol.

3. SAME—ANCIENT PLATS—INSTRUCTIONS.
   In an action for breach of covenant of seisin in a deed to a lot conveyed according to a plat made in 1899, such plat not

being ancient, a request to charge that few of the early plats were accurate, and that lines shown thereon should not be corrected by new surveys, was inapplicable.

4. SAME—DAMAGES—INSTRUCTIONS.

Where, in an action for breach of covenant of seisin in a deed, by failure of title to certain gores of land along the boundary lines, it appeared that defendant had sold the land for less than its actual value, an instruction, permitting a recovery for the difference in value between the lot with its boundaries as described, and what it was actually worth with the gores cut out of it, as shown by the evidence, was prejudicial error.

5. SAME—DAMAGES—LOSS OF PART OF TRACT.

Where a covenant of seisin was broken as to a part of the land conveyed, the measure of damages, in the absence of fraud, was such a proportion of the price as the part to which title failed bore to the tract conveyed, with interest.

Error to Wayne; Donovan, J. Submitted February 23, 1904. (Docket No. 118.) Decided July 27, 1904.

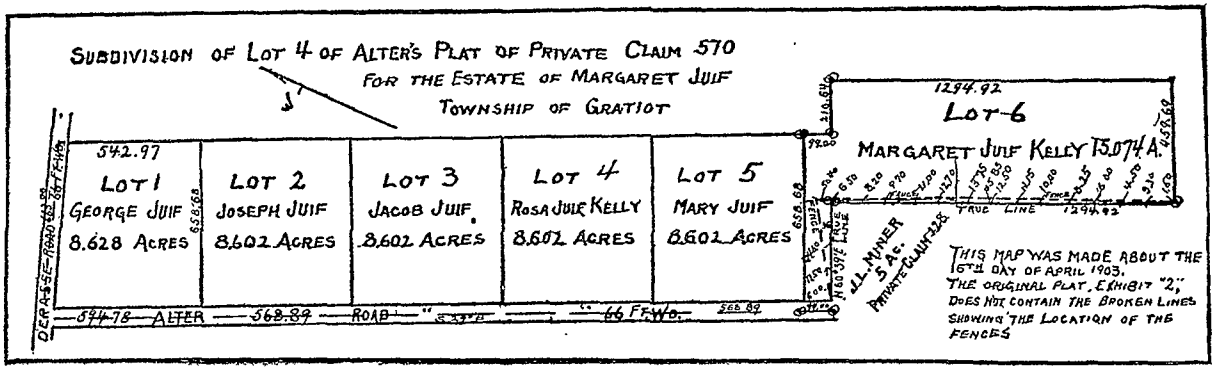
Assumpsit by John Dubay against George H. Kelly for breach of covenant of seisin in a deed. There was judgment for plaintiff, and defendant brings error. Reversed.

Walter Barlow, for appellant.

Jasper C. Gates, for appellee.

MOORE, C. J. Plaintiff sued to recover damages for breach of covenant of seisin in a warranty deed dated June 25, 1900. The plaintiff recovered a judgment. The defendant has brought the case here by writ of error.

A reference to the plat on the following page will aid in understanding the questions involved. The Juif estate was the owner of a quantity of real estate in the township of Gratiot. In 1898 and 1899 Mason L. Brown, an engineer and surveyor, was employed to survey, subdivide, and plat it for the heirs. He did so, and made a plat in all respects like the annexed plat, except it did not have the broken lines on it showing the location of the fences. This plat was re-


SUBDIVISION OF LOT 4 OF ALTER'S PLAT OF PRIVATE CLAIM 570
FOR THE ESTATE OF MARGARET JUIF
TOWNSHIP OF GRATIOT
542.97
LOT 1
GEORGE JUIF
8.628 ACRES
LOT 2
JOSEPH JUIF
8.602 ACRES
LOT 3
JACOB JUIF
8.602 ACRES
LOT 4
ROSA JUIF KELLY
8.602 ACRES
LOT 5
MARY JUIF
8.602 ACRES
1294.92
LOT 6
MARGARET JUIF KELLY 15.074 A.
ALTER ROAD
ALTER
ROAD
66 FT. WD.
TRUE LINE
1294.92
A.L. MINER
5 AC.
PRIVATE CLAIM 328
THIS MAP WAS MADE ABOUT THE 16TH DAY OF APRIL 1903.
THE ORIGINAL PLAT, EXHIBIT "2," DOES NOT CONTAIN THE BROKEN LINES SHOWING THE LOCATION OF THE FENCES

corded at page 117, Liber 512 of Deeds, Wayne county records. June 25, 1900, by warranty deed, and for a consideration of $1,600, defendant conveyed to plaintiff lot 6 "according to the plat of the subdivision of the estate of Margaret Juif, deceased, as recorded in Liber 512 of Deeds, page 117, Wayne county records." It is undisputed that when this deed was made defendant had neither title to nor possession of the whole of this lot 6. One Joseph L. Miner was, and still is, the owner and in possession of certain gores of lot 6, which aggregate nearly one-half acre. For the purpose of getting possession of these gores the plaintiff brought ejectment against Mr. Miner, and gave notice to Mr. Kelly to take charge of the case. Mr. Kelly paid no attention to the case. Upon the trial a judgment was rendered in favor of Mr. Miner, and his costs were taxed against the plaintiff in the sum of $43.40. The taxed bill of costs was offered in evidence. Plaintiff also gave evidence that he paid in that case an entry fee of $4, a stenographer's fee of $3, and to Mr. Kelly $2.80 as witness fees, making a total of $53.20. Error is assigned on the admission of this testimony. Counsel says:

"The practice endeavored to be adopted by the plaintiff to bring the defendant Kelly into that suit was the old common-law remedy known as 'voucher to warranty.' * * * The remedy known as 'voucher in real actions' under the old common law has, however, been expressly abolished by our statute. 3 Comp. Laws, § 11198."

We think the testimony was properly admitted, under *Webb* v. *Holt*, 113 Mich. 338 (71 N. W. 637).

Plaintiff was allowed to put in evidence tending to show that before he obtained his deed he was on the ground, and noticed that the fences did not seem to be on the lines of lot 6, and called the attention of defendant to it, and he represented that, as soon as the grain was cut, he would have them moved upon the true line. Counsel say this was improper, because it occurred before the deed was made, and all conversations are merged in the deed. There would be much force in this construction if it was

sought to dispute the deed by parol testimony; but it is not. The testimony is in harmony with the deed, and shows the negotiations between the parties. See *Dikeman* v. *Arnold*, 83 Mich. 218 (47 N. W. 113).

Counsel are not all agreed as to what is involved in this case. It is the claim of plaintiff that he was deeded lot 6 according to the recorded plat thereof, and that defendant did not make good his title to all of the land shown in said plat; while defendant claims the action is brought to recover a claimed discrepancy in the acreage conveyed. Defendant preferred a great many requests bearing along the same line. It will answer every purpose to insert one of them. It reads:

"Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and, if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. But no law can sanction this course. *Diehl* v. *Zanger*, 39 Mich. 601, 605."

The trouble with these requests is they do not apply to the record as made. The plat which is referred to in the deed was not an ancient plat, but was made in 1899. It showed the stakes and the outlines of lot 6. It did not show the location of the fences. Defendant saw fit to make this plat part of his deed. See *Wilson* v. *Hoffman*, 70 Mich. 552 (38 N. W. 558); *Nichols* v. *Furniture Co.*, 100 Mich. 230 (59 N. W. 155), and cases there cited. There is no question from the record but that the lines of the lot as shown by the plat embrace more land than was inclosed within the fences. The testimony is also irresistible that defendant knew this. The plaintiff and his witnesses say he agreed to move the fences back. He says he agreed to do what he could to have them moved back.

Upon this branch of the case the court might very properly have directed a verdict in favor of the plaintiff.

We now come to the question of damages. The court was requested to charge the jury that the measure of damages is the value of the land so lost to the plaintiff as agreed on at the time of the conveyance of lot 6 to him by the defendant as expressed in the consideration of such conveyance. This is at the rate of $106.666 per acre. Upon that branch of the case the judge charged:

"It is for you to consider the situation. We are coming now to the value, the surroundings and value of this property, and to determine from the evidence how much these gores are worth; and the question is how much more lot six would have been worth if these boundaries had been as laid out in the plat, or referred to in the deed from the defendant to the plaintiff, than it was actually worth with the gores cut out of it, as shown by the evidence in the case. If you find for the plaintiff, you are to determine the amount of this value, and give the plaintiff a verdict therefor, which is proper, and you are to add interest at the rate of five per cent. from the 25th of June, 1900, the date of the delivery of the deed."

It will be observed that the great bulk of this lot did not adjoin a highway. It was reached from the Alter Road, having only 99 feet frontage thereon, and half way back this strip was narrowed by the gore to 50 feet. The rule contended for by defendant would be very unjust. When one has failed to obtain title to land sold him his damages in a suit on the covenants of his deed are determined, not as stated in the foregoing charge, by the actual value of the land lost—as it would be in a case of a suit for fraud (see *Page* v. *Wells*, 37 Mich. 415; *Jackson* v. *Armstrong*, 50 Mich. 65 [14 N. W. 702]), but by the consideration paid for the land (see *Cook* v. *Curtis*, 68 Mich. 612–619 [36 N. W. 692]). His recovery is limited to that consideration, with interest. See 2 Warvelle on Vendors (2d Ed.), § 967. If, therefore, the title to the entire land conveyed to plaintiff by defendant had failed, plaintiff could have recovered no more than the amount paid, with legal interest thereon. In this case the title to a portion of that land

has failed. In accordance with the foregoing principle, the recovery in such case must be limited to such a proportion of the consideration paid as the value of the land, the title to which failed, is of the entire value of the parcel conveyed; otherwise one might recover more for the loss of a part of his land than he could for the loss of the whole. The charge would not have been prejudicial to defendant had he not sold the land for less than its actual value. The testimony shows that he sold the entire tract of 15 acres for $1,600, or $106.666 per acre. There was testimony that its actual value was $200 per acre. It is to be presumed from the jury's verdict that they accepted this testimony, and that, therefore, defendant was prejudiced by the charge under consideration. For this error judgment must be reversed.

There was testimony that the land fronting on Alter Road was worth $300 an acre, or one-half more than the average price of the entire tract. Regarding this difference in value as a basis in computation, the value of the gores, according to the contract price, would be $160 per acre, or, for the .494 acres, $79.04, to which sum should be added $53.20 for costs in the ejectment suit, and interest from June 25, 1900. A judgment may be rendered here for that amount, or a new trial will be ordered, at the option of the defendant. In either case defendant will recover costs of this court.

The other assignments of error have been examined. We think they are without merit, but do not think it necessary to discuss them.

Judgment is reversed.

The other Justices concurred.

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ALBRING *v.* WARD.

1. ADOPTION—HEIRSHIP.
   Heirship, except that based upon consanguinity, can be created only by a constitutional law by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature.
2. SAME—COMMON LAW.
   Heirship by adoption is unknown to the common law.
3. SAME—UNCONSTITUTIONAL STATUTE.
   Where a statute under which complainant was adopted was unconstitutional, and there was no contract between her and her foster parents to make complainant their heir, other than that arising from the adoption proceedings, she was not entitled to share in the real estate of which her foster father died seised.
4. WITNESSES—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.
   Under Act No. 30, Pub. Acts 1903, providing that no person who shall have acted as agent in the making or continuing of a contract with any person who may have died shall be a competent witness in any suit involving such contract, complainant's natural father was incompetent to testify to an agreement made between him and complainant's foster father for her benefit when she was a child two years of age, by which deceased agreed to make complainant his heir.

Appeal from Monroe; Lockwood, J. Submitted February 25, 1904. (Docket No. 109.) Decided July 27, 1904.

Bill by Lucy Bell Albring against Edward Ward and Martha Ward to establish a right to share in the distribution of the estate of Henry Ward, deceased. From a decree for complainant, defendants appeal. Reversed.

The complainant is the daughter of John Bennett and Ann Bennett. Her mother died soon after her birth. Mr.

and Mrs. Bennett had two other small children. The three were taken care of by Mr. Bennett's mother. The mother did not feel equal to the care of the three children, and both Mr. Bennett and his mother desired to provide for her maintenance and care elsewhere. Mr. Bennett was a farmer of little means. Mr. Bennett and his mother took Lucy to the home of Henry Ward and his wife, the defendant Martha. After keeping her a few months, they concluded to take steps under the statute to adopt her. Accordingly Mr. and Mrs. Ward and Mr. Bennett went before the judge of probate on December 8, 1881, and executed articles of adoption under the statute then supposed to be valid. In that instrument Mr. Bennett acknowledged that he executed the instrument for the purpose of giving his consent in writing to the adoption of his daughter Lucy, of the age of two years, by said Henry and Martha; that she should thereafter bear the family name of the Wards; and that he further consented that she, so adopted by them, might become their heir at law. The Wards, on their part, declared that they adopted said child as their heir at law; that they desired her to bear their family name; and that they desired the judge of probate to enter an order confirming the adoption of said child. Lucy lived with her adopted father and mother until she was 17 years of age, when she was married. She continued to live with them for a while after her marriage, and finally went away with her husband to live in Toledo. Mr. Ward died in August, 1901, leaving his widow and a son, the defendant Edward. The defendants denied the legal adoption of complainant, and thereupon she filed this bill praying to be declared the owner in fee simple of the undivided one-half of the real estate of said Henry Ward, subject to the widow's dower interest. The bill alleges a contract between Henry Ward and complainant's father, Mr. Bennett, to the effect that if Mr. Bennett would relinquish all claim to the custody, care, and control of his daughter, and all his rights as her father, to the said Henry Ward, the said Ward would make her his heir

at law, and that at his death she should inherit a share of the property as if she were his natural child. The answer of defendant Martha alleges that Mr. Bennett and his mother brought the child to their home, saying that his mother could not keep them all; that, unless she could persuade some one to take the child, her father would be compelled to take her to the State home for dependent children; that they left said child with the Wards, promising to return later in the day and take her away; that after about a week Mr. Bennett's mother returned, saying she hoped that they would change their mind and keep the child, and that Mr. Bennett would do anything desired to give up the legal custody and control of the child, and thereafter proceedings were taken to adopt her. Pleadings and proofs were taken in open court, and a decree entered for the complainant. The decree, according to the opinion of the learned circuit judge, is based upon his finding that Henry and Martha Ward agreed with complainant's father that she should be an heir at law with each of them equally with their own son, Edward.

George M. Landon and *Southard & Southard*, for appellants.

C. A. Golden and *Ray & Cordill*, for appellee.

GRANT J. (*after stating the facts*). Heirship, except that based upon consanguinity, can be created only by a constitutional law by which "relations of paternity and affiliation are recognized as legally existing between persons not so related by nature." Heirship by adoption is unknown to the common law. *Morrison* v. *Sessions' Estate*, 70 Mich. 297 (38 N. W. 249, 14 Am. St. Rep. 500); *Sarazin* v. *Railroad Co.*, 153 Mo. 485 (55 S. W. 92); *Ex parte Clark*, 87 Cal. 641 (25 Pac. 967). If the statute is held void, or, if valid, is not complied with, the adoption fails, and the supposed adopted person obtains no interest in the property or estate of the adopting per-

son. Void articles of adoption are no evidence of themselves of a contract for an interest in property, real or personal. Mr. Ward and his wife, at the urgent request of the complainant's father and grandmother, took steps under the then statute for adoption, intending to adopt the complainant. The papers drawn and the order made were such, and such only, as were provided by the statute. That statute was held unconstitutional. *People* v. *Congdon*, 77 Mich. 351 (43 N. W. 986). By the articles, even if valid, Mr. Ward made no contract with complainant's father or with her to give her any specific interest in any of his property. Complainant had no contract with Mr. Ward, the specific performance of which she could enforce. At most, it was only a statutory proceeding to establish heirship, which left the right of property to depend alone upon such heirship. Such void articles for heirship cannot be converted into a contract for the sale of land, and complainant in this suit claims only an interest in land by virtue of a supposed contract. Complainant's father was a witness for her, and undoubtedly endeavored to make her case as strong as possible. He stated the transaction in the following language:

"We all came to Monroe and consulted Judge Phinney, and they said they wanted to adopt the child as their own lawful heir. That was the way it was understood. That was the way I understood it. It was put down on the paper that way, and was all the arrangement we had. I signed the paper when it was prepared. I supposed it was an adoption."

The above language of the witness is consistent with the theory of adoption. It has no reference to any other relation, or any attempt to convey any interest in property other than by adoption. But this testimony of the father is inadmissible under Act No. 30, Pub. Acts 1903, which provides that no person "who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit involving such contract." If any contract was made,

it was made by Mr. Bennett on behalf of his daughter. A more appropriate case for the application of the law cannot well be imagined. Counsel for the complainant rely mainly on *Wright* v. *Wright*, 99 Mich. 170 (58 N. W. 54, 23 L. R. A. 196). Several authorities are cited in the opinion in that case, written by Justice LONG, and concurred in by Chief Justice MCGRATH. The authorities were found not to be in harmony. Justice LONG, in his opinion, sustained the title of the defendant upon the ground that upon the undisputed facts there was an implied contract that the defendant was to have the property. That case differs from this in several important particulars. Mr. Wright lived till he was about 23 years of age upon the farm, supposing he was the natural son of Phineas R. Wright. Phineas had no children. Frank, the supposed adopted son, had rendered valuable services upon the representation and belief that he was the heir. Phineas had accepted such services, knowing that Frank understood that he was his son and would receive the property. In my concurring opinion, I said:

"Each case of this character stands upon its own peculiar circumstances and facts, upon which relief is granted or denied. * * * They gave defendant their own name, and, by their conduct, language, and treatment, represented to him that he was their own son. He lived with them upon this understanding until some time past the age of majority. He had a right to rest and act upon the belief that he was the legal heir. So long as his reputed father and mother chose to let him repose in this belief, others had no right to interfere. * * * Defendant rendered services upon the faith of his relationship. Those services were accepted in reliance upon such relationship, declared in the most solemn manner. There are no children interested."

No such state of affairs exists here. Complainant, when a mere child, knew who her real father was. She had rendered no service in the belief she was the real daughter of Mr. Ward, or that she would be an heir to his property. About as soon as she was old enough to

render to Mr. and Mrs. Ward any valuable service, she was married, and soon after left them. Some witnesses testified to statements made by Mr. and Mrs. Ward in which they spoke of her as their daughter, and that she called them father and mother. Such statements are consistent with the theory of supposed legal adoption. They are not evidence of a contract to make her an heir, or to convey her any property. If there were any evidence of a legal contract on the part of Mr. Ward to make complainant his heir, such statements might be of some value in proof of the contract. But as already stated, the proceedings for adoption afford the sole basis for any claim to such a contract, and they are valueless for that purpose. If *Wright* v. *Wright* is construed by the profession to mean that void articles of adoption can afford the basis of a contract for heirship, it should, in my judgment, be overruled. Counsel for complainant cite some authorities which are not cited in *Wright* v. *Wright*. We have examined them, and find that some of them are based upon an express contract that the complainant should have a share of the estate. Such is the case of *Hall* v. *Gilman*, 77 App. Div. 458 (79 N. Y. Supp. 303), where the contract claimed was that if the claimant would live with him (the deceased), and care for him, as a daughter, until his death, she should have all his property. In so far as any of them may be in contravention of this opinion, we decline to follow them.

Decree reversed and bill dismissed, with costs of both courts.

The other Justices concurred.

GARDNER *v.* COUCH.

FALSE IMPRISONMENT—JUSTICES OF THE PEACE—ERRORS.

A justice of the peace, acting under authority conferred upon him by a city charter and ordinances to try and punish vagrancy, is not liable to one so tried and punished, though there are errors and irregularities in his proceedings.

ON MOTION FOR REHEARING.

1. CRIMINAL LAW—PRELIMINARY COMPLAINT—SUFFICIENCY.

A conviction under complaint and warrant containing no detailed statement of the facts constituting the offense, but charging in general language that accused is a vagrant in violation of a specified ordinance, will not justify detention where accused seeks relief by habeas corpus proceedings.

2. FALSE IMPRISONMENT—JUSTICES OF THE PEACE—INSUFFICIENT COMPLAINT.

A justice of the peace is not civilly liable for issuing a warrant and authorizing the detention of the person complained against, where the offense named is within his general jurisdiction, though the complaint and warrant do not describe the offense with sufficient particularity to withstand inquiry on habeas corpus.

Case made from Chippewa; Steere, J. Submitted April 5, 1904. (Docket No. 6.) Decided July 27, 1904. Rehearing denied December 22, 1904.

Case by Charles Gardner against John A. Couch for false imprisonment. There was judgment for defendant, and plaintiff assigns error. Affirmed.

A. R. Macdonell and *W. A. Coutts*, for appellant.

Sharpe & Handy, for appellee.

MOORE, C. J. The questions involved grow out of the charge of the judge to the jury, and for that reason we insert the material portions of it here:

"This is what is known as a suit for false imprisonment, the plaintiff suing the defendant to recover damages for an alleged illegal sentence of sixty days in the common jail of this county. The defendant admits the sentencing of this plaintiff to sixty days' imprisonment, and he admits that his action in so doing was based upon the complaint and warrant which have been introduced in evidence, each charging plaintiff with being a vagrant. In that connection the defendant denies he ever committed this plaintiff to prison, but, on the contrary, claims he suspended sentence upon him. The claim of the plaintiff is that on the 8th of last December, after he had pleaded not guilty in the defendant's court, when arraigned and called upon to plead to the charge of vagrancy the defendant proceeded to declare him guilty, without any further plea, hearing, or trial, and then sentenced him to sixty days in jail, proposing, in that connection, tosuspend sentence if he would leave town; but that later a commitment was issued for him under this proceeding, and he was confined in jail. That is denied by the defense, and it is asserted that upon the arraignment the plaintiff pleaded guilty. A formal sentence was thereupon pronounced, with the overture of a suspension of the sentence if he would leave town.

"Now, such a proceeding as is claimed by plaintiff on the part of the magistrate would entitle the plaintiff to recover damages, and you are instructed that to sentence a man who had pleaded not guilty without receiving any further plea, and without giving him any hearing or trial, would be an arbitrary and unwarranted proceeding, without jurisdiction, and without color of law, and the office would not protect the individual in so doing. It would be entirely different from a case where there was an honest error of judgment in the performance of an official duty. The same rule should and does apply to justices' courts as to the higher courts in that particular. Where the subject-matter is within the jurisdiction of the court, and an honest but erroneous conclusion is reached, although the party against whom the judgment is rendered should, by reason of the error, be injured, and entitled to have this judgment set aside, and he be restored to his former rights, yet he is not entitled to claim compensation and damages for such erroneous conclusion. But, on the contrary, if the judge of an inferior court acts in excess of his legal authority, without any authority or claim of authority,

knowingly, arbitrarily, and without any color of right, his office would not protect him, and he is liable.

"It is for you to say, from all the disputed testimony in this case, whether or not, at the time this plaintiff was arraigned in justice's court before the defendant, he pleaded guilty to the charge. If he did not, and he was afterwards sentenced and committed, the warrant being issued out of and by authority of defendant's court, and he imprisoned under it, he is entitled to recover—to recover such damages as the testimony shows he has suffered, including loss of time, injury to feelings, annoyance, mortification, and disgrace, which are to be determined by the jury, according to what seems to be just and right, from all the testimony. If the defendant only proceeded to sentence this plaintiff on a plea of guilty, after the same had been made in court before him, you are instructed that the proceedings and papers in court, although somewhat irregular, would protect him in the honest exercise of what he believed to be his official duty. This charge is a charge of vagrancy, over which the court had jurisdiction. There was a complaint and warrant in the case, and plaintiff pleaded to the charge. This being so, if he pleaded guilty, mere errors or irregularities appearing in such proceedings would not, as the case presents itself, render the defendant liable.

"Whether or not there was a commitment issued, and this plaintiff taken in custody under it, and confined in jail, is an issue of fact for you to determine. If there was a commitment issued out of the defendant's court in the usual course of business under this sentence which was pronounced, even though not issued by the defendant himself, but by his clerk, in the preformance of his duty under the sentence which had been pronounced, that commitment would be binding upon the defendant, so far as that phase of the case is concerned.

"Something has been said to you in regard to the sentence being excessive. If this plaintiff pleaded guilty, even though the sentence pronounced was excessive, the plaintiff would not be entitled to recover in this case on that ground, because he would have his remedy by other proceedings. He could be legally sentenced, upon a conviction for vagrancy, to the common jail, for thirty days; and, if the sentence were pronounced for sixty days, it would still be good for the thirty days. It would be a valid sentence for that limit of time, and at the expiration

of that time he would be entitled to his release under other proceedings, and there would be no liability on the part of the magistrate by reason of the excessive sentence.

"Those are the questions of fact before you. You are to remember that in these proceedings the burden of proof is upon the plaintiff. In order to recover upon these issues, he must satisfy you by a preponderance of evidence that when arraigned in justice's court he pleaded not guilty; that he was sentenced without further proceedings looking to a determination of whether or not he was guilty; that he was not only sentenced, but he was committed and imprisoned under a commitment issued from defendant's court."

The plaintiff raises the following questions:

1. Were the complaint and warrant sufficient to give the defendant jurisdiction, as a justice of the peace, so as to protect him in causing the imprisonment of plaintiff?
2. Was the issuance of a commitment from defendant's court necessary to his liability?

He contends the answer to both of them should be in the negative.

The defendant was a justice of the peace in the city of Sault Ste. Marie. The charter of that city authorized him "to try and punish offenders for violations of the ordinances of the city as in such ordinances prescribed and directed." Act No. 468, Local Acts 1901, § 32. It was conceded on the trial that the defendant was acting under this provision of the charter. An ordinance provides, "All vagrants shall be deemed disorderly persons and punished as hereinafter provided." A complaint in the language of the ordinance was made against the plaintiff, and a warrant was issued. It is the claim of defendant that the plaintiff pleaded guilty. This is denied by the plaintiff. It already appears that question was left by the judge to the jury, who found in favor of defendant. It is the claim here that the complaint and warrant did not state an offense, and were no justification to the magistrate, and that, in any event, he was liable for the time plaintiff was in jail after arraignment and before sentence.

We do not think it necessary to decide whether the warrant is valid. The case is within *Brooks* v. *Mangan*, 86 Mich. 576 (49 N. W. 633, 24 Am. St. Rep. 137); *Curnow* v. *Kessler*, 110 Mich. 10 (67 N. W. 982); *Tillman* v. *Beard*, 121 Mich. 475 (80 N. W. 248, 46 L. R. A. 215); and *James* v. *Sweet*, 125 Mich. 132 (84 N. W. 61). In these cases the discussion is so full and the collation of authorities so complete, we deem it unnecessary to do more than to refer to them. If any one had occasion to complain of the charge of the court, it was not the plaintiff.

Judgment is affirmed.

The other Justices concurred.

ON MOTION FOR REHEARING.

PER CURIAM. This is an action of false imprisonment. It appears from the testimony that plaintiff was arrested December 1, 1902; remained in custody until December 8th, was then tried, convicted, and sentenced to imprisonment for 60 days. In disposing of this case we held that it must be presumed, under the charge of the court, that the jury found that the plaintiff pleaded guilty, and therefore that he could not recover in this case. By this application for a rehearing appellant represents that this disposition of the case did not determine his contention that his imprisonment for the eight days before trial was illegal. We think he is right, and that, for the purpose of determining the validity of that claim, we must consider another question, viz., was defendant liable in an action for false imprisonment because he issued the warrant for plaintiff's arrest? The complaint and warrant contained no detailed statement of the facts which constituted plaintiff's alleged offense. It merely charged in general language that plaintiff was a vagrant, in violation of a specified ordinance. We would be bound to hold that a conviction under such a complaint and warrant would not justify a detention if plaintiff sought relief by

habeas corpus proceedings. See *In the Matter of Sarah Way*, 41 Mich. 299 (1 N. W. 1021). But does it follow that defendant, who was a justice of the peace, acting judicially, is responsible as a trespasser because he reached an erroneous decision. Plaintiff contends that it does, and he relies upon our decisions (see *Clark* v. *Holmes*, 1 Doug. [Mich.] 390; *Shadbolt* v. *Bronson*, 1 Mich. 85; *La Roe* v. *Roeser*, 8 Mich. 537; *Sheldon* v. *Hill*, 33 Mich. 171; *Stensrud* v. *Delamater*, 56 Mich. 144 [22 N. W. 272]) which hold a justice to be a trespasser when he acts without or in excess of jurisdiction. We do not think these decisions applicable. In the case at bar defendant had jurisdiction of the subject-matter, and it was his duty to judicially determine whether or not a warrant should issue. Had he determined that it should not issue, surely that determination would have been a judicial act, which might have been corrected if erroneous. His determination was none the less judicial because he erroneously decided that the warrant should issue. To hold him civilly responsible for such an erroneous decision would not only be unjust, but injurious to public interests. In deciding whether or not a warrant should issue, the magistrate should be free to act according to his judgment. If the law made a magistrate civilly responsible if he erroneously issues a warrant, it is obvious that he would be tempted to resolve all doubts against its issuance, and that, in consequence, public interests would suffer because crimes which should be, would not be, investigated or punished.

The distinction between the above cases and the case at bar is shown by a quotation from the opinion of Justice CHRISTIANCY in *La Roe* v. *Roeser*, supra:

> "This was not a mere error of judgment in the performance of his judicial duties, such as an erroneous opinion or judgment on the trial of a cause of which he had jurisdiction."

I think it may be said that no principle of law is better settled than that a judicial officer is not civilly liable for an erroneous judicial decision.

Says Justice COOLEY:

"Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State and the peace and happiness of society; that, if he shall fail in the faithful discharge of them, he shall be called to account as a criminal, but that, in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages." Cooley on Torts (2d Ed.), p. 477.

See, also, Webb's Pollock on Torts (Am. Ed.), p. 138. This principle was applied in *Wheaton* v. *Beecher*, 49 Mich. 348 (13 N. W. 769). There, after this court had determined (see *Beecher* v. *Anderson*, 45 Mich. 543 [8 N. W. 539]) that a warrant was so defective that it did not authorize an arrest, it was held that the parties who obtained that warrant were none the less exempt from responsibility in an action for false imprisonment. This proceeds upon the ground that the judicial determination by a magistrate having jurisdiction of the subject-matter—who in that case was a justice of the peace—was their protection. It would be absurd to suppose that such judicial determination protected them, but did not protect him.

It results from these views that defendant is not responsible in damages for plaintiff's imprisonment during the eight days which occurred before his trial. The application for a rehearing must therefore be denied.

NATIONAL LIFE & TRUST CO. *v.* OMANS.

1. INSURANCE — PREMIUM NOTE — FRAUD — WAIVER — FAILURE TO REPUDIATE.

   Though a note given in payment of the first premium on a life policy received by defendant on her application was obtained by fraud of plaintiff's agent, retention of the policy for an unreasonable time, and failure to notify the company that she repudiated the transaction, waive the fraud, and bind defendant to pay the note, though the policy provides that nonpayment of a premium when due shall terminate the company's liability; there being a provision for reinstatement, including the right to payment of a specified sum at the end of 10 years.

2. TRIAL—INSTRUCTIONS IN ABSENCE OF COUNSEL.

   There is no error in the court's recalling the jury and giving further instructions in the absence of counsel.

Error to Kent; Wolcott, J. Submitted April 5, 1904. (Docket No. 65.) Decided July 27, 1904.

Assumpsit by the National Life & Trust Company against Martha J. Omans on a promissory note. There was judgment for plaintiff, and defendant brings error. Affirmed.

James E. O'Keefe, for appellant.

Don E. Minor, for appellee.

MONTGOMERY, J. This action was brought to recover the amount appearing due on a promissory note signed by defendant, payable to the order of Jennie E. Heyser, an agent of the plaintiff, and now owned by the plaintiff. The defendant set up the defense that she never intentionally signed the note in question, and that, if the signature thereto was hers, it was obtained by a fraud practiced by Miss Heyser, the payee. This defense was supported by

defendant's testimony, to some extent corroborated by other witnesses, but the claim was denied by Miss Heyser, who gave testimony tending to show that the note was given in payment of the first premium on a bond or policy issued by plaintiff, and was signed at the date of making such application. The bond was promptly furnished and received by defendant. There was also testimony that in June following, when the first installment was due upon this note, the defendant received notice from a bank that it was due, and took no notice of the same. She testifies:

"I thought like this—if Miss Heyser had given my note, she could pay it. I didn't know any other way it could be done."

She, however, retained the bond, and did nothing to repudiate either that contract or the note. True, she testifies that she did not know she had received the bond until September, when she had a talk with Miss Heyser and went home, made a search for the bond, and found it among some other papers. How it came to be among these papers is not explained. After this the bond was retained for two years, until suit was brought.

The circuit judge charged the jury as follows:

"There is another element in the case. It appears that the defendant received a policy of insurance, or a bond, as it is called, from the plaintiff, in response to this application which she had signed, and in payment of the premium for which the note in question is claimed to have been given. It was the duty of the defendant on receiving this policy, if she believed it was obtained by fraud, to have either returned the policy to the company, notifying the company or its agent that she would not accept the policy, and to do this within a reasonable time after receiving it, or within a reasonable time after learning of the fraud that she claimed was practiced upon her. This question is, in a sense, independent of whether or not the defendant was induced to sign the note by misrepresentation on the part of the agent. That is to say, if you should find that the defendant signed the note by reason of some fraud practiced upon her in the manner she claims, still, it appearing that this application was

sent in to the company, and the policy sent to the defendant, which she retained, if, under all the evidence in the case, it has appeared in the evidence she retained it an unreasonable length of time, or failed for an unreasonable length of time to notify the company or its agent that she repudiated the transaction and would not be bound by the note, then such retention of the policy without complaint would be a waiver of any fraud she claimed, and would bind her to pay the note."

This instruction was applicable to the facts, and would seem to be but an application of the well-understood rule that one who seeks to rescind a contract for fraud must do so within a reasonable time after the discovery of the fraud. It is urged, however, that there was no occasion for rescission, as the contract of insurance contained the following clause:

"The nonpayment of any premium when due shall forfeit all premiums paid on this bond and terminate the liability of the company thereunder except as hereinafter provided."

There is a further provision for reinstatement or restoration of the bond. In any view of this provision which may be taken, the rights of a delinquent policy holder were not wholly withdrawn. The right to reinstatement existed, including the right to payment of a specified sum at the end of a 10-year term. It was therefore plainly the defendant's duty, on discovering the facts, to make her election to rescind within a reasonable time. *Bostwick* v. *Insurance Co.*, 116 Wis. 392, 408 (80 N. W. 540, 92 N. W. 246).

The court, after the jury had retired, called them in for further instructions, which were given in the absence of the parties. The instructions were taken down by the reporter in the usual manner, but it is claimed the court erred in giving these instructions in the absence of counsel. Counsel cites *Snyder* v. *Wilson*, 65 Mich. 336 (32 N. W. 642); *Fox* v. *Color Works*, 84 Mich. 676 (48 N. W. 203); *Hopkins* v. *Bishop*, 91 Mich. 328 (51 N. W. 902, 30 Am. St. Rep. 480); *Le Beau* v. *Construction Co.*, 109

Mich. 302 (67 N. W. 339). None of these cases go the length of sustaining the contention of defendant's counsel. These cases hold that it is improper for the judge to visit the jury-room or send communications to the jury in the absence of any consent of counsel, but none of them holds that the court is made responsible for the attendance of counsel in court during trial, or when additional instructions may be given.

There is no force in the suggestion that the jurors were coerced.

The judgment is affirmed.

The other Justices concurred.

POLLOCK *v.* SOWERS.

1. DRAINS — PROCEEDINGS TO CONSTRUCT — INVALIDITY — SUBSEQUENT PROCEEDINGS.

   2 Comp. Laws, § 4366, as amended by Act No. 272, Pub. Acts 1899, and 2 Comp. Laws, § 4369, providing for the completion of drains begun and uncompleted because of defects in the proceedings, should be construed together, and, as so construed, authorize a county drain commissioner to complete a drain, after a tax for its construction has been declared void, for the reason that the drain was not completed at the time the tax was levied, though the proceeding instituted by the taxpayer attacked the payment of the tax only, and the drain commissioner had certified that the drain had been completed.

2. SAME—INVALIDITY OF TAX—RES JUDICATA.

   Where, in proceedings to enforce a drain tax, the court found that the assessment was irregular in form; that the taxes were not placed on the tax roll under the proper heading; that the benefit to the taxpayer from the drain was slight, because it had not been completed, and that therefore it would be unjust to decree the tax against the land,—such finding did not constitute a judgment that the tax was

wholly void, or that, if benefits were actually received when the drain should be completed, complainant's land would not be subject to proper assessment therefor, so as to preclude a completion of the drain and reassessment of the costs as authorized by 2 Comp. Laws, §§ 4366, 4369.

3. SAME—DELINQUENT CONTRACTOR—COMPLETION.

The fact that a public drain contractor becomes delinquent, and fails to complete the drain through complainant's land as specified in the contract, will not exempt such lands from taxation for the subsequent completion of the drain by other contractors under subsequent proceedings.

Appeal from Eaton; Smith, J. Submitted April 8, 1904. (Docket No. 24.) Decided July 27, 1904.

Bill by Samuel Pollock and Lyman H. McCall against Rosslyn L. Sowers, drain commissioner of Eaton county, to restrain the completion of a drain. From a decree dismissing the bill, complainants appeal. Affirmed.

Garry C. Fox, for complainants.

Lewis J. Dann and *Horace S. Maynard*, for defendant.

MONTGOMERY, J. In the fall of 1896 Morrell E. Newcomb, then county drain commissioner, received a petition to locate, establish, and construct a county drain in Eaton township, Eaton county. The proposed drain was to traverse the lands of complainants. Both complainants signed the petition. On the 10th of April, 1897, the drain was lawfully located and established. The drain was then divided into sections. The drain commissioner sold at public auction the jobs for the construction of the drain. One of the bidders forfeited his job, and the same was relet. The drain commissioner certified that the drain was completed, the tax was spread upon the tax rolls, and the lands owned by complainants were assessed. The taxes remaining unpaid, the auditor general filed a petition in the circuit court for the county of Eaton for the sale of these lands, and on the hearing the circuit judge refused

to direct a sale of these lands for the drain tax, the summing up of his finding in the matter being as follows:

"Taking into consideration the entire case as shown by the evidence; that the drain is not completed as per the survey; that the benefits to contestant are slight, if any he has; that when this tax of four hundred dollars and upwards was levied against his lands, and when he was asked to pay it, that nothing had been done toward the construction of a drain on his land, and below it the contracts had not been completed according to the survey, and also considering the subsequent proceedings in the reletting of the job on contestant's land and constructing of the drain thereon, and the further fact of the want of benefit to his land—it seems to me that it would be unjust to decree this tax against his land."

The matter remained in abeyance until September, 1901, when a petition was filed by the present drain commissioner, asking that the drain be completed under the statute (section 4366, 2 Comp. Laws, as amended by Act No. 272, Pub. Acts 1899, § 13, chap. 6). The defendant commissioner was proceeding to take steps to complete the drain under this act and under section 4369 of the Compiled Laws, when this bill was filed by the complainants, and the question presented in the case is whether this statute authorizes the present proceeding.

The statute is broad in its terms, and reads as follows:

"Whenever any drain has been located, established, and the work of construction completed or partially completed, and any court has declared such proceedings illegal or void for any cause other than that such drain is unnecessary and not conducive to the public health, convenience, or welfare, the county drain commissioner shall, without unnecessary delay, proceed to relay and complete such drain under the provisions of this act, and reassess upon the lands benefited by such drain the original cost thereof, together with the expenses of relaying and completing, and shall continue so to do until such drain has been legally established and constructed: *Provided*, that on such relaying or completion of such drain proceedings it shall not be necessary to readvertise a day of letting, but he shall advertise a day of review for benefits, which review may be held at the office of the county drain commissioner:

Provided further, that any person who has paid the tax for benefits assessed against him for such drain shall be allowed the amount so paid and the township treasurer or other officer authorized to receive payment for taxes assessed in any township or city shall accept the receipt heretofore issued or certificate of the county treasurer that such taxes were paid, for the payment of such drain taxes as cash, the same to apply on such renewed assessment. The receipt (or certificate) so received by the township treasurer or other officer shall be credited to him and allowed as money. The provisions of this section shall also apply to drains laid out and wholly or partly constructed under the provisions of all drain laws in force prior to the passage of this act."

The complainants, however, contend that this section was not intended to cover cases where the drain commissioner had certified the drain as completed, and where the proceedings instituted by the taxpayer simply go to the payment of the tax. It is said that this drain has not been declared void, but that the tax imposed for the same has. We think, however, that this section should be read in connection with section 4369, which throws light upon the legislative intent, and that the real purpose of the legislature is thus made manifest.

It is the contention of the complainants in the present case that this drain was not constructed at the time the tax was levied, and never has been completely constructed, and that it has been so adjudicated by the circuit court in chancery in the case instituted by the auditor general. This appears to be the fact. The facts, therefore, bring the case directly within the language of section 13.

But it is further contended that, the tax against complainants' lands having been declared void in the auditor general proceedings, this section cannot now be operative, for it would permit the drain commissioner to overturn a decision of the circuit court in chancery. This contention has much of plausibility in it, and appealed somewhat strongly to the court at the hearing. But a further investigation has convinced us that it cannot be said that the finding of the circuit judge in the chancery case was

to the effect that this tax was wholly void. The minutes of his decision indicate that stress was laid upon the fact that the assessment was irregular in its form; that the taxes were not placed upon the roll under a proper heading; that the taxpayer has a right, before he is called upon to pay his taxes, to have the ditch built substantially as contemplated; and that, as the drain was not completed, and the benefit to the contestant was slight, and that as when this tax was levied upon complainant's lands nothing had been done toward the construction of the drain upon his land, and the contract had not been completed—it would be unjust to decree this tax against his land. We are convinced that this is not a determination that, if the benefits were actually received, and when and as soon as the drain should be completed in accordance with the original survey, the complainant's land would not be subject to a proper assessment. We think, therefore, the case falls within *Hauser* v. *Burbank*, 117 Mich. 463 (76 N. W. 109), and *Anketell* v. *Hayward*, 119 Mich. 525 (78 N. W. 557).

It must be assumed that the defendant, in completing this drain, will spend as much money, and no more, than is necessary to complete the same in accordance with the survey as originally made. We do not overlook the fact that the result may bear heavily upon the present complainants, and that they may be compelled to bear a burden in excess of what their taxes would have been had the drain been properly completed by the first drain commissioner. This is manifest. But we do not think the fact that the first contractors were delinquent, and failed to perform their duty, exempts the complainants' lands from taxation for the completion of the drain. In a sense, the public officers who spread a tax for any public improvement, or who supervise the execution of contracts for such improvement, are the agents of those particularly or generally benefited by the improvement. For any dereliction of duty the party who suffers a loss by their neglect or wrong may have an action for damages. But be-

cause one contractor goes wrong we do not think it is contemplated that an entire public improvement may be arrested at a point where no benefit may result from the labor expended.

The decree of the court below, which accords with the views herein expressed, will be affirmed.

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

RATHBONE v. GROH.

1. SPECIFIC PERFORMANCE—RIGHT TO REMEDY.
   Specific performance is a remedy of grace rather than of right, and will be refused whenever enforcement would be inequitable.
2. SAME—LAND CONTRACT—ADEQUATE REMEDY AT LAW—BONA FIDE PURCHASER.
   Specific performance of an option to purchase real estate will be denied where the rights of a bona fide purchaser have intervened and complainant will suffer little if any loss and has an adequate remedy at law.

Appeal from Wayne; Donovan, J. Submitted April 12, 1904. (Docket No. 41.) Decided July 27, 1904.

Bill by William S. Rathbone and Alfred Graham against Albert A. Groh, Lillian C. Groh, Chase Aldona, and Tilly Aldona, impleaded with Sophia M. B. Slocum and John H. Smedley, to enforce the specific performance of a land contract. From a decree for complainants, defendants Groh and Aldona appeal. Reversed.

Chamberlain & Guise and *William H. Turner*, for complainants.

S. S. Babcock, for defendants Groh.

William F. Atkinson, for defendants Aldona.

HOOKER, J. Defendants Albert A. and Lillian C. Groh are husband and wife. On December 11, 1893, Louis Groh conveyed to his son, said Albert A. Groh, the lands in controversy, but the wife of said Louis Groh, then and now living, did not sign the deed. The lands were also incumbered by a mortgage to one Slocum for $1,000. These lands adjoined lands owned by Rathbone and Ella Graham, the complainants, and the boundary was in dispute. Negotiations were had with a view to settling the same, in the course of which there was talk of a purchase of the land in controversy by the complainants Rathbone and Ella Graham, but, as they were not ready to do so at that time, the parties made the two writings following:

"Agreement made and concluded this thirteenth day of November in the year of our Lord one thousand nine hundred, between Albert A. Groh and Lillian C. Groh, his wife, of the township of Monguagon, Michigan, parties of the first part, and Ella B. Graham (formerly Ella B. Crane) by Alfred Graham, her attorney in fact, and William S. Rathbone, of the city of Detroit, Wayne county, Michigan, parties of the second part, *Witnesseth*, that

"*Whereas*, there has been a dispute between the parties hereto as to the true line between Elba Island and the lands adjoining same and now owned by the said Groh, and

"*Whereas*, it is the desire of all parties to have a settlement of such dispute and differences,

"*Now, Therefore*, it is hereby agreed that the said line shall be considered and established as follows:

"Beginning at an iron stake distance east 2,965 feet from the northwest corner of lot eight (8), as designated and located on the plat recorded in the office of the register of deeds for Wayne county, Michigan, in Liber 5 of Deeds, on page 321, and running thence north ten (10) degrees east to the north line of section 554; thence on a straight line to the southeast corner of land conveyed by Louis Groh and Emeline, his wife, to Walter Crane by deed dated September 11th, 1889, and recorded January 23rd,

1892, in the office of the register of deeds for Wayne county, Michigan, in Liber 387 of Deeds, on page 92; said land being situated in the township of Monguagon, Wayne county, Michigan.

"It is understood that at the time of the making of this agreement the said Emeline Groh, widow of Louis Groh, claims to have a dower interest in the land affected by this agreement, and that it is also incumbered by a mortgage given to Elliott T. Slocum.

"The said parties of the first part in consideration of the payment of the sum of one hundred seventy-five dollars ($175.00), hereinafter mentioned to be paid by the said parties of the second part, agree that they will, in addition to executing this agreement establishing the line as above set forth, pay any claim that may arise by reason of the dower interest of Emeline Groh in this property, also to secure a release from Elliott T. Slocum from the operation of said mortgage of so much of said land as may be necessary to enable the said parties of the first part to carry out this agreement.

"And the said parties of the first part hereby agree to warrant and defend the said parties of the second part from all claims of any other person or persons who may claim rights or interest in said lands, the intent and purpose being that the said parties of the second part shall be fully protected against any claims or pretended interest or claims of other parties that would interfere with their peaceable enjoyment of the premises up to the line hereby agreed upon as the boundary line between the parties.

"The said parties of the second part upon the performance of the agreements and undertakings of the parties of the first part hereto agree to pay to the said Albert A. Groh, and Lillian C. Groh, his wife, the sum of one hundred seventy-five dollars ($175.00).

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

"ALBERT A. GROH. [L. S.]
"LILLIAN C. GROH. [L. S.]
"WILLIAM S. RATHBONE. [L. S.]
"ELLA B. GRAHAM,
"By ALFRED GRAHAM,
"Atty. in Fact. [L. S.]

"Signed, sealed, and delivered in presence of
"A. C. SLAGLE.
"STANLEY G. STEVENS."

"We hereby propose to sell and convey to you, William S. Rathbone and Ella B. Graham, by deed of general warranty, at any time before April 1, 1901, all the land embraced within the following lines:

"Beginning at a point in the center of the highway on the easterly side of Grosse Isle, being the southwest corner of lands conveyed by Louis Groh and Emeline Groh, his wife, to Walter Crane by quitclaim deed dated September 11th, 1889, and recorded in the office of the register of deeds for Wayne county, Michigan, in Liber 387 of Deeds, page 92; thence following the center line of said highway southerly to the intersection of said center line with the south line of lot number seven (7) in section 544; thence easterly on the south line of said lot seven to a point which intersects with the boundary line between Elba Island and our lands; thence northeasterly along the boundary line between Elba Island and the lands of said Groh to its intersection with the southeasterly corner of land conveyed by said Louis Groh and Emeline Groh to Walter Crane, above described; thence following the south line of said lands deeded to said Walter Crane by said Louis Groh and Emeline Groh to its intersection with said highway, all of said lands being in the township of Monguagon, Wayne county, Michigan.

"The purpose and intent being that you shall have all of the land bounded by said highway, the south line of lot seven in section 554, Elba Island, and the land heretofore conveyed by Louis Groh and Emeline Groh to Walter Crane and above mentioned; but I except from said land above described, so much thereof as we have agreed to convey to William Cady, and described as follows:

"Beginning at the southwest corner of land deeded to Walter Crane by Louis Groh and Emeline Groh, as per quitclaim deed, recorded January 23, 1892, in Liber 387, page 92 of Deeds, in the register's office, Wayne county, Michigan; thence easterly along the southerly line thereof, three hundred forty (340) feet; thence in a southerly direction parallel with the center line of the highway on the easterly side of Grosse Isle two hundred and forty feet (240); thence westerly on a line parallel with the north line thereof, three hundred forty (340) feet; thence on a northerly course along said highway to the place of beginning.

"And we hereby agree to pay any claim that may arise by reason of the dower interest of Emeline Groh in said property.

"In consideration whereof you are to pay us the sum of one thousand dollars ($1,000) less the sum of one hundred seventy-five dollars ($175.00) already paid by you under the agreement of even date herewith, the purpose of which was to establish a boundary line between us; and said land shall be free from all incumbrances, assessments, and taxes of every kind.

"We also agree to furnish a Union Trust Company abstract, showing good title in ourselves, free and clear of and from all incumbrances.

"ALBERT A. GROH.
"LILLIAN C. GROH.

"Signed, sealed, and delivered in presence of
"A. C. SLAGLE.
"STANLEY G. STEVENS.

"STATE OF MICHIGAN, County of Wayne—ss.:

"On this thirteenth day of November in the year of our Lord, nineteen hundred, before me, a notary public, in and for said county, personally appeared Albert A. Groh, and Lillian C. Groh, to me known to be the same persons named in and who executed the above and foregoing instrument, and severally acknowledged the same to be their free act and deed.

"STANLEY G. STEVENS,
"Notary Public, Wayne county, Michigan."

These writings were duly acknowledged on the same day. The option was afterwards assigned by Ella Graham to her husband, Alfred Graham. The sum of $175, mentioned in the agreement regarding the boundary, was duly paid, and within the period of 90 days, to wit, on March 1, 1901, they sent the following letter to Albert A. Groh:

"DETROIT, MICH., Mar. 1, 1901.

"Mr. ALBERT A. GROH.

"*Dear Sir:* We desire to notify you that we will be ready March 25, 1901, and desirous to carry out the agreement made and executed the 13th day of November, 1900, whereby you and your wife, Lillian C. Groh, agree to sell us the land as specified therein for the sum of one thousand ($1,000) dollars, one hundred and seventy-five ($175) dollars of which we have paid to you, leaving a balance of eight hundred twenty-five ($825) dollars to be paid in full as per agreement. Upon the delivery to us of

proper conveyance of lands described in said agreement, free and clear of all incumbrances, assessments, and taxes of any kind, we will pay to you the sum mentioned above, namely, eight hundred twenty-five ($825) dollars.

"Yours truly,
"WILLIAM S. RATHBONE.
"ELLA B. GRAHAM,
"By ALFRED GRAHAM,
"Atty. in Fact."

Some two weeks after the expiration of the period given for acceptance of the option, Mrs. Groh, who desired to sell the place, saw Mr. Rathbone, and asked him to pay for the place or return the papers, and he said he could not return them because they were recorded. She subsequently threatened him with suit if he did not return the papers. Subsequently, and within two weeks of Aldona's purchase, she had another interview with Rathbone. Of this she testified:

"The option had expired, and I wanted to see whether he really wanted it or not, and so I went to him, and I said to him, 'Do you want the land just as it stands?' and he says, 'Have you got the release?' and I says, 'You know what we could do about that?' and he says, 'No; I cannot do anything with it in that way; no, I do not want it.' * * *

"*Q.* Now, what do you say Mr. Rathbone said to you?

"*A.* He said, 'No, he could not.' I said, 'Do you want it just as it stands?' and he said, 'Have you got the release?' and I said, 'No, you know we could not get it;' and he said, 'I do not want it.' I cannot just remember all.

"*Q.* Give the substance.

"*A.* I says, 'Do you want it as it stands?' and he says, 'No.'"

Thereupon she sold it to Aldona for $25 less than she would have received from complainants, had they taken it under their contract.

This bill was filed to compel specific performance, and the defendants have appealed from a decree for the complainants; the defendants Aldona claiming to be bona fide purchasers for value.

Aldona testified that he paid $800 for the property in ignorance of any claim or interest of the complainants, and received a warranty deed on May 7, 1901. The tenant on the place afterwards attorned to Aldona. Complainants put their option upon record June 3, and Aldona caused his deed to be recorded on June 7, 1901.

We discover nothing in the record which indicates that Aldona was not a bona fide purchaser for value, and he should be protected in his purchase, unless the fact that the record of complainants' contract before the record of his deed precludes it. The testimony shows that Aldona bought at a time when complainants' option was not of record, and in ignorance of its existence. He paid $800 for the property, and has since made improvements upon the place, which he must lose if he is defeated in this case upon the technical rule that, by recording this option before Aldona recorded his deed, the complainants have superior equities. Had Aldona taken title during the period of the option, it may be that he should be held to have taken subject to the contract, but he did not. If the option had been of record when he purchased, there was nothing to indicate that it had not expired. After it was recorded, the same thing was true, except the fact of its subsequent record; and, had Aldona actual notice of the making of the contract, there was nothing to indicate to him that the complainants had acted upon it, or had longer any equitable claim under it. Specific performance is a remedy of grace, rather than right (see *Chambers* v. *Livermore*, 15 Mich. 381; *Chapman* v. *Morgan*, 55 Mich. 124 [20 N. W. 820]), and will be refused where it is inequitable to grant it (*Munch* v. *Shabel*, 37 Mich. 166; *Rust* v. *Conrad*, 47 Mich. 449 [11 N. W. 265, 41 Am. Rep. 720]; *Pingle* v. *Conner*, 66 Mich. 193 [33 N. W. 385]).

In *Chambers* v. *Livermore*, supra, Mr. Justice COOLEY said:

"Specific performance, even of a binding contract, is not a matter of right, and a court of equity will refuse it, and turn the complainant over to his remedy at law, if

not clearly satisfied that it embodies the real understanding of the parties."

Again authorities are numerous that unconscionable bargains will not be so enforced. In the present case there is evidence that convinces us that this agreement was based upon a mutual expectation that Slocum would be willing to release his mortgage, and the understanding that complainant could and would procure such release for him. The proof shows that complainant tried to accomplish this, but failed, and so informed the defendant Groh, who then asked him if he wanted the deed as it stood, and he said "No," whereupon she sold it for $25 less to other parties. This justified her in believing that the complainant did not insist upon his option, and in selling elsewhere. Now he seeks to impose on her and another innocent party, Aldona, the burden of such obligation. But whether this was complainant's intention or not, viz., to waive his right under the option, it is inequitable to insist upon the letter of his writing, which did not fairly state the bargain, and it is inequitable to ask that Aldona be subjected to loss, when the complainant will suffer but little, if any, loss in any event, and has another remedy at law if the Grohs have broken their contract.

The decree of the circuit court is reversed, and the bill is dismissed, with costs of both courts.

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

STEWART v. CITY OF DETROIT.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS—VACATION—EQUITY—ESTOPPEL.

An abutting owner, having knowledge of defects in the proceedings to improve a street and failing to make them known, while he stands by and sees the improvement made and the city obligate itself for payment, is estopped to set up the defect in a bill to restrain collection of the special tax, though he remonstrated against the improvement on general grounds.

Appeal from Wayne; Hosmer, J. Submitted April 13, 1904. (Docket No. 48.) Decided July 27, 1904.

Bill by Martha F. Stewart against the city of Detroit, William B. Thompson, city treasurer, and Thomas M. Lucking, receiver of taxes, to restrain the collection of a paving tax. From a decree for complainant, defendants appeal. Reversed.

James H. Pound, for complainant.

Timothy E. Tarsney (*John W. McGrath*, of counsel), for defendants.

MOORE, C. J. Section 6 of chapter 11 of the charter of the city of Detroit (1893) provides:

"That the common council shall not in any one year enter into contracts for the grading and paving of streets, alleys, and public places, the cost of which will exceed in the aggregate two hundred thousand dollars, except upon the petition of the holders of the larger portion of the real estate directly abutting upon the portions of the street or alley proposed to be improved."

On April 25, 1899, a petition was presented to the common council of the city for the pavement of Lothrop avenue from Woodward avenue to Third avenue. Upon its face the petition showed the required majority of frontage,

and it was so certified and so reported to the council May 2, 1899, by the board of public works. At the same meeting a resolution was adopted ordering the paving. At this meeting remonstrances were presented to the common council by complainant and Samuel W. Stewart, her son, who was acting for Mrs. Stewart, against said improvement, which set forth specifically the grounds of protest, to wit, that the pavement should be extended westerly beyond Third avenue to Hamilton Boulevard; that the public would not derive any benefit from the pavement of that portion of the street; that the purpose of the pavement is to enable petitioners to get so much of their property as they choose on the market. At the next meeting of the council, held May 9th, a motion was made to reconsider the action of the council ordering the pavement, pending the consideration of which a letter from the president of the board of public works was read. This letter recited that, after the usual investigation of looking up the signers of the petition in the assessor's books for confirmation, the result showed that the majority of the feet frontage was represented by the property owners signing the petition. The motion to reconsider was lost.

On May 31, 1899, the complainant and her son each filed a second remonstrance, in which, by certain preambles, they set forth that the pavement had been ordered, but that the contract had not been confirmed, and they notify the council: *First*, that the said petition and all proceedings thereunder are absolutely null and void; *second*, that the property abutting upon said street, which is sought to be charged under such petition and proceedings with the cost of such improvement, is not liable therefor under said void proceedings; *third*, that any contract made or confirmed for such proposed improvement under said petition and proceedings would be made and confirmed at the cost of the city of Detroit, and not of the abutting property; *fourth*, that any pavement laid under the said petition and proceedings will be laid at the sole risk and expense of the city of Detroit, and that the entire expense thereof

must be borne by the city of Detroit, and no part thereof by the property claimed to be benefited thereby.

Samuel W. Stewart was personally present in the council when the last remonstrance was presented. This remonstrance was served upon the council before the contract was confirmed. Samuel W. Stewart knew when the work under the contract was commenced. He knew all the facts relating to the insufficiency of the petition for the pavement prior to the time when the last remonstrance was filed. It was shown that before the filing of the bill of complaint in this case the city had paid the cost of the intersections upon said street; had issued the bonds for the improvement, making the cost of the same a general charge upon the city; and that the contractor had been paid in full for the work. It was conceded upon the trial by counsel for the city that the original petition was in fact defective, the defect consisting in the fact that certain estates were petitioners, and the petitions were signed by the executor, instead of by the heirs at law—a defect that doubtless could easily have been remedied if Mr. Stewart had stated in his remonstrance the knowledge he had upon that subject. No action was taken by Mrs. Stewart, except as stated, until this bill was filed.

Accompanying the brief of complainant's counsel is a copy of the opinion filed by the trial judge. In that opinion he decided not only this case, but also the case of *Farr* v. *City of Detroit*, which was a proceeding similar to this. That case was appealed to this court, and is reported in 136 Mich. 200 (99 N. W. 19). While the cases differ in some respects, there is not such a difference as to affect the result. We think this case comes within the principles announced in *Farr* v. *City of Detroit*, supra.

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

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

SONDHEIM *v.* FECHENBACH.

1. WILLS — CONSTRUCTION — REMAINDERS — PERSONS ENTITLED TO SHARE.
   Where a will devises the homestead to the widow for life, remainder to "my children hereinafter named," and all testator's children are subsequently named in the will, the estate goes to them all share and share alike.
2. SAME—CODICILS.
   A codicil is treated as a part of the will.
3. SAME—CONSTRUCTION—EXTRINSIC EVIDENCE.
   Not only the four corners of the instrument, but the amount of testator's estate and his surroundings, are to be considered in determining the meaning of ambiguous provisions in a will.
4. SAME—CODICIL—SUBSTITUTIONAL BEQUEST.
   Evidence examined and *held* that a bequest contained in a codicil was intended as a substitute for a similar one of less amount to the same heir in the body of the will, the instrument being ambiguous.

Appeal from Wayne; Donovan, J. Submitted April 5, 1904. (Docket No. 11.) Decided July 27, 1904.

Bill by Rudolph Sondheim against Emma Fechenbach and others to construe the will of Solomon Sondheim, deceased. From a decree for complainant, defendants appeal. Modified.

Joseph R. Nolan, for complainant.

James H. McDonald (*Adolph Sloman*, of counsel), for defendants.

MOORE, C. J. This bill is filed for the purpose of obtaining a construction of the will of Solomon Sondheim, deceased. The material portions of the will, which was first made in 1897, read as follows:

"I give to my wife, Eva Sondheim, during her natural

life and while she remains my widow, the use and enjoyment of my household furniture, ornaments, and appurtenances, and also of the residence which I at the time of my death may be occupying as a home for my family, to be kept and used by her as a house for herself. In case my wife shall not survive me or at her death or remarriage, if she shall survive me, I give and devise said homestead, furniture, ornaments, and appurtenances to my children hereinafter named, and their issue, share and share alike, except the piano which I give to my daughter Emma, to be taken by her when she shall marry, or at my wife's death. * * * All the rest and residue of my estate of every name and nature and wheresoever situate, I give, devise, and bequeath to my trustees hereinafter named and his successors, but only in trust for the following purposes: * * * Out of the income of the said property to pay to my wife during her natural life, while she remains my widow, for the purpose of maintaining the house for herself, the sum of $10.00 each and every week commencing at the day of my death. * * * After the death or marriage of my wife, to set aside the sum of two thousand dollars, and to give the income therefrom, monthly, to my daughter Tilly or her guardian during her lifetime, whether she marry or not, and at her death the said principal sum to her issue, if she have any. After the death of my wife, to give to Theresa $4,000, Emma $2,000, Otto $1,000, and divide the balance between Philip, Rudolph, and Louis, paying to each son or his issue and my daughter Theresa or her issue, their shares immediately, and to my daughter Emma her share when she shall marry; but if any sums are obtained by my children from insurance on my life, the sum so obtained shall be deducted from the sum hereby given to him or her. To hold said fund of $2,000 until the death of my said daughter Tilly and also the portion of my daughter Emma until she shall marry."

This will was resigned and republished on the 5th of February, 1901. It is the claim of the defendants it was done in the forenoon, and that in the afternoon a codicil was added, the material parts of which read:

"I, Solomon Sondheim, do make, publish, and declare this to be a codicil to my last will and testament dated this day. * * * *Second*, I have agreed that upon her wedding day I will give to my daughter Emma Sondheim, the

sum of three thousand ($3,000) dollars, and in case I shall not live so long I direct that she be paid that sum upon her wedding day out of my estate."

It is the claim of appellee that the resigning of the original will and the making of the codicil were contemporaneous. It is contended by the complainant, and the circuit judge decreed, *first*, that the homestead on the death of the mother passed to the three sons, Rudolph, Philip, and Louis; that the $3,000 which the testator recites in the second paragraph of the codicil was in lieu of the legacy of $2,000 provided for in the body of the will; and that as the testator had paid that sum to her on her marriage by way of advancement, she no longer had any interest in the property of the estate. The case is brought here by appeal.

The bill avers the testator at his death left $8,958.35 of personal property, after deducting expenses of administration. The answer admits this averment to be true. The testator left surviving him a widow, who died nearly a year after his death, three daughters, and four sons—Theresa, Emma, Matilda, Philip, Otto, Rudolph, and Louis. Emma was married on the 12th of March previous to her father's death, at which time she was paid $3,000. Counsel say the following points are involved: *First.* Did the homestead, under the terms of the will, pass to the three sons or to all of the children, share and share alike? *Second.* Was the $3,000 given by the codicil substitutional or additional to the legacy of $2,000 given by the will? *Third.* Was the court in error in admitting oral testimony as to the testator's intention, or was such intention to be determined from the instruments themselves?

We think the court erred in holding that the real estate should not be shared by all the children. The provision of the will is that at the death of the wife the "homestead shall go to my children hereinafter named." Later provisions of the will name all of the children.

The other questions are more troublesome. Codicils are

treated as parts of the will. Schouler on Wills (3d Ed.), § 7. The same author says:

"The cardinal rule of testamentary construction, as already intimated, is that the plain intent of the testator as evinced by the language of his will must prevail, if that intent may be carried into effect without violating some deeper principle of public policy. And whatever respect the construction put upon corresponding words in other wills may deserve from the court by way of precedent, this plain and lawful intent of the particular will should not be defeated. Courts have spoken of such intention as the 'law,' the 'pole star,' or the 'sovereign guide,' when referring to this governing principle of testamentary causes; and the doctrine, in one formula or another, is constantly affirmed in the reports. But it is the intention of the testator, as expressed in his own will, which governs; and this intention must be discerned through the words of the will itself, as applied to the subject-matter and the surrounding circumstances. In other words, the plain and unambiguous words of the will must prevail, and cannot be controlled or qualified by any conjectural or doubtful constructions growing out of the situation, circumstances, or condition of the testator, his property, or the natural objects of his bounty. And since the interpretation and exposition of certain phrases found in similar wills are entitled to weight, it may sometimes happen that the intention as expounded by the courts differs from the testator's own private intention and understanding. For the true inquiry in interpreting the will is not what the testator meant to express, but what the words used in the will express. Yet every will should be interpreted, as far as possible, from the standpoint apparently occupied by the testator; and attendant circumstances, such as the condition of his family, and the amount and character of his property, may and ought to be taken into consideration as part of the res gestæ where the language is not plain nor the meaning obvious." Schouler on Wills (3d Ed.), § 466.

See, also, *Eyer* v. *Beck*, 70 Mich. 179 (38 N. W. 20); *Wales* v. *Templeton*, 83 Mich. 177 (47 N. W. 238). In *Barnes* v. *Marshall*, 102 Mich. 248 (60 N. W. 468), Justice LONG, speaking for the court, said:

"The general rule for the interpretation of wills is that it

is the duty of courts to give full and complete effect to the testator's intention, and carry out such intention if it be lawful. *Rock River Paper Mill Co.* v. *Fisk*, 47 Mich. 212 (10 N. W. 344); *Cummings* v. *Corey*, 58 Mich. 494 (25 N. W. 481); *Eyer* v. *Beck*, 70 Mich. 179 (38 N. W. 20). Courts are bound to carry out the real design of the testator as derived from a comparison of all the parts of the will; and the meaning of all words and phrases must, if possible, be harmonized. *Bailey* v. *Bailey*, 25 Mich. 185."

In *Hamlin* v. *Express Co.*, 107 Ill. 443, the rule is stated that "the latter part of the will is to be considered no less than the former part; and, to the extent there is repugnance, the language of the former part is to be read as modified by that of the latter part." In section 467 of Schouler on Wills it is said:

"'The struggle in all such cases,' observes Judge Story, 'is to accomplish the real objects of the testator, so far as they can be accomplished consistently with the principles of law; but in no case to exceed his intention fairly deducible from the very words of the will.' *Nightingale* v. *Sheldon*, 5 Mason, 336. In fine, where the meaning of the language of the will is plain, the court of construction does not go outside to discover what the testator intended; but where the provisions are doubtful, or may admit of more than one interpretation, the court will put itself in the situation of the testator, in reference to the property and the relative claims of the testator's family, the relations subsisting between him and them, and the circumstances which surrounded him, in order to be enlightened."

When the provisions made for Emma in the will are read, and the provision made for her in the codicil is then read, a doubt at once arises as to just what was intended by Mr. Sondheim. In the will he gave her a piano, which was to be taken by her when she shall marry. He also gave to her, after the death of his wife, $2,000, to be paid to her when she shall marry. These provisions were in the will when it was made in 1897, and remained in it when it was resigned. If, when the codicil was signed, he had said the $3,000 was to be in lieu of the

$2,000 named in the body of the will, or if it had been stated it was to be in addition thereto, it would have dispelled the ambiguity. Unfortunately this was not done, and to arrive at his meaning we must consult not only the four corners of the instrument, but the amount of Mr. Sondheim's estate and his surroundings. If we regard the $3,000 as all that was to be paid to Emma, then there is personal property enough to take care of all of Mr. Sondheim's gifts and pay the expenses of administration, and leave a small sum to be divided, as provided in the will, between Philip, Rudolph, and Louis. If Emma is to have $5,000, as claimed, there would not only be no personal property to divide between the boys, but there would not be enough to pay, by a very considerable amount, the provisions made in the will for Theresa, Emma, and Otto. Mr. Sondheim undoubtedly knew what property he had, and it is not probable he meant to make bequests which could not be paid. Taking all the surroundings of the case, we think the provision of the codicil was to take the place of the sum provided for Emma in the body of the will.

The decree will be affirmed as to the personal property and reversed as to the real estate.

The other Justices concurred.

BUTCHER *v.* BUTCHER.

1. ADVERSE POSSESSION—DOWER—ALIMONY—LIMITATIONS.
Evidence examined and *held* that defendant's occupancy of land under a conveyance from his father was adverse to the dower and alimony claims of his mother during the whole period of limitations, notwithstanding her residence there with him during a part of the period.

2. LIMITATION OF ACTIONS—PLEADING—ESTOPPEL.
The defect of failure to plead exclusive possession in a plea of limitations cannot be taken advantage of by complainant who alleges in his bill that he has been excluded by defendant during the whole period.

3. DOWER—BAR BY ADVERSE POSSESSION.
Dower may be barred by adverse possession.

Appeal from Hillsdale; Chester, J. Submitted April 15, 1904. (Docket No. 42.) Decided July 27, 1904.

Bill by Margaret J. Butcher against John Butcher for partition and for an accounting. Defendant filed an answer in the nature of a cross-bill to quiet title. From a decree for defendant, complainant appeals. Affirmed.

F. A. Lyon, for complainant.

W. J. Sampson and *Charles M. Weaver*, for defendant.

MONTGOMERY, J. In 1874 complainant's husband, William Butcher, was the owner of 75 acres of land in the county of Hillsdale, subject to mortgages of nearly $1,500. He also owned some personal property, amounting in value to a few hundred dollars, and also owed unsecured debts amounting to nearly the value of the personal property. The family of the Butchers consisted of William Butcher, his wife (complainant), and seven children, of whom John (the defendant) was next to the oldest, being at that

time 20 years of age. The youngest was a daughter but little more than one year of age. The husband and wife did not get on well together, and a separation was agreed upon. At the same time it was agreed with John that, if he would stay on the farm, take the personal property, make a home for and care for the younger children until such time as they were able to care for themselves, pay off the personal debts owing by William, and pay the mortgage on the place, he should have the place. With this end in view, a power of attorney was executed to Thomas J. Lowrey, authorizing him to deed or mortgage the land or sell the personal property at will. The complainant understood and assented to the arrangement with John. William left for California, and has never returned.

In 1884 complainant obtained a decree of divorce from her husband, and was awarded one-third of all his land in Hillsdale county as alimony, and, as the divorce was on grounds of drunkenness, was also entitled to dower in his estate. Complainant had continued a member of John's family for the most part until 1883 or 1884, when she left for good. Defendant continued in possession of the land, claiming the rights in it accorded by his father's contract with him. In 1901 the present bill was filed for partition.

The defendant filed an answer in the nature of a cross-bill to quiet title. Defendant prevailed in the court below, and complainant appeals.

In addition to setting out the equities above alluded to, the defendant also set up the statute of limitations, which we consider a complete answer to complainant's claim, and shall, therefore, omit discussion of the other interesting questions raised.

Complainant asserts that the defendant has not well pleaded the statute of limitations, for the reason that the answer fails to aver that the defendant's possession was exclusive; that is, that complainant was excluded from the rights which she now claims. This contention is sufficiently answered by the fact that the complainant's bill itself

very distinctly avers that she has been excluded all this time from the premises.

In 1889 Lowrey, acting under the power of attorney mentioned above, conveyed the land to defendant. Complainant contends that up to this time defendant's possession was not hostile to her, but that he was occupying in the right of his father. He was occupying, however, as the equitable owner of the whole, and this with complainant's knowledge. There was no recognition of any cotenancy. Complainant's bill, in effect, asserts this, and the fact is so. On the contrary, complainant knew the character of defendant's occupancy from the first, and that it was in no sense in subordination to her claim, but was adverse to it.

That complainant's dower may be bound, see *Beebe* v. *Lyle*, 73 Mich. 114 (40 N. W. 944).

The decree will be affirmed, with costs.

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

McDONALD *v.* CITY ELECTRIC RAILWAY CO.

1. CARRIERS—STREET RAILWAYS—INJURIES TO PASSENGERS—PREMATURE START—INSTRUCTIONS.

   Where, in an action for injuries to a passenger, the issue is whether plaintiff was injured while leaving a moving car or by the starting of the car while in the act of alighting, defendant is entitled to a requested instruction that, while it was defendant's duty to stop the car to afford plaintiff an opportunity to alight, yet its failure to do so would not give plaintiff the right to jump from the moving car.

2. SAME—MISLEADING INSTRUCTIONS.

   Instructions examined and *held* misleading as authorizing recovery if plaintiff attempted to alight from a moving street car on failure of the carrier to stop it as requested.

3. TRIAL—INSTRUCTIONS—CURE OF ERROR.

Where a proper request has been refused and language employed in its stead which is calculated to induct the jury into the very error which the charge requested was designed to guard against, a conflicting instruction will not cure the error unless it clearly appears that the jury could not have been misled.

Error to St. Clair; Tappan, J. Submitted April 15, 1904. (Docket No. 29.) Decided July 27, 1904.

Case by Daniel McDonald against the City Electric Railway Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Phillips & Jenks, for appellant.

Avery & Walsh (*S. A. Graham*, of counsel), for appellee.

MONTGOMERY, J. The plaintiff recovered a verdict and judgment of $5,000 for injuries received while alighting from one of defendant's cars.

The declaration contains two counts, and in each it is alleged that the defendant's servants brought the car to a stop, and that, while plaintiff was in the act of alighting, the car was suddenly started, throwing plaintiff down and causing the injuries complained of.

The evidence on the trial was in sharp conflict. The testimony on the part of plaintiff tended to support the declaration, while that on the part of the defendant tended strongly to show that the plaintiff attempted to alight while the car was in motion, and before it was brought to a stop.

In one portion of the charge the circuit judge clearly defined the issue and charged the jury as follows:

"Now, gentlemen, upon these claims of the parties I charge you that you are to determine from the evidence and facts submitted to you whether the defendant company so stopped its car when it did stop it as to permit the

plaintiff to alight and get safely clear from the car before again starting up; whether, in alighting from the car at the point where he did alight, the plaintiff exercised that due care and caution in alighting that men of ordinary prudence would use under like circumstances; and whether, while the defendant was endeavoring to stop its car, and before it actually did stop, the plaintiff jumped from the moving car, as claimed by the defendant, and thereby became himself responsible for the injury."

Had this been the whole of the charge upon the subject, and had no request been preferred by defendant upon the subject, there would be no difficulty in saying that the subject was fairly covered. Defendant, however, did prefer a request which asked the court to say to the jury, in substance, that, while it was the duty of defendant to stop its car to afford the plaintiff an opportunity to alight, yet the failure to do so would not give the plaintiff the right to jump from the moving car. Clearly the defendant was entitled to this instruction, in view of the issue presented by the declaration. It was not given, but, apparently in lieu thereof, the court gave the following:

"While it is the duty of the defendant to stop its car at the point where plaintiff requested to be let off, if he did so, notwithstanding the fact defendant carried him past that point, this would not excuse the plaintiff, or give him a right to jump off from a rapidly moving car, if you find he did so jump. If, under these circumstances, you find that as a fact the plaintiff jumped from the car moving at a rate of speed that should restrain men of ordinary care and prudence from alighting from a car under such circumstances, then your verdict should be for the defendant;"

—And added, on his own motion, the following:

"I further charge you that the plaintiff cannot be charged with contributory negligence because he was riding in the vestibule instead of taking a seat inside of the car; further, that it was the duty of the employés in charge of the car upon which plaintiff was riding to bring the car to a full stop, and allow the plaintiff sufficient time to alight before again starting; that, when the car was brought to a full stop, it was incumbent upon plain-

tiff to step off the car, and away from it, in a careful and prudent manner; that if the employés of the company, or either of them, failed to bring the car to a stop, and allow the plaintiff sufficient time to alight and to get away from it while he was trying to do so in a careful and prudent manner, but, instead, started the car up suddenly while he was in the act of alighting, and thus injured the plaintiff, then the defendant is liable, and your verdict should be for the plaintiff."

We cannot escape the conclusion that the instruction was well calculated to mislead the jury, and constituted error for which the case should be reversed, unless the error is cured by what took place at the conclusion of the charge.

At the conclusion of the charge the court requested of counsel as to whether there was anything further, and counsel for plaintiff then stated: "Here is one request. I think your honor has covered it, but I would like to have it given." The request was then submitted to defendant's counsel, who objected to its being given, and requested that the defendant's request presented upon this theory should be given. The court then charged the jury according to the request of the plaintiff, as follows:

"If plaintiff alighted from the car when in motion, he would be guilty of contributory negligence which would prevent his recovery. I think it is fully covered in the charge given, in connection with the qualification that he is not to step off the car."

This instruction so given was disassociated from defendant's theory, and in conflict with the charge as previously given, although accompanied by a statement that it was thought to be fully covered. When conflicting instructions are given, it ought to be made clearly to appear that the jury could not have been misled. This is especially true where a proper request has been refused, and language employed in its stead which is calculated to induct the jury into the very error which the charge re-

quested was designed to guard against. See *Sterling* v. *Callahan*, 94 Mich. 536 (54 N. W. 495).

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

KNIGHT *v.* BROWN.

1. DURESS—WHAT CONSTITUTES.
   Duress exists when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will.

2. CHATTEL MORTGAGES—EXECUTION—DURESS.
   Where plaintiff admitted that no threats were made to induce her to sign a chattel mortgage which was given on an exchange of horses between herself and defendant, but, after holding out for several hours, and refusing to sign the mortgage, she finally did so on the insistence of defendant and his brother, that a valid trade had been made, and that, if she refused to sign, she would become liable for a larger amount than that for which the mortgage was given, the mortgage was not void for duress.

Error to Grand Traverse; Mayne, J. Submitted April 14, 1904. (Docket No. 61.) Decided July 27, 1904.

Replevin by Agnes Knight against Willard Brown. There was judgment for plaintiff, and defendant brings error. Reversed.

This is an action of replevin for a horse. The declaration is in the usual form; plea, the general issue. Plaintiff is a widow, living upon and carrying on her farm. She gave evidence tending to show that defendant suggested to her to trade her horse for a span of ponies owned by his brother, Harlan; that at defendant's request she

went with him to Harlan's house to see them; that they talked over the terms of the trade; that there was a mortgage on the ponies for $75; that this was to be discharged, plaintiff to execute a new one for $35, and defendant was to exchange a horse he owned with Harlan for plaintiff's horse, which Harlan was to have, and defendant was to give a mortgage of $50 for his part of the boot money; that she was to take the ponies, try them, and, if they suited her, the parties were to meet and consummate the trade; that one of the ponies, while she was trying them, kicked off the dashboard; that she immediately notified the defendant and his brother that she would not trade; that they told her that she had made the trade, and that the ponies were hers; that she tried to induce them to give up her horse, but they would not; that they insisted on her signing the mortgage and giving her note, and that the papers be executed immediately. Three other persons were present, one of whom drew the mortgage which plaintiff signed. Her own version of the conversation, which she claims to constitute duress, is as follows:

"Well, I held out there till after dark before I would consent to signing any mortgage at all, and that it was because they said they would throw the whole thing—the whole mortgage—onto my shoulders. They said I could either pay the $35 or pay the whole thing, just as I liked. Harlan Brown told me I could pay $75 or $35. They all went outside—Willard and Harlan—and they came in again, and I said I wouldn't sign the mortgage at all, not under these circumstances; and they finally went out. They came in, and they said: 'Well, you sign the mortgage. You sign for the $35.' In the first place, Willard says to Mr. Barnum, 'Tomorrow I am going to go and hire that $50 that I am to pay, and I will pay that to you, and then she can sign for the $35, or you can keep the horses, just as you are a mind to.' 'Well,' I says, 'if it is a have to be, it will have to be, but I am not going to sign for that any way. I will stand out for it yet.' Then they went outside and talked together. I don't know what transpired between them, but when they came in they said: 'You have your choice to sign for the $35 or else the whole thing. Sign for the $35, or we will throw the

whole thing onto your shoulders, and you can pay the whole thing.' 'Well,' I said, 'if it is a have to be, it will have to be a have to be, but I don't sign it with a good will.'"

She further testified that she held out from 3 or 4 o'clock in the afternoon until 8 o'clock. She testified as follows:

"*Q.* What did Mr. Barnum do to you to make you sign those papers?

"*A.* Nothing.

"*Q.* Well, what did you sign them for, then?

"*A.* Because Mr. Barnum said he didn't know as there was any way out; that I had traded. But he said I could get the horse by replevining it. He told me that just before I signed the papers."

Mr. Barnum was one of those present. She kept the ponies several days; then returned them to Harlan Brown. Whether she returned them before or after suit was brought we cannot determine from the record. It is claimed by the defendant that they were not returned until after the suit was brought. This, however, is immaterial, in the view we take of the case. The case was submitted to the jury on the theory of duress. The jury found that no trade was consummated, and that no title had passed to the defendant, and rendered a verdict in her favor.

Parm C. Gilbert, for appellant.

Pratt & Davis, for appellee.

GRANT, J. (*after stating the facts*). We think plaintiff did not bring herself within the principle of duress as enunciated by the authorities. In *Hackley* v. *Headley*, 45 Mich. 569 (8 N. W. 511), Justice COOLEY said:

"Duress exists when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will."

According to her own statement, she held out for four

hours, refusing to sign the papers. Three parties were present who had no interest in the transaction. There were no threats. She was simply told that the defendant and his brother insisted that a valid trade had been made, and what the consequences were. She denied it. We do not find in her own version of the transaction any evidence that she was deprived of the exercise of her free will.

Judgment reversed, and new trial ordered.

The other Justices concurred.

PEOPLE v. KLAMMER.

CRIMINAL LAW—LARCENY FROM BUILDING—INFORMATION—WORDS—CONSTRUCTION.

An information charging larceny "from the residence" of M., sufficiently charges the offense denounced by 3 Comp. Laws, § 11551, prohibiting larceny by stealing "in any building" on fire.

Exceptions before judgment from St. Clair; Tappan, J. Submitted April 21, 1904. (Docket No. 191.) Decided July 27, 1904.

Otto Klammer was convicted of larceny from a burning building. Affirmed.

John M. Kane (*C. A. Hovey*, of counsel), for appellant.

Burt D. Cady, Prosecuting Attorney, for the people.

GRANT, J. Respondent was convicted under section 11551, 3 Comp. Laws, which provides that, "every person who shall commit the offense of larceny by stealing in any building that is on fire, shall be punished," etc. The

information charged the respondent with the larceny of "one open-faced ladies' watch and one ladies' chain, of the value of twelve dollars, of the goods, chattels, and property of, and in the possession of, one Sarah McMillan, from the residence of the said Sarah McMillan, No. 2,721 Wright street, Port Huron, * * * the same being then and there on fire."

The court instructed the jury that they must be satisfied beyond a reasonable doubt that the defendant stole the watch, and that it was stolen from some part of the burning building. Respondent made a motion in arrest of judgment, claiming that the word "residence" is not synonymous with "building," and the word "from" is not synonymous with "in." These are the only questions raised upon the record. It is contended in the brief of the people that no objection was made upon the trial to the sufficiency of the information, and the objections now made were first made upon the motion in arrest of judgment. The record is silent upon this point. Without determining, however, whether the objections come to late, we think that they are not sound. Whether the term "residence" may sometimes be used without reference to the dwelling wherein a party lives, it would be doing violence to the ordinary use of language and to ordinary intelligence to hold that in this information it does not mean a building. Vacant lots are not the residences of persons. The information fixes the residence of the owner of the property at a given numbered lot in a city. This implies that the party lived in a dwelling house upon that lot. Persons do not reside on or in vacant lots. The respondent so understood it, and the case was tried upon that theory.

The second point is equally without merit. The word "from," used in the information, implies that the property was taken from within the building. That the word is often used interchangeably with "in," and is so commonly used, appears from *People* v. *Wilson*, 55 Mich. 506, 516 (21 N. W. 905, 909), where Chief Justice COOLEY,

in discussing the case, says: "It may be questionable whether the larceny in this case was not larceny *from* a store, and therefore compound larceny, under 2 How. Stat. § 9137"—that being a similar statute to the one under which the respondent in this case was convicted. The learned Chief Justice used the word "from" as synonymous with "in." It was held in *O'Connor* v. *City of Fond du Lac*, 109 Wis. 253 (85 N. W. 327, 53 L. R. A. 831), that the word "from" has no certain literal or legal meaning that can be accepted as a guide under all circumstances. In *Re Lewis*, 124 Mich. 199 (82 N. W. 816), the commitment recited that the defendant was convicted of larceny from a store, and the precise point was raised to invalidate the commitment as is raised here. This court held that the conviction was valid. I have examined the judgment entry and information in that case. The judgment entry recites that the respondent was convicted "of the crime of larceny from a store." The docket entry in the circuit court reads, "Information for larceny from a store." The information charges that the respondent did "steal, take, and carry away the property from the said store." It is true that in another part of the information the property is described as "then and there situate and being found in the store," but the offense is described as "larceny from the store." See, also, *Bailey* v. *State*, 99 Ala. 143 (13 South. 566).

I do not think that *People* v. *Rathbun*, 105 Mich. 699 (63 N. W. 973), bears any analogy to this case. "Unto a jail," or "unto a building" is not a common form of expression, and in no popular sense has it ever been used to mean to convey within a building. Probably no case can be cited where that word has ever been construed to be synonymous with or to mean "into." But the word "from" has a popular meaning, indicating an entrance into the building from which the property is taken. When one says that A. stole his horse or his harness from his stable, or his ox from his barn, or his grain from his granary, it is the common understanding of mankind that he

means that the thief entered his stable, or his barn, or his granary, and took the property from within. Can the language of Chief Justice COOLEY, in the case above cited, be explained upon any other theory? If one left his wagon, or his harness, or his grain outside his buildings, and in his yard, he would not say that the thief stole the property from his building, but that he stole it from his yard. The word "to" is held to mean "into"—as where a corporation was authorized to construct a road "to the city of Hudson" it was held that the word "to" meant "into." *President, etc., of Farmers' Turnpike Road* v. *Coventry*, 10 Johns. 389.

The conviction is affirmed.

The other Justices concurred.

PEOPLE *v.* DE BLAAY.

137 402
148 485

1. STATUTES—AMENDMENT—TITLES—LOCAL ACTS.
   A general statute of local application cannot be extended in its operation to the whole State by an act having a title merely indicating a purpose to amend the local statute.

2. SAME—REPEALING CLAUSE—INVALIDITY.
   Where an act attempting to extend a law of local application to the whole State is ineffectual because of a defect in its title, the provisions therein repealing the existing general statute on the same subject are likewise ineffectual, and the general statute stands unrepealed.

3. HAWKERS AND PEDDLERS—STATUTES—INVALIDITY—REPEAL.
   Act No. 137 of the Public Acts of 1895, attempting to extend to the whole State Act No. 204 of the Public Acts of 1889, regulating hawkers and peddlers in the Upper Peninsula, is invalid for failure of its title to express its purpose, and the attempted repeal therein of the general statute on the same subject (1 How. Stat. §§ 1256-1266, 2 Comp. Laws, chap. 136), is ineffectual.

4. STATUTES—AMENDMENT—CONSTITUTIONAL LAW.
Though as a general rule an unconstitutional law cannot be made valid by amendment, such a law may be re-enacted after the unconstitutional features have been eliminated, and the fact that the Constitution requires that laws amended be re-enacted and published at length presents no obstacle to that course.

5. HAWKERS AND PEDDLERS—CLASS LEGISLATION.
Chapter 136, 2 Comp. Laws, prohibiting peddling without license, but making an exception in section 22 in favor of wholesale merchants selling by sample, and manufacturers, farmers, mechanics, and nurserymen selling their own product, is not class legislation.

Exceptions before judgment from Kent; Perkins, J. Submitted April 21, 1904. (Docket No. 188.) Decided July 27, 1904.

John De Blaay was convicted of hawking and peddling without a license. Affirmed.

Smedley & Corwin, for appellant.

William B. Brown, Prosecuting Attorney, and *Carl E. Mapes*, Assistant Prosecuting Attorney, for the people.

MONTGOMERY, J. The respondent was convicted of the offense of hawking and peddling without a license, the charge being based upon chapter 136, 2 Comp. Laws.

Two major contentions are made by respondent's counsel in this court: *First*, that the statute under which the prosecution was had has been repealed; and, *second*, that, if not repealed, it is unconstitutional. Obviously, if the first contention is sustained, the second is unimportant. We therefore direct our first attention to this point.

Act No. 204, Pub. Acts 1889, was an act which, under a title restricting its operation to the Upper Peninsula, made provision for licenses to peddlers in that territory. By Act No. 137, Pub. Acts 1895, under a title which indicated a purpose to amend Act 204, Pub. Acts 1889, re-

ferring thereto by its title, and also to repeal sections 1257–1266, 1 How. Stat., the sections under which this prosecution is had, the legislature undertook to make the Upper Peninsula law applicable to the whole State, and to repeal the general provisions then in force for the whole State. The statute of 1895 was clearly unconstitutional in so far as it attempted to extend legislation to the entire State of a statute limited to the Upper Peninsula, with no notice of such purpose expressed in its title. Indeed, counsel for respondent do not contend that this provision of the statute is valid, but insist that, even though this be held invalid, the section repealing the general law is nevertheless valid. It is worthy of consideration as to whether the title to the act of 1895 is not double, within the meaning of the constitutional provision that no law shall embrace more than one object, which shall be expressed in its title; but as this view is not contended for, and as a like result may be reached on settled principles, we do not determine the question. Whether the legislative intent was to repeal the general law in any event, and independently of enacting another to take its place, is the question here presented. We think it clear that there was no purpose to wholly abrogate all law relating to licensing peddlers in the Lower Peninsula. On the contrary, the very purpose of the act of 1895 was to cover this subject. The repeal was incidental to the affirmative enactment. When the enactment of the first section proved futile, the second section fell with it. The case cannot be distinguished from *John Spry Lumber Co.* v. *Trust Co.*, 77 Mich. 199 (43 N. W. 778, 6 L. R. A. 204, 18 Am. St. Rep. 396), to which attention was directed at the argument.

Having determined that chapter 136, 2 Comp. Laws, has not been repealed, it remains to consider whether it is, as claimed, unconstitutional. Its constitutionality is assailed on two grounds: *First*, that the statute, as it now reads, was never duly enacted under a proper title; and, *second*, that the statute is class legislation. The precise point under the first head is this: The general law

relating to hawkers and peddlers (chapter 21, Rev. Stat. 1846) contained in section 22 a clause discriminating in favor of residents of the State similar to the clause contained in section 8 of Act No. 248, Pub. Acts 1897, which was held in *Rogers* v. *Kent Circuit Judge*, 115 Mich. 441 (73 N. W. 381), to be unconstitutional. The present chapter 136, 2 Comp. Laws, has been evolved by amendments to the Revised Statutes of 1846, and it is said that an unconstitutional statute cannot be made valid by amendment. It is not to be denied that there are cases cited by defendant's counsel which sustain his contention. We think, however, that the legislature has in this matter kept well within the provisions of our own Constitution. Section 25, art. 4, provides:

"No law shall be revised, altered, or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length."

It is not denied that in the amendment to the original act the provisions of this section of the Constitution were observed. This section was intended as a guide to the legislature, and we can discover in it no obstacle to an elimination from the original act of such provisions as rendered the act unconstitutional. The new act becomes then the act of the legislature following the prescribed course for its enactment. This view is sustained by *State* v. *City of Cincinnati*, 52 Ohio St. 419 (40 N. E. 508, 27 L. R. A. 737); *Ferry* v. *Campbell*, 110 Iowa, 290 (81 N. W. 604, 50 L. R. A. 92); *Sweet* v. *City of Syracuse*, 129 N. Y. 337 (27 N. E. 1081, 29 N. E. 289); *Allison* v. *Corker*, 67 N. J. Law, 596 (52 Atl. 362, 60 L. R. A. 564).

The only question left for consideration is whether section 22 of the act as it now stands constitutes this legislation class legislation. This section reads as follows:

"Nothing contained in this chapter shall be construed to prevent any manufacturer, farmer, mechanic, or nurseryman from selling his work or production by sample or otherwise without license, nor shall any wholesale mer-

chant be prevented by anything herein contained from selling to dealers by sample without license, but no merchant shall be allowed to peddle or to employ others to peddle goods not his own manufacture without license in this chapter provided." 2 Comp. Laws, § 5330.

We do not think this can be called class legislation in such sense as to deny to such citizen an equal protection under the law. Under this provision all persons in the same class are treated alike under like circumstances and conditions. Similar provisions have been sustained by this court. *People* v. *Sawyer*, 106 Mich. 428 (64 N. W. 333). See, also, *Rosenbloom* v. *State*, 64 Neb. 342 (89 N. W. 1053, 57 L. R. A. 922); *State* v. *Stevenson*, 109 N. C. 730 (14 S. E. 385, 26 Am. St. Rep. 595).

The conviction is affirmed.

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

PEOPLE *v.* HORLING.

FISH—INLAND LAKES—PRIVATE OWNERSHIP—RIGHTS OF OWNER—FISHING REGULATIONS—STATUTES—APPLICATION.

Where a lake is so situated that fish from a river migrate to and from it at different periods of the year, the fact that it is wholly located on defendant's land, which he has posted, and that he himself has stocked the lake with fish acquired from private sources, does not deprive the public of its right to take fish therefrom, nor entitle him to take fish therefrom by means other than a hook and line, in violation of 2 Comp. Laws, § 5849.[1]

Exceptions before judgment from Ottawa; Padgham, J. Submitted April 21, 1904. (Docket No. 190.) Decided July 27, 1904.

[1] As to right to fish, see note to *State* v. *Shaw*, (Ohio) 60 L. R. A. 481.

John W. Horling, Bert Horling, and John Horling were convicted of illegal fishing. Affirmed.

Smedley & Corwin, for appellants.

Charles A. Blair, Attorney General, and *Henry E. Chase*, Deputy Attorney General (*W. I. Lillie*, of counsel), for the people.

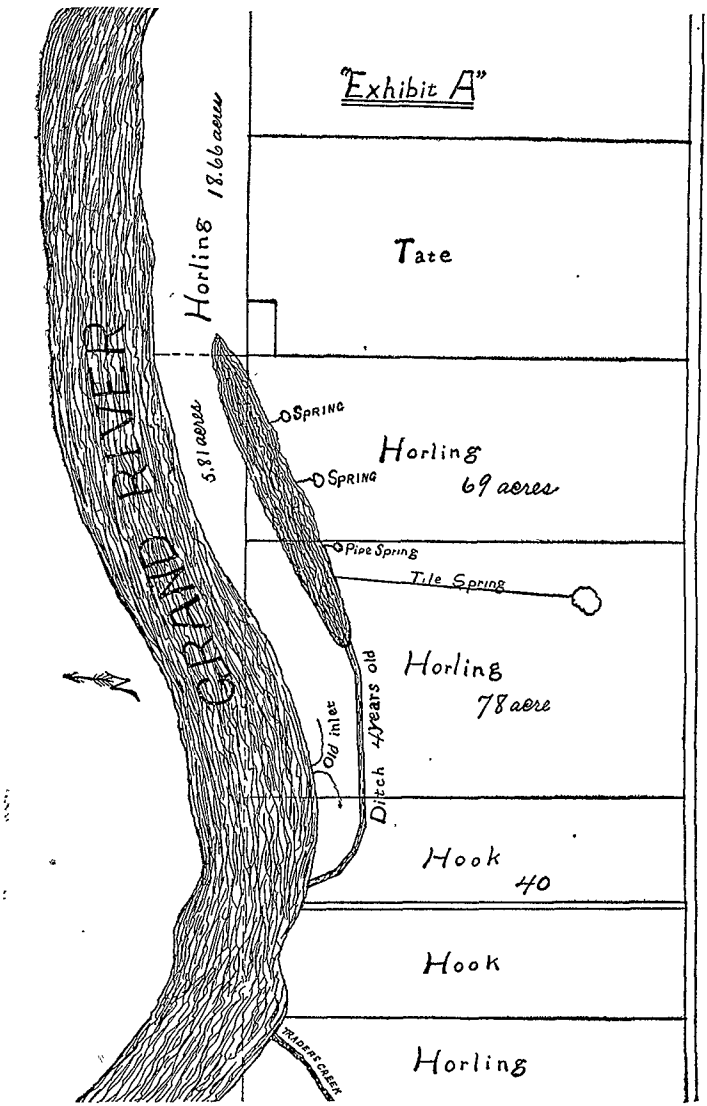
MOORE, C. J. The respondents were convicted of violating the provisions of section 5849, 2 Comp. Laws, which reads:

"That it shall not be lawful for any person to take, catch, or kill, or attempt to take, catch, or kill, any fish in any of the inland lakes in this State with any kind of spear, or grap hook or by the use of jacks or artificial light of any kind, or by the use of set lines or night lines, or any kind of net, or any kind of fire-arms or explosive or other device, except the hook and line."

The accompanying plat will help to understand the situation (p. 408).

The testimony on the part of the people was in part as follows: That at the time of the fishing alleged in the complaint, witnesses for the people testified that they went up the drain marked on the plat, with a boat, into said lake or bayou, and found the nets respondents were fishing with that night; that said respondents, or some of them, put a wire netting in said drain, reaching from the bottom thereof to above the top thereof, and that the respondents, or some of them, admitted that they put this screen in said drain to keep fish from going up and down said drain and into or out of said lake or bayou; that the length of time water runs in and out of said lake through said drain depends upon the length of time the water is high enough to get in and out, but in every year there is always more or less time that fish can go in and out of said lake; that most of the fish planted in said lake or bayou, except carp and bass, have been taken from holes or pools in the lowland surrounding said lake or bayou

after the high water receded and left the lowlands comparatively dry; that in the spring freshets, when Grand river rises and overflows its banks, then said bayou is



connected with Grand river, so that fishes can come and go to and from Grand river; that this connection exists as long as the high water exists; that some four years ago a public drain was laid by the drain commissioner; this drain does not follow any old outlet, but takes a westerly course, and strikes Grand river farther down, where the cut in the river bank is located, so that after the river lowers, and there is no connection between the river and the bayou through this cut in the bank, the water still continues to run out of the bayou or lake, through this ditch, into the river; that after the ditch was dug it lowered the lake some two feet, and drained considerable land surrounding the lake; that fishes can come and go through this ditch for part of the year, as it does not become dry as soon as the old inlet or cut in the river bank. That some of the witnesses for the people testified that there were both spring and fall freshets, and that from three to five months of the year, during the spring and fall freshets and natural high water, fish could go in and out of said lake and bayou; that some of the witnesses claimed that there were freshets in July and August, in which water was high enough so that fish could go in and out of said lake or bayou.

On the part of the defendants, they offered evidence tending to show that since 1851 the defendant John W. Horling has been the owner and in possession of the land upon which this bayou or lake is situate; that he owns all the land around said lake or bayou, and that the same is not a meandered lake; that over 15 years ago he put up notices, painted wooden signs, and nailed them on the trees in the vicinity of the lake, telling the public that it was private property, and that no fishing was allowed in said lake or bayou, and that said signs have ever since been kept up to notify the public; that the bank of the river very seldom overflows, but once a year the river would get high enough so that the water would flow into the old inlet, which would last sometimes 15 days; the water would subside in the river, then the river would be

entirely shut off, and the bayou or lake would have no connection with any public waters until the next spring freshet came; that there is no water in the ditch to exceed 20 to 25 days in any one year; the rest of the time the bayou or lake is entirely disconnected from any other waters; that there is no inlet to said lake; that the inlet from the river has no defined channel, except where it breaks through the high bank near the river; that this is dry so much of the time that it is overgrown with tame grass, and becomes good pasture land; that during the last 30 years the owner of the land has piped and tiled cold spring water from the adjoining land down to this lake, and during all these years has planted little fishes in said lake, obtained from surrounding pools of water, such as carp, bass, sunfish, and pickerel; that on account of the planting of these fish (not obtained from any public fish hatchery) this bayou or lake has become well stocked with fish, so that the fishing is much better than in Grand river, and people resorted there to fish to such an extent that it became necessary, and the owner of the land put up signs forbidding trespassing, and notifying the public that it was a private lake, and that fishing was not allowed; that on the day alleged in the complaint and warrant the respondents were fishing with a net, which they claimed they had a right to do, as it was private property; they set these nets near the place where the cold-water pipes and tile made the water fresh, and where the fishes were in the habit of frequenting to get cool water.

Among other things, the judge charged the jury:

"If you should find in this case from all the evidence in the case, that this lake is so connected with Grand river, or with any other body of water that is public, so that fish can go from public waters into this water or into these waters, if they can go there at any time of the year during freshets, or if the fact is that Grand river fish can get into this lake and out again, no matter whether they come out the same day, or the next week, or the next season, if they can go into this lake, and have a free passage in and out again into the public waters, under those

circumstances your verdict should be 'Guilty' in this case, because, as I instruct you, that would make this one of the inland lakes coming within the description under this statute; that it is not necessary that any particular length of time should exist during the year in which this body of water is connected with Grand river, or any other public body; it is not necessary that any particular time should exist. If you find that the fish can migrate from a public body of water (which it is admitted Grand river would be) into this lake, and can go back again (in other words, if they have free access in and out), the length of time during the year cuts no particular figure, but, of course, unless that should be the fact, they would not be guilty. If fish cannot get into this lake at all from any outside waters, and it has no connection at any time of year with any other body of water, the contention of these respondents would be correct."

It is insisted this charge is error; that respondents owned the land around and under the lake, the water of the lake, and the fish therein; and that the statute does not apply to such a case.

This statute has been before the court a number of times, though the exact question presented here has not been passed upon. There is a great diversity in the laws of the various States and the various countries in relation to what constitutes navigable waters and to the rights of riparian owners. As early as *Thunder Bay River Booming Co.* v. *Speechly*, 31 Mich. 336 (18 Am. Rep. 184), it was contended there can be no such thing as a navigable stream in which the public have rights, which is only open to the public use periodically; but it was held, as was held as early as *Moore* v. *Sanborne*, 2 Mich. 519 (59 Am. Dec. 209), that this was not so, but that such a stream is a public highway by nature, but one which is such only periodically, and while the natural condition permits a public use, during which time the public right and the private right of the riparian proprietors must each be exercised with due consideration for the others. In *Lincoln* v. *Davis*, 53 Mich. 375 (19 N. W. 103, 51 Am. Rep. 116), there is an interesting discussion of the status

of fishes and the right to take them, in which it is declared they are feræ naturæ, and can be taken by any one who has the right to be on the premises, unless forbidden by the statute. Notice is taken of the fact that the State has taken the subject under its control. In *People* v. *Collison*, 85 Mich. 105 (48 N. W. 292), the respondent was convicted under a similar statute to this one. His defense was that "he was fishing upon his land, over his own soil, and in his own water," and that the statute, so far as it undertook to interfere with his right to do so, was invalid, and unconstitutional, because it deprived him of his property without compensation. In disposing of the case Justice MCGRATH, speaking for the court, said:

"It does not appear here that the land of James Collison extends into the lake, but, in our view of the case, that is entirely immaterial, as the rule would be the same whether he did or did not own the land over which the fish were caught. It is sufficient that he did not own Gun Lake, and, even though he did, that it connected with other lakes and streams through which fish migrate. The right of James Collison to fish in Gun Lake is not an exclusive right, and the design of the statute is to protect others in Gun Lake, as well as in the other waters connecting therewith, in the enjoyment of the same privilege. The right to fish even in these waters is so far public that the State may by statute protect it. The protection of fish in Gun Lake is necessary for their preservation in the waters of Pan Lake, Gun river, the Kalamazoo river, Lake Michigan, and the other Great Lakes. Defendant, James Collison, never acquired any property in the fish which frequent Gun Lake. By reason of their migratory habits, their ownership is in the whole people of the State, and no individual has any property right in them until they have been subjected to his control. To fish is a privilege accorded by the State, and the question of individual enjoyment is one of public privilege, and not of private right. 'Unless the catching of fish,' as is said by one writer, 'is conducted with reason, either the fish may be altogether exterminated, or the enjoyment of the right by one may interfere with the equal enjoyment of the right by others.' Hence, for the protection of fish, a valuable article of food and merchandise, the control of which is

in the State, and to preserve equality in the right to fish, the State has an undoubted right to regulate the manner in which they shall be caught, and to protect their migrations. There was no error in the refusal of the court to direct a verdict for defendants."

In *People* v. *Conrad*, 125 Mich. 1 (83 N. W. 1012), the complaint was made under the same section of the statute involved here. In that case there was neither inlet nor outlet connecting the lake with other waters, and, while it was held that the respondents were improperly convicted, the court said:

"If it [the lake] were connected with other lakes and streams, so that fish might pass in and out of it, others than the owners would then have an interest in the protection of the fish in the lake."

The case of *People* v. *Bridges*, 142 Ill. 30 (31 N. E. 115, 16 L. R. A. 684), is an instructive case, though the Illinois statute, as stated by counsel for respondent, is much broader than the title of the act involved here. The opinion, among other things, states:

"It is said that Miller's rights in said body of water are so paramount and exclusive that, if he chose to fill it up, and thereby destroy it as a lake or pond, no rights of any private party or of the public would be infringed. And this is put forward as the test of the legislative intention to include said lake among the waters enumerated by said act. It seems to us to be a sufficient answer to this contention that the statute itself neither expressly nor by implication has established any such test. There may be and doubtless are various, and perhaps many, lakes, ponds, sloughs, and bayous in the State which are so far private property that the owner may drain them, or fill them up without infringing any public or private right, but which, so long as they are permitted to remain in their natural condition, are places where fish common to the waters of the State are propagated and raised. And, while this is so, the statute makes no distinction between bodies of water thus situated and those in respect to which public rights or private easements exist. Its language applies to all alike. * * * Indeed, the power to protect and preserve the fish in the waters of the State would be

practically nugatory, if, as is contended, it was confined to streams and watercourses, and was excluded in case of all bodies of water which were so far subject to private ownership that the owners would have a right to drain them or fill them up, and thus destroy them as bodies of water. * * * While said body of water has no continuous connection with the river, situated but a few yards away, such connection is established during all periods of high water, and continues for a sufficient length of time to allow fish to pass into it, or the fish in the lake to escape therefrom. During such periods of high water, which occur once or twice, if not oftener, every year, and continue sometimes for several weeks, said lake, so far as the passage of fish to and from it is concerned, becomes, for all practical purposes, a part of the river. During these periods, as we may presume, migratory fish passing up the river in search of proper places for depositing spawn are liable for such purpose to pass into this, as into other, bayous where the waters are quiet, but with this difference: That while, in case of ordinary bayous, which maintain their connection with the stream, the fish, after accomplishing their purpose, are at liberty to leave, and go elsewhere, here, by the receding of the water, their exit is for the time being cut off, and they, as well as their progeny, are compelled to remain. As soon, however, as another flood occurs—a thing which may happen at any season of the year—the fish thus impounded are at liberty to escape, and, if they do so, any qualified property the owner of the lake may have in them is at once divested. We are unable to see how the mere fact that said lake, instead of having a continual connection with the river, has such connection only during periods of high water, can have any essential bearing upon the rights which the owner of the soil has in the fish that happen for the time being to be in the lake. * * * It is impossible, therefore, to distinguish the present case from those arising in relation to other waters in the State to which the statute is applicable. The public interest is involved in both in the same way, if not to the same extent, and the public interest in both is such as to justify legislative interposition."

The court may take notice of the fact that fish are an important food product, and that the State as a whole is interested in having the supply increase, instead of de-

crease. So important is this thought to be, that large sums of money, raised by taxation, are expended by the State, under the direction of a commission, in the propagation and distribution of fish. Along similar lines laws are enacted for the protection of the fish, making certain methods of taking them unlawful. The facts disclosed by this record show that during the various overflows of Grand river a very large proportion of the fish found in this lake came to it from Grand river. Fish would naturally go there from Grand river in the spring for spawning purposes, and later, when the spawn was hatched and became fish of some size, during periods of high water they would find their way into Grand river. We do not think it can be said the public has no interest in this lake and in the fish therein.

The conviction is affirmed.

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

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OESTERREICH v. CITY OF DETROIT.[1]

1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—INJURIES—CONTRIBUTORY NEGLIGENCE.
   It is not negligence per se for one knowing of defects in a sidewalk to attempt to pass over it.

2. SAME—EVIDENCE—SUFFICIENCY.
   In an action for injuries to a pedestrian by a defect in a city sidewalk, evidence reviewed, and *held* insufficient to show plaintiff's contributory negligence as a matter of law.

3. SAME—CONTRIBUTORY NEGLIGENCE.
   Where a pedestrian was injured by the tipping up of a plank which was a part of a defective sidewalk, the fact that she might have seen and avoided holes in the walk was insuffici-

[1] Rehearing denied October 27, 1904.

ent to render her chargeable with negligence in failing to discover that the plank on which she stepped would tip up and cause her injury.

4. SAME—NOTICE OF CLAIM—SUFFICIENCY.

Notice to municipal officers of a claim for personal injuries is sufficient if it describes the time, place, cause, and nature of the injury in general terms.

5. SAME—STATUTE—CONSTRUCTION.

The statute requiring that notice of a claim for personal injuries be served on a municipal corporation before suit, being in derogation of a common right, is strictly construed.

Error to Wayne; Donovan, J. Submitted May 17, 1904. (Docket No. 117.) Decided July 27, 1904.

Case by Anna M. Oesterreich against the city of Detroit for personal injuries. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

Palmer & Palmer, for appellant.

P. J. M. Hally (*T. E. Tarsney*, of counsel), for appellee.

The notice referred to in the opinion is as follows:

"Hon. TIMOTHY E. TARSNEY,
"Corporation Counsel,
"Detroit, Mich.

"*Dear Sir:* In accordance with the statute, you are hereby notified that the undersigned suffered an injury by reason of a defective sidewalk situate within the limits of the city of Detroit.

"The accident was suffered by me on Thursday, April 17, 1902, between 8 and 10 o'clock in the evening, on the north side of Biddle street, between Twenty-Seventh street and Vinewood avenue, at a point about 100 feet westerly of Twenty-Seventh street.

"The cause of the injury was a defect in the sidewalk laid along said Biddle street at said place.

"The injury suffered was a severe wrench, sprain, and bruise of the hip and back, together with other internal injuries. MRS. ANNA OESTERREICH.

"Dated Detroit, June 14, 1902."

MONTGOMERY, J. This action is brought to recover damages sustained by the plaintiff while walking over a defective sidewalk in Biddle street, in the city of Detroit. The circuit judge directed a verdict for the defendant on the ground that the plaintiff was shown by her own testimony to be guilty of contributory negligence.

The first question for consideration is, therefore, whether the plaintiff's own testimony conclusively shows that she took a risk which no ordinarily prudent person would have taken under the circumstances, or neglected that care for her own safety which the law requires. Her testimony shows that the walk in question was in bad condition, in that there were numerous holes in it, and was known to be in this condition by the plaintiff; that on the evening in question, about 8:30, she returned from shopping in the city, alighted from a car, and started to travel over the walk in question, having her child, 1½ years old, in her arms, and carrying a half dozen eggs. The plaintiff might have avoided the sidewalk where the injury occurred by going across lots through a path, but she testified that she did not consider it safe to do so at that time in the evening. Surely she cannot be charged with negligence for acting upon such motives as would without doubt influence most women similarly situated. It is not negligence per se for one knowing of defects in a sidewalk to attempt to pass over it. *Vergin* v. *City of Saginaw*, 125 Mich. 499 (84 N. W. 1075), and cases cited. Was the plaintiff's injury due to inattention to known dangers? She testified as follows:

"I kept an eye on the sidewalk as carefully as I could with the child in front of me. I couldn't see just where I was stepping. I could have seen a hole if I had been looking at it. It was big enough to see.

"*Examination by the Court: Q.* Was it light enough that night, so that, if you had been looking along the footpath pretty closely, you could have seen the holes, or was it dark enough to obscure the holes?

"*A.* Well, it wasn't so pitch dark, but not so dreadfully light along there.

"*Q.* What would be your judgment about that, so that, after you had cast your eye down on the plank right along where you were walking, whether you could have seen the hole; was it sufficiently light?

"*A.* Well, I kind of think I could if I had not been carrying anything.

"*Q.* You paid very considerable attention to distinguish holes at night?

"*A.* Yes.

"*Q.* Considerable attention?

"*A.* Yes.

"*Q.* Was there anything to attract your attention—like the blowing of a train whistle, or anything of that kind—was there any crossing there that called your attention?

"*A.* No, sir."

And on being recalled testified as follows:

"I knew that the sidewalk was defective between Twenty-Seventh street and our house, but I never examined the particular boards. I fell at the board which you have letter 'A' on Exhibit B. I did not step into a hole. I was walking along, and the board tipped down, and then I fell into the hole. I did not know that the board would tip down. I never examined it for special defects. I knew that the hole in the sidewalk was bad. I knew that there were holes all through there. I do not think that I said this morning that I stepped into the hole. I did not step into the hole. I fell into it. If I said otherwise this morning, I was mistaken."

We do not think it can be said that this testimony shows want of due care as matter of law. If it be said that she might have seen the holes and avoided them, it does not follow that she was in fault in failing to discover that the plank upon which she stepped would tip up and cause her injury. The city attorney contends that the judgment should be sustained in any event, for the reason that the notice served on the corporation counsel was not sufficient in form. The claim is that it failed to state with sufficient certainty the cause of the injury. The charter provision relied upon was considered in *Tattan* v. *City of Detroit*, 128 Mich. 650 (87 N. W. 894), where a notice very

similar to the one given in this case was held to have sufficiently described the time, place, and cause of the injury. It was there said that the statute, being in derogation of common right, should receive a reasonably strict construction. We hold the notice in the present case adequate.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

COLE v. DOOLEY.

1. NAVIGABLE WATERS—LOGGING.
   A stream and lake, which were used for floating logs as long as any were tributary, and since then for navigation by skiffs and steamers, are navigable.

2. DRAINS—NAVIGABLE LAKE.
   A public drain, the avowed purpose of which is to reclaim land by lowering the level of a navigable lake, is not authorized, under section 4339 of the Compiled Laws, which prohibits impairing the navigability of waters by such drains.

Appeal from Barry; Winsor, J., presiding. Submitted June 10, 1904. (Docket No. 9.) Decided July 27, 1904.

Bill by Ervin P. Cole and others against Patrick Dooley, drain commissioner of Barry county, to restrain the construction of a proposed drain. From a decree for complainants, defendant appeals. Affirmed.

Colgrove & Potter, for complainants.

Thomas Sullivan and *Fred W. Walker*, for defendant.

HOOKER, J. Thornapple Lake is a body of water between two and three miles long, and half a mile in width, in the county of Barry. The testimony in the case shows

that there is deep water in the lake, but that the edges are low and wet, and that shallow water extends some distance into the lake, and that the bottom is soft, to a depth of many feet. The shore around the lake is in many places springy, and it appears to be the consensus of opinion that springs exist in the lake, which help to feed it. Several streams empty into this lake, the largest of which is Thornapple river, about 60 feet wide where it flows into the lake. There is much low land along this river, especially near the lake. The outlet of the lake is also called "Thornapple River," and it is larger than the inlet of the same name.

Interested parties filed a petition with the county drain commissioner to establish a drain beginning at the outlet of the lake and extending down the stream, the avowed object of which was to lower the level of the lake four feet. Near the south bank of this lake there is a high bluff, owned by the complainants, which approaches within 50 feet or thereabouts of the water's edge. The complainants' father owned this property, consisting of a farm, and he built a dock and filled in along the shore behind it; thereby giving access to the lake, where he kept boats to let, and a steamer, which he used to transport pleasure seekers who were attracted to the place. For three decades or more he and his children, who now own the place, conducted a successful resort, and spent considerable money in improvements. Among other things constructed by them to this end were a dance hall, and a larger dwelling, a boathouse, and a depot or waiting room for passengers. This was immediately in front of, and within 70 feet or thereabouts of, the house, and also immediately opposite the dock. There is about 4 feet of water at the dock at the ordinary stage of water.

The drain proposed will lay bare about 66 acres of the bottom of the lake, and it will make shallows of other lake bottoms now covered by 4 feet and more of water. It will correspondingly lessen the area that can be traversed by complainants' boats—especially their steamboat. The com-

plainants own a mile and a half of the shore of the lake, with the riparian rights incident thereto, and they oppose the proposed drain, and have filed the bill in this cause to restrain its construction. The testimony shows that the interested landowners, who expect to have lands reclaimed by this drain, have contributed to a fund to conduct the defense; and it is significant that several, if not most, of the large contributors, own lands near the inlets, and are not owners of land through which the proposed drain is to be constructed. It seems to be a plain case of tapping and drawing down the surface of a lake, and a barefaced proceeding to improve farms, at complainants' expense, under the pretense of improving the public health—a prostitution of the drain law to private purposes.

The complainants were not made parties to the drain proceeding. They were not assessed for benefits, and we do not see how they could be, and, on the other hand, no damages suffered by them were considered.

Section 4339, 2 Comp. Laws, provides:

"Drains may be laid or extended into or along or from any lake or other body of water surrounded wholly or in part by a swamp, marsh, or other low lands for the general purpose of drainage contemplated by this act but not so as to impair the navigation of any navigable water."

The evidence in this case is clear that Thornapple river and Thornapple Lake have been used for floating logs whenever there were logs to float, and occasion to float them. As long as there was timber in the vicinity, it was floated upon the lake; and in early days timber was brought down the tributaries not only to a boom and mill upon the lake, but also down the outlet to a mill situate at Quimby, a mile or two below the lake, and it has been navigated since by thousands in steamboats and skiffs owned by complainants. The stream and lake were therefore navigable waters, under our decisions. See *Moore* v. *Sanborne*, 2 Mich. 520 (59 Am. Dec. 209); *Lorman* v. *Benson*, 8 Mich. 18 (77 Am. Dec. 435); *Sterling* v. *Jackson*, 69 Mich. 530 (37 N. W. 845, 13 Am. St. Rep.

405). As shown by the last-mentioned case, the Ordinance of 1787, art. 4, which provided:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, imposts, or duty therefor"

—Saved to the public the right to navigate the streams of the State by bateaux, and even canoes. Who can doubt that the Grand river and its tributaries were navigable, under this rule, as well as Thornapple Lake, through which the river runs? It may be that hurrying the water from the surface of the land by artificial drains, which empty it into the Great Lakes with a celerity which nature abhors, is essential to public health. Under this statute, it is possible that private lakes and ponds may be obliterated in the interest of public health, upon compensating the owners for the loss, which, however, has not been done nor proposed in this instance; but the legislature has set bounds to the practice, by limiting such draining and prohibiting the impairing of the navigability of water. Thornapple Lake being navigable, and this drain being admittedly intended to lower the ordinary level of the lake four feet, it is forbidden by the statute.

As this point disposes of the case, we do not pass upon other questions raised.

The decree is affirmed.

The other Justices concurred.

CRAM v. WARD.

1. DEEDS—PROPERTY CONVEYED—APPURTENANCES.
The exclusive and unrestricted use of land carries with it title to the land itself.

2. SAME—RESERVATIONS—RIGHTS OF GRANTOR.
The purchasers of lots fronting on a beach, their deeds granting them the right in common to make such use of the beach as is usual at summer resorts, on all the lots on the plat being granted, take the fee of the beach, and leave the grantor without right to enter thereon and remove sand, irrespective of whether such entry interferes with the grantees' use of it as a summer resort.

Appeal from St. Clair; Law, J. Submitted June 10, 1904. (Docket No. 12.) Decided July 27, 1904.

Bill by Roys J. Cram against Charles A. Ward and others to restrain the removal of sand from a beach in which complainant and other of defendants' grantees have an undivided interest. From a decree for complainants granting insufficient relief, complainant appeals. Reversed and decree entered for complainants.

Defendant Ward, being the owner of certain lands in the township of Ft. Gratiot, lying between a public highway known as the "Lake Road" and the shores of Lake Huron, platted the same, and duly recorded the plat. It shows 59 lots, each with a frontage of 50 feet, fronting on the beach, and running back 300 feet to the road. This land was platted for the sole purpose of a summer resort. All the lots have been sold, and nearly all built upon—some quite expensive residences. The purpose of the grantor, Ward, in platting this land and in selling the lots, was to provide and keep intact the beach in front of the lots for the common benefit of all the lot owners and summer residents. If the lots had been sold as extending to

the shore, they evidently would not have been as valuable as they now are, because it would be in the power of any owner to fence in his portion of the beach, and destroy it as a place of resort. Each of the deeds made by Mr. Ward to his grantees, and by his grantees to others, contains this provision:

"Together with the right to use in common with other grantees, and persons who shall become grantees of the party of the first part, her heirs and assigns, of all land lying between the platted portion of said Gratiot Beach and the waters of Lake Huron, which use and enjoyment by said second party, other grantees, and persons, shall be limited to such use as is usual for residents and visitors at a family summer resort, to make of a beach in connection with such resort."

Following this is also a provision against selling or keeping for sale upon said premises intoxicating liquors, and making such deed void if the grantee violates the provision.

Complainant owns a valuable summer residence. The defendants, claiming to own the land between the lots and the shore, are selling and permitting to be drawn away, in large quantities, the sand which makes the beach. This sand, which at the time was not supposed to possess any commercial value, has proved to be very valuable for the manufacture of concrete. Teams were employed in drawing the sand away, and as a summer resort the place was practically destroyed. This bill was filed to restrain the defendants from removing the sand.

The defendants deny that the complainant has any right or interest in the land between his lot and the shore, or any right to interfere with them or their agents in removing the sand. They admit that complainant has an easement in the land, but say that the removal of the sand does not in any way interfere with such easement. The case was heard upon pleadings and proofs taken in open court, and a decree was entered declaring that the said complainant and the other lot owners, by virtue of their deeds, obtained an "easement or right to use and

enjoy for such use as is usual for residents and visitors at a family summer resort to make of a beach in connection with such resort, and for no other purpose or use, all the land lying between the east line of said lots and the waters of Lake Huron; * * * that the removal of sand and gravel, as the proof shows it to have been taken away, produces no permanent impairment or injury to said easement." The decree then enjoins the removal of sand and gravel from said beach between the 15th day of June and the 15th day of September of each year, for the reason that the removal at that time is a discomfort, inconvenience, and annoyance to the lot owners and to visitors.

Stevens, Graham & Stevens (*William T. Mitchell*, of counsel), for complainant.

Frank T. Wolcott and *Thomas Wellman*, for defendants.

GRANT, J. (*after stating the facts*). The theory of the complainant is that he and the other grantees of Mr. Ward acquired the exclusive use and control, for them and their grantees forever, of the land known and designated on the plat as the "beach."

The theory of the defendants is that the complainant and other grantees of Ward acquired only an easement to use the land during the summer season as a resort, and that Ward reserved in himself the fee of the land, and the right to use it as he saw fit, subject to such easement.

The situation at the time becomes material in construing the language of the deed. The land was of little value unless it could be utilized as a summer resort. Should the narrow lots run to the lake shore, the beach would be of comparatively little value to the owners, for each could make such use of his own narrow lot as he saw fit. He could fence it, or place at the shore or elsewhere on his lot any building he might choose to erect. It would therefore be impracticable to preserve the land as a beach

or park if the lots extended to the water. Therefore Mr. Ward adopted the plan of laying out the lots fronting on a part of the land next to the water, to be known as the "beach," and conveying to each lot owner the right to use the beach in common with all the others. Under this arrangement the lots, most of which have been sold and built upon, have become very valuable. If the beach is destroyed, the lots and buildings thereon are of but little value.

The evidence is conflicting as to the damage done to the beach by the removal of the sand. Witnesses for the complainant testify that the effect is to expose the rocks, and to substitute gravel for the hard sand, and to do great injury to the beach. The evidence on the part of the defendants controverts this position. We find it unnecessary to determine to what extent the removal of the sand injures the property of the lot owners.

What did Mr. Ward convey to his grantees? There is nothing in the deed restricting the use in time or manner. The limitation is confined "to such use as is usual for residents and visitors at a family summer resort to make of a beach in connection with such resort." The limitation was not for the benefit of Mr. Ward, as grantor, but for the benefit of his grantees and himself, so long as he owned any of the land. The purpose of the limitation was to keep the beach forever in suitable condition to be used by all the grantees, their families, and visitors, for a common purpose, to wit, as their pleasure ground. If the language created only an easement, what did Ward reserve? In express terms, nothing; by implication, nothing which could in any manner interfere with the enjoyment by his grantees. He could not build docks, warehouses, or buildings. He could not cultivate or improve the land in any way he might see fit. He, so long as he owned any of the land, and his grantees, could unite in improving or building upon it, or in performing any act to which they all might agree. Did he reserve the right to dig up or remove the gravel or soil? Counsel for the defendants now

admit that he could not, if by doing so, he interfered with the use and enjoyment of plaintiff and his other grantees. How many lots would he have sold if he had reserved the right to remove the sand? Even if he had added thereto the words "so as not to interfere with his grantees in the use of the interest conveyed to them," no one would probably purchase land, with lawsuits sure to grow out of such a reservation. We think it clear that Mr. Ward's grantees acquired the exclusive right to use this land called the "beach." When he sold it all, he no longer had land adjoining the beach, by which he could get any interest in the beach. His grantees were not limited to a use for that period of time which a court or jury might determine was the usual season for a summer resort. They had the right of possession at any and all times, winter and summer, for the purposes of improvement, use, and enjoyment. They could build a breakwater, if necessary to prevent the encroachment of the waters. They could lay out drives, erect fountains, plant trees, make grass plats—in fact, could use and improve every foot of the land for the purpose designated in their deeds. This necessarily excluded any interest or right of possession in Mr. Ward. The exclusive and unrestricted use of land carries with it title to the land itself. *Reilly* v. *Booth*, L. R. 44 Ch. Div. 26; *Metropolitan R. Co.* v. *Fowler*, L. R. 28 Q. B. Div. 165; *Caldwell* v. *Fulton*, 31 Pa. St. 475 (72 Am. Dec. 760). In *Reilly* v. *Booth* certain parcels of land were conveyed, together with the exclusive use of a gateway into Oxford street, giving the dimensions, etc., of the gateway. It was held that the title to the gateway passed to the grantee. In *Metropolitan R. Co.* v. *Fowler* the railroad company acquired the right to, and did, construct an underground railway. It was held that the railroad company did not acquire an easement, but a hereditament. In *Caldwell* v. *Fulton* it is said:

"There are two modes in which the subject-matter of the deed may be described, both equally potential. The one is by a description of the thing itself, as of land by

metes and bounds, or by a known name. The other is by a designation of its usufruct, or of the dominion over it. Thus a grant of the rents, issues, and profits of a tract of land is uniformly held to be a grant of the land itself; * * * the reason is that the grant of a thing can be no more than the grant of the full and unlimited use of it."

When the right becomes exclusive, or where the whole exclusive use of a thing is obtained, the right becomes an interest, or the whole dominion passes, and there is no longer an easement, but the property is the thing itself. Exclusive use cannot be devised, and the land not.

If A., owning a 40-acre lot of land, with streets on its four sides, plats it, except a piece in the center, and the lots extend from the streets to such center piece, and he sells the lots, describing them as fronting upon such piece, and conveys to each lot owner an undivided interest in such center piece, to be used in common with all the others, as a park or for other purpose, he has clearly parted with all interest he had in the entire 40 acres. Each grantee owns his lot and an undivided interest in the center piece. All the lot owners must unite in improving or disposing of said center piece. All may unite and divide it up, or all may unite in selling their lots to a single individual or corporation, and such grantee would take title to the entire 40 acres.

Counsel for the defendants insist that the terms of the conveyance clearly indicate the intention of the grantor to retain the fee of the land. We think otherwise. Mr. Ward knew that he was granting the unrestricted and perpetual use of this land as a resort or a park. Had he desired to reserve the right to remove the soil, or any part thereof, naturally he would have incorporated such a right in his deed. The language used is just such as is natural where one conveys to several the exclusive use of his land for the common enjoyment of all. Neither complainant nor any other grantee would have purchased his lot without purchasing the interest in the beach. Without the rights in the beach, as specified in the deeds, the lots are

comparatively worthless. Complainant did not purchase his interest subject to the right of Mr. Ward to remove any part of the soil, sand, or gravel upon this beach, upon the theory that such removal would not injure the beach. He did not purchase it subject to the right of a court to determine that such removal was a benefit or injury to the beach. The lot owners own the exclusive use of this beach, and they alone have the right to say what will be a benefit and what a damage thereto. It is theirs to do what they please with it when acting in unison, but no one can use it for any other purpose except that specified in the deed, without the consent of all the others.

Decree reversed, and decree entered in this court for the complainant, with costs of both courts.

MOORE, C. J., CARPENTER and MONTGOMERY, JJ., concurred. HOOKER, J., concurred in the result.

LANDOWSKI v. CHAPOTON.

1. MASTER AND SERVANT—FELLOW-SERVANTS.
   A scaffold builder in the employ of a building contractor is the fellow-servant of a brick carrier employed by the same contractor.

2. SAME—INJURIES TO SERVANT—SCAFFOLDING—NEGLIGENCE.
   Where a building contractor furnished competent scaffold builders and sufficient good material for the construction of the scaffold, he was not liable for injuries to a servant, caused by the breaking of a center board, weakened by a knot, negligently used in constructing such scaffold.

Error to Wayne; Donovan, J. Submitted June 14, 1904. (Docket No. 14.) Decided July 27, 1904.

Case by Joseph Landowski against Alexander Chapoton

for personal injuries. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

S. E. Engle, for appellant.

Keena & Lightner, for appellee.

GRANT, J. The defendant was a large contractor and builder. Among his various contracts was one for the erection of a church and parish house in connection therewith. Plaintiff was a brick carrier. While carrying brick upon a scaffold, it broke. He fell and was injured. The scaffold was first built by the carpenters. One for the use of masons is required to be stronger. In the necessary division of the work defendant had a scaffold builder, who had built scaffolds for 20 years, and never before had one broken. When the work was ready for the masons, the scaffold builder strengthened the scaffold as they deemed sufficient. The cause of the accident was a knot in the center plank. It was established by the testimony of both plaintiff and defendant that Mr. Chapoton employed competent men and furnished sufficient good material. If there was any negligence, it was that of a fellow-servant. The court properly directed a verdict for the defendant. The case is ruled by the following decisions: *Quincy Mining Co.* v. *Kitts*, 42 Mich. 34 (3 N. W. 240); *Hoar* v. *Merritt*, 62 Mich. 386 (29 N. W. 15); *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 196 (61 N. W. 658, 27 L. R. A. 266); *Petaja* v. *Mining Co.*, 106 Mich. 463 (64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505).

Judgment affirmed.

The other Justices concurred.

KAPP *v.* BOARD OF AUDITORS OF WASHTENAW COUNTY.

PHYSICIANS — CONTAGIOUS DISEASES — TREATMENT — BOARD OF HEALTH—CONTRACTS—LIABILITY OF COUNTY—VESTED RIGHTS—STATUTES—APPLICATION.

Where a physician entered into a contract with a township board of health to care for indigent persons affected by contagious diseases at a specified price per visit and mileage, at a time when the county was liable to pay for such services on their allowance by the local board of health, the physician had a vested right to payment for such services, though Act No. 7 of the Public Acts of 1903, authorizing boards of supervisors to pass on the reasonableness of claims for such services, took effect before such claim was allowed by the local board.

Certiorari to Washtenaw; Kinne, J. Submitted June 14, 1904. (Calendar No. 20,496.) Decided July 27, 1904.

Mandamus by Christian F. Kapp to compel the board of auditors of Washtenaw county to allow a bill for services in cases of contagious diseases. From an order denying the writ, relator brings certiorari. Reversed.

A. J. Waters (*A. F. & F. M. Freeman*, of counsel), for relator.

John L. Duffy, for respondent.

HOOKER, J. On January 9, 1903, the board of supervisors of Washtenaw county passed a resolution providing for contracts with physicians relative to care of indigent persons affected by contagious diseases. The supervisor of the township of Freedom in said county was present when the resolution was passed, and had knowledge thereof. On February 10, 1903, he, as one of the board of health of his township, made a written contract with relator respecting such cases in his township at the price of

$10 per visit and 25 cents per mile going, only. Services were rendered under this contract, and a bill for $1,371 was rendered. This sum includes $34 for clothing and other property furnished and destroyed. It was allowed at the sum of $569.50. Relator claims that $801.50, covered by the first contract, was wrongfully disallowed.

At its 1903 session the legislature passed Act No. 7 of the Public Acts of that year, and gave it effect March 13, 1903, being after the services under the contract of February 10th were performed. This act provided for a change in the law giving the boards of supervisors authority to pass upon the reasonableness of claims for services in caring for indigent persons, by direction of the board of health, whereas before the allowance by the local board was usually final and conclusive upon the board of supervisors. The board of auditors refused to allow and pay the bill.

It is the claim of the respondent that Act No. 7, referred to, affected the remedy only, and has a retrospective effect; that the contract was not impaired, (1) because relator has his remedy against the township, (2) because the contract was with the township, and not with the county, which did not assent to it. No question appears to be raised over the authority of the township board of health to agree in advance upon the price to be paid for such services. It is unimportant whether they might properly do so or not, for the service was rendered at the request of that board, and the bill was audited and allowed by it. We understand that there is no question of fraud or collusion in the case.

Had this allowance been made before the act took effect, we think it clear that the respondent must have paid the bill, and that relator's right could not, in such case, have been affected by the legislature. Does the fact that the allowance was deferred until after such act took effect justify the board of auditors in its action? The relator rendered services under a law which made the county liable to pay for them upon allowance by the local board. The amount was agreed upon in advance. He had a

vested right to such payment, when lawfully allowed by the local board, and it could not be taken away or impaired by legislation, as it would be if the supervisors were authorized to question its reasonableness. The services were rendered upon different terms. *Elliott* v. *Board of Sup'rs of Kalkaska Co.*, 58 Mich. 452 (25 N. W. 461, 55 Am. Rep. 706); *Pease* v. *Common Council of Saginaw*, 126 Mich. 440 (85 N. W. 1082); *Zimmerman* v. *Board of Sup'rs of Cheboygan Co.*, 133 Mich. 494 (95 N. W. 535); *Township of Cedar Creek* v. *Board of Sup'rs of Wexford Co.*, 135 Mich. 124 (97 N. W. 409).

The order of the circuit judge is reversed, and the writ will issue as prayed.

The other Justices concurred.

HUGHES *v.* HALLY.

1. ARREST — JAIL-LIMITS BOND — ASSIGNMENT — DEPUTY SHERIFF.
   3 Comp. Laws, § 10520, providing that, if a bond for the liberty of jail limits shall be forfeited, the person at whose suit the prisoner shall have been confined shall be entitled to an assignment thereof, which shall be made by the sheriff taking it, or by his successor, or, in case of vacancy, by an undersheriff, by an indorsement thereon, is not mandatory to the extent of prohibiting a sheriff from assigning by his deputy.

2. SAME — ATTORNEYS — JAIL-LIMITS BOND — VIOLATION — ATTENDANCE ON SUPREME COURT.
   1 Comp. Laws, § 1117, providing that all officers of courts of record shall be liable to arrest, and may be held to bail, in the same manner as other persons, except during the actual sitting of any court of which they are officers, does not permit counsel, who has been arrested, and has given bail for liberty of jail limits, not during, but before, the actual sitting of a court, to violate the condition of his bond by going beyond the limits of the county, when thereafter professional engagements call for his presence in the Supreme Court.

3. SAME—FORFEITURE OF BOND—DAMAGES.

One who is arrested on a capias ad satisfaciendum, gives bond for liberty of jail limits, is then surrendered by his sureties, and afterwards gives another such bond, is thereafter confined, not on a surrender in exoneration of bail, but by virtue of a capias ad satisfaciendum, within 3 Comp. Laws, § 10521, providing the various measures of damages in such cases for forfeiture of such a bond.

Error to Wayne; Hosmer, J. Submitted June 16, 1904. (Docket No. 31.) Decided July 27, 1904.

Debt by Michael F. Hughes against Patrick J. M. Hally and Samuel Kennedy for the amount of a bond. There was judgment for plaintiff on a verdict directed by the court, and defendants bring error. Affirmed.

T. E. Tarsney and *A. B. Hall*, for appellants.

Richard Price, for appellee.

HOOKER, J. In June, 1897, plaintiff recovered a $500 judgment in Wayne circuit court against a newspaper called the Catholic Witness and Patrick J. M. Hally. Costs were taxed at $80.95. On September 20, 1897, an execution was returned unsatisfied. On December 30th plaintiff caused a capias ad satisfaciendum to be issued against Hally, and he was arrested by the sheriff on December 31st. On the same day Hally gave a bond for the liberty of jail limits to Chipman, sheriff, with Sheeran and Thompson sureties. The bond was for $1,162. This bond was afterwards given by Chipman to G. Duffield Stewart, his successor in office, and while he was sheriff the sureties surrendered Hally in exoneration of bail. On December 28, 1900, the sheriff took another bond for jail limits, Kennedy being surety, for $1,162. Afterwards Hally, as assistant corporation counsel, attended the Supreme Court at Lansing upon official business, and while there Hughes procured an assignment of the bond, and began suit against the defendants upon the same. A

verdict was directed in favor of the plaintiff, and defendants have appealed.

The questions involved in the case were:

1. Was the assignment of the bond a valid assignment, being made by "Henry A. Dickson, sheriff, by L. W. Hines, deputy sheriff."
2. Was the leaving of Wayne county, under the circumstances, a breach of the bond?
3. Should the damages have been limited to nominal damages?

3 Comp. Laws, § 10520, provides that the plaintiff shall be entitled to an assignment, and specifies that a sheriff or his successor in office, or, in case of a vacancy, his undersheriff, shall make it by indorsement thereon. We think that this is not a mandatory provision to the extent of prohibiting a sheriff from assigning by his deputy. The plaintiff had a right to demand it, and the sheriff no right to refuse it. See *Wilcox* v. *Ismon*, 34 Mich. 268.

The second point rests upon section 1117 of the Compiled Laws, which provides:

"All officers of the several courts of record shall be liable to arrest, and may be held to bail, in the same manner as other persons, except during the actual sitting of any court of which they are officers," etc.

This statute exempts counsel from arrest on process and being held to bail, during the actual sitting, etc. Hally was not so arrested. He was arrested before, and had given bail. He now contends, in substance, that this statute permits him to violate the condition of his bond, and, in effect, that jail limits are to be extended, in the case of a lawyer, beyond the confines of the county, when professional engagements call for his presence at the Supreme Court. No authority in point is cited, and we think the claim should not be sustained.

3 Comp. Laws, § 10521, provides for a suit upon the bond, and that damages shall be as follows:

"If the prisoner escaping was confined by virtue of an execution, or by virtue of an attachment for nonpayment

of costs, the measure of the plaintiff's damages shall be the amount directed to be levied by such execution or attachment with interest thereon to the time of such recovery. If such prisoner was confined by virtue of a capias ad respondendum, or upon a surrender in exoneration of his bail, made before or after judgment rendered against him, the plaintiff shall recover only the actual damages sustained by him."

It is now contended that defendant was confined upon a surrender in exoneration of bail, and actual damages only, and not the amount of the judgment, are recoverable. We think not. He was confined by virtue of a ca. sa., and this was extended to jail limits by his bond. The damages are fixed by paragraph 1 of the section quoted.

The judgment is affirmed.

The other Justices concurred.

PEOPLE *v.* KUNEY.

1. CRIMINAL LAW—INDUSTRIAL HOME FOR GIRLS—AIDING SUBJECT TO LEAVE THE STATE—JUSTICE OF THE PEACE—DISQUALIFICATION—WAIVER.

   In a prosecution for aiding and assisting a girl to leave the State, knowing her to be a subject of the industrial home for girls, without the consent of the board of control of the home, where defendant entered a plea of not guilty at his examination before a justice of the peace, the plea was a waiver of an alleged disqualification of the justice, on the ground that the justice held a clerical position in connection with the home, and was in fact an employé of the superintendent, the complaining witness in the case.

2. SAME—EVIDENCE—SUFFICIENCY.

   In a prosecution for aiding and assisting a girl to leave the State, knowing her to be a subject of the industrial home for girls, without the consent of the board of control of the home, the introduction of the commitment, indorsed with the

approval of the circuit judge, to prove that the girl was legally subject to the control of the home, was sufficient to put in evidence the indorsement of the approval of the circuit judge thereon without special offer of the approval; and hence a contention that there was no proof of the fact was untenable.

Exceptions before judgment from Lenawee; Chester, J. Submitted June 17, 1904. (Docket No. 191.) Decided July 27, 1904.

Le Roy Kuney was convicted of aiding and assisting a girl to leave the State, knowing her to be a subject of the industrial home for girls, without the consent of the board of control of said home. Affirmed.

John E. Bird and *J. L. O'Mealey*, for appellant.

Theodore M. Joslin, Prosecuting Attorney, for the people.

HOOKER, J. In 1901 the defendant's wife obtained from the industrial home for girls at Adrian one Lila Jackson, an inmate of said home, to serve as domestic, under the usual contract made by that institution. The girl lived and worked in defendant's family for a year and three days, until July 13, 1902, when she left, and went to Toledo. She was soon after returned to the home. Lucy Sickles, superintendent of the home, made complaint against defendant before one Charles Humphrey, a justice of the peace, by whom defendant was bound over to the circuit court, and he was afterwards informed against and convicted of the offense charged in the complaint and warrant, viz., of aiding and assisting a girl to leave the State knowing her to be a subject of said home, without the consent of the board of control of said home, contrary to the statute. He was convicted later, and has appealed.

The questions in the case are: (1) Was Humphrey, the justice, disqualified? (2) Was the absence of proof that Lila Jackson was in the legal custody of the home, fatal?

The first of these questions is predicated upon the fact that Humphrey held a clerical position in connection with the home, and expected to continue to hold it. It is claimed that he was an employé of Mrs. Sickles, the complainant. If there is any force in this claim, it was waived by the defendant's plea of not guilty. See *People* v. *Jones*, 24 Mich. 215.

To prove that Lila Jackson was legally subject to the control of the industrial home, the commitment was offered in evidence. The record, as amended, shows that the commitment is indorsed with the approval of the circuit judge. It is contended that the commitment only was offered in evidence, and that this did not justify the consideration of the appended indorsement. We think this overcritical. The commitment without the indorsement would not have been recognized or acted upon. It could not have been either legally or prudently. The indorsement is a part of the commitment, and was properly in evidence.

The conviction is affirmed, and, as we assume that the case is here before sentence, the court is directed to impose sentence, if he has not already done so.

The other Justices concurred.

LYON *v.* CLARK.

1. EQUITY—JURISDICTION—FRAUD—DISMISSAL OF BILL.
   A bill to set aside a conveyance of real estate, and avoid a transfer of personal property, though not sustained as to the land, and there is an adequate remedy at law as to the personalty, should not be dismissed on the merits, where the bill alleges that the property was obtained by fraud, through a conspiracy, and that an accounting is necessary.

2. SAME—BILL—MULTIFARIOUSNESS—WAIVER.
   An answer on the merits waives the defect of multifariousness in the bill.

Appeal from Clinton; Stone, J. Submitted June 17, 1904. (Docket No. 32.) Decided July 27, 1904.

Bill by Willard C. Lyon, trustee in bankruptcy of the estate of Fred E. Hazle and Frank B. Clark, against Nathaniel J. Clark to set aside certain conveyances as fraudulent. From a decree for complainant, defendant appeals. Affirmed.

Almond G. Shepard (*Lyon & Moinet*, of counsel), for complainant.

Fred R. Everett (*Norton & Dooling*, of counsel), for defendant.

HOOKER, J. Hazle and Frank Clark engaged in the shoe and furnishing trade at Ovid with a capital of $3,000, each having borrowed $1,500 on his personal paper. Clark was also owner of a store building, which he purchased from his father, Nathaniel Clark, the defendant in this case, on credit, of whom he also borrowed his share of the capital stock. Hazle and Clark became insolvent, and the store was sold back to the defendant for $3,000. He also purchased the stock of goods and fixtures and outstanding accounts, giving therefor a check for $5,000 upon the account of his brother-in-law, one Lamb, for whom he did business, and for whom he claims to have made the purchase.

Bankruptcy proceedings followed, in which Hazle and Frank Clark were declared bankrupts; Lyon, the complainant, being appointed trustee in bankruptcy. Finding insufficient property belonging to the bankrupts to pay their debts, he attacked the conveyances to this defendant by filing a bill to set aside the conveyance of the store, and bringing assumpsit to recover the value of the stock of goods, which had been sold or intermingled with other similar goods, so as to have become indistinguishable. Both cases came to this court. The assumpsit case is reported in 129 Mich. 381 (88 N. W. 1046), and it was held

that trover, and not assumpsit, was a proper form of action to reach the stock, upon the claim that title vested in the trustee under the bankruptcy act, if there was fraud in the transfer, and the plaintiff was for that reason defeated. The case involving the store is reported in 132 Mich. 521 (94 N. W. 4), and the validity of that transfer was sustained upon the merits, and we see no reason for saying that it was not a final adjudication of that question between the parties.

The original bill in the present cause was filed after the decision of the assumpsit case by this court, but a year or so before the disposition of the chancery cause. A demurrer clause in the answer to this bill, as subsequently amended, was interposed and overruled, and the case was afterwards heard upon the merits, upon full pleadings. The court sustained the validity of the conveyance of land, but found for the complainant as to the stock of goods, and the defendant has appealed.

Counsel for the defendant in their brief limit the questions raised to three, viz.:

"(1) Has a court of equity, under the facts and circumstances of this case, jurisdiction to hear, try, and determine the matters involved therein?

"(2) Has the defendant waived his right to question the jurisdiction of the court?

"(3) Is the defendant guilty of having violated the provisions of the national bankruptcy law?"

1. Counsel for the defendant admit that, if the bill was in good faith filed to reach real estate as well as personal property, equity had jurisdiction; but that real estate was included merely for the purpose of giving jurisdiction, and in the face of a former conclusive decision regarding it, and that under such circumstances the bill should be dismissed upon the hearing of the merits, if, as is insisted, the question as to the personal property could as well have been settled in an action at law—i. e., trover. That question was tried upon the demurrer. We do not find it necessary to dismiss the bill for the reason that the bill

alleges that the property was obtained by fraud, through a conspiracy, and that an accounting is necessary. See *Edwards* v. *Investment Co.*, 132 Mich. 1 (92 N. W. 491). It is said that the bill is multifarious, but, if so, there is no impediment to a disposition of the case, in view of the fact that defendant answered. *Wales* v. *Newbould*, 9 Mich. 81; *Payne* v. *Avery*, 21 Mich. 537. This rule is also a sufficient reason for our conclusion upon the last preceding question.

2. The second question is practically disposed of by what has been said.

3. The third question relates to the merits. We concur in the opinion of the learned circuit judge upon this branch of the case. The subject has been before us twice, and, while we did not have occasion to decide the merits on the former hearing, that record appears to have created a similar impression upon our minds, and is reassuring as to the correctness of our conclusion upon this record.

We see no occasion to disturb the decree of the circuit court, and it is affirmed, with costs.

The other Justices concurred.

NAFTZKER *v.* LANTZ.

1. ACTION ON NOTES—EXECUTION—DELIVERY—DENIAL—AFFIDAVIT—CHARACTER OF DEFENDANT.

   Under Circuit Court Rule No. 8 and 1 Comp. Laws, § 826, failure to deny on oath the execution of the written instrument sued on, at the time of entering the plea, admits, not only its execution, but its delivery and the partnership of defendants; it purporting to be signed by a partnership.

2. SAME—APPEAL FROM JUSTICE—PLEADING—AMENDMENT.

   On appeal from justice's court, an amendment denying the execution of the instrument sued on is properly denied, where

the question was not raised below, except by an unsworn notice filed with the plea, and defendants allowed judgment there to go practically by default.

Error to Monroe; Lockwood, J. Submitted June 27, 1904. (Docket No. 203.) Decided July 27, 1904.

Assumpsit by Jacob Naftzker against Henry Lantz, Gordon Lantz, and Myron Lantz, copartners as Lantz & Co., on a promissory note. There was judgment for plaintiff on a verdict directed by the court, and defendants bring error. Affirmed.

Willis Baldwin, for appellant.

W. L. McAran, for appellee.

HOOKER, J. The plaintiff sued the three defendants, father and sons, as copartners, in justice's court, upon a promissory note signed "Lantz & Co." They appeared by counsel, and plaintiff declared upon the note, filing the same with the justice at the time of pleading, in conformity to the practice permitted by 1 Comp. Laws, § 826, which provides:

"When any written instrument purporting to be executed by one of the parties is declared upon or set off, it may be used in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by oath, at the time of declaring, or pleading, or giving notice of set off, if such instrument shall be produced and filed with the justice."

The defendants pleaded the general issue, accompanied by an unsworn notice that they would "give evidence tending to show that said defendants never were partners, and that there is no joint liability among them, upon the claim described in plaintiff's declaration, and that defendants Myron and Gordon Lantz did not undertake to pay, assume, or become responsible for any part of the claim described."

The justice rendered a judgment for $86.76, including

costs. It is stated, and not denied, that, though the defendants were present, they offered no evidence in support of the plea (and the record implies this), but afterwards appealed. On March 10, 1904, the cause was noticed for trial, and a week later defendants filed a motion for leave to amend their plea and notice, accompanying the same by an affidavit, made by Myron and Gordon Lantz, denying the execution of the note declared upon. This motion was denied upon the ground that it should have been filed at the time of joining issue. The motion was renewed at the time of the trial, two days after its first denial, and was again denied, the court stating:

"There has been a motion made in this case for an order allowing defendant to amend his plea by filing an affidavit denying the execution of this note by the two defendants Gordon and Myron Lantz. That motion has been denied, and is again renewed. I again deny the motion. I am of the opinion that under the justice of the peace acts the affidavit should have been filed at the time of filing the plea. I am also of the opinion that, if the court has power after the appeal to allow this amendment, notwithstanding the statute governing the justice's court, that I should not allow it for the reason that it will materially change the issue in the justice's court; in other words, would form a new issue in this court. For these two reasons I think the motion should be denied."

Upon the trial defendants' counsel offered to show that the so-called firm of Henry Lantz & Co. consisted solely of Henry Lantz; that previous to the time the note was given he had been in copartnership with two other men, but this was dissolved at the death of one of them, and Henry Lantz continued to use the firm name, though sole proprietor of the mill at the time the note was given; that the two other defendants worked in the mill for wages, and had no interest in the business; and that the note was the sole obligation of Henry Lantz. Testimony in support of this offer was rejected, and a verdict for plaintiff was directed by the court, and a motion for new trial was subsequently denied. Defendants have appealed.

The questions raised are: (1) Did the court err in refusing to allow the proposed amendment? (2) Was the testimony offered admissible under the pleadings? (3) Was it error to direct a verdict for the plaintiff?

A rule of the circuit court reads as follows:

"Upon the plea of the general issue in an action upon any written instrument, under seal or without seal, the plaintiff shall not be put to the proof of the execution of the instrument or the handwriting of the defendant unless the defendant, or some one in his behalf, shall file and serve a copy of an affidavit denying the same." Cir. Ct. Rule No. 8.

This rule has been applied in many cases holding its meaning to be that a failure to file the affidavit provided for therein is an admission of the execution by the defendant who omits to file the affidavit. *Hoard* v. *Little*, 7 Mich. 468; *Thatcher* v. *West River Nat. Bank*, 19 Mich. 196; *Polhemus* v. *Ann Arbor Savings Bank*, 27 Mich. 44; *Peoria, etc., Ins. Co.* v. *Perkins*, 16 Mich. 380; *Lobdell* v. *Manufacturers' Bank*, 33 Mich. 408; *Jacobson* v. *Miller*, 41 Mich. 90 (1 N. W. 1013); *Inglish* v. *Ayer*, 92 Mich. 371 (52 N. W. 639); *People* v. *Johr*, 22 Mich. 461; *Union Central Life-Ins. Co.* v. *Howell*, 101 Mich. 334 (59 N. W. 599). The statute hereinbefore cited is given a similar construction in *Pegg* v. *Bidleman*, 5 Mich. 26. The claim that the delivery is not included in the admission is without force. The statute and rule would be of little value if it were so, and they have been otherwise construed.

The question of copartnership is unimportant. By failing to file affidavits seasonably, the defendants admitted that they executed and delivered the note, and that whoever signed it bound them by the signature. This necessarily admits the copartnership, in view of the signature to the note. Neither the justice nor the circuit judge would have been justified in denying plaintiff a judgment upon the issue as it stood.

The remaining question relates to the proposed amend-

ment. As the case stood before the justice, issue was not taken upon the execution and delivery of the note. They were admitted by the pleading, notwithstanding the notice accompanying the plea of the general issue. An affidavit was indispensable if defendants sought to dispute the validity of the note. Defendants made no defense, but allowed judgment to go by default practically, and then appealed, and sought to spring a new defense inconsistent with their pleading. We think it within the discretion of the circuit judge to deny the motion.

The judgment is affirmed.

The other Justices concurred.

WILLSIE v. COMMON COUNCIL OF IONIA.

1. MUNICIPAL CORPORATIONS — BOARD OF PUBLIC WORKS — OFFICERS—IONIA CHARTER.

   Under sections 83, 92, and 93 of the charter of Ionia (Act No. 246, Local Acts 1891), the board of public works has authority to appoint officers and agents without the approval of the common council.

2. JUDGMENT—RES INTER ALIOS ACTA.

   The decision of a question of law, arising upon the construction of a city charter, is not binding upon one who was not a party to the suit.

Certiorari to Ionia; Davis J. Submitted July 7, 1904. (Calendar No. 20,589.) Decided July 27, 1904.

Mandamus by Samuel Willsie to compel the common council of the city of Ionia to pay relator's salary as engineer. From an order denying the writ, relator brings certiorari. Reversed.

R. A. & W. E. Hawley, for relator.

H. J. Horrigan (*Miller & McKenna*, of counsel), for respondent.

HOOKER, J. The relator, Samuel Willsie, was employed by the board of public works of Ionia as assistant engineer, and later as engineer, of the city waterworks, and his compensation was fixed by said board. The common council did not approve his employment. It is claimed that it did not approve the amount of compensation provided for such service. The relator performed some service, for which the council refused to pay upon the ground that it had not approved his employment. Relator was afterwards denied a mandamus to compel payment. The cause is before us on certiorari.

Counsel seem to agree that the result must depend upon the construction to be given three sections of the Ionia charter and the effect of a former adjudication upon a similar case, to which this relator was not a party.

In 1883 provision was made for waterworks by an addition to respondent's charter. Section 83 provided that—

"The common council shall have the power to establish, construct, maintain, control, supervise, regulate, and keep in repair a system of waterworks, * * * and are hereby invested with full and complete power and authority to enact, make, and adopt any and all such ordinances, by-laws, rules, and regulations as they may deem necessary, requisite, and expedient to carry into complete effect the power and authority hereby conferred upon them relative to the waterworks of said city and for the conduct of its business." Act No. 309, Local Acts 1883.

Section 92 provided that the board of public works (the members of which were elected by the council) shall have the control and management of the waterworks of the city. Section 93 provided that the board of public works may appoint such officers and agents as they deem necessary for the proper management of the works, and prescribe and define their duties and fix their compensation.

These sections, as originally passed, authorized the board to employ engineers. In 1885 section 93 was amended by adding the following, viz.:

"Subject to the approval of the common council: *Provided*, that in case of accidental breakage of machinery or pipes, the said board of public works may proceed immediately to repair the same." Act No. 364, Local Acts 1885.

This amendment seems to have been designed to require the approval of the council to the appointment and amount of compensation fixed by the board. In 1887 section 92 was amended. The following was the conclusion of the section:

"They [the board] shall also have authority to, and may appoint such officers and agents under them, as may be necessary for the management of said works, and oversight of said sewers and public buildings, and define and fix the duties and compensation of such officers, subject, however, to the approval of the common council, as to the compensation they shall receive." Act No. 485, Local Acts 1887.

Here is a marked change in relation to the approval by the common council by dropping the requirement of approval of appointments but retaining that as to compensation. In 1891 section 83 was amended so as to read as follows:

"SEC. 83. The common council shall have the power to establish, construct, maintain, control, supervise, regulate, and keep in repair a system of waterworks for the purpose of supplying the city of Ionia with water for municipal, domestic, and other purposes, and are hereby invested with full and complete power and authority to enact, make, and adopt any and all such ordinances, by-laws, rules, and regulations as they may deem necessary, requisite, and expedient to carry into complete effect the power and authority hereby conferred upon them relative to the waterworks of said city, and for the conduct of its business: *Provided*, however, that the common council may delegate by resolution or ordinance any of the powers herein conferred to be performed as provided by section ninety-two of this act,

by the said board of public works." Act No. 246, Local Acts 1891.

At the same time section 92 was amended, and was as follows:

"SEC. 92. The board of public works shall have the management and control of the waterworks of the city; they shall have authority to and may lay down, repair, and maintain and do all things necessary to the laying down, repairing, and maintaining of waterworks, water mains, and pipes beneath, and through and along the streets, lanes, and alleys, and into the public places of said city, and for the purpose of supplying water for public and private use; they shall also have the superintendence and management in the erection, repairing, and maintaining of all the public buildings of said city, and in the construction, maintaining, and repairing of all sewers that may be required in said city: *Provided*, however, that all of the powers herein vested in said board of public works, and all acts done by said board by virtue thereof, shall be subject to the approval of the common council, after delegation of such powers as provided in section eighty-three of this act. In cases of necessary repairs of said waterworks, mains, pipes, buildings, and sewers, they shall cause the same to be made as soon as may be when required at the expense of said city, rendering to the common council the actual cost of the same, which shall be paid out of the funds of the city upon order of the common council. They shall also have authority to, and may appoint such officers and agents under them as may be necessary for the management of said works and oversight of said sewers and public buildings, and define and fix the duties and compensation of such officers subject, however, to the approval of the common council as to the compensation they shall receive." Act No. 246, Local Acts 1891.

Section 93 remains as amended in 1885, viz.:

"SEC. 93. Plans and estimates for constructing waterworks, and for repairing the same, shall be submitted to the common council for their approval, and when so approved the material may be purchased and the work may be let to the lowest responsible bidder, who shall give adequate security and do the work under such rules and regulations

as may be prescribed by the board of public works; or the said board of public works may procure the work to be done in such manner as they deem for the best interests of the city. The board of public works may appoint such officers and agents as they may deem necessary for the proper management of the works, and prescribe and define their duties, and fix their compensation subject to the approval of the common council: *Provided*, that in case of accidental breakage of machinery or pipes, the said board of public works may proceed immediately to repair the same." Act No. 364, Local Acts 1885.

It is contended that section 83 provides that the board can have only such powers as are delegated by the common council, and that these powers have not been so delegated; and again section 93, which still stands, requires the approval of the common council to appointments and compensation. We think these positions untenable. We must construe these somewhat inconsistent provisions together, by aid of their chronology. If we do so, we find that sections 92 and 93 have for many years limited section 83 by declaring that the board should have certain powers. In these respects they superseded the provision of section 83 as to full control, etc. When first adopted, these sections required approval by the common council. Subsequently this was changed, and approval as to compensation only retained. To our minds, it seems plain that the authority to appoint was then relieved of the necessity for approval, and has since remained so. The appointments by the board were lawful, and beyond the control of the council.

It is contended that the provision contained in section 92, as finally amended, to the effect that "all of the powers [power] herein vested in said board of public works, and all acts done by said board by virtue thereof, shall be subject to the approval of the common council," after delegation of such powers as provided in section 83, includes the appointment of engineers. We think, however, that it does not, because the language which follows evidences a design to except that.

The decision of the circuit court upon the question of law in this case between different parties is not conclusive in the present case. The return shows that the council had fixed the salaries of the chief and assistant engineers at $65 and $45 per month, respectively, and had paid relator to April 15, 1904, at these rates.

The writ should issue as prayed.

The other Justices concurred.

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In re LAMBRECHT.

1. CONSTITUTIONAL LAW—EX POST FACTO LAWS—INDETERMINATE SENTENCES.

An in eterminate sentence law which increases the minimum punishment for crime beyond what might have been inflicted under the statute which it supersedes, is ex post facto in so far as it applies to crimes committed before its enactment.

2. STATUTES—CONSTRUCTION—RETROACTIVE STATUTES—PRESUMPTION.

Statutes are given only a prospective application unless the legislative intent that they shall be retroactive is clearly manifest.

3. CRIMINAL LAW—INDETERMINATE SENTENCE LAW—PROSPECTIVE APPLICATION.

The indeterminate sentence law of 1903 (Act No. 136), providing for the sentence of persons "hereafter convicted of crime," is prospective in its operation, and applies only to crimes committed after it took effect.

4. SAME—COMMON-LAW CRIMES.

Unless some statute provides a penalty, acts criminal at the common law are not crimes in this State.

5. STATUTES—CONSTRUCTION—ABSURD RESULT.

A statute will be given an interpretation leading to absurd and mischievous consequences only when no other is possible.

6. SAME—REPEAL—PRIOR ACTS IN CONFLICT.
A statute repeals a prior statute in so far as it is in conflict therewith.

7. CRIMINAL LAW — INDETERMINATE SENTENCE LAW — REPEAL OF STATUTE.
The indeterminate sentence law of 1903 (Act No. 136), did not repeal 3 Comp. Laws, § 11784, providing punishment for attempts to commit crime.

8. SAME—SENTENCE—HABEAS CORPUS.
Where, on petitioner's conviction of an attempt to utter a forged instrument, committed prior to the taking effect of the indeterminate sentence law of 1903 (Act No. 136), the court erroneously sentenced petitioner under such act to imprisonment for an indeterminate term of not less than 2½ years, nor more than 3 years, and the sentence would evidently have been no less if it had been imposed under 3 Comp. Laws, § 11784, providing that for such attempts the court may sentence to imprisonment for a term not exceeding 3 years, the sentence was valid as to the minimum term, and could not, therefore, be set aside on habeas corpus.

Habeas corpus proceedings by William J. Lambrecht to obtain his release from the State prison at Jackson. Submitted July 7, 1904. (Calendar No. 20,584.) Prisoner remanded July 27, 1904.

Petitioner was convicted October 26, 1903, of an attempt to utter a forged instrument on July 10, 1903, and sentenced to the State prison for not less than 2½ and not more than 3 years, under Act No. 136 of the Public Acts of 1903, known as the "Indeterminate Sentence Law." The act took effect September 16, 1903. The punishment for uttering a forged instrument is imprisonment in the State prison not more than 14 years, or in the county jail not more than 1 year. 3 Comp. Laws, § 11660. No express provision is made by statute for the punishment of attempts to utter forged instruments. The statute in regard to attempts reads thus:

"If the offense so attempted to be committed is punishable by imprisonment in the State prison for life, or for five years or more, the person convicted of such attempt, shall

be punished by imprisonment in the State prison not more than three years, or in the county jail not more than one year." 3 Comp. Laws, § 11784, subd. 2.

When the crime in this case was committed, the punishment was that provided by section 11784.

The petitioner is now before us on the writ of habeas corpus, and the validity of his sentence is attacked upon the following grounds:

1. The sentence is void because made by virtue of a statute not in force at the time the crime was committed.
2. The act is unconstitutional and void in so far as it provides for the sentence of persons convicted of crimes committed before it took effect.
3. That it repealed those portions of previous statutes providing a different punishment than provided by its provisions, and petitioner could not be sentenced under the provisions of the act in force at the time the crime was committed.
4. That if the effect of the act was not to so repeal said statute, it operated as an amendment or exclusive provision for the sentence and punishment of all persons convicted of crime after it took effect, and therefore there was no law in force at the time the petitioner was convicted and sentenced authorizing any punishment whatever, except confinement in the county jail.
5. The said sentence being void, and having been in part carried into effect, this court has no jurisdiction to remand petitioner for sentence, if a lawful one might have been inflicted under the original statute applicable to his offense.

The provisions of Act No. 136, Pub. Acts 1903, material here are:

"SECTION 1. Every sentence to the State prison at Jackson, to the Michigan reformatory at Ionia, to the State house of correction and branch of the State prison in the Upper Peninsula, and to the Detroit house of correction, of any person hereafter convicted of a crime, except of a person sentenced for life, or a child under fifteen years of age, shall be an indeterminate sentence as hereinafter provided. The term of imprisonment of any person so convicted and sentenced shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted

and sentenced, and no prisoner shall be discharged until after he shall have served at least the minimum term as provided by law for the crime for which he was convicted: *Provided*, that in all cases where the maximum sentence, in the discretion of the court, may be for life or any number of years, the court imposing the sentence shall fix the maximum sentence: *Provided* further, that in all cases where no minimum sentence is fixed by law, the court imposing sentence shall fix such minimum, which minimum shall not be less than six months.

"SEC. 2. If, through oversight or otherwise, any person shall be sentenced to imprisonment in the said State prisons for a definite period of time other than for life, said sentence shall not for that reason be void, but the prisoner so sentenced shall be entitled to the benefit and subject to the liabilities of this act, in the same manner and to the same extent, as if the sentence had been in the terms required in section one of this act: *Provided*, that in these cases where no minimum sentence is fixed by the court, the minimum limit of any such sentence in any case shall not be for a less period than one year, except in those instances where the minimum limit is now fixed or which may hereafter be fixed or provided for by law."

Wilson & Cobb, for petitioner.

Charles A. Blair, Attorney General, for respondent warden of State prison.

GRANT, J. (*after stating the facts*). 1. The attorney general conceded that the indeterminate sentence act, if retroactive, is unconstitutional and void in so far as it authorizes crimes committed before it took effect to be punished under it. This is obvious, for the punishment is increased, as the minimum punishment under the act is greater than that provided by section 11784, subd. 2, 3 Comp. Laws.

Is the act retroactive? The legislative intent must govern when it can be ascertained. "It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Cooley,

Const. Lim. (6th Ed.) 455; End. Int. of Stat. § 271; *Angell* v. *City of West Bay City*, 117 Mich. 685 (76 N. W. 128). The legislature is presumed to know that penal statutes cannot be made retroactive. It should therefore be held that they intended such a statute to act prospectively, if the language would reasonably permit such a construction.

"A thing which is within the spirit of a statute is within the statute, although not within the letter; and the thing within the letter is not within the statute, unless within the intention." *Common Council of Detroit* v. *Rush*, 82 Mich. 542 (46 N. W. 951, 10 L. R. A. 171).

We are therefore of the opinion that the legislature, in providing for the sentence of persons "hereafter convicted of crime," intended only crimes committed after the act took effect.

2. Is the previous law (3 Comp. Laws, § 11784)—the statute in force when the crime was committed—repealed by the indeterminate sentence act of 1903? We can look only to the statute for any crime punishable in this State. We look to the common law for definitions and principles in our criminal jurisprudence, but, unless the statute provides a penalty, acts criminal at the common law are not crimes in this State. *In re Lamphere*, 61 Mich. 105 (27 N. W. 882). If the penalty for attempts be taken away, the entire statute falls with it. Under petitioner's contention, therefore, the law of attempts is repealed by the act of 1903, and no such law is now in force. Other criminal statutes would also be repealed. The legislature will not be presumed to have intended such a wholesale repeal of criminal statutes, and jail delivery of all those guilty of crimes under such statutes, but not then convicted and sentenced. "An interpretation of a statute which must lead to consequences which are mischievous and absurd is inadmissible, if the statute is susceptible of another interpretation by which such consequences can be avoided." Suth. Stat. Con. § 238; *Alvord* v. *Lent*, 23 Mich. 369.

"Not unfrequently a clause is inserted in a statute repealing all laws in conflict or inconsistent with it, 'contravening' it, or the like. If the provisions of the former and present enactments are in direct contrariety, the repeal takes place, but only to the extent of the repugnance. If, on the other hand, by any reasonable contracting, expanding, cutting short, or extending of the old laws or the new, as explained in the foregoing chapter, they can be brought into harmony without repeal, the interpretation should be so, and all suffered to stand together." Bishop on Stat. Crimes, par. 2, § 152.

See, also, *Smith* v. *People*, 47 N. Y. 330. Where a subsequent act is absolutely repugnant to and inconsistent with any other provisions of a prior act, the former act is repealed to the extent of such repugnance only, and the repugnancy must be clear and unavoidable. *Connors* v. *Iron Co.*, 54 Mich. 168 (19 N. W. 938); *Tillotson* v. *City of Saginaw*, 94 Mich. 240 (54 N. W. 162); *Crane* v. *Saginaw Circuit Judge*, 111 Mich. 496 (69 N. W. 721).

A statute in conflict with a prior statute in so far as the one is in conflict with the other, is no more effective as a repeal than if such repealing clause were omitted. In either case the former statute is repealed in so far as the later one is in conflict with it. In *Murphy* v. *Commonwealth*, 172 Mass. 264 (52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266), the indeterminate sentence act is nearly identical in its terms with that of Michigan. It was held that it did not repeal a prior act which entitled a prisoner to a deduction for good behavior. The court in that case said:

"To hold that that statute operates by necessary implication as a repeal of it to that extent, as it would seem that we should be obliged to do if the statute of 1895 (Stat. 1895, chap. 504) is construed to apply to all sentences to State prison after it took effect, whether the offenses occurred before or after it went into operation (*Flaherty* v. *Thomas*, 12 Allen, 428, and *Commonwealth* v. *McDonough*, 13 Allen, 581), would result in the discharge of all persons who might have been sentenced under it to the State prison for offenses committed before it took effect.

On the other hand, by construing it, as we think properly may be done pursuant to the general rule that statutes are to be construed prospectively, to apply to sentences for offenses committed after it took effect, this difficulty will be avoided."

After the first act providing for indeterminate sentences was declared unconstitutional (*People* v. *Cummings*, 88 Mich. 249 [50 N. W. 310, 14 L. R. A. 285]), the people adopted a constitutional amendment authorizing such sentences. The present act was passed in accord with that amendment. It was not intended to repeal any of the statutes providing for criminal offenses. It recognized such crimes as still existing under the various laws of the State, and provided only a new mode or character of punishment, which the people and the legislature believed would tend to the reformation of criminals. It was evidently intended, and should be regarded, rather as an amendment to the criminal statutes. We must therefore hold that it did not operate as a repeal of the statute under which the petitioner was convicted.

3. It follows that the petitioner could not have been sentenced under the indeterminate sentence act. The court imposing the sentence considered that the petitioner should be sentenced for at least 2½ years. The sentence would evidently have been no less if the court had imposed the sentence under section 11784. In *Murphy* v. *Commonwealth*, supra, which was before the court on writ of error, the prisoner was remanded for sentence under the prior law. It is contended that this court cannot so order under the writ of habeas corpus, where the sentence has been partly executed. We need not determine this point. In *People* v. *Cummings*, which was also brought to this court on a writ of error, the sentence was affirmed as to the minimum term. If the sentence was a valid one as to such term upon a writ of error, it would not be good logic to say that it was void when coming before the court on a writ of habeas corpus. If valid in the one case, it is

equally valid in the other. In this respect we must follow our own decisions.

The sentence for the minimum time is therefore affirmed, and the prisoner remanded to complete that term of imprisonment, in accordance with the law and rules in existence at the time of the commission of the crime.

The other Justices concurred.

In re LEONARD.

CRIMINAL LAW—BREAKING AND ENTERING—INDETERMINATE SENTENCE.

Under the indeterminate sentence law of 1903 (Act No. 136), the court has power to fix the minimum term of imprisonment for statutory burglary, as defined by section 11547, 3 Comp. Laws, no minimum being provided by the statute.

Habeas corpus proceedings by John M. Leonard to obtain his release from the State prison at Jackson. Submitted July 7, 1904. (Calendar No. 20,592.) Prisoner remanded July 27, 1904.

John M. Leonard, in pro. per.

Charles A. Blair, Attorney General, for respondent warden of State prison.

MOORE, C. J. Petitioner was convicted of the crime of burglary, committed on the 18th day of October, 1903, and on the 18th day of February, 1904, was sentenced to the State prison at Jackson for a maximum term of 15 years, and a minimum of 10 years, pursuant to the provisions of Act No. 136 of the Public Acts of 1903, known as the "Indeterminate Sentence Law," which became operative about September 16, 1903. He now petitions for his re-

lease from imprisonment upon the ground that the sentence imposed is in violation of the provisions of said act; the claim being made that the minimum term provided by law for the crime of burglary is 1 year, and the court therefore had no authority to fix the same at 10 years.

The information, a copy of which is attached to the petition filed herein, shows that petitioner was charged with the crime of breaking and entering, in the night-time, a store not adjoining to or occupied with a dwelling house, with intent to commit the crime of larceny therein. The statute fixing the punishment for this offense (section 11547, 3 Comp. Laws) provides that one guilty thereof shall be punished by imprisonment in the State prison not more than 15 years. No minimum sentence is provided in the statute.

Section 1 of the indeterminate sentence law contains a provision that in all cases where no minimum sentence is fixed by law, the court imposing sentence shall fix such minimum, which shall not be less than six months. Under this provision of the statute, the court was undoubtedly authorized to fix the minimum sentence — none being fixed in the statute prescribing the penalty for the offense of which petitioner was convicted — and the sentence is clearly valid.

It necessarily follows that petitioner's application for release from imprisonment should be denied.

The other Justices concurred.

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143 671

DEAN v. ANN ARBOR RAILROAD CO.

1. HIGHWAYS AND STREETS — RAISING GRADE OF CROSSING RAILROAD—INJUNCTION—PECULIAR DAMAGES.

   One whose frontage on a street would be lessened by the raising of the grade of a railroad crossing the street in the block in which his lots are located, and whose passage out of the block in the direction of the railroad would thereby be cut off, increasing the cost of trucking to and from his warehouses on the lots, and depreciating the value of his property, suffers a special damage different from that of the public, authorizing him to maintain a suit for injunction.

2. SAME—ABUTTING OWNERS—COMPENSATION.

   Power in the charter of Ann Arbor to designate grades of railroads coming into the city, and to establish a grade for streets and sidewalks, does not authorize the city to in effect vacate part of a street by allowing a railroad to cross it on an embankment above the grade of the street, thereby cutting off an abutting owner's access to his property, without providing him compensation.

Appeal from Washtenaw, Lockwood, J., presiding. Submitted February 23, 1904. (Docket No. 91.) Decided September 13, 1904.

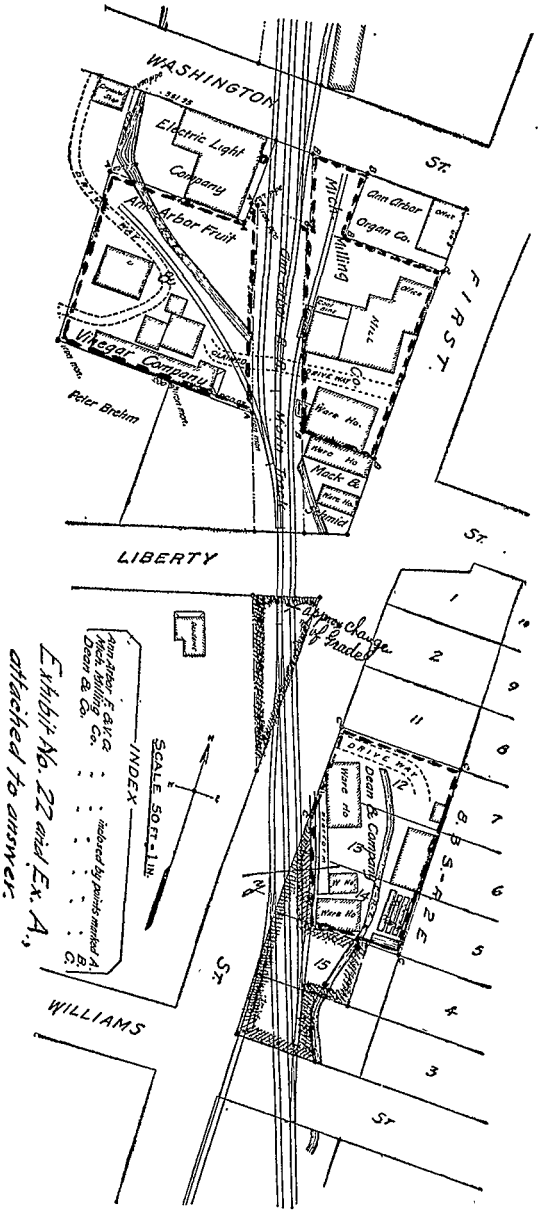
Bill by Sedgwick Dean and Henry S. Dean against the Ann Arbor Railroad Company, the city of Ann Arbor, and others to restrain the obstruction of a certain street. From a decree for complainants, defendants appeal. Affirmed.

Jasper C. Gates, for complainants.

A. J. Sawyer & Son (*A. L. Smith*, of counsel), for defendant railroad company.

Thomas D. Kearney, for defendant city.

The following is the plat referred to in the opinion:


WASHINGTON
ST.
Electric Light
Company
Ann Arbor Fruit
Vinegar Company
Peter Brehm
Mich. Milling
Ann Arbor
Organ Co.
Office
Mill
Coal
Ware ho.
Mach. &
Ware ho.
Annex
FIRST
ST.
LIBERTY
Approx. Change of Grade
1
2
9
11
8
7
6
5
4
3
12
15
Dean & Company
Ware ho.
W. ho.
Ware ho.
B. B. S. A. & E.
ST.
WILLIAMS
ST
INDEX
SCALE 50 FT. 1 IN.
Ann Arbor F. & V. Co.
Mich. Milling Co.
Dean & Co.
indicated by points marked A. B. C.
Exhibit No. 22 and Ex. A, attached to answer.

MOORE, C. J. A reference to the plat and a reading of the opinion filed by the circuit judge will give an understanding of the questions involved in this case. The opinion reads:

"The bill in this case is filed to enjoin the Ann Arbor Railroad Company and the city of Ann Arbor and its officers from building an embankment in and across First street, in the city of Ann Arbor, and from closing or diverting First street, and for a decree compelling the defendants to keep First street from Williams street to Liberty street in good repair and in a condition reasonably safe for public travel. A long time prior to 1882, William S. Maynard's Addition to the village (now city) of Ann Arbor had been made, and the streets therein, including First street, had been opened and used as public streets.

"In 1872 the common council of the city of Ann Arbor granted permission, by ordinance, to the Toledo, Ann Arbor & Northern Railroad Company, the predecessors of the present corporation, to construct its tracks through the city of Ann Arbor and across many of its streets, fixing the grade of the railroad at the then existing grade of each street crossed. At this time Roger Mathews and Mary Mathews were owners of lots 12, 13, and 14 of block 3 south of Huron street, range 2 east, according to the plat of Wm. S. Maynard's Addition. These lots are situated on the east side of First street, in the middle of the block between Williams street on the south and Liberty street on the north, and had a frontage of 150 feet on First street, with no frontage on any other street. After the passage of said ordinance, the owners of these three lots conveyed to the railroad company a right of way across said lots, described as being 25 feet wide on each side of the center line of the railroad as located.

"The railroad was constructed between 1872 and 1876, its general course through the city of Ann Arbor being north and south, but at the point where it crossed First street its course was north, 22 degrees west; the crossing at First street being at an angle of 22 degrees. The right of way took the westerly part of lot 14 and the southwest corner of lot 13, the easterly line of the said right of way intersecting the easterly line of First street near the center of lot 13. The grade of the railroad as then constructed was at the grade of the street, which was but little, if any, above the level of the surrounding lots. In

1882 the complainants purchased from the said Roger and Mary Mathews said three lots 'except' the land in the southwest corner conveyed to the railroad company. This land purchased by the complainants exclusive of the railroad right of way had a frontage of about 75 feet on First street. The complainants, who are dealers in groceries, crockery, and oils, doing a wholesale and retail business in the city of Ann Arbor, built warehouses and oil tanks upon these lots, which are used in storing goods handled in their business. The defendant railroad company furnished a siding so that cars could be unloaded at the warehouse on these premises. The freight house of the railroad company stands upon the east side of First street, south of Williams street, and the complainants in shipping out goods from the warehouse truck them south on First street, across the railroad tracks and across Williams street to this freight house. Their business has gradually increased since 1882, and they are now handling very large quantities of merchandise each year in these warehouses and oil tanks. The buildings and improvements placed upon these lots by complainants for the purpose of accommodating their business cost about $8,000. The grade of the railroad has remained substantially as first constructed at the crossing of First street.

"On October 1, 1902, the common council of the city of Ann Arbor passed an ordinance entitled:

"'An ordinance relative to changing the course and grade of certain streets, and elevating the tracks of the Ann Arbor Railroad Company.'

"This ordinance was duly approved, published, and accepted by the railroad company as therein provided. A copy of this ordinance is attached to the bill of complaint, and it provides, in brief, for raising the grade of five east and west streets in the southerly portions of the city, at the points where they are intersected by the tracks of the railroad company, from 1½ to about 7 feet, for lowering the grades of other streets at the intersection of the said railroad tracks from 2 to 3 feet. It provides for steel viaducts above Felch street, Miller avenue, Huron, Washington, and Liberty streets, and at the foot of Ann street. These last-mentioned streets are east and west streets, and are north of the premises of complainants. This ordinance contemplates the raising of the grade of the Ann Arbor Railroad from Williams street north from 9 to 15 feet above

its present grade. The provision in said ordinance in relation to First street is as follows:

"'That First street be diverted so as to intersect Liberty street west of the present right of way of the said company.'

"The next day after the passage of this ordinance the complainants notified the defendant railroad company that they would resist by legal proceedings, if necessary, any attempt to do the work contemplated, and that they claimed that said ordinance was not valid.

"The defendant railroad company proceeded to do work in preparation for raising its grade, and had done a small amount of work on its grade in the way of surveys, testing the foundations, and the like, prior to the filing of this bill. This bill was filed March 7, 1903. Upon its filing a preliminary injunction was issued, restraining the defendant from building any embankment either in First street, in said city of Ann Arbor, between Williams and Liberty streets, or in front of the premises of the said complainants, and from in any wise closing or diverting First street, or placing any obstructions therein, and from interfering with or obstructing the said complainants, or either of them, in their free use of said First street, in either direction, north or south, from their said premises. This injunction was later dissolved on motion of the defendants.

"The defendant railroad company has continued to do work in raising its grade, and has raised a portion of its grade north of Liberty street, and put in foundations for the abutments in the streets over which viaducts are to be constructed. It has purchased and has upon the ground a large amount of steel and material for the construction of the viaducts, and is going forward in the work in raising its grade. It has now expended large amounts in doing the work and buying the material. At the time this case was heard no change had been made at the intersection of First street or south thereof. The evidence in this case shows that it is the plan and purpose of the railroad company to put in all the viaducts provided in the ordinance except perhaps the one at the foot of Ann street, which street does not cross the railroad track, and to provide for the separation of the grades of their track and the streets on Felch street, Miller avenue, Huron, Washington, and Liberty streets. In each case the street is to pass under the railroad track. That the east and west streets south of Liberty street will cross the railroad track

at grade, the grade of the streets being raised in most cases to bring it to the proposed grade of the railroad. That at the intersection of First street it is proposed to build a grade for the railroad from 12 to 13 feet higher than it is at present, and higher than the level of the street. That the railroad company proposes that, if it finds it necessary, in order to retain this embankment upon its 50-foot right of way, to build foot walls of masonry to hold the base of the embankment. The embankment will occupy the whole of the 50-foot right of way of the railroad company, and will occupy all of that part of First street falling within this 50 feet. The crossing of First street is a long one. If this embankment is made, it will occupy most of the street in front of complainants' premises. The north line of their premises projected west will intersect the east line of the embankment at about the middle of the street. The only portion of the street in front of any of these premises unoccupied by the embankment will be a right-angled triangle, with a base of about 75 feet along the east line of the street, and a perpendicular of about 32 feet along the north line of the premises projected west. In other words, all the street left open in front of these premises would be about 32 feet wide at the north line, and would narrow to nothing at a point about 75 feet south of the north line. All the balance of this street in front of complainants' premises would be entirely obstructed, and practically vacated and abandoned as a public way. It also appears from the evidence that no provision is to be made for the crossing of the railroad track on First street; that the portion of First street within the 50-foot right of way will be entirely obstructed; that it will be impossible to cross the tracks of the defendant railroad company on First street when the contemplated grade is completed. It also appears from the evidence in this case that the intention to open First street along the westerly side of the right of way of the defendant railroad company to Liberty street has been abandoned. It appears that after the passage of the grade ordinance proceedings were instituted for the purpose of opening this street, but that the common council of the city of Ann Arbor determined not to open it. There is no evidence in this case tending to show a purpose on the part of the city to vacate or abandon that portion of First street north of the railroad right of way and between it and Liberty street. The driveway which provides in-

gress and egress from complainants' property on First street with trucks and wagons is near the north line of lot 12. If the embankment proposed is constructed across First street, the complainants can still get to this driveway into their property on First street from the north, but cannot get to their property on First street from the south. The portion of First street north of the railroad right of way will be a cul-de-sac. It appears from the evidence in this case that the value of the complainants' premises for the purpose for which they are used would be depreciated if the said embankment is constructed, and if the complainants continue to use their premises for the purpose for which they have been used since they have owned them, and they will be compelled to travel considerably farther in getting to the freight house of the railroad company, and that the added expense of trucking their goods from their warehouse to the freighthouse by reason of the increased distance would amount to several hundred dollars each year."

It is the claim of appellants that the city is the owner of the fee in the street. This is denied by complainants. Appellants say it is not important. Their position is that complainant had:

"The right to use First street in common with the public—that is, the right to use First street between Liberty and Williams streets with their teams and vehicles—but manifestly this right they enjoyed in common with all the rest of the public who might have occasion to pass that way. So far as this right was interfered with, they have no standing in court to pray for an injunction. It is well settled that in cases of this kind an injunction will not be granted except to one who has suffered a special damage or inconvenience, different in kind from that suffered by the rest of the public. Differences in degree are of no importance here. *Henry* v. *Railroad Co.*, 116 Mich. 314 (75 N. W. 886); *Buhl* v. *Union Depot Co.*, 98 Mich. 596 (57 N. W. 829, 23 L. R. A. 392); *People, ex rel. Bristol*, v. *Supervisors of Ingham Co.*, 20 Mich. 95.

"The complainants, as the owners of abutting property, are not entitled to any compensation for damages for any injury to the use of the street that is common to the general public. * * *

"It cannot be honestly denied that all the means of access that were ever owned by the complainants are preserved to them in this instance intact. That right would

be in no way infringed upon by the building of the embankment contemplated under this ordinance. The same mode of ingress and egress would remain to and from First street, and therefore, under the authorities cited, the complainants are not entitled to any redress, and certainly not entitled to an injunction."

Counsel for complainants do not admit this contention, and the learned circuit judge reached a different conclusion. He is justified by the record in saying that for many years the complainants had a frontage on First street of 75 feet, and, when they reached the street at any point in front of their premises, could travel either north or south thereon. The result of the proposed action of defendants will be to make of this street a cul-de-sac, very materially shortening the frontage of complainants, and making it impossible for them, when they reach the street, to travel south thereon. The conclusion cannot be avoided that, if this proposed improvement is carried out, the value of complainants' property will be greatly depreciated, and the expense of conducting their business will be greatly increased. These are effects limited to the property of complainants and its business, and not common to the public.

It is said by counsel:

"Subdivision 10 of section 88 of the charter of Ann Arbor (Act No. 331, Local Acts 1889) reads as follows:

"'*Tenth.* To determine and designate the routes and grades of any railroad coming into or passing through said city, and to restrain and regulate the use of locomotives, engines, and cars upon any railroad within the city.'

"Subdivision 31 reads as follows:

"'*Thirty-first.* To establish a grade for streets and sidewalks and cause the sidewalks to be constructed in accordance with the same.'

"Is there any doubt but that these subdivisions of this section authorize the city of Ann Arbor not only to designate the route of the Ann Arbor Railroad, but to fix and establish the grade, and to fix the grade of the streets over which it crosses? And by these provisions it may raise the grade of the railroad above or beneath the grade

of the streets over which it passes. The ordinance in question simply establishes the grade of the Ann Arbor Railroad through the city of Ann Arbor, and changes the grade of certain streets, and authorizes the railroad to build viaducts over certain streets; and clearly the charter authorizes such an ordinance"—citing *City of Pontiac* v. *Carter*, 32 Mich. 164; *City of Detroit* v. *Beckman*, 34 Mich. 125 (22 Am. Rep. 507); *Larned* v. *Briscoe*, 62 Mich. 393 (29 N. W. 22).

The facts do not disclose that the city was simply attempting to change a grade for highway and sidewalk purposes. The effect of what it attempts to do is to vacate a considerable portion of a street, and deprive not only the complainants, but the public, of the use of it, and give it over to the use of a railroad company. The principles involved are fully discussed in *Schneider* v. *City of Detroit*, 72 Mich. 240 (40 N. W. 329, 2 L. R. A. 54), *Harper* v. *City of Detroit*, 110 Mich. 427 (68 N. W. 265), and *Phelps* v. *City of Detroit*, 120 Mich. 447 (79 N. W. 640), which cases are controlling.

Desirable as this improvement undoubtedly is, the complainants cannot be compelled to submit to the loss which they would be obliged to sustain if it was made without due compensation.

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

The other Justices concurred.

VAN CAMP *v.* MICHIGAN CENTRAL RAILROAD CO.

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1. STATUTES—CONSTRUCTION—PENAL STATUTES.
Penal statutes will not be enlarged by construction.

2. CARRIERS—PASSENGERS—TRANSPORTATION—CHANGE OF SCHEDULE.
Railroad companies may change their time-tables and may

take off and put on trains, only reasonable notice to the public of such changes being necessary. 2 Comp. Laws, § 6235.

3. SAME—CHANGE OF SCHEDULE—NOTICE.

If, after reasonable public notice of change of schedule has been given, a ticket agent misinforms a passenger, the statute (2 Comp. Laws, § 6235) providing a penalty in such cases does not apply, and the passenger can recover only his actual damages as at common law.

4. SAME—TRAIN SCHEDULES—FAILURE TO MAINTAIN—PENALTY.

Where a railroad company had advertised a train on a branch line to leave a connecting point shortly after the arrival of another train, and had sent printed posters to its agents showing the contemplated operation of such train, but before the time arrived when the train was advertised to be put on notice of its withdrawal was sent to some of the company's agents, and was published, but the agent at Y. had received no such notice, by reason whereof he sold a ticket to plaintiff for passage over such branch line, and advised her of the running of the advertised train, and on her arrival at the junction point she was compelled to remain there overnight, the company was liable for the penalty prescribed by 2 Comp. Laws, § 6235, for failure to transport in accordance with her contract.[1] HOOKER and CARPENTER, JJ., dissenting.

Error to Berrien; Coolidge, J. Submitted May 17, 1904. (Docket No. 141.) Decided September 13, 1904.

Debt by Alberta E. Van Camp against the Michigan Central Railroad Company for failure to transport, under 2 Comp. Laws, § 6235. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

This suit was brought to recover the penalty of $100 provided by section 6235, 2 Comp. Laws, for the failure of the defendant to transport the plaintiff, in accordance with her contract of carriage, without legal or just excuse. Her home was in Benton Harbor, Mich. She was attending school at Ypsilanti, Mich. She purchased a ticket

[1] As to liability to passenger for default or delay in running railroad train, see note to *Hansley* v. *Railroad Co.*, (N. C.) 32 L. R. A. 543.

June 24, 1903, good for a continuous passage from Ypsilanti to Grand Junction. Her route was over the main line of the Michigan Central to Kalamazoo, from which place defendant has a branch line to Grand Junction. Previously to and at the time of purchasing her ticket she inquired of the defendant's agent at Ypsilanti if she could take the train leaving Ypsilanti at 1:25 p. m., and make close connections at Kalamazoo with the train for Grand Junction. She was informed by the agent that she could, and he showed her a schedule stating that a train left Kalamazoo at 4:45 p. m., her train on the main line arriving at 4:25 p. m. She testified that she relied upon the schedule shown her, and the statement of the agent in purchasing a ticket. On arrival at Kalamazoo she was informed that there was no train running to Grand Junction at 4:45, and she was therefore obliged to remain in Kalamazoo overnight. Defendant introduced as a witness its agent at Kalamazoo, who testified that the defendant had issued a time card to take effect June 14, 1903, showing a train scheduled to leave Kalamazoo at 4:45 p. m. each day except Sunday; that that card was canceled by another one, eliminating that train from the schedule, and that a notice was received from the division superintendent's office at Jackson advising that this train would not be put on until further notice; and that a further notice was received June 29th announcing that this train would commence to run July 1st. A time card was introduced in evidence, in which this train was advertised, to take effect June 14th. The evidence did not show when this card or time-table was posted in the office whence it was taken.

The above is a statement of all the evidence produced upon the trial. The court directed a verdict for the plaintiff for the statutory penalty of $100.

Humphrey S. Gray and *G. M. Valentine*, for appellant.

John J. Sterling and *Cady & Andrews*, for appellee.

GRANT, J. (*after stating the facts*). The statute is a penal one, and will not be enlarged by construction. *Crosby* v. *Railroad Co.*, 131 Mich. 288 (91 N. W. 124).

In several cases we have discussed what constitutes a "legal and just excuse" within the meaning of the statute. *Freeman* v. *Railroad Co.*, 65 Mich. 577 (32 N. W. 833); *Reed* v. *Railway Co.*, 100 Mich. 507 (59 N. W. 144); *Hoyt* v. *Railway Co.*, 112 Mich. 638 (71 N. W. 172).

The learned counsel for the defendant contend that the undisputed facts do not bring the case within the statute. They admit that the defendant had determined to put on this extra train for summer service to leave Kalamazoo at 4:45 p. m. for South Haven, passing through Grand Junction; that time-tables showing such train were prepared, and public posters were printed and sent to the agents along the line for public distribution; that they were to take effect June 14th. But they insist that immediately thereafter, and before June 14th, notice was sent to the several agents that this extra summer train would not be put on until further notice, and that a new public poster or time-table for distribution, omitting this extra train, was issued and published. If the facts were as stated, the defendant's position would undoubtedly be correct. Railroad companies may change their time-tables, may take off and put on trains, and all that the statute requires is that they give reasonable notice to the public of such change. *Sears* v. *Railroad Co.*, 14 Allen, 433 (92 Am. Dec. 780). If, when such reasonable notice is given, the ticket agent misinforms a passenger, this statute does not apply, and the passenger so misinformed can recover only his actual damages. *Ohio, etc., R. Co.* v. *Hatton*, 60 Ind. 12; *Marshall* v. *Railway Co.*, 78 Mo. 610; *St. Louis, etc., R. Co.* v. *Atchison*, 47 Ark. 74 (14 S. W. 468). In such case he must count upon the common-law liability, and not upon that of the statute.

The mistake of counsel is one of fact, and not of law. The undisputed facts are that the plaintiff applied two or more times to the authorized agent of the defendant to

ascertain about this train. She was shown a time-table issued by defendant and in the hands of its duly authorized agent. She was under no obligation to look for a schedule posted in the defendant's depot or published in the newspapers. She went to the proper place for the most reliable information. She obtained it by being shown a printed schedule. She relied on it as well as on the representations of the agent. This made her case, and entitled her to a judgment under the statute, unless the defendant showed "a legal and just excuse" for not carrying her in accordance with her contract of carriage and printed schedule. The defendant wholly failed to show that the notice countermanding the advertised schedule was delivered to its agent at Ypsilanti. Its only witness was the agent at Kalamazoo, who had nothing to do with issuing or countermanding schedules. He did not know, and did not testify that he knew, that any such countermand or notice was sent to the agent at Ypsilanti. Neither the agent at Ypsilanti nor the defendant's agent who was authorized to issue the schedule was called upon to testify that any such notice or countermand was sent to or received by the agent at Ypsilanti. It cannot, therefore, be said that the act which caused the plaintiff to purchase her ticket and take the train was solely that of the ticket agent at Ypsilanti. On the contrary, it was the act of the defendant itself in issuing and publishing its schedules and failing to notify its agent of the change. So far as this record shows, the agent relied upon this schedule, and was authorized to rely upon it until notified otherwise.

The plaintiff made a case within the statute, and the judgment is affirmed.

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

HOOKER, J. (*dissenting*). The plaintiff purchased a ticket over defendant's railroad, from Ypsilanti to Grand Junction, upon the representation made by defendant's agent at Ypsilanti that a train upon defendant's branch

road, running from Kalamazoo to Grand Junction, would leave soon after the arrival at Kalamazoo of the train over its main line. In a schedule issued shortly before by the defendant such connection was advertised, but in fact this schedule was changed before the time for it to take effect, and trains were not run in accordance with it at any time. The agent at Ypsilanti was unaware of this withdrawal, or forgot it, though the agent at Kalamazoo testified that the schedule referred to was canceled by a later one, which omitted this train. The plaintiff was misled by the statement of the agent at Ypsilanti, and was obliged to stay for the night in Kalamazoo in consequence. She thereupon began this action to recover a penalty of $100, under 2 Comp. Laws, § 6235, and the circuit judge directed a verdict in her favor for that sum. The defendant brings error.

The statute in question (2 Comp. Laws, § 6235) is a part of the law providing for the incorporation of railroad companies, and to regulate the running and management and to fix the duties and liabilities of such companies. Section 6235 is as follows:

"(6235) SEC. 10. Every such corporation shall furnish sufficient accommodation for the transportation of all such passengers and property, as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting, and the junctions of other railroads, and at siding and at stopping places established for discharging and receiving way passengers and freight; and shall take, transport, and discharge such passengers and property at, from, and to such places, on the due payment of toll, freight, or fare, legally authorized therefor; and every such corporation shall transport merchandise, wood, lumber, and other property and persons from the various stations upon said road, without partiality or favor, when not otherwise directed by the owner of said property, and with all practicable dispatch, and in the order in which such freight and property shall have been received, under a penalty for each violation of this provision, of one hundred dollars, to be recovered by the party aggrieved, in an action of debt against such corporation: *Provided*, that perishable or explosive freight and property shall have the

preference over all other classes of merchandise. In case of the refusal by such corporation or agents to take and transport any such passenger or property, as aforesaid, or to deliver the same, or either of them, without a legal or just excuse for such default, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit, or the penalty prescribed in this section, at the election of the party aggrieved."

If defendant is liable to the penalty sued for, it is because it failed to transport the plaintiff from Ypsilanti to Grand Junction "with all practicable dispatch." The evidence shows that she was transported by the first train scheduled, and that to have transported her with greater dispatch it would have been necessary for defendant to send a special train from Kalamazoo to Grand Junction, with its attendant inconvenience and dangers. In my opinion, this statute was not intended to cover a case like this, but was designed to secure fair, impartial, and diligent transportation according to its actual running schedule. Had the plaintiff been misled without the fault of the defendant or its agent, and found herself delayed in Kalamazoo, it would hardly be contended that the company should have put on a special train to take her to her destination at once. It is true that she was misled by defendant's agent, and it is possible that under the law of principal and agent she may have an action for the damages resulting from a breach of contract, if it can be said that there was a contract to take her to her destination without delay at Kalamazoo. The damage for a few hours' delay might or might not amount to $100. There was no discrimination against her. There was no unusual delay in running the trains. She was transported as speedily as practicable according to the existing rules and schedule of trains. The penalty is applicable to these things, and is not to be imposed for disappointment and delay arising from a mistake of the agent, or even a breach of contract to transport a passenger contrary to the schedule of trains made under a misapprehension of its

schedule. Penal statutes are to be strictly construed, and not to be extended beyond the letter of the law.

The argument has been made that the agreement that she should be transported without delay may be taken as evidence that she was not transported as "soon as practicable." It seems to me that this is fallacious, as it "begs the question," and, in effect, makes the penal provision applicable to and a means of enforcing all special contracts relating to transportation, rather than to the general management of trains and business. It is not probable that the station agent had authority to make a contract for transportation, except in accordance with the existing schedules, it not being within the scope of his authority, and, if he had not, the railroad company was under no obligation to perform such a contract if expressly agreed upon by him; yet it is now proposed to punish the defendant by the imposition of a penalty for not doing so. This is a liberality in the construction of penal statutes which the law does not permit. *Weaver* v. *Railroad Co.*, 107 Mich. 300 (65 N. W. 225); *Ohio, etc., R. Co.* v. *Hatton*, 60 Ind. 12; *St. Louis, etc., R. Co.* v. *Atchison*, 47 Ark. 74 (14 S. W. 468); *Marshall* v. *Railway Co.*, 78 Mo. 610; *Lake Erie, etc., R. Co.* v. *People*, 42 Ill. App. 387. The case last cited is much like the present case. See, also, *Gulf, etc., R. Co.* v. *Dwyer*, 84 Tex. 194 (19 S. W. 470); *State* v. *Railroad*, 15 W. Va. 362 (36 Am. Rep. 803); *Com.* v. *Stevens*, 153 Mass. 421 (26 N. E. 992); *Com.* v. *Nichols*, 10 Metc. 259 (43 Am. Dec. 432); *Hall* v. *Railroad Co.*, 44 W. Va. 36 (28 S. E. 754, 41 L. R. A. 669, 67 Am. St. Rep. 75); *Com.* v. *Railroad Co.*, 1 Grant, Cas. 329; *Railway Co.* v. *Clark*, 58 Ark. 410 (25 S. W. 504). The foregoing cases, all cited in the brief of defendant's counsel, show that this statute should not be applied to a case like the present.

The judgment should be reversed, and no new trial ordered.

CARPENTER, J., concurred with HOOKER, J.

NEWAYGO PORTLAND CEMENT CO. *v.* TOWNSHIP OF SHERIDAN.

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1. TAXATION—WATER RIGHTS—ASSESSMENT.

Where the owners of lots fronting on a lake conveyed to plaintiff the portion of the lots that was covered by water, the deeds reciting that it was the intention of the grantors to convey all their rights to the water and the soil under water in the lake belonging and appurtenant to the described premises, and thereafter the lots were assessed to the grantors under a description excepting the riparian rights, plaintiff was properly assessed on the remainder as that part of the same lots lying in F. Lake, including all the riparian rights belonging and appurtenant thereto.

2. SAME—ASSESSMENT—ABBREVIATIONS.

Where, after the conveyance of that part of certain lots fronting on a lake that was under water, the remainder of the lots were assessed by number, with the addition "excp't rip'in r'g't," such abbreviations sufficiently excepted the riparian rights of the owners of the remainder of the lots.

3. SAME—STATUTES—CURING ERRORS.

Where certain lots fronted on a lake, and that part of the soil under water was conveyed to plaintiff, and the remainder of the lots assessed to the owners under a description consisting of the lot number and the abbreviations "excp't rip'in r'g't," an assessment of the part conveyed to plaintiff as unplatted lands in the village, consisting of that part of the following described premises lying in F. Lake, including all the riparian rights belonging to and appurtenant to said premises, followed by a recital of the numbers of the lots, etc., if defective, was cured by 1 Comp. Laws, § 3922, providing that no tax assessed shall be held invalid on account of any irregularity, informality, omission, or want of any matter of form or substance that does not prejudice the property rights of the person whose property is taxed, etc.

Error to Newaygo; Palmer, J. Submitted May 17, 1904. (Docket No. 153.) Decided September 13, 1904.

Assumpsit by the Newaygo Portland Cement Company

against the township of Sheridan for taxes paid under protest. There was judgment for plaintiff, and defendant brings error. Reversed.

A. F. Tibbitts, for appellant.

E. L. Gray, for appellee.

MOORE, C. J. This is a suit brought to recover taxes paid under protest. From a judgment obtained by plaintiff, the defendant has brought the case here by writ of error.

Some time prior to 1901 the plaintiff obtained from Peter Smalligan, who owned lot 2 adjoining Fremont Lake, a quitclaim deed to that portion of the lot covered by water. Like deeds were obtained from seven or eight other owners of lots running to the lake. Each of the deeds contained the following language:

"It being the intention of the parties of the first part to convey all their rights to the water and the soil under water in Fremont Lake belonging and appurtenant to said above-described premises."

In 1901 the supervisor made the following assessment: "Peter Smalligan, lot 2, excp't rip'in r'g't. Sec. 2, T. 12 N., R. 14 W." A tax of $3.36 was levied against this description and paid. Like assessments were made against each person who had conveyed to plaintiff company. Taxes were extended thereon and paid. The same roll shows the following assessment:

"Newaygo Portland Cement Company. Unplatted lands of the village of Fremont. That part of the following-described premises lying in Fremont Lake including all the riparian rights belonging and appurtenant to said premises, namely: Lot 2 of section 2; lot one, north half of lot two; lot three and east fifty rods of lot four, section 11; lots one and three, section ten; lot one, section 4 12–14, assessed at $5,000 all together, and assessed down under the real estate column at $5,000 more. State taxes, $14; county tax, $15; town tax, $3.00; highway tax, $6.00;

school and mill tax, $34.00; drain taxes at large, $5.50; making $77.50."

On the side is marked: "Paid under protest." The plaintiff company declined to pay its taxes. A levy was made upon a team belonging to it. The taxes were then paid under protest, and this suit was brought.

The circuit judge was of the opinion that the assessment to the plaintiff of its riparian rights in the lots and parcels of land was void, because the riparian rights cannot be assessed separately from the government descriptions, under the laws of this State, and, not being occupied by plaintiff as one description, could not be assessed as a whole, and therefore, not being assessed in separate and distinct parcels, the assessment was void, and the taxes levied by virtue of said assessment were void; that said assessment of riparian rights is indefinite, and incapable of identification, and for that reason said taxes levied on said description are void.

We cannot agree with this conclusion. It is evident that the plaintiff became the owner, by virtue of its deeds, not only of the rights of the grantors to the waters of Fremont Lake, but also of the soil under the water. We think it also clear that in making the several assessments against the several grantors the supervisor excepted therefrom what had been conveyed to the plaintiff. It is equally clear that he also assessed to the plaintiff what had been conveyed to it by the several grantors, and what the supervisor had excepted in the assessments made against the several grantors. We think that no one can reasonably doubt that by the abbreviations "rip'in" "r'g't" was meant the riparian rights of the parties. It is also clear that the several grantors who have paid their taxes did not pay for that portion of the several lots which were in Fremont Lake, and that the plaintiff, who is the owner of the property, ought to pay the taxes levied thereon. If there is any irregularity in the assessment and levy of the tax, it is cured by section 3922, 1 Comp. Laws.

Judgment is reversed, and one will be entered here in favor of defendant, with costs of both courts.

The other Justices concurred.

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137 478
153 243

BECKER *v.* HEADSTEN.

1. APPEAL AND ERROR—FINDINGS OF FACT—CONCLUSIVENESS.
Where no amendments to the trial court's findings were proposed, as authorized by Cir. Ct. Rule 26 *b*, it will be assumed on error that the evidence warranted the findings made.

2. USURY—PENALTIES—FORFEITURE OF INTEREST—MISTAKE.
Where neither the borrower nor the lender of money was able to figure the interest due on the notes, whereupon the parties went to L., and had him figure the interest, and on the basis of his conclusion a new note was erroneously given for more than was justly due on the notes, but the lender had no intention of taking usury, and as soon as he learned of the mistake indicated his willingness to correct the same, he was not subject to a forfeiture of all interest due on the debt for taking usury, as provided by 2 Comp. Laws, § 4857, but was entitled to the allowance of his claim against the debtor's estate to the extent of the amount due, with legal interest.

Error to Delta; Stone, J. Submitted June 10, 1904. (Docket No. 78.) Decided September 13, 1904.

Charles Becker presented a claim against the estate of Carrie A. Headsten, deceased, for the amount of a promissory note. The claim was allowed in the probate court, and Anna R. Headsten, the administratrix, appealed to the circuit court. There was judgment for claimant at the circuit, and defendant brings error. Affirmed.

James H. Clancy, for appellant.

George Gallup (*A. H. Ryall*, of counsel), for appellee.

MOORE, C. J. Mr. Becker presented a claim in probate court. It was allowed at the sum of $589.19. The administratrix appealed to the circuit court. The case was tried before the judge without a jury. A judgment was rendered for claimant for $582.36. The case is brought here by writ of error.

August 5, 1893, Carrie A. Headsten gave to claimant her note for $100, bearing 8 per cent. interest. On July 24, 1890, she gave him one for $200, drawing 8 per cent. interest. November 1, 1890, she gave him one for $100. In the early part of 1898 the maker of the notes and the payee, neither of whom could figure interest, went to Mr. Linden, and had him figure the interest. January 30, 1901, Carrie A. Headsten, a daughter of the maker of the notes, taking Mr. Linden's figures as a basis, figured the amount from that date and found it to be $846.50. For this amount a note was given to Mr. Becker by Mrs. Headsten, which note is the claim presented by Mr. Becker. It is admitted the note was given for $136.70 too much, which defendant claims was usurious interest, and for that reason no interest should be allowed. Section 4857, 2 Comp. Laws. It is the contention of claimant that he had no intention of taking usurious interest, and that an unintentional mistake was made in the computation, and that as soon as he learned the mistake he indicated his willingness to correct it. The circuit judge found:

"I further find that it was the intention of both of the parties thereto to make said new note for the amount of, and to take the place of, said original notes. I find that neither the maker nor the payee could compute the interest on these notes, and that a mistake was made in the computation of the interest due upon said notes. I find that through inadvertence and by mistake said new note was given for the sum of $846.50, whereas it should have been given for only the sum of $710.10. I find that neither of the parties to said new note intended it to include usury or unlawful interest. An inspection of said original notes shows that upon no theory of computation

could they have amounted to $846.50. * * * The claim will therefore stand allowed against said estate, and in favor of said claimant, as of October 2, 1902, at $582.36, and an order will be entered accordingly. My reasons for this conclusion are as follows: I think that this erroneous computation was the result of a mistake, and that it was therefore not intentional."

No amendments to these findings were proposed. See Cir. Ct. Rule No. 26 *b*. We must therefore assume the evidence warranted the findings. See *Merrill* v. *Newton*, 99 Mich. 226 (58 N. W. 69), and cases there cited; *Congdon* v. *Bailey*, 121 Mich. 570 (80 N. W. 369).

The findings of the circuit judge bring the case within *Green* v. *Grant*, 134 Mich. 462 (96 N. W. 583), and cases cited therein.

Judgment is affirmed.

CARPENTER, GRANT, and MONTGOMERY, JJ., concurred. HOOKER, J., concurred in the result.

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137 480
143 167
137 480
146 180
137 480
150 484

HERRING *v.* CITY OF ST. JOSEPH.[1]

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE — DIVERTED ATTENTION. Where packages plaintiff was carrying in her arms became disarranged, and while she was rearranging them, her attention being diverted, she came closer to a defective gutter than she thought she was, and stepped into it, her contributory negligence is a proper question for the jury.

Error to Berrien; Coolidge, J. Submitted June 10, 1904. (Docket No. 146.) Decided September 13, 1904.

Case by Nettie Herring against the city of St. Joseph

[1] Rehearing denied December 7, 1904.

for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

N. A. Hamilton, for appellant.

James O'Hara, for appellee.

CARPENTER, J. On the 11th of May, 1903, plaintiff was injured by stepping into a gutter on one of the streets of the city of St. Joseph. She brought this suit for compensation, and recovered a small verdict and judgment. No question is raised in this court respecting defendant's negligence, and therefore we do not consider that question. We are asked to reverse the judgment solely upon the ground that the plaintiff's own testimony shows that she was guilty of contributory negligence.

It appears from that testimony that the existence of the gutter was well known to plaintiff; that it was broad daylight when she stepped into it; that she was carrying packages of merchandise in her arms; that "They got disarranged, and I * * * was arranging them. I hadn't got to the gutter yet, but just about the time I got finished, I was nearer the gutter than I thought I was, and the consequence was that I got into the gutter." That her "attention had been diverted to the packages," and she "did not know she was so close to this place."

We think that under this testimony the question of plaintiff's contributory negligence was properly submitted to the jury. See *Sias* v. *Village of Reed City*, 103 Mich. 312 (61 N. W. 502); *Lowell* v. *Township of Watertown*, 58 Mich. 568 (25 N. W. 517); *Graves* v. *City of Battle Creek*, 95 Mich., at page 271 (54 N. W. 759, 19 L. R. A. 641, 35 Am. St. Rep. 561); *Belyea* v. *City of Port Huron*, 136 Mich. 504 (99 N. W. 740). See, also, *Cumisky* v. *City of Kenosha*, 87 Wis. 286 (58 N. W. 395), and *Crites* v. *City of New Richmond*, 98 Wis. 55 (73 N. W. 322).

As no other complaint is made by appellant, the judgment is affirmed.

The other Justices concurred.

137 482
149 2382
150 415

McLEAN *v.* PERE MARQUETTE RAILROAD CO.

1. MASTER AND SERVANT — RAILROADS — INJURIES TO SERVANTS — DERAILMENT OF CARS—TRANSPORTATION OF FREIGHT.

   In an action for injury to a section hand by the derailment of a hand car, evidence *held* sufficient to establish negligence of defendant in permitting an open rack car to be loaded with loose planing mill refuse, from which short pieces of hardwood flooring could fall on the track, one of which caused the derailment in question.

2. SAME — FURNISHING UNSUITABLE CARS — ACCIDENTS — NEGLIGENCE—RES IPSA LOQUITUR.

   Where a railroad company permitted planing mill refuse to be loaded loose on an open rack car, so that, as the car was being transported, some of the material would drop from the car, and might be drawn onto the rail and lodge there by the suction of the train, and plaintiff, a section hand, was injured by the derailment of a hand car, caused by the lodgment on the rail of one of the pieces of wood so transported, there being no other possible theory of the cause of the accident, the rule that the happening of an accident was not of itself evidence of negligence does not apply.

3. SAME—CONTRIBUTORY NEGLIGENCE.

   Where defendant negligently permitted planing mill refuse to be loaded loose on an open rack car, and plaintiff, a section hand, was injured by the derailment of a hand car, caused by certain of such refuse falling on the track, the fact that, as the train containing the loaded car passed plaintiff, he saw it, and thought it was dangerous to so load such material, he never having seen it loaded in such manner before, did not render him guilty of contributory negligence, as a matter of law, in immediately following the train containing such car on his hand car, under the direction of his foreman.

4. SAME—ASSUMED RISK.

   Plaintiff having a right to assume that defendant had furnished a proper car, and loaded it in a proper manner, the danger was not so obvious that he assumed the risk.

5. RAILROADS—STATION AGENTS—AUTHORITY TO BIND COMPANY.

   A station agent's actions and contracts within the scope of his authority bind the company.

6. Master and Servant — Railroads — Injuries to Servant — Fellow-Servants.

Where a railroad station agent was intrusted by his master to select proper cars for the transportation of property over its railroad, and he negligently ordered an open rack car for the transportation of planing mill refuse to be transported loose, and plaintiff, a section hand, was injured by the derailment of a hand car, caused by the falling of certain of the refuse on the rail, the station agent, in selecting such car, etc., was not plaintiff's fellow-servant, since the railroad's duty to select reasonably safe cars could not be delegated.

Error to Osceola; McAlvay, J. Submitted June 14, 1904. (Docket No. 19.) Decided September 13, 1904.

Case by William E. McLean, an infant, by his next friend, against the Pere Marquette Railroad Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

On September 5, 1902, plaintiff, a section hand in the employ of the defendant, was injured by the derailment of a hand car upon which he and the other members of the section crew were riding. The section men had been working on the track about two miles east of Chase. About 10 or 15 minutes before they quit work in the afternoon a freight train passed over the track going west toward Chase. Plaintiff noticed in this train a rack car loaded with planing mill refuse. The rack car was such as the plaintiff understood was used for transporting barrels. The open spaces in the rack were three or four inches wide and about six feet long. The planing mill refuse consisted of pieces of hard maple flooring from three to four inches wide, and from four inches to three feet long. Plaintiff had never noticed such a car, loaded with such material, pass over the road before that. It was immediately in front of the caboose. Immediately upon seeing it, it occurred to him that that was a dangerous way of transporting mill refuse, for the reason that blocks might drop out between the racks and be drawn up on top of the rails

by the suction of the train. Ten or fifteen minutes after the train had passed, the section crew placed their hand car on the track, and started toward Chase, following the train with the rack car in it. At that time they saw the smoke of another train coming from the east, and heard the whistle of its locomotive. Under the rules of the railroad company governing trackmen, it was their duty to keep out of the way of moving trains when they were passing along the track on a hand car. As they went westward they were watching the train approaching them from the east. As the hand car approached Chase, it was derailed by striking a block of hard maple flooring about one inch thick, three inches wide, and four inches long, which lay upon the rail just east of a highway crossing. Plaintiff was thrown upon the cattle-guards at the side of the highway, and sustained the injuries upon which this action is based.

The theory of the declaration is that the defendant furnished an improper car for the transportation of material of the character above described, and that a piece of it fell through one of the openings and lodged upon the rail, in consequence of which the hand car was derailed and plaintiff injured.

The suit was brought in justice's court, where plaintiff recovered a verdict of $100. Defendant appealed the case to the circuit court, where a like verdict was rendered.

Charles McPherson (*Frederick W. Stevens*, of counsel), for appellant.

Charles A. Withey, for appellee.

GRANT, J. (*after stating the facts*). 1. Defendant's first contention is that there is no evidence of negligence. Defendant's trainmaster, a witness in its behalf, conceded that it was unsafe to load an open rack car with such material thrown loose in it. There was sufficient evidence to establish negligence on the part of some one in furnishing and loading the car in the manner described. The

block or piece of wood was found immediately after the accident with the dent of the flange of the car wheel on it. It was of the same material as that with which the car was loaded. The car had passed over the track only 10 or 15 minutes before. It is a fair inference that it fell from that car, and that in some way it lodged upon the rail. It might have lodged there as it fell. The train was going fast, and as the block struck the ground it would naturally roll some distance before stopping, and in this way might have lodged upon the rail. It might have been drawn there by the suction of the train. The evidence of the effect of the suction of a train upon pieces of wood the size of this was conflicting. There was no other probable theory of the cause of the accident. This is not a case, therefore, for the application of the rule that an accident is not of itself evidence of negligence. *Schoepper* v. *Chemical Co.*, 113 Mich. 582 (71 N. W. 1081).

2. The mere fact that, as the train passed, plaintiff saw the car, and thought it was dangerous to load such a car with such material in such manner; and that he, under the direction of the section foreman, rode over the track immediately after, is not conclusive evidence of contributory negligence. Neither did he thereby assume the risk. He had seen nothing of the kind before, and had the right to assume that the defendant had furnished a proper car and loaded it in a proper manner. The danger was not so obvious as to require him to place his own judgment at once against that of his employer. The question of contributory negligence was properly submitted to the jury.

3. It is also contended that the furnishing and loading of the car were the acts of fellow-servants. The precise claim is that the car was furnished to the shipper by defendant's station agent at Reed City, whose province it was to determine the kind of cars to be used; that it was the duty of the train conductor to inspect every loaded car before taking it, and to determine whether it was properly loaded, and to refuse to take it if, upon inspection, he de-

termined it was not properly loaded; and that these two employés were plaintiff's fellow-servants. The question as to the conductor may be eliminated from the controversy by the fact that there is no evidence of any other method of loading this mill refuse into cars for transportation. There is no suggestion, even, of any other method. The method was proper for a suitable car. The plaintiff gave no direct testimony showing by whose authority or direction this car was furnished. The only testimony upon the point is that of defendant's trainmaster, and is as follows:

"As trainmaster I have supervision over the station agents of my division in the handling of cars for trains. I am acquainted with the manner in which agents obtain cars for their customers. The station agent determines what sort of a car shall be delivered to a customer who wants one. The customer applies to the agent, and the agent orders the kind of a car he wants from the car distributor. If the agent wanted a stock car for sheep, he would not specify to the car distributor that he wanted it to put sheep in. He would simply order a single or double deck stock car for a given destination. If he wanted a rack car, he would not specify to the car distributor what kind of wood he wanted to put in it. It appears that on the day on which plaintiff was injured a rack car loaded with mill refuse was shipped out of Reed City. The agent at Reed City determined what kind of a car should be used for that purpose. If he had chosen to order a box car, or a gondola, he could have obtained it."

Under this record the defendant intrusted its station agent to select proper cars for the transportation of property over its road. The authority of a station agent is very extensive. His actions and contracts in all things within the scope of his authority bind the company. 1 Wood on Railroads, § 165.

It is established by the decisions of this court that the primary duty to provide cars, etc., reasonably safe and in reasonably good condition for the purposes for which they are to be used, is one which cannot be delegated. *Thomas* v. *Railroad Co.*, 114 Mich. 59 (72 N. W. 40); *Sheltrawn* v. *Railroad Co.*, 128 Mich. 669 (87 N.

W. 893); *Morton* v. *Railroad Co.*, 81 Mich. 425 (46 N. W. 111); *McDonald* v. *Railroad Co.*, 132 Mich. 372 (93 N. W. 1041). This duty is not performed by furnishing a car designed, suitable, and safe for one purpose, to be used for another purpose for which it is unsuitable and unsafe. The shipper in this case did not ask for a car suitable and safe for the transportation of barrels, but for one suitable and safe for the transportation of his mill refuse. The defendant is equally responsible for furnishing a car unsuitable and unsafe for the use to which it is to be put as it would be in furnishing a car of the proper kind in an unsafe condition. Cases of defective loading (*Miller* v. *Railroad Co.*, 123 Mich. 374 [82 N. W. 58]) have no application to cases where defective appliances and machinery have been provided. See a discussion of this subject in *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 203 (61 N. W. 658, 27 L. R. A. 266).

Some errors are assigned upon certain portions of the charge of the court. They are, in the main, controlled by what we have already said. Considering the charge as a whole, it was a correct exposition of the law, and we think there is no occasion for holding that the jury were misled by it, although in one instance a sentence standing by itself is not strictly correct.

Judgment affirmed.

The other Justices concurred.

KING *v.* ANN ARBOR RAILROAD CO.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action against the owner of a steamboat for negligently killing a laborer by collision with a dock, evidence examined and *held* to make a proper case for the jury.

2. SAME—INSTRUCTIONS—WEIGHT OF TESTIMONY.

Instructions in an action for wrongful death examined and *held* prejudicial as on the weight and effect of the evidence.

Error to Benzie; Chittenden, J. Submitted June 14, 1904. (Docket No. 20.) Decided September 13, 1904.

Case by Elfa H. King, administratrix of the estate of Sheridan J. King, deceased, against the Ann Arbor Railroad Company for the alleged negligent killing of plaintiff's intestate. There was judgment for plaintiff, and defendant brings error. Reversed.

T. W. Whitney (*Alexander L. Smith*, of counsel), for appellant.

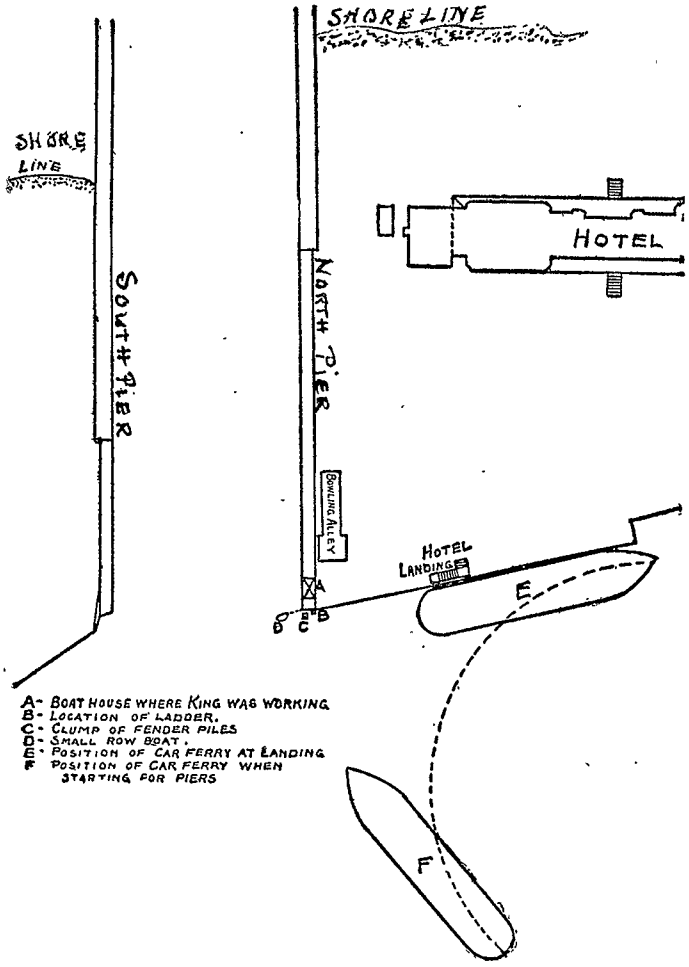
D. G. F. Warner and *Charles A. Withey*, for appellee.

MOORE, C. J. This cause comes into this court on a writ of error to reverse a judgment rendered in favor of the plaintiff for damages for wrongfully causing the death of the plaintiff's husband, Sheridan J. King.

The accident by which Mr. King came to his death occurred on the 26th day of June, 1902, at Frankfort. The accompanying plat will help understand the situation.

It is the claim of plaintiff and admitted by defendant that instead of the boat getting out as far as "F" it was midway between "E" and "F." The defendant company has its terminus at Frankfort. The harbor consists of a small lake, known as "Lake Betsey," connected with Lake Michigan by a channel about 200 feet wide between parallel docks. This channel runs nearly east and west. At the easterly end of the northerly pier it is built at right angles, and extends northerly several hundred feet, bordering upon Lake Betsey, furnishing a landing place for passengers for a large hotel. At the easterly end of the northerly dock or pier there is at a short distance from the face of the dock a clump of piles not connected with the

dock. These piles are loosely bound together by a chain, and are called "fender" piles. They are designed to protect the corner of the dock, and also vessels approaching



the corner of the dock, from injury. The dock is a substantial timber structure about five feet above the water line. There is just about at the water line a 10-inch timber extending out from the dock, forming a ledge upon which

a man can stand or walk. In passing around the corner of the dock on this ledge a man would pass between the spring piles and the face of the dock. These piles extend some 4 or 5 feet above the level of the pier. Just before the accident Mr. King had been engaged in painting a small shed belonging to the government which stood on the pier about 15 feet from its easterly end, and within 14 inches of the channel side. He had rowed over from the south side in the morning in a small rowboat belonging to the United States government, in whose employ he was, and had tied his boat to the foot of a small ladder on the east end of the dock. The ladder is made of 2x4 pieces nailed to the face of the dock with four cleats for crosspieces. In tying this boat Mr. King passed the rope between the clump of piles and the dock. The rowboat was riding out into the water of the channel. One of the defendant's car ferries had been stopped at the hotel dock. It was then backed out into Lake Betsey. She was in charge of Capt. Robertson, who was on the pilot house, about the center of the boat, and 20 feet from the side. When his vessel was about 200 feet from the corner of the dock Capt. Robertson called out to the men on the dock, "Somebody pull that boat in out of the way;" or, "Get that boat out of the way." There were at the time one or two other men on the dock besides Mr. King. The latter heard the call, got down from the building he was painting, and walked east toward the end of the dock. When he arrived at the top of the small ladder, he turned, backed down the ladder, and stooped down to untie the rope. In so doing he leaned against the spring piling, and he was in this position when the large vessel struck against the piling, and he was killed. Suit was brought, with the result already indicated.

It is claimed the court erred in submitting the case to the jury, for the reasons:

1. That there is no evidence fairly tending to show

any negligence on the part of defendant of any duty owed to the deceased.

2. That King was himself guilty of negligence proximately and directly causing his death.

The counsel are not agreed as to what the record shows. It is the claim of counsel for plaintiff that while the boat was 200 feet away, and still backing, or at a standstill, and certainly before beginning to move forward, the captain commanded the removal of the small boat, and that from then on he paid no attention to the man who obeyed his order. It is the further claim that Mr. King obeyed the order in the only way that it could have been done; that to untie the rope he needed to stoop down facing the dock, and, on account of the narrowness of the ledge, steady himself against the piles; and that while he was doing so he was in plain view of the captain, who, if he had looked, would have seen he was in a place of danger. It is his further claim that both Mr. King and the captain were familiar with the situation, that there was plenty of room in the channel to take the boat out without striking the piles, and if the big boat was so taken out the little boat would be in the way, but if the big boat was so steered as to strike the fender piles the little boat would not be in her way, and, this being the situation, Mr. King, as a reasonably prudent man, had a right to expect the boat would be kept away from the fender piles, and to do what he did, and that he would not have been in an unsafe place had it not been for the negligence of the captain. On the other hand, it is claimed the large boat was coming forward when the order was given, that any one could see she would strike the fender piling, and that any one would know, if he were between the fender piling and the dock, that he was in a place of great danger. It is also claimed the captain had no reason to suppose any one would undertake to do what Mr. King did; that he was not in a position to see Mr. King. They further claim, using the language of counsel:

"It seems too plain for argument that King was guilty

of the grossest carelessness. He knew all the circumstances of the situation—of the approaching car ferry. If he did not know that it would actually strike the piling, he certainly knew that it was liable to do so. And with this knowledge he deliberately turns his back to the approaching ferry, and then gets between the piles and the dock, and is killed. Such negligence is simply inexcusable. If he had glanced over his shoulder, he could have saved his life by a step. Or did he miscalculate the force of the impact? Who shall say?"

We think there was evidence in the case in support of each of these theories, and that the court could not properly withdraw the case from the jury.

Error is assigned in relation to the charge of the court. The defendant asked the court to give his third request to charge, which was as follows, except the words in the parenthesis being omitted:

"I further charge you that if Mr. King knew that the car ferry was approaching the corner of the pier when he got down on the ledge of timber at the bottom, and that he did not look to see whether the car ferry was liable to strike the piling (but carelessly and negligently, and without using ordinary care), placed his body between the piling and the pier just before the ferry boat struck the piling, and that if he had not gone into that place he would not have been killed, then the verdict should be for the defendant, even though the jury also find that those in charge of the boat were negligent in allowing the boat to strike the fender piling."

The court modified it by inserting the words in the parenthesis. This request, as originally prepared, met a phase of the case contended for by defendant in relation to which they have offered evidence.

The court also charged the jury:

"*Third.* I charge you, as a matter of law, and wish you to understand it, that it is the duty of all persons, the defendant railroad company no more and no less than any one else, to so use and manage their property as not to unnecessarily injure others. This rule is general, and applies to defendant in this case. Those in charge of the boat ordered or requested leaving a place of safety for the

purpose of moving the boat out of the way of the transport. The defendant knew that if they ran against the spring pile when Mr. King was between it and the dock they might kill or injure him, and, knowing where he was likely to be, and the dangers incident to what he was doing, if the transport struck the spring pile, it was the duty of the defendant, by its servants in charge of the transport, to use all reasonable diligence not to bring Mr. King into any unusual or unnecessary danger, and to keep away from the spring pile when he was near it, and until he was out of danger. * * *

"*Fourth.* I further charge you that the fact that the plaintiff's husband was not working for the defendant will not defeat her recovery, because the railroad company, when it requested the removal of the rowboat, knew of the situation, and was in plain view of the surroundings, and the situation Mr. King was in, and owed to him the duty of all reasonable care on the part of those in charge of the boat to prevent injury to said King while he was carrying out their request. And the fact that the channel upon the waters of which the rowboat was then riding was a public highway does not release the defendant from the responsibility and duty of using due diligence and care in the premises."

In giving these requests the charge substantially told what the weight and effect of the testimony was. This should be left to the jury.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

QUIRK v. RAPID RAILWAY.

1. APPEAL AND ERROR—FORMER APPEAL—QUESTIONS SETTLED.
The decision on a former review in the same case is res judicata as to all issues there decided.

2. SAME—QUESTIONS FIRST RAISED ON APPEAL.
Whether the proximate cause of a pedestrian's injury by a

street car was the motorman's negligence in failing to discover him on the track, or the catching of the wheel of plaintiff's cart in the track, cannot be first raised on a second writ of error.

3. STREET RAILROADS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

Instructions in an action against a street-railway company for injury to a boy on the track examined and *held* to properly submit the issue of contributory negligence where plaintiff was injured because his cart, to which he was tied, caught in the track.

4. TRIAL — ARGUMENT OF COUNSEL — SIZE OF VERDICT — CURING ERROR.

Argument against the jury's endeavoring to foreclose an appeal by giving a small verdict *held* rendered innocuous by the prompt action of the court.

Error to Wayne; Hosmer, J. Submitted June 14, 1904. (Docket No. 15.) Decided September 13, 1904.

Case by John Quirk, by next friend, against the Rapid Railway, for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Brennan, Donnelly & Van De Mark and *Henry L. Lyster*, for appellant.

S. E. Engle, for appellee.

MOORE, C. J. This case has been in this court before. It is reported in 130 Mich. 654 (90 N. W. 673). A reference to the opinion then handed down will make it unnecessary to make so long a statement of the questions involved as might otherwise be required.

After the case was reversed, a new trial was had. The testimony upon the part of the plaintiff was substantially the same as on the former trial. More witnesses were sworn on the part of the defendant than at the former trial. The jury also viewed the premises where the accident occurred. A verdict and judgment were obtained

by the plaintiff. The case is brought here by writ of error.

It is the claim of counsel:

(1) The record discloses no evidence of negligence on the part of the defendant which justified the case being submitted to the jury.

(2) Plaintiff was guilty of contributory negligence as a matter of law, and the evidence conclusively shows that defendant was not guilty of any gross, willful, or subsequent negligence.

(3) Review of the cases cited in the majority opinion in *Quirk* v. *Railway*, 130 Mich. 654 (90 N. W. 673).

(4) The catching of the wheel of plaintiff's cart in the rail was the proximate cause of his injury, and the negligence of the defendant, if there was any, was only the remote cause.

(5) The trial court took from the jury the question of plaintiff's contributory negligence after entering upon the track.

(6) The improper remarks of plaintiff's counsel in his opening and argument before the jury prejudiced the jury against defendant.

We will endeavor to dispose of these assignments of error in the order in which they were presented.

As to groups 1 and 2 the same questions now in the record were in it when it was here before. The opinion written by Justice MONTGOMERY deals with them, and must be regarded as res adjudicata as to them.

Under head 3 counsel review the majority opinion of the court, and the cases cited in support thereof, and undertake to show the court reached a wrong conclusion. We think the opinion in that respect must be regarded as res adjudicata.

4. Was the catching of the wheel of the cart in the rail the proximate cause of the injury, and the negligence of the defendant, if any, the remote cause? The case has been tried in this court once, and in the circuit court twice. Upon the last trial counsel preferred several requests to charge, but in none of them, nor in any other place in the record, is the view now presented by counsel made to

appear. It is presented now for the first time, and for that reason should not be considered by us.

5. Did the trial court take from the jury the question of plaintiff's contributory negligence after entering upon the track? Counsel's third request reads as follows:

"The evidence shows that the plaintiff did not look in the direction from which the train was coming immediately before entering upon the track, as it was his duty to do, and therefore in entering and going along the track without looking in the rear and listening for an approaching car he was guilty of negligence, and, the plaintiff being guilty of negligence in the way in which he entered upon the track and proceeded along the track, according to his own testimony, he cannot recover unless he convinces you by a preponderance of the evidence that the motorman in charge of the construction train did not use reasonable efforts to stop his train after he, the motorman, observed or could have observed that plaintiff was not going to get off the track; and if, when plaintiff entered upon the track, the motorman sounded his gong on the car, reversed his current, and applied his brakes for the purpose of stopping the car so as to avoid running over the plaintiff, then your verdict must be for the defendant; and in deciding this question you must take into consideration the fact that the plaintiff did hear the approach of the car, and got off the track himself, and was injured only because of the fact that he was tied by a rope to a little cart which became caught in the rails of the track."

The judge charged the jury as follows:

"I am asked to charge you that the evidence shows plaintiff did not look in the direction from which the construction train was coming immediately before entering upon the track, as it was his duty to do. Is that the testimony?

"*Mr. Engle:* No, it is not, your honor.

"*Mr. Brennan:* No, he did not at the time—at the time he entered he did not look or listen. He says both.

"*The Court:* The difference between the time at which they looked and the time of the entry, gentlemen of the jury, may be so inconsequential as practically to amount to looking at the very moment of entering upon the track.

"*Mr. Brennan:* He might have seen it, he said, if he had looked.

'*The Court:* All I may say to you in that regard, if you find from the testimony that he might have seen the train when entering upon the track, and if you find that the train was at that distance when a prudent person would not have occupied the track as he did, then, and under those circumstances, he would be guilty of contributory negligence, and therefore, under those circumstances, in entering and going on the track he would be guilty of negligence, and, the plaintiff being guilty of negligence in the way he entered the track and proceeded along the track, he could not recover, unless he convinces you by a preponderance of evidence that the motorman in charge of the construction train did not use reasonable efforts to stop his train after he (the motorman) observed, or could have observed, the plaintiff was not going to get off the track; and if, when plaintiff entered upon the track, the motorman sounded the gong on his car, and reversed his current, and applied the brake for the purpose of stopping the car, so as to avoid running over the plaintiff, then, and under those circumstances, your verdict must be for the defendant. And in deciding this you should take into consideration the fact plaintiff did hear the approach of the car, and got off the track himself, and was injured only because of the fact that he was tied by a rope to a little cart, which became caught in the rails of the track. Well, I think, gentlemen of the jury, that that is perhaps nothing more or less than an application of what I have already said in a more general way, and I therefore give it to you. And I charge you, as requested by the defendant, as a matter of law, if plaintiff in this case was capable of understanding when he was in a position of danger, and if you find it was negligence for any one to enter upon the track in the manner in which he entered this track, and to travel along the track without taking the precautions to look around to see whether a car was coming, then you must hold this plaintiff to have been guilty of such negligence as contributed to his injury, which would preclude his recovery. I think there can be no question, gentlemen of the jury, about that. You must deal with the plaintiff here, although he was fourteen—or, I think, fifteen—at the time, as with an ordinary person."

We do not think it can be said the question was taken from the jury, but, on the contrary, it was fully and fairly submitted to them.

6. Should the case be reversed because of the improper remarks of counsel? The record discloses the following: Mr. Engle, in his argument to the jury, said:

"Do not make this mistake. Jurors sometimes make this mistake. I beg you not to do that, and I know you won't after we call your attention to it. Jurors sometimes say, 'Here now, they will fight this case. If we give a small one, maybe they will pay it—if we give a small verdict.' Instead of paying it, up she goes again to the Supreme Court, and you have got to follow them, and, if we succeed there, what do we get? Just what you allowed us on the anticipation that they would pay it—half of what we ought to have had—in order to avoid the expense. Now, we have had the expense, and now we have succeeded, and now we have not got what we ought to have. The safest way is, do your duty as jurymen, as I know you will, when it is brought to your attention here—do your duty as jurymen, and give what you think is a fair verdict. Let the rest of it go. Leave it to the management of the boy's attorneys, friends, and the court. If you think he ought to have $20,000, give it to him; and if they want to take it up—as they probably will—if they can see any error at all, they will take it up; but if we win we have got something. If you think $15,000, give it to him. Don't cut down on your verdict on anything of that kind, because that is beyond your power; and leave that to those under whose management that jurisdiction comes. So far as your duty goes, it is to reach a verdict. That is all, gentlemen.

"*Mr. Brennan:* I wish to except to that part of the argument of Mr. Engle where he said that juries sometimes give a small verdict because they think the company will pay it, and saying that they should give a big verdict because the company will take it up no matter what the verdict is. I take an exception.

"*The Court:* You should have called it to the court's attention at the time, when it might have been corrected. Very well. Note an exception."

This portion of the argument was made during the temporary absence of the trial judge from the court-room. When he came to charge the jury, he instructed them as follows:

"There is one thing I wish to correct, so far it is sus-

ceptible of correction at the present time. I think yesterday, in his argument to you, Mr. Engle made certain statements with reference to a verdict—what you ought to do. Much of what Mr. Engle said was unquestionably proper. In reaching your verdict, of course, sympathy, as Mr. Brennan says, should not be allowed any consideration in your minds. So, too, gentlemen of the jury, if the plaintiff is entitled to recover, he is entitled to recover such sum as will compensate him for his injury, irrespective of any other consideration; but what they would probably do—whether the company will probably appeal to the Supreme Court, or whether they will not appeal it to the Supreme Court, and considerations of that character, which were alluded to by Mr. Engle—is a matter not for your consideration.

"*Mr. Engle:* That is just exactly what I said, your honor—that they should not consider that.

"*The Court:* Gentlemen of the jury, you are not to consider what the company will do about this matter. I am not to consider what the company will do with this matter. It is your duty and my duty to apply the law to the given facts in the case, and let the parties manage their own matters as best they may."

We have had repeated occasion to condemn like arguments to this. See *Selby* v. *Railway*, 122 Mich. 311 (81 N. W. 106); *Britton* v. *Railroad Co.*, 118 Mich. 491 (76 N. W. 1043); *Oliver* v. *Jessup's Estate*, post, 642 (100 N. W. 900).

The trial court, however, did not allow the improper argument to go unchallenged, but instructed the jury as to what their duty was. We think the jury heeded the instruction of the judge. We are led to that conclusion from the fact that Mr. Engle's argument was addressed to the question of damages—the amount of the verdict. No motion for a new trial on account of excessive damages was made, and it is not suggested in the briefs that, if the plaintiff was entitled to recover at all, the damages given were too large. The trial judge carefully guided the trial along the lines indicated in the opinion when the case was here before, and we do not find any reversible error.

Judgment is affirmed.

MONTGOMERY and HOOKER, JJ., concurred. CARPENTER, J., concurred in the result.

GRANT, J. I regard the questions concluded by the former decision.

BENDING *v.* AUDITOR GENERAL.

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153 [5]197

1. TAXATION—TAX SALES—PREMATURE DECREE.
   A decree for the sale of land for taxes, rendered before the expiration of the five days' notice provided by the statute (1 Comp. Laws, § 3889), is premature and therefore void.

2. SAME—DECREE—VALIDITY—STATE TAX LAND.
   A decree for the sale of land for taxes, rendered at a time when the land is held as State tax land under a decree and sale for the taxes of a prior year, is void.

3. SAME—VALIDITY OF DECREE—MANNER OF RAISING QUESTION.
   Intervening petition by the aggrieved owner is the proper remedy for raising the question of the validity of a decree for the sale of land for taxes, unless the rights of third parties have intervened.

4. SAME—RIGHTS OF THIRD PERSONS.
   Where a tax sale purchaser sold the timber on the land to a third person before any steps were taken by the original owner to have the tax sale set aside, the purchaser of such timber being entitled to defend his rights in an original proceeding, the original owner was not entitled to maintain a petition in the tax-sale proceedings to set aside the decrees, but was compelled to institute an original suit for that purpose.

5. SAME—LACHES.
   A landowner who pays no taxes, and takes no proceedings to protect his title for ten years, is guilty of such laches as to bar his right to question the validity of tax sales, though he petitions within eight months after he learns that certain persons had bought the land six, and the timber thereon two, years before.

Appeal from Ontonagon; Haire, J. Submitted June 15, 1904. (Docket No. 25.) Decided September 13, 1904.

Petition by Ferdinand Bending against Perry F. Powers, auditor general, Charles H. Chick, and the Diamond Match Company to set aside the decree and sales of certain lands delinquent for the taxes of 1892, 1893, and 1894. From a decree dismissing the petition, petitioner appeals. Affirmed.

M. J. Sherwood, for petitioner.

J. B. Judkins, for defendant Chick.

Ball & Ball, for defendant Diamond Match Co.

MOORE, C. J. The circuit judge, in disposing of this case, filed a written opinion, which contains a concise statement of the questions involved. It is as follows:

"FACTS.

"In this cause petitioner, Bending, asks the court to vacate and set aside the decrees and the sales thereunder made on certain lands in Ontonagon county for the years 1892, 1893, and 1894. The land is described as the southwest quarter of section seventeen (17), town forty-eight (48) north, of range thirty-eight (38) west. Petitioner claims that the tax decrees and sales for the above-named years were void. The Diamond Match Company and Chick were each notified by petitioner, and the former appeared specially for the purpose of objecting to the jurisdiction as against it. Chick did not appear. By permission of the court, counsel for Chick was allowed to file a brief after the hearing. He also objects to the jurisdiction in these proceedings. No testimony was offered by the Diamond Match Company or by Chick at the hearing. It is clearly undisputed that for the taxes of 1892 on the above land the decree was rendered on the 12th day of November, 1894, before the expiration of the five days from the advertised date of hearing; for the taxes of 1893 the decree was rendered on November 4, 1895, which was after said five days had elapsed, but while the land was held as State tax land for the year 1892; for the taxes of 1894 the

decree was rendered on the 27th of October, 1896, and before the said time limit had expired. Briefly stated, the decrees for the taxes of 1892 and 1894 were prematurely rendered, and the decrees for the taxes of 1893 were rendered while the land was held as State tax land. The decree for the taxes of 1893 was enrolled at the request of one James Everett Ball, on the 3rd day of April, 1897. The land was sold to the State for the taxes of 1892 at the tax sale held in December, 1894. At the tax sale for taxes of 1893, held in December, 1895, defendant Chick became the purchaser for the said taxes of 1893, and also purchased from the State list at the same time the rights of the State in the lands under this bid for the aforesaid taxes of 1892. At the tax sale in December, 1896, Chick again purchased the land for the taxes of 1894.

"Petitioner, Bending, was the owner of the original title to the above-described land. On December 31, 1898, Chick, the tax-title purchaser, sold to the Diamond Match Company all the timber on the land, under a bill of sale with full warranties. The deed for this sale was recorded January 19, 1899. In this deed a limited time was given to remove the timber. In May, 1902, it appears that Bending first ascertained that his land and the timber thereon had been sold as above stated. The Diamond Match Company was about this time notified by M. J. Sherwood, petitioner's solicitor, not to cut the timber, and that the tax titles were void. Negotiations for settlement were begun soon after this between Bending's solicitor and the agent of the Diamond Match Company and solicitor for Chick, and were continued to the time of filing these petitions; and it appears from the affidavits of Mr. Sherwood, petitioner's solicitor, D. J. Norton, and Ira E. Bush, filed in this cause, that in September, 1902, the agent of the company agreed not to cut the timber until there was a settlement of the dispute as to the tax titles. These affidavits were filed by permission of the court after the hearing of this cause. Afterwards, in the winter of 1902 and 1903, the Diamond Match Company cut the timber on the land. In January, 1903, petitioner filed this petition to vacate the several decrees and sales. Testimony was also introduced by petitioner, which tended to show that at the hearing in the matter of taxes for 1893 the register filled in the 'amounts decreed against lands' after court had adjourned, and after the decree was signed. I do not consider this important in this cause.

"LAW.

"*Claims of Parties.* Petitioner claims that, the tax titles being void, he is entitled to have them vacated and set aside on paying taxes and interest advanced. Defendants Diamond Match Company and Chick claim that the petition should be dismissed for the reasons:

"(1) That the court had no jurisdiction to pass on these cases in a proceeding begun by a petitioner, because the rights of the Diamond Match Company, a third party, have intervened, and that these rights cannot be litigated except in an original proceeding.

"(2) Because, the decree having been enrolled, it cannot be opened except by bill of review.

"(3) Because the petitioner is guilty of laches, and not entitled to relief.

"(4) Because the decree for the taxes of 1893, entered in November, 1895, was a valid decree.

"1. *As to the Validity of the Decrees.* Upon the repeated decisions of our Supreme Court, the decrees for the taxes of 1892 and 1894 are void, because rendered prematurely. *Peninsular Sav. Bank* v. *Ward*, 118 Mich. 87, 93 (76 N. W. 161, 79 N. W. 911); *McGinley* v. *Mining Co.*, 121 Mich. 88 (79 N. W. 928); and others.

"The decree for the taxes of 1893 is void, because the land had been sold for the taxes of 1892, and was then held as State tax land. *Connecticut Mut. Life-Ins. Co.* v. *Wood*, 115 Mich. 444 (74 N. W. 656); *Aztec Copper Co.* v. *Auditor General*, 128 Mich. 615 (87 N. W. 895); and others.

"That petition is the proper method of raising this question, see the above decisions.

"The decrees in the case at bar having been void for the above reasons, it is not necessary to discuss the question of the method of entering the 'amounts decreed against lands' by the register. It is also clear that, unless one of the first three points raised by defendants is good, it is the duty of the court to vacate the decrees.

"2. *As to the Question of Jurisdiction.* This brings us to the first and principal point raised and contended for by the defendants, viz., that the court has no jurisdiction to hear the petition, because the rights of a third party have intervened; that, if petitioner has any rights in the premises, he must begin by some original proceeding.

"It is undisputed that defendant Chick made his last tax purchase of this land for the taxes of 1894 in December, 1896; that on December 31, 1899, he sold the timber on

the land to the defendant Diamond Match Company; that in May, 1902, petitioner, Bending, ascertained that his land and timber were sold; that some negotiations for settlement were made in September, 1902, which failed; that the petition in this cause was filed in January, 1903—at least eight months after the discovery of the condition of the title of Bending; that the timber was cut by the Diamond Match Company in the winter of 1902 and 1903. The last tax deed was recorded about six years, and the Diamond Match Company's timber deed about two years, previous to the beginning of this proceeding, and Bending knew the status of affairs pertaining to the title eight months previous thereto.

"It is clear to the court that the above undisputed facts bring this case under that class of cases where the rights of third parties have intervened, and must be decided accordingly. The Diamond Match Company was in no sense a party to the original proceeding. Chick, the auditor general, and Bending certainly were. The company merely purchased the timber, and received a deed therefor from Chick, and is clearly a third party; otherwise there can be no such thing as a third party to judicial and public sales. Bending, Chick, and the auditor general had to do with the taxes. Except that its title received from Chick may depend upon the validity of the tax proceedings, the company had nothing to do with the taxes. To contend that the company is a party to the original proceedings strikes the court as absurd. It is a third party, and must be treated as such in this cause. The Diamond Match Company, being a third party, and its rights in the premises having intervened long before the filing of the petition, the court is constrained to hold the law in conformity with the views of defendant's counsel:

"'That, where the rights of third parties have intervened, these rights cannot be litigated except in some original proceeding in which such third persons may be made parties and have an opportunity to answer and defend.'

"This was settled by an early decision in this State, viz., *Crawford* v. *Tuller*, 35 Mich. 57. See, also, *Jewett* v. *Morris*, 41 Mich. 689 (3 N. W. 186); and *Spaulding* v. *O'Connor*, 119 Mich. 45, at page 50 (77 N. W. 323). The learned counsel for petitioner urges that the case at bar is covered by the rule in *Ritson* v. *Dodge*, 33 Mich. 463, and *Brewer* v. *Dodge*, 28 Mich. 359. These cases arose in re-

gard to the same property, and it seems that a previous decree relating to the property had been set aside on motion as having been unwarrantably entered. In deciding the case of *Ritson* v. *Dodge*, Chief Justice COOLEY says:

"'It is insisted on behalf of complainant that, inasmuch as he bought of Brewer while a decree existed in his favor, and after the time for appealing had expired, the complainant is such a purchaser in good faith as cannot be affected by a subsequent order setting aside the decree, at least until after he has had notice, and an opportunity to be heard. No authority is cited to this petition, and we know of none for it. The decree was found to have been entered without authority, and there is no question before us but that, as between the parties thereto, it was properly set aside. A purchaser under a decree must ascertain at his peril whether the decree was warranted or not.'

"Whether Chief Justice COOLEY intended to make the statement in the *Ritson Case* a universal rule is not very clear, but, if he did, he afterwards radically changed it in the case of *Crawford* v. *Tuller* 35 Mich. 57, where he uses this language:

"'We held in the case of *Hill* v. *Robinson*, decided last term (not reported), that a party attacking a judicial sale as invalid after the rights of a third party had accrued, should be required to do so by some original proceeding in which an issue could be formed and tried in the ordinary way.'

"An examination of subsequent cases shows that the rule in *Crawford* v. *Tuller* has ever since been recognized as the rule in Michigan. Counsel for petitioner cites *Cook* v. *French*, 96 Mich. 525 (56 N. W. 101), as following the *Ritson Case*. An examination of the case of *Cook* v. *French* shows that the action was begun by bill of review, and not by petition. An examination of other Michigan cases shows the rule to be, as above stated, that where a party seeks to attack a judicial decree after the rights of third parties have intervened, he must do so by an original proceeding, and not by motion or petition. The case of *Crawford* v. *Tuller* is cited with approval in *Spaulding* v. *O'Connor*, 119 Mich. 45, at page 50 (77 N. W. 323). In the case of *Cook* v. *Hall*, 123 Mich. 378, at page 385 (82 N. W. 59), Justice GRANT says:

"'These petitions must be treated as ones to set aside the decrees in the original proceedings, and to permit the petitioner to attack the validity of the decrees and sales; and the sole issue in those

proceedings was, were the decrees valid? The tax law is neither designed, nor is it adapted, to the trial of the rights of parties who have bought the products of these lands from either the original owner or the tax-title owner after the sale. If either party seeks to reach these products which have been severed from the realty and sold as personalty, he must commence by an original proceeding, in which the parties interested can be summoned into court and defend their rights. *Crawford* v. *Tuller*, 35 Mich. 57; *Spaulding* v. *O'Connor*, 119 Mich. 45 (77 N. W. 323).'

"It will be noticed that he cites both *Crawford* v. *Tuller* and *Spaulding* v. *O'Connor*.

"The cases of the *Aztec Copper Co.* v. *Auditor General*, 128 Mich. 615 (87 N. W. 895), *Thomas* v. *Moore*, 120 Mich. 535 (79 N. W. 812), and *Connecticut Mut. Life-Ins. Co.* v. *Wood*, 115 Mich. 444 (74 N. W. 656), were all between the original parties to the tax proceedings; that is, between the owners or mortgagees of the property as petitioners and the auditor general and tax-title purchasers as defendants. Many more cases are cited by counsel on both sides, all of which have been thoroughly examined by the court, and they do not change the rule as first above stated. A further discussion seems unnecessary. Counsel for petitioner appears to think that there is no question but that the decree should be vacated as to Chick and the auditor general, even if it is not as to the Diamond Match Company. As the court understands the decisions above quoted, the law as it now stands makes no exceptions to the parties concerned. If the rights of third parties have intervened, a petition will not lie. Chick has sold the timber on this land to the Diamond Match Company. He is vendor of the timber on this land. He is equally interested with the company in this transaction. He may have equities in the premises, unknown at this time to the court, that will appear on the hearing of the cause, if any is had. An accounting may be necessary, wherein the payment of the taxes, the amount of the timber, and other such matters may require adjudication between the parties. With this view on the question of jurisdiction, it becomes unnecessary to discuss the questions of enrollment and laches."

Counsel for petitioner insists the trial judge put a misconstruction upon the decisions of this court to which he referred in his opinion, and says:

"This is not a petition for rehearing, nor is it a bill of review strictly, but it partakes of the nature of both. In the peculiar practice under the tax law there can be no such thing as a rehearing of the auditor general's petition, or of a review of that hearing. The tax law (1 Comp. Laws, § 3893) provides (section 70) that the decree of sale may be set aside on motion under certain circumstances, where the motion is made within one year from the time the landowner has actual notice of the sale. It does not provide for, nor does it contemplate, a rehearing of the petition. Under the interpretation of the tax law given by this court, when the decree of sale made on the auditor general's petition is set aside, it is done on the condition that the landowner shall pay to the tax purchaser or to the State the amount of taxes, with interest and penalties, alleged to be due on the lands in the auditor general's petition. Bending, in this case, has offered to comply with this condition."

He urges that, as the decrees were taken *pro confesso*, the proper method to set them aside is by petition. He also says:

"*Cook* v. *Hall*, 123 Mich. 378 (82 N. W. 59), presents an entirely different case from the one at bar. It does not decide that petitions will not lie where third parties have purchased relying upon the tax decree, but, if anything, impliedly holds that it will lie. That case was decided on the ground of laches in Cook. This court recognized the fact that Cook, under the tax law, might bring the petitions which he sought to bring had he moved in time. Cook attempted in his proceedings to make 'third' parties account for timber which had been severed from the land, and sold to them after being severed—sold as personal property. This the court held could not be done under the proceedings authorized by the tax law, because the law was not designed for that purpose.

"'The tax law is neither designed, nor is it adapted, to the trial of the rights of parties who have bought the products of these lands from either the original owner or the tax-title owner after the sale. If either party seeks to reach these products which have been severed from the realty and sold as personalty, he must commence by an original proceeding, in which the parties interested can be summoned into court and defend their rights. * * * Some of the defendants have meanwhile become interested, not in the land itself,

but in the timber cut therefrom, and without any knowledge that the petitioner claimed any interest therein. Under such circumstances equity requires that a party move with promptness to assert his rights and to protect the interests of those who may become innocent purchasers of the products which may be severed.'

"In the case at bar there is no attempt to reach product severed from the land. At the time these petitions were brought, Bending did not know that any product had been severed from the land. No product of the land has been severed and sold as personalty. All of the defendants are interested in the land itself. No one of them is interested in the timber cut therefrom, and none of them can be heard to say that at the time the timber was cut it was without the knowledge on the part of the respondents that Bending claimed an interest therein. The *Cook Case* and the case at bar are nowhere similar, and it would be unconscionable here to hold that the Diamond Match Company may raise as a barrier its broken pledge not to cut the timber to estop Bending from his rights, and by the very reason of its broken pledge and the abuse of his confidence shut him out from the remedy by motion as authorized by the tax law."

The claim of waiver of laches in this case is based upon the conversation which occurred between Mr. Sherwood, who represented the petitioner, and Mr. Hotchkiss, who represented only the Diamond Match Company, in September, 1902. Conceding this conversation should operate as a waiver on the part of the Diamond Match Company for the delay in filing the petition after the conversation occurred, what shall be said of the laches of the petitioner which occurred before this conversation? The record discloses he became the owner of this land in April, 1893. He allowed it to be sold in 1896 for the taxes of 1892. In 1897 it was sold for the taxes of 1893. In 1898 it was sold for the taxes of 1894. The Diamond Match Company paid the taxes for 1898 and the subsequent years. The taxes of 1895, 1896, and 1897, were not paid by the petitioner. We have, then, the case of a landowner who knows he ought to pay taxes upon his land every year who pays nothing thereon for 10 years. He knows, in case of nonpayment, that his lands will be

returned, and that it will be the duty of the auditor general to sell them. He knows that some one is likely to buy them, and that, if no bids are received, they will be bid in by the State, and later may be sold to an individual. He permits this to be done year after year, and he now asserts that, because he filed this petition within eight months after he learned that the Diamond Match Company bought the timber upwards of two years before, and Mr. Chick bought the land six years before, he has not been guilty of laches.

We agree with the interpretation put upon the decisions of this court by the learned circuit judge. We are also of the opinion that if a taxpayer was ever guilty of such laches that he ought not to be permitted to open a decree, this record discloses such a case.

The decree is affirmed.

The other Justices concurred.

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PLUCHAK v. CRAWFORD.[1]

EQUITY—ANSWER—AMENDMENT TO CONFORM TO PROOF.

Pleadings and evidence in a suit for injunction examined and *held* proper to reject an amended answer offered after the proofs were closed setting up a prescriptive right inconsistent with the original answer.

Appeal from Menominee; Stone, J. Submitted June 16, 1904. (Docket No. 29.) Decided September 13, 1904.

Bill by Robert Pluchak against Samuel Crawford and others to restrain the flooding of complainant's land. From a decree for complainant, defendants appeal. Affirmed.

[1] Rehearing denied May 12, 1905.

N. C. Spencer, for complainant.

L. D. Eastman (*E. C. Eastman*, of counsel), for defendants.

MOORE, C. J. The complainant is the owner of a steam sawmill on Devil's creek. The defendants are owners of 40,000,000 feet of timber, which for three years they have been cutting and floating down said stream, using two dams for that purpose. They expect, according to their claim, to continue to cut and float down the stream logs cut from this timber at the rate of 2,000,000 feet a year. It is the claim of complainant that by the use of these dams his property is flooded so that 2½ feet of water stands upon the engine room floor of his mill, that the flooding continues so long the standing water kills his timber, and that he is deprived of the use of his mill for a considerable portion of the season. The complainant filed an injunction bill. The learned trial judge, in granting a decree for complainant, filed a written opinion, which represents clearly nearly all of the questions involved. The material parts of it read as follows:

"This cause was heard upon the pleadings and proofs taken before the circuit court commissioner, except that at the hearing the testimony of Frank Donnelly, Thomas Duncan, Frank Gerue, and John Murphy was taken in open court by consent of the solicitors for the respective parties.

"I have spent a good deal of time in the examination of the pleadings and evidence in the case. I shall only refer to such parts of the pleadings as are necessary to explain my conclusions. Neither do I deem it necessary to refer to the evidence at length. The parties were first before me soon after the bill was filed upon the motion of complainant for an injunction. The pleadings were then examined, and also numerous affidavits in support of the bill and answer. I made an order at that time that an injunction issue as prayed for unless the defendants should execute and deliver to complainant a bond in the sum of $1,000, with sureties to be approved by the register of the court, conditioned that said defendants would pay and perform any decree that might be entered in the case.

The bond was given, and hence no injunction has ever been issued. Soon after, and on March 21, 1902, by virtue of a stipulation on file, complainant amended his bill of complaint so as to include a claim for damages and an accounting for the alleged flooding of complainant's said premises for the years 1900 and 1901, and the case has proceeded upon the claim for damages and an accounting for the three years of 1900, 1901, and 1902. The bill was filed primarily to restrain the defendants in the operation of certain dams in Devil's creek, in Menominee county, to compel the abatement thereof, and to recover damages from defendants for the flooding of the complainant's premises, as set forth in the bill. At the final hearing defendants' solicitors asked leave to file an amended answer. This motion was made after the proofs had been closed. I will consider and dispose of the questions raised by counsel in the order in which they are presented in their briefs.

"1. The solicitors for the defendants raise the question and express doubt as to the jurisdiction of this court. In view of the Michigan decision cited by complainant's solicitor in his brief, and especially in view of the two cases somewhat recently decided by this court and affirmed in the Supreme Court, there can, I think, be no serious doubt of the jurisdiction of the court. I refer to the cases of *Michigan Land & Iron Co.* v. *Lumber Co.*, 109 Mich. 164 (66 N. W. 953), and *Hall* v. *Nester*, 122 Mich. 141 (80 N. W. 982). The principle that equity, having once acquired jurisdiction, will retain it, to give such full relief as will finally dispose of the controversy, is well settled in this State.

"2. As to defendants' right to file an amended answer raising for the first time a prescriptive right in defendants to flow the complainant's land, I am of opinion that it would be inequitable to allow the amendment to be made at this stage of the case. In defendants' answer, which was sworn to, it is stated:

"'That these defendants, nor any nor either of them, have never attempted to assume or exercise exclusive possession or control of the said Devil's creek, or to exclude or prevent the complainant or any other person from banking, floating, and driving his or their saw logs in said creek in, through, and over the said dams of these defendants, and do not desire or intend to interfere with or exclude the complainant in any manner from the free enjoyment of said

Devil's creek for the purpose of floating and driving his saw logs down the same.'

"Upon the issue framed upon this answer the complainant, and in fact both parties, proceeded to take a large amount of testimony before the commissioner, continuing for many months, and involving a good deal of expense to complainant. The proposed amended bill (answer) is wholly inconsistent with the position taken by the defendants in their original answer. As complainant's solicitor well says:

"'One of the all-important elements of a prescriptive right or title is the adverse holding. A holding, to be adverse, must be distinct and hostile. The defendants now undertake to claim an easement in the complainant's land. The owner of an easement in the land of another has a right therein which is paramount to the rights of the owner of the fee. It is a right which brooks no interference from any one. It is a right which necessarily interferes with the convenience of the owner of the servient estate whenever his convenience conflicts with that of the owner of the dominant estate. In order to gain an easement by prescription, this hostility must have been maintained for the statutory period.'

"This is so inconsistent with and repugnant to the position taken by defendants in their sworn answer filed in the case, and upon which the issue was framed and the testimony taken, that to permit the proposed answer to be filed would be an injustice to the complainant. It would be such an entire change of position on the part of the defendants that it would be an abuse of discretion to permit the amendment. The case of *Ogden* v. *Moore*, 95 Mich. 290 (54 N. W. 899), although relating to amendments of a bill of complaint, applies as well to the answer as to the bill. But it is urged that the amendment should be allowed so that the pleadings may conform to the proof. I have carefully examined the testimony, and have been unable to find any evidence that would support the proposed answer in this respect. Even the testimony of John Murphy, especially when viewed in connection with his affidavit on file in the case, fails to show any such actual, continued, visible, notorious, distinct, and hostile possession as would satisfy the rule relating to the establishment of a prescriptive right. If his testimony tends to establish any possession at all, it was a possession without any claim of right, and in no way hostile. The evidence is undisputed that the Spalding Lumber Company

put its drives through in such a short time that it did not materially injure the complainant. The evidence all tends to show that the damage complained of all occurred in the years 1900, 1901, and 1902. A prescriptive right can only be exercised in the manner and to the extent that it has been used during the whole prescriptive period. *Chapel* v. *Smith*, 80 Mich. 100 (45 N. W. 69); *Osten* v. *Jerome*, 93 Mich. 196 (53 N. W. 7). It is a well-established rule in this State that a pleading defective in its averments will not be amended where the case is essentially defective on the proof. *Curtis* v. *Goodenow*, 24 Mich. 18; *Craig* v. *Bradley*, 26 Mich. 353; *Church* v. *Holcomb*, 45 Mich. 29, 40 (7 N. W. 167).

"Notwithstanding the mistake of law claimed by defendants' solicitors, the court must not pervert nor abrogate plain rules and principles of pleading and practice. The proposed amended answer cannot, therefore, be filed as a pleading in the cause, but it will be permitted to be filed as an offered or proposed answer, so that the Supreme Court may have possession of it in the record; for that court will have the power to grant the amendment on appeal, should it deem it proper.

"3. This brings us to the question of a claimed combination of an efficient responsible agency with a natural irresponsible agency, which it is said caused the damage. Defendants' counsel call attention to the rule laid down by the supreme court of Wisconsin in the somewhat noted case of *Cook* v. *Railway Co.*, 98 Wis. 624 (74 N. W. 561, 40 L. R. A. 457, 67 Am. St. Rep. 830). At page 642, that learned court uses the following language:

"'Where a cause set in motion by negligence reaches to the result complained of in a line of responsible causation, and another cause, having no responsible origin, reaches it at the same time, so that what then takes place would happen as the effect of either cause entirely regardless of the other, then the consequence cannot be said with any degree of certainty to relate to negligence as its antecedent. Requisite intelligent causation necessary to legal liability is wanting, leaving no ground in reason or in law for it to rest upon.'

"That this is good law, and clearly expressed, there can, I think, be no doubt. Upon the question involved complainant's solicitor relies upon the doctrine laid down by the Michigan Supreme Court in the case of *Stone* v. *Lumber Co.*, 59 Mich. 24 (26 N. W. 216). At page 31, that court says:

"'The fact that natural causes contribute with the unlawful acts complained of in producing the injury does not relieve from liability to the injured party (citing cases).

"'The record in this case shows that the annual freshets occurring upon this stream were not of a character to seriously impede the growth of hay upon this marsh, or to prevent its improvement by complainant previous to the erection of this dam.'

"Counsel concur in the position that these cases are distinguishable, and in this I agree. In the Wisconsin case it might well be said that the damage would have resulted had the locomotive been a thousand miles away.

"As counsel for complainant argues:

"'It could hardly be said that the fire from the locomotive even contributed to the damage, for, without that fire, the fire from the unknown cause would have been just as hot and would have burned just as quickly as the union of the two fires. In that case, how is the court going to say what proportion of the damage, if any, is the human agency responsible for? In the *Lumber Co. Case* the spring freshets did do some damage, but that damage was increased and augmented by the wrongful act of the defendant, and he was, therefore, not relieved from liability, because he caused a certain degree of damage, which would not otherwise have occurred.'

"I have examined the evidence with great care upon this question, and I am forced to the conclusion that the spring or springs would not and did not produce the injury complained of. While the springs at times rendered the fire hole damp, they did not interfere seriously with the operation of the mill. But the uniting with this dampness of the wrongful acts of the defendants in raising the water in the stream did cause the injury complained of, so that it must be said that the water from the spring or springs was not of a character or quantity sufficient to seriously impede the running of the mill, but that it was the raising and setting back of the water in the stream by the defendants, as complained of, that caused the damage.

"4. This brings us to the final question of damages, if the bill was properly filed. I am satisfied that the lower dam caused most, if not all, of the damage complained of. On page 23 of the testimony appears the following in the testimony of the complainant:

"'*Q.* Does raising the water above you interfere with you?

"'*A.* No; just on the lower dam.'

"This is consistent with all of the evidence in the case. In view of the Michigan cases, I think that a perpetual in-

junction should issue as to the use by defendants of the lower dam. *Stone* v. *Lumber Co.*, supra; *Turner* v. *Hart*, 71 Mich. 128 (38 N. W. 890, 15 Am. St. Rep. 243); *Powers* v. *Hibbard*, 114 Mich. 533 (72 N. W. 339).

"The use of the upper dam, except in conjunction with the use of the lower dam, will not cause material injury. It is the holding of the water by the lower dam that has caused the flooding of the mill of complainant. By a clear preponderance of the evidence, it appears that the stream in question has not sufficient capacity or water to admit of the running of logs without the use of dams. If, however, it can be so used without the raising of water by the use of the said lower dam, the defendants will be permitted to avail themselves of such use. Coming to the question of damages, I shall take a conservative view of the evidence. Much of the evidence of complainant is very general, some of it is vague and indefinite, and some of it is exaggerated with reference to data and values.

"On page 56 of the testimony, in answer to the question:

"'When your operations are not impeded by this drive, how much, on an average, do you run your mill in the course of the summer months, in a month, on an average?

"'*A.* Run her about half of the time.'

"After going over all of the evidence carefully, I have concluded to allow complainant $600 damages for the year 1900, based upon the loss of the use of the mill for 50 days, estimating the cut at 3,000 feet per day, and estimating the profits at $4 per 1,000 feet. In 1901 I shall allow him for 18 days, 3,000 feet per day, profit of $4 per 1,000 feet, or $216. For the year 1902 I estimate 15 days, 3,000 feet per day, profit $4 per 1,000 feet, or $180—making a total of $996. I shall allow no other damages in the case, for the reasons already stated. The complainant may have a decree restraining the defendants from raising the water in the lower dam, and a money decree against the defendants of $996, and may have execution therefor. Complainant may also have and recover his taxable costs in the case.

"Let a decree be prepared accordingly."

The defendants have brought the case here by appeal. They contend (we quote from brief of counsel):

"(1) In refusing to allow defendants to amend their

answer as proposed, and to take further testimony in support of the issues which would be raised thereby.

"(2) In restraining the defendants from raising heads of water upon, and operating their so-called lower dam.

"Did the trial court exercise a sound discretion in refusing to allow defendants to amend their answer? The original answer, found at Record, p. 6, was prepared in reliance, through misapprehension, upon the cases of *Boyd* v. *Conklin*, 54 Mich. 583 (20 N. W. 595, 52 Am. Rep. 831), and other cases, from which it apparently appears to require 20 years in Michigan to acquire title by prescription. We therefore sought to mitigate as far as possible the complainant's claim for damages."

It is insisted that if the original answer and the amended one—

"Be read together, they will not appear inconsistent. If they appeared in the same answer, objection could not be made that the allegations were inconsistent. The allegation from the original answer could well stand in mitigation of damages, and the allegations of the amended answer as a plea in bar. In the first the idea of prescriptive right is not negatived at all. It is simply that the defendants have not and do not wish to exclude the complainant or any person from the use of Devil's creek as a highway to drive his or their logs to market. In the second or amended answer the defendants simply claim the prescriptive right to flood complainant's premises for the purpose of making such creek an available highway to aid in the driving of logs to market. Of course, we concede that the prescriptive right was not pleaded in the original answer, and it constitutes a new defense unquestionably, but we do maintain that the two allegations are not necessarily inconsistent."

It is also insisted a different rule should apply in relation to amending an answer from the one applying to bills of complaint, for the reason that, if the allegations of a bill are not sufficient, the complainant may discontinue, and commence over again; while a defendant, if not permitted to amend, loses his defense entirely. The question of the amount of damages allowed is not argued.

In our view of the case, we shall need to discuss but one feature of it. The question of amendment arose in this

way: The record discloses by a great quantity of proof that complainant was injured by the acts of defendants; that the flooding of the three years in controversy was much more, and continued for a greater length of time, than it had previously done. The defendants produced as a witness John Murphy, who testified as follows:

"I was an officer of the Spalding Lumber Company before the Crawfords went to Cedar river. I am acquainted with Devil's creek. I had the improvements made on that stream in the summer of 1884. I superintended the driving operations of the Spalding Lumber Company to some extent. If we had thought that Devil's creek could be driven without the aid of dams, we would not have built them there. I know the class of timber they are getting out that is coming down that creek. From what I know of driving, and of the class of timber, and the quantities coming down Devil's creek, and get it down to the mouth of the river, I don't think you could drive it there without the dams, for the reason that, in the first place, it is a very small creek, and there is not sufficient water runs into the creek to enable you to drive without the use of dams. Besides, there is a great descent to the creek, and more so than there is to any other creek up in that country. The fall is rapid."

On cross-examination he said:

"I don't think there is water enough at any time in that creek to admit of driving without the aid of dams. You might drive small cedar logs and posts, but you couldn't drive hemlock or pine logs. It takes about as much water, in my judgment, to drive hemlock logs as it does pine, for the reason that you have considerable large hemlock, and they are very heavy floaters. Of course, peeled hemlock, floats lighter than if they are not peeled. I have not driven the creek since 1898. I have been on the stream since then. When I speak of the improvements on the creek, I refer to the two dams in question, the one above and the one below Pluchak's mill. There were no other dams across the stream. We had several breakwaters to confine the water in shoal places from spreading out. The timber was a good deal larger in those days. I think it would take more water to drive it. I am familiar with the creek along there by Pluchak's mill. I don't think the stream at that point would be capable of being driven

without the aid of dams for cedar products and hemlock logs running 15 to 20 logs to the thousand. At the point of the mill that is not as shoal a place as at other places. It is kind of flat. Below the lower dam is a very shoal place. The flow of the lower dam reaches nearly up there to Pluchak's mill. When the water in the upper dam is let off, the water from the lower dam would not flood quite up there; but it is practically a dead place, more so than it is farther up and down below the lower dam. The ordinary flow of the stream without the use of dams in the spring of the year—the ordinary freshets—would not, I think, overflow that flat ground around Pluchak's mill. There might be water enough right at the mill to carry the forest products in the bed of the stream; but, as I say, above the mill and below the lower dam you couldn't. From the time we built the improvements there, the use of both the upper and lower dams raised the water over the low ground by Pluchak's mill. I continued with the Spalding Lumber Company from the time these dams were built until that company sold out. Driving was done every year upon this stream by me by means of these dams. That resulted in more or less flooding of the premises around Pluchak's mill in that vicinity. That was uniformly so every year—more or less flooding there—as the driving was done with the use of these dams. That was uniformly so. I have been there since Spalding Company sold out.

"*Q.* Was it flooded as much before as since, or more?

"*A.* The dams were just the same. I have not been there when they were driving. But the dams were just the same, and the flooding would be about the same."

This is all of his testimony given upon the trial, though he had made an affidavit earlier, which it is claimed is inconsistent with his testimony; but we do not need to further refer to it.

The following then occurred:

"At the close of the testimony in open court, and upon the testimony given by the witness John Murphy in open court, solicitor for defendants asked permission to prepare and file an amended answer in the cause and submit the same to the court and solicitor for complainant, together with written argument and brief. Permission was given by the court to solicitor for defendants to prepare and sub-

mit to the court a proposed amended answer. Such proposed amended answer on the part of the defendants was seasonably prepared and submitted to the court and solicitor for the complainant, together with written argument and brief in the cause, and was, by leave of the court, filed herein on the 22d day of June, A. D. 1903, as a proposed amended answer, but was refused as an amended answer in the cause."

It will be observed this application to amend occurred after the testimony was all in, and without any request whatever being made to take further proof. There is not a suggestion in the record that counsel desired in the lower court to put in further testimony. If we consider the amended answer as allowed, and also consider the testimony of Mr. Murphy, which is the only testimony bearing upon that subject, it will be found the defendants have not met the case presented by the complainant. Mr. Murphy's testimony shows he has driven no logs on the stream since 1898, and that he has not been there when they were driving logs since then. Giving his testimony the fullest credence, it fails to meet the testimony of complainant that the flooding during 1900, 1901, and 1902 was much worse, and for a longer period of time, than it had been before.

The decree is affirmed.

The other Justices concurred.

PROCHASKA v. FOX.

1. ASSUMPSIT—COMMON COUNTS—BREACH OF LEASE.

Plaintiff leased land of defendant for two weeks for a certain use, paying the rent. After he had used it for a week, a preliminary injunction, at suit of a third person, issued against such use, and plaintiff discontinued it. *Held*, that plaintiff could not maintain a suit on the common counts for the rent

paid, as, if defendant broke his covenant for quiet enjoyment, or if plaintiff was evicted by a superior title, the declaration should be special; the measure of recovery being the value of the use for the remaining week.

2. PLEADING—DECLARATION—AMENDMENT—TIME.

Refusal of amendment of the declaration, asked for after plaintiff has rested and the court is about to direct a verdict, is not error.

Error to Wayne; Hosmer, J. Submitted June 17, 1904. (Docket No. 34.) Decided September 13, 1904.

Assumpsit by Vincent W. Prochaska against Harry J. Fox for money had and received. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

B. & L. owned some vacant lots in the city of Detroit. They leased them to P. for a display of fireworks. P. appears to have subleased to defendant, who leased to plaintiff the bar privileges for a period of two weeks, July 14th to July 26th. Plaintiff put up tents, and kept a saloon therein, where he sold intoxicating liquors. B. & L., claiming that they had not leased the property for saloon purposes, filed a bill in chancery against P., the defendant, and the B. Stroh Brewing Company, praying for an injunction to restrain the defendant from selling intoxicating liquors upon the premises. A preliminary injunction was issued and served after plaintiff had carried on the business five days. That suit it appears never came to a hearing, and consequently the merits of the case were never determined. Upon the serving of the injunction, the business was discontinued. Plaintiff brought suit in justice's court on the common counts, claiming damages $500. Defendant demanded a bill of particulars. Whether such bill was ever served the record does not show. The plea was the general issue. Plaintiff was defeated in the justice's court, and appealed to the circuit court, where he was again defeated by direction of the court. He paid

defendant $550 by check of the B. Stroh Brewing Company for the saloon privilege for the two weeks.

Alex J. Groesbeck and *John C. Tobias*, for appellant.

Dwight C. Rexford, for appellee.

GRANT, J. (*after stating the facts*). 1. The theory of the plaintiff is that he was evicted from the premises before the expiration of his term; that the defendant was responsible for such eviction, and was guilty of breach of contract; and that plaintiff is entitled to recover on the common counts in assumpsit for money equitably due him. His counsel claim the right to recover the money paid for the lease. Clearly he could not recover the whole amount, for he had the use of the premises nearly half the time granted by the lease. If the defendant had broken his covenant or agreement for quiet enjoyment, or if plaintiff had been evicted by a paramount title, the declaration should have been special, and the measure of damages would have been the value of the use of the land less the rent. 5 Enc. Pl. & Prac. pp. 371–375; 2 Taylor, Landl. & Ten. § 661; *Cornelissens* v. *Driscoll*, 89 Mich. 34 (50 N. W. 749); *Long* v. *Sinclair*, 38 Mich. 90; *Coulter* v. *Norton*, 100 Mich. 389 (59 N. W. 163, 43 Am. St. Rep. 458).

2. After the plaintiff had rested, and the court was about to direct a verdict, plaintiff's counsel asked leave to amend the declaration. No amendment was tendered, and what the form of the amendment would be is not shown. Whether the proposed amendment would have been admissible we need not determine. The court did not err in refusing an amendment at that stage of the trial.

Judgment affirmed.

The other Justices concurred.

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HOSTE *v.* DALTON.

1. EQUITY—DECREE—FILING OPINION.
   Whether or not a decree is void because the opinion was not filed within six months after final submission of the cause, as required by 1 Comp. Laws, § 558, is not presented for decision by a record that merely shows that, after the close of the testimony, time was given counsel to file briefs, and it does not appear that the briefs were filed more than six months before the decision of the controversy.
2. SAME—WAIVER OF OBJECTION.
   Participation by defendants' counsel in the settlement of a decree without raising the objection that no opinion was rendered within six months after the case was finally submitted, as required by 1 Comp. Laws, § 558, waives the objection.
3. MARRIED WOMEN—ARBITRATION.
   Section 10924 of the Compiled Laws, excepting "married women" from the persons who are thereby authorized to enter into a statutory arbitration, has no application to an agreement for a common-law arbitration.
4. SAME—COMMON-LAW ARBITRATION.
   Section 8690 of the Compiled Laws, providing that a married woman shall have complete power to contract with relation to her own property, empowers a married woman to enter into an agreement for a common-law arbitration.
5. ARBITRATION AND AWARD—PARTIES—CONCLUSIVENESS.
   Where one of testator's children, interested in the probate of his will, was not a party to a contest thereof, an arbitration agreement for the settlement of such contest was not void by reason of her failure to sign the same, since she could not be affected by the award.
6. SAME—AGREEMENT—CONSTRUCTION.
   Where the parties to a will contest entered into an arbitration agreement for the settlement thereof, providing that if any question should arise as to the construction and enforcement of the agreement it should be submitted for decision to the circuit court, such agreement should be construed to refer to the side of the circuit court having jurisdiction of the controversy that might arise, and was not limited to the law side of the court, on which the will contest was then pending.

7. SAME—COURTS—OUSTING JURISDICTION—APPEAL.
Where an arbitration agreement provides that any controversy between the parties thereunder shall be submitted to the circuit court, and that its decision shall be final, such agreement is valid and binding on the parties, though it ousts the Supreme Court of jurisdiction of an appeal, and precludes a review of the decision of the circuit court.

8. PUBLIC POLICY—DISCOURAGING LITIGATION.
On grounds of public policy, litigants should be encouraged to accept as final the decisions of courts of original jurisdiction.

Appeal from Wayne; Hosmer, J. Submitted June 17, 1904. (Docket No. 36.) Decided September 13, 1904.

Bill by Catherine Hoste and others against Honorah Dalton and others to compel specific performance of an agreement to arbitrate. From a decree for complainants, defendants appeal. Affirmed.

Ed. E. Kane, for complainants.

Robert M. Dalton, for defendants.

CARPENTER, J. Honorah Dalton is the widow of Lawrence Dalton, deceased. The other parties to this suit are the children of said Lawrence and Honorah. The parties to this suit entered into a written agreement by which they settled a pending contest of the will of said Lawrence Dalton, deceased. Complainants brought this suit to enforce said agreement, and obtained a decree in the court below. Defendants insist that said agreement should be vacated, because no opinion was filed therein within six months after the cause was finally submitted, as required by section 558 of the Compiled Laws of 1897. It is not necessary in this case to determine whether or not the proper construction of this statute renders void a decree not entered within said six months, as it does not clearly appear on this record that the statute was violated. When the testimony was closed, time was given counsel to file briefs, and it does not appear that these briefs were filed

—that is, that the case was, in the language of the statute, "finally submitted"—more than six months before the decision of the controversy. We are compelled also to say that defendants' counsel waived the objection by participating in the settlement of the decree without raising it.

The agreement sought to be enforced in this case contained a provision by which the amount which defendants Lawrence J. and Robert M. (proponents in the will contest) were to pay complainants (contestants in the will contest) was to depend upon the value of certain lands left by said Lawrence, deceased. This value was to be determined by the majority of three arbitrators. The arbitrators were to be appointed in the usual manner. Two of said arbitrators signed a report, agreeing on the value of said land. It is urged that this agreement for settlement is not binding, because complainants, being married women, were incapable of entering into a contract of arbitration. The arbitration in question was not a statutory arbitration, and therefore the clause in section 10924 of the Compiled Laws of 1897, excepting "married women" from the persons who may enter into a statutory arbitration, has no application. The arbitration in question was a common-law arbitration, and in our judgment section 8690, 3 Comp. Laws—the statute which gives a married woman complete power to contract with relation to her own property—authorized the making of the contract in question. See Morse on Arbitration and Award, p. 27.

It is also contended that the contract was invalid because Margaret Baumgartner, another child of Lawrence and Honorah Dalton, was not a party to, and did not sign, the same. Margaret Baumgartner was undoubtedly interested in the probate of her father's will. If the contest instituted by complainants had succeeded, she would have profited by it the same as they. But it is to be inferred from this record that she did not make herself a party to that controversy. It therefore follows that the decisions (see *Owen*

v. *Hurd*, 2 Term Rep. 643; *McCarthy* v. *Swan*, 145 Mass. 471 [14 N. E. 635]) which hold that all the parties to a controversy must sign the agreement to submit to arbitration have no application. Nor is it true that the award of the arbitrators determined her rights. The authorities (see *Gregory* v. *Trust Co.*, 36 Fed. 408; *City of Mobile* v. *Wood*, 95 Fed. 537) which hold that such agreements are invalid unless all parties who are bound thereby sign the same have therefore no application.

It is insisted that the award of the arbitrators is not binding because of various irregularities. In our judgment these objections should not be considered by this court, because the parties to this suit have made a valid and binding agreement to accept the decision of the circuit court as final. In the agreement, heretofore referred to, we find this language:

"If any question should hereafter arise between the parties hereto as to the construction and enforcement of this agreement, the same shall be submitted for decision to this court [the agreement was entitled in the circuit court for the county of Wayne] and its decision shall be final."

We cannot agree with defendants' counsel that this language, properly construed, referred to the law side of the court, in which the will contest was then pending. It is much more reasonable to suppose that it referred to that side of the court which would have jurisdiction of the controversy that might arise, and that means in this case the chancery side of the court. Nor can we agree that the proper construction of this language permits an appeal. It cannot be said that the agreement that the decision of the circuit court shall be final, as it can of an agreement that an award shall be "final and conclusive," merely indicates the intention of the parties to be bound by the decision. See *Mussina* v. *Hertzog*, 5 Bin. (Pa.) 387. The agreement that the decision shall be "final" necessarily implies that it shall not be reviewed by another court.

It is further objected that an agreement to accept the

decision of a lower tribunal as final—in other words, that an agreement not to appeal from such a decision—is invalid. We are referred to no authority in support of this proposition. On the contrary, there are numerous decisions holding the contrary. See *Townsend* v. *Stone Dressing Co.*, 15 N. Y. 587; *People* v. *Stephens*, 52 N. Y. 306; *Riggs* v. *Insurance Co.*, 125 N. Y. 11 (25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716); *Watson* v. *Wetter*, 91 Pa. St. 385; *Rogers* v. *Playford*, 12 Pa. St. 181.

It is contended that the agreement is invalid because it ousts the Supreme Court of jurisdiction. It is true that it has been often held that an executory agreement to submit future disputes to arbitration are enforceable only by suit for damages, because such agreements oust the courts—that is, all courts—of their jurisdiction. See *Chippewa Lumber Co.* v. *Phenix Ins. Co.*, 80 Mich., at page 120 (44 N. W. 1055); *White* v. *Railroad Co.*, 135 Mass. 216; also authorities collected, 2 Am. & Eng. Enc. Law (2d Ed.), pp. 570–578. The agreement under consideration does not oust all courts of their jurisdiction. On the contrary, it requires the decision of a court of competent jurisdiction, and the only court of original jurisdiction. It is true that the agreement, by preventing the defeated litigant from reviewing his case in the Supreme Court, ousts that court of its jurisdiction. That agreement is not prohibited by the foregoing authorities. On the contrary, as heretofore indicated, it is sustained by all of the authorities brought to our notice. Unless the rule that makes agreements unenforceable because they oust courts of their jurisdiction is considerably extended, it does not apply to this case. And we think it is authoritatively settled by our own decisions (see *Van Poucke* v. *St. Vincent de Paul Society*, 63 Mich. 378 [29 N. W. 863]; *Canfield* v. *Knights of Maccabees*, 87 Mich. 626 [49 N. W. 875, 13 L. R. A. 625, 24 Am. St. Rep. 186]; *Hembeau* v. *Knights of Maccabees*, 101 Mich. 161 [59 N. W. 417, 49 L. R. A. 592, 45 Am. St. Rep. 400]; *Fillmore* v.

Knights of Maccabees, 103 Mich. 437 [61 N. W. 785]) that it is not to be extended. We are therefore compelled to hold that the rule does not apply to this case.

We think on grounds of public policy litigants should be encouraged to accept as final the decisions of courts of original jurisdiction.

The decree appealed from is therefore affirmed, with costs.

The other Justices concurred.

PEOPLE v. HUTCHINGS.

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1. CRIMINAL LAW—SECOND JEOPARDY.
   Where, on a juror becoming ill after the prosecutor's opening statement, but before the introduction of any testimony, the court, over respondent's objection, discharges the remainder of the jury from further consideration of the case, on the ground that respondent is out on bail and other more urgent matters require the attention of the court, he is not so put in jeopardy as to preclude a subsequent trial.

2. SAME—TRIAL—CURING ERROR.
   Refusal, in a prosecution for larceny, to permit respondent to show restitution by cross-examination of the complaining witness, is not prejudicial where the whole matter was developed at a later stage of the trial.

3. SAME—EVIDENCE—COMPARISON OF HANDWRITING.
   Where, in a prosecution for larceny of money, alleged to have been obtained through the forgery of a draft by respondent, he claimed that he was paid the money secured by the draft, by a third person, to be used to purchase wood in the country, and introduced a receipt for wood so purchased in his own handwriting, the draft being properly in evidence, it was not error for the court to permit respondent's signature on the receipt and the indorsement on the draft to be compared.

4. SAME—ADMISSIONS OF CO-RESPONDENTS.
   Where respondent and another were informed against for the lar-

ceny of money obtained through a forged draft, and respondent was separately tried before his co-respondent, and was not charged with conspiracy, evidence given by his co-respondent in the police court, by which he attempted to fix the crime on respondent, was inadmissible.

5. SAME—ARGUMENT OF COUNSEL.

Where, in a prosecution for the larceny of money, alleged to have been obtained through a forged draft, the draft and a receipt signed by defendant were introduced in evidence, it was not error for the prosecuting attorney, in argument to the jury, to call their attention to identical peculiarities in the handwriting on the receipt and in the indorsement on the draft.

6. SAME.

Where, in a criminal prosecution, there is nothing in the record justifying a claim that prior to the offense in question respondent has done anything requiring him to have a pal, it is improper for the prosecuting attorney, in argument, in commenting on character witnesses introduced, to state that none of the character witnesses knew anything about what respondent was doing while living in D., or his reputation, and the only man called from D., where respondent resided two years, was one of respondent's pals.

7. SAME—REQUESTS TO CHARGE.

Matters sufficiently covered by the general charge need not be repeated.

Error to recorder's court of Detroit; Phelan, J. Submitted June 17, 1904. (Docket No. 188.) Decided September 13, 1904.

Frank E. Hutchings was convicted of larceny. Reversed.

Samuel W. Burroughs, for appellant.

Ormond F. Hunt, Prosecuting Attorney, and *Louis C. Wurzer*, Assistant Prosecuting Attorney, for the people.

MOORE, C. J. The respondent was convicted of the crime of larceny. He has brought the case here upon writ of error.

Prior to October 11, 1902, Mrs. Claude E. Price was a resident of Bay City, where she had some money in a bank. In October, 1902, she lived on Duffield street, in Detroit. She requested the bank in Bay City to send her a draft. It sent her one for $187.31, payable to Mrs. C. E. Price, and inclosed it in a letter addressed to Mrs. C. E. Price, Detroit, Mich. The mail carrier, instead of delivering the letter to Mrs. C. E. Price, Duffield street, October 11th, delivered it to C. E. Price & Co., 1304 West Fort street.

On October 13th the respondent presented it to the Wayne County Savings Bank, first indorsing his name on the back of it in the presence of the paying teller. It then had the words "Mrs C E Price" over the signature of Mr. Hutchings. He obtained the money on it.

Soon after this, it was found the indorsement purporting to be that of Mrs. Price was not hers. The paying teller went to respondent's house, but he was not at home. Later Mr. Gardner, who had been in the employ of the bank, and was a relative of respondent, was requested to look him up. He did not find respondent at home, and left word for him that something was wrong with the draft. After respondent was told of this by his wife, he went to the bank, and the same information was given him. He expressed his surprise, and was requested to accompany the teller to police headquarters. On his way there he expressed his desire to make the bank good, and said he supposed the draft was all right. He explained he had assisted some men in making a horse trade at the market for which he was to be paid $5; that they had the draft, and, being strangers to the bank, wanted the respondent, who had before dealt with the bank, to get the money; and that he drove with them in a buggy to the bank, where they waited outside while he got the money. He repeated this story to the officers after he got to the police headquarters. He was searched, and $12 was found on his person. Later he told the officers he got the draft from C. E. Price & Co., and got it cashed at their request.

He also produced from his stocking $70. The two Prices were arrested, and they as well as defendant, after a preliminary examination, were held for trial in the recorder's court. Respondent's counsel demanded a separate trial for him. An information was filed against him for larceny, and, upon his standing mute when arraigned, a plea of not guilty was entered, and a trial was had, with the result before stated.

It was his claim upon the trial, and is here, that he was acquainted with the two Prices; that they owed him $50; that he desired to buy wood in the country, to sell again, and had sought a loan from them to enable him to do so; that they sent for him to come to their place of business, and showed him this draft, which had the indorsement on the back of it, "Mrs C E Price," and told him to get the money at the bank, pay himself what they owed him, use the balance to buy wood, and divide the profits with them; that he, in the utmost good faith, got the money at the bank, and that the occasion of his being in the country when the teller and Mr. Gardner looked for him was to buy wood; that he bought $90 worth of wood. A receipt for some of the money paid thereon, in his handwriting, except the signature, was produced in evidence on the trial. It was his further claim that when his wife told him about the draft he at once saw the Prices, who told him how to account for having the draft by telling the horse-trading story. It is his claim he acted in good faith in getting the money.

The Prices' version is that the respondent took the draft from their desk, and made the indorsement and got the money after they told him they were afraid, and that the draft should be returned to the post office.

The record is long, and the assignments of error are many. It may be stated that the following grouping will cover them:

(1) Discharge of the jury; (2) prejudicial remarks by the court; (3) restriction of cross-examination; (4) evidence of restitution excluded; (5) comparison of hand-

writing; (6) cross-examination of defendant; (7) police court testimony of codefendant E. W. Price; (8) argument of prosecutor; (9) charge of court and requests to charge; (10) variance between information and proof; (11) failure to file written reasons for denying motion.

As to groups 2, 3, 6, 10, 11, we think it unnecessary to say more than that we have examined them in connection with the record, and do not think that they are well taken.

(1) Did the court err in discharging the first jury? The facts in relation to that transaction are as follows: On the first day of the trial, after the jury were sworn and the counsel for the respective parties had made their opening statement, but before any testimony was taken, the case was adjourned until the next morning. The next morning one of the jurors was ill, and the case was adjourned until the following morning. The following morning the juror was still ill, and it became necessary to decide what should be done. Counsel for respondent desired that another juror be drawn from the regular panel, the jury resworn, and the trial proceed. The judge inquired if the respondent was in custody, and was informed that he was out on bail. The court then stated there were but five days remaining in the term; that other business demanded the attention of the court; that the best interests of the people required the court to take up some other case; and directed an order to be entered reciting the facts, and discharging the 11 men from the further consideration of the case. When a new jury was impaneled, objection was taken to any further proceedings on the ground that respondent had been once placed in jeopardy. We do not think the court erred in his conduct of this feature of the case. 17 Am. & Eng. Enc. Law (2d Ed.), pp. 1258–1260, and cases cited therein.

(4) Evidence of restitution excluded. Was there error in this? The court might very properly have allowed respondent to show by the teller on the cross-examination all that occurred between the bank officers and the respondent. The substance of this, however, was gone into later,

and we do not think respondent was prejudiced as to this feature of the case to that extent as to require a reversal of the case for that reason.

(5) Was there error in relation to the comparison of handwriting? The receipt for wood was introduced in evidence by Mr. Hutchings. The draft was properly in evidence. We have no doubt it was proper to compare these handwritings. The record is not clear that Exhibit 2 was introduced in evidence, and when the question was raised the comparison with it was not urged.

(7) Did the court err in admitting the testimony of E. W. Price, given in the police court, to be read in evidence? Mr. Price was produced and sworn. When he was asked about the transaction his counsel claimed, as he had not been tried, he should not be compelled to answer, as his answer would serve to incriminate him. This claim was sustained. Against the objection of respondent, his testimony given in the police court, covering 10 pages of the printed record, was read to him, and he was permitted to answer that he so testified in the police court. In reply to the objection to this testimony, counsel for the people say the objection to it was waived by counsel for respondent, and it is not necessary to discuss it. We do not so understand the record. Counsel for respondent stated several reasons why he objected to this testimony, some of which were perhaps removed by what subsequently occurred, but he persisted in the claim that, as his client was separately charged with larceny, and was then being tried separately, anything Mr. Price might have testified to in the police court could not be used against Mr. Hutchings. The effect of allowing this testimony was to get 10 printed pages of testimony before the jury without respondent having the benefit of cross-examination. We held in *People* v. *Butler*, 111 Mich. 483 (69 N. W. 734), that where two persons were on trial for conspiracy, and one of them had voluntarily testified in the police court, this testimony was competent as against the one giving it. But that is a very different case from this one. Here the information

was against Hutchings alone. He was not charged with conspiracy, but with larceny. Price was not upon trial. This testimony was taken after Price and Hutchings had ceased to act in harmony, and when each was seeking to place the crime upon the other. We think the admission of this testimony was error.

(8) Should the case be reversed because of the argument of counsel? We think much of the argument was justified by the testimony. To illustrate: The attorney for the people said to the jury:

"Now, gentlemen of the jury, I am going to prove to you by the testimony in this case that Hutchings did commit the forgery upon the back of this draft, and that it was Hutchings himself who signed the name 'Mrs E C Price' upon the back of this check, although he denies having done so. * * * I will first show it to you by the two signatures, and I will point them out to you. One of the peculiarities of Hutchings' handwriting is this: That he never uses a period, he never puts a period behind the capital letters. I will call your attention to the signature 'Mrs C E Price.' There is no period behind the 'Mrs,' there is no period behind the 'C,' there is no period behind the 'E,' although all these different letters and abbreviations require periods. * * * I call your attention to the signature 'F E Hutchings' below. No periods between 'F,' no period between 'E.' I call your attention— I would like to have you gentlemen remember that, because you will have a right to take this draft and papers in the jury-room with you to compare them. I call your attention also to the similarity of the 'c' in Price— the small 'c'—and the 'c' in Hutchings."

We have facsimiles of the signatures before us, and we think this argument was justified by them. We cannot, however, say the same of the following:

"They talk about character witnesses. He was here two years in the city of Detroit, and none of these character witnesses knew anything about what he was doing here; didn't know anything about his reputation; and the man—the only man—they called from Detroit, who did know him, was a pal of his in Detroit."

There is nothing in the record which justified the claim

that prior to this respondent had done anything requiring him to have a pal, or the calling of the witness as to good reputation a pal of respondent's, and the characterization had better have been omitted. We do not mean to say that, had this been the only error, we should reverse the case.

(9) Did the court err in refusing the requests of counsel and in his charge to the jury? We have examined the requests carefully, and the charge as well. All of the requests which were good law were fully covered in a charge of unusual clearness. This group of assignments of error is not well taken.

For the reasons stated, the conviction is set aside, and a new trial ordered.

The other Justices concurred.

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137 534
153 83

BARBOUR *v.* HURLBURT.

ASSUMPSIT — COMMON COUNTS — PURCHASE — FRAUDULENT REPRESENTATIONS AS TO PRICE—RESCISSION.

Defendant, representing that a mine could be bought for $60,000, obtained $1,000 from plaintiff, on the understanding that defendant was to raise $65,000 from different persons, pay $60,000 for the mine, and convey it and the remaining $5,000 to a corporation to be formed to work the mine; plaintiff to have one sixty-fifth interest in the syndicate. Defendant in fact purchased the mine for $10,000, and kept $50,000 himself. *Held*, that plaintiff, who had received his interest in the mine by reason of his interest in the corporation to which the deed was made, not having rescinded before commencement of action, could not recover the entire amount paid by him; but in assumpsit on the common counts he could, on the theory of an affirmance of the purchase at the price actually paid, recover his proportion of the money not used in accordance with the contract, or on special counts he could recover damages for the fraud under 3 Comp. Laws, § 10421.

Error to Wayne; Rohnert, J. Submitted April 5, 1904. (Docket No. 8.) Decided September 14, 1904.

Assumpsit by Levi L. Barbour and Dwight C. Rexford against Charles A. Hurlburt for money had and received. There was judgment for plaintiffs on a verdict directed by the court, and defendant brings error. Reversed.

George W. Bates (*John D. Conely*, of counsel), for appellant.

John W. Beaumont and *Dwight C. Rexford*, for appellees.

HOOKER, J. The plaintiffs recovered a verdict and judgment for $1,033.32 upon a count for money had and received, the case having been commenced by attachment. The court directed the verdict, and defendant has appealed. The substance of plaintiffs' claim is that they were solicited by the defendant to join with himself and others in the purchase of some mines, and in forming a corporation to develop and operate the same, to which corporation the mines were to be deeded, which, with $5,000 of the money raised, were to constitute its capital stock. He represented that one Dempster had an option upon these mines at the price of $60,000, and thought so well of them that he was willing to take an interest, as was the defendant. Plaintiffs consented, and paid over the money, i. e., $1,000, to defendant, as did others. They afterwards subscribed articles of association and elected officers. They afterwards discovered that Dempster had an option on the mines for $10,000, and that defendant knew that his option was not for $60,000, and that it was for not over $25,000, and that $10,000 was all that was paid to the owner for the property, and that Hurlburt and Dempster and one Hovey, who was interested in the deal with Hurlburt, divided the remainder of the money between them, unless possibly $5,000 was paid to the corporation. The court said to the jury that:

"The plaintiffs in this case seek to recover in an action in assumpsit under what is ordinarily termed the common counts for the recovery of $1,000, which the plaintiffs paid to the defendant for a certain purpose. The plaintiffs claim that not having devoted this money for the purposes for which it was paid over, that defendant still has that $1,000, which they are entitled to recover from the defendant. The plaintiffs also claim that they are entitled to sue in assumpsit on a promise to pay, based upon the fact that they were induced to part with their money by the deceit and fraudulent representations of the defendant. The court has excluded this view of the case, holding that under the common counts the action cannot be maintained on an implied promise to pay based upon deceit and fraud. The plaintiffs, therefore, are restricted in their rights to recover, if they are entitled to recover at all, upon the first theory which I have stated. It is upon this plaintiffs plant their case. In this case the testimony is substantially all on behalf of the plaintiffs; that introduced on behalf of the defendant amplifying, extending, and explaining facts which were not shown in the plaintiffs' testimony, apparently not denying any of the testimony of the plaintiffs, nor was defendant's testimony contradicted by the testimony of the plaintiffs."

After stating further that there was nothing to show that at the time the money was paid to the defendant there was any syndicate in existence of which defendant could be the agent, he said that in the light of the testimony, including the receipt given by him for the money, he received it as a custodian, to be used in payment of the one sixty-fifth interest in the syndicate to purchase these mines at the price of $60,000. Continuing, he said:

"So that when he represented to Barbour and Rexford, and got their money as custodian, it was for the purpose of putting it into this group of mines at a price which he represented to them, and when they put up their $1,000, it was for the purpose of going into a proposition such as he represented to them. It appears as a fact in this case that the Sapphire group of mines was not the group of mines which he represented them to be. While it was the same property, the price or value was a feature of that property, and when it differs from that which is represented as the price or value, it ceases to be the property

represented by Hurlburt. So that I charge you, gentlemen, as a matter of law, that at the time of the payment of this $1,000 by Barbour and Rexford, it was given to Mr. Hurlburt to hold as their agent until such time as a syndicate was formed to purchase the Sapphire group of mines, having an actual selling price to the syndicate by the actual owner at that time of $60,000. It was not to be paid by the agent to the syndicate to purchase the Sapphire group of mines in British Columbia, having a selling price of $10,000 or $25,000 from the owner to the syndicate. If this were as far as the testimony had developed the case at this time, a verdict would be directed in favor of the plaintiffs and against the defendant for the amount which they put up, and which was not appropriated to the purpose for which it was put up."

Continuing, he said:

"Other features of the case were developed, and we will now proceed to consider those. It appears that in the original talk it was contemplated that a corporation be formed to take this property over from the syndicate. It appears, also, from the testimony, that a corporation known as the Sapphire Gold Mines, Limited, was organized. It appears, also, that the plaintiffs in this case took part in the organization of that company. It appears, also, that a resolution was passed by that company, directing the acquisition of the Sapphire mines, and to pay therefor the entire capitalization of the company. The meeting at which this resolution was passed was participated in by one of the members of plaintiffs' firm. It also appears from the testimony that not until some time after the 1st of August did the plaintiffs know that the owner under the option—the original option—was selling the Sapphire group of mines for less than $60,000, or selling it for $10,000 or $25,000. It therefore appears that at the time of the organization of this company they did not know these facts with regard to this mine, and their direction or the direction of the company for the acquisition of this mine, being participated in by Barbour and Rexford, must be construed as a direction to purchase the group of Sapphire mines, such as the defendant represented them to be, viz., having a selling value from the original owner of $60,000. They did not direct the purchase of a $10,000 Sapphire mine, or Sapphire mines having only a value of $10,000 or $25,000. This arrangement and the organiza-

tion of the corporation and its acquisition of the mines, while it was contemplated at the time of the organization or original subscription of February 18th, is not a part of that transaction. The money was paid for the purchase of an interest in a syndicate, and not in the corporation—a 1/65 interest in the syndicate, which was to take over these mines. If the defendant in this case had done his duty by the plaintiffs, he would not have invested that money, or turned the money over for the payment of an interest in the Sapphire mining syndicate, for a mine having a selling value of $10,000. If he had done that, the corporation was in no situation to purchase these mines from the syndicate. While this was, in effect, the scheme, the consummation of it and the organization and acquisition by the corporation would not have been possible if this money were only appropriated in the direction for which it was directed to be appropriated by Barbour and Rexford, and that is for the acquisition of an interest in a syndicate to purchase a $60,000 Sapphire group of mines. While Barbour and Rexford obtained an interest in the corporation, and perhaps indirectly obtained an interest in this group of mines, yet, when they discovered the situation, they at once wrote a letter rescinding the action, or disclaiming the transaction. At that time the defendant was not in Michigan. He was not where a tender could be made with reasonable ease. He did not return to this State until after this suit was commenced. A tender was made of an assignment of whatever interest Barbour and Rexford had by reason of this transaction. While the question of fraud and deceit does not enter into this case, yet whatever situation Barbour and Rexford are in today is by reason of the conduct of the defendant in this case, and all that he can reasonably expect is to acquire whatever interest they had; they having disclaimed to be bound by anything which was done. In view of the circumstances, gentlemen, the plaintiffs having made a tender of whatever they had and an assignment of whatever they have to the defendant, they are in a position to recover the money which they turned over to Mr. Hurlburt to use for a certain purpose. Having never used it for that purpose, he now holds this money for their use and benefit, and they are entitled to recover the amount, with interest on the same from September 20, 1902, the date of the commencement of this suit. I direct a verdict for the plaintiffs against the defendant for the sum of $1,033.32."

Upon the testimony, all of which we feel justified in saying is in the record, it is conclusively shown that the defendant obtained the money in question through misrepresentation and deceit. We have no hesitation in saying that contract relations existed between the parties, in accordance with which the plaintiffs paid, and he received, the money. The agreement was that he should use it, in connection with a sufficient amount of other money to make $60,000, in payment to Dempster of $55,000 for the title to the mines, and $5,000 was to be reserved as cash for developing purposes, presumably to be paid to the corporation when formed for that purpose. Plaintiffs' money was to pay for one sixty-fifth interest. At this time defendant made no promise to a syndicate or corporation. It was a promise to take plaintiffs' money, and make a certain disposition of it, and he was accountable to them if he did not. Whatever claim other investors or the corporation subsequently had could be enforced by it against the plaintiffs, perhaps, but not against the defendant. When the fraud was discovered, the property had been procured and deeded to the corporation. The plaintiffs were practically in possession of the one sixty-fifth interest through their interest in the corporation which held the deed. Three courses were open to them. One was to promptly rescind the contract, and recover the money which had been fraudulently obtained. But the evidence shows that this was not done. Complaint was made and correspondence had saying that the best thing for defendant to do was to send $2,000 to cover this and other subscriptions, but not until after the trial had begun was there a notice of rescission, with an offer to put defendant in statu quo, as nearly as practicable. The court, therefore, rightly excluded the theory of rescission. The plaintiffs also had a right of action to recover damages for the fraud or deceit either through an action on the case or an action of assumpsit, under 3 Comp. Laws, § 10421. In neither of these cases would the common counts be a proper declaration. See *Hallett* v. *Gordon*, 128 Mich. 364 (87 N. W.

261); *Anderson Carriage Co.* v. *Pungs*, 134 Mich. 79 (95 N. W. 985). The third remedy rests on the theory of an affirmation of the purchase at the price actually paid, and the recovery back from the defendant of the money not used in accordance with the contract. We see no reason why such recovery could not be had upon the common counts. It is said that the bill of particulars does not cover such a theory, but we think otherwise. It is as follows:

"Money received by defendant as plaintiffs' agent or custodian for the purpose of paying for 1/65 interest in the syndicate to purchase the Sapphire group of mines, situated near Slocan City, British Columbia, $1,000. Interest thereon."

It is not inaccurate to say that defendant received the money as agent or custodian. Plaintiffs were not purchasing from him, for he had nothing to sell. They were associated with him in the purchase and proposed scheme, and intrusted their money to him for the agreed purpose. Had he been unable to purchase the mines, they would have been entitled to recover it from him.

There are many assignments of error upon rulings and requests to charge in this case that need not be discussed. It seems obvious that the court should not have directed a verdict for the defendant. It is possible that he might properly have directed a verdict for the plaintiffs for some sum, representing the unexpended money, or, had he been requested, he might have permitted an amendment of the declaration, and left the case to the jury under the statute cited; but we think the theory adopted in the charge erroneous. The plaintiffs had received the property. They were not entitled to keep it, and also recover back the full amount of money paid to defendant.

The judgment is reversed, and a new trial directed.

The other Justices concurred.

137 541
141 s 21
142 s 268

COMSTOCK *v.* TOWNSHIP OF GEORGETOWN.

1. DAMAGES—PLEADING AND PROOF—NATURAL EFFECT OF ALLEGED INJURY.
   Under a declaration alleging injury to an arm, the effect of such injury on the use of the hand may be shown.

2. SAME.
   Under a declaration alleging that plaintiff's face was cut and bruised, it may be shown that this affected his mouth, so that he could not open it, and, as a consequence, his speech and ability to eat were affected.

3. EVIDENCE—HEARSAY—EXPRESSIONS OF PAIN.
   Expressions of pain, vocal or otherwise, made to physicians called by plaintiff, not to give medical aid, but to make up medical testimony, are inadmissible.

4. BRIDGES—EVIDENCE—RELEVANCY—SETTLEMENT WITH OTHERS.
   In an action against a township for injuries received from the breaking of a bridge by a traction engine, plaintiff, who was driving it, cannot show that the township has paid the owner for taking it from the stream.

5. EVIDENCE—OPINIONS AND CONCLUSIONS.
   In an action against a township for injury from the breaking of a bridge, witnesses may not testify that the bridge was reasonably safe for public travel; that being the question for the jury.

6. BRIDGES—DEFECTS—NEGLIGENCE—EVIDENCE.
   Where plaintiff drove an engine, with a tank full of water, on defendant's bridge, which broke thereunder, evidence that it was the general practice of those having such engines not to take tanks on bridges with the engines, is competent on the question of defendant's negligence and plaintiff's contributory negligence.

7. SAME—WARNING—CASUALTY.
   Where plaintiff, before driving an engine on defendant's bridge, was warned by the highway commissioner that the bridge was of doubtful strength, and advised to use planks on it—the commissioner expressing the opinion that it would be safe if he kept on the planks, and that probably it would be

safe anyway—and planks were used, but the engine ran off of them, thus causing the accident, defendant was not liable, though the running off of the planks was not due to any negligence of the plaintiff; the accident in such case being but a casualty, and defendant not being an insurer.

8. SAME—CARE REQUIRED—INSTRUCTIONS.
Instructions as to the care required of a township in maintaining its bridges examined and *held* as favorable to the township as it was entitled to.

9. DAMAGES—PLEADING AND PROOF—AGGRAVATION OF EXISTING INJURY.
Under a declaration alleging physical injuries, whereby plaintiff became sore and lame and permanently injured, recovery may be had for rheumatism ascribable to the accident, located in the alleged injured parts, though recovery cannot be had for a mere aggravation of rheumatism, this not being alluded to in the declaration.

10. BRIDGES—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
An instruction, in an action for injury from the breaking of a bridge while plaintiff was driving an engine over it, that plaintiff was guilty of contributory negligence in attempting to drive the engine over the bridge without unhitching the water tank thereof, is properly refused, the question of contributory negligence being for the jury.

11. SAME—NOTICE OF DEFECT—INSTRUCTIONS.
An instruction as to latent defects in defendant's bridge not being notice to it, is properly refused as inapplicable, where it appears that defendant had notice of the defects, and claimed to have informed plaintiff thereof.

12. TRIAL—INSTRUCTIONS—REQUESTS.
Requests to charge that are sufficiently covered by the general charge are properly refused.

Error to Ottawa; Padgham, J. Submitted April 15, 1904. (Docket No. 73.) Decided September 14, 1904.

Case by Ardon B. Comstock against the township of Georgetown for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Walter I. Lillie (*Charles O. Smedley*, of counsel), for appellant.

Lombard & Hext, for appellee.

HOOKER, J. The plaintiff was injured while driving a traction engine which broke through a bridge which it was the defendant's duty to maintain. The action is based upon alleged negligence of the defendant's officers in allowing certain partially decayed stringers to remain in the bridge. There is some testimony that one or more of the officers had been informed that the stringers were affected to some degree by rot, and the question of notice, as well as the degree of decay, and the propriety of permitting them to remain, were questions for the jury. A verdict being rendered in favor of the plaintiff, the defendant has brought error. Counsel have grouped their numerous assignments of error, and, for convenience, the facts pertinent to each question will be stated in connection therewith.

(1) The questions raised under this class of assignments relate to the introduction of testimony as to injuries, and are based upon the claim that the declaration did not warrant proof that plaintiff's hand and arm were injured; that his face was cut; that his mouth "did not work right," and could not be controlled, and that his speech was affected, and that his chin, lips, and nerves were affected; that numbness of the parts was produced, and a thickening of ligaments of the wrist, affecting the use of the tendons. The declaration, as amended, alleged:

"And he, the said plaintiff, without any fault or negligence on his part, was then and there thrown with great force and violence from and off his seat upon said engine, and upon and against said engine and water-tank wagon and timbers forming said bridge, and the said engine, water-tank wagon and timbers, then and there, because of the premises aforesaid, and without any fault or negligence on the part of the said plaintiff, struck, bruised, and wounded the said plaintiff upon and about his face, head, back, shoulders, spine, and body, and by means of the several premises aforesaid the said plaintiff was then and

there cut, burned, bruised, hurt, and wounded, and permanently injured about his face, head, back, shoulders, left arm, spine, and body, and on account of which said injuries the said plaintiff became sick, sore, lame, and disordered, and permanently injured in and about his nervous system, face, head, back, neck, shoulders, spine, and body, and has so remained for a long time, to wit, from thence hitherto, during all of which time he has thereby suffered great pain, distress, and mortification, and has been from the time of said injury and will continue to be prevented from performing his usual occupation and has been prevented from earning large sums of money, to wit, two dollars per day, from the time of said injury hitherto, and will continue to be so prevented from performing his usual labor and avocation in a large degree, to wit, during the remainder of his natural life, and has, because of the premises aforesaid, been greatly depreciated in his earning capacity and ability to labor, and has heretofore since the injury been confined to the bed for the period of, to wit, three weeks, and entirely unable to earn any sum of money whatever, which said time was worth the sum of two dollars per day, and will hereafter during his natural life suffer great pain, distress, and mortification, and was thereby and will continue to be thereby permanently prevented from carrying on his business of a farmer and thresher, in which, to wit, on the day and year aforesaid, he was engaged in active work, and from which he was making large gains and proceeds, to wit, fifteen hundred dollars ($1,500) per annum, and was by means of the premises also obliged to lay out and pay large sums of money, amounting to, to wit, the sum of five hundred dollars ($500), in and about endeavoring to be healed and cured of his said wounds, injuries, sickness, and disorder, and will continue to be obliged to lay out and pay large sums of money therefor."

One Dr. Walkley, who never saw the plaintiff until a few days before he was called as a witness, was allowed to testify that he "made an examination of his physical condition." Among other things he said:

"He stood right in front of me. I could tell it was swollen by the abrupt raising. It wasn't symmetrical, like the other shoulder. I examined the spine, and found just one tender point—the seventh cervical vertebra.

"*Q.* How could you tell that was sore and tender?

"*A.* Well, he flinched when I was examining it, and he didn't flinch at any of the others, and he said it was sore.

"*Mr. Smedley:* I object to what he said, and move to strike it out.

"*The Court:* Strike it out.

"*Mr. Smedley:* I move that the other be stricken out —that he flinched. He went to this doctor for the purpose of using him as a witness, and it is incompetent for the doctor to testify to anything the plaintiff did—if he said anything or if he flinched. He must testify to things he knows of his own knowledge. He says he learned it was tender because the man flinched, and it is incompetent.

"*The Court:* I will let it stand.

"*Mr. Smedley:* Note an exception.

"*Q.* I will ask you, doctor, whether, from your observation of the man, and the nature of the examination you made—whether, in your judgment, he was feigning that tenderness, or whether it was real?

"*Mr. Smedley:* I object to that as incompetent.

"*The Court:* He may answer.

"*Mr. Smedley:* Note an exception.

"*A.* I think it was real, for he flinched so very prompt.

"*Q.* It came on time?

"*A.* It came on time, and he didn't know where I was going to touch him next."

Dr. Wedgewood was allowed to testify that a week before the trial he made an examination of him, and gave him some medicine; that "he had a slight fever that particular morning, and the pulse slightly accelerated;" and that "he found him tender through the neck and shoulder, and apparently suffering a great deal of pain." This being objected to, again counsel for plaintiff said:

"*Q.* I will modify the form of the question, and ask you— I think you stated a moment ago you found tender spots. Could you tell from his actions and appearance whether or not your examination of those parts produced pain?

"*Mr. Smedley:* I object to that as incompetent.

"*The Court:* I think he may answer.

"*Mr. Smedley:* Note an exception.

"*A.* They did— The examination did produce pain.

"*Q.* How could you tell that, doctor?

"*A.* A man naturally would—

"*Mr. Smedley:* I object to what a man naturally would do. Let him state what he found and what he saw.

"*A.* Well, I saw, by pressure and percussion over the neck, back, and shoulder, that the man flinched, and gave signs to me that he was sore and suffering pain.

"*Mr. Smedley:* I object to that, and move to strike it out—that he gave signs to him that he was sore and suffering pain.

"*Mr. Lombard:* I will ask what the doctor means by that.

"*The Court:* Let it stand at present. Go on.

"*Mr. Smedley:* Note an exception.

"*Q.* In your judgment, doctor, was he actually sore, or feigning?

"*Mr. Smedley:* I object to that as incompetent. Let him state what he saw.

"*The Court:* He may answer that.

"*Mr. Smedley:* Note an exception.

"*A.* It appeared to me he was sore, and not feigning his soreness.

"*Q.* Did you treat him that morning?

"*A.* I did."

The trial was between four and five months after the accident.

(2) The assignments in the second class relate to testimony given by physicians against defendant's objection. One Dr. Wedgewood was called to treat the plaintiff at the time of the accident and gave testimony regarding his condition and treatment immediately after the accident, and until his convalescence.

(3) Error is assigned to the exclusion of the answer to questions put to defendant's witnesses—e. g.:

"Was that bridge reasonably safe and fit for travel by the public?"

And:

"*Q.* Have you had any experience in traveling with threshing outfits?

"*A.* I have not.

"*Q.* Have you had any experience in knowing and testing the strength of timber?

"*A.* Not to any great extent.

"*Q.* I will ask you whether, in your opinion, that bridge, as you saw it the next day after the accident, would have been strong enough to stand the public travel of any vehicles that was used in 1895?

"*Mr. Lombard:* Objected to as incompetent. That is a conclusion.

"*The Court:* That would be calling for a conclusion, purely.

"*Mr. Smedley:* Note an exception."

(4) Defendant sought to show that it was the general practice by those having traction engines not to take tanks upon the bridges with the engines, in support of the claim that plaintiff was negligent in putting the tank on the bridge with the engine, thereby increasing the load upon the bridge some 2,000 or 3,000 pounds. This was excluded.

(5) It appeared by the testimony that the engine was heavier than any other in use in that neighborhood, and that the tank was unusually heavy. It appeared that, before reaching the bridge, defendant's highway commissioner had given plaintiff a warning about this bridge, and advised the use of planks if he should attempt to cross it.

The plaintiff testified:

"There were four run plank, laid end to end. I felt it when the engine went down. It went down all at once. I didn't have time to jump and get off. I didn't hear the timbers crack. I never examined the bridge after this went down. I helped place the run plank. I can't tell from the picture whether the east run plank is under the wheel or not. The west one is."

Fred Kort, owner of the engine, testified:

"After the bridge broke, the wheels on the west side of the engine remained on the planks, and the wheels on the east side was off the plank; that is, the drive wheel. The north end of the run plank was on the west side of the east drive wheel, next to the boiler."

And again:

"I should think that engine weighed seven tons. We tried to have it weighed last fall in Grand Rapids. The scales would weigh something over twelve thousand pounds,

and it wouldn't weigh this engine. We left the countershaft and counterwheel and gearing at the bridge, when we took the engine, and had it weighed, and, with all that iron off, the scales wouldn't tell."

And:

"We didn't try to lighten the load at all."

And:

"It went down quick; yes, sir."

Kort then follows that up by apparently trying to show that he saw the east drive wheel on the plank when it started to go down, but admits that the north span of the bridge was as old as the south span, and that they came across the north span all right.

Clarence Comstock testified:

"I was on the east side of the water tank when the bridge went down. I saw the plank was under the drive wheels when they went down. * * * No one else in the neighborhood owns one as heavy. The rims of the wheels in this are more than a foot wide. That one is heavier than other engines used in that vicinity. * * * When the bridge broke, the plank came up four or five feet back of the center abutment. The stringers made them come up. They didn't break off at the center stringer. It was strong enough to raise the plank of the whole bridge back there at least four or five feet."

Fred Vander Veen testified:

"The bridge went right off just like a cannon. It never gave any warning at all. It took a sudden drop right down."

Peter Balkema testified:

"The west drive wheel was on the plank. Instead of the east run plank being under the wheel, it had gotten from under, or was under towards the boiler. The west run plank broke under the drive wheel—didn't break off."

And:

"I examined the run plank on the east side at the point about the drive wheel. It laid beside the wheel and there

were lug marks about three feet from the end, and outward like, and down at the end, as though it had chugged over—slid over and down. They were not of the same nature as the others on the board. These lug marks were not found the whole length of the plank which it had been over before, but it was bruised and torn as though the engine chugged over as it came down; and I took that as the reason for the plank being from under the wheel at the time."

Orrin Comstock testified:

"The wheel had slipped off the run plank—was right under the cog-wheel. The plank had slipped on the inside. There were lug marks on the plank. So I say, according to my judgment, that in falling, or some way, I don't know how— It looked to me that it jarred off or jumped off in some way. I don't know how it was done. The marks looked as though they might have scraped."

John M. Quigley testified:

"The east run plank lay lengthwise inside of the wheels on the west side of the drive wheel under the boiler. I examined the plank. It showed he had run up on them about two feet and a half, and the marks were on where the lugs had slipped off and dropped off from the plank. I called the attention of the town board to that."

And this witness further testified that Clarence Comstock said to him when they were looking the work over:

"By God! John, that bridge would have carried that engine all right if we hadn't taken a drop and went off from that plank."

And the same witness testified on redirect examination:

"None of the stringers that broke when the engine went down were broken on the stone wall—the south abutment. They were broken in the center."

The court was requested to charge the jury in relation to this subject as follows:

"If you should find from the evidence in this case that the engine, in passing over said bridge on said run plank, passed in such a manner that the east drive wheel slipped off from the run plank onto the main planks of the bridge

a distance of about three inches, and that at that time the bridge broke, and the engine and tank went down together, then I charge you that such breaking would be no fault on the part of the township; and your verdict would be, 'No cause of action.'"

The court did not give this request, but instructed the jury that:

"There has been some evidence in this case that there were indications that the east drive wheel of this engine ran off the run plank; that, when the accident was over, it was discovered that this plank was not under the east drive wheel; and that there were marks on said plank which would indicate that the drive wheel had run off and dropped onto the bridge. Now, if you find that to be a fact—if you find that the drive wheel did run off of this plank because of carelessness or negligence on plaintiff's part in driving the engine, and dropping three inches onto the bridge, and that the dropping of this heavy weight off of the plank is what caused the bridge to go down—then I charge you that the plaintiff cannot recover. But if you should find that the wheel run off of the plank while the plaintiff was carefully and cautiously running the engine, and without his fault, then such dropping off would not prevent his recovery, so far as this point is concerned."

(6) The plaintiff requested and the court instructed the jury that:

"'Reasonable repair' and 'reasonably safe' mean what the terms imply—in other words, that the timbers of the bridge are reasonably sound and strong, and in a good condition to carry safely a load as heavy as bridges constructed in like manner, of equally as large timbers, ought to carry when reasonably sound and in a reasonable state of repair."

(7) The court also gave the following requests of plaintiff:

"If you find from the evidence in the case that the bridge in question would have been sufficiently strong to hold up the engine and water tank, attached as they were, had the bridge been in a reasonable state of repair, the plaintiff had a right to cross it with the engine and tank in the manner in which he attempted to. * * *

"If this bridge in question, when in a reasonable state of repair, would have borne the load safely, then the weight of this engine and water tank, as compared with other engines and water tanks, would be immaterial, and would make no difference in this case."

(8) The court refused the following request made by defendant's counsel:

"Every man is presumed, under the law, to use ordinary care and caution in protecting himself from harm or injury. That is the duty of every man to avoid danger, and to keep himself from being injured. Actual notice is not required to be given to the traveler on a highway of every specific obstruction. It is enough if he has knowledge that there is a probability of danger; even less—if he has such notice or knowledge of such facts as ought to put him on inquiry. Such notice or knowledge of obstructions or defects in a highway need not be as specific to a traveler in broad daylight as in the night, because a traveler in broad daylight, after having notice or knowledge of facts as ought to put him on inquiry, has the opportunity to observe, and, having the opportunity, it becomes his duty, in order to save himself from injury, to make proper investigation; and if he neglects to make an investigation of a bridge or highway, or if he does investigate, and after such investigation he attempts to cross a bridge or to travel over a highway, having notice or knowledge of such facts as ought to put him on inquiry, he crosses such bridge or travels such highway at his own risk, and cannot recover if injured."

He gave the following, offered by plaintiff's counsel:

"If you find from all the evidence in the case that the plaintiff had no knowledge that the bridge in question was out of repair and unsafe, and you further find that, just before going upon the bridge at the time in question, he met the highway commissioner, who then told plaintiff that he had just come from the bridge, and instructed the plaintiff and his associates to take the two run plank which were at the Wiersam bridge to the big bridge; that there were two planks there; to lay down the four planks, and to run onto the last two, then carry the other two ahead; that they would go over all right; that he thought they would anyway, but they had better use the planks to make sure—the plaintiff had a right to rely upon the in-

formation furnished, and instructions given by the highway commissioner. * * *

"The plaintiff, if he had no actual notice that the timbers of the bridge were decayed, or that the bridge was out of reasonable repair, had a right to rely upon the information and instructions received from the highway commissioner on the same day, and shortly before attempting to cross the bridge. It was the duty of the highway commissioner to see that the bridge was kept in a reasonable state of repair, and reasonably safe and convenient for public travel; and if you find that the said commissioner stated to the plaintiff, or in his hearing, that he had just come from the bridge, the plaintiff had a right to presume that said commissioner knew the condition of the bridge, and had a right to rely upon the information and instructions given to him or in his hearing concerning the condition of the bridge, and the manner or method to be pursued by them in crossing the same."

(9) The court charged that:

"If you should find for the plaintiff, and should further find that because of the injuries received, at the time complained of, to his arm, shoulder, back, spine, and neck, he became lame and sore in and about the same, and has suffered any pain, or will continue to suffer pain, in the same, the plaintiff will be entitled to recover full compensation therefor, even though the same be of a rheumatic nature, providing you find the same has affected or become seated in the part mentioned because of the said injuries received."

The amended declaration states:

"Without any fault or negligence on the part of the said plaintiff, struck, bruised, and wounded the said plaintiff upon and about his face, head, back, shoulders, spine, and body, and, by means of the several premises aforesaid, the said plaintiff was then and there cut, burned, bruised, hurt, and wounded, and permanently injured about his face, head, back, shoulders, left arm, spine, and body, and on account of which said injuries the said plaintiff became sick, sore, lame, and disordered, and permanently injured in and about his nervous system, face, head, back, neck, shoulders, spine, and body, and has so remained for a long time, to wit, from thence hitherto."

Plaintiff testified:

"I might have had rheumatism for five years. Don't know how bad. Had it in my hips, mostly, and one side of my back. Just streaked across the point of my hips and down part way in my legs. It used to streak down, but never went up. I don't remember, but I might have limped a little from the effects of rheumatism five years ago. Sometimes I have it worse than others. I don't hitch unless I have rheumatism. When it hurts me I limp, and whenever I limp it is on account of rheumatism."

(10) Error is assigned upon the refusal to give the following requests bearing upon the question of contributory negligence:

"I charge you that the evidence in this case shows that the plaintiff was guilty of negligence in attempting to cross this bridge without unhitching the water tank, and that his negligence contributed to the injury, and therefore the plaintiff cannot recover, and your verdict should be, 'No cause of action.'

"It was the duty of the plaintiff, when he was notified and warned by the highway commissioner in regard to this bridge, to use more than ordinary care in crossing it; and even the warning given to the plaintiff by the highway commissioner, according to the plaintiff's own testimony, was sufficient notice to put him on his guard, and, after receiving the notice that he says he received, if you find that the plaintiff still attempted to cross this bridge with his heavy engine without unhitching the iron water tank, and thus lightening the load, he was guilty of contributory negligence, and cannot recover, and your verdict should be, 'No cause of action.'

"If you find that the plaintiff was notified that the bridge was unsafe on account of the defective stone wall having caved in, yet, even though the accident was not caused on account of the defective stone wall, still this notice was warning enough to put the plaintiff on inquiry, and it was his duty to make an examination of the bridge, and, if he was not sure, it was his duty to lighten the load and unhitch the heavy water tank before attempting to cross the bridge; and if you find that he did not do these things, nor took the ordinary precautions that a prudent man would take, then he is guilty of negligence, and he cannot recover, even although the township was partially to blame.

"The defendant in this case claims that the plaintiff, Ardon B. Comstock, was informed by the highway commissioner, Mr. Quigley, before the plaintiff attempted to cross the bridge in question, that the same was not in good condition for the passage over it of so heavy an outfit as the plaintiff was then running, and that the plaintiff was advised to examine the bridge and determine for himself, and that a set of run planks had been provided for use on bridges on the highway on which this bridge was located, and that if the plaintiff satisfied himself after investigation that the bridge was strong enough, by the use of said run planks, to use the same, but that his crossing said bridge would be at his own risk; that said engine was at least a nine-ton engine, and that ordinary engines used in that vicinity were of about six tons' weight; that attached to this nine-ton engine which the plaintiff was running was a water tank weighing between two and three tons, making a total weight of eleven or twelve tons; that not only did the highway commissioner notify the plaintiff, but that before the notice given by the commissioner, and while the plaintiff was at Mrs. Van Single's, the plaintiff stated that the bridge was in poor condition, but that he supposed Quigley had fixed it, but that he was going across anyhow; that when the plaintiff arrived at the said bridge he got off from said engine, and that others who were with him got off from said engine, and that some examined the bridge, and that after the examination of said bridge the plaintiff made the remark, 'Well, by God! I am going to get on and take her across,' and that after making that remark he got onto said engine and started to take said engine and tank across; that in going across, and while on the south span of said bridge, the east drive wheel of said engine slipped off the run plank, and took a drop of at least three inches, and that this drop caused said bridge to give way under the drive wheels of said engine; that afterwards, in conversation with one Otis Lowing, the said plaintiff admitted that the breaking of said bridge and the injury to him was his own fault; and that afterwards the said plaintiff admitted to one E. C. Conklin that the injury he received from the breaking of said bridge was his own fault, and that he had been warned by the commissioner in reference to said bridge.

"I instruct you that, although you may believe from the evidence that the defendant township had negligently suffered this bridge to be and remain in an unsafe condi-

tion for driving traction engines of the weight of this engine upon and over it, still, if you also believe from the evidence that such unsafe condition of the bridge was known to the plaintiff before and at the time he attempted to drive this engine upon and over the bridge, and if, knowing that said bridge was unsafe and out of repair, he attempted to drive this engine upon and over said bridge, and did drive it upon the bridge, he would not be using due care and prudence to avoid an injury, which the law in this State requires, but plaintiff would in such case be guilty of contributory negligence; and, if you so find the facts to be, you must find a verdict for the defendant, 'No cause of action.'"

(13) Counsel for defendant requested the following instructions:

"The burden of proof is upon the plaintiff throughout the whole case. He must satisfy you by a preponderance of the evidence that the injury complained of was caused by the negligence of the defendant township. He must satisfy you by a preponderance of the evidence that, if the bridge was unsafe, the defendant township had notice of it, and had reasonable time to repair the same after such notice. He must satisfy you by a preponderance of the evidence that he (the plaintiff) had no notice of the unsound condition of the bridge, if the same was unsound, and that he took ordinary care and precautions to avoid any injury. And he must satisfy you by a preponderance of the evidence that the injury he claims to have received was not caused by his own fault or negligence. And unless he does so satisfy you by a preponderance of the evidence, then your verdict will be, 'No cause of action.'"

(14) Error is assigned on the failure to give the following request:

"Township officers are not expected to have the knowledge of experts, and they are not obliged to use the same knowledge that an expert would use. The law only requires them to use such ordinary care as prudent officers would use, and they are not liable for defects in a bridge which are latent—that is, defects which cannot be seen; and if you find that the outside of these timbers looked sound, and, on being tested with an ax, sounded all right, yet, if you find that the interior was rotting to such an ex-

tent it weakened the bridge, still the township is not liable for these defects which cannot be seen by the naked eye, nor discovered by pounding on the timbers with an ax. Therefore you have a right to take into consideration the fact that these rotten spots on the interior of these timbers are not notice to the officers of the township."

(15) Defendant's 23d request was as follows:

"I charge you, as a matter of law, that the failure of a township to keep a bridge in a reasonably safe condition for public travel is not ground of liability, and the plaintiff cannot recover unless knowledge or notice of the existence of the defects which caused the bridge to break down was given to the township officers, and an opportunity to remedy it be shown, and that such notice cannot be inferred from a mere failure to seasonably inspect the bridge."

(16) Defendant's 32d request was as follows:

"There is no general rule for determining when causes are proximate and when remote, but in actions for damages, such as this, it becomes necessary whether, if the plaintiff in the case was guilty of contributory negligence, that negligence was proximate and contributed to the injury; and in this case, if you should find that the defendant township was careless in leaving the bridge in the condition that it was, and at the same time you should find that this carelessness was antecedent to the negligence of the plaintiff—if you should find negligence on the part of the plaintiff—and that the plaintiff might by ordinary care have discovered the failure of the township to use such care in time to have avoided the injury, there can be no recovery, because the intervening negligence of the plaintiff would be the direct and proximate cause of his injury."

It is said that the court erred in refusing to submit the following question to the jury:

"Even although the township might have been to blame, did the conduct of the plaintiff, Ardon B. Comstock, by his recklessness or negligence, have anything to do with causing his injuries?"

Before entering upon a discussion of the various assignments of error, which exceed 90 in number, and the re-

quests to charge, which aggregate upwards of 50 upon both sides, many of them lengthy, and many of them involving a statement of the testimony, or conclusion upon the same, we venture to suggest the annoyance to the trial court of requests of such a character, covering 17 printed pages of the record. It is the province of the jury to pass upon controverted facts, and the court should not be asked to do it. On the other hand, there ought not to be great difficulty in presenting questions of law intelligibly, and so that the court will understand and apply them, without writing a charge for him. The theory of the law is that the court, and not counsel, will prepare the charge; and we cannot wonder that courts are reluctant to impair its directness and lucidity by long requests, many of them argumentative, by reason of their application, or to indulge in the more befogging practice of reading a series of requests for the respective parties as a substitute for a charge. It appears to us that while requests have their office, and there is no intention to indicate an arbitrary limitation upon counsel's exercise of an undoubted right and a useful function, yet we think the requests in this case might have been shorter and fewer without harm to the parties, and possibly without so much danger to the verdict.

1. It is contended that the declaration did not lay a foundation for the proof that:

"That hand you see, I cannot shut it as naturally as I do this one. This is caused by the bruise. I cannot use that arm. I cannot grasp anything with that hand like I can with the other."

And again:

"This cut from my eye down was from that, and over here you can see that scar. The mouth doesn't work right. Any man can see that it affects my speech."

Again, speaking of the injury to the face:

"It [the face] has a hard, numb feeling. It feels hard. * * * I cannot handle my lips, my mouth, anywhere

nigh like I could if I didn't have it. * * * I spit all over. I can't spit like I used to. I slobber all over. I cannot control my lips and mouth in the usual way. * * * My lips— All I could get in my mouth was the flat of a teaspoon—the handle. That was all I could get between my teeth. All the way I could eat anything was just to suck it in—just milk. That is all I could get into my mouth."

The declaration says nothing about the hand, but it complains of the injury to the arm. In showing the effect of the injury to the muscles, ligaments, and tendons, it appeared that the consequence was an impairment of the hand, which was the natural effect of such injury, and consequently one that defendant should have understood to be covered by the declaration.

The same is true of the cut and bruised face. It affected the mouth, and perhaps every other part of the face. It was competent to show that he could not open his mouth, and, as a consequence, his speech and ability to eat were affected.

We do not discover that any claim is made for an injury to the eye. It was competent to show the cut in the face, and the consequences, such as the scars, numbness, and effect upon the lips. These matters seem well within the rule laid down in the cases of *Montgomery* v. *Railway*, 103 Mich. 46 (61 N. W. 543, 29 L. R. A. 287), and *Snyder* v. *City of Albion*, 113 Mich. 279 (71 N. W. 475).

2. Dr. Walkley was called to show plaintiff's condition shortly before the trial. He saw him first a week before the trial. After testifying to some visible physical conditions that were abnormal, he testified that certain parts were sore and tender, and, when asked how he could tell, said:

"Well, he flinched when I was examining it, and he did not flinch at any of the others, and he said it was sore. * * * I think it was real, for he flinched so very prompt.

"*Q.* It came on time?

"*A.* It came on time, and he didn't know where I was going to touch him next."

On cross-examination he said:

"All I know about its being tender is that he flinched when I touched him."

The judge struck out what the plaintiff had said about its being sore, but allowed the testimony as to his flinching to stand. This witness was not called to treat the plaintiff, and it is inferable that his examination was for the purpose of obtaining information as a basis for testimony to be given at the instance of the plaintiff.

In the case of *Grand Rapids, etc., R. Co.* v. *Huntley*, 38 Mich. 544 (31 Am. Rep. 321), the court was considering the admissibility of exclamations of pain, and said that:

"It is difficult to lay down any very clear line of admission or exclusion where the exclamation refers to the feelings of the moment. But we think it would not be safe to receive such testimony in any case where it is not the natural and ordinary expression of pain, called out without purpose or in the course of medical treatment. The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, and which, if feigned, he should have skill enough to subject to some test of truth, stand on a footing which removes them, in general, from suspicion. But we cannot think it safe to receive such statements which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here were not called in to aid or give medical treatment. The case had been relinquished long before, as requiring no further attendance. They were sent for merely to enable the plaintiff below to prove her case. The whole course of the plaintiff was taken to no other end. She had in her mind just what expressions her cause required. They were therefore made under a strong temptation to feign suffering, if dishonest, and a hardly less strong tendency, if honest, to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor."

In discussing the principle under which such testimony is admissible, the writer of that opinion shows that:

"To be admissible, such statements must be shown to be

the natural effusions of a party, who not only knows the truth, but who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."

These were limitations on the rule of admissibility, conditions precedent upon which admissibility depended. See authorities there cited.

In *Jones* v. *Village of Portland*, 88 Mich. 602 (50 N. W. 731, 16 L. R. A. 437), in an opinion by the late Mr. Justice CHAMPLIN, the court emphasized the principle and applied the rule enunciated in the former case. In discussing authorities alleged to support the admission of testimony of the character mentioned, he said:

"In each of them also the exclamations were at a time when motives to make testimony favorable to the party in a suit such party had brought or contemplated bringing were absent."

It hardly needs an argument to show that flinching is an expression, if not an exclamation. Like an exclamation, it may be involuntary, or it may be voluntary; and in either case it is in the nature of, or has the effect of, a declaration, and, when taken to indicate suffering, becomes hearsay, if proven by another, and therefore subject to the principle discussed.

In the case of *McKormick* v. *City of West Bay City*, 110 Mich. 270 (68 N. W. 149), Mr. Justice MONTGOMERY so treats such acts. He said:

"So far as expressions or acts of the plaintiff such as could be voluntarily made or simulated were testified to, the testimony was incompetent."

Out of abundant caution, we there reserved the question as to the inflexibility of the rule, having no occasion to hold that in no case could the act be shown; but it was said that in any case "the proof that the flinching is involuntary should be clear, and naturally such exclamations or such acts are subject to be carefully scrutinized, and are open to suspicion."

In *Grand Rapids, etc., R. Co.* v. *Huntley*, 38 Mich. 545 (31 Am. Rep. 321), the court reserved the same question, saying:

"It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain made under circumstances free from suspicion, even post litem motam. The case must at least be a very plain one which will permit this. The present controversy presents no such difficulty. The physicians were called in, not to give medical aid, but to make up medical testimony, and the declarations were made to them while engaged in that work. It would be difficult to find a case more plainly within the mischief of the excluding rule."

The same may be said in this case, i. e., that it is not necessary to decide upon the inflexibility of the rule; but it may also be said that no number of such reservations amount to a *decision* that the rule is not inflexible, and the danger of such reservations being treated as a negative authority and given undue weight has been adverted to in many cases. Much law has a no more substantial basis. This testimony was not admissible.

Another error is found in the admission of testimony. Counsel for plaintiff were allowed to show that the township board paid for taking the tank and engine out of the stream. That was not admissible. The fact that the township settled with the owner of the engine, if it did so, cannot affect its case with the plaintiff. *Fulton Iron & Engine Works* v. *Township of Kimball*, 52 Mich. 146 (17 N. W. 733).

3. We think the judge did not err in refusing to allow witnesses to testify that the bridge was reasonably safe. That question was for the jury. The witnesses were not asked whether the bridge was safe for the passage of this engine or for ordinary use, but whether it was "reasonably safe for public travel." This was the standard of safety fixed by law, and, to answer the question, the witness must have determined it for himself.

4. It was competent to show that it was negligent to

take a tank full of water upon the bridge with the engine, and, if it was not customary or necessary to take such heavy loads upon bridges, that fact bore upon the question of defendant's negligence in maintaining a bridge that, while it would carry an engine, would not stand under the added weight of a tank full of water. The common requirements that teams be driven no faster than a walk, and that but 20 head of cattle are permitted upon a bridge together, illustrate the practice of accommodating the load to the bridge which the authorities may reasonably require, and expect if they do not require. If it was true that this outfit was exceptionally heavy, it might be only ordinary prudence to divide the load, and the township might not be negligent in not providing for both at one time. This testimony was admissible.

Again, it bore upon the question of plaintiff's care. It is not a question of his knowledge of a custom, alone, but whether he was as prudent as men generally. In *Aldrich* v. *Monroe*, 60 N. H. 118, it was held competent to show plaintiff's imprudence by evidence that it was customary to chain a wheel in going down a hill, where plaintiff, who did not take this precaution, met with an accident. The question is akin to the custom of railroads, as an evidence of negligence. Good teaming, as well as good railroading, is an element in such cases, if not a standard. See *Kolsti* v. *Railway Co.*, 32 Minn. 133 (19 N. W. 655), where the court said:

"When the question is, did a person use ordinary care in a particular case, the test is the amount of care ordinarily used by men in general in similar circumstances. If it be matter of common knowledge, such amount of care needs no proof. The jury take notice of it. But if it pertained to some special business which the jury cannot be supposed to know, it may be proved."

This testimony was important in connection with the warning that plaintiff received from the highway commissioner that the bridge was in doubtful condition, and, while we are not satisfied to say that he went upon the

bridge at his peril, there is testimony in the case which, if believed, might have convinced the jury of his contributory negligence.

5. Attention has been called to the testimony under this group of assignments, and the request which was refused, and the charge given in relation to it. Here was a bridge of doubtful strength. The plaintiff was so informed, and advised to use planks upon it. The commissioner expressed an opinion that it would be safe if he kept on the planks, and that probably it would be safe anyway. Upon this state of facts, the planks were used; but who was responsible if the engine ran off from the planks, thus causing the accident? The judge charged that the township would be liable in such case, unless such running off was due to plaintiff's negligence. What more should the commissioner have done if the bridge really was capable of carrying the outfit on planks? Wherein can it be said that he was negligent? We are of the opinion that, under such state of facts, this was no more than a casualty, and the court practically made the township an insurer against everything but plaintiff's negligence. The commissioner practically said, "Don't cross that bridge unless you can keep on the planks." The plaintiff now says, "I did not keep on the planks, as you told me to do, but I ran off by accident, without negligence on your part or mine, and therefore you are liable." This is not a sound proposition.

6. We think it unnecessary to comment upon these assignments. The explanation given was as favorable as defendant had a right to expect.

7. The granting of these requests, if not qualified, was error, for the reason that there was evidence which tended to show that plaintiff was admonished of danger. Possibly this defect in the requests was cured elsewhere in the charge, but it is dangerous to give unqualified requests where the proof shows that they should be qualified. It is unnecessary to determine whether they were injurious, as the case must be reversed for other reasons.

9 and 10. We are not satisfied that the case should be

reversed upon these assignments. Apparently the court intended to limit recovery for rheumatism to such as was ascribable to this accident. If, however, the plaintiff already had rheumatism, he could not recover for an aggravation, when there was no allusion to the subject in the declaration. See *Hall* v. *City of Cadillac*, 114 Mich. 99, (72 N. W. 33). The question of contributory negligence was for the jury.

11. This subdivision has been sufficiently discussed in another connection.

12. We have held many times that a township is not an insurer. It ought not to take four argumentative requests to so instruct the jury. We think the court covered this legal proposition in his charge.

13. This request was covered by the charge.

14. Counsel say they were entitled to have this request given, because it was copied from the case of *Township of Medina* v. *Perkins*, 48 Mich. 67 (11 N. W. 810). But it appears that the township officers had notice, and claim to have given information to plaintiff. It was therefore uncalled for.

15 and 16. We think these questions were sufficiently covered by the instructions given.

17. The plaintiff was not injured by this ruling. A substantially similar question was submitted and answered.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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MURPHY v. DOBBEN.

1. DRAINS—ASSESSMENT DISTRICT—BOARD OF REVIEW.
   A board of review, appointed by the judge of probate on appeal from the apportionment of the drain commissioner, has power to add lands to the assessment district laid out by the commissioner.

2. SAME—BOARD OF REVIEW—NOTICE TO LANDOWNERS
   Where persons, whose lands were added to the assessment district by a board of review, are not objecting, the action of the commissioner in disregarding the board's apportionment and making the assessment according to his own, will not be sustained on the theory that no notice was given such persons, where the record shows an adjournment for the purpose of giving notice, though no notice is shown.

3. STATUTES—APPROVAL OF GOVERNOR.
   The fact that the words in the provision of Act No. 272, Pub. Acts 1899, chap. 5, § 5, authorizing the board of review to add lands to an assessment district for the construction of a ditch, are in brackets, is immaterial; they having been in the act as signed by the governor.

4. DRAINS—BOARD OF REVIEW—REPORT.
   That the board of review, appointed by the judge of probate and required to make such changes in the assessment of the drain commissioner for construction of a ditch as they deem just and equitable, merely orders certain changes in the assessment of certain lands, without referring in their report to the lands, the assessment on which is not changed, is immaterial.

5. SAME—SUIT TO SET ASIDE TAX—PARTIES.
   Where plaintiff, in an action against the township treasurer to recover drain taxes paid under protest, joined the drain commissioner as required by section 1 of Act No. 141, Pub. Acts 1899, and afterwards discontinued as to the commissioner at the treasurer's request, the treasurer waives compliance with the statute.

6. SAME—SUIT TO RECOVER TAX—ESTOPPEL.
   The rule in equity that one who stands by and sees an improvement completed without protest will not be relieved of his

share of the burdens, does not apply in an action at law to recover a tax erroneously spread, and paid under protest.

Error to Newaygo; Palmer, J. Submitted May 17, 1904. (Docket No. 102.) Decided September 14, 1904.

Assumpsit by James Murphy against Gerrit Dobben, treasurer of Garfield township, for taxes paid under protest. There was judgment for defendant, and plaintiff brings error. Reversed.

Martin Rozema, for appellant.

George Luton, for appellee.

HOOKER, J. This action is assumpsit. It was begun in justice's court against a township treasurer and county drain commissioner to recover certain drain taxes, paid under protest, by the plaintiff and 15 others, who afterwards assigned their claims to him.

It is admitted that the drain proceedings were regular up to the commissioner's apportionment of benefits. The Butler drain—i. e., the one in question—was laid out and constructed by proceedings instituted in the spring of 1902. The assessment district included 82 parcels of land. One of the interested parties, viz., C. W. Stone, appealed from the drain commissioner's apportionment, and the probate court appointed a board of review. In due time this board filed its report. This report states:

"That at the time and place aforesaid we proceeded to view the grounds and to review the said assessments and apportionments made by said county drain commissioner, and to hear the proofs and allegations of all parties in respect to the matter of said appeal. That in our judgment there is a manifest error and inequality in said assessment and apportionment, and we hereby order the following changes to be made, deeming such changes to be just and equitable, to wit: (Here follow 60 of the descriptions contained in the assessment roll of the drain commissioner in which reductions were made, and 16 descriptions on which the assessments were increased.) That the following

described land, it is determined by said board, on personal examination, should be, and the same are, added to said assessing district, to be assessed at the following per cent., to wit: The S. E. ¼ of the S. W. ¼ of Sec. 24, T. 12 N., R. 14 W., at 2 per cent. The N. W. ¼ of the S. E. ¼, Sec. 24, T. 12 N., R. 14 W., at 1½ per cent. That said board thereupon adjourned said meeting to meet on the 25th day of July, 1902, at 10 o'clock in the forenoon, at the office of Martin Rozema, in the village of Fremont, in said county, in order that notice might be given to the owners of the land so added to said assessing district, as provided by law."

The assessments of the plaintiff and his assignors were diminished by this report.

It does not appear in the case that proof that notice was served upon those whose land was added to the district was returned to the drain commissioner, or that he ever asked for it. On or before September 24, 1902, he filed with the township clerks special assessment rolls, in which the lands were assessed according to his original apportionment, and not in accordance with the report of the board of review. The clerks reported the same to the board of supervisors, who, in the absence of opposition, ordered the drain taxes to be spread in accordance therewith. It appears that the drain cost $1,324, that all was collected and the work completed before the commencement of this suit, and that the plaintiff and his assignors knew that the drain was in process of construction immediately after July 25, 1902. The amount claimed by the plaintiff for himself and his 15 assignors was $136.16.

Upon the trial of the cause in justice's court, at the request, and with the consent, of the defendants, the plaintiff voluntarily discontinued the case against the drain commissioner, and judgment was rendered against the remaining defendant, the township treasurer, to whom the tax had been paid. An appeal to the circuit court was taken by him, when the cause was tried by the court.

The conclusions of law were:

"(1) That the plaintiff is not entitled to recover any

sum whatever from Gerrit Dobben, treasurer of the township of Garfield.

"(2) That Alexander Burrell, drain commissioner, should have been a party to this suit.

"(3) That the defendant is entitled to a judgment of no cause of action, with costs to be taxed against the plaintiff."

The plaintiff brings error.

The order of the board of review was within its powers, and its proceedings were apparently regular, unless it be in relation to the matter of notice to the persons whose lands were added. Proof of such notice is not made. Neither is it shown that it was not given. The order of the board shows an adjournment for the purpose of giving such notice, and it is not a violent assumption to infer it from the record, but whether it was given or not, such persons are not objecting.

It was within the power of the board to add property to the assessment district, the provision permitting it being a part of the act as signed by the governor; in which respect the act differs from that passed upon in *Robertson* v. *Baxter*, 57 Mich. 131 (23 N. W. 711). The fact that the language "acted upon" is in brackets is unimportant. The report of the board of review mentioned only such descriptions as were affected by the changes made. This was not a fatal defect, the law requiring them to make such changes in the assessment of benefits made by the commissioner as they may deem just and equitable, which they did. This report should have been acted upon.

Act No. 141, Pub. Acts 1899, § 17, provides:

"In any suit brought to set aside any drain tax, or in any way attacking the legality of any drain proceedings, the county drain commissioner shall be made a party to said suit."

This section is found in the drain law, and was apparently an attempt to provide for the protection of the public interests in drains. Its effect upon the present litigation need not be considered, for the record shows that the com-

missioner was made a party, and the case was discontinued as to him, at the request of the defendant's counsel. The point should be treated as waived.

The claim is made that the plaintiff should be estopped from asserting a claim to this money under the circumstances. It is the settled rule in equity cases brought by the person taxed that one will not be relieved from his share of the burdens in such cases, and were this an equity proceeding brought by this plaintiff, the rule should be applied to him. *Atwell* v. *Barnes*, 109 Mich. 10 (66 N. W. 583); *Moore* v. *McIntyre*, 110 Mich. 237 (68 N. W. 130); *Township of Walker* v. *Thomas*, 123 Mich. 290 (82 N. W. 48); *Auditor General* v. *Melze*, 124 Mich. 285 (82 N. W. 886); *Wilson* v. *Woolman*, 133 Mich. 350 (94 N. W. 1076); *Township of Swan Creek* v. *Brown*, 130 Mich. 382 (90 N. W. 38). This, however, is not an equity case. This tax was erroneously spread, and being paid under protest, the plaintiff had a right to sue the treasurer, to whom it was paid, for the same. 2 Comp. Laws, § 4359. *Auditor General* v. *Calkins*, 136 Mich. 1 (98 N. W. 742), which discredits the dictum in *Smith* v. *Carlow*, 114 Mich. 70 (72 N. W. 22).

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

WILLIAMS *v.* BROWN.

1. PLEADING—AFFIRMATIVE DEFENSE—NOTICE.

   Cir. Ct. Rule 7, subd. *b*, requiring notice of affirmative defense relied upon to defeat or avoid the legal effect of the cause of action set forth by plaintiff, has no application to actions of trover and replevin where the declaration does not allege plaintiff's source of title.

2. WITNESSES—CROSS-EXAMINATION—TAX STATEMENT—PRIVILEGE.
Under 1 Comp. Laws, § 3846, a tax statement made by a taxpayer may not be used on his cross-examination as a witness on the issue of the value of the property in question.

3. EXEMPTIONS—FRAUDULENT VENDEE—SELECTION—WAIVER.
Whether a fraudulent vendee is entitled to claim the exemption which his fraudulent vendor is entitled to under 3 Comp. Laws, § 10326, or not, no duty to make the selection is imposed by statute on an officer attaching the property on a claim against the vendor, and the vendee must notify the officer, and demand the right of selection, or be held to waive it.

4. FRAUDULENT CONVEYANCES — SALES OF GOODS — CHANGE OF POSSESSION—PRESUMPTIONS.
Section 9520, 3 Comp. Laws, making every sale of goods unaccompanied by immediate delivery and followed by an actual and continued change of possession presumptively fraudulent and void as against the vendor's creditors, applies to prior, as well as subsequent, creditors of the vendor.

Error to Bay; Shepard, J. Submitted June 16, 1904. (Docket No. 28.) Decided September 14, 1904.

Trover by Ira E. Williams against John R. Brown, sheriff of Clare county, for the conversion of certain goods seized on attachment. There was judgment for defendant, and plaintiff brings error. Reversed.

Plaintiff's two sons, trading as Williams Bros., owned and operated a mill, with a store in connection therewith. They did not own the land upon which the mill was situated. They also owned a half interest of the Harrison Cooperage Company, a copartnership. The firm owned the mill and machinery, but not the land on which the mill was located. The sons were married men, with families, and had no other business than that above described, which they had carried on since 1893.

March 21, 1900, the sons executed to the plaintiff a bill of sale of all the above interests, the consideration named being $5,833.73, of which plaintiff claimed he paid $3,000 in cash, and a receipt for $2,833.73, claimed

to be due from them to him. The sons continued in possession of the property, and carried on the business in substantially the same way as before, under power of attorney given them by plaintiff. One Alderton was an indorser for the sons, paid the notes, and on July 27, 1900, brought suit by attachment against the sons, and attached the mill machinery, above described, and the lands, which the sons occupied as homesteads. Soon thereafter plaintiff instituted this suit in trover against the defendant, the sheriff of the county, upon the theory that the defendant had converted the property, and was liable for its value. Defendant attached to his plea a notice that he seized the property under his writ of attachment; that judgment had been rendered for the plaintiff therein; that he could show that the property when seized was not the property of the plaintiff in trover, but was the property of Charles and Lafayette, plaintiff's sons; and that plaintiff, as against the defendant, had no right, title, or interest in said property. Defendant gave evidence tending to show that before Alderton indorsed the notes, plaintiff said to the agent of Mr. Alderton's firm, which was then selling goods to the sons, that the sons did not owe him (plaintiff) anything. The record also states that "the cross-examination of the plaintiff tended to show that there was no indebtedness from Williams Bros. to the plaintiff at the time of the making of the bill of sale of March 21, 1900." The record also states that defendant gave testimony tending to prove that the bill of sale was made with intent to delay, hinder, and defraud their creditors, and that Williams Bros. were not then indebted to the plaintiff in any sum whatever. The jury rendered a verdict for the defendant.

F. A. Lyon, for appellant.

James H. Davitt (*A. J. Lacey*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). Four questions are presented:

(1) Was the notice of special defense sufficient to admit evidence of fraud?

(2) Was certain testimony in regard to tax statements made by Lafayette admissible?

(3) Was plaintiff entitled to recover the value of the exemptions of his sons?

(4) Was the burden of proof upon the plaintiff to show the bona fides of the sale?

1. Plaintiff relies upon Cir. Ct. Rule No. 7 of the revised rules of practice (subdivision "*b*"), which reads as follows:

"An affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, or failure of consideration in whole or in part, and any defense which, by other affirmative matter, seeks to avoid the legal affect of, or defeat the cause of action set forth in plaintiff's declaration, must be plainly set forth in a notice added to the defendant's plea."

The application of the rule to this case would be manifestly unjust. Plaintiff's declaration gives no intimation as to the source of his title. The defendant was not called upon either to plead to, or give proof of, his ground for attacking plaintiff's title until he had shown what his title was. If plaintiff had set forth a special count, alleging the purchase and bill of sale from his sons, the rule would have been applicable, and notice of the fraud would have been necessary. *Wait* v. *Kellogg*, 63 Mich. 144 (30 N. W. 80); *Eureka Iron & Steel Works* v. *Bresnahan*, 66 Mich. 489 (33 N. W. 834). The rule does not cover actions of trover and replevin, where the declaration does not allege plaintiff's source of title. Title in third persons may be shown in actions of trover to defeat plaintiff's action. *Ribble* v. *Lawrence*, 51 Mich. 569 (17 N. W. 60); *Wessels* v. *Beeman*, 87 Mich. 481 (49 N. W. 483).

2. The statute provides that no tax statement made by a taxpayer "shall be used for any other purpose except the making of an assessment for taxes as herein provided,

or for enforcing the provisions of this act." 1 Comp. Laws, § 3846. When the tax statement was offered in evidence, the offer upon objection was withdrawn, and everything that had been said in regard to it stricken out.

Afterwards Lafayette Williams was a witness. The value of these mill properties was evidently considered material as bearing upon the bona fides of the alleged sale. He had testified that their value was from $2,500 to $3,000. The tax statement was then placed in his hands after the court had again ruled it out, and he was asked, and required under objection to testify, what values he then placed upon the properties. These values were very much lower than those to which he had testified on direct examination. The effect was to place the contents of these statements before the jury as effectually as though they had been introduced and read before them. We think this was within the prohibition of the statute. The purpose of the statute evidently is to make such statements privileged, except for the use specified in the statute. The language of the statute is emphatic and unambiguous. It prohibits their use for any other purpose than the making of an assessment and enforcing the provisions of the law. The effect inevitably was to discredit the witness before the jury. It was error to place them in the hands of the witness, and elicit from him their contents. We are unable to say that it was harmless error.

3. It is next urged that plaintiff purchased all the property which his sons had in the business; that he thereby was subrogated to the rights of his sons in the exempt property; that plaintiff had a right to select these exemptions; and that, having made no selection, it was the duty of the attaching officer to set them off to him. No specific articles of this property were exempt, only goods out of a larger bulk were subject to selection as exempt. The sons did not, and were not in position to, ask for exemptions. They remained in possession, sold goods to the amount of $1,000, and paid the money to plaintiff before the attachment was levied. The statute exempts property only to

the debtor, and gives only the debtor or his agent the right of selection. It does not require the attaching or levying officer to select exemptions for any other than the debtor. 3 Comp. Laws, § 10326. The officer could not well know the conditions of the sale between his sons and the plaintiff, or the arrangement, if there was any, in regard to the exemptions. The plaintiff did know, and it was his duty, if he desired to claim exemptions by virtue of his purchase, to notify the officer, and demand the right of selection. Where no duty of selection is imposed upon the officer, the debtor waives his right to the exemption if he fails to demand it. *Stanton* v. *French*, 83 Cal. 194 (23 Pac. 355); *Harrington* v. *Smith*, 14 Colo. 376 (23 Pac. 331, 20 Am. St. Rep. 272). Whether a fraudulent vendee is entitled to claim the exemption of his fraudulent vendor, where the property levied upon is in excess of the exemption, quære; but if he is, inasmuch as the statute imposes no duty upon the officer to make selection in such case, the vendee must notify the officer, or be held to waive his selection.

4. The statute makes every sale of goods unaccompanied by immediate delivery, and followed by an actual and continued change of possession, presumptively fraudulent and void as against the vendor's creditors. 3 Comp. Laws, § 9520. Counsel for the plaintiff contends that where a sale is made after the purchase, there is no such presumption, and the burden of proof is on the attaching or levying creditor. To sustain this contention would virtually nullify the statute. Under it a debtor might purchase goods to a large amount on credit on Monday, on Tuesday execute a bill of sale to a third party, continue in the possession, use, and control of the goods as before the pretended sale, and the statute would make such a sale presumptively honest. The bare statement of the proposition shows its unsoundness. Every such sale is presumptively fraudulent as to all creditors.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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SUDWORTH *v.* MORTON.

1. PLEADING—VARIANCE—FRAUD—AGENTS.
   A declaration for fraud, alleging that false representations were made to plaintiff who paid his money relying thereon, is supported by proof that the representations were made to and the money paid by plaintiff's duly authorized agent.

2. FRAUD—COLLUSION—JOINT DEFENDANTS.
   Evidence in an action, on the ground of fraud, against a land company and its agent to recover money paid for a tax title examined, and *held* to warrant recovery against both on the ground of collusion in misrepresenting facts.

3. STIPULATIONS—ENFORCEABILITY.
   Oral stipulations between counsel to admit the genuineness of certain signatures are unenforceable.

4. APPEAL AND ERROR — CURING ERROR — FACT SUFFICIENTLY PROVED.
   Efforts of counsel to show an oral stipulation of the genuineness of certain signatures are not prejudicial where their genuineness is sufficiently proved by oral testimony.

5. FRAUD—EVIDENCE—ACTS OF JOINT DEFENDANTS.
   Where, in an action to recover money alleged to have been paid for a tax title in reliance on fraudulent representations, the evidence warrants a finding that both defendants engaged in a common enterprise to obtain the money so paid, the acts of each are admissible against the other.

Error to Washtenaw; Kinne, J. Submitted July 27, 1904. (Docket No. 88.) Decided September 14, 1904.

Case by George B. Sudworth against Hudson T. Morton and the Wolverine Land Company for fraud and deceit. There was judgment for plaintiff against defendant Morton, and Morton brings error. Affirmed.

Frank E. Jones, for appellant.

J. W. Bennett and *Arthur Brown*, for appellee.

HOOKER, J. The plaintiff derived title to the premises in question by purchase from one Noble, whose title came through the foreclosure of a mortgage given by McMahon, the prior owner. In 1875 defendant Hudson T. Morton received a tax certificate for $74.44, and in 1876 another for $70.32 on his purchase at the tax sales for said years. In 1901 Morton filed with the auditor general his affidavit of ownership and loss of said certificate, and obtained auditor general's deeds upon them, and subsequently quitclaimed his interest in the land to the Wolverine Land Company, his codefendant. At this time the plaintiff was not a resident of Ann Arbor, where the property is situate and the defendants reside. The property was in charge of his mother, Mary E. Sudworth, who was his agent, and she had authority to care for, rent, and do other things necessary for the preservation of the property; her acts in the transaction upon which this action arose, being also approved and ratified by the plaintiff afterwards. After its purchase from Morton, an officer of the Wolverine Land Company called upon Mrs. Sudworth, and stated that it had a valid title to the premises, and suggested a settlement and quitclaim by them for $500. It is unnecessary to repeat the particulars of the negotiations further than to say that she called upon Morton, who had been a friend of her family, and he advised her to settle the matter, as it would be cheaper than to contest it, and volunteered to induce the land company to accept $200, which he did, and the matter was so settled. She paid the $200 from her own funds, for the benefit of her son, taking a deed to him from the land company, and the plaintiff afterwards repaid her. Morton received $148.74 from the land company for his deed. Subsequently this action was brought against the two defendants, the declaration charging fraud and deceit by them in filing said affidavits and taking and making said deeds, and in representations to the plaintiff that Morton had lost said certificates and was the owner of said titles, and that by his conveyance to the land company it acquired a good and clear title to the

premises, and thereby obtained from him said sum of $200, while in fact Morton was not the owner of said certificates at the time he made the affidavits and deed, but had previously assigned the certificates to Mrs. Noble, plaintiff's grantor, for a valuable consideration. Upon trial a verdict was rendered against defendant Morton who has brought error.

Counsel for defendant says that the principal question upon this record grows out of a variance between the declaration and proof. It is claimed that the proof shows that no representations were made to the plaintiff, nor was he deceived and induced to pay money to defendants; that the entire transaction was with his mother; that she only, if any one, was deceived; and that it was her money, and not his, that was paid. We are satisfied that there was proof to go to the jury if the allegation was sufficient, and we think that it was. The defendants' deal was with the plaintiff, through his agent. The representations to the agent were representations to the principal, who acted upon them through the agent, who was not only authorized, but whose act was ratified. The money was paid for the plaintiff, and between him and the defendants it was his money that they received. Pleadings in actions at law state things according to their legal effect. Hence, when the declaration states that the representations were made to the plaintiff, who paid his money, it is sufficient, though the fact be that the parties dealt through an agent.

Counsel cite many cases analogous to this, to a few of which we will allude.

Thus a declaration which charges a defendant with having negligently driven his cart against plaintiff's horse is supported by evidence that a servant drove the horse. *Brucker* v. *Fromont*, 6 T. R. 659; *Turberville* v. *Stampe*, 1 Ld. Raym. 264.

In *Livermore* v. *Herschell*, 3 Pick. 33, an action for fraud, the court held that though the fraud was perpetrated by an agent, it might be alleged as the act of the principal, "according to the well-established rule that

every act may and should be alleged according to the legal effect."

In *Bank of Metropolis* v. *Guttschlick*, 14 Pet. 19, the Federal Supreme Court said:

"It is a rule in pleading that facts may be stated according to their legal effect. Now the legal effect of an agreement made by an agent for his principal, whilst the agent is acting within the scope of his authority, is that it is the agreement of the principal. * * * This principle has been applied too in actions ex delicto as well as ex contractu."

So in New York, in the case of *Bennett* v. *Judson*, 21 N. Y. 238, a case of deceit, the court said:

"The complaint in setting forth the cause of action counts upon false representations made by the defendant, without any reference to the agent. This mode of stating the case, we think, was proper under any system of pleading. The same rule of law which imputes to the principal the fraud of the agent, and makes him answerable for the consequences, justifies the allegation in pleading that the principal himself committed the wrong."

In *Santo* v. *Maynard*, 57 Conn. 157 (17 Atl. 700), an allegation that the act was done by the principal, when in fact it was done by an agent, "was all that could be required under the strictest rule of the common law."

This court made a similar holding in the case of *Regents of the University* v. *Detroit Young Men's Soc.*, 12 Mich. 138, where Mr. Justice CHRISTIANCY said:

"Had the pleader only purported to set forth the contract by its legal effect, it would not have been necessary to notice the fact that it was executed by agents; it might have been stated as executed by the defendant directly; the agency would be mere matter of proof."

See, also, *Harrington* v. *Gies*, 45 Mich. 374 (8 N. W. 87); *Hamilton* v. *Mining Co.*, 108 Mo. 364 (18 S. W. 977); *Chesapeake, etc., R. Co.* v. *Thieman*, 96 Ky. 507 (29 S. W. 357); *Illinois Cent. R. Co.* v. *Latimer*, 128 Ill. 163 (21 N. E. 7); *Wagener* v. *Kirven*, 56 S. C. 126 (34 S. E. 18); *Higbee* v. *Trumbauer*, 112 Iowa, 74 (83 N.

W. 812); *Shull* v. *Arie*, 113 Iowa, 170 (84 N. W. 1031); *Blotcky* v. *Miller* (Neb.) 91 N. W. 523; *Wolf* v. *Lachman* (Tex. Civ. App.) 20 S. W. 867. The case last cited was much like this case.

Counsel claim that no cause of action was stated or proved against Morton. The declaration seems to charge both alike, hence it must be good against both if good against either. We think it sufficient upon the question of proof. While it is true that Morton did not personally make the representations, if it was done at his instigation, as the jury might properly, and probably did, find, he is chargeable with the acts of his codefendant. We are of the opinion that there was a case to go to the jury.

Complaint is made of the statements made by counsel concerning an alleged agreement by one of defendants' counsel to admit certain signatures. The ruling of the court was correct, and plaintiff's counsel were not entitled to have the alleged agreement enforced. It might have been better to have submitted without protest to the rule, which he ought to have understood, that oral stipulations of that character cannot be regarded, even if they were made; but we think no harm came of his failure to do so. The fact seems to have been satisfactorily proven, and is apparently undisputed.

Counsel also complain of some strictures upon the character and conduct of Morton, but we think they do not call for a reversal of the case.

The motion for new trial was properly denied. It may be that the jury found the defendants engaged in a common enterprise, viz., inducing a purchase of this title for their mutual benefit, and all that each did was admissible. The land company acted through its officers and agents. It could act no other way, and anything that was done in the transaction was a part of the res gestæ.

The judgment is affirmed.

The other Justices concurred.

OCTOBER TERM, 1904.

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BARNUM *v.* GRAND TRUNK WESTERN RAILWAY CO.

1. RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

   In an action against a railroad company for the death of a person by being struck by an engine backing across a street on which deceased was driving in a closed wagon, and attempting to cross the track just after a gravel train going in the same direction had passed, which the locomotive was backing out to assist over a grade, evidence examined, and the question whether deceased was guilty of contributory negligence *held* to be for the jury.

2. SAME—NEGLIGENCE—ENGINE FOLLOWING TRAIN.

   Held further, that negligence of the defendant cannot be inferred from the mere fact that the engine immediately followed the train.

Error to Genesee; Wisner, J. Submitted January 12, 1904. (Docket No. 19.) Decided October 4, 1904.

Case by Hartson G. Barnum, administrator of the estate of George F. Nixon, deceased, against the Grand Trunk Western Railway Company for the alleged negligent killing of plaintiff's intestate. There was judgment for plaintiff, and defendant brings error. Reversed.

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

Mark W. Stevens (*George W. Cook*, of counsel), for appellee.

HOOKER, J. Deceased rode in a closed wagon upon the track of defendant's railroad, immediately in front of a locomotive which was backing to the westward to aid a

gravel train, which had passed a short time before, in crossing a grade, and was struck by said locomotive, and received injuries therefrom, which caused his death a day or so later.

In this action, brought by his administrator, a verdict and judgment were rendered for the plaintiff for the sum of $8,710.40, and the defendant has brought the case to this court by writ of error.

The negligence relied upon is stated in defendant's brief as follows:

"(1) That it failed to allow a sufficient and reasonable length of time to elapse after the gravel train crossed Beach street before the yard engine attempted to cross; that the yard engine followed the gravel train so closely that travelers and vehicles in the vicinity were not given a reasonable opportunity to cross.

"(2) That it failed to station a competent and vigilant person on the west end of the tender to watch for persons and vehicles approaching the crossing, and to warn them of the approach of the engine.

"(3) That it was its duty to keep a flagman, or maintain the equivalent—that is, crossing bells, etc.—at the Beach street crossing to warn travelers of the approach of trains, and that it failed to perform this duty.

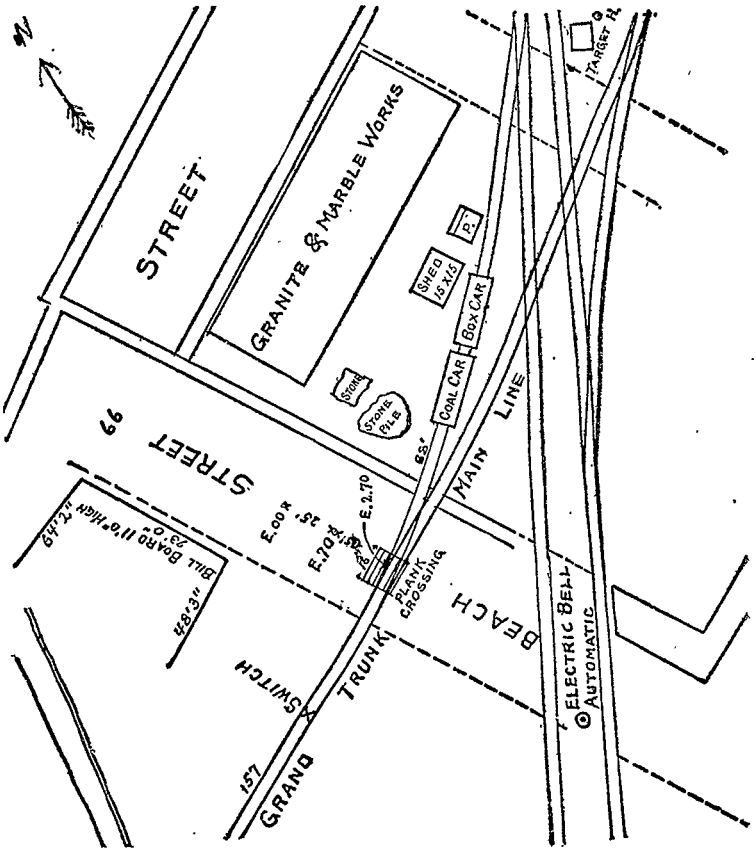
"(4) That it failed to cause the engine bell to ring.

"(5) That the yard engine was running at an excessive rate of speed."

Defendant's counsel requested the court to direct a verdict upon the grounds (1) that the evidence showed that the defendant was not guilty of any negligence that caused the injury; (2) that the plaintiff's intestate was guilty of contributory negligence. These were refused. After the rendition of the verdict defendant's counsel made a motion for a new trial upon several grounds; one of them being that the verdict was contrary to the weight of the evidence. This was denied; reasons being given as required by law.

As this last point requires an examination of the evidence, we will state our conclusions regarding it first, and this will require a somewhat detailed statement of

the testimony. The defendant's railroad crosses Beach street in a direction approximately an easterly and westerly course, and substantially at right angles. Within a block east of said street, this railroad is crossed by the Pere Marquette Railroad, which also crosses Beach street a



few rods south of defendant's track, going southwesterly. There was an electric bell upon the crossing between the two Pere Marquette tracks, so arranged as to give warning for both roads, and this was ringing as deceased approached the track. A switch, or Y, extended from one railroad to the other upon the north side of the defendant's road. The plat appended shows the situation.

On this Y, some distance east of the street crossing, were two cars; the westerly one being a coal car and the other a box car. From the evidence and from the plat it conclusively appears that, from a point of view 10 feet from defendant's main track, the coal car was north of the line of vision to the eastward for a long distance; and we may also take judicial notice that an engine was visible from a wagon, when some ways farther back from the track, over the coal car, which was much lower than a locomotive, and a finding to the contrary by the jury would have been unwarranted.

The undisputed proof shows that the deceased and a boy were riding in a covered and inclosed bakery wagon, with a small glass in front and open doorways at the sides, and a window just above the seat on each side, through one of which last the locomotive might have been seen, and was seen by the boy, immediately before the deceased drove upon the track; and the boy testified that they saw a freight train going west on defendant's road when they were half a block or more from the crossing, at which time they were crossing the bridge, 150 feet, or thereabouts, west of Lyon street. As he approached the track the boy looked east and saw the engine, and told deceased that an engine was coming. The horse was then walking. When told an engine was coming, deceased's horse was very near the track, and the engine was very close—he thought within 15 feet. The horse got across the track and stopped, or was stopped. The engine struck the wagon and shoved it along, until it caught upon something and tipped over. The boy got out of the front window, the horse ran away, and the man went under the engine. He did not hear any bell ringing. A number of witnesses testified that they heard the bell of the engine ringing, and one or more others testified that they did not hear it.

Several of the witnesses testified that there was a switchman upon the footboard of the engine, and the crew of the locomotive and the switchman himself so

testified. It also appeared that the engine was proceeding westward to make a coupling with the gravel train while in motion, which could hardly have been done in the absence of the switchman.

The switchman testified that he was upon the footboard of the engine, which was proceeding at the rate of 5 or 6 miles an hour. He saw the horse and wagon driving up toward the track, and called to him to look out, gave the engineer the signal, and stepped off; and the engineer reversed his engine and applied his air. This was done as soon as deceased indicated an intention to cross the track, and at a time when the horse was 10 feet from the track.

Kate H. Stevens, walking on the street, saw that there was going to be a collision, and ran behind a billboard so as not to see it. Her attention was attracted by the bell.

Another witness, Powell by name, heard the engine and bell, saw the smoke, and could see the top of the engine over the coal car. He told his brother there was going to be an accident. Before he was struck the engine was reversed, and the drivers were turning the other way, and the witness heard the air set. He also saw the switchman signal to stop.

The evidence relied on to show that the switchman was not there is as follows: The boy says that he did not see any one at the end of the tender. Question by plaintiff's counsel: "Was there anybody there, now? No, sir." Mortimer Phelps, a witness for the defendant, is said to be one who testified that no brakeman was on the engine; but the nearest that he came to it was to say that "when I got there the fireman, *brakeman*, and another man were assisting the man out from under the engine." How this shows that the other man had not been upon the footboard is not very clear, nor do counsel attempt to explain how the brakeman happened to be there, if not one of the crew of the engine. He stated on redirect that he did not see the brakeman on the tender. Ewer was on a Pere Marquette engine, some distance away, and did not see any one standing on the tender, or see any one jump off.

Rothwell, a Pere Marquette switchman, some distance off, saw the engine, but did not see any one on the footboard, and did not see a man jump off. He thought he would have seen it, had it occurred.

Counsel claim that, if the testimony did not conclusively show contributory negligence, the court should have granted the motion for a new trial upon the ground that the verdict was contrary to the evidence; but, as the case must be reversed upon another ground, we do not pass upon the latter question.

The court instructed the jury as follows in regard to defendant's negligence:

"It is for you to determine, under all the circumstances, surroundings, and conditions as they existed at and near the crossing, the buildings and other obstructions that you may find existed, the fact that the Pere Marquette Railroad was in close proximity, under all the facts in the case, whether the defendant railroad was exercising such ordinary and reasonable care and caution as ordinary prudence would dictate in running its engine and tender, backing the same, in such close proximity to the freight train that had just passed Beach street, going in the same direction and on the same track. If you find that the defendant railroad was not exercising such ordinary and reasonable care and caution in its conduct as ordinary prudence would dictate, then I charge you that the defendant railroad would be guilty of negligence, and the plaintiff would be entitled to a judgment, if you find that such negligence of the railroad was the proximate cause of injury, provided you further find that Mr. Nixon was exercising such ordinary and reasonable care and caution as an ordinarily prudent man would exercise under the same circumstances, surroundings, and conditions as you will find they appeared to him at the time.

"The court instructs the jury that the defendant was not required to have a flagman stationed on Beach street where the accident happened, and the plaintiff cannot recover in this case for failure to have a flagman stationed there.

"The court instructs the jury, from the evidence in this case, they must find that the speed of the train at the time of the accident did not exceed six miles an hour. In

speaking of the train, that refers to the engine and tender. And the court further instructs the jury that six miles an hour was not an excessive rate of speed, and did not, as an isolated circumstance, constitute negligence on the part of the defendant."

This was in effect allowing the jury to find that it was negligent for the defendant to permit its locomotive to follow its train at so short a distance and time.

We have held in the case of *Breckenfelder* v. *Railway Co.*, 79 Mich. 563 (44 N. W. 957), that we could not say as a matter of law that one going upon a track immediately after a portion of a train had passed, without looking to see if it was closely followed by another car or cars, was guilty of contributory negligence; but it was for the jury to determine whether one injured under such circumstances could be said to have used ordinary care, and to be, therefore, free from contributory negligence. We are of the opinion that the same rule should be applied here; but it does not follow that the defendant was guilty of negligence from the mere fact of sending its engine immediately after its train. If it may use a locomotive to push its trains over the grade, it must either couple it to the train before it starts, or have the right to follow at a constantly diminishing distance until it overtakes the train. If we were to say it should couple only to a stationary train, the engine must follow the train at a short interval, unless we are to require delay, after the train stops; and if we were to say that, it would not help the matter, for few persons would expect an engine or train to run up close to a stationary train. Safe railroading is often a matter of minutes, sometimes seconds, and it is not for juries or courts to determine what good or bad railroading requires, from their own notions, or from the fact that an accident has happened under certain conditions. It was not proper to say that the jury might find negligence from the mere fact that the engine followed the train.

The judgment is reversed, and a new trial ordered.

MOORE, C. J., CARPENTER and MONTGOMERY, JJ., concurred with HOOKER, J.

GRANT, J. I concur in the result reached by my Brother HOOKER. I think that upon this record there is no evidence of any negligence on the part of the defendant, and I think it is conclusively established that the deceased was guilty of contributory negligence.

For these reasons, and for the further reason that no different state of facts can, in my judgment, be made to appear upon a new trial, I think none should be awarded.

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GRAND RAPIDS & INDIANA RAILWAY CO. v. CITY OF GRAND RAPIDS.

1. RAILROADS — TAXATION — SPECIFIC TAXES — EXEMPTION FROM GENERAL TAXATION.

   Under 2 Comp. Laws, § 6277, a parcel of land owned by a railroad and occupied by side tracks and a coal dock belonging to the road, the spaces between the tracks being occasionally and necessarily used for the storage of bulky articles, is "actually used for railroad purposes," and is exempt from general taxation.

2. SAME—LAND OCCUPIED BY INDIVIDUALS.

   Lands owned by a railroad, but in possession of private individuals, and used exclusively by them in their individual business for wood and coal yards and sheds and storage of grain, etc., are neither "actually occupied" by the railroad nor "necessary or in use in the proper operation" of the road within section 6277, 2 Comp. Laws, and are therefore properly taxable as other real estate under the general law. GRANT and HOOKER, JJ., dissenting.

3. TAXATION—ASSESSMENT—DESCRIPTION.

   A parcel of land described according to a plat, except parts used for the right of way of two named railroads, is sufficiently identified, there being a presumption that the rights of way are matter of record.

4. EQUITY—OFFER TO DO EQUITY.

A landowner, seeking to enjoin the collection of a tax on real estate, cannot prevail on showing that a part of the tract is exempt, though such a showing would be sufficient at law; in order to be entitled to relief in equity he should do equity by paying or offering to pay that portion of the tax justly assessable to the unexempt part.

Appeal from superior court of Grand Rapids; Newnham, J. Submitted January 15, 1904. (Docket No. 37.) Decided October 4, 1904.

Bill by the Grand Rapids & Indiana Railway Company against the city of Grand Rapids and Marcus A. Frost, city treasurer, to enjoin the sale of certain land for the taxes of 1901. From a decree for complainant for a portion of said land, it appeals. Modified.

T. J. O'Brien and *James H. Campbell*, for complainant.

Moses Taggart, for defendants.

CARPENTER, J. The object of this suit is to enjoin the sale of ten parcels of land for the nonpayment of taxes assessed thereon by the city in 1901. The trial court gave complainant relief as to parcels 8 and 9, but held it liable to pay either all or part of the taxes assessed against the other parcels. Complainant paid the taxes on parcels 4 and 6, and asks this court on this appeal to decree that it is not liable to pay taxes on the other parcels. The principal ground upon which complainant seeks relief is that the parcels of land in question are by law exempt from taxation.

The larger part of parcels 1, 2, 3, 5, and 7 were, by the consent of complainant, in 1901, in the exclusive possession of private individuals, who used the same for their own business. Two wood and coal yards were located on parcel 2, one on parcel 1, one on parcel 7. A wood yard was located on parcel 3, a lumber yard on parcel 5. The

business carried on at these yards by these various private individuals was apparently precisely what it would have been had their location been remote from the railroad. Most, if not all, of the merchandise bought by them came to them by rail over complainant's railroad. Some of that sold by them—though in the case of the wood and coal this appears to have been very little—were shipped away over complainant's railroad. But apparently they sold, and had a right to sell, merchandise to any one who would buy. The estates of these private individuals granted by the railroad company were not in form permanent. The record does not show what rights the owner of the wood yard on parcel 3 had. Complainant gave no express permission for the occupancy of parcel 5 for a lumber yard. But we are bound to decide that that permission was implied. The occupation of parcels 1, 2, and 3 for coal and wood yards was under an express agreement called a "permission and license." The record contains the agreements by which parcels 2 and 7 are occupied. The occupant was to pay no rent; to remove the buildings by him erected, and to vacate the property, in one case in 60 and in the other in 30 days after notice. The occupants of parcel 2 agreed to pay the taxes on the property, if any were assessed. On parcel 1 there was also situated an elevator owned and controlled by the Brown Milling Company. This building was erected under a written permission made in 1888, similar to the writing above described, except that there was no provision for the payment of taxes. The writing specifies that the building "shall be used for the purpose of a grain elevator and warehouse." There is no provision in the writing that the business of a public warehouseman shall be carried on, and there is nothing to indicate that the business that was actually carried on was in any sense a public business. On the contrary, it is to be inferred that the occupant used the same exclusively for storing and shipping the grain purchased or shipped in by itself.

Though the estate of these occupants is called a license,

it was, in a legal sense, more than a license. See *Morrill* v. *Mackman*, 24 Mich. 279 (9 Am. Rep. 124). It had many of the characteristics of an estate at will. See 1 Washburn on Real Property (6th Ed.), §§ 762–796. While it was terminable at will, it might last for a long period, and as a matter of fact at the time the assessment was made parcel 7 had been occupied under the agreement above described for 19 years.

Parcel 10 was in the form of a parallelogram, 800 feet in length north and south, and 350 to 400 feet in width east and west. A short distance from its eastern boundary was a side track. On the western 85 feet of the tract were four side tracks and a coal dock belonging to complainant. About midway between the tracks on the western side and the side track on the eastern side was another track—a stub track—which extended south about 100 feet from the northern line of this tract. All these side tracks were used by complainant as occasion demanded. While it is evident that when the assessor placed this tract upon the assessment roll he found it vacant, we are nevertheless satisfied from the testimony of complainant that the spaces between these various tracks were occasionally used, and necessarily used, for the storage of bulky articles; e. g., railroad material of various kinds and sewer pipe. This does not mean that every foot of space on this tract was actually used for storage purposes. The space was used for that purpose as occasion demanded, and we are bound to say that such use was occasionally demanded.

Was this property subject to taxation like other real estate? This depends upon the proper construction of the following part of section 6277 of the Compiled Laws of 1897:

"The taxes so paid [the specific tax] shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but

such real estate so accepted [obviously this should be "excepted"] shall be liable to taxation in the same manner, and for the same purposes, and to the same extent, and subject to the same conditions and limitations as to the collection and return of taxes thereon, as in other real estate in the several townships or municipalities within which the same may be situated."

I agree with my Brothers GRANT and HOOKER that under this section parcel 10 is not liable to general taxation.

Are the other parcels liable to such taxation?

As shown by the foregoing statement, the greater portion of parcels 1, 2, 3, 5, and 7 are, by the consent of complainant, in the exclusive possession of private individuals, and exclusively used by them for their individual business. In the case of the elevator, that business is the purchasing and storing of grain. In the case of the wood and coal yards, that business is the sale of coal and wood. In such business complainant could not lawfully engage. When, by the consent of a railway company, its land is exclusively devoted to a business in which it cannot lawfully engage—a business foreign to the purpose of its organization—such land is not, in my judgment, "actually occupied" by it, and is "not necessary or in use in the proper operation of its road," and is, therefore, under the statute above quoted, taxable "like other real estate in the several townships or municipalities in which the same may be situated."

It is true that there is a relation between complainant's business and the business carried on upon this land. That relation arises from the fact that complainant transported the coal, wood, and lumber sold on these several parcels, and will transport or has transported the grain purchased and stored in the elevator. If this relation affords a ground for exemption, I think we must say that all lands of a railway company used for the storage, purchase, manufacture, or sale of goods which have been or are to be carried by it are exempt from taxation. If so, land of a railway company occupied by a grocery store for the sale

of groceries carried by it, land occupied by a dry goods store for the sale of dry goods carried by it, land occupied by a clothing store for the sale of clothing carried by it, and land occupied by a saloon for the sale of liquors carried by it are all exempt from taxation. And I cannot see why, by the same reasoning, the buildings on said land and the goods stored, purchased, manufactured, or sold thereon are not also exempt. The principle which leads to such consequences cannot, in my judgment, be sound. I think, therefore, that the parts of parcels 1, 2, 3, 5, and 7 which were exclusively in the possession of private individuals, and exclusively used by them for their individual business, were liable to taxation like other real estate. This conclusion is supported by authority.

Under a charter which provided "that no other or further tax or imposition [than the specific tax therein provided] shall be levied or imposed upon the said company," it was held by the supreme court of New Jersey that docks of a railway company leased for lumber yards, for which rent or equivalent compensation was paid, were liable to general taxation. See *State* v. *Newark*, 25 N. J. Law, 315. The judgment in that case was affirmed by the court of errors and appeals. See *Id.*, 26 N. J. Law, 519.

Under a similar provision in a charter it was held by the last-named court that property leased by a railway company for a coal yard was liable to general taxation. See *Cook* v. *State*, 33 N. J. Law, 474.

It appears from the case last cited that the test of taxability was the profit derived from renting the land. While I do not think this is the test under our statute, which, as already indicated, differs from the New Jersey statute, still, if that test were applied, it would not, in my judgment, help complainant. For while it appears that those who used the land in question paid no rent, it does appear that as a consequence of that occupancy the railway company materially augmented its earnings by carry-

ing their freight. Complainant did, therefore, receive compensation for the occupancy.

The decisions of our own and other States (see *Detroit, etc., Station Co.* v. *City of Detroit*, 88 Mich. 347 [50 N. W. 302]; *Pennsylvania R. Co.* v. *Mayor, etc., of Jersey City*, 49 N. J. Law, 540 [9 Atl. 782, 60 Am. Rep. 648]; *Chicago, etc., R. Co.* v. *Bayfield Co.*, 87 Wis. 188 [58 N. W. 245]) which hold that elevators erected for the purpose of facilitating the loading and unloading of grain carried by railways are not liable to taxation clearly have no application to the land exclusively used by private individuals for the business of conducting coal or wood yards, as appears from the following quotation from the opinion in *Detroit, etc., Station Co.* v. *City of Detroit*, supra:

"This elevator is as essential and necessary to the complainant in the handling of its grain as is its depot for the use of passengers, or its freight depot for the handling of the general merchandise it carries."

Neither do these decisions apply to the land occupied by the Brown elevator. Those decisions are authority for the proposition that elevators which railroad companies are empowered to erect and operate are not liable to general taxation. Railway companies have not, as had the complainant station company in *Detroit, etc., Station Co.* v. *City of Detroit*, supra, any express authority to own and operate an elevator. They undoubtedly do have an implied authority to erect any elevator which enables them to better perform their obligation as common carriers of grain. It is obvious that such elevators—like the elevator in question in *Detroit, etc., Station Co.* v. *City of Detroit*, supra, and in the other cases last cited—afford equal advantages to all shippers. They are not, like the elevator in the case at bar, devoted to the exclusive use of a single person engaged in the business—a business which complainant itself could not carry on—of purchasing and shipping such grain.

The distinction between the business of running an elevator to facilitate the carriage of grain and of running it as a public warehouse for the storage of grain has been made. See *Milwaukee, etc., R. Co.* v. *City of Milwaukee*, 34 Wis. 271; *In re Swigert*, 119 Ill. 83 (6 N. E. 469). And it is held that the first class of elevators are not liable to taxation, and that the second are. It is apparent that these authorities go much further than it is necessary to go to justify the conclusion that the land occupied by the elevator in question is liable to taxation.

It is contended that our own decision of *Auditor General* v. *Railroad Co.*, 114 Mich. 682 (72 N. W. 992), is opposed to this decision. In that case the auditor general undertook to sell a part of the terminals and depot grounds of the railroad company situated in Bay City. It was held by this court that this could not be done, even though it appeared that two lumber firms "also occupied a part of the docks." I think it may be inferred from the record in that case, as pointed out in the opinion of my Brother HOOKER, that certain portions of the land assessed were in the exclusive occupancy of these lumber firms who used the same for carrying on their individual business of running a lumber yard. The contention that these portions of the land were taxable because they were used exclusively for a business foreign to that of a railway company does not seem to have been presented to the court, or considered by it. And, if it had been, it would not have affected the decision. Had such a contention been made, the court could have answered it by saying the State has no power to sell this entire description of land, most of which is exempt from taxation, because a portion of it is not exempt. See *Osborn* v. *Railroad Co.*, 40 Conn. 498. In my judgment, therefore, *Auditor General* v. *Railroad Co.*, supra, is not opposed to the views stated in this opinion.

It is said that, as the State has once taxed these earnings, it is unjust for it to also tax the land the use of which contributed to augment them. This charge of injustice is

not well founded. It is true that, except for their arrangement with complainant, the lumber dealers and coal dealers who occupied its land would not have shipped their lumber and coal over complainant's road; but either they or other dealers who supplied the city of Grand Rapids would in that event have shipped it over other railroads. The earnings of railroads liable to State taxation were therefore entirely unaffected by the arrangement between complainant and the occupants of its land. The truth is that complainant, by granting to these lumber and coal dealers a special privilege, viz., the privilege of occupying its land without paying rent, which gives such dealers an advantage over their competitors, has been enabled to obtain the carriage of their freight, which otherwise would have been carried by its competitors. In other words, the railway company, by giving the lumber and coal dealers an advantage over their competitors, obtains an advantage over its competitors. If this arrangement is proper, it is beneficial only to the lumber and coal dealers and to complainant. It in no way inures to the benefit of the public, and therefore does not entitle complainant to any public consideration.

Neither is it true that the arrangement for the occupancy of these parcels of land was beneficial to the city because it resulted in the erection of buildings which are subject to taxation. It must be assumed that, if this arrangement had not been made, these buildings would have been erected in some other part of the city, where they would have also been subjected to taxation. It was, therefore, a matter of indifference to the city where they were erected. Nor would these buildings have escaped taxation if the railroad company had itself erected them. It is true that, if it had used them for some legitimate railway purpose, they would have been exempt; but, if they had been used as these were, it is clear that under the reasoning of this opinion they would not have been. We do not hold these parcels of land liable to taxation simply because of the use to which they are put, but because that use proves that

the land is "not actually occupied" by complainant, and is "not necessary or in use in the proper operation of its road." And the statute (section 6277, 2 Comp. Laws) in express terms makes all land of this description liable to taxation. See *City of St. Paul* v. *Railway Co.*, 39 Minn. 112 (38 N. W. 925); *Milwaukee, etc., R. Co.* v. *City of Milwaukee*, supra.

Complainant, as additional grounds for relief, contends:

(*a*) That the description of the third parcel is fatally defective.

(*b*) The assessment of the first, second, and third parcels is void because included in one description, and under one valuation, are distinct parcels owned by complainant and the Michigan Central Railroad Company.

(*c*) Included in every description are parts which are certainly exempt.

The ground upon which it is claimed that the third description is defective is that there is no means of knowing what is described by this exception: "Also except part used for G. R. & I. and M. C. R. R. Company's right of way." The right of way of the Grand Rapids & Indiana Railway Company is shown by a deed made in 1870 and duly recorded. There is nothing to indicate, and it should not be presumed, that the right of way of the Michigan Central Railroad Company is not also shown by a similar recorded deed. We cannot say, therefore, that the description was not good under our decision in *Harts* v. *City of Mackinac Island*, 131 Mich. 680 (92 N. W. 351).

The other objections, if valid, would prevail if they were asserted in a suit at law or as a defense to a suit to enforce the tax. See *Auditor General* v. *Railroad Co.*, 114 Mich. 682 (72 N. W. 992). But here complainant is seeking relief in a court of equity. Part—the greater part—of these parcels of land is justly liable to taxation. Equitably complainant should pay the proportionate tax justly assessable against such part. It never offered to pay, and now objects to paying, that. Complainant seeks to be relieved from the entire burden of taxation, part of

which, equitably, it ought to bear. It seeks equity, but declines and has declined to do what is equitable. Nor has it presented to us a record which enables us to make any just correction in the decree appealed from—a decree which relieved complainant from the payment of part of the taxes under consideration. Under these circumstances the objections under consideration do not entitle complainant to relief. See *Palmer* v. *Township of Napoleon*, 16 Mich. 176; *Merrill* v. *Auditor General*, 24 Mich. 170; *Conway* v. *Waverly Township Board*, 15 Mich. 257; *Tisdale* v. *Auditor General*, 85 Mich. 261 (48 N. W. 568).

It follows that, in my judgment, complainant is entitled to a decree enjoining the sale of parcel 10, and that the decree appealed from so far as it relates to the other parcels should be affirmed. Complainant will have costs in this court.

MOORE, C. J., and MONTGOMERY, J., concurred with CARPENTER, J.

GRANT, J. (*dissenting*). The object of this bill is to enjoin the sale of ten parcels of land owned by the complainant in the city of Grand Rapids for general city taxes for 1901. The principal claim of the complainant is that these parcels of land were actually occupied in its legitimate business and use, and were exempt from local taxation under 2 Comp. Laws, § 6277. A somewhat full statement is essential to a clear understanding and determination of the question. The southern terminus of the complainant's road is at Richmond, Ind. It extends from that city north through the entire Lower Peninsula of Michigan to Mackinaw City, passing through the defendant city. Grand Rapids is the largest and most important point on the road, which is divided into two divisions; that city being the dividing point and also being the division headquarters. There is a large passenger and freight business in and out of the city. For the purpose of carrying on its business it has obtained considerable

land through the city from the southern to the northern limits. It has a large passenger and two freight depots, a large yard and grounds for delivering and receiving freight along its tracks. In running north its tracks cross Hall street, Fifth, Fourth, Third, Second, and First avenues in the order named. It has extensive railroad shops and a roundhouse located on the west side of the main track between Hall street and Fifth avenue. Its yard extends from a line south of Hall street to Fifth avenue, and some of the tracks extend north of Fifth avenue. But for the streets intervening, the land involved would be one parcel. Parcel 10 lies south of Fifth avenue, and is about 800 feet north and south and about 350 feet east and west. Immediately at the south of this strip are the roundhouse and construction and repair shops of complainant. Parcel 1 lies between Fifth and Fourth avenues. The south line of this parcel extends from its main track west to Hilton street, thence north 10 rods, thence east 150 feet, and thence north to Fourth avenue, parallel to Hilton street. This line extends as far north as Second avenue, and is the west line of complainant's land, which gradually narrows as it approaches Second avenue. The second parcel lies between Fourth and Third avenues, the third parcel between Third and Second avenues, and the fifth—a strip about 50 feet wide—between Second and First avenues, and is described as the east 50 feet of lots 2, 3, 4, and 5 in block 14. The east boundary line of the above parcels is the west line of the right of way of the main track. The seventh parcel lies about a half mile farther north, and is a strip 70 feet wide, along the east side of Ottawa street between Island and Fulton streets. It is the west 70 feet of lots 2, 4, 6, 8, 10, and 12 on South Ottawa street. It is just north of the train shed and freight house. West of the center line of this block stands the brick freight house fronting on Fulton street. Upon this parcel is a coal yard and a track inside of it. There is only one track within that 70 feet, but there are four tracks on the same lots adjoining. They are used for

delivering coal, and for reaching the freight house, and in loading and unloading cars at the freight house. At the north end these tracks connect with the main track at Market street. The coal shed covers a space of about 40 by 125 feet on the southwest corner of the 70 feet. The rest of the lot is a coal yard. That company uses all of the west 70 feet of these six lots that is not occupied by the railroad company. All the coal that comes to them is brought over the Grand Rapids & Indiana tracks. There is a driveway 12 to 15 feet wide along the west side of the track from which the Bennett Company unloads and loads its freight. This driveway is used by others if occasion requires. The above are the only descriptions now in dispute.

Complainant's coal docks are situated on the west side of the tenth parcel. These docks are used exclusively for its own use in storing coal and coaling engines. The cars are run upon a trestle for dumping into the coal bunkers. There are in all seven tracks upon this parcel—one upon the east, called the "caboose track," used for storing cabooses and sometimes other cars, and a track called the "Porter track," running from the north about 200 feet south of Fifth avenue, used for loading and unloading cars. Teams drive there for the purpose of loading and unloading. Coal, wood, and lumber are unloaded there, and cars are loaded for shipment out. The space between the east and west tracks is used for depositing material such as is required for use in its shops. This parcel of land, or the greater portion of it, was assessed in the year 1900. In a decree dated March 6, 1901, in the usual suit brought by the auditor general for the foreclosure of tax liens, it was held that this land was exempt under the statute above cited. There was no change in the situation between that and the following year. Two or more tracks in legitimate use for freight purposes are located upon parcels 1, 2, 3, and 5. Two lumber dealers, who ship in and out large amounts of lumber, unload their cars and pile their lumber along the tracks upon parcel 5.

There is no arrangement between these parties and the complainant in regard to the use of this land. It appears to be to the interests of all parties, as well as to the public, to leave this lumber there for sale and for reshipment. The Bennett Ice & Fuel Company occupies the west 60 feet of the seventh parcel under a written license made May 26, 1883. This license permits the Bennett Company to erect sheds for the purpose of loading and unloading coal and wood and shipping the same, and for no other purpose. No rent is charged. The sheds are to be removed whenever the company desires, upon 30 days' notice. Either party can at any time terminate the agreement, in which case the Bennett Company is to remove the sheds at its own expense. On the southwest corner of parcel 1 is located an elevator owned by one Brown, and erected under a written license February 27, 1888. By this agreement Mr. Brown was permitted to erect a building at this place at his own expense, to be used for the purpose of a grain elevator and a warehouse, and not to be rented or let to any other party without the written consent of the railroad company. On parcel 2 a similar license was given by complainant to Hulst & Van Heulen on July 16, 1900, giving them the right to use a piece of land described by metes and bounds, and containing 23,430 square feet, for the purpose of erecting a building to be used for a coal and wood yard, and for no other purpose. A similar license, dated October 2, 1900, was also granted to the South Grand Rapids Ice & Coal Company, containing an area of 21,615 square feet, to be used for the same purpose as that granted to Hulst & Van Heulen. A track runs through the center of this parcel north and south, from which Hulst & Van Heulen and the ice and coal company receive and ship their freight.

The statute taxing railroads in 1901 provided that on all gross income not exceeding $2,000 per mile railroads should pay 2½ per cent. on such gross income; upon that in excess of $2,000 and not exceeding $4,000 per mile, 3¼ per

cent.; on all in excess of $4,000 and not exceeding $6,000 per mile, 4 per cent., etc. The statute then provided:

"The taxes so paid shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but such real estate so accepted [excepted] shall be liable to taxation in the same manner and for the same purposes and to the same extent and subject to the same conditions and limitations as to the collection and return of taxes thereon as is other real estate in the several townships or municipalities within which the same may be situated." 2 Comp. Laws, § 6277.

If these lands are in actual present use for railroad purposes, they are exempt from further taxation, having already paid the tax under the law above cited. If they are not so used, but are held for future use, or for the accommodation of private parties, then they are subject to taxation.

An elevator built by a railroad company for the purpose of storing grain for hire after its liability as a common carrier has ceased is not exempt from taxation. *Milwaukee, etc., R. Co.* v. *City of Milwaukee*, 34 Wis. 271.

An elevator erected by a railroad company at a terminus of the road and used for transshipping grain and relieving cars of their lading, the grain remaining in the elevator until called for by the consignee, and a charge made if permitted to remain over 10 days, was held a necessary part of its equipment, and not subject to taxation. *Pennsylvania R. Co.* v. *Mayor, etc., of Jersey City*, 49 N. J. Law, 540 (9 Atl. 782, 60 Am. Rep. 648). See, also, *In re Swigert*, 119 Ill. 83 (6 N. E. 469).

A railroad company may lease its wharves and docks when not in use by it, and charge wharfage therefor, without being subject to taxation, provided that the use by the lessee is subordinate to the use of the railroad company. *Osborn* v. *Railroad Co.*, 40 Conn. 498.

An elevator situated 900 feet from the right of way of a railroad company, together with 20 acres on which it was located, and the spur track there, is held exempt. *State* v. *Railway Co.*, 86 Tenn. 438 (6 S. W. 880).

It is said in *Milwaukee, etc., R. Co.* v. *Supervisors of Crawford Co.*, 29 Wis. 116, that provisions of this character should receive a fair and liberal construction in favor of the company, because they are not exempt from taxation, but are required to pay their share of the public burdens by another method. If the grounds, buildings, and tracks are reasonably suitable and proper, and are in use for the furtherance of the business of the railroad company, they are exempt from other methods of taxation.

We held in *Auditor General* v. *Railroad Co.*, 114 Mich. 682 (72 N. W. 992), that where two lumber firms occupy a part of the docks, but paid no rent, and it was a convenience to the company in shipping lumber over its road, and the entire lumber was so shipped, and the land was constantly used in shipping freight, it was not subject to general taxation.

This court held that an elevator used as a warehouse in connection with its regular business as a common carrier was not subject to a general tax. *Detroit, etc., Station Co.* v. *City of Detroit*, 88 Mich. 347 (50 N. W. 302).

Parcel 10, with its seven tracks, used for storing cabooses, coal, receiving and discharging freight, coaling engines, running its cars to its repair shops situated close to the south end of the parcel, and receiving material for its shops, is exempt. The circuit court for the county of Kent in chancery so held as to the tax of 1900 in a decree brought by the auditor general to foreclose lands delinquent for taxes. The condition was the same in 1901 as in 1900. Whether that decree is res adjudicata depends upon whether the city was party or privy to that suit. It is unnecessary to determine this question, inasmuch as we hold that the decree was right.

The fact that the complainant permitted the Bennett Company and other parties to erect buildings upon its land in which to receive and send out freight is in furtherance of the convenience of both carrier and shipper, and, we may fairly conclude, for the benefit of the general public. Because, the better the facilities for receiving and shipping, the less the cost. The Bennett Company pays annually about $30,000 to the complainant for carrying its merchandise, consisting mainly of coal, bulky and requiring temporary storage. Upon this amount it has already paid a tax. If the company owned these shops, and there discharged its freight to be delivered and received by the consignee, this would certainly be a legitimate use for the purposes of the company. It is no less the legitimate use because a party doing an immense business is permitted to erect its own sheds in which to receive the freight. These buildings are the personal property of the Bennett Company, and are subject to taxation. The parties, for their own convenience and that of the railroad company, have erected them, and they evidently facilitate the business of both. The Bennett Company has not the control of the track. This is under the control of the complainant, and when not in use in loading or unloading freight for the company can be and is used in handling freight for the other parties. The same is true of all the tracks. It is certainly a legitimate use of its land to run a side track thereon for the purpose of loading and unloading lumber. It does not make that use illegitimate, within the meaning of the law, because the parties are permitted to pile their lumber upon the land near by, awaiting delivery or reshipment. All these tracks and buildings are used solely for receiving and transporting freight. The complainant makes no charge for their use. The traffic at this point is large, and, we think, comes fairly and honestly within the legitimate use of the railroad company, so as to exempt it from general taxation under the statute.

Decree should be reversed, and decree entered here for complainant, with costs of both courts.

HOOKER, J. (*dissenting*). Complainant's bill was filed to restrain the city of Grand Rapids from collecting a tax levied upon several parcels of land, all of which were covered by tracks of the complainant's railroad. As the law now stands, similar questions cannot hereafter arise, complainant's claim being based on the law in force in 1901, which imposed a specific tax of 2½ per cent. upon the gross earnings of railroads, and relieved their property from other taxation, except such property as they should not actually occupy in the exercise of their franchises, and was not necessary or in use in the proper operation of the roads. While the land in controversy is described as separate and distinct parcels, such parcels are contiguous to each other, except as they are separated by city streets, and they are all within the yard of the company at Grand Rapids; and, as we view the testimony, all were used, in whole or in part, for railroad purposes, such as switching and storing cars, loading, unloading, and storing freight, etc. Upon some of the parcels there were wedge-shaped pieces between tracks, and strips of land of greater or less width outside of the tracks, which the defendant claims were either not used at all or were given over to the private use of individuals under leases or licenses, for the storage of wood, coal, and lumber.

As to the former of these classes, we are of the opinion that the wedge-shaped and other parcels, if not used for tracks, or not occupied by cars or other property of the railroad, or used for the loading or unloading of freight, were nevertheless in use for railroad purposes. They were so located as to be comparatively, if not wholly, useless for any other purposes, and the safety of trains is promoted by an absence of crowding and by the increased advantages of vision which open spaces afford.

The authorities have been liberal in construing the law where railroads have not used land contiguous to their tracks for purposes foreign to railroad business. It is a fact well known that there are miles of right of way in the country crossed by but a single track. It has never been

proposed to subject any part of this to local taxation upon the ground that it is not in use for railroad purposes, or is a provision for future use. The strip of land in dispute in this case is two or three or four times as wide, but the requirements of the company, and the business done over it, are proportionately much larger than that done over country tracks. We are of the opinion that the land appropriated by the complainant is not unreasonable in amount, and that it was not subject to local assessment upon the ground that it was not used for railroad purposes, except such parts thereof as were appropriated to other uses, if there were any such.

The evidence shows that portions of this yard were devoted to the loading and unloading and storing of freight. We understand that defendant does not claim that land used for the loading or unloading of freight, to be drawn away immediately, is not used in connection with the business of the railroad. We are not sure that it would be claimed that such use would not properly include temporary storage of heavy and bulky commodities upon the ground or in sheds erected by the company for the purpose. At all events, we understand it to be a common and proper practice for railroads to store freight in depots and warehouses until called for, and that the practice is well within the proper management of their business, and in fact could not be safely omitted; and we know of no reason why the rule does not include grain, wood, coal, and lumber. These are bulky articles, and it is important that they be not subjected to the necessity of repeated drayage. It is the general practice for dealers in such commodities to deliver them to the consumer from the car where practicable, and otherwise store them where unloaded from the car until sold. Some dealers own or rent their sheds or yards, and induce the railroads to run sidings to them. In the present case the railroad appears to have been willing to allow such storage upon its land adjacent to its sidings.

The evidence shows that upon one of these parcels the

complainant has permitted one Brown to erect a building to be used as a grain elevator. Upon other portions different persons have been assigned specific places for the unloading, loading, and storing of wood, coal, and lumber brought in or to be shipped out upon complainant's cars or over its road. Written authority has been given in some cases, in others verbal; but it is our understanding that in no case is such authority more than a license, and in no case is rent reserved or paid. If this is such a use as to bring these parcels within the exception of the statute, the complainant must fail; but if it is a proper and legitimate use of the land for the purposes of complainant's business, its complaint should be sustained.

The statute in question need not necessarily be called a statute of exemption to be strictly and technically construed against the complainant. It provides a tax by appropriating a percentage of complainant's gross income, and, instead of saying that it shall be exempt from other taxes, says that this specific burden shall be *in lieu* of all other taxes. Which method would be productive of the greater revenue may be an open question. Certainly there is no presumption against the specific tax. A reasonable construction would seem to be that the legislature proposed to apply the specific tax to all productive property of railroads where used for railroad purposes, but not to allow them to escape taxation upon property that they did not see fit to use at all, or to devote to other and perhaps less productive purposes. See *Kimball* v. *Milford*, 54 N. H. 406; *Gardner* v. *State*, 21 N. J. Law, 560.

In *City of St. Paul* v. *Railway Co.*, 39 Minn. 112 (38 N. W. 925), it was said:

"These charters do not exempt the property from taxes, but provide a substituted method of taxation, based upon the assumption that the property of the companies will be used for railroad purposes, and thereby an income be derived, the percentage of which received by the State will be equivalent in its results to taxation of the property." Citing *County of Ramsey* v. *Railway Co.*, 33 Minn. 537 (24 N. W. 313).

In *Milwaukee, etc., R. Co.* v. *Supervisors of Crawford Co.*, 29 Wis. 123, it was said:

"The payment of this sum into the State treasury, and which is called 'license money,' must, in the light of past legislation upon the subject, be regarded as, in the judgment of the legislature, an equivalent for the taxes which those companies would otherwise be required to pay if assessed and taxed according to the ordinary method prescribed by law. A strict construction of the statute, therefore, against the company, or a liberal one in favor of the public, can, with difficulty, be justified in view of what seems to have been the legislative intent, and it would seem that little or no effect can be given to the rule. We are at liberty, therefore, and, indeed, required, to give the statute a fair and liberal construction in favor of the company, or such an one as it should receive supposing there is no injustice in the claim made by the company, or advantage to be gained by it over the public or taxpaying community generally in avoiding the taxation complained of."

If we were without authority upon this subject, and the case were therefore one to be decided upon "first impression," justice would require that weight be given to the effect of such use. Manifestly, the earnings from freight handled for these persons in connection with their use of said parcels furnish revenue to the State; and, if the lands are also to be taxed, the public obtains additional revenue, although the use of the land has been directly instrumental in producing taxable revenue for the company, in the exact way that the statute contemplates, and not through uses foreign to the railroad purpose.

Mr. Justice GRANT has alluded to several cases where elevators owned and operated by railroads have been held to be structures properly connected with the railroad business. We may take judicial notice that nearly all the grain of the country is the subject of shipment, and, as has been often said, the facilities for loading afforded by an elevator are as appropriate to the loading of grain as derricks or trucks are for loading heavy freight.

In *Pennsylvania R. Co.* v. *Mayor, etc., of Jersey*

City, 49 N. J. Law, 540 (9 Atl. 782, 60 Am. Rep. 648), it was held that a grain elevator built by the road, and used for storing and transshipping grain, was used for railway purposes, and not taxable locally. It was there said:

"It appears in the evidence that the elevator is used for transshipping grain and relieving cars of their lading. The elevator does by machinery what was before done by hand, and appears to be one of the necessary terminal facilities of a railroad engaged in the transportation of large quantities of grain. It further appears that the grain passing through this elevator, if not called for by the consignee, is retained there, and if it remains in store for over ten days a charge is made of one-quarter of a cent per bushel for each ten days thereafter. Before the elevator was built, grain was sometimes detained in the cars, and when so detained a demurrage charge of $5 or $10 a day per car, or two cents per bushel, was paid by the consignee. Other trunk lines to the west had erected elevators prior to the erection of the one in question. They are used as freight houses for grain, and seem to be as indispensable to the railroads in handling the immense quantity of grain which they carry as any other freight houses used for the reception or unloading of merchandise transported. If grain was allowed to remain in the elevator until called for without charge, it would unquestionably be an appliance for railroad purposes. The fact that a small penalty is added to the freight charge to induce shippers to remove their grain within a reasonable time does not withdraw this structure from that class of improvements which are necessary for railroad uses, within the meaning of that term as construed in *State* v. *Hancock*, 35 N. J. Law, 537."

A similar case will be found in *State* v. *Railway Co.*, 86 Tenn. 438 (6 S. W. 880). See, also, *In re Swigert*, 119 Ill. 83 (6 N. E. 469), and *Gilkerson* v. *Brown*, 61 Ill. 486.

The question is settled in this State where the Union Depot Company owns and operates the elevator, by the case of *Detroit, etc., Station Co.* v. *City of Detroit*, 88 Mich. 347 (50 N. W. 302).

In the present case the complainant did not own the elevator, and therefore derived no profit from the storage or handling of grain. It allowed another to erect an eleva-

tor upon its grounds, thereby obtaining the usual facilities for loading grain without cost to itself. This elevator was subject to taxation to the person owning it, as was held in the case of *Gilkerson* v. *Brown*, 61 Ill. 486, and, so far as the land was concerned, it was devoted to railway purposes as fully as though the company had owned and managed the structure. So the coal sheds erected by dealers would be subject to local taxation. Thus, in both instances, the city would profit by such practice, for, if the elevator or sheds were erected and controlled by the railroad company, they would not be subject to local taxation.

Stress is laid upon the claim that the owners of the elevator and those who owned the coal, wood, and lumber were allowed to use the land for their own private purposes, and it is argued that this is controlling. We should not feel justified in holding that a railroad company might escape local taxation upon lands leased by it to others and devoted to manufacturing or mercantile purposes; but neither does it seem reasonable that land in its yards, which is in daily use for the unloading of freight from its cars, is to be taxed merely because the company permits its use for temporary storage until the property can be transshipped or sold and delivered about town, or because, in the economical conduct of its business, it sets aside given portions for large shippers who manage their business from there. Great abuses of such privileges do not necessarily follow. Each case must rest upon its own facts, and evasions can be detected and excepted from the application of the rule.

The case of *Auditor General* v. *Railroad*, 114 Mich. 682 (72 N. W. 992), is in point upon this case. In that case the railroad company owned a piece of land in Bay City, near the river, and a dock. The company was said to have used that land constantly in "originating [whatever that may mean] and shipping freight." The uncontradicted proof shows that the land was occupied by two lumber firms; i. e., "lumber dealers," who "had lumber yards upon it," and were in the habit of shipping such

lumber as they shipped by rail over the company's road. There was also a fish house on the dock, used by Tromper & Co. for preparing fish for shipment over the road. No rent was paid. The inference to be drawn from the record is that all of these persons were licensees, in exclusive occupancy of certain portions of the land for the purposes mentioned. It was held that such holding was a convenience to the railroad company, and that the land was not subject to local taxation.

The present case seems to be clearly within the principle laid down in the two Michigan cases cited. I concur in the opinion and conclusion reached by Mr. Justice GRANT.

CRAWFORD *v.* STEEL.

1. STATUTE OF FRAUDS—TRANSFER OF NOTE.

   An oral promise by the indorser of a note held by a bank that he would deposit its value to the credit of the bank with its New York correspondent if the bank would send the note to him, is void under the statute of frauds, in the absence of proof of an actual delivery of the note in pursuance thereof.

2. BILLS AND NOTES—FRAUD—BANKS.

   The director of a bank conspired with the cashier to deliver to the director a note on which he was indorser, and to carry a fictitious credit entry on the bank's books for its value until after the note had become uncollectible, and then fraudulently connived with the cashier to return the note to the bank without the knowledge or authority of its officers, by reason of which the bank was prevented from collecting the note during the time it was withdrawn when it was collectible. *Held*, that recovery against the director of the full amount of the note could not be had by reason of the fraud without proof that at the time the alleged agreement was made the note was collectible, and that when it again appeared in the files of the bank it was worthless.

Error to Clinton; Stone, J. Submitted February 24, 1904. (Docket No. 102.) Decided October 4, 1904.

Assumpsit by James B. Crawford and others against George A. Steel for money had and received. There was judgment for plaintiffs, and defendant brings error. Reversed.

H. E. & E. L. Walbridge (*H. Geer*, of counsel), for appellant.

Lyon & Moinet, for appellees.

MOORE, C. J. This case was tried before a jury. There was judgment in favor of plaintiffs, and defendant has brought the case here by writ of error. Plaintiffs' declaration consists of three special counts and the common counts.

The first count alleges that on August 31, 1895, the First National Bank of Ithaca, Michigan, was a national bank doing business at Ithaca; that it was the owner of a note of $2,817.55, dated June 13, 1895, made by the Whipple Harrow Company, payable to the order of R. M. Steel, and bearing his indorsement, and guaranty of payment by George A. Steel, attorney, and made payable to M. F. Chafey, cashier, or order, said Chafey being the cashier of the bank; that the note was then and there of value, to wit, its face and accrued interest; that on August 31, 1895, George A. Steel, at Ithaca, requested and directed the bank to send said note to him at St. Johns, and promised and agreed that, if the bank would send the note to him, he would place $3,000 to the credit of said bank at the National bank of the Republic of New York, its correspondent in that city; that the First National Bank of Ithaca, relying upon defendant's promise, sent and delivered the note to him; that defendant did not place any money to the credit of the bank, as promised, and did not pay the money, or any part thereof, to the bank; that on July 1, 1896, George Reed was duly appointed receiver of said

First National Bank of Ithaca, and qualified and entered upon his duties as such receiver; that while so acting as receiver on July 30, 1901, said bank and said receiver, being thereunto duly authorized, duly assigned to plaintiffs all of its and his right and interest in and to the claim and demand of said bank against defendant on account of the premises.

The second count alleges the existence of the First National Bank of Ithaca, as stated; its ownership and possession of the note, as stated; that the note was then and there of value; that on August 31, 1895, defendant was a director of said bank, and, while exercising the rights and privileges, and under the obligations and duties of his said office, and assisting in and about the management of the affairs of the bank, he promised the bank that if it would send him said note he would place said sum of money to its credit, as stated; that the bank then and there sent the note to defendant in accordance with his request; that defendant, contriving to injure the bank, did not place the money to its credit, as promised, and did not pay the money to the bank, but received and retained the note, and fraudulently connived with the cashier, Chafey, and induced and persuaded him to place and carry upon the books of the bank a fictitious entry of a pretended deposit, credit, and payment of $3,000 as made by defendant at the National Bank of the Republic for and in behalf of the Ithaca bank; that said defendant caused said fictitious credit to be continued upon the books of the Ithaca bank until July 11, 1896, when he fraudulently connived with the cashier to return the note to the bank, and place it among the papers of the bank, without the knowledge of the bank or the authority of its officers; that defendant thereby deprived and prevented the bank from taking the usual and proper steps for the collection of the note during the time it was out of the bank; that, if defendant had not connived with said cashier, and withdrawn and retained said note from the bank during the time stated, it would have been collected; that the note,

when returned to the bank, was uncollectible and worthless; that by such fraudulent conduct defendant produced and inflicted an injury to and upon the bank, and defrauded it of its property and rights, for which an action on the case for fraud or deceit might then and there have been brought; that by reason of the statute in such case made and provided (3 Comp. Laws, § 10421), defendant then and there promised the bank to pay all just damages arising from such fraud and deceit; that George Reed was duly appointed receiver of said First National Bank of Ithaca, and qualified and entered upon his duties, as stated; that said receiver duly assigned and transferred to plaintiffs, the claim, demand, and right of action of the bank, and of himself, as receiver, against defendant, by reason of the premises.

The third count alleges the existence of the First National Bank of Ithaca, as stated; its ownership and possession of the note, as stated; that at the request of defendant the bank agreed to sell and deliver, and did sell and deliver, said note to him, for a large sum of money, to wit, $3,000; that defendant received and accepted said note, and has not paid therefor; that George Reed was appointed receiver of the First National Bank of Ithaca, and qualified and entered upon his duties, as stated; that while so acting, and being thereunto duly authorized, he duly assigned and transferred to plaintiffs the right and interest of the bank and of himself in and to said demand and right of action against defendant by reason of the premises.

Plaintiffs gave evidence tending to support the claims stated in the several counts of the declaration. Defendant pleaded the general issue. He denied the making of the agreement as stated in the various counts, and denied the allegations contained in the second count, and gave evidence tending to support his denials.

The record contains upwards of 500 pages, and nearly 100 assignments of error. These assignments of error are discussed under the following heads:

"(1) We claim that there was no testimony in the case tending to prove that there was any contractual relations between the First National Bank of Ithaca and defendant, George A. Steel, as claimed by plaintiffs in their first and third counts of the declaration, in relation to the note in question, and that the trial court should have so instructed the jury.

"(2) We also claim that if this court should hold that there was testimony introduced in the case on the part of the plaintiffs tending to show contractual relations with the First National Bank of Ithaca and the defendant in relation to the note in question, said bank had, by its conduct, acts, and declarations after July 11, 1896, disaffirmed and annulled any contractual relations that might have existed prior to that time in relation to said note by treating said note after July 11, 1896, as the property of the bank, and said bank, by its conduct, was estopped from maintaining any action against defendant based upon contractual relations. The bank being estopped, plaintiffs were likewise estopped from maintaining an action against the defendant upon contract.

"(3) We claim that the trial court should not have submitted the case to the jury under the second count of the plaintiffs' declaration, for the reason that the testimony introduced by plaintiffs did not show or tend to show a fraudulent combination and conspiracy between the cashier of the bank and defendant in this case.

"(4) We claim that if this court should hold that there was testimony in the case tending to establish the allegations contained in the second count of plaintiffs' declaration to the effect that there was a fraudulent conspiracy between the cashier of the bank and the defendant in relation to the note in question, then and in such case the National Bank of Ithaca suffered no damage by reason of the alleged fraudulent transaction set forth in said count, because the undisputed testimony in the case established the fact that the maker and indorser of said note were insolvent and uncollectible at all times after the date of the note, and that the said note could not have been collected or secured at any time after the date thereof.

"(5) If this court should hold that there is testimony in the case tending to show that the First National Bank of Ithaca might have collected or secured said note, in whole or any part thereof, between the 16th day of August, 1895, and the 11th day of July, 1896, had it not been for the

fraud charged against the defendant in the second count of the plaintiffs' declaration, then it became and was the duty of the trial court to submit to the jury the question as to the value and collectibility of the note in question during the period above named, and the probability of the bank being able to have secured the payment of said note in whole or in part during the period of time above mentioned.

"(6) Can the plaintiffs in this case, as assignees of the First National Bank of Ithaca, maintain an action against the defendant for the fraud and deceit charged against defendant in second count of the plaintiffs' declaration? Is such a cause of action assignable?

"(7) The circuit court for the county of Gratiot had no power or authority, under and by virtue of the petition filed in said court, to make said order transferring to the plaintiffs in this case the cause of action set forth in the second count of the plaintiffs' declaration.

"(8) The First National Bank of Ithaca, having retained the note in question after it was entered upon the discount register July 11, 1896, as a part of the assets of the bank, until the said bank went into the hands of the receiver, George Reed, and the said bank, by its receiver, George Reed, having sold said note in question as a part of the assets of the bank to the plaintiffs in this case in July, 1901, said bank and its assignees, the plaintiffs in this case, are estopped from maintaining the cause of action set forth in the second count of the plaintiffs' declaration."

The proposition contained in heads 5 and 7 are especially relied upon by appellants. We have examined all of the propositions with great care. We do not deem it necessary to discuss them further than to say that we do not deem any of them well taken, except the propositions contained under head 5.

The circuit judge charged the jury as follows:

"Now, if you find from the evidence that the defendant promised and agreed with said bank that if it would deliver to him the note in question he would remit the $3,000 to its New York correspondent, and afterwards the defendant entered into a fraudulent connivance and collusion with the cashier of said bank, whereby the defendant and the cashier conspired together, and by means of their state-

ments and conduct and entries upon the books of the bank they intentionally and designedly, and for the purpose of cheating and wronging said bank, made and caused it to appear that the note had been delivered to the defendant, and that the defendant had remitted $3,000 to New York to the credit of the bank, when in fact he had not done so, and when in fact the note had not been delivered to the defendant, but had remained in the bank, or in the custody and control of the cashier, then the defendant would be estopped by such fraudulent conduct from defending here upon the grounds that the note had not in fact been delivered, and the note must be treated as having been delivered to him, and in such case your verdict should be for the plaintiffs for the amount of the note."

The promise which it is claimed defendant made was an oral one, and, if not followed by an actual delivery of the note, would be void under the statute of frauds, and could not be enforced.

If what was done by Mr. Chafey and the defendant constituted such a fraud upon the bank as to entitle it to maintain an action as for fraud and deceit, as claimed in the second count of the declaration, then it was incumbent upon the plaintiffs, before they could recover for the full amount of the note, to show that at the time of the alleged agreement the note was collectible, and, when it was made to again appear in the files of the bank, was worthless. It will be observed the trial judge omitted from his charge to the jury both of those very essential elements.

The case is reversed, and a new trial ordered.

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

DEAN v. RADFORD.[1]

1. DEED AS MORTGAGE—EVIDENCE.
   On a bill to have a deed declared a mortgage, evidence examined and *held* to show that the deed was a mortgage to secure the amount named as consideration therein.
2. CHATTEL MORTGAGES—EVIDENCE.
   On a bill to enjoin the foreclosure of a chattel mortgage, evidence examined and *held* that the mortgage was valid for an amount determined.

Cross-appeals from Wayne; Hosmer, J. Submitted April 6, 1904. (Docket No. 192.) Decided October 4, 1904.

Bill by Edgar S. Dean against George W. Radford and Laura F. Radford to have a deed declared a mortgage and to restrain the foreclosure of a chattel mortgage. From the decree rendered, all parties appeal. Reversed.

May & Dingeman, for complainant.

Thomas A. E. Weadock, for defendants.

MOORE, C. J. In May, 1892, complainant made a contract with Bowen, Douglas & Whiting that they should conduct certain litigation for him to obtain a construction of a will made by his father. They filed a bill in chancery, on his behalf. Later complainant entered into a contract, the material parts of which read as follows:

"This agreement, made this first day of August, A. D. 1892, between Edgar S. Dean, of Detroit, of the first part, and George W. Radford, of the same place, of the second part, witnesseth: (1) That whereas, by the will of Horace M. Dean, deceased, father of said party of the first part, the share of the estate of Horace M. Dean devised to said Edgar S. Dean is so limited by the terms of the will of

[1] Rehearing denied December 7, 1904.

said Horace M. Dean, deceased, that no part of the principal comes into the possession or control of Edgar S. Dean; * * * (4) whereas, the law firm of Bowen, Douglas & Whiting has heretofore filed a bill in chancery, in the circuit court for the county of Wayne, for the purpose of obtaining construction of said will; and (5) whereas, said party of the second part has advanced one hundred and eighty-five dollars in cash to said first party with which to pay for the services of said Bowen, Douglas & Whiting to date in said cause; and * * * (7) whereas, said first party, for the purpose of security for the performance of this agreement, has conveyed to said second party by quit-claim deed an undivided one-fifth of all of said first party's interest in and to the said estate of Horace M. Dean, deceased: * * * It is also agreed that, in consideration of his said services in said cause, said second party shall receive said one-fifth of all the estate and property which said first party shall acquire as the result of said suit, or twenty per cent. less of the proceeds of any settlement said first party may make in said cause, approved by said second party, and independent of any income coming to said first party under the terms of said will. And in addition to the above said second party is to first receive from said first party all sums heretofore advanced by said second party as aforesaid, and which he may hereafter advance to defray the costs of said suit as above provided."

Mr. Radford conducted said litigation to a successful ending. An opinion in complainant's favor was handed down in this court December 7, 1894. *Dean* v. *Mumford*, 102 Mich. 510 (61 N. W. 7). During the progress of this litigation Mr. Radford made many advances to Mr. Dean to enable him to live and to aid him in his business operations. On the 14th of November, 1894, the parties had a settlement, when they both agreed there was due Mr. Radford $3,025, for which amount Mr. Dean gave Mr. Radford his note, and it is Mr. Radford's claim that the receipts and vouchers Mr. Dean had given to him for the amounts represented by this note were delivered to Mr. Dean and destroyed. In May, 1895, there had been an appraisement and partition of the estate between the widow and the various heirs, and certain real estate was set off to the widow as dower. It is claimed that under

the contract Mr. Radford was entitled at this time to $5,875 as his proportion of the estate assigned to the complainant, exclusive of his interest in the real estate assigned to the widow as dower. At this time 260 shares of stock in the Detroit White Lead Works, to which complainant was entitled, appraised at $7,150, were assigned to Mr. Radford. Receipts were exchanged at this time. On the 2d of November, 1895, a deed was drawn, running from Mr. and Mrs. Dean to Mr. Radford. The consideration named therein was $1,000. The property described therein was the real estate which had been assigned as dower to the widow. It was stated therein that the grantors were the owners of the property free and clear of incumbrance, except the dower interest of Mrs. Mary C. Dean, the mother of the complainant. This deed was acknowledged and delivered to Mr. Radford December 3, 1895. At the same time a mutual release was signed by Mr. Dean and Mr. Radford, reading as follows:

"This release, made this 3d day of December, A. D. 1895, between George W. Radford and Edgar S. Dean, both of the city of Detroit, Michigan, witnesseth: That the said parties have this day, for a valuable consideration, adjusted and settled all claims and demands which each holds against the other; and in consideration thereof each of the said parties, for himself and his legal representatives, release and discharge the other of and from all claims and demands whatsoever up to and including the said above date."

It is the claim of Mr. Radford that because of this settlement and release at this time he delivered to Mr. Dean vouchers and notes given by him to Mr. Radford. Later than this Mr. Radford let Mr. Dean have various sums of money, to secure the payment of which a chattel mortgage was given, upon which it is claimed there was due at the time this cause was decided about $560.

In June, 1902, the complainant filed this bill of complaint, alleging that the deed of December 3, 1895, was in fact a mortgage given to secure the payment of $1,000 and interest, and that complainant had caused to be ten-

dered to Mr. Radford in October, 1901, the sum of $1,355, and that to secure a later debt of $549 he had given a chattel mortgage to Mr. Radford, and that Mr. Radford claimed the deed of December 3, 1895, was an absolute deed, and threatened to foreclose the chattel mortgage if complainant took any steps to recover the real estate. The bill prayed for an accounting, and that the deed might be treated as a mortgage, and for an injunction restraining defendant from foreclosing the chattel mortgage.

The defendant answered at great length, claiming the deed of December 3, 1895, conveyed to him the title in fee, subject to the dower interest of the widow of Horace M. Dean, and that the chattel mortgage was a valid mortgage. The case was heard in open court. The judge held that the deed of December 3, 1895, was a mortgage, and that there was due from Mr. Dean to Mr. Radford $892.14 as principal and $316.64 as interest, and that upon payment of that amount Mr. Radford and his wife convey an undivided 4/25 of the property described in the deed to the complainant. He also decreed the chattel mortgage to be without consideration and void, and ordered it canceled.

It is the claim of complainant that the decree should have required the conveyance of 5/25 interest, instead of 4/25, and for that reason complainant has appealed the case. We deem it unnecessary to discuss this claim, further than to say we think the circuit judge gave a proper construction to the contract and the papers relating to this feature of the case.

The defendant George W. Radford claims the deed was not a mortgage, but a valid deed, and should have been so held. He also contends that, if treated as a mortgage, there is a much larger amount due than the circuit judge found. He also claims the chattel mortgage should not have been canceled. For these reasons he has appealed.

The consideration of the case has been attended with great difficulty. Neither party kept books of account in which the dealings between them was stated. Counsel for defendant has prepared a careful statement of what he

claims on behalf of his client. The counsel for complainant on this branch of the case have contented themselves with printing in their brief the written opinion of the circuit judge. As before stated, Mr. Radford claims that at the times settlements were had and receipts given he delivered to Mr. Dean receipts and vouchers showing the state of the accounts. He produces in court such checks as he has, which he gave to Mr. Dean. They cover a very large portion of the items. The items most in dispute between the parties are one of $185 mentioned in the contract of August 1, 1892, an item of $500 represented by check 6,262, dated January 25, 1895, and an item of $327.69, insurance money paid to Mr. Radford. When he decided the case the circuit judge disallowed the $185 item and the $500 item. He said of the item of $500 that, if there was a check for it, he had unquestionably done Mr. Radford an injustice.

We will take up the item of $185 first. Mr. Radford swears positively that he let Mr. Dean have this money as stated in the contract of August 1, 1892; that Mr. Dean said he wanted the money to pay Bowen, Douglas & Whiting, so that they should not know from whom it came. Owing to the absence of a member of that firm, settlement was not made with them until September 19, 1892, when they were paid $200 by Mr. Radford giving his check for that amount. Mr. Dean denies receiving this money. Mr. Radford says Mr. Dean received it and used it. The contract recites it was advanced. The contract contemplates Mr. Radford should make advancements. Mr. Dean was at this time needing money. In addition to producing the check of $200, paid to Bowen, Douglas & Whiting September 19, 1892, one of $265 is produced, dated October 8th, for money which Dean got; November 23d one for $10; November 29th one for $10—sums received by Dean; and other sums follow later. There can be no serious dispute but that the parties got together November 14, 1894, when the recollection of both of them ought to have been clear as to this item of $185, and ar-

rived at a settlement showing $3,025 due Mr. Radford, for which Mr. Dean gave his note; and in his testimony he says several times he owed Mr. Radford at this time $3,000, and claimed it was paid January 18, 1895, by delivering to Mr. Radford John Ward's check of $3,000. We think it fairly certain Mr. Dean received the $185.

The $500 item is evidenced by check 6,262 for that amount, delivered by Mr. Radford to Mr. Dean. Mr. Dean admits he had the money, and paid it to Larabee & Forncrook on account of lots he had bought of them. He says he had the money in the bank, and when he wanted to get the $500 the bank was closed, and would not open until 6 o'clock, and for that reason he got the check from Mr. Radford; that when the bank opened at 6 o'clock he got the money and paid it to Mr. Radford, who put it in his vault and kept it there that night; that he delivered it in the presence of Mr. Race. Mr. Race was sworn as a witness, and has no recollection of such a transaction. Mr. Radford swears positively it did not occur. We think he should be charged with this item.

As to the insurance item, defendant says complainant was credited with it, and produces checks showing where it was paid out. Complainant admits it was paid out as stated, but claims he got no credit for it. It cannot be demonstrated, from the state of the account as disclosed by the record, what the fact is. Defendant has produced checks aggregating $10,466.74. He also claims that, exclusive of the item of $185 which we have already considered, he paid to Mr. Dean six items for cash paid to Mr. Dean, aggregating $251.90, and that there were sundry other charges for average interest on balances due him and services not embraced in the contract, for which amounts settlements were agreed upon, aggregating $1,243.82, and that, after allowing all credits to which Mr. Dean is entitled, including the insurance of $327.69, there is a balance in Mr. Radford's favor of upwards of $2,000. We think that the evidence is fairly clear that in the dealings subsequent to the giving of the

deed of December 3, 1895, and prior to the computation of the amount due on the chattel mortgage in September, 1901, made by Mr. Morse, of which computation the complainant had full knowledge, this item of insurance money, $327.69, received September 20, 1897, was accounted for.

Troublesome as the foregoing questions have been, we come now to two even more difficult ones: (*a*) What was the consideration of the deed? (*b*) Was it a mortgage?

The deed recites the consideration to be $1,000. Mr. Dean swears that was the amount, and he produces a paper, which his counsel say was delivered to him by mistake, in the handwriting of Mr. Radford, commencing: "Detroit, Mich., 188—. In account with George W. Radford, attorney," etc. Then follow, commencing with May 31, 1895, 12 different charges, and then the following, under date of December 4, 1895: "By deed of dower reversion, $1,000." Then follow 20 charges, aggregating nearly $1,700. Mr. Morse, a reputable attorney, then in the employ of Mr. Radford, now dead, who drew the deed, testifies that the consideration was the cancellation of the balance due from Mr. Dean, which he understood was $1,000 or $1,200, and $600 to be paid to him by Mr. Radford, which was afterwards paid. He also says the amount of the consideration named in the deed was fixed by Mr. Dean. Mr. Radford's testimony is substantially the same as that of Mr. Morse, except that he put the amount due to him several hundred dollars higher than does Mr. Morse. He also says he had no knowledge of the amount named as the consideration in the deed until it was delivered to him. Human recollection after a long interval of time is so faulty that we are inclined to give great weight to the written memorandum. That made by Mr. Morse in the deed states it to be $1,000. The memorandum made by Mr. Radford as of December 4, 1895, the next day after the deed was delivered to him,

reads: "By deed of dower reversion, $1,000." We think these written memorandums should control.

We now come to a consideration of the question, Should the paper be regarded as a mortgage? Mr. Dean says it was so understood. Miss Doolittle was of that impression, though her testimony, standing alone, would have little value. Mr. Morse and Mr. Radford both say Mr. Dean sold the property, and that the deed was not intended to be a mortgage. In reaching a conclusion, it is well to consider the value of the property and the situation of the parties. We have already reached the conclusion that the consideration was $1,000. The assessed valuation of all the property described in the deed was $32,800. At the time the deed was made Mr. Dean delivered to Mr. Radford a statement from Larabee & Forncrook, real estate men, estimating the property to be worth $60,500. In the appraisal of the estate of Horace M. Dean, made by men familiar with real estate, when it was assigned to the widow as dower, it was called worth $57,700. We think a great preponderance of the testimony shows it was worth at least $57,000. Upon this basis 4/25 would be worth $9,120. It has been made clear that the 4/25 of the land is subject to the dower of Mary C. Dean. She was 54 years old at this time. We do not know of any proper method of computation which will reduce the value of real estate, worth $9,120 if no dower interest therein existed, to $1,000 because of a dower interest possessed therein by a woman 54 years old. It should not be forgotten that the relationship of client and attorney existed between these parties. Both Mr. Morse and Mr. Radford say, when this deed was made, Mr. Dean was in straitened circumstances, and give that as a reason why he was anxious to sell the land. In any aspect of the case, we think this deed ought to be treated as a mortgage, upon which there is due as principal $1,000 and interest from date. A careful examination of the record leads us to the belief that there was due on the chattel mortgage September 28, 1901, $559.74, no part of which has been paid.

That part of the decree which canceled the chattel mortgage should be set aside.

The decree is reversed, and one will be entered here in accordance with this opinion.

The other Justices concurred.

PHELPS v. O'CONNOR.

TAXATION—TAX SALES—BILL OF REVIEW—DISMISSAL—COSTS.

Where complainant, in a bill to review a decree for the sale of land for taxes, though he fails to make a case, obtains a longer time in which to redeem than he would have had if he had not filed the bill, it is error to dismiss the same without costs to defendants.

Appeal from Gratiot; Stone, J. Submitted April 8, 1904. (Docket No. 25.) Decided October 4, 1904.

Bill of review by Clark S. Phelps and another against William O'Connor and Perry F. Powers, auditor general. From a decree dismissing the bill without costs, defendants appeal. Reversed.

Wilson & Wilson, for complainants.

Thomas, Cummins & Nichols, for defendants.

MOORE, C. J. On February 6, 1902, the auditor general obtained a decree for the sale of certain lands belonging to the complainants for the taxes of 1899 and previous years. The lands were sold at the tax sale in May, 1902, and bid in by the State. The State, on October 31, 1902, sold them to William O'Connor, trustee, and issued a certificate to him. The complainants claim it was not until January, 1903, they heard of these proceedings. Prior to

April 27, 1903, they filed a petition asking leave to file a bill of review for reasons stated in their petition. Service of this petition was made upon the auditor general and upon William O'Connor. A hearing was had thereon, the prosecuting attorney appearing for the auditor general and the drain commissioner. No one appeared for Mr. O'Connor. The judge granted the prayer of the petition, but "ordered that said petitioners pay the amount of said tax, together with interest to date on same, into court, pending the final disposition of said cause, and that the said auditor general be, and is hereby, ordered and directed to issue no deed for the said tax on petitioners' lands as set out in their said petition, to any person or persons, until the final disposition or the further order of this court; and in case, on said hearing upon the said bill of review, the final decree should be against said petitioners, then said funds paid into court shall be applied to the discharge of said tax lien."

The money was paid into court the next day after the order was made. The bill of review was filed within a few days, in which it was prayed that the several taxes mentioned therein "may be set aside, canceled, and held for naught; and that your orators may have such other and further relief in the said premises as equity and good conscience may require and to this honorable court may seem meet."

An answer and replication was filed. The case was heard, and the judge made a decree November 16, 1903, that the bill of complaint be dismissed, but without costs, and that the register remit to the auditor general the amount of said tax, together with the interest thereon, that being the moneys paid in by complainants for the redemption of said lands, and that he issue a certificate of redemption from the said taxes.

The defendants have appealed. It is their claim that the decree of the court directing the auditor general to issue his certificate of redemption is erroneous for the following reasons: (1) Because it is not based upon the pleadings or

any issues in the case; and (2) because a court of equity has no power to extend or modify in any manner the provisions of the statute with reference to redemption from tax sales.

It will be observed that the effect of the decree is to deprive the defendants of their costs, though the bill of review was dismissed, and complainant, though he failed to make a case calling for the intervention of the court, obtained a longer time in which to redeem than he would have had if he had not filed the bill of review. We think the court should have dismissed the bill of complaint, with costs to the defendants.

The decree is reversed, and one will be entered here in accordance with this opinion. Appellants will recover costs in this court.

The other Justices concurred.

SUPREME TENT KNIGHTS OF THE MACCABEES OF THE WORLD *v.* PORT HURON SAVINGS BANK.

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s147 552

1. BANKS—DRAFTS.

In an action against a bank to recover the amount of a certain draft alleged to have been wrongfully issued by plaintiff's finance keeper, who was also cashier of defendant bank, and not credited to plaintiff, evidence examined and *held* that the court should have instructed that the amount of certain other drafts in plaintiff's favor should be deducted from any claim of the plaintiff against defendant on the first draft.

2. SAME—OFFICERS—MISAPPROPRIATION OF FUNDS.

Where the president and cashier of defendant bank knew that a certain draft was procured by its assistant cashier with plaintiff's funds, and that he had no right to use any of such funds to pay his individual debt, the question as to whether defendant was a bona fide holder of such draft in an action to recover the proceeds thereof was immaterial, since, if it

was used to pay the individual indebtedness of the assistant cashier to defendant, and not to reimburse defendant for money used by him to pay warrants or other items properly charged against plaintiff, defendant was liable.

3. SAME—EVIDENCE—RES GESTÆ.

Where defendant's cashier, who was also plaintiff's finance keeper, after having drawn certain drafts on defendant's foreign correspondents, was questioned by defendant's officers concerning the same, and thereupon stated that the drafts had been drawn to cover proper charges against plaintiff, and that a draft from plaintiff's funds would be deposited to cover the same, which the bank subsequently received, such statement by the cashier was admissible as res gestæ in an action by plaintiff against the bank to recover the proceeds of the draft deposited on the ground that such proceeds had been misappropriated by such assistant cashier and finance keeper.

4. SAME—EVIDENCE — ADMISSIONS — STATEMENTS IN FURTHERANCE OF INTEREST.

Since plaintiff claimed that the cashier was using the draft for the purpose of concealing a deficit in his accounts as assistant cashier, such statement was a statement made in his own interest, and therefore was inadmissible to establish a claim by defendant against plaintiff.

Error to St. Clair; Law, J. Submitted April 14, 1904. (Docket No. 60.) Decided October 4, 1904.

Assumpsit by the Supreme Tent Knights of the Maccabees of the World against the Port Huron Savings Bank for money had and received. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Reversed.

Stevens & Graham (*John B. McIlwain*, of counsel), for appellant.

Lincoln Avery and *P. H. Phillips* (*DeVere Hall* and *D. D. Aitken*, general counsel, of counsel), for appellee.

MOORE, C. J. This is an action of assumpsit. It was tried before a jury. The circuit judge directed a verdict

in favor of the plaintiff for $56,223. The case is brought here by writ of error.

The plaintiff is a fraternal beneficiary association. From 1883 until 1901 Charles D. Thompson was its finance keeper. During the period from 1883 until November 30, 1900, he was assistant cashier of the defendant. Until the transactions arose involved in this case, Mr. Thompson had the confidence and esteem of the officers of the fraternal society, and also of the bank. On the morning of December 1, 1900, a draft for $50,000 on a New York bank was delivered by Mr. Thompson to the defendant under circumstances which will be stated later, upon which draft defendant received $50,000.

It is the claim of plaintiff that the obtaining the funds for this draft by Mr. Thompson created a deficit of $50,000 in his account as plaintiff's finance keeper and that the draft balanced his irregularities as assistant cashier of the bank. On the other hand, it is claimed that the draft simply represented cash or its equivalent which was furnished by defendant to the plaintiff.

The record discloses that on Thanksgiving Day, November 29, 1900, Mr. Harrington, cashier of the bank, discovered Mr. Thompson had detached from the New York draft book of the bank a draft without filling in the stub. Mr. Harrington immediately wired the New York bank an inquiry and a direction to withhold payment until further advised. After the close of business on November 30th, Mr. Harrington discovered Mr. Thompson had drawn a New York draft for $15,000, which did not appear upon the business of the day. He at once sent for Mr. Thompson, and questioned him about the drafts. As to the first one, he said it was for $20,000, and had been sent to the Bankers' National Bank of Chicago, one of the depositories of plaintiff, and placed to the credit of the Maccabees, and that his failure to fill up the stub was an inadvertence. As to the $15,000 draft he said it went to the Commercial Bank of Port Huron, another depository of the plaintiff, and was placed to the credit of the plain-

tiff. This conversation was in the presence of Mr. McMorran, the president of the bank. As before stated, on the morning of December 1st the draft for $50,000 was given to the defendant bank, Mr. Thompson saying it covered the two drafts mentioned, and also $15,000 cash of defendants, which he had used for Maccabee purposes, warrants of the plaintiff, and other items properly paid in its behalf. The cash was gone over at this time, and it is claimed the statement of Mr. Thompson was verified. After this was done, the New York bank was telegraphed by Mr. Harrington to honor the two drafts. They were paid, and placed to the credit of the plaintiff. The defendant bank afterwards realized $50,000 on the draft delivered to it by Mr. Thompson.

If this was all there was of the transaction relating to the two drafts, it would seem to be very unjust for the plaintiff to repudiate the act of its finance keeper, and at the same time get the benefit of credits amounting to the sum of $35,000 of the money of the defendant, which resulted from the transaction. It, however, is claimed by the plaintiff that these drafts were necessary to make good a deficit which existed on the part of the bank in its transaction through Mr. Thompson with the plaintiff. In support of this claim counsel have prepared a somewhat detailed statement of credits and debits between the plaintiff and the bank commencing with an item of $20,000 March 12, 1900, by which it is made to appear that it was necessary to include the two drafts to balance the account on November 30, 1900. The trouble with this statement of account is it does not commence early enough. If the commencement of the account had been January 12, 1898, it would show that up to November 30th defendant had received from plaintiff $331,400, and had paid out a like amount, without including either of the drafts in controversy. Taking the record as we find it, we think it clear the circuit judge should have said to the jury that the amount of the two drafts should be deducted from any claim the plaintiff might have against defendant.

This leaves the remaining $15,000 to be considered. Before entering upon that discussion, we think it well to consider some legal questions presented by counsel. Stated briefly, it is the claim of plaintiff that defendant, in order to defend against the claim of plaintiff, must show it was a bona fide holder of the $50,000 draft. On the part of the defendant it is claimed plaintiff must show mala fides on the part of defendant before it can sustain its action. In our view of the case, neither of these questions is involved. There can be no reasonable doubt Mr. McMorran, the president, and Mr. Harrington, the cashier, of the bank, knew the $50,000 draft was procured with the funds of plaintiff. They also knew Mr. Thompson could not properly use any of those funds to pay his individual debt. In our judgment, the question as relating to the remaining $15,000 is a simple one of fact, to wit, was it the individual debt of Mr. Thompson which the money paid, as claimed by plaintiff, or was it to reimburse the bank for money used by Thompson to pay the warrants or other items properly chargeable against the plaintiff, as claimed by defendant. This was a question to be submitted to the jury upon the testimony under proper instructions.

When the plaintiff traced $50,000 of its funds into the hands of the defendant, as it did by showing defendant received a draft bought with its funds, of which defendant's officers had knowledge, and obtained the money thereon, it made a prima facie case. It then became the duty of the defendant to show plaintiff had received full value for this amount. We have already seen that, as the record is presented, it did account for $35,000 of this amount.

It is claimed by plaintiff that Mr. Thompson's statement to the officers of the bank at the time of the transaction is not competent. Defendant claims it is competent, not only as part of the res gestæ, but also as an admission which should bind the bank that the $15,000 was used to pay the warrants of the plaintiff and other proper charges against it. We have no doubt the conversation was admissible as part of the res gestæ. Whether it was

admissible as tending to establish a claim against plaintiff presents a much more difficult question. Upon the proposition that it is admissible for that purpose counsel cite *Oakland County Sav. Bank* v. *State Bank of Carson City*, 113 Mich. 284 (71 N. W. 453, 67 Am. St. Rep. 463), *State Sav. Bank of Ionia* v. *Montgomery*, 126 Mich. 327 (85 N. W. 879), and many other authorities. If the only persons interested in the transaction were the plaintiff and defendant, doubtless the contention of counsel is sustained by these authorities. But if the claim of plaintiff is true that Mr. Thompson was using this draft for the purpose of covering up a deficit in his account with the plaintiff, then he is a party in interest, and his statements would be made in his own interest. In *State Sav. Bank of Ionia* v. *Montgomery*, supra, after a detailed analysis of several authorities and the citation of a great many others, it was held that the knowledge of the agent would not be imputable to the principal where in the particular transaction his interests were adverse to the interests of the principal. The same principle is involved here. Mr. Thompson may have been actuated by self-interest in making these statements, and for that reason they should not bind the plaintiff.

The other questions have been considered, but we do not deem it necessary to discuss them.

For the reasons stated, the judgment is reversed, and a new trial ordered.

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

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BARNARD v. PATERSON.

1. MORTGAGES—MORTGAGEE IN POSSESSION—DISBURSEMENTS—REPAIRS.

   A mortgagee in possession is not entitled to reimbursement for expenditures for repairs not necessarily made to save the estate from loss and injury.

2. SAME—RENTS—COLLECTION—COMPENSATION.

   A mortgagee in possession is not entitled to compensation for collecting rents, where he collects them for his own benefit, and there is no express agreement that he shall be compensated for such services, and no evidence from which such an agreement may be inferred.

3. SAME—RATE OF INTEREST—ESTOPPEL.

   Two years after certain mortgages matured the mortgagee's agent furnished defendants a statement of account, in which interest on the overdue principal was computed at the rate of 7 per cent. per annum, and defendants' solicitors objected to such statement only in so far as it contained charges for disbursements, and requested a corrected statement, eliminating such items. Nearly two years later another statement was rendered, in which interest was also computed at 7 per cent. *Held*, that complainant, having induced defendants to remain her debtor in the expectation that interest would be charged at a rate not exceeding 7 per cent., was estopped from thereafter claiming a higher rate. HOOKER, J., dissenting.

Appeal from Wayne; Mandell, J. Submitted April 5, 1904. (Docket No. 12.) Decided October 4, 1904.

Bill by Mary E. Barnard against John Paterson, Hattie W. Paterson, and the Wayne County Savings Bank to foreclose certain mortgages. From a decree for complainant for less than the amount prayed for, she appeals. Affirmed.

Wilkinson, Post & Oxtoby, for complainant.

Corliss, Andrus, Leete & Joslyn, for defendants Paterson.

CARPENTER, J. This is a bill to foreclose two mortgages given to the complainant by the first two named defendants. The sole question involved relates to the amount due on said mortgages.

December 2, 1897, before the mortgages became due, and while an installment of interest was unpaid, the first two named defendants executed and delivered to complainant a paper which read as follows:

"In consideration of our indebtedness to Mary E. Barnard, we do hereby assign, set over, and convey to her, said Mary E. Barnard, all rents accrued and accruing to and from the 1st day of December, 1897 [then follows the description of the residences described in the mortgage], to be had and received by her until our indebtedness in her favor is extinguished; further right being hereby given to her to rent and re-rent said house as often as occasion shall require while said indebtedness remains unpaid."

Under the authority given by this writing, complainant collected the rents for several years. She claims that she expended therefrom the amount of $292.16 for necessary repairs, and she asks in this suit to be allowed for these disbursements. She also asks for commission of 5 per cent. for collecting said rents, and that the interest on the mortgages, which became due in 1898, should since that time be computed at the rate of 8 per cent. per annum. Each of these claims was disallowed by the trial court.

DISBURSEMENTS FOR REPAIRS.

It is contended by complainant that she occupied the position, and had the authority, of a mortgagee in possession. A mortgagee in possession—

"Has no authority to make the estate better at the expense of the mortgagor, but is bound to use reasonable means to preserve the estate from loss and injury. He cannot charge the mortgagor with expenditures for convenience or ornament. The rule is sometimes stated to be that the mortgagee must preserve the estate in as good condition as that in which he received it. But he may properly, under some circumstances, go beyond this, and

supply things that were wanting at the time of entry, as where the doors or windows of a house are gone, he is justified in supplying these, in order to put the estate in condition for occupation." 2 Jones on Mortgages, § 1126.

See, also, *Woodward* v. *Phillips*, 14 Gray, 132; *Robertson* v. *Read*, 52 Ark. 381 (14 S. W. 387, 20 Am. St. Rep. 188).

Tested by this rule, we think the trial court properly disallowed the items of complainant's account for repairs. Many of those items are entirely unsupported by evidence. The other items should be rejected because it is satisfactorily shown respecting some items, by complainant's own testimony, and respecting the others by the weight of the testimony that the expenditures were not made to preserve the estate from loss and injury.

COMMISSION FOR COLLECTING RENTS.

It is held by some courts (see *Brown* v. *Savings Bank*, 148 Mass. 300 [19 N. E. 382]; *Bradley* v. *Merrill*, 91 Me. 340 [40 Atl. 132]; *Waterman* v. *Curtis*, 26 Conn. 241) that a mortgagee in possession is entitled to such commissions, or, as it is sometimes said, charges, for taking care of the estate; but the great weight of authority is against their allowance. See *French* v. *Baron*, 2 Atk. 120; *Elmer* v. *Loper*, 25 N. J. Eq. 475; *Turner* v. *Johnson*, 95 Mo. 431 (7 S. W. 570, 6 Am. St. Rep. 62); *Allen* v. *Robbins*, 7 R. I. 33; *Benham* v. *Rowe*, 2 Cal. 387; *Harper* v. *Ely*, 70 Ill. 581; *Neptune Ins. Co.* v. *Dorsey*, 3 Md. Ch. 334.

We think the rule established by the weight of authority the proper rule to apply in this case. Complainant collected these rents for her own benefit. There was no express agreement that she should be compensated for this service, and no evidence from which such an agreement might be inferred. Under these circumstances, we think the defendants had a right to understand that there would be no charge for such services.

RATE OF INTEREST.

The important question, however, relates to the complainant's claim that she is entitled to charge interest at the rate of 8 per cent. per annum since the maturity of the mortgages. The mortgages obligate the mortgagor to pay interest at the rate of 8 per cent. per annum, semi-annually, upon all overdue interest and principal from the time of its or their maturity. About two years after the mortgages matured, and some time in 1900 (the exact date is not shown by the record), complainant's agent furnished defendants a statement of account, in which was stated in detail the rents collected and the items claimed to have been disbursed. In this statement interest on the overdue principal was computed at the rate of 7 per cent. per annum. December 29, 1900, defendants' solicitors wrote complainant that they objected to the charges for disbursements, and desired "a correct statement of the amount due, eliminating those items." In 1902 complainant's agent rendered another statement, in which interest was computed at 7 per cent. Complainant contends that this computation should be regarded as a proposition to settle on condition that defendant should pay the items disbursed, and, as defendant rejected this proposition, such computation has no force. We cannot accede to this view. It is quite apparent that defendant's letter of December 29, 1900, objecting to the disbursement for repairs, proceeded upon the assumption that the interest should be computed at 7 per cent.; in other words, complainant was informed by this letter that defendants were dealing with her upon the assumption that interest would be computed, as stated in the aforesaid statement, at 7 per cent. Complainant was not bound to acquiesce in this assumption. She might very properly have said, "If you decline to pay my disbursements, I will withdraw my proposition to accept interest at 7 per cent." This, however, she did not do. She remained silent for nearly two years, and then rendered a second statement, in which interest was again

computed at 7 per cent. Defendant Paterson was warranted by this conduct in believing, and it may be assumed that he continued to remain complainant's debtor because he believed, that interest on the overdue principal would be computed at 7 per cent. Complainant, having thus induced defendant to remain her debtor in the expectation that interest would be computed at 7 per cent., is, in my judgment, estopped from exacting a higher rate.

"There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on." *Faxton* v. *Faxon*, 28 Mich., at page 161.

We hold, therefore, that interest was properly computed at 7 per cent. See *Vereycken* v. *Vanden Brooks*, 102 Mich. 121 (60 N. W. 687).

It results from these views that the decree appealed from should be affirmed, with costs to defendants.

MOORE, C. J., and GRANT, J., concurred with CARPENTER, J.

HOOKER, J. (*dissenting*). I am of the opinion that there is nothing in this record justifying the denial of interest to complainant at the stipulated rate of 8 per cent., there being an absence of circumstances amounting to an estoppel. I think the cause should be reversed and a decree entered for the complainant as prayed in the bill.

MONTGOMERY, J., did not sit.

CITY OF MONROE *v.* BOARD OF SUPERVISORS OF MONROE COUNTY.

1. CERTIORARI—OBJECTIONS REVIEWABLE.
   On certiorari to review the granting of a mandamus, relator cannot object to the consideration of a finding below on the ground that it contradicts an averment in his answer on which no issue was taken, unless he assigns it as error in his affidavit for certiorari.

2. SAME—FINDINGS BELOW—MANDAMUS.
   The court cannot disregard the findings of the court below though they are contrary to statements in respondent's return on which no issue was taken.

3. HEALTH — CONTAGIOUS DISEASES—CLAIMS — POWER OF SUPERVISORS—ACT OF 1903.
   Boards of supervisors have no power, under Act No. 7, Pub. Acts 1903, to reject a claim for services rendered by order of a board of health, without giving the claimant an opportunity to be heard and to present proof in its support.

4. SAME—POLICE SERVICES.
   A claim presented to a board of supervisors by a city for the services of a "special policeman" in "smallpox cases," cannot be peremptorily rejected on the ground that the claim shows on its face that it was for "policing" the city.

Certiorari to Monroe; Lockwood, J. Submitted May 17, 1904. (Calendar No. 20,470.) Decided October 4, 1904.

Mandamus by the city of Monroe to compel the board of supervisors of Monroe county to fix a time and place for the hearing of evidence respecting a certain claim. There was an order granting the writ, and respondent brings certiorari. Affirmed.

John J. Kiley, City Attorney (*C. A. Golden*, of counsel), for relator.

Thornton Dixon and *Willis Baldwin*, for respondent.

PER CURIAM. A writ of certiorari was issued to bring before us a mandamus proceeding instituted in the circuit court for the county of Monroe. That court awarded a mandamus requiring respondent to fix a time and place for the hearing of evidence to be produced before them respecting a certain claim of relator's which it once rejected. Respondent asks us to vacate said order.

The facts, as appear from the petition of relator, answer of respondent, and findings of the lower court, are these:

In May, June, and July, 1903, two cases of smallpox appeared in the city of Monroe. Relator's board of health took charge of these cases, and, besides engaging physicians and nurses, it employed a watchman to prevent communication between the afflicted persons and the public. The bill for the services of the watchman, after having been paid by said relator, was by it presented to said respondent. It described the services as those of a "special policeman" in a "smallpox case," and named the individual at whose residence they were performed. Attached to the bill was a formal certificate, signed by the president and secretary of relator's board of health. It was therein certified that the services were rendered in pursuance of an order of the board of health; that they were rendered to prevent the spread of smallpox, and for the safety of the inhabitants of said township; that the sums charged are reasonable and just; that the person for whom rendered, his parents, or other persons liable for his support are unable to pay for the same; and that the bill had been examined and approved by said board of health. Respondent rejected said bill without taking any testimony or making any investigation except that the chairman of its committee on claims and accounts made a casual outside inquiry of some of relator's citizens.

The trial court also found, as appears from the order complained of, as well as from the opinion filed:

"That before the said claim of relator was rejected the relator offered to produce before the respondent * * *

evidence tending to prove the legality of said claim, and it further appeared from the evidence that subsequent to the rejection of said claim the relator again offered to produce evidence before the respondent board tending to show the legality of its said claim, which offers were ignored by the respondent board."

Appellant objects to our considering the latter finding because it is directly contrary to an averment in respondent's answer upon which no issue was taken. In our judgment, respondent cannot insist upon this objection, because it is not raised by any of the assignments of error in its affidavit for the writ. See *Grand Rapids, etc., R. Co.* v. *Weiden*, 69 Mich. 572 (37 N. W. 872). Nor can we disregard this finding—which is supported by testimony—and say, as requested by appellant, that full opportunity was given relator to have witnesses sworn. See *Hyde* v. *Nelson*, 11 Mich. 353; *Linn* v. *Roberts*, 15 Mich. 443; *Lynch* v. *People*, 16 Mich. 472.

The circuit judge made the order complained of upon the ground that the method of procedure adopted by respondent did not give relator the opportunity of being heard, to which by law it was entitled. What, if any, opportunity of being heard, did the law give relator? This depends upon the proper construction of the following part of Act No. 7 of the Public Acts of 1903:

"The said board of supervisors shall, as soon as may be, proceed to audit the said bill, and if found that the expenses were necessarily incurred, the services actually and necessarily performed, and the amounts claimed for such expenses and services are severally just and reasonable under the circumstances, the said board of supervisors shall allow the same or such parts thereof as the majority of the members-elect of said board shall deem just, and provide for their immediate payment by the said county, and in auditing such accounts, said several boards of supervisors shall have full power to examine into the merits of all claims presented to them in accordance with the provisions herein contained, and may subpœna witnesses and take any other measures necessary to arrive at the truth of the same."

It was intended by this law to give the boards of supervisors the right, which they did not theretofore have (see *Elliott* v. *Board of Sup'rs of Kalkaska Co.*, 58 Mich. 453 [25 N. W. 461, 55 Am. Rep. 706]), of determining the propriety and reasonableness of bills incurred by local boards of health. It is conceded by the relator and by the circuit judge that under the new law above quoted the decision of boards of supervisors which have legally investigated such bills is final. But can such a bill be rejected without giving to the claimant who presents it an opportunity of being heard? While the statute does not expressly provide that this opportunity shall be given, such a provision is necessarily implied. See *Miller* v. *Hoffman*, 135 Mich. 319 (97 N. W. 759); *Gilson* v. *Munson*, 114 Mich. 671 (72 N. W. 994). See, also, *Mixer* v. *Board of Sup'rs of Manistee Co.*, 26 Mich. 422; *Hickey* v. *Board of Sup'rs of Oakland Co.*, 62 Mich. 94 (28 N. W. 771).

While it is difficult to say precisely what opportunity of being heard must be given a claimant, we must regard it as settled by our decisions that the opportunity of presenting proofs which tend to establish the validity of his claim cannot be denied him (see *Mixer* v. *Board of Sup'rs of Manistee Co.*, supra) in any case in which he has offered to produce such proof. See *Hickey* v. *Board of Sup'rs of Oakland Co.*, supra.

It may be that cases may arise where courts might properly say that the denial of the right to introduce testimony was not prejudicial. Perhaps this would be such a case if relator's claim appeared on its face, as respondent contends, to be a claim for "policing" the city of Monroe. It might forcibly be argued in such a case that it is so obvious from the inspection of the bill that the charge is improper that relator is not prejudiced by not being permitted to introduce testimony. The bill in question, however, does not appear on its face to be for policing the city. It appears to be for the services of a "special policeman" in "smallpox cases." If it cannot be inferred from the bill

and the certificate thereto attached that such services were necessary, surely that fact might be established by testimony.

It follows that, in our judgment, respondent, in ignoring relator's offer to produce evidence tending to prove the legality of its claim, denied the latter the opportunity of being heard, to which by law it was entitled. The decision of the trial court was therefore right, and should be affirmed.

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OLIVER *v.* JESSUP'S ESTATE.

1. WORK AND LABOR—EVIDENCE—DECEDENTS' ESTATES.
   Where a claim is made against the estate of a deceased person, on the theory that the services rendered decedent and his wife became more onerous after the execution of a contract and lease, and decedent orally promised further compensation, evidence of what the entire services, including those compensated by the lease, were worth, is inadmissible.
2. SAME—EVIDENCE—UNSIGNED CODICIL.
   An unsigned codicil is likewise inadmissible to show the value of the alleged additional services, in the absence of evidence as to the circumstances under which it was written, or whether decedent expected it to take the place of the lease or whether it was intended as a voluntary gift.
3. TRIAL—CONDUCT OF COUNSEL.
   Failure of counsel to acquiesce in the rulings of the court is to be condemned.
4. WORK AND LABOR—VALUE OF SERVICES—EXCESSIVE VERDICT.
   Evidence examined in a case where a claim was made against the estate of a deceased person for compensation for additional services of a more onerous nature performed after the execution of a contract and lease, and *held* that a verdict for $930 was excessive.

Error to Lenawee; Chester, J. Submitted June 9, 1904. (Docket No. 7.) Decided October 4, 1904.

Charles H. Oliver presented a claim against the estate of Charles E. Jessup, deceased, for services rendered. The claim was allowed by the commissioners, and the estate appealed to the circuit court. There was judgment at the circuit for claimant, and defendant brings error. Reversed.

Fellows & Chandler, for appellant.

John E. Bird and *John L. O'Mealey*, for appellee.

MOORE, C. J. The claimant produced testimony tending to show that he and his sister, younger than himself, entered the family of deceased when claimant was about 13 years old; that they were cared for, clothed, educated, and treated as decedent's children; that when claimant reached the age of 21 he and his sister continued in the house of decedent; that decedent's wife was in ill health for about two years and a half prior to her death, which occurred in May, 1899; that decedent died suddenly of heart failure, in 1901. His testimony further tended to show that decedent expressed satisfaction with the services performed, and said that claimant would get his pay for the same; that at one time he stated that claimant had talked some of leaving, but he told him if he would stay he would compensate him. He also gave testimony tending to show the value of the services performed. No suggestion was made in putting in his case that he had a life lease.

The estate claimed these services were performed under a written contract; that the claimant and his sister had accepted the terms and consideration of this contract, and had agreed to perform these services for an agreed consideration, and that claimant had been paid in full; that on January 29, 1898, after Mrs. Jessup had been ailing something over a year, the decedent and his wife executed to the claimant and his sister a life lease of his real estate, consisting of 127 acres of land, to take effect at the death of decedent and wife, the consideration of which was as follows:

"This lease is made in the consideration of the faithful service rendered by the parties of the second part [claimant and his sister] to the parties of the first part, and the further agreement of the parties of the second part that they are to remain with, care for, and serve the said parties of the first part during the lifetime of the said first parties, as they have heretofore done."

This paper was in the possession of claimant, and it appeared that after decedent's death claimant and his sister took possession of the premises, recorded the life lease, and had ever since been in possession of these lands.

The case was tried by a jury who rendered a verdict in favor of claimant of $930. The defendant has brought the case here by writ of error. It is insisted there was error in relation to the following: *First*, admissibility of testimony; *second*, conduct of counsel; *third*, the estate's requests and the charge of the court; *fourth*, the motion for a new trial.

1. It was the claim of defendant that all the services were rendered under this agreement, and that a verdict should have been directed in its favor. It was the contention of claimant that after this agreement was drawn the character and amount of the service required was changed from what had heretofore been done; that Mrs. Jessup had a cancer, which made the care of her more and more burdensome and disagreeable, and required so much care from himself and sister they had decided they must quit the work, when Mr. Jessup said to the claimant if he would remain he would pay him a further sum for his services.

Upon the trial claimant was allowed to show not only what the value of his services was during the illness of Mr. and Mrs. Jessup, but for five or six years prior thereto. At this time nothing had developed in relation to the lease, and in the claim filed pay was not asked for services prior to the commencement of the sickness of the Jessups. We do not think it can be said there was no testimony tending to show that the services required of claimant became more onerous after the lease was made,

and that there was an agreement for additional compensation. *Goebel* v. *Linn*, 47 Mich. 489 (11 N. W. 284, 41 Am. Rep. 723). If the jury found that fact was established, the claimant was entitled to a judgment, not for the full value of his services, for some of them were taken care of by the provisions of the lease, but to what the additional services were reasonably worth, less an offset, which we will mention hereafter. The testimony, from any aspect of the case, was incompetent.

In 1878 Mr. Jessup made a will. Claimant was allowed to show that attached to this will, under date of December 1, 1900, Mr. Jessup had written:

"To Charles H. Oliver I bequeath the sum of five hundred dollars ($500), and the two horses, and whatever farming tools belongs to me Charles Edward Jessup, Senior."

This was followed by showing that in the inventory the horses and farming tools were appraised at $350. It is said this was in the nature of an admission that the services were regarded by Mr. Jessup as worth $850 at least, and this was so argued to the jury. This paper was not signed by Mr. Jessup. It is not shown under what circumstances he wrote it—whether he expected it would take the place of the lease or whether it was a voluntary gift. It is clear that, whatever he had in mind, he did not see fit to give it effect by attaching his signature. It should have been excluded.

2. Error is assigned as to the conduct of counsel. As the case is to be reversed for other reasons, we will content ourselves with saying that the conduct of counsel in not acquiescing in the rulings of the court is to be condemned. We have expressed our opinion of similar conduct in *Thompson* v. *Railway Co.*, 91 Mich. 255 (51 N. W. 995), *Cavanagh* v. *Township of Riverside*, 136 Mich. 660 (99 N. W. 876), and *Hillman* v. *Railway Co.*, ante, 184 (100 N. W. 399).

3. We do not deem it necessary to discuss the assign-

ments of error in relation to the charge, as the errors naturally grew out of the improper admission of the testimony.

4. A motion was made for a new trial. It was overruled. It has already appeared that in consideration of the life lease certain services were to be rendered. It is not shown when this agreement was modified. Mrs. Jessup lived only 15 or 16 months after the lease was made. The lease bound the claimant to continue to render to Mr. and Mrs. Jessup during their lifetime such services as he had heretofore rendered them. After Mrs. Jessup died, the claimant worked for Dr. Vaughn by the month. What attention he gave to Mr. Jessup was rendered either in the evening or at night. There was no competent testimony which would warrant the jury in rendering so large a verdict. It should have been set aside because it was excessive.

Judgment is reversed, and new trial ordered.

The other Justices concurred.

NUGENT *v.* PETERMAN.

ADVERSE POSSESSION—CHARACTER OF HOLDING—MINORS—NOTICE.

Where a father deeded land to his daughter as a gift, but remained in possession and paid the taxes several years out of funds in his hands belonging to her, but after her death, leaving infant children, allowed the land to be sold for taxes and purchased it at the sale, limitations would not run against the title of the minor children until actual notice to them of the adverse character of his possession.

Appeal from Jackson; Peck, J. Submitted June 10, 1904. (Docket No. 10.) Decided October 4, 1904.

Bill by Catherine Nugent against Jacob L. Peterman

to set aside a deed. From a decree dismissing the bill, complainant appeals. Affirmed.

Parkinson & Campbell, for complainant.

Charles A. Blair and *Charles E. Townsend*, for defendant.

MONTGOMERY, J. This case concerns the title to the south 33 feet of lot 2, block 32, of Ford's Extension to the City of Jackson. The father of the complainant, James Nugent, was in 1872 the owner of the whole of lot 2. On April 29th of that year he conveyed the south 33 feet to his daughter, Mary Ferguson, as a gift. Mary Ferguson for a time lived with her husband, Peter Ferguson, in her father's house on the north part of the lot, paying rent for the same. Some stone were landed on the south 33 feet of the lot by Peter Ferguson, the purpose being to build a house thereon. In 1874 or 1875 Mrs. Ferguson removed to Grand Rapids, leaving the premises in charge of her father, who made use of them for a cow and chicken yard, and paid the taxes out of money owing by him to Mrs. Ferguson. In 1877 Mrs. Ferguson died, leaving four daughters, all of whom were minors; the youngest being but a few months of age. No change of possession followed upon Mrs. Ferguson's death. James Nugent continued to occupy the land as before. Peter Ferguson paid the taxes of 1877. The taxes of 1878 were not paid, and James Nugent became the purchaser at auditor general's sale, obtaining his deed in November, 1880. After 1883 the 33-foot strip was assessed to James Nugent until 1893, when for a time it was assessed to complainant. James Nugent, on December 5, 1891, conveyed the 33-foot strip to his daughter, the complainant, who lived with him on the north portion of the lot. James Nugent continued to occupy the entire premises as before until 1898, when he died. The defendant acquired the title of the heirs of Mrs. Ferguson.

It is apparently conceded that the tax title was originally

invalid; the complainant's contention being that the defendant's title had been defeated by adverse possession. The circuit judge ruled against this contention, and complainant appeals.

We think the ruling of the circuit judge should be sustained. The occupancy of James Nugent began in subordination to the title of Mrs. Ferguson, and unquestionably so continued to the time of her decease. The title to to the 33-foot strip then vested in minor heirs of Mrs. Ferguson. There was no ouster as to them by any actual notice, either during their minority or afterwards. There was no change in the character of the occupancy. It is true there is evidence of assertions of ownership made by James Nugent to others, but no notice is brought home to the owners of the legal title, even if such notice would be availing during the minority of the children; there having, clearly, been no ouster of their ancestor. The case is, in many of its features, like that of *Paldi* v. *Paldi*, 84 Mich. 346 (47 N. W. 510), and is ruled by that case.

Complainant's counsel ask what more James Nugent could have done to show his holding to be adverse. The answer is that if the possession held in subordination to the title of the ancestor could be changed into an adverse possession as against these minors, it must also follow that notice of the purpose to so change the holding might have been given to them. Under section 9718, 3 Comp. Laws, these infants were under disability. When they severally attained their majority, notice of adverse holding might have been given, but it was not.

The decree is affirmed, with costs.

The other Justices concurred.

THORNE *v.* FOLEY.

1. LIMITATION OF ACTIONS—EXPRESS TRUST.
   Limitations do not run in favor of the trustee of an express trust except where he repudiates the trust, and assumes an adverse position with notice to the cestui que trust.

2. TRUSTS—ENFORCEMENT—REPUDIATION—LACHES.
   A bill on behalf of certain cestuis que trust, against defendant as the alleged trustee, alleged that year by year the original trustee and his successors in office represented to such cestuis que trust and their heirs and representatives, both expressly and by implication, that the title to the property was vested in such trustee and his successors by virtue of the statute of limitations; and that a certain decree quieting such title was a final adjudication and determination of all the rights of such cestuis que trust, their heirs and representatives, and was an absolute bar to any proceedings by them or for their benefit to recover the premises. The bill also set up the recent discovery of a certain ancient deed to defendants, which was unrecorded, but which, if recorded, would only have shown that defendants held subject to a different trust than that claimed by complainants, and adverse to them. *Held* that a delay of more than 45 years by complainants in bringing suit was such laches as deprived them of relief.

Appeal from Wayne; Rohnert, J. Submitted June 10, 1904. (Docket No. 13.) Decided October 4, 1904.

Bill by Charles Thorne and others against John S. Foley and others to enforce a trust. From a decree sustaining a demurrer to the bill, complainants appeal. Affirmed.

Jasper C. Gates (*Louis J. Rosenberg*, of counsel), for complainants.

Keena & Lightner, for defendant Foley.

MONTGOMERY, J. This case is before us on appeal from a decree passed in favor of the defendants on a hearing on

demurrer to the bill of complaint. The bill is essentially a bill to declare and enforce a trust. The complainants' case is grounded upon a deed of the premises in question, known as the "Melchers Farm," made in April, 1808, by Francis Paul Melchers to Louis Beaufait, Joseph Cerre dit St. Jean, Benoit Chapaton, Charles Rivard, and Francis Rivard, acting as attorneys for the inhabitants of the Cote N. E. in the district of Detroit. The bill sets out at length the terms of this deed, which it is claimed were apt to create a trust in favor of the inhabitants of the Cote N. E. It is also averred that the complainants are descendants of the then inhabitants of the Cote N. E., and have succeeded to their rights, and that in this right they are entitled to have this trust enforced in their favor.

The bill also avers that in April, 1833, Louis Beaufait and Francis Rivard, being then the only survivors of the trustees named in the Melchers deed of 1808, made a conveyance of the farm to Rev. Frederick Rese, then the archbishop of the diocese of Cincinnati, and to his heirs and assigns, but in trust for religious and literary purposes. This last-mentioned deed was not recorded until August, 1901. The bill also alleges that at a date prior to 1857 Jacob M. Howard, Addison Mandell, William P. Wesson, and others associated together and obtained deeds of conveyance from certain of the inhabitants of the Cote N. E. other than the ancestors of the complainants.

The bill further alleges that in 1857 Peter Paul Le Fevre, then exercising the office of bishop of the Roman Catholic Diocese of Detroit, filed a bill of complaint in the Wayne circuit court, in chancery, against William P. Moore, in whom had been vested the Howard and Mandell title, praying, among other things, that the court decree that a full and absolute fee of said premises was vested in and held by said Peter Paul Le Fevre in trust for the use and benefit of said Roman Catholic Church, free and clear of all claim of right thereto on the part of said Moore. In this suit James Abbott, Victor Moross, and Louis L. Beaufait were joined as defendants. The bill averred that the inhabitants of

the Cote N. E. were so numerous that it would be impracticable to make them parties.

The present bill avers that this latter allegation was untrue, and that the whole proceeding in 1857 was collusive and fraudulent, and that the decree was taken under an agreement that the farm should be divided between the bishop and the Howard and Mandell syndicate, which was in fact done after the decree was entered. The decree was entered in accordance with the prayer of the bill, and the bishop has since used and controlled the property.

The circuit judge was of the opinion that, if the rights of complainants under the original Melchers deed be assumed to have been as stated, those rights have been cut off by the statute of limitations and by complainants' laches. Our first inquiry should be directed to this question.

The claim of the complainants is that the Melchers deed created an express trust, and that the statute of limitations does not run as against a cestui que trust and in favor of the trustee of an express trust. Such unquestionably is the general rule. 2 Perry on Trusts, § 863. But it is equally well settled that, where the trustee repudiates the trust, and assumes an adverse position with notice to the cestui que trust, an action to recover land is barred. Id.; Wood on Limitations, § 200, p. 464; *Speidel* v. *Henrici*, 120 U. S. 377 (7 Sup. Ct. 610); *Naddo* v. *Bardon*, 51 Fed. 493, 2 C. C. A. 335.

The bill in this case alleges:

"And also that year by year, and every year since the making of said decree, either said Bishop Le Fevre, or some of his successors in office, did by themselves and by and through the several and various priests who have from time to time been in charge of and who have officiated in the said churches, stated and represented to said persons, said 'inhabitants' and their heirs and representatives, both expressly and by implication, that it was under and by virtue of the statute of limitations of this State that the legal title to said 'farm' was vested in said Bishop Le Fevre and his said successors; and, further, that said decree was a final adjudication and determination of all

the rights of said 'inhabitants' and their heirs and representatives in and to said 'farm,' and an absolute bar to any and all suits and proceedings by them or on their behalf in the premises."

This averment imparts knowledge of the decree, and that the defendants were claiming title adverse to the claim of complainants. But it is said that, had the deed of 1833 been recorded, it would have disclosed that the defendants took the farm subject to the trust declared by the deed of 1808, and that the concealment of this deed and of the agreement between Howard and Mandell and Bishop Le Fevre prevents the bar of the statute. Had the deed of 1833 been recorded, it would have disclosed to the complainants that defendants were claiming to hold the land in question by virtue of a deed declaring a trust other and different from that which the complainants claim—a trust adverse to complainants. This claim of defendants, at least so far as it was based upon the decree of 1857, was well known to complainants. It is said that, if this deed had been recorded, it would have disclosed that Bishop Rese took the title of the trustees subject to the burdens of complainants' rights. How else could the bishop have taken the title? The bill is particular in averments to show that no adverse possession existed prior to 1857. Complainants did not require a view of the deed of 1833 to assure them of their rights under the Melchers deed. The utmost that can be claimed is that the defendants made broader claims as to their rights than the law would sustain them in, but all the time complainants were in possession of knowledge of the *facts* affecting their title, and since 1857 knew that that title was disputed. This delay of more than 45 years bars their remedy.

The decree is affirmed, with costs.

The other Justices concurred.

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

1. APPEAL AND ERROR — DISCRETION OF TRIAL COURT — REFUSAL OF NEW TRIAL.

   The case must be a very clear one, affording very strong evidence that the verdict is the result of bias or prejudice, to justify this court in overturning the decision of the trial judge adverse to a new trial on the ground that the verdict is opposed to the great weight of evidence.

2. TRIAL — INSTRUCTIONS — CREDIBILITY OF WITNESSES.

   An instruction that in weighing the testimony of the witnesses any interest of the witnesses may be considered, but in the same connection cautioning the jury against drawing an unfair inference because the witnesses are in defendant's employ, does not invade the province of the jury.

Error to Mecosta; Palmer, J. Submitted June 14, 1904. (Docket No. 18.) Decided October 4, 1904.

Case by James Lovely against the Grand Rapids & Indiana Railway Company for the negligent killing of a steer. There was judgment for plaintiff, and defendant brings error. Affirmed.

T. J. O'Brien and *James H. Campbell*, for appellant.

Charles A. Withey (*J. E. Richardson*, of counsel), for appellee.

MONTGOMERY, J. The plaintiff brought an action against the defendant to recover the value of a steer killed by defendant's train at Paris, Mecosta county. On the trial at the circuit, a recovery for the value of the steer was had. The case is brought here on error.

It is first urged that the circuit judge was in error in refusing to grant a new trial on the ground that the verdict was opposed to the great weight of evidence in the case. We have carefully considered the testimony of the

various witnesses, and do not think that the preponderance is so great in favor of the defendant as to overcome the inference that the circuit judge reached the correct conclusion. The case must be a very clear one, affording very strong evidence that the verdict is the result of bias or prejudice, to justify this court in overturning a decision of the trial judge adverse to a new trial on this ground. He has the advantage of having seen the witnesses, and of having noted their appearance on the stand.

The second point urged is that the circuit judge erred in his instructions relative to the witnesses for the defense. The instruction, as given by the circuit judge, was as follows:

"You may take the testimony of these railroad men; you may take their appearance upon the stand; you may take into consideration any interest which they might have that would in any way influence their testimony here, but no inference unfair to men should be drawn because they are in the employ of the railroad company; you will take into consideration the testimony of the plaintiff—and then weigh up the testimony on both sides, and say where, in your judgment, the truth lies, and what your duty would be in giving weight to testimony."

We see nothing objectionable in this language, taken as a whole. None of the cases cited by defendant's counsel supports their contention that the circuit judge was in this instruction invading the province of the jury. It is true the jury were told that in weighing the testimony of the witnesses the interest of the witnesses might be considered; but in the same connection the court cautioned them against drawing an unfair inference based upon the fact that these witnesses were in the defendant's employ. The question is ruled by *McDonell* v. *Rifle Boom Co.*, 71 Mich. 61 (38 N. W. 681), in which case the case of *Marquette, etc., R. Co.* v. *Kirkwood*, 45 Mich. 51 (7 N. W. 209, 40 Am. Rep. 453), relied upon by counsel, is analyzed and distinguished.

There is no error. Judgment affirmed.

The other Justices concurred.

HINCHMAN *v.* SPAULDING.

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1. JUSTICES OF THE PEACE — REMOVAL OF CAUSES TO CIRCUIT COURT—TITLE TO LAND.

   Under 2 Comp. Laws, §§ 782–784, providing for transfer to the circuit court of causes begun before justices where the title to land comes in question, a justice does not lose jurisdiction by the filing of a notice and bond and the deposit of a sum not sufficient to pay the accrued costs on a day between the return and adjourned day.

2. CERTIORARI—CONCLUSIVENESS OF RETURN.

   The return of a justice to a writ of certiorari, being responsive, and covering the points of error appearing in the affidavit for certiorari, is conclusive.

Error to Berrien; Coolidge, J. Submitted June 15, 1904. (Docket No. 23.) Decided October 4, 1904.

Trespass quare clausum fregit by George Hinchman against J. Harvey Spaulding. Plaintiff had judgment in justice's court, and defendant brought certiorari to the circuit court. The circuit court set aside the judgment of the justice, and plaintiff brings error. Reversed.

James O'Hara, for appellant.

Gore & Harvey, for appellee.

MONTGOMERY, J. Plaintiff brought a suit in trespass in justice's court by summons returnable October 12, 1903. On the return day the parties appeared, and joined issue, and the cause was adjourned until the 19th of October. On the 17th of October the defendant presented to the justice a written plea accompanied by a notice that the title to land would come in question on the trial, at the same time handing to the justice a bond in the sum of $200, signed by himself as principal and Charles F. Parrin as

surety. At the time the justice gave to the defendant a receipt reading as follows:

"Received of J. Harvey Spaulding for costs of suit and certified transcript of docket to the circuit court up to date, wherein George Hinchman is plaintiff and J. Harvey Spaulding is defendant."

On the adjourned day—October 19th—the defendant did not appear before the justice, and, after waiting one hour, the plaintiff proceeded with his proofs, and the justice pronounced judgment in plaintiff's favor. Defendant thereupon sued out a writ of certiorari from the circuit court of Berrien county, and upon the coming in of the justice's return the circuit court set aside the judgment of the justice upon certain conditions (of which the plaintiff could not, perhaps, complain). This judgment of the circuit court is brought before us for review on error.

The rules of law involved are not intricate, nor are they much in dispute. The statute (1 Comp. Laws, § 782) provides that:

"In every action where the title to land shall in any wise come in question, the defendant may give notice thereof, under the general issue, upon the return day or any adjourned day of such action."

The next section prescribes the requirements of such plea and notice.

Section 784 provides for a bond, to be approved by the justice, and for the payment of plaintiff's costs up to the time, and also $1 for return and $2 entry fee.

If these conditions are complied with, it is made the duty of the justice to certify the case to the circuit; if not, he retains jurisdiction to try the case. It is to be noted that the plea and notice were not tendered on the return day nor on the adjourned day. This is not of consequence except in this: The defendant was not able, nor was the justice, to learn what costs had been incurred by the plaintiff after the adjourned day and prior to the 17th of October. Undoubtedly, if a sufficient sum had been paid in to cover the costs actually incurred, and had this, together

with an approved bond, been retained by the justice in his possession on the adjourned day, the statute would have been sufficiently complied with. In this case it appears, however, that the amount of costs tendered was insufficient to cover certain items of disbursement previously properly made by the plaintiff.

The circuit judge was of the opinion that the defendant had the right to rely upon the justice's receipt. We need not determine whether in any case the defendant might so rely upon an acceptance of a stated sum by a justice, deposited at a time when, in the very nature of things, he would not be better able to fix the amount than would the defendant; for in this case the justice returns that he informed the defendant that he did not know what the costs were, and could not inform him until the adjourned day; that the plaintiff had subpœnaed witnesses; that the defendant insisted upon his taking $5 and giving the receipt above quoted, and that he (the justice) thereupon gave it. The justice further returns that he repeatedly told defendant to be present on the adjourned day and justify a legal bond; that he did not give defendant to understand that the bond was satisfactory to him, or that he accepted and approved said bond. This return is conclusive. *Traverse City, etc., R. Co.* v. *Seymour*, 81 Mich. 378 (45 N. W. 826). The circuit judge recognized this rule, but evidently was of the opinion that the return, taken as a whole, negatived the statements above referred to. We are not able to so read the return.

The defendant having failed to comply with the requirements of the statute, the judgment of the circuit court is reversed, and that of the justice affirmed, with costs of all the courts to the plaintiff.

The other Justices concurred.

GAY *v.* BERKEY.

1. TENANCY IN COMMON—SERVICES OF CO-TENANT—COMPENSATION.
   In the absence of an agreement, one tenant in common in lands cannot recover of his co-tenant for services rendered in connection therewith.

2. ACCOUNTING—INTEREST—AGREEMENT—MUTUAL ACCOUNTS.
   In a suit for an accounting brought by heirs against one who had had business dealings with deceased, but not as a partner, resulting in a mutual account, evidence examined, and in connection with the prayer of defendant's answer and cross-bill, "that the court shall make and state the account between the parties hereto, and that it compute the interest thereon at the legal rate, but without annual rests," *held* sufficient to show an agreement to pay interest on the mutual account at the rate provided by law, in the absence of stipulation for a different rate.

3. INTEREST—COMPOUND INTEREST—AGREEMENT.
   An agreement, made before interest becomes due, to compound it, is void.

4. SAME—AGREEMENT AFTER INTEREST DUE.
   An agreement to pay interest on interest, made after the interest becomes due, is valid; the forbearance to enforce payment and extension of time being a sufficient consideration.

5. SAME—COMPUTATION—EVIDENCE.
   The fact that two persons, in their dealings with a corporation in which each was interested, assented to settlements, with annual rests and compound interest, is insufficient to show that in their dealings with each other they made an agreement to pay it, or that they settled on that basis as to mutual accounts of their business dealings.

6. ACCOUNTING—INTEREST—COMPUTATION—APPLICATION OF CONNECTICUT RULE.
   In a suit for an accounting by heirs against one who had had business dealings with deceased, but not as a partner, resulting in a mutual account, where defendant admitted that he paid a certain sum on the account, and made other payments fully satisfying the account, and that certain taxes paid by him were paid on the agreement, as stated in the bill of complaint, that one-half of the amount so paid should be

credited by deceased to defendant in the mutual accounts between them, he is in no position to claim the application of the Connecticut rule in the computation of interest—that is, simple interest on the items of each side of the account from the date of the items—the sole basis for making such claim being that the items of credits to defendant were not payments, but independent items.

Cross-appeals from Kent; Wolcott, J. Submitted June 15, 1904. (Docket No. 24.) Decided October 4, 1904.

Bill by William H. Gay, individually, and as administrator of the estate of George W. Gay, deceased, and Gertrude A. Carman against Julius Berkey for an accounting. From the decree rendered, all parties appeal. Modified and affirmed.

Butterfield & Keeney, for complainants.

Burlingame, Belden & Orton (*Benton Hanchett*, of counsel), for defendant.

GRANT, J. George W. Gay and the defendant, Berkey, formed a partnership about the year 1865 for the manufacture of furniture. In 1873 they merged the partnership into the Berkey & Gay Furniture Company, of which Mr. Gay was the secretary and treasurer up to the time of his death, September 13, 1899. Mr. Berkey was president during the same time, and is still its president. They were engaged in other transactions, but not as partners. They formed a corporation known as the Oriel Cabinet Company. They bought lands in Texas and Louisiana, which they held as tenants in common. They were interested in a corporation known as the Furniture Caster Association, and several other enterprises unnecessary to mention.

A mutual account existed between them for about 20 years prior to Mr. Gay's death. This account began in November, 1880. Neither kept a book account of their dealings. Unfortunately they never had a settlement, and death has sealed the lips of Mr. Gay, and the statute has

sealed those of Mr. Berkey. The items are not numerous, but large. This may account for lack of accurate accounts and of settlements.

Some of their joint lands in the South were sold, but at Mr. Gay's death they were still the owners, as tenants in common, of considerable tracts of land in Texas. Mr. Berkey evidently looked after the payment of the taxes, and had general care of the southern lands. It appears it was incumbent upon him to pay the taxes. He failed to pay them some years upon the Texas lands. They were sold, and Mr. Berkey bought up the tax titles, taking them in his own name, instead of the names of himself and Mr. Gay. The title thus stood at Mr. Gay's death.

Complainants are the children and sole heirs of Mr. Gay. They failed to secure an accounting with Mr. Berkey, or to obtain from him a deed of their half interest in the tax titles. They thereupon filed this bill for an accounting, and for a removal of the cloud from their title. The bill sets up the various items upon which an accounting is sought, and the claims of the complainants in regard to them. The answer made an issue of fact as to some of these items, but upon the hearing and proofs, taken in open court, the claims of the complainants were conceded, and certain payments by the defendant conceded, and the only items left in dispute are four: (1) One-half of $200, which defendant claims to have expended in a trip to Texas in 1899, to look after the lands owned by the two. (2) One-half of $2,000, for services in his attempt to find a purchaser for these lands. (3) A credit for an interest claimed to have been sold by defendant to Mr. Gay in what is known as the Caster Patents and the Caster Furniture stock. (4) Interest.

The items are so few that the issue might as well have been tried at law as in equity, but for the cloud upon the complainants' title caused by the tax titles standing in defendant's name. At the hearing defendant admitted that the complainants were entitled to a release of the tax titles upon their one-half interest.

The court disallowed the first three items.

The item of $200 was disallowed because defendant owned other interests in Texas, and the testimony was too indefinite to show how much, if any, of that was actually spent in looking after the lands owned by Mr. Gay and Mr. Berkey.

The court gave the same reason for disallowing the $2,000. We thoroughly agree with the conclusion reached by the court below. In addition to that, it may be said that no agreement was shown for the payment of services by Mr. Gay to Mr. Berkey in looking after these lands. They owned them as tenants in common, and, in the absence of an agreement, neither could recover for services against the other, rendered in connection therewith.

It is unnecessary to enter into a detailed statement of the facts in regard to the claim on the part of Mr. Berkey for the interest in the Caster Patents, and the stock which he claims he sold to Mr. Gay, and for which he claims that he had never received payment. If he was entitled to recover anything, it was the full value of a quarter interest in the patents at the time of the sale, which was only $450. It proved to be very valuable, and the stock of the company organized to manufacture the casters became very valuable. We, however, agree with the conclusion reached by the circuit court that this interest was owned and sold by Mr. Fox to Mr. Gay, and not by Mr. Berkey to Mr. Gay.

The only remaining and important question relates to the interest. Complainants claim the right to compute interest at going bank rates, with annual rests. The defendant claims: (1) That no interest can be computed, except from the date of the filing of the bill. (2) That there is no foundation for compounding the interest. (3) That if interest is to be allowed prior to the filing of the bill, it must be computed according to what is known as the Connecticut rule, i. e., simple interest upon the items of each side of the account from the date of the items.

The court in its decree considered the credits in the de-

fendant's account, except certain taxes and expenses pertaining to the Texas lands, as payments, and computed the interest according to the rule adopted by the United States, the Massachusetts courts, and this court, viz., the rule of partial payments. As to the taxes and expenses pertaining to the Texas lands, the court decreed that they were made to third parties, and interest should be computed under the Connecticut rule. The decree for the complainants was $21,307.98.

Complainants base their claim for interest upon an agreement between Mr. Berkey and Mr. Gay. If there was such an agreement, it becomes unnecessary to determine when interest begins to run upon an open mutual account.

On March 9, 1892, Mr. Berkey rendered an account to Mr. Gay. Mr. Gay rendered an account to Mr. Berkey on the following day. Both statements were brief and the items few; neither exceeds two pages of the record. Each computed interest upon the account rendered—one upon the basis of 7 per cent., the other upon the basis of 8. None of the items in Mr. Gay's statement, except the method of computing interest, were disputed by Mr. Berkey. Two or three items in Mr. Berkey's account were disputed by Mr. Gay; the principal one being a credit claimed by Mr. Berkey for the one-fourth interest in the Caster Patents, stated in the account at $5,929.61. This was the only account ever rendered by the parties each to the other. No book account or statemant of any kind was found among the papers of Mr. Gay throwing any light upon the claim. The character and the history of the dealings between these parties, as shown in the accounts rendered and by other testimony, is of importance in determining whether there was an agreement to pay interest. The first item of the account is the sale by Mr. Gay to Mr. Berkey of Oriel Cabinet Company stock for $9,500, November 1, 1881. Standing alone, this item would bear interest. Whether the parties at that time contemplated mutual dealing in the future, and an open account therefor, we do not know. Mr. Berkey recog-

nized his obligation to pay interest upon this amount in a letter to Mr. Gay dated July 18, 1882:

"I write this to show that I acknowledge that I am personally indebted to you for the stock that I hold in the Oriel Cabinet Company, less $500 difference in purchase, with interest from organization of said company."

The next items in the account are the rents due on a lease by Mr. Gay of a building in Grand Rapids for three years, at $3,200 per year, dated April 15, 1884, payable monthly. These items constituted the entire debit side of Mr. Gay's statement to Mr. Berkey. Both are found in the statement of Mr. Berkey.

The date of the first item—a small one, $250—in Mr. Berkey's statement, claimed to apply on his indebtedness to Mr. Gay, is June 2, 1882. The next is an item of October 1st of the same year, of $421. No other payments were made by him until August 28, 1885, as appears by the accounts. A claim found in the statement dated May 1, 1884, known as the "Clock Company rent," for $414.40, was abandoned by Mr. Berkey upon the hearing. It is now conceded that upon the amount due for the Oriel Cabinet Company's stock Mr. Berkey should pay interest. Thus for about four years Mr. Berkey was indebted to Mr. Gay in the sum of $9,500, with only two small offsets or payments.

The lease was also a separate transaction. If the rent was not paid, it bore interest just as certainly as though it had expressly provided for interest. It was a separate and distinct item in the account, bearing interest, with the evident understanding that when they settled, the items for rent under the lease should be included. If the lease had provided "with interest," it would then have been upon the same basis as the amount due for the Oriel Cabinet Company stock. But, as already stated, each installment of rent bore interest from the date it became due. The dealings between these parties did not constitute a strictly mercantile account. The transaction was rather this: Mr. Gay virtually loaned Mr. Berkey money. He

gave him a lease, with an annual rental, payable monthly. Mr. Gay stood in the position of a creditor loaning money and leasing property, and defendant in the position of a debtor and tenant. The injustice in holding that Mr. Berkey should have this amount of Mr. Gay for so long without interest is apparent. Each recognized this obligation in the accounts rendered, and we think Mr. Berkey in his answer conceded it. Without quoting the allegations of his answer and cross-bill, he prays:

"That the court shall make and state the account between the parties hereto, and that it compute the interest thereon at the legal rate, but without annual rests; and, further, that if the court should determine to compute said interest in a different method, that the same rule be applied to both sides of the account between the parties hereto."

We therefore conclude with the circuit judge that there was an agreement to pay interest.

We also think it clear that there was no agreement as to the rate of interest, but that both parties contemplated the interest provided by the law, where there is no stipulation for a different rate. There is nothing prior to the rendition of these statements in 1892 to indicate any agreement as to the rate of interest. Mr. Berkey in his statement computed it at 7 per cent.; Mr. Gay in his at 8 per cent. We think this conclusive that no rate other than that provided by law was agreed upon.

It is vigorously urged by the complainants that there was an agreement to compute the interest with annual rests, and thus compound it. The sole evidence upon which this claim is based is the accounts rendered in 1892. There had up to that time been no settlement, and no striking of annual balances carried into a new statement for the next year. The parties disagreed upon these accounts, and unfortunately nothing was done towards a settlement until one had died. If, as urged with much force by the defendant, the bill alleges an agreement, before the interest became due, to compound it, such an agreement is void and unenforceable. *Hoyle* v. *Page*, 41

Mich. 533 (2 N. W. 665); *Voigt* v. *Beller*, 56 Mich. 140 (22 N. W. 270).

Complainants deny that the bill is susceptible of such a construction. We find it unnecessary to determine the question. After interest becomes due, an agreement to pay interest upon interest is valid; the forbearance to enforce payment and extension of time being a sufficient consideration.

What conversation had taken place between Mr. Berkey and Mr. Gay prior to the rendition of these accounts is of course unknown. There was evidently an attempt to settle, and the claims of each were put into a statement and delivered to the other. Mr. Berkey in his statement computed compound interest, adopting the Connecticut rule. Mr. Gay adopted the Michigan rule. We do not feel justified in saying that this, in view of all the circumstances of the case, amounted to an agreement to compound interest upon the basis of a valid agreement after interest had become due. No accounts were rendered by Gay and assented to by Berkey which would, in our judgment, justify such a holding. We do not think the case comes within the rule of some cases, holding that where certain specific items in an account rendered are objected to and others not, the statement becomes an account rendered as to those unobjected to. Mr. Gay may have said to Mr. Berkey, "I will agree to compound the interest under the rule of partial payments." Mr. Berkey may have said to Mr. Gay, "I will agree to compound interest if we adopt the Connecticut rule." We cannot say that they agreed to either, or that such statements are evidence upon which to base an agreement to pay compound interest. The fact that Mr. Berkey and Mr. Gay, in their dealings with a corporation, assented to settlements with annual rests and compound interest, is no evidence that in their dealings with each other they made an agreement to pay it, or that they settled upon that basis.

The method of computing interest in case of partial payments is recognized by counsel for both sides to be as stated in *Wallace* v. *Glaser*, 82 Mich. 190 (46 N. W. 227,

21 Am. St. Rep. 556). The sole basis for claiming the application of the Connecticut rule is that the items of credits to the defendant were not payments, but independent items. This, of course, cannot be true of several items, which were direct payments to apply on his indebtedness, including one-half the amount received by Mr. Gay for the sale of the Louisiana lands, for which credit was given to Mr. Berkey. It was evidently the understanding between these parties that the amounts paid out by Mr. Berkey in the various transactions in which both were interested should be considered as payments on the amounts he owed Mr. Gay; otherwise, the statute of limitations would have run against the indebtedness due from Mr. Berkey to Mr. Gay, and it is unreasonable to say that Mr. Gay, an experienced business man, would permit it. Defendant's answer, we think, is a complete refutation of his claim that these items were not intended to be payments, but were independent items, upon which he might at any time have sued Mr. Gay. The defendant in his answer admits that "he paid $2,000 to apply on said account, and made other payments from time to time thereafter, fully satisfying said account, as hereinafter more fully set forth." He also admits that the taxes paid by him upon the Texas lands were "upon the agreement, as stated in said bill of complaint, that one-half of the amounts so paid should be credited by said George W. Gay to defendant in the mutual accounts between them." Under these and other allegations of the answer, Mr. Berkey could not have sued Mr. Gay for any of the items he expended in behalf of Mr. Gay. He paid them upon the express understanding that when made by him they were to be a credit to him to apply on his indebtedness to Mr. Gay. The only error made by the court below was in computing the interest on the taxes according to the Connecticut rule. They should have been computed like the other items, on the partial payment rule.

The decree will be so modified, and, as modified, will be affirmed, with costs to the complainants.

The other Justices concurred.

CALDWELL v. CITY OF DETROIT.

HIGHWAYS AND STREETS — DEFECTIVE SIDEWALKS — INJURIES TO PEDESTRIANS—INSTRUCTIONS.

In an action against a city for injuries on an alleged defective sidewalk, an instruction that the city was required to keep its walks "in suitable repair," so that persons traveling over them, using ordinary care, might do so in safety, is erroneous, as imposing a higher degree of care on the city than is required by the statute (1 Comp. Laws, § 3441).

Error to Wayne; Frazer, J. Submitted June 16, 1904. (Docket No. 3.) Decided October 4, 1904.

Case by George E. Caldwell against the city of Detroit for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

P. J. M. Hally and *A. B. Hall* (*T. E. Tarsney*, of counsel), for appellant.

William M. Mertz (*Dalton, Mertz & Renaud*, of counsel), for appellee.

MONTGOMERY, J. The plaintiff recovered a verdict and judgment of $1,000 for injuries sustained by stepping into a hole in a defective walk. The defendant brings error.

The circuit judge charged the jury as follows:

"The law requires the city to keep its sidewalks in suitable repair, so that persons traveling over them, exercising ordinary care, may do so with safety. It is essential that this should exist at all times, and unless the city of Detroit does this, and anybody suffers an accident or injury on account of it, they would be liable in damages to the person so injured. If the sidewalk on Frederick street was in a defective condition, it is essential that the city would have had knowledge of this defective condition,

and this knowledge should be either by actual notice to the city authorities, such as somebody seeing it and reporting it to some city authority, or it must have existed so long that the city was bound to take notice of the defect. This latter form of notice is what is known as constructive notice; that is, that the city shall be deemed to have known of this defect if it had existed for an exceptional length of time, for them to have known of it by an ordinary fair inspection of it."

It is contended that this charge fixed a higher standard than is required by 1 Comp: Laws, § 3441. It is undoubtedly true that, speaking in the abstract, the duty imposed by the statute is that of keeping the sidewalk and street in *reasonable* repair, and in a condition *reasonably safe* and *fit* for public travel. Indeed such is the language of the statute, and it has often been pointed out that a broader rule ought not to be given to the jury. *Shippy* v. *Village of Au Sable*, 65 Mich. 494 (32 N. W. 741); *Bigelow* v. *City of Kalamazoo*, 97 Mich. 121 (56 N. W. 339); *Weisse* v. *City of Detroit*, 105 Mich. 482 (63 N. W. 423); *Yotter* v. *City of Detroit*, 107 Mich. 4 (64 N. W. 743); *Gilson* v. *City of Cadillac*, 134 Mich. 189 (95 N. W. 1084).

It is urged, however, that the instruction in the present case could not have misled the jury, as the testimony given on behalf of plaintiff was not disputed. The jury are to judge, however, as to whether the sidewalk in the condition described was in reasonable repair, and in a condition reasonably safe and fit for public travel. The question is one for the jury, and not for the court, except in a case altogether free from doubt. In determining this question, the jury have the right to consider the location of the walk, whether in a greatly frequented part of the city, or in a less traveled place. We are not able to say that the misdirection may not have affected the result.

The other questions are unlikely to occur on another trial.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

BRYANT v. WILCOX.

1. GARNISHMENT—PAYMENT INTO COURT—EFFECT OF JUDGMENT.
A garnishee defendant who has disclosed that B. claims the fund, vouched him in, paid the fund into court, and been discharged, as provided by the statute (1 Comp. Laws, § 1017), may plead the judgment thereafter rendered in bar of any further proceedings against him on the part of B., though he prompted the creditors to bring the garnishment proceedings, and prior thereto B. had brought trover against him for the fund.

2. FRAUD—REMEDY—PARTIES IN PARI DELICTO.
One who has placed money in the hands of another for the purpose of perpetrating a fraud on the creditors of a third person will not be assisted by the law to recover it.

Error to Hillsdale; Lockwood, J., presiding. Submitted June 16, 1904. (Docket No. 22.) Decided October 4, 1904.

Trover by Ira N. Bryant against Amos Wilcox. There was judgment for plaintiff for less than the amount claimed, and both parties bring error. Reversed.

Frankhauser & Cornell, for plaintiff.

F. A. Lyon, for defendant.

MONTGOMERY, J. One Ozon M. Keith was, in October, 1901, indebted to different parties in the sum of about $400. Keith, to secure the defendant for an indorsement of a note of $81, gave a chattel mortgage, which the testimony tends to show was given with the purpose of defeating Keith's creditors. The mortgage purported to secure an indebtedness of $500. One of Keith's creditors sued out an execution against Keith's property. Defendant, Wilcox, claimed to such creditor that he held a mortgage of $500, but notwithstanding this claim, and in defiance of it,

the creditor levied. Keith thereupon requested defendant to bring replevin, but it appears that defendant declined to assert in court the validity of the mortgage for its full amount. The plaintiff was then called in, and it was arranged that the mortgage should be assigned to him, and that he should interpose between Keith and his creditors. Some claim is made that the assignment was also to secure plaintiff for his indorsement of a note of $250, given by Keith and secured by a mortgage to the Thompson Savings Bank; but at all events the testimony tends to show a purpose of asserting the mortgage as against the intervening creditor's lien and for its full face. The testimony further tends to show that for the purpose of making it appear to the levying creditor that the mortgage really secured $500, the plaintiff gave to the defendant his check for $500, which defendant was expected to exhibit to Coggswell, Keith's creditor, to convince him of the bona fides of the mortgage, or, at the option of the defendant, he was to draw the money on the check, and exhibit that to Coggswell. It was agreed that after this use of the check, either that or the money should not remain with defendant. Plaintiff claims it was to be returned to him. Defendant claims it was to be paid over to Keith. Upon this question the jury found with plaintiff. The defendant did not return either the check or money. Plaintiff brought this suit in trover to cover the amount of the check.

After suit was brought, two of Keith's creditors instituted garnishee proceedings to reach the fund. Defendant disclosed, showing that plaintiff was a claimant. Plaintiff was cited to appear and make good his claim, under section 1017, 1 Comp. Laws, but failed to appear. Judgment went against the defendant in the garnishment proceedings for amounts aggregating nearly $400. Defendant was permitted to plead such proceedings in bar. The circuit judge held that the garnishment proceedings were a bar pro tanto, and submitted to the jury the question whether the defendant agreed to return the

check or money to plaintiff, with instructions that if he did, the plaintiff was entitled to recover the balance. Both parties bring error.

The plaintiff contends that the garnishment proceedings constitute no bar. The defendant asserts the bar of the garnishment proceedings, and further contends that the plaintiff is not entitled to recover any sum whatever, on the ground that the transaction was against public policy, and the law will leave the parties where it finds them.

1 Comp. Laws, § 1017, provides that when the examination or disclosure of the garnishee shall disclose that any other person or corporation than the defendant claims in whole or in part the money, property, or indebtedness due by him or in his possession, and the name and residence of such claimant, the garnishee defendant may deliver such money, property, or indebtedness to the justice, who shall cause to be served on such claimant a written notice to appear in such court and maintain such claim. The statute further provides that such deposit of money or property shall discharge the garnishee, and that from that time the case shall proceed against the claimant. The proceedings in the present case were admittedly regular. The case falls within the plain words of the statute, and the judgment is res judicata, unless some of the reasons urged against the binding force of the judgment are to prevail.

It is contended that the defendant colluded with the creditors of Keith to cause the proceedings to be instituted. This contention may have some support in the testimony, and would be of importance, but for the fact that without regard to the manner of instituting the suit, the defendant has had his day in court. The very purpose of the statute was to give to the claimant such an opportunity to try the question of his title to money or goods, and whatever may have preceded the notice to him, he was by that notice afforded the full opportunity which the statute contemplates.

But it is contended that the status of the parties was

fixed when the plaintiff elected to bring trover, and that a subsequent garnishment could not defeat the action. The institution of the trover suit did not pass the title to this money to defendant. It was still the plaintiff's. Unquestionably the defendant might have paid over the money to plaintiff in mitigation of damages in the trover suit, and we think that, as long as it remained plaintiff's property, defendant, having it in his hands, had the right to deposit it with the justice, and cause plaintiff to be vouched in under this statute.

The more comprehensive question is whether the plaintiff is in position to maintain a suit at all, under the circumstances as indicated by the testimony of defendant. We think this question must be answered in the negative. By this testimony the money was placed in defendant's hands for the sole purpose of effectuating a fraud upon the creditors of Keith. The law will leave the parties to such a transaction where it finds them, and will not, where both are equally culpable, engage itself to determine the right of the matter as between them. *Smith* v. *Hubbs*, 10 Me. 71; *Boatner* v. *Yarborough*, 12 La. Ann. 249; *Fisher* v. *Transportation Co.*, 136 Mich. 218 (98 N. W. 1012).

The judgment will be reversed, with costs of this court, and a new trial ordered.

The other Justices concurred.

PEOPLE, *ex rel.* DEAN, *v.* ANN ARBOR RAILROAD CO.

APPEAL AND ERROR—INJUNCTION—VIOLATION—CONTEMPT.

The Supreme Court will not review the determination of a circuit judge refusing to punish for contempt in violating an injunction.

Appeal from Washtenaw; Kinne, J. Submitted June 17, 1904. (Docket No. 33.) Decided October 4, 1904.

Petition by the People of the State of Michigan, on the relation of Sedgwick Dean and Henry S. Dean, against the Ann Arbor Railroad Company and others, to punish respondents for contempt in violating an injunction. From an order denying the relief, petitioners appeal. Dismissed.

Jasper C. Gates, for petitioners.

A. J. Sawyer & Son (*Alexander L. Smith*, of counsel), for respondents.

MONTGOMERY, J. The relators, having obtained a decree granting a perpetual injunction against the respondents, restraining them from interfering with relators' ingress and egress to and from certain premises owned and occupied by them, by means of filling of the street in front of the premises, subsequently filed the petition in this matter, alleging a violation of the terms of this injunction, and asking that the respondents be punished as for contempt, and that costs and damages be awarded relators.

The circuit judge upon a full hearing denied the relief, finding that the acts complained of were not within the contemplation of the terms of the final decree; "that First street has not been closed, nor has travel thereon been in the least impaired, but rather improved, and there has been no material invasion of the rights of the relators

in the matter of ingress and egress to and from their property, unless it be in the slight rise of the approach to their property, which does not seem to me to be important or material."

From this order the relators appeal to this court.

We find it settled by the previous decisions of this court that this court will not review the determination of a circuit judge refusing to punish for contempt. The question arose first in *Schwab* v. *Coots*, 44 Mich. 463 (7 N. W. 61), in which the subject is treated at some length by Justice CAMPBELL, and the conclusion reached that certiorari would not lie to review such action. The question arose in the same form in *Montgomery* v. *Booming Co.*, 104 Mich. 411 (62 N. W. 561), and the same conclusion was announced, following *Schwab* v. *Coots*. In *Rasch* v. *Sheppard*, 105 Mich. 667 (63 N. W. 968), the question arose in an appeal from an order in a chancery proceeding refusing to find the defendant guilty of the contempt charged, and the court held, in an opinion by Mr. Justice LONG, that the complainants had no right of appeal; citing and following the two cases of *Schwab* v. *Coots* and *Montgomery* v. *Booming Co.*

We are not able to distinguish this case from the cases cited, and the appeal will be dismissed, with costs.

The other Justices concurred.

WILSON v. HENRY.[1]

1. CREDITOR'S SUIT—ISSUES—EVIDENCE TO SUSTAIN.
A judgment creditor's bill is not sustained by proof merely of the judgment, execution, and return unsatisfied; it must be shown that defendant has property, either legal or equitable, either in hand or due from some one else, or that he has legal title to real estate which he withholds from the record, where that is alleged in the bill.

2. SAME—AMENDMENT—ERROR—RIGHT TO ALLEGE.
Refusal to permit at the hearing the amendment of a judgment creditor's bill, to more particularly describe the judgment, if error, is not available to complainant where he failed to offer evidence to support his bill either as originally filed or as amended.

Appeal from Wayne; Rohnert, J. Submitted June 17, 1904. (Docket No. 35.) Decided October 4, 1904.

Judgment creditor's bill by Ira Wilson against Adam Henry. From a decree dismissing the bill, complainant appeals. Affirmed.

James H. Pound (*May, O'Brien & Baluss*, of counsel), for complainant.

John E. Moloney, for defendant.

MOORE, C. J. On the 10th day of March, 1898, the complainant filed a judgment creditor's bill. In paragraph 1 complainant alleges:

"On the 11th day of January, A. D. 1898, in the cir-

[1] January 30, 1905. On rehearing. A further showing being made by the circuit judge, in connection with the motion for rehearing, from which it appeared that the failure to offer further proofs arose from a misapprehension of the court's rulings, and it appearing to the court that a mistrial occurred through no fault of complainant's counsel, *ordered* that the cause be remanded to the circuit court in chancery, with directions to proceed to a hearing de novo; no costs to either party in this court.

cuit court for the county of Wayne, State of Michigan, by the consideration and judgment of said court, your orator recovered against Adam Henry the sum of $307.28, as well for damages which he had sustained by reason of the nonperformance of certain promises and undertakings of the said Adam Henry, as for the costs and charges of your orator about his suit in that behalf expended, as by the record of said judgment, reference being thereto had, will more fully appear."

Then follow several other paragraphs, alleging the issuance of an execution and the return of same unsatisfied. Then follow the usual allegations of a judgment creditor's bill.

The defendant filed an answer, and, among other things, denied complainant had obtained a judgment against him, as set forth in the bill of complaint. The other material allegations of the bill of complaint were neither admitted nor denied. A replication was filed. On the 7th day of October, 1903, this cause was brought on for hearing, when the following occurred:

"*Mr. O'Brien:* We ask to have it appear of record that the court says that he will hear the judgment creditor's bill first.

"*Mr. Baluss:* I will first offer in evidence the files in Ira Wilson against Adam Henry, and the affidavit and transcript and the execution and the return. If there is any question about this judgment being a circuit court judgment, I ask for leave of the court to amend the bill in that respect, to allege that it is upon a transcript, instead of the words 'A judgment in the circuit court for the county of Wayne.'

"*The Court:* This answer has been in since March 28, 1898, and I think it is rather late to ask for an amendment on the day of the trial. If I do that, I will have to give them further time to answer.

"*Mr. Moloney:* They cannot make their proofs under the allegations, because they have no judgment of the circuit court for the county of Wayne.

"*The Court:* I will refuse the motion to amend at this time.

"*Mr. O'Brien:* We ask leave to amend, and we offer to allow defendant time in which to file an amended

answer, if necessary. The court has refused to allow either an extension of time or to allow an amendment at this present time.

"*The Court:* Just put down that it appears that this bill was filed March 10, 1898, and that issue was raised by the answer, which was filed March 28, 1898, upon the point with regard to which plaintiff wishes to amend, so that he cannot be surprised by reason of that fact. This case has been on call to be tried for some time in this court, and the court has arranged its business in such a way as to take up this matter this morning, to the exclusion of other litigants in this court. The court does not consider that the plaintiff has been surprised, and I consider that he has delayed his application for an amendment to a time when the court cannot in justice grant it.

"*Mr. Moloney:* We object to the amendment anyway. We object to the introduction of the transcript of a judgment, on the ground that it does not disclose a circuit court judgment.

"*The Court:* I hold that it is not a circuit court judgment. I hold this, that it would have the force and effect of a circuit court judgment if it had been properly entered. The bill will be dismissed.

"*Mr. O'Brien:* I move that I be allowed to amend to the extent of showing the preliminary steps leading up to the transcript, and I offer to hold the matter up for a sufficient length of time to allow Mr Moloney to file an answer in any way he sees fit.

"*The Court:* I will rule the same way for the same reasons. I will deny the motion. Note an exception."

The court then called upon both parties for further testimony. Both sides resting, the bill was dismissed.

Counsel for complainant say two questions are presented: *First.* Is a judgment transcript a circuit court judgment? *Second.* If not, should the court have allowed an amendment?

A copy of the files offered in evidence is here. They show a judgment regularly obtained in justice's court. An affidavit meeting the requirements of section 845, 1 Comp. Laws, and a transcript were made. This transcript and the proper affidavit were filed with the clerk of the circuit court, who indorsed on the back thereof: "Entered and

filed January 11, 1898," but it does not appear that the clerk entered and docketed the judgment, as required by section 846, 1 Comp. Laws. If it be conceded that the court was wrong in his opinion that it was necessary to enter and docket the judgment to give it validity as a circuit court judgment, see *Udell* v. *Kahn*, 31 Mich. 198, and if it also be conceded the court was wrong in refusing leave to amend the bill of complaint, still the complainant has fallen far short of making a prima facie case.

When called upon by the judge for further testimony, none was offered. It was not made to appear that defendant had property, either legal or equitable, either in hand or due from some one else, nor was it shown he had legal title to real estate, which he withheld from the record, as stated in the bill of complaint.

The decree is affirmed.

The other Justices concurred.

PEOPLE *v.* ALBERS.

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137 704

1. PERJURY—FORMER ACQUITTAL—BAR.

The acquittal of one accused of crime is not a bar to his subsequent prosecution for perjury as a witness at the trial, where, though his testimony was material, its falsity was not, legally speaking, inconsistent with his innocence.

2. JURORS — DISQUALIFICATION — PREJUDICE — ISSUES IN PRIOR CASE.

On the trial of accused for perjury in giving false testimony on his own trial for bribery, jurors who have sat in a trial at which another than accused was convicted of bribery in connection with the same matter are not disqualified, respondent having been acquitted of the bribery, and that adjudication being conclusive as to respondent's connection with the corrupt plan, if any existed.

3. SAME—VOIR DIRE—QUESTION AS TO PREVIOUS VERDICT.
A juror who has sat in the trial of another person for a crime arising out of the same matter cannot be asked whether he formed any opinion in the previous case as to the truth or falsity of the testimony of a witness who testified therein and who is also a proposed witness in the prosecution on trial, as such a question violates the statute (3 Comp. Laws, § 10239) prohibiting a juror being questioned regarding his verdict.

4. SAME—HARMLESS ERROR.
Refusal, in a criminal prosecution, to permit a juror, who has sat in the trial of another person for a crime arising out of the same matter, to answer the question whether his sitting on that trial and having heard the testimony would affect his judgment in the case at bar, is harmless, where the testimony of the only witness who testified in the previous case was improperly admitted in the case at bar.

5. SAME—REVIEW—QUESTIONS PRESENTED.
Section 10247, 1 Comp. Laws, authorizing the review without exceptions of errors in charging or refusing to charge the jury, does not authorize the review of a challenge to a juror, to the overruling of which no exception was taken.

6. PERJURY—EVIDENCE—HEARSAY.
Where perjury is assigned on accused's denial that V. sent him to bribe R., the testimony of S. that he, S., requested V. to have accused see R. in relation to the matter, is inadmissible as hearsay, though it corroborates V.'s testimony that he did send accused to R. as alleged.

7. SAME—STATEMENT OF CO-CONSPIRATOR.
Where accused is acquitted of an attempt to bribe in connection with a corrupt conspiracy and is subsequently prosecuted for perjury committed at the trial, evidence, otherwise inadmissible, cannot be admitted on the assumption that he made himself a party to the conspiracy and thereby opened the door to such testimony, as the former acquittal conclusively negatives such assumption.

8. CRIMINAL LAW—EVIDENCE—CHARACTER.
The opinion of witnesses as to accused's character for honesty and integrity, based on personal knowledge and not on reputation, is inadmissible.

9. PERJURY—REPUTATION—TRUTH AND VERACITY.
One accused of perjury is entitled to show that his reputation for truth and veracity is good.

10. SAME—SAVING QUESTION.
Where evidence of accused's reputation for truth and veracity is rejected, in a trial for perjury, the question is sufficiently saved without an express statement by counsel that the purpose of its offer is to prove a trait of character, accused not having offered himself as a witness.

11. SAME—CURE OF ERROR.
Where, in a prosecution for perjury, the court erroneously excluded evidence that defendant's reputation for truth and veracity was good, the error was not cured by permitting evidence that defendant had a good reputation for honesty and integrity.

12. CRIMINAL LAW—EVIDENCE—SUFFICIENCY—INSTRUCTIONS.
A charge that whatever would convince the jury beyond a reasonable doubt, in the judgment which they use in their ordinary affairs of life, was all that was necessary to convince them sitting as jurors in any criminal case, is misleading.

13. PERJURY—MATERIALITY OF TESTIMONY.
Where, in a prosecution of accused for offering a bribe to R., R. testified that accused offered him a bribe for his vote, and told him that V. had sent him there, accused's evidence in rebuttal, in which he denied that V. had in fact sent him to R., was material, and, being false, was sufficient to sustain an indictment for perjury.

Exceptions before judgment from superior court of Grand Rapids; Newnham, J. Submitted June 17, 1904. (Docket No. 195.) Decided October 4, 1904.

Gerrit H. Albers was convicted of perjury. Reversed.

Frank A. Rodgers and *Myron H. Walker*, for appellant.

William B. Brown, Prosecuting Attorney, and *Charles E. Ward*, Assistant Prosecuting Attorney, for the people.

CARPENTER, J. In May, 1903, respondent was acquitted of the charge of corruptly offering to one Joseph Renihan, an alderman of the city of Grand Rapids, $3,000, with the intent to induce said Renihan to vote, as a member of

the common council of the city of Grand Rapids, in favor of entering into a contract for the purchase of water, to be conveyed from Lake Michigan to said city, for municipal and other purposes. On that trial respondent was a witness in his own behalf. He corroborated the testimony of Renihan that he offered him $3,000 for his vote, and that he told him that one Dr. De Vries had sent him there; but he denied that De Vries had in fact sent him, and he testified that he made this offer with no corrupt motives, but in order to ascertain whether or not Renihan was an honest man. In the present case, respondent is charged with perjury in testifying that De Vries did not in fact send him to Renihan. He was convicted of that charge, and asks that conviction to be set aside upon many grounds.

First. Respondent claims that his acquittal by the jury of the charge of attempting to bribe Renihan is a bar to the prosecution of this suit. He sets forth that:

"The question of fact as to whether this respondent was sent by the said De Vries or some one else, or went of his own accord, to see Renihan, was in issue upon said trial, and evidence was adduced upon the side of the people and of this respondent thereto, and the determination of the same was material to and necessarily involved in the determination of the guilt or innocence of this respondent upon said charge, and was necessarily passed upon and determined by the jury in arriving at their verdict."

In support of the contention that his acquittal of the charge of bribery is res adjudicata, defendant cites *U. S.* v. *Butler*, 38 Fed. 498; *Cooper* v. *Commonwealth*, 106 Ky. 909 (51 S. W. 789, 59 S. W. 524, 45 L. R. A. 216, 90 Am. St. Rep. 275); *Petit* v. *Commonwealth*, (Ky.) 57 S. W. 14.

In *U. S.* v. *Butler*, supra, respondent was first acquitted on the charge of selling liquor without payment of the tax. He was subsequently put on trial for perjury in swearing on his preliminary examination that he did not so sell liquor. It was held that the acquittal of respondent on the first charge was a bar to his prosecution on the second.

In *Cooper* v. *Commonwealth*, supra, the respondent was first prosecuted for adultery and acquitted. It was held that this acquittal prevented his conviction in a prosecution, subsequently commenced, charging him with having committed perjury in the first suit in denying that he committed the adultery there charged.

In *Petit* v. *Commonwealth*, supra, respondent was first tried and acquitted on a charge of carrying a concealed weapon, viz., a pistol. It was held that this acquittal prevented his conviction on a prosecution, subsequently commenced, on the charge of committing perjury in testifying in the first suit that he was not guilty of the charge made against him.

These cases are authority for the proposition that an acquittal of a certain charge is a complete defense to a subsequent prosecution for perjury which is based upon the assumption that respondent was guilty of that charge. If this proposition be sound, and it has been denied (see *State* v. *Caywood*, 96 Iowa, 367 [65 N. W. 385]; *Hutcherson* v. *State*, 33 Tex. Cr. Rep. 67 [24 S. W. 908]; *People* v. *Sculley*, 3 N. Y. Cr. R. 244), it has no application to this case. It is true that the perjured testimony under consideration was material, because it strengthened respondent's claim that he was not acting corruptly. But its falsity is not, legally speaking, inconsistent with respondent's innocence of the crime of bribery. Because respondent was innocent of that crime, it does not follow that all testimony tending to prove his innocence was true, and that all testimony tending to prove his guilt was false. It is not even certain that the jury who acquitted respondent of the charge of bribery found that De Vries did not send him to Renihan. From the nature of the case this is a fact extremely difficult, if not impossible, to be proved. But if we assume that they did so find, as alleged in respondent's plea, it by no means follows that such finding is res adjudicata in this suit. The foregoing authorities certainly do not so hold. Because the people may not prosecute one for perjury upon the basis that he

was guilty of the crime for which he has been acquitted, it by no means follows that they cannot prosecute him for perjury simply because the jury credited his perjured testimony, and particularly when the prosecution for the crime of perjury does not proceed upon grounds inconsistent with his innocence of the first charge.

The verdict of the jury in the first case adjudged respondent innocent of the crime of bribery. By what reasoning can it be contended that it also adjuged him innocent of the crime of perjury in giving his testimony therein? He was not then tried for that charge, and he could not have been there convicted of it. If a prosecution on that charge had been at once instituted, the pendency of the first prosecution could not have been pleaded in abatement of the second; and it has been held that the judgment in the suit in which perjury is alleged to have been committed is inadmissible evidence on the question of guilt or innocence in the prosecution for perjury. See *U. S.* v. *Burkhardt*, 31 Fed. 141; *Estill* v. *State*, 38 Tex. Cr. Rep. 255 (42 S. W. 305); *State* v. *Caywood*, 96 Iowa, 367 (65 N. W. 385); *State* v. *Williams*, 60 Kan. 837 (58 Pac. 476); *People* v. *Sculley*, 3 N. Y. Cr. R. 244; *Futherson* v. *State*, 33 Tex. Cr. Rep. 67 (24 S. W. 908).

The general proposition that one can escape punishment for perjury, because he succeeded in inducing a jury to credit his false testimony, is supported neither by authority nor by reason. If he could, then it is true, as stated by counsel for the people, that the law encourages parties, particularly respondents in criminal cases, to perjure themselves. We must declare that the law is guilty of no such folly.

Is the rule changed by the fact that the suit in which credit was given to the perjured testimony was another suit between the same parties? We think not.

"The former verdict is conclusive only as to facts directly and distinctly put in issue, and the finding of which is necessary to uphold the judgment. The doctrine of estoppel [that is, the conclusiveness of a former judg-

ment] is restricted to facts directly in issue, and does not extend to facts which may be in controversy, but which rest in evidence, and are merely collateral. 'A fact or matter in issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish the matters or facts in issue.' *Garwood* v. *Garwood*, 29 Cal. 521." 1 Freeman on Judgments, § 257.

See, also, *King* v. *Chase*, 15 N. H. 16 (41 Am. Dec. 675); Wells on Res Adjudicata, p. 195; *Burlen* v. *Shannon*, 99 Mass. 202 (96 Am. Dec. 733); *Dickinson* v. *Hayes*, 31 Conn. 423; *People* v. *Johnson*, 38 N. Y. 65 (97 Am. Dec. 770).

Second. Immediately before the trial of respondent, several members of the jury had sat as jurors in the case of *People* v. *Jacob P. Ellen*, in which Ellen was convicted of accepting a bribe to vote as a member of the common council of the city of Grand Rapids in favor of the city's entering into the water contract heretofore referred to. It is urged that the fixed opinion thus formed that there was a corrupt plan to induce the city to enter into this water contract disqualified these men to sit as jurors on the trial of respondent.

Was the existence of this corrupt plan a material fact respecting respondent's guilt or innocence? It certainly was not a fact necessary to be established, and it was not established, on respondent's trial.

Would testimony tending to prove the existence or nonexistence of such plan have been material? If respondent willfully and falsely testified that De Vries did not send him to Renihan, he was guilty of perjury. If he did not willfully and falsely so testify, he was not guilty of perjury. It is obvious that the existence or nonexistence of the corrupt plan to induce the city to enter into the water contract had no direct bearing on this issue. It is true that proof of the existence of such plan might have a tendency to increase the probability of respondent's guilt; but reflection will show that this is true only upon the as-

sumption that respondent was a party to that plan, and this in turn rests upon the assumption that respondent did corruptly attempt to bribe Renihan. In other words, the corrupt plan was material to this issue only upon the assumption that respondent was guilty of the crime of bribery, for which he has been acquitted. Whatever we may think of the authorities (see *U. S.* v. *Butler* and *Cooper* v. *Commonwealth*, supra) which hold that such acquittal is a conclusive adjudication that respondent was not guilty of perjury in testifying to his innocence, there can be no doubt that it is a conclusive adjudication of such innocence. When a fact has once been judicially determined, that determination is conclusive in all other controversies between the same parties. This rule applies, though the subject-matter and purposes of the two controversies are not the same. See *Coffey* v. *U. S.*, 116 U. S. 436 (6 Sup. Ct. 437); *Green* v. *Bogue*, 158 U. S. 478 (15 Sup. Ct. 975); *Meadows* v. *Duchess of Kingston*, Ambl. 756; *Langmead* v. *Maple*, 18 C. B. (N. S.) 255; 1 Freeman on Judgments, § 253. The rule applies, though the fact which is directly determined in the first suit is only tried in a collateral way or is incidentally involved in the second suit. See *Meadows* v. *Duchess of Kingston*, supra. See, also, *Coffey* v. *U. S.*, supra; *Rex* v. *Duchess of Kingston*, 20 How. St. Tr. 355–538; Van Fleet, Former Adjudications, pp. 28, 29. This rule is not confined in its application to civil cases. It applies to criminal prosecutions. See *Rex* v. *Duchess of Kingston*, supra. Evidence cannot, therefore, be introduced in this case which is admissible only upon the assumption of respondent's guilt of the crime of bribery, for which he has been acquitted. We must hold, therefore, that the existence of such corrupt plan was a fact altogether immaterial in the prosecution of respondent for perjury. It is possible, though, in our judgment, not probable, that the jurors' fixed belief in the existence of the corrupt plan might unduly incline them to credit De Vries' testimony, which was in harmony with such belief. The legal disqualifications of a juror must be tested

by something more certain than the bare possibility that he may be prejudiced by his belief of an immaterial fact. Otherwise, no person would be qualified.

Indorsed upon the information in this case as witnesses for the people were the names of Lant K. Salsbury, Clark Slocum, and Corey P. Bissell. These three had been sworn as witnesses in the *Ellen Case*. One of the jurors who sat in the *Ellen Case* was asked "whether he had formed any opinion in that case as to the truth or falsity of the testimony of Lant K. Salsbury." He was asked, further, if the three witnesses above named should testify in this case to the same state of facts as in the *Ellen Case*, "would the fact of your sitting on the other trial and having heard the testimony affect your judgment in this case?" These questions were excluded. An answer to the first question, if permissible at common law, would have violated the statute (section 10239, 3 Comp. Laws), which prohibits a juror being questioned respecting his verdict. See *Welch* v. *Publishing Co.*, 83 Mich. 661 (47 N. W. 562, 11 L. R. A. 233, 21 Am. St. Rep. 629). As neither Slocum nor Bissell testified in this case, and as the testimony of Salsbury, as will hereafter appear, was improperly admitted, respondent was not aggrieved because the court refused to permit the juror to answer the second question.

It appears by the record that one of the jurors who sat in this case was not a taxpayer, as required by law, and that this fact was brought to the attention of the trial court and to both counsel. He was not challenged, and the court ordered him sworn as a member of the jury, to which ruling no exception was taken. While we may review without exception errors in charging or refusing to charge the jury (section 10247, 3 Comp. Laws), it is well settled that we have no authority to review other rulings not excepted to. See *Roberts* v. *Fitzgerald*, 33 Mich. 4; *Larkin* v. *Lumber Co.*, 42 Mich. 296 (3 N. W. 904). We have, therefore, no authority to review the ruling under consideration, and this court is charged with no higher

duty than that of keeping within the prescribed limits of its authority.

It is no answer to this point to assert, relying on *Hill* v. *People*, 16 Mich. 351, that respondent could not waive his objection to the juror's want of qualification, and therefore his failure to except did not prevent his subsequently questioning the juror's qualification. In that case the propriety of the ruling of the trial court was considered on an exception to the court's refusal to grant a new trial. If it be true that defendant in a criminal case cannot waive any lack of qualification in a juror, it is none the less true that his failure to except to the court's ruling does not give this court authority to review such ruling in a proceeding where, as in this case, it can review only rulings to which exception was taken. The propriety of the ruling in question must therefore be assailed, if assailed at all, by collateral attack, and whether or not such an assault will succeed is a question foreign to this issue.

Third. The prosecution was permitted to prove both by witnesses De Vries and Lant K. Salsbury that the latter requested the former to see respondent in relation to the water deal. It will be conceded that this conversation between De Vries and Salsbury, standing by itself, was immaterial to the issue of respondent's guilt. If this testimony was admissible at all, it was so only because it tended to corroborate the testimony of De Vries that he sent respondent to see Renihan. While it may be conceded that it would have such a tendency, and was therefore material, it by no means follows that it was competent. It would have a tendency to convince the jury that De Vries actually did send respondent, only upon the assumption that De Vries complied with Salsbury's request, and whether he did so comply depends upon the credit the jury gave to De Vries' testimony that he did. In other words, the value of Salsbury's testimony rests in part on the veracity of De Vries. This testimony was, therefore, hearsay testimony, which is defined as "that kind of evidence which does not derive its credibility solely from the

credit due to the witness himself, but rests also in part on the veracity and competency of some other person." 1 Phillips on Evidence, p. 169; 1 Greenleaf on Evidence, § 99; 11 Am. & Eng. Enc. Law (2d Ed.), p. 520. This testimony was not a part of the res gestæ, and did not come within any of the excepted classes of hearsay testimony, which are, under the rules of law, admissible. It is no answer to this objection to say that this testimony furnished moral corroboration to the testimony of De Vries. This argument might be urged for the admission of very much of the hearsay testimony which the rules of law exclude. See *People* v. *Abell*, 113 Mich. 80 (71 N. W. 509). And we cannot accept it without altogether overthrowing the rule which excludes hearsay testimony, and that every one will concede we cannot do.

It is urged that respondent, by undertaking to bribe Renihan, made himself a party to the conspiracy to procure the water contract, and therefore the acts of other conspirators were competent. This argument rests upon the assumption that respondent did corruptly attempt to bribe Renihan, and, as we have shown in another part of this opinion, evidence is not admissible upon that assumption.

Fourth. The court refused to permit witnesses introduced by respondent to give their opinion, based on personal knowledge, and not on reputation, of respondent's character for honesty and integrity. Was this error?

The purpose of testimony of this nature is to prove that the person charged with crime possesses a character inconsistent with guilt. It may be said that the authorities are substantially agreed that it is not competent to prove such character by specific acts of respondent, and that it is competent to prove such character by reputation; that is, by the estimate of the community in which he lives. It is urged in this case that it is also competent to prove it by the opinion of those who have habitually observed respondent. We do not consider ourselves at liberty to examine the arguments in support of this contention, upon

the assumption that this is an unsettled question. While there are authorities holding such testimony to be admissible (see 1 Bishop, New Criminal Procedure, § 1117, and the authorities there cited), we think it authoritatively settled that the rule of the common law, which we are bound to apply, excludes it. See Underhill, Criminal Evidence, § 81; Wharton, Criminal Evidence, §§ 58, 259, 261; 1 Best on Evidence, 486; 1 Phillips on Evidence, 764; *Reg.* v. *Rowton*, 10 Cox, Cr. Cas. 25; *Rex* v. *Jones*, 31 How. St. Tr. 310; *Hirschman* v. *People*, 101 Ill. 568; *Berneker* v. *State*, 40 Neb. 810 (59 N. W. 372); *Jackson* v. *State*, 78 Ala. 471; *State* v. *King*, 78 Mo. 555; Evidence of Character, 70 Law Times, 167, quoted 12 Cent. Law J. 415. The ruling under consideration was therefore correct.

Fifth. The trial court refused to permit respondent to introduce testimony tending to prove that his reputation for truth and veracity was good.

"The particular trait of character which the indictment impugns, probably by all opinions, may be given in evidence in defendant's favor." 1 Bishop, New Criminal Procedure, § 1113; *People* v. *Stewart*, 28 Cal. 395. See, also, *Coffee* v. *State*, 1 Tex. App. 548.

The excluded testimony was, therefore, clearly admissible. It is said by the counsel for the people that this testimony would not have been excluded, had defendant's counsel indicated that this testimony was directed to prove a trait of character, and that it was excluded because respondent had not been a witness, and it was understood that the purpose of this testimony was to treat respondent as though he had been. It is true that defendant's counsel did not state the purpose of this testimony, but the record shows nothing—either inquiry from the court, or opposing counsel, or anything else—that made it his duty to state it. We are at a loss to understand why its purpose was not sufficiently obvious. Nor is respondent's counsel at fault because the trial court and counsel for the people erroneously assumed that it was his purpose to treat re-

spondent as though he had been a witness. He was not informed of this erroneous understanding, and had, therefore, no opportunity to correct it.

It is urged that in any event the ruling was not prejudicial to respondent, because he was permitted to offer testimony tending to prove that his general reputation and his reputation for honesty and integrity was good. If it is true, as assumed by the people, that a good reputation for honesty and integrity necessarily proves a good reputation for truth and veracity, it does not follow that the exclusion of this testimony was not injurious. We cannot say with certainty that the jury gave credit to the testimony that respondent's reputation for honesty and integrity was good, and we certainly cannot say that they would have discredited the excluded testimony respecting respondent's reputation for truth and veracity. Counsel's argument that the error under consideration was harmless is based on the assumption that the jury did in fact infer, from the testimony that respondent's general reputation was good, that his reputation for truth and veracity was good. The jury were not encouraged to draw any such inference. They were not told that they might draw it. They knew that this testimony was excluded, not on the ground now urged, that the fact was already proved, but because it was immaterial. It is difficult to believe that the jury thought it their duty to infer the existence of a fact which the court decided to be immaterial.

Sixth. It is urged that the conviction in this case cannot stand because it was secured by the uncorroborated testimony of De Vries. We do not think it can be said that the testimony of De Vries is uncorroborated. The testimony of Renihan and the testimony of respondent himself, given on the former trial, furnished such corroboration.

Seventh. In charging the jury, the trial judge used this language:

"Whatever would convince you beyond a reasonable doubt, in the judgment which you use in your ordinary

affairs of life, is all that is necessary to convince you sitting as jurors in any criminal case."

I think it may be said that in the ordinary affairs of life most men never require evidence which convinces them beyond a reasonable doubt. The charge under consideration, therefore, tells such men to act on an impossible assumption, and it is likely to lead to the notion—a notion that all will concede to be erroneous—that they may convict a person charged with crime on such evidence as would convince their judgment in the ordinary affairs of life.

Says the supreme court of Wisconsin of a similar charge:

"The absence of doubt of guilt, when the measure and limit of the scrutiny is that which reasonable men would exercise in the ordinary affairs of life is not sufficient; for it does not necessarily result therefrom that the evidence, properly considered, would leave no such doubt. * * * If the circuit judge desired to make use of any such analogy, he should have told the jury that it was their duty to scrutinize the evidence with the utmost caution and care, bringing to that duty the reason and prudence which they would exercise in the most important affairs of life." *Anderson* v. *State*, 41 Wis. 430.

The language employed is not altogether clear, and it is possible that it misled the jury.

Eighth. Respondent suggests, though it can scarcely be said that he contends, that the alleged perjured testimony was immaterial. To avoid any misapprehension, though at the risk of repetition, we think it proper, as well as sufficient, to say that for the reasons heretofore set forth it was in our judgment material.

No other complaint demands discussion.

The conviction is set aside, and a new trial granted.

The other Justices concurred.

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PEOPLE *v.* MOL.

1. JURORS—VOIR DIRE—QUESTION AS TO PREVIOUS VERDICT.
   Jurors cannot be asked on their voir dire whether, from the testimony presented in the previous trial of another for bribery arising out of the same conspiracy, they formed an opinion respecting the guilt of accused, since such question would open the door to inquiries which would disclose the precise grounds upon which they reached the conclusion of guilt. 3 Comp. Laws, § 10239.

2. SAME—DISQUALIFICATION—PREJUDICE—ISSUES IN PRIOR CASE.
   Where several are charged with bribery arising out of the same conspiracy, and the same evidence is relied on to sustain a conviction against each, jurors who have sat in the trial of certain of the conspirators previously tried are subject to challenge for cause. GRANT, J., dissenting.

3. CRIMINAL LAW—QUESTIONS REVIEWABLE—DECISION AS TO FAVOR OF JURORS.
   This court has a right to review a decision as to the favor of a juror when it raises a legal question.

4. SAME—EVIDENCE—ACTS AND DECLARATIONS OF CO-CONSPIRATORS.
   In a prosecution for bribery arising out of a conspiracy, evidence of a conversation had between accused and another of the conspirators, after the conspiracy was abandoned, relating to the re-election of the other as city attorney, for the avowed purpose of avoiding an exposure of the crime, which would be more probable if a third person were elected to such office, was admissible.

5. SAME.
   Where a conspiracy is established, the declarations and acts of any of the co-conspirators before the conspiracy is abandoned are admissible against each.

6. BRIBERY—OFFICER—MATTER OFFICIALLY COGNIZABLE.
   Where a proposition to let a contract for waterworks was one which might come before a city council for official action, the fact that the council had no authority to make the contract did not prevent the payment of money to councilmen to influence their action on the same from constituting a violation of 3 Comp. Laws, § 11312.

Exceptions before judgment from superior court of Grand Rapids; Newnham, J. Submitted June 17, 1904. (Docket No. 193.) Decided October 4, 1904.

James Mol was convicted of accepting a bribe. Reversed.

Smedley & Corwin, for appellant.

William B. Brown, Prosecuting Attorney, and *Charles E. Ward*, Assistant Prosecuting Attorney, for the people.

CARPENTER, J. Respondent was convicted in the superior court of Grand Rapids of the charge of corruptly accepting $350 to vote as an alderman in favor of the city of Grand Rapids entering into the same water contract which was before this court in *People* v. *Salsbury*, 134 Mich. 537 (96 N. W. 936), and *People* v. *McGarry*, 136 Mich. 316 (99 N. W. 147).

Six of the men who sat as jurors on respondent's trial had only a few days before assented to a verdict of guilty in the case of *People* v. *Jacob P. Ellen*. Respondent exhausted his peremptory challenges. He challenged these jurors for cause. The trial court overruled his challenge. Was this ruling error?

The informations in the *Ellen Case* and in this case, except in the name of the respondents, were exactly alike. The name of every witness who testified in this case was indorsed upon the information in the *Ellen Case*. The principal witness in each case was Lant K. Salsbury. He gave substantially the same testimony in each case. In this case he testified to bribing Ellen. In the *Ellen Case* it is to be inferred that he testified to bribing Mol. Most of his testimony and substantially all the corroborating testimony consists of the details of the conspiracy, admissible alike in each case. In that case it is to be inferred that he testified more particularly about Ellen, and in this case more particularly about Mol. The difference between the

two cases, then, consists in the particular application of substantially the same testimony to different defendants, together with the fact that in the *Ellen Case* there is opposed to it the denial of Ellen, and in this case there is opposed to it the denial of Mol.

Five of these jurors, in reply to questions on their voir dire, said they had formed no opinion of the guilt or innocence of respondent. One of them said: "If the case is just alike, I have; if it is not, I have not." Did the court err in deciding that these jurors were qualified?

If this decision is to be governed by common-law principles, the decision of the trial judge was correct.

It was resolved by all the judges in the *Regicide's Case*, 5 How. St. Tr. 978, in the year 1660:

"That if several persons be indicted together in one indictment for one crime, in case some of them be found guilty by one jury, and afterwards some of the same jury be returned for trial of others in the same indictment, it is no challenge for those prisoners to say that those jurors have already given their verdict and found others guilty who are indicted in the same indictment for the same offense; for * * * in the law it is the several indictment against every one of them, and the crime is several, and one may be guilty and not another, and the jury are to give their verdict upon particular evidence against every several person, and therefore the finding one guilty is no argument or presumption that those jurors will find another guilty."

In the trial of Peter Cook at the Old Bailey, before Lord Chief Justice Treby, in 1696 (13 How. St. Tr. 313), counsel for respondent said:

"Here are some persons returned upon this panel that were formerly jurors in a cause that was tried for the same species of treason that this gentleman, the prisoner, is charged with in this indictment; and I think the witnesses at that trial did mention in their evidence my client as being present at those very consults about which they gave their evidence. These gentlemen gave credit to those witnesses and found the verdict against the person then accused. We humbly submit it to your lordship and

the court whether we may not for this cause challenge this person as not indifferent, it being for the same cause and consult that the other was tried for."

To this the Lord Chief Justice replied:

"Well, there is nothing in it."

These decisions, which have been followed by some courts in modern times (see *U. S.* v. *Wilson*, Baldw. 84 [Fed. Cas. No. 16,730]; *Dew* v. *McDivitt*, 31 Ohio St. 139; *State* v. *Williams*, 31 S. C. 238 [9 S. E. 853]; *Thomas* v. *State*, 36 Tex. 315; *Bowman* v. *State*, 41 Tex. 417), were pronounced before there was any judicial acceptance of our modern conception of a jury as a tribunal which should dispose of a controversy solely on the testimony introduced before them. When they were made, while jurors heard testimony produced by the parties, their verdict was not, as we might infer from the rule in the *Regicide's Case*, based solely upon that testimony. They might, as is shown by the following authorities, in accordance with the ancient practice still in part existing, use in the decision of a controversy their private knowledge of facts, or, it seems, their private information concerning them. See 2 Pollock & Maitland, History of Eng. Law, p. 622.

In *Bushell's Case* (this case arose from an imprisonment of the jurors who had acquitted William Penn of a criminal charge), decided in 1670 (see 6 How. St. Tr. pp. 1010, 1011), the right of a court to fine and imprison a juror for rendering a verdict in favor of the defendant in a criminal case, against the manifest testimony, was judicially denied on the ground that—

"The judge * * * can never know what evidence the jury have. * * * Being returned of the vicinage whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue, though no evidence were given on either side in court. * * * They may have evidence from their own personal knowledge by which they may be assured, and sometimes are, that what is deposed in court is absolutely false."

In the *Case of Tutchin*, 14 How. St. Tr., at page 1100, decided in 1704, the issue in the case was whether the defendant was the author of a certain libel. A person called as a juror stated that he had read the alleged libelous publication, and publicly disallowed them, and he did not doubt defendant was the author of them. The attorney general answered:

"If this gentleman knows him to be the author of them, he is proper to be on the jury, for the jury are by law to be of the neighborhood of the place where the fact is alleged to be done, because they are presumed to know what is done there."

It is to be inferred that this argument was approved by Lord Chief Justice Holt, who presided at the trial.

As the juror at the common law was not compelled to render his verdict on the testimony given in court, it was no ground of challenge, as some courts have held (see *People* v. *Vermilyea*, 7 Cow. 108), that he had knowledge that would prevent his rendering such a verdict. At the common law the challenges to jurors for affection or partiality were of two kinds: (1) "For principal cause;" (2) "to the favor." A challenge is called principal "because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triors." 1 Co. Litt. 156*b*. Relationship to one of the parties or interest in the subject-matter of the litigation furnish illustrations of grounds for challenges for principal cause. Challenge to the favor (and the challenge under consideration is challenge to the favor, *Stephens* v. *People*, 38 Mich. 739) "is when the party alleges any such exception against one or more of the jurors, which is not forthwith sufficient upon acknowledgment of the truth thereof, but rather arbitrable and considerable by the rest of the jurors." *State* v. *Sawtelle*, 66 N. H. 508 (32 Atl. 831). "It showeth causes of favor which must be left to the conscience and discretion of the triors, upon hearing their evidence, to find him favorable or not favorable." 1 Co. Litt. 157*b*.

"In this form of challenge probable circumstances of suspicion, such as great intimacy with one party, or strife and quarrels with the other, any acts or sayings indicating affection for one or malevolence toward the other, in short, anything tending to show a motive on the part of the juror to favor one party or to wrong the other, may be alleged and proved." *State* v. *Sawtelle*, supra.

The question raised by this challenge was not that a juror had knowledge or opinions which would prevent his deciding the case according to the evidence, but it was that because of affection toward one party or of hatred toward the other, or because of some other similar motives, he would not decide the case according to the truth. This is illustrated by the following decisions:

In 1429 (see 7 Hen. VI. 25, pl. 8), in an action of replevin, a juror was challenged "for that he was favorable." Babington, C. J., submitting the questions to the triors, said:

"Do you know, triors, what is meant by favorable? He is favorable who, whether the matter is true or false, will pass for one or the other. * * * But, if one has said twenty times that he will pass for the one or the other party, you will inquire upon your oath whether the cause is for the affection he has for the party, or for the knowledge he has of the matter in issue; and if it is for the affection he has for the party, then he is favorable, but otherwise he is not."

Said Newton, J., in a case decided in 1442, reported in 20 Hen. VI. 40, pl. 9 (see *State* v. *Sawtelle*, supra):

"And if a juror say that he will pass for the plaintiff, his saying is no cause for withdrawing him, unless it is found by the triors or by the court that he said this more for favor than for the truth of the matter."

In *Rex* v. *Edmonds*, 4 B. & Ald. 490, decided in 1821, Abbott, C. J., speaking for the court, said:

"The language of Mr. Sargeant Hawkins upon this subject (4 Hawkins, Cr. Pl., bk. 2, chap. 43, § 28) is that, if the juryman 'hath declared his opinion beforehand that the party is guilty, or will be hanged, or the

like, yet if it shall appear that the juror hath made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge." So that, in the opinion of this learned writer, the declaration of a juryman will not be a good cause of challenge, unless it be made in terms or under circumstances denoting an ill intention towards the party challenging. A knowledge of certain facts, and an opinion that those facts constitute a crime, are certainly no grounds of challenge; for it is clearly settled that a juryman cannot be challenged by reason of his having pronounced a verdict of guilty against another person charged by the same indictment."

The supreme court of New Hampshire was justified in saying in *State* v. *Sawtelle*, supra (this case contains a careful and painstaking analysis of nearly all the common-law decisions on the subject, and it has been of great aid in the preparation of this opinion):

"In ancient times the law esteemed those who, being without motive to favor either party, had immediate and personal knowledge of the facts in dispute, to form the best conceivable tribunal for the determination of the issue. * * * The common law esteems jurors indifferent who have no motive to find for or against either party. All the valid objections to their competency, propter affectum [that is, for affection or partiality], whether for principal cause or for favor, rest on a motive presumed by law, or proved as a fact, to find for one or the other party."

We are forced to the conclusion, therefore, that our conception of a jury as a tribunal who should dispose of the case solely from the testimony produced before them did not come from the ancient rules of the common law. We are bound to say that the provision in the Constitution of Michigan (article 6, § 28), which, like the provision in other American constitutions (see Constitution of United States), gives the accused a right to trial by "an impartial jury," gave him a right to trial by jurors qualified to dispose of the case upon the testimony presented to them. A jury is not impartial "whose members are already so impressed with the guilt of the accused that evidence will be required to overcome such impressions." See *Stephens* v. *People*,

38 Mich. 739. See, also, *Smith* v. *Eames*, 4 Ill. 76 (36 Am. Dec. 515).

The decisions heretofore referred to, which hold that one who had participated in a trial of another person accused by the same indictment is not disqualified to sit as a juror, which proceed, as they do, upon the ground that a juror need not be qualified to determine a case upon the testimony, have therefore no application to the practice required by our Constitution; and it is our duty, as we have already before declared, to disregard them. See *People* v. *Troy*, 96 Mich. 530 (56 N. W. 102).

The question, then, is, not what was the practice at common law, but were those jurors who had agreed to a verdict of guilty in the *Ellen Case* impartial jurors under the meaning of our Constitution? Of course, the mere fact that they formed an opinion, if that opinion would not influence their verdict, would not disqualify them. See *People* v. *Quimby*, 134 Mich. 625 (96 N. W. 1061). But in the *Ellen Case* it was their duty to consider testimony which indicated both the guilt of Ellen and respondent. That testimony convinced them beyond a reasonable doubt that Ellen, who had the opportunity of being heard, was guilty. Are we warranted in assuming that they reached no conclusion respecting the guilt of respondent, against whom the testimony was almost equally strong, and who was not heard? Can these jurors, having already said that substantially the same evidence which is introduced in this case convinced them of the guilt of Ellen, enter upon the trial of respondent presuming him to be innocent? These questions answer themselves. The jurors who had determined that this evidence proved Ellen's guilt would stultify themselves if they determined that it did not convince them of respondent's guilt. The evidence of respondent's guilt was introduced in the *Ellen Case* as affording additional evidence of the latter's guilt. It was the duty of the jury to give due weight to that testimony. It should be presumed that they did their duty. It is not unfair to presume that in doing this duty they determined

respondent's guilt, for that determination is in harmony with their verdict. If they did in fact make such a determination, I think all will concede that they were disqualified to sit as jurors. While, as I have endeavored to show, the qualifications of jurors are not now tested by the rules of the common law, it is not improper to say that according to those rules a juror was disqualified who had "given a verdict upon the same title or matter." 1 Co. Litt. 157*b*.

It cannot be denied that it is possible that a juror may be so peculiarly constituted that his rendition of the verdict in the one case would have no influence upon his action in the other. But, in my judgment, this question must be disposed of upon the assumption that all jurors possess the characteristics common to ordinary men. We certainly cannot permit all jurors who had participated in the first trial to sit in the second, upon the assumption that their natures were so extraordinary that they had formed no disqualifying opinion. That assumption would compel the accused to be tried by men who had prejudged his case. Neither is it possible to determine by an investigation whether jurors have formed conclusions in the first case which disqualify them from sitting in the second. From the nature of the question to be investigated, no valuable testimony can be obtained, except from the jurors themselves. You cannot ask the juror whether, from the testimony presented in the first trial, he formed an opinion respecting the guilt or innocence of the accused, without opening the door to inquiries which will disclose the precise grounds upon which he reached the conclusion of guilt. If the practice at common law permitted any such investigation, which I doubt (see *Rex* v. *Edmonds*, supra), though it was adopted in *U. S.* v. *Wilson*, Baldw. 84 [Fed. Cas. No. 16,730], such practice is now prohibited by our statute. Section 10239, 3 Comp. Laws. See *Welch* v. *Publishing Co.*, 83 Mich. 661 (47 N. W. 562, 11 L. R. A. 233, 21 Am. St. Rep. 629).

I think we are bound to conclude, therefore, that persons

who have sat as jurors in a case where they had an opportunity to judicially determine upon substantially the same testimony the question of respondent's guilt or innocence are not the "impartial" jurors to which he is constitutionally entitled, and that, therefore, the court erred in the ruling under consideration. These views are in harmony with our own decision in *People* v. *Troy*, 96 Mich. 530 (56 N. W. 102), and with the following cases: *Smith* v. *State*, 55 Ala. 1; *Wickard* v. *State*, 109 Ala. 45 (19 South. 491); *Brown* v. *State*, 104 Ga. 736 (30 S. E. 951); *Garthwaite* v. *Tatum*, 21 Ark. 336 (76 Am. Dec. 402); *Railway Co.* v. *Smith*, 60 Ark. 221 (29 S. W. 752); *Swarnes* v. *Sitton*, 58 Ill. 155; *Apperson* v. *Logwood*, 59 Tenn. 262.

Neither may it be contended that the question we have considered was not fairly presented to the trial judge. After respondent's counsel had exhausted his peremptory challenges, he urged in support of his challenge to the jurors who had sat in the *Ellen Case* that the witnesses who had testified in the *Ellen Case* would be the witnesses in this case, and that their testimony would be substantially the same. The court overruled this challenge, not upon the ground that counsel was incorrect in his statement, but because the two cases were not "identical * * * in the main point;" that is, as stated by counsel for the people:

"The issue in that case was whether Mr. Ellen was bribed. The issue in this is whether Mr. Mol was bribed. One might be guilty, and the other innocent."

In short, the trial judge had occasion to decide, and did decide, the very question we decide, viz., Does the legal difference between the two issues which unquestionably exists—the fact that in the one case the issue relates to the bribery of Ellen and in the other to the bribery of Mol—render jurors who sat in the one case competent to to sit in the other? He held that it did. We are compelled to hold that it did not.

Nor can it be said that, because at common law the decision of the triors whose determination whether jurors were favorable or not was final, the decision under consideration cannot be reviewed by this court. It is settled that we have a right to review those decisions when they raise legal questions. See *Stephens* v. *People* and *People* v. *Troy*, supra.

Respecting the other questions raised in the case I concur in the opinion of my Brother GRANT. I think, for the error pointed out, the conviction should be set aside and a new trial ordered.

MOORE, C. J., MONTGOMERY and HOOKER, JJ., concurred with CARPENTER, J.

GRANT, J. (*dissenting*). In the year 1900 respondent was an alderman of the city of Grand Rapids. His prosecution arose out of the notorious water boodle scheme, the design of which was to secure a contract with the city to supply it with water from Lake Michigan. The information charges that respondent—

"Did corruptly accept from, to wit, Lant K. Salsbury, a gift and gratuity, to wit, $300, under an agreement and with the understanding that the vote, opinion, and judgment of him, the said James Mol, as such alderman, should be given in a particular manner and upon a particular side, to wit, in favor of said city of Grand Rapids entering into a contract with some person, firm, or corporation, under which contract said city of Grand Rapids should receive and pay for water to be conveyed from Lake Michigan for municipal and other uses, the same being a question and proceeding then brought and to be brought before him, the common council of the city of Grand Rapids, and being a question which might by law be brought before him, the said James Mol, in his official capacity as such alderman of the city of Grand Rapids aforesaid."

That part of the statute material to the case reads as follows:

"Every executive, legislative, or judicial officer, who

shall corruptly accept any gift or gratuity, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his vote, opinion, or judgment shall be given in any particular manner, or upon a particular side of any question, cause, or proceeding, which is or may be by law brought before him in his official capacity, * * * shall be punished." 3 Comp. Laws, § 11312.

Respondent was convicted. The facts material to the points raised will be stated in connection therewith. For a general statement of the conspiracy see *People* v. *Salsbury*, 134 Mich. 537 (96 N. W. 936), and *People* v. *McGarry*, 136 Mich. 316 (99 N. W. 147).

1. The first most important question for determination is the competency of certain jurors. Two trials growing out of the same conspiracy had preceded this one. The first was the case of *People* v. *Ellen*, charged with accepting a bribe. The other was the case of *People* v. *Albers*, ante, 678 (100 N. W. 908), charged with perjury in his testimony upon his trial for attempting to bribe another alderman. In both of those cases, as in this, evidence was introduced to establish the conspiracy, substantially the same in all the cases. In addition to those cases, Salsbury, McGarry, and Taylor had been convicted, and several aldermen and other city officers had confessed and pleaded guilty. These things were matters of common knowledge to all intelligent inhabitants of the city and the county of Kent.

Of the jurors who were summoned upon the trial of respondent, two had served upon the trial of Albers, five had served upon the trial of Ellen, and one had served upon the trial of both. It is strenuously urged in behalf of the respondent that these jurors were disqualified by reason of their service on the other trials.

We may dispose of the alleged disqualification of the jurors in the *Albers Case* by saying that that case and the case of respondent are not identical, and the mere fact that in the *Albers Case* the testimony to establish the conspiracy—which we hold in an opinion handed down

herewith (see *People* v. *Albers*, supra) was material to the issue in that case—was the same as that in the respondent's case did not per se disqualify the jurors in this case. That case did not involve the guilt of the respondent in this.

If, as counsel assume, the issue in the *Ellen Case* was identical with the issue in respondent's case, their contention should undoubtedly prevail. But it evidently was not. Ellen was convicted of corruptly receiving a certain sum upon a promise to vote for the water deal, while respondent was convicted of receiving another certain sum upon a separate and distinct promise to vote for the same deal. It did not appear that respondent had talked with Ellen about it, or that he even knew that Ellen had been bribed or had made any promise. Salsbury testified that he told respondent that he did not want him to talk with any one about it.

Counsel cite and rely upon *People* v. *Troy*, 96 Mich. 530 (56 N. W. 102), and other similar cases. Troy and another united in assaulting an officer. One was charged with assault, and the other with resisting an officer. The acts alleged to constitute each offense were the same, and identical in time and place, and the two offenders acted in unison. In the light of these facts we said:

"Where the issue is the same in both cases, it is but fair to the respondent that he have another panel of jurors to try his cause."

Opinions upon conceded or uncontroverted facts will not disqualify. 17 Am. & Eng. Enc. Law (2d Ed.), p. 1148; *State* v. *Wells*, 28 Kan. 321; *State* v. *Sorter*, 52 Kan. 531 (34 Pac. 1036); *Conatser* v. *State*, 80 Tenn. 436.

The jurors were not asked whether they had formed an opinion as to the existence of a criminal conspiracy. Its existence was not disputed upon the trial. The only question was the connection of the respondent with it. If an opinion upon this question would have disqualified, a jury of sufficient intelligence could not have been found in the county.

One may believe that a murder has been committed, and not be disqualified. *Cargen* v. *People*, 39 Mich. 549.

One may believe that a burglary has been committed, and not be disqualified to serve as a juror, if he have no disqualifying opinion as to whether the respondent committed the crime. *Stewart* v. *People*, 23 Mich. 63 (9 Am. Rep. 78).

So the circumstances surrounding the burning of a building may be such as to leave no reasonable doubt that the crime of arson was committed; but the belief that such crime had been committed would not per se disqualify one from acting as a juror, if he had no positive opinion that the respondent was the guilty party. These illustrations might be multiplied.

Though one has served in similar cases, he is not disqualified, unless the opinion he has formed is such as to repel the presumption of innocence. 17 Am. & Eng. Enc. Law (2d Ed.), p. 1140.

All these jurors testified that they entertained no prejudice against respondent, and had formed no such opinions from the testimony given upon the other trial of Ellen, or from what they had heard, as would prevent them from giving him a fair and impartial trial. The situation is well shown by the cross-examination of one of these jurors:

"From what I heard in that trial, and from what I had learned before that trial commenced, either by reading or conversation, I formed an opinion in regard to some of the other respondents that were arrested. It would not require evidence on the part of this respondent to remove that impression. It has nothing to do with him. I neither formed nor expressed an opinion in any way, shape, or manner as to the guilt or innocence of Mr. Mol. I did not form any opinion as to all that were charged. Of course, we must admit the guilt of those we tried, and also those that acknowledged it—those that pleaded guilty. We presume the others are innocent until they are tried. As to the rest, I have no fixed opinion of any of them, none but what I could lay aside at the commencement of every one of these trials. I could start in this case as

though I hadn't heard a word. All I have heard does not prejudice me at all in regard to Mr. Mol."

Yet this juror was challenged for cause. The statute of Michigan makes a juror competent, though he has formed an opinion, if he declare upon his oath that he verily believes that he can render an impartial verdict, and the court shall be satisfied that he does not entertain such a present opinion as would influence his verdict. 3 Comp. Laws, § 11947.

All the jurors in this case so declared, and the judge passed his judgment upon their qualifications.

"The opinion entertained by a juror, which disqualifies him, is an opinion of that fixed character which repels the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already." *People* v. *Barker*, 60 Mich. 277 (27 N. W. 539, 1 Am. St. Rep. 501).

No juror in this case had formed any such opinion.

Appellate courts cannot substitute their own judgment of the qualification of jurors for that of the circuit judge, where different conclusions may be drawn from the juror's examination. The candor, character, and manner of the juror are elements for the consideration of the trial judge in determining his competency. The question is often difficult of determination, and only when the juror's examination shows conclusively that he has a disqualifying opinion should the appellate court reverse the decision of the trial court.

Upon this subject Chief Justice Waite, in *Reynolds* v. *United States*, 98 U. S. 145, said:

"It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less

stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for a new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court. * * * In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so."

I hold that there was no error in holding the jurors qualified.

2. Salsbury was permitted to testify, under objection and exception, to a conversation between himself and respondent after the abandonment of the conspiracy, and fixed the time and place. One De Vries testified that he took Mr. Salsbury to respondent's house at that time. The objection to this testimony is that it comes within the rule that acts and declarations made after the consummation or abandonment of the conspiracy are inadmissible. This conversation related to the re-election of Salsbury as city attorney, for the avowed purpose of avoiding an exposure of the crime, which would be more probable if another should be elected city attorney. This conversation does not come within the rule. It was a conversation between two conspirators, devising means to avoid exposure.

3. One Ghysels testified that Salsbury paid him $300 for his vote. He, also, was one of the conspirators and an alderman. When the conspiracy is established, the declarations and acts of the co-conspirators, before the conspiracy is abandoned, are competent. *People* v. *Salsbury* and *People* v. *McGarry*, supra. Under this same rule, declarations and conversations between other co-conspirators were competent.

4. It is next urged that the matter could not legally be brought before the common council, and that therefore there was no crime. This question is ruled by the cases of *People* v. *Salsbury* and *People* v. *McGarry*, supra.

The conviction should be affirmed.

THICK *v.* DETROIT, UTICA & ROMEO RAILWAY.

1. PLEADING — DECLARATION — OBJECTION TO EVIDENCE — DEMURRER.

   Where a declaration is sufficient to sustain a judgment, and its only fault is that it should be more specific, defendant may not object to the admission of any evidence under it, but, if desiring it to be made more specific, must demur to it.

2. SALES—REFUSAL TO COMPLETE CONTRACT—NECESSITY OF TENDER.

   Refusal by the purchaser to carry out a contract for sale of railroad ties justifies the seller in treating the contract as broken and suing for damages, without a delivery or formal offer of delivery.

3. SAME—ACTION FOR BREACH—EVIDENCE.

   Plaintiff, in an action for refusal of defendant to carry out a contract for the purchase of railroad ties, may show that, though he did not have the ties, he was able to procure them.

4. SAME—EVIDENCE.

   Evidence, in an action for refusal of defendant to carry out a contract to purchase railroad ties, that some of the ties defendant afterwards contracted to purchase from another were

a part of the lot for which plaintiff had contracted with which to fill defendant's order, is inadmissible; it not being contended there were not some good ties in the lot.

5. SAME—INSPECTION OF GOODS.

Where plaintiff's contract to sell and deliver ties made no provision for inspection, it is not changed, as to plaintiff's duty to deliver them without a prior inspection, by defendant's compliance with plaintiff's request, made on account of the demand of the person from whom plaintiff was obtaining the ties, that an inspector be sent; plaintiff having refused to abide by his inspection, and defendant having refused to send another inspector.

6. SAME—PAYMENT ON DELIVERY—DRAFT ACCOMPANYING BILL OF LADING.

A contract to furnish railroad ties of a certain quality, to be paid for cash on delivery, entitles the buyer to inspect before paying, and an offer to ship, with sight draft attached to bill of lading, unaccompanied by an offer of inspection, is not a tender of performance.

Error to Wayne; Donovan, J. Submitted July 7, 1904. (Docket No. 204.) Decided October 4, 1904.

Assumpsit by Joseph A. Thick against the Detroit, Utica & Romeo Railway for breach of a contract to purchase certain ties. There was judgment for plaintiff, and defendant brings error. Reversed.

The contract, for the breach of which this suit is brought, is evidenced by the following writings:

"DETROIT, MICH., March 14, 1900.

"J. A. THICK.

"*Dear Sir:* We will take seventeen thousand (17,000) cedar ties, to be delivered on the M. C. R. R. at Center Line, North Detroit, or Belt Line, as we may hereafter direct. Price for No. 1 standard cedar ties forty-one cents (41). We will take some No. 2 ties at twenty-five cents. Terms cash on delivery.

"Yours truly,

"DETROIT, UTICA & ROMEO RY.

"Geo. B. Davis, Pres.

"I accept the above order.

"J. A. THICK."

Plaintiff owned no ties, but relied upon his ability to buy and furnish the same to the defendant. He furnished none, but claimed that he had contracted for some, had them ready for delivery, but that the defendant refused to receive them. Plaintiff testified that at Posen he contracted for 20,000 ties; that he telegraphed to defendant's agent to send an inspector. Defendant's agent, Mr. Davis, telegraphed that he would send one, fixing time. The inspector came. Two carloads were inspected and loaded. The parties from whom plaintiff contracted to purchase were dissatisfied with the inspection, claiming that it was unfair, and refused to load any more cars under that inspector. Plaintiff then went to Detroit to see Mr. Davis. His version of what then occurred, and his reason for considering the contract broken by the defendant, are given by him as follows:

"I told him that the tie inspector was an incompetent man. He didn't know a good tie from a bad one, and the men wouldn't load any more under his inspection; but they would get Woods for inspection—he was inspecting ties for the D. & M. and the Central Northwestern—or any other inspector who was a qualified inspector. He said: 'We can get the Detroit Northwestern inspector, or Mr. Maltby's inspection.' Mr. Davis said he didn't want Mr. Woods to inspect those ties, and said: 'Do you want this man Duggan?' I said: 'Yes.' And he said: 'Would you be satisfied with his inspection?' I said: 'Yes.' And he said: 'All right; I will let him go up in the morning.' And I said: 'Well, tomorrow is Saturday.' And he said: 'Well, he can go up Monday morning.' And I said: 'All right.' On Monday morning I went up to see if Mr. Duggan was going up, and said to Mr. Davis: 'I don't see anything of Mr. Duggan.' And he said: 'No; I am not going to let him go up this morning. You have two cars loaded, haven't you?' I said: 'Yes.' And he said: 'You can ship them down.' I said: 'Yes; these cars are coming with a sight draft attached to the bill of lading.' He said: 'That isn't cash on delivery.' I said: 'That is cash on delivery in my estimation, Mr. Davis. I am not going to ship down 17,000 ties, and put them into the railroad, and then let you go into litigation for three or four years, the same as the French road did.'

He said: 'You needn't ship any more ties. I won't send an inspector.' I says: 'If you don't want the ties, I can send them from other shipping points.' And he said: 'I don't want them at all. I won't let you furnish them with a sight draft attached to the bill of lading.' I said: 'I will not ship them any other way. That is the way my contract reads, and I think that is a sight draft attached. You don't need to pay for them until inspected and delivered.' He said: 'I won't accept them in that shape.' I said: 'I won't ship them, then.' I had no other deal with Mr. Davis."

Plaintiff made no further offer to furnish ties. The defendant after some time made a contract with other parties for ties, which were furnished. Plaintiff sued, and recovered verdict and judgment for breach of contract.

Philip T. Van Zile, for appellant.

J. Emmet Sullivan, for appellee.

GRANT, J. (*after stating the facts*). 1. The declaration alleges a contract to buy of plaintiff, the ties to be delivered by him to defendant at Detroit, and to be paid for on delivery; the promise on the part of the defendant to accept and receive them; plaintiff's readiness and willingness to carry out the contract; and the refusal by the defendant to accept the ties selected by him in accordance with the agreement, and consequent loss of profits. The plea was the general issue. Upon the trial defendant objected to the admission of any evidence, for the reason that the declaration did not state a cause of action. The precise objection is that the declaration does not allege delivery, or offer to deliver, or ability to deliver, or that he was prevented from delivery by the defendant. The declaration should, perhaps, have been more specific; but, if it is sufficient to sustain a judgment, the only course open to defendant was to demur. *Rowland* v. *Kalamazoo Superintendents of Poor*, 49 Mich. 553 (14 N. W. 494), and authorities there cited. The declaration alleges a selection of ties according to the contract and the refusal to accept them. Under plaintiff's version of the case a

delivery or formal offer of delivery was unnecessary. A refusal on the part of defendant to carry out the contract justified plaintiff in treating it as broken, and bringing suit for damages. We think the declaration states a cause of action, and that, if defendant desired a more specific one, it should have demurred.

2. We do not think it was error to permit plaintiff to show his ability to procure ties by purchase or otherwise to fill his contract.

3. About two months after the conversation above detailed between plaintiff and Davis, Davis on behalf of the defendant made a contract with other parties to furnish ties. Plaintiff was permitted to show that some of these ties were a part of the lot which plaintiff had contracted for at Posen. This evidence was wholly immaterial. It had no tendency to sustain the plaintiff's case. It was not contended that there were not good ties in that lot. Some of them passed the inspection of the inspector first sent there under the telegram from plaintiff to defendant. The admission of this evidence might not constitute error of sufficient gravity to reverse the case if there were no other errors.

4. The contract provided for no inspection. It was the duty of the plaintiff to deliver the ties at the place named. There was no subsequent agreement for inspection. Evidently plaintiff could not purchase the ties at Posen without an inspection satisfactory to the person from whom he purchased. Plaintiff's request by telegram to send an inspector, and defendant's compliance with the request, did not change the contract, or provide for a binding inspection. Plaintiff recognized this, for he repudiated the inspection. If the parties had agreed to an inspector, his inspection, in the absence of fraud or mistake, would have been conclusive. Under plaintiff's version defendant refused to provide and send another inspector. It was then clearly plaintiff's duty to deliver the ties at the time and place agreed upon. It was, therefore, error to submit to the jury the question of any change in the contract.

5. The circuit judge instructed the jury that a sight draft accompanying the bill of lading was equivalent to the payment of cash on delivery. This was error. The contract is unambiguous. All prior conversations were merged in it, and were inadmissible in evidence. It was the duty of the plaintiff to deliver ties of the character specified. It was the right of defendant to examine them before accepting and paying for them. Plaintiff had no ties at the time to deliver. Plaintiff might manufacture them, or might purchase them from others.

The law applicable to this case is stated by the Supreme Court of the United States in *Pope* v. *Allis*, 115 U. S. 363, 372 (6 Sup. Ct. 69, 73):

"When a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract."

Where goods are sold and shipped to the vendee, and the vendor draws a sight draft with bill of lading attached, the vendee is not entitled to examine the goods in the hands of the carrier until he pays the draft and procures the bill of lading. In such case the vendee's only remedy is, having paid for the goods, to rescind the sale and sue for the purchase price, or to retain the goods and bring suit for damages. 2 Dan. on Neg. Inst. § 1734c; *Whitney* v. *McLean*, 4 App. Div. 449 (38 N. Y. Supp. 793). The parties may agree that the vendee and drawee may inspect before acceptance and payment, but, unless they do, no such right exists; or, if the vendor accompanies his draft with an offer of inspection before acceptance, that is sufficient tender of performance.

Judgment reversed, and new trial ordered.

The other Justices concurred.

MEYER *v.* KNOTT.

1. CONTINUANCE—ABSENT WITNESS—INCOMPETENT TESTIMONY.
   Continuance to procure the attendance of a medical witness, whose testimony is incompetent, except as to facts admitted by defendant, is properly refused.
2. FRAUD — MISREPRESENTATIONS—CHRISTIAN SCIENCE—SINCERITY OF BELIEF.
   In an action for fraud, in falsely representing to plaintiff that defendant was a sincere believer in Christian Science, and thereby inducing him to pay defendant for instruction in the art of healing by that science, evidence that, some two years before, defendant had had superfluous hairs removed from her face by material means, does not tend to show her lack of sincerity.

Error to Wayne; Brooke, J. Submitted September 13, 1904. (Docket No. 161.) Decided October 4, 1904.

Case by Martin Meyer against Annie M. Knott for alleged fraud. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Charles S. Hampton (*William D. Fuller*, of counsel), for appellant.

Lodge, Trevor & Brown, for appellee.

MONTGOMERY, J. This case is novel (not to say unique). The defendant is a teacher of Christian Science, and was in February, 1901, first reader of the First church of Christ, scientist, of the city of Detroit. The declaration alleges that on the 14th of February, 1901, defendant "did falsely and fraudulently represent, claim, and pretend to said plaintiff that she (the defendant) was then and there a sincere, honest, and conscientious believer in and adherent, follower, and practicer of the principles of Christian Science, and then and there mentally and morally

qualified and competent to give class instruction in Christian Science mind healing;" that plaintiff agreed to pay and did pay defendant $100 for instruction which was given; that by reason of defendant not being a sincere, honest, and faithful believer in and follower and practicer of Christian Science, the plaintiff received no benefit from the instruction given him. In this action he seeks to recover the money paid and compensation for the time spent in the attempt to learn to "cure disease through the power of Christian Science mind healing." Upon the testimony which will be referred to later the circuit judge directed a verdict for the defendant. Plaintiff brings error, and has assigned error on three classes of rulings: *First*, refusal of the circuit court to grant a continuance; *second*, the refusal to submit certain special questions to the jury; and, *third*, the direction of the verdict.

It is manifest that, if the verdict was properly directed, the refusal to submit special questions was also proper. Our inquiry is, therefore, directed in the first instance to the first and third questions. The plaintiff sought to show that the defendant was not a true and conscientious believer in, and adherent, follower, and practicer of, Christian Science, by proof that at a date two or three years before his contract (as fixed by his testimony) she (the defendant) received treatment of a material nature from one Dr. De Forest, and that this was contrary to the teachings of Christian Science, and that this fact showed that she was not an adherent or follower of Christian Science. Before the trial the plaintiff, upon a showing of diligence, asked for a continuance to secure the attendance of Dr. De Forest to show that defendant received medical treatment, "and that such treatment was not merely for the purpose of removing facial blemishes." This offer indicates a purpose to show by the physician what disease he did discover in defendant and treat. Such testimony would not have been competent as against defendant's objection. *Lammiman* v. *Railway Co.*, 112 Mich. 603 (71 N. W. 153). In so far as the physician's testimony would have

been competent, the facts were admitted by the defendant. There was no error in refusing the adjournment.

On the trial it appeared that the defendant had, at a date two or three years prior to the contract with the plaintiff, had superfluous hair removed from her face by Dr. De Forest by means of electrical treatment, and, as plaintiff was able to call medical experts who testify that the superfluous hair is known to pathology by the name of "hypertrichosis," and is a disease, and as Christian Science is opposed to material treatment for disease, it follows that one who has superfluous hair removed is not a true believer in, and adherent, follower, and practicer of, the principles of Christian Science. Apart from the consideration that this departure from the true faith, if it be such, occurred two years before the contract with plaintiff, thus leaving ample time for defendant to mature her belief, we deem it sufficient answer to the plaintiff's contention that, if it be conceded that superfluous hair is a disease, it is also regarded by many as a facial blemish. Some conceal it as well as they may by the use of face powder; some have it removed. The defendant, because her little son teased her about the appearance of this superfluous hair, caused hers to be removed. This was not done as a treatment for disease, but as a means of making herself more presentable. We think this does not tend to show that defendant was guilty of fraud in holding herself out as a teacher of Christian Science.

It is to be understood that both plaintiff and defendant proceed upon the theory that Christian Science, as taught by Mrs. Eddy's book, "Science and Health," is true. We have therefore determined the case on that assumption.

The judgment is affirmed.

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

OTT v. BRISSETTE.

ELECTIONS—BALLOTS—ERROR IN NAME.

Where the name of Christian Ott is erroneously printed O. H. Christian on a township ticket, and several ballots are cast before the mistake is discovered and corrected on the remainder of the official ballots, Ott is not entitled to have votes cast for Christian counted for him, though no person by that name resides in the township, and the copy of the ballot was not filed for two days, as required by 1 Comp. Laws, § 3660.

Error to Bay; Shepard, J. Submitted October 4, 1904. (Docket No. 215.) Decided October 7, 1904.

Quo warranto proceedings by Christian Ott against Peter Brissette to try the title to the office of supervisor of Kawkawlin township. There was judgment of ouster, and respondent brings error. Reversed.

This is an action of quo warranto to test the title to the office of supervisor for the township of Kawkawlin. The facts are stipulated. Two tickets were named; one known and headed as the "Kawkawlin Township Ticket," and the other known and headed as the "Citizens' Ticket." The respondent was candidate for supervisor on the Township ticket; the relator was a candidate for supervisor upon the Citizens' ticket. There were no other candidates. Relator's name as Christian Ott was regularly certified to the board of election commissioners by the chairman and secretary of the caucus which nominated him. The ballots were prepared by the clerk of the board of election commissioners, and sent to the printer with the name of Christian Ott thereon. The printer read the name of Christian Ott as "Christian O. H.," and printed the name on the ballot as "O. H. Christian." No copy of said ballots was on file with the township clerk for two days, as required

by law. The relator did not call at said office to examine the proof. The ballots were printed, wrapped in paper, and tied securely and sealed, and delivered to respondent, who was then supervisor, and by him delivered to the inspectors of election at the opening of the polls.

After 22 persons had voted, the name of "O. H. Christian" was discovered to be upon the ballots, instead of the name of "Christian Ott." The board seemed to concede that there was a mistake, and erased the name of O. H. Christian on the remaining ballots, and placed thereon "Christian Ott." The name of O. H. Christian did not appear upon the ballot list or registration list, and no person by that name was known in the township of Kawkawlin. When the votes were counted, Peter Brissette had 174 votes, Christian Ott 167, and O. H. Christian 12 votes. The board declared Christian Ott elected. Respondent demanded a recount, which was had, and on such recount respondent was declared elected. The relator thereupon instituted this suit.

Lewis P. Coumans (*Pierce & Kinnane*, of counsel), for appellant.

Albert McClatchey (*Chester L. Collins* and *Horace Tupper*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). The sole question is whether the 12 votes cast for "O. H. Christian" should be counted for Christian Ott. The name "Christian Ott" is not idem sonans with "O. H. Christian." The names are as distinct as two names possibly can be.

It is conceded that under the decisions prior to the adoption of the present quasi Australian ballot system these 12 votes could not be counted for relator. *People* v. *Tisdale*, 1 Doug. 59; *People* v. *Higgins*, 3 Mich. 233 (61 Am. Dec. 491); *People* v. *Cicott*, 16 Mich. 283 (97 Am. Dec. 141); *People* v. *McNeal*, 63 Mich. 294 (29 N. W. 728); *Andrews* v. *Otsego Probate Judge*, 74 Mich. 283 (41 N. W. 923).

These cases exhaustively discuss the reasons why neither boards of election nor the courts can enter into evidence to determine that votes for different names were in fact intended to be for but one person. Does the Australian ballot system change the rule? The argument in behalf of relator is that, inasmuch as he had nothing whatever to do with the printing of his name, but that the placing of his name is regulated by law, therefore he cannot be deprived of votes by the action, either fraudulent or innocent, of those whose duty it is to report the proceedings of the caucus and to print the name upon the ballot. If relator's contention be correct, it follows that, if his name had not been printed upon the ballots at all, still the ballots should be counted for him; or, if the mistake had not been discovered, and all the ballots had been cast for O. H. Christian, still they must be counted for him. This would assume that every one who voted the Citizens' ticket would have voted for the relator. It would assume —which is unusual—that every member of relator's party would have voted for him. We must assume, in order to sustain the relator's right to the office, that every one of the 12 men who voted for O. H. Christian would have voted for Christian Ott. A voter might know Christian Ott, and be unwilling to vote for him, but an elector might be willing to vote for any other man, and, though not knowing O. H. Christian, might vote for him. Courts cannot assume, under such circumstances, that such votes would have been cast for relator. The law makes ample provision to secure the correct printing of the ballots. Section 3660, 1 Comp. Laws, requires that "the proof copy of the ballot shall be open to the inspection of the chairman of each committee at the office of the township clerk * * * not less than two clear secular days before such election." Had the proper officials filed this proof, and had the chairman of the committee examined it, no such mistake would have been possible. We are glad to state that it is conceded there was no intentional fraud on the part of any one.

We think the repeated decisions of this court in such cases are not supplanted by the Australian ballot system, and that the reason why neither boards nor courts can enter into a determination of the intention of the voters any further than appears upon the face of the ballot remains undisturbed by the present system of voting.

Judgment reversed, and entered in this court for respondent.

The other Justices concurred.

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137 720
149 396

JENNINGS *v.* BOARD OF ELECTION COM'RS OF DELTA COUNTY.

ELECTIONS—CONVENTIONS—NOMINATIONS.

In the absence of fraud, the determination of a political convention as to who are its nominees is final, and mandamus will not be granted to compel the printing on the official ballot of a name not certified, on the theory that relator received a majority of the votes of the convention, the chairman having ruled otherwise, and no appeal having been taken from his ruling.

Mandamus by Ira C. Jennings to compel the board of election commissioners of Delta county to place relator's name upon the official ballot as the republican candidate for judge of probate. Submitted October 7, 1904. (Calendar No. 20,767.) Writ denied October 8, 1904.

The relator and Thomas B. White were candidates for the office of judge of probate at a recent convention of the republican party for the county of Delta, held at Escanaba, in said county. There were 46 delegates present. On the first informal ballot Mr. White received 25 votes, and the relator, Mr. Jennings, received 21. A formal ballot was taken immediately thereafter, and Mr. White re-

ceived 21 votes, and the relator 23. The chairman ruled that, as there were 46 delegates present and no one had received a majority thereof, no nomination had been made. No appeal was taken from this ruling. On a subsequent ballot Mr. White received 24 votes and Mr. Jennings 22. Mr. White was then declared the nominee of the convention. Mr. Jennings, the relator, contends that he was nominated on the first formal ballot, and asks for a writ of mandamus to compel the board of election commissioners to place his name, and his name only, on the official ballot in the republican column.

F. D. Mead (*George Huggett*, of counsel), for relator.

T. B. White, for respondent.

PER CURIAM. We think the case is controlled by *Stephenson* v. *Election Com'rs*, 118 Mich. 396 (76 N. W. 914, 42 L. R. A. 214, 74 Am. St. Rep. 402), and *Phillips* v. *Gallagher*, 73 Minn. 528 (76 N. W. 285, 42 L. R. A. 222).

Mandamus will be denied.

INDEX.

ACCOUNT.

1. In a suit for an accounting brought by heirs against one who had had business dealings with deceased, but not as a partner, resulting in a mutual account, evidence examined, and in connection with the prayer of defendant's answer and cross-bill, "that the court shall make and state the account between the parties hereto, and that it compute the interest thereon at the legal rate, but without annual rests," *held* sufficient to show an agreement to pay interest on the mutual account at the rate provided by law, in the absence of stipulation for a different rate. *Gay* v. *Berkey*, 658.

2. In a suit for an accounting by heirs against one who had had business dealings with deceased, but not as a partner, resulting in a mutual account, where defendant admitted that he paid a certain sum on the account, and made other payments fully satisfying the account, and that certain taxes paid by him were paid on the agreement, as stated in the bill of complaint, that one-half of the amount so paid should be credited by deceased to defendant in the mutual accounts between them, he is in no position to claim the application of the Connecticut rule in the computation of interest—that is, simple interest on the items of each side of the account from the date of the items—the sole basis for making such claim being that the items of credits to defendant were not payments, but independent items. *Id.*

ADJOURNMENTS—See JUSTICES OF THE PEACE (3).

ADOPTION.

1. The provisions of 3 Comp. Laws, § 8780, for the adoption of children, do not make such children heirs of the kindred of the persons adopting them. *Van Derlyn* v. *Mack*, 146.

2. Heirship, except that based upon consanguinity, can be created only by a constitutional law by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature. *Albring* v. *Ward*, 352.

3. Heirship by adoption is unknown to the common law. *Id.*

4. Where a statute under which complainant was adopted was unconstitutional, and there was no contract between her and her foster parents to make complainant their heir, other than that arising from the adoption proceedings, she was not entitled to share in the real estate of which her foster father died seised. *Id.*

ADVERSE POSSESSION.

1. Evidence examined and *held* that defendant's occupancy of land under a conveyance from his father was adverse to the dower and alimony claims of his mother during the whole period of limitations, notwithstanding her residence there with him during a part of the period. *Butcher* v. *Butcher*, 390.

2. Where a father deeded land to his daughter as a gift, but remained in possession and paid the taxes several years out of funds in his hands belonging to her, but after her death, leaving infant children, allowed the land to be sold for taxes and purchased it at the sale, limitations would not run against the title of the minor children until actual notice to them of the adverse character of his possession. *Nugent* v. *Peterman*, 646.

AGENCY—See PRINCIPAL AND AGENT.

ALIMONY—See ADVERSE POSSESSION; DIVORCE.

AMENDMENTS—See EQUITY (5, 11); INFANTS.

Harmless error in refusal, see CREDITOR'S SUIT (2).

On appeal from justice, see JUSTICES OF THE PEACE (6).

Time to move, see PLEADING (3).

APPEAL AND ERROR.

1. The admission of incompetent testimony as to the value of claimant's services was not reversible error, where there was competent testimony, and the jury could not have rendered a smaller verdict under the evidence. *Shane* v. *Shearsmith's Estate*, 33.

2. Where defendant contends for his theory on an unfounded assumption as to the evidence, it is not error for the court to fail to perceive that the same theory was sound on a proper assumption. *Hunter* v. *Village of Durand*, 54.

3. On error, the Supreme Court will consider only the evidence presented to the lower court, and will not resort to the recollection of the justices to determine the grounds on which a mandamus was denied, no written opinion being filed. *Hoffman* v. *Silverthorn*, 60.

4. The findings of fact in a trial before the court without a jury are conclusive on error to the Supreme Court. *Id.* 61.

5. The Supreme Court cannot, from statements in counsel's brief, draw any inference of fact opposed to the findings of the trial judge. *Id.*

6. An order of the probate court, denying a petition to compel a guardian to account, is appealable under 1 Comp. Laws, § 669, and hence cannot be reviewed on mandamus. *Hopper* v. *Livingston Probate Judge*, 124.

7. Act No. 92, Pub. Acts 1901, providing that a party, appealing from an order of the probate judge, shall give a bond to the adverse party to secure the payment of damages and costs if

APPEAL AND ERROR—Continued.

the case shall not be reversed, and in case an administrator appeals from the allowance of his account, to secure the payment of the amount found due, does not require an administrator, appealing from an order removing him, to give a bond securing anything more than the costs that might be awarded to the adverse party by the appellate court. *Fleming* v. *Ottawa Probate Judge*, 139.

8. The mischief of an improper argument, when persisted in by counsel, *held* not cured by the admonition of the court. *Hillman* v. *Detroit United Ry.*, 184.

9. Where the court, at the request of defendant, an administrator, charged the jury that the fact that the deceased signed the note would not authorize a recovery provided that the defendant showed the note was given without consideration, the defendant cannot complain of a further charge that the burden of showing there was no consideration for the note rested on the defendant. *Farnsworth* v. *Fraser*, 297.

10. It was not prejudicial error to refuse to permit one of defendant's counsel to argue a particular question to the jury, where the other counsel was subsequently permitted to argue the question, and it did not appear that the question was not fully argued, or that the defendant asked to have the particular counsel argue it. *Id.*

11. Where no amendments to the trial court's findings were proposed, as authorized by Cir. Ct. Rule 26 *b*, it will be assumed on error that the evidence warranted the findings made. *Becker* v. *Headsten*, 478.

12. The decision on a former review in the same case is res judicata as to all issues there decided. *Quirk* v. *Rapid Ry.*, 493.

13. Whether the proximate cause of a pedestrian's injury by a street car was the motorman's negligence in failing to discover him on the track, or the catching of the wheel of plaintiff's cart in the track, cannot be first raised on a second writ of error. *Id.*

14. Efforts of counsel to show an oral stipulation of the genuineness of certain signatures are not prejudicial where their genuineness is sufficiently proved by oral testimony. *Sudworth* v. *Morton*, 575.

15. The case must be a very clear one, affording very strong evidence that the verdict is the result of bias or prejudice, to justify this court in overturning the decision of the trial judge adverse to a new trial on the ground that the verdict is opposed to the great weight of evidence. *Lovely* v. *Grand Rapids, etc., R. Co.*, 653.

16. The Supreme Court will not review the determination of a circuit judge refusing to punish for contempt in violating an injunction. *People, ex rel. Dean,* v. *Ann Arbor R. Co.*, 673.

ARBITRATION AND AWARD.

1. Where one of testator's children, interested in the probate of his will, was not a party to a contest thereof, an arbitration

ARBITRATION AND AWARD—Continued.

agreement for the settlement of such contest was not void by reason of her failure to sign the same, since she could not be affected by the award. *Hoste* v. *Dalton*, 522.

2. Where the parties to a will contest entered into an arbitration agreement for the settlement thereof, providing that if any question should arise as to the construction and enforcement of the agreement it should be submitted for decision to the circuit court, such agreement should be construed to refer to the side of the circuit court having jurisdiction of the controversy that might arise, and was not limited to the law side of the court, on which the will contest was then pending. *Id.*

3. Where an arbitration agreement provides that any controversy between the parties thereunder shall be submitted to the circuit court, and that its decision shall be final, such agreement is valid and binding on the parties, though it ousts the Supreme Court of jurisdiction of an appeal, and precludes a review of the decision of the circuit court. *Id.* 523.

4. On grounds of public policy, litigants should be encouraged to accept as final the decisions of courts of original jurisdiction. *Id.*

Power of married women to arbitrate, see HUSBAND AND WIFE.

ARGUMENT OF COUNSEL—See TRIAL.

ARREST.

1. 3 Comp. Laws, § 10520, providing that, if a bond for the liberty of jail limits shall be forfeited, the person at whose suit the prisoner shall have been confined shall be entitled to an assignment thereof, which shall be made by the sheriff taking it, or by his successor, or, in case of vacancy, by an undersheriff, by an indorsement thereon, is not mandatory to the extent of prohibiting a sheriff from assigning by his deputy. *Hughes* v. *Hally*, 433.

2. 1 Comp. Laws, § 1117, providing that all officers of courts of record shall be liable to arrest, and may be held to bail, in the same manner as other persons, except during the actual sitting of any court of which they are officers, does not permit counsel, who has been arrested, and has given bail for liberty of jail limits, not during, but before, the actual sitting of a court, to violate the condition of his bond by going beyond the limits of the county, when thereafter professional engagements call for his presence in the Supreme Court. *Id.*

ASSIGNMENTS.

Assignment of jail-limits bond, see ARREST (1).

ASSUMPSIT.

1. Where a bailee, without authority from the owner, turned the property over to another under an agreement that, if it should prove satisfactory, such person would buy it, the owner could waive the tort, and sue the bailee on the common counts in *assumpsit* for its value. *Brown* v. *Foster*, 36.

ASSUMPSIT—Continued.

2. Plaintiff leased land of defendant for two weeks for a certain use, paying the rent. After he had used it for a week, a preliminary injunction, at suit of a third person, issued against such use, and plaintiff discontinued it. *Held*, that plaintiff could not maintain a suit on the common counts for the rent paid, as, if defendant broke his covenant for quiet enjoyment, or if plaintiff was evicted by a superior title, the declaration should be special; the measure of recovery being the value of the use for the remaining week. *Prochaska* v. *Fox*, 519.

3. Defendant, representing that a mine could be bought for $60,000, obtained $1,000 from plaintiff, on the understanding that defendant was to raise $65,000 from different persons, pay $60,000 for the mine, and convey it and the remaining $5,000 to a corporation to be formed to work the mine; plaintiff to have one sixty-fifth interest in the syndicate. Defendant in fact purchased the mine for $10,000, and kept $50,000 himself. *Held*, that plaintiff, who had received his interest in the mine by reason of his interest in the corporation to which the deed was made, not having rescinded before commencement of action, could not recover the entire amount paid by him; but in assumpsit on the common counts he could, on the theory of an affirmance of the purchase at the price actually paid, recover his proportion of the money not used in accordance with the contract, or on special counts he could recover damages for the fraud under 3 Comp. Laws, § 10421. *Barbour* v. *Hurlburt*, 534.

ATTORNEY AND CLIENT.

Privilege from arrest, see ARREST (2).

BAIL.

One who is arrested on a capias ad satisfaciendum, gives bond for liberty of jail limits, is then surrendered by his sureties, and afterwards gives another such bond, is thereafter confined, not on a surrender in exoneration of bail, but by virtue of a capias ad satisfaciendum, within 3 Comp. Laws, § 10521, providing the various measures of damages in such cases for forfeiture of such a bond. *Hughes* v. *Hally*, 434.

BAILMENTS—See ASSUMPSIT (1).

BANKS AND BANKING.

1. In an action against a bank to recover the amount of a certain draft alleged to have been wrongfully issued by plaintiff's finance keeper, who was also cashier of defendant bank, and not credited to plaintiff, evidence examined and *held* that the court should have instructed that the amount of certain other drafts in plaintiff's favor should be deducted from any claim of the plaintiff against defendant on the first draft. *Supreme Tent Knights of the Maccabees of the World* v. *Port Huron Sav. Bank*, 627.

2. Where the president and cashier of defendant bank knew that a certain draft was procured by its assistant cashier with plaintiff's funds, and that he had no right to use any of such

BANKS AND BANKING—Continued.

funds to pay his individual debt, the question as to whether defendant was a bona fide holder of such draft in an action to recover the proceeds thereof was immaterial, since, if it was used to pay the individual indebtedness of the assistant cashier to defendant, and not to reimburse defendant for money used by him to pay warrants or other items properly charged against plaintiff, defendant was liable. *Id.*

3. Where defendant's cashier, who was also plaintiff's finance keeper, after having drawn certain drafts on defendant's foreign correspondents, was questioned by defendant's officers concerning the same, and thereupon stated that the drafts had been drawn to cover proper charges against plaintiff, and that a draft from plaintiff's funds would be deposited to cover the same, which the bank subsequently received, such statement by the cashier was admissible as res gestæ in an action by plaintiff against the bank to recover the proceeds of the draft deposited on the ground that such proceeds had been misappropriated by such assistant cashier and finance keeper. *Id.* 628.

4. Since plaintiff claimed that the cashier was using the draft for the purpose of concealing a deficit in his accounts as assistant cashier, such statement was a statement made in his own interest, and therefore was inadmissible to establish a claim by defendant against plaintiff. *Id.*

Fraud by bank officers, see BILLS AND NOTES (5).

BILLS AND NOTES.

1. Where decedent induced claimant to remove from his farm and reside with her by a promise that she would see that he did not lose by it, and the change in residence proved unsatisfactory to her, whereupon she agreed with him that she was under a legal obligation to compensate him for his loss incurred in moving, and gave him her note therefor, such satisfaction of his claim was an adequate consideration for the note. *Farnsworth* v. *Fraser*, 296.

2. It was not necessary that a claimant should show that the value of the consideration was equal to the face of the note, it being sufficient to show the parties agreed it was of that value. *Id.*

3. Where there was no evidence that the consideration of a note was worth less than its face value, it was not error to refuse to submit to the jury the question of a partial failure of consideration. *Id.*

4. The duty of introducing proof to show want of consideration for the note of a decedent is on the administrator, but he does not have the burden of proving by a preponderance of testimony that there was no consideration. *Id.* 297.

5. The director of a bank conspired with the cashier to deliver to the director a note on which he was indorser, and to carry a fictitious credit entry on the bank's books for its value until

BILLS AND NOTES—Continued.

after the note had become uncollectible, and then fraudulently connived with the cashier to return the note to the bank without the knowledge or authority of its officers, by reason of which the bank was prevented from collecting the note during the time it was withdrawn when it was collectible. *Held*, that recovery against the director of the full amount of the note could not be had by reason of the fraud without proof that at the time the alleged agreement was made the note was collectible, and that when it again appeared in the files of the bank it was worthless. *Crawford* v. *Steel*, 610.

Necessity of denying execution, see PLEADING (2).

BILLS OF PARTICULARS.

In criminal cases, see CRIMINAL LAW (9).

BONDS.

1. Where a statute required that a bond should be made to the county to secure the repayment of money deposited by the treasurer in a bank, a written guaranty of payment, under seal, indorsed on a contract by a bank to the county treasurer and board of auditors of the county, is a substantial compliance with the statute. *Buhrer* v. *Baldwin*, 264.

2. Such bond may be supported as a common-law obligation, though it does not strictly conform to the statute. *Id.*

Jail-limits bond, see ARREST; BAIL.

On appeal, see APPEAL AND ERROR (7).

BOUNDARIES.

Cutting trees on, see LICENSE (1); TRESPASS (2).

BRIBERY.

Where a proposition to let a contract for waterworks was one which might come before a city council for official action, the fact that the council had no authority to make the contract did not prevent the payment of money to councilmen to influence their action on the same from constituting a violation of 3 Comp. Laws, § 11312. *People* v. *Mol*, 692.

BRIDGES.

1. In an action against a township for injuries received from the breaking of a bridge by a traction engine, plaintiff, who was driving it, cannot show that the township has paid the owner for taking it from the stream. *Comstock* v. *Township of Georgetown*, 541.

2. Where plaintiff drove an engine, with a tank full of water, on defendant's bridge, which broke thereunder, evidence that it was the general practice of those having such engines not to take tanks on bridges with the engines, is competent on the question of defendant's negligence and plaintiff's contributory negligence. *Id.*

3. Where plaintiff, before driving an engine on defendant's bridge, was warned by the highway commissioner that the

BRIDGES—Continued.

bridge was of doubtful strength, and advised to use planks on it—the commissioner expressing the opinion that it would be safe if he kept on the planks, and that probably it would be safe anyway—and planks were used, but the engine ran off of them, thus causing the accident, defendant was not liable, though the running off of the planks was not due to any negligence of the plaintiff; the accident in such case being but a casualty, and defendant not being an insurer. *Id.*

4. Instructions as to the care required of a township in maintaining its bridges examined and *held* as favorable to the township as it was entitled to. *Id.* 542.

5. An instruction, in an action for injury from the breaking of a bridge while plaintiff was driving an engine over it, that plaintiff was guilty of contributory negligence in attempting to drive the engine over the bridge without unhitching the water tank thereof, is properly refused, the question of contributory negligence being for the jury. *Id.*

6. An instruction as to latent defects in defendant's bridge not being notice to it, is properly refused as inapplicable, where it appears that defendant had notice of the defects, and claimed to have informed plaintiff thereof. *Id.*

BROKERS.

1. By completing the sale to a customer first introduced by plaintiff, a real-estate broker, to whom defendant had given authority to find a purchaser, after notice that the broker will claim commissions in case of sale to that customer, defendant becomes liable for plaintiff's commissions, though the negotiations that culminate in sale are begun by an agent of the purchaser who does not at first disclose his principal. *Decker* v. *Widdicomb*, 331.

2. In an action for broker's commissions, a newspaper advertisement, published by plaintiff, is admissible as showing what was done by plaintiff in pursuance of his contract to sell the property. *Id.* 332.

BURGLARY.

Sentence, see CRIMINAL LAW (17).

CANCELLATION OF INSTRUMENTS.

A decree setting aside a deed for breach of condition and as having been obtained through undue influence, *held* to have been justified by the evidence. *Olk* v. *Shugars*, 114.

CARRIERS.

1. A railroad company is not chargeable with the common-law liability of a common carrier in the transportation of live stock, and is bound only to carry the same with reasonable dispatch. *McKenzie* v. *Michigan Cent. R. Co.*, 112.

2. Shippers of live stock assume the risk of unavoidable accidents and delays. *Id.*

CARRIERS—Continued.

3. Where the shipper of live stock sent a care taker with them, and he made no request of the railroad company for an opportunity to water and feed them, in the absence of a special agreement, the company is not liable for neglect to afford such an opportunity. *Id.*

4. In an action by a passenger against a carrier for personal injuries, the burden of proof rests upon plaintiff to show negligence. *Thurston* v. *Detroit United Ry.*, 231.

5. In an action by a passenger against a street-railway company, for personal injuries received in a collision between the defendant's car and a wagon, the plaintiff is entitled to recover if the motorman was negligent, although the driver of the wagon was also negligent. *Id.*

6. Where, in an action by a passenger against a street-railway company for injuries received in a collision between defendant's car and a wagon, the evidence showed that the car was going down grade at a high rate of speed, that the horses and wagon approached the track when the car was about 200 feet distant, and that the horses were on the track when the car was 40 feet distant, the question of whether the motorman used due care in bringing his car under control, after seeing the wagon approaching the track, was one of fact. *Id.* 232.

7. Where, in an action for injuries to a passenger, the issue is whether plaintiff was injured while leaving a moving car or by the starting of the car while in the act of alighting, defendant is entitled to a requested instruction that, while it was defendant's duty to stop the car to afford plaintiff an opportunity to alight, yet its failure to do so would not give plaintiff the right to jump from the moving car. *McDonald* v. *City Electric R. Co.*, 392.

8. Instructions examined and *held* misleading as authorizing recovery if plaintiff attempted to alight from a moving street car on failure of the carrier to stop it as requested. *Id.*

9. Railroad companies may change their time-tables and may take off and put on trains, only reasonable notice to the public of such changes being necessary. 2 Comp. Laws, § 6235. *Van Camp* v. *Michigan Cent. R. Co.*, 467.

10. If, after reasonable public notice of change of schedule has been given, a ticket agent misinforms a passenger, the statute (2 Comp. Laws, § 6235) providing a penalty in such cases does not apply, and the passenger can recover only his actual damages as at common law. *Id.* 468.

11. Where a railroad company had advertised a train on a branch line to leave a connecting point shortly after the arrival of another train, and had sent printed posters to its agents showing the contemplated operation of such train, but before the time arrived when the train was advertised to be put on notice of its withdrawal was sent to some of the company's agents, and was published, but the agent at Y. had received no such notice, by reason whereof he sold a ticket to plaintiff

CARRIERS—Continued.

for passage over such branch line, and advised her of the running of the advertised train, and on her arrival at the junction point she was compelled to remain there overnight, the company was liable for the penalty prescribed by 2 Comp. Laws, § 6235, for failure to transport in accordance with her contract. *Id.*

CEMETERIES—See EQUITY (4, 5).

CERTIORARI.

1. On certiorari to review the granting of a mandamus, relator cannot object to the consideration of a finding below on the ground that it contradicts an averment in his answer on which no issue was taken, unless he assigns it as error in his affidavit for certiorari. *City of Monroe* v. *Board of Sup'rs of Monroe Co.*, 638.
2. The court cannot disregard the findings of the court below though they are contrary to statements in respondent's return on which no issue was taken. *Id.*
3. The return of a justice to a writ of certiorari, being responsive, and covering the points of error appearing in the affidavit for certiorari, is conclusive. *Hinchman* v. *Spaulding*, 655.

See JUSTICES OF THE PEACE (4).

CHATTEL MORTGAGES.

1. A chattel mortgagee cannot complain of a charge that the mortgage was valid against one who had actual notice of its existence, though filed in the wrong township. *Loeser* v. *Jorgenson*, 220.
2. Where plaintiff admitted that no threats were made to induce her to sign a chattel mortgage which was given on an exchange of horses between herself and defendant, but, after holding out for several hours, and refusing to sign the mortgage, she finally did so on the insistence of defendant and his brother that a valid trade had been made, and that, if she refused to sign, she would become liable for a larger amount than that for which the mortgage was given, the mortgage was not void for duress. *Knight* v. *Brown*, 396.
3. On a bill to enjoin the foreclosure of a chattel mortgage, evidence examined and *held* that the mortgage was valid for an amount determined. *Dean* v. *Radford*, 617.

CODICILS—See WILLS (4).

CONSIGNMENTS—See FACTORS (1).

CONSPIRACY.

Acts and declarations of co-conspirators, see CRIMINAL LAW (32, 33).

CONSTITUTIONAL LAW.

1. Act No. 217, Pub. Acts 1903, is not unconstitutional in that it makes the order of the probate court depend upon the certifi-

CONSTITUTIONAL LAW—Continued.

cate of nonjudicial persons, as the requirement amounts to nothing more than a rule of evidence which does not deprive the alleged insane person of vested rights, but safeguards those rights. *Grinky* v. *Wayne Probate Judge*, 49.

2. No one can have a vested right to have another sent to an insane asylum. *Id.* 50.

3. The provision in said act that keepers of asylums cannot hold patients "except upon certificates of insanity and an order for admission" does not confer judicial powers on them. *Id.*

4. A township cannot claim that an act of the legislature, exempting such townships from taxation for county road systems as shall establish a township road system, constitutes a contract, the obligations of which a subsequent legislature cannot impair by repealing the act, as the municipality is but a government agency. *Board of Sup'rs of Saginaw Co.* v. *Hubinger*, 72.

5. A statute, taking from the board of control of the State public school the right to sue and be sued, does not impair the obligation of contracts previously made with the board. *Wheeler* v. *Board of Control of State Public School*, 291.

6. Chapter 136, 2 Comp. Laws, prohibiting peddling without license, but making an exception in section 22 in favor of wholesale merchants selling by sample, and manufacturers, farmers, mechanics, and nurserymen selling their own product, is not class legislation. *People* v. *De Blaay*, 403.

7. An indeterminate sentence law which increases the minimum punishment for crime beyond what might have been inflicted under the statute which it supersedes, is ex post facto in so far as it applies to crimes committed before its enactment. *In re Lambrecht*, 450.

Subjects and titles of acts, see STATUTES.

Validation of unconstitutional law by amendment, see STATUTES (8).

CONTEMPT.

Review of refusal to punish for violation of injunction, see APPEAL AND ERROR (16).

CONTINUANCE.

Continuance to procure the attendance of a medical witness, whose testimony is incompetent, except as to facts admitted by defendant, is properly refused. *Meyer* v. *Knott*, 714.

CONTRACTS.

1. The seller of wood wrote the buyer to find out what he could get a boat to deliver it for. The buyer replied that the boat Westford would carry it for a certain price, which was satisfactory to the seller, and the arrangement was made that the boat should go when the wood was ready. The agent of the boat, thinking it could not go at the time agreed upon, noti-

CONTRACTS—Continued.

fied the buyer's bookkeeper that he could send another vessel, the Hayward. The seller was informed by wire that the latter boat could be sent, and not noticing the name of the boat, answered by wire to send the boat. The Hayward for some reason did not go, and the agent arranged with the buyer's bookkeeper that the steamer Ford should carry the wood. *Held*, (1) that the minds of the parties did not meet on any contract regarding the Ford, (2) that the buyer's bookkeeper was not authorized by the seller to engage the boat unconditionally. *Nipigon Transit Co.* v. *Smythe*, 103.

2. The meeting of minds, which is necessary to the formation of a contract, is determined by the expressed intentions of the parties, which may be wholly at variance with their secret intentions or understanding. *Hudson* v. *Columbian Transfer Co.*, 255.

Authority of partner, see PARTNERSHIP (1).

Rescission, see ASSUMPSIT (3).

CONVERSION—See PARTNERSHIP (2).

CONVEYANCES.

Cancellation, see CANCELLATION OF INSTRUMENTS.

CORPORATIONS.

Statute of 1903, see STATUTES (4, 5).

COSTS.

Where one having no interest in an estate makes a claim as heir, and the executor brings suit to determine the rights of the claimant, he is entitled to recover the costs. *Van Derlyn* v. *Mack*, 146.

On dismissal of bill to review tax sale, see TAXATION (20).

COUNTIES.

1. Suit is properly brought in the name of the county treasurer, for the use and benefit of the county, to recover upon a guaranty of payment of money deposited in a bank by a former treasurer for the county. *Buhrer* v. *Baldwin*, 263.

2. The board of auditors of Wayne county was not a necessary party to a suit, brought in the name of the county treasurer, for the benefit of the county, upon a guaranty of payment of money deposited in an unincorporated bank, in pursuance of a contract entered into by the county treasurer and the board of auditors of the county with such bank. *Id.* 264.

Liability for treatment of contagious diseases, see HEALTH.

COURTS.

1. By the re-enactment of a rule of court the construction which has been placed upon the same language by the court is also adopted. *Preston Nat. Bank* v. *Wayne Circuit Judge*, 152.

2. Whether or not a decree is void because the opinion was not

COURTS—Continued.

filed within six months after final submission of the cause, as required by 1 Comp. Laws, § 558, is not presented for decision by a record that merely shows that, after the close of the testimony, time was given counsel to file briefs, and it does not appear that the briefs were filed more than six months before the decision of the controversy. *Hoste* v. *Dalton*, 522.

3. Participation by defendants' counsel in the settlement of a decree without raising the objection that no opinion was rendered within six months after the case was finally submitted, as required by 1 Comp. Laws, § 558, waives the objection. *Id.*

Jurisdiction of proceedings to vacate streets, see HIGHWAYS AND STREETS (8).

Jurisdiction, waiver of objection, see PROCESS.

COVENANTS.

1. Defendants conveyed by warranty deed to plaintiff's intestate land against which there were outstanding tax liens. Defendants' grantor, recognizing his liability for the taxes, deeded to the intestate a house upon which there was a mortgage, as security for the payment of the taxes. The rents of the house were absorbed in interest, repairs, and taxes. Subsequently the house was conveyed to the mortgagee, and plaintiff realized nothing from it. The intestate, at the time such security was taken, also secured from defendants a written guaranty that the taxes should be paid in any event. *Held*, that the evidence justified the direction of a verdict for plaintiff, in an action to recover the amount of the taxes. *Bigelow* v. *Stearns*, 26.

2. In an action for breach of covenant of seisin, evidence of the costs taxed against plaintiff in an ejectment suit to recover a part of the land which defendant had been notified, but had failed, to take charge of, was admissible notwithstanding the abolition of the common-law remedy of voucher in real actions by 3 Comp. Laws, § 11198. *Dubay* v. *Kelly*, 345.

3. In an action for breach of covenant of seisin in a deed to a lot of land described by reference to a recorded plat, evidence that before plaintiff obtained the deed he was on the ground, and noticed that the fences did not seem to be on the lines shown by the plat, to which he called defendant's attention, who represented that as soon as the grain was cut he would have the fences moved to the true line, was not objectionable as an attempt to contradict the deed by parol. *Id.*

4. In an action for breach of covenant of seisin in a deed to a lot conveyed according to a plat made in 1899, such plat not being ancient, a request to charge that few of the early plats were accurate, and that lines shown thereon should not be corrected by new surveys, was inapplicable. *Id.*

5. Where, in an action for breach of covenant of seisin in a deed, by failure of title to certain gores of land along the boundary lines, it appeared that defendant had sold the land for less than its actual value, an instruction, permitting a recovery for the difference in value between the lot with its bound-

COVENANTS—Continued.

aries as described, and what it was actually worth with the gores cut out of it, as shown by the evidence, was prejudicial error. *Id.* 346.

6. Where a covenant of seisin was broken as to a part of the land conveyed, the measure of damages, in the absence of fraud, was such a proportion of the price as the part to which title failed bore to the tract conveyed, with interest. *Id.*

Breach of covenant for quiet enjoyment, see ASSUMPSIT (2).

CREDITOR'S SUIT.

1. A judgment creditor's bill is not sustained by proof merely of the judgment, execution, and return unsatisfied; it must be shown that defendant has property, either legal or equitable, either in hand or due from some one else, or that he has legal title to real estate which he withholds from the record, where that is alleged in the bill. *Wilson* v. *Henry*, 675.

2. Refusal to permit at the hearing the amendment of a judgment creditor's bill, to more particularly describe the judgment, if error, is not available to complainant where he failed to offer evidence to support his bill either as originally filed or as amended. *Id.*

CRIMINAL LAW.

1. On a prosecution for stealing property from a barn in the night-time, evidence that other articles than those described in the information were taken from the barn at the same time and found in his possession, is admissible as res gestæ. *People* v. *Nagle*, 88.

2. On a prosecution for entering a barn with intent to commit larceny, evidence of other larcenies committed by respondent is admissible as bearing upon his intent. *Id.*

3. On a trial for murder, testimony by the sheriff that a conversation with respondent, immediately after the shooting, occurred in a saloon, was not inadmissible because it showed a violation of the liquor law requiring saloons to be closed after 10 o'clock. *People* v. *Farrell*, 127.

4. Where respondent, on his trial for murder, testified to a difficulty with the deceased on the Sunday prior to the shooting, it was proper to show, on his cross-examination, that such difficulty occurred in a saloon, though it proved that he had violated the liquor law. *Id.*

5. Testimony on behalf of the people, on a murder trial, that the respondent had drawn a revolver on other persons before he shot the deceased, was admissible, as it would tend to lessen the credit given to his claim of self-defense, although it tended to prove the respondent guilty of a statutory offense. *Id.*

6. An objection to the testimony of a physician that a wound caused death, on the ground that there is nothing in the record that qualifies it and makes it competent, does not raise the question that the physician was not shown to have the

CRIMINAL LAW—Continued.

qualifications required by 2 Comp. Laws, § 5280, to enable him to practice medicine. *Id.*

7. Testimony of a physician that he learned, not from observation but from information, that deceased did not have proper care, is hearsay, and has no tendency to prove the deceased died from improper care. *Id.* 128.

8. Where respondent's requests to charge are correct and proper, for the court, on giving them, to state that they present his theory of the case, is prejudicial error, as it indicates that the jury are not bound to follow them. *Id.*

9. In a prosecution for keeping a place where intoxicating liquors are sold unlawfully, the prosecutor is not bound to furnish a bill of particulars of the testimony upon which he relies. *People* v. *Congdon*, 133.

10. A conviction under complaint and warrant containing no detailed statement of the facts constituting the offense, but charging in general language that accused is a vagrant in violation of a specified ordinance, will not justify detention where accused seeks relief by habeas corpus proceedings. *Gardner* v. *Couch*, 358.

11. In a prosecution for aiding and assisting a girl to leave the State, knowing her to be a subject of the industrial home for girls, without the consent of the board of control of the home, where defendant entered a plea of not guilty at his examination before a justice of the peace, the plea was a waiver of an alleged disqualification of the justice, on the ground that the justice held a clerical position in connection with the home, and was in fact an employé of the superintendent, the complaining witness in the case. *People* v. *Kuney*, 436.

12. In a prosecution for aiding and assisting a girl to leave the State, knowing her to be a subject of the industrial home for girls, without the consent of the board of control of the home, the introduction of the commitment, indorsed with the approval of the circuit judge, to prove that the girl was legally subject to the control of the home, was sufficient to put in evidence the indorsement of the approval of the circuit judge thereon without special offer of the approval; and hence a contention that there was no proof of the fact was untenable. *Id.*

13. The indeterminate sentence law of 1903 (Act No. 136), providing for the sentence of persons "hereafter convicted of crime," is prospective in its operation, and applies only to crimes committed after it took effect. *In re Lambrecht*, 450.

14. Unless some statute provides a penalty, acts criminal at the common law are not crimes in this State. *Id.*

15. The indeterminate sentence law of 1903 (Act No. 136), did not repeal 3 Comp. Laws, § 11784, providing punishment for attempts to commit crime. *Id.* 451.

16. Where, on petitioner's conviction of an attempt to utter a forged instrument, committed prior to the taking effect of the

CRIMINAL LAW—Continued.

indeterminate sentence law of 1903 (Act No. 136), the court erroneously sentenced petitioner under such act to imprisonment for an indeterminate term of not less than 2½ years, nor more than 3 years, and the sentence would evidently have been no less if it had been imposed under 3 Comp. Laws, § 11784, providing that for such attempts the court may sentence to imprisonment for a term not exceeding 3 years, the sentence was valid as to the minimum term, and could not, therefore, be set aside on habeas corpus. *Id.*

17. Under the indeterminate sentence law of 1903 (Act No. 136), the court has power to fix the minimum term of imprisonment for statutory burglary, as defined by section 11547, 3 Comp. Laws, no minimum being provided by the statute. *In re Leonard*, 457.

18. Where, on a juror becoming ill after the prosecutor's opening statement, but before the introduction of any testimony, the court, over respondent's objection, discharges the remainder of the jury from further consideration of the case, on the ground that respondent is out on bail and other more urgent matters require the attention of the court, he is not so put in jeopardy as to preclude a subsequent trial. *People* v. *Hutchings*, 527.

19. Refusal, in a prosecution for larceny, to permit respondent to show restitution by cross-examination of the complaining witness, is not prejudicial where the whole matter was developed at a later stage of the trial. *Id.*

20. Where, in a prosecution for larceny of money, alleged to have been obtained through the forgery of a draft by respondent, he claimed that he was paid the money secured by the draft, by a third person, to be used to purchase wood in the country, and introduced a receipt for wood so purchased in his own handwriting, the draft being properly in evidence, it was not error for the court to permit respondent's signature on the receipt and the indorsement on the draft to be compared. *Id.*

21. Where respondent and another were informed against for the larceny of money obtained through a forged draft, and respondent was separately tried before his co-respondent, and was not charged with conspiracy, evidence given by his co-respondent in the police court, by which he attempted to fix the crime on respondent, was inadmissible. *Id.*

22. Where, in a prosecution for the larceny of money, alleged to have been obtained through a forged draft, the draft and a receipt signed by defendant were introduced in evidence, it was not error for the prosecuting attorney, in argument to the jury, to call their attention to identical peculiarities in the handwriting on the receipt and in the indorsement on the draft. *Id.* 528.

23. Where, in a criminal prosecution, there is nothing in the record justifying a claim that prior to the offense in question respondent has done anything requiring him to have a pal, it is improper for the prosecuting attorney, in argument, in commenting on character witnesses introduced, to state that

CRIMINAL LAW—Continued.

none of the character witnesses knew anything about what respondent was doing while living in D., or his reputation, and the only man called from D., where respondent resided two years, was one of respondent's pals. *Id.*

24. Matters sufficiently covered by the general charge need not be repeated. *Id.*

25. Refusal, in a criminal prosecution, to permit a juror, who has sat in the trial of another person for a crime arising out of the same matter, to answer the question whether his sitting on that trial and having heard the testimony would affect his judgment in the case at bar, is harmless, where the testimony of the only witness who testified in the previous case was improperly admitted in the case at bar. *People* v. *Albers*, 679.

26. Section 10247, 1 Comp. Laws, authorizing the review without exceptions of errors in charging or refusing to charge the jury, does not authorize the review of a challenge to a juror, to the overruling of which no exception was taken. *Id.*

27. The opinion of witnesses as to accused's character for honesty and integrity, based on personal knowledge and not on reputation, is inadmissible. *Id.*

28. Where evidence of accused's reputation for truth and veracity is rejected, in a trial for perjury, the question is sufficiently saved without an express statement by counsel that the purpose of its offer is to prove a trait of character, accused not having offered himself as a witness. *Id.* 680.

29. Where, in a prosecution for perjury, the court erroneously excluded evidence that defendant's reputation for truth and veracity was good, the error was not cured by permitting evidence that defendant had a good reputation for honesty and integrity. *Id.*

30. A charge that whatever would convince the jury beyond a reasonable doubt, in the judgment which they use in their ordinary affairs of life, was all that was necessary to convince them sitting as jurors in any criminal case, is misleading. *Id.*

31. This court has a right to review a decision as to the favor of a juror when it raises a legal question. *People* v. *Mol*, 692.

32. In a prosecution for bribery arising out of a conspiracy, evidence of a conversation had between accused and another of the conspirators, after the conspiracy was abandoned, relating to the re-election of the other as city attorney, for the avowed purpose of avoiding an exposure of the crime, which would be more probable if a third person were elected to such office, was admissible. *Id.*

33. Where a conspiracy is established, the declarations and acts of any of the co-conspirators before the conspiracy is abandoned are admissible against each. *Id.*

See HOMICIDE; INTOXICATING LIQUORS.

DAMAGES.

1. In an action for fraud in inducing plaintiff to sell an interest in real estate for less than it was worth, the measure of damages is the difference between what she received and what it was reasonably worth; and, if there is anything in the circumstances of the case to take it out of the general rule, the defendant should call the court's attention to it by a request. *McMillan* v. *Reaume*, 1.

2. The fact that plaintiff was suffering from disease, at the time of an injury, will not prevent a recovery for pains and injuries caused solely by the accident, although he was more susceptible to suffering because of other ailments. *Hunter* v. *Village of Durand*, 54.

3. In an action for personal injuries, it was proper to exclude evidence of habitual intoxication of the plaintiff, offered on the ground that it would account for his physical ailments, until it was shown that such intoxication could have some effect in producing the injuries for which suit was brought. *Id.*

4. Plaintiff in a personal injury case may recover for the expense and pain attendant upon a future surgical operation if under the evidence one is deemed necessary to effect a cure. *Beattie* v. *City of Detroit*, 320.

5. Under a declaration alleging injury to an arm, the effect of such injury on the use of the hand may be shown. *Comstock* v. *Township of Georgetown*, 541.

6. Under a declaration alleging that plaintiff's face was cut and bruised, it may be shown that this affected his mouth, so that he could not open it, and, as a consequence, his speech and ability to eat were affected. *Id.*

7. Under a declaration alleging physical injuries, whereby plaintiff became sore and lame and permanently injured, recovery may be had for rheumatism ascribable to the accident, located in the alleged injured parts, though recovery cannot be had for a mere aggravation of rheumatism, this not being alluded to in the declaration. *Id.* 542.

See COVENANTS (2, 5, 6).

In false imprisonment, see FALSE IMPRISONMENT (3, 4).

On forfeiture of jail-limits bond, see BAIL.

DEATH.

Instructions in an action for wrongful death examined and *held* prejudicial as on the weight and effect of the evidence. *King* v. *Ann Arbor R. Co.*, 488.

DEDICATION.

Where a landowner conveyed land to a city for streets, by a deed containing a condition that certain parcels of land retained by him should be exempt from assessments for opening streets, and afterward dedicated a plat showing the land conveyed as streets, and recognized his dedication by the sale of lots,

DEDICATION—Continued.

the right of the public to the streets was established. *Leggett* v. *City of Detroit*, 247.

See EASEMENTS (2).

DEEDS.

1. Where a deed contained a condition that the grantee, his heirs and assigns, would not occupy the premises except for one dwelling house on each lot, a subsequent grantee may be enjoined from erecting a two-story building designed for a dwelling in each story. *Harris* v. *Roraback*, 292.

2. The exclusive and unrestricted use of land carries with it title to the land itself. *Cram* v. *Ward*, 423.

3. The purchasers of lots fronting on a beach, their deeds granting them the right in common to make such use of the beach as is usual at summer resorts, on all the lots on the plat being granted, take the fee of the beach, and leave the grantor without right to enter thereon and remove sand, irrespective of whether such entry interferes with the grantees' use of it as a summer resort. *Id.*

4. On a bill to have a deed declared a mortgage, evidence examined and *held* to show that the deed was a mortgage to secure the amount named as consideration therein. *Dean* v. *Radford*, 617.

See EVIDENCE (6).

Cancellation, see CANCELLATION OF INSTRUMENTS.

Condition subsequent, see MUNICIPAL CORPORATIONS (6).

Deed as mortgage, see MORTGAGES (3).

DESCENT AND DISTRIBUTION.

Inheritance by adopted children, see ADOPTION.

DISCOVERY.

Circuit Court Rule No. 50, providing that a party may be compelled to produce and discover all such books, papers, and documents as may be necessary to enable the party applying for such discovery to prepare for the trial of the cause, does not authorize the court to compel the production of a party's books until the moving party shows his inability to compel production by a subpœna duces tecum. *Preston Nat. Bank* v. *Wayne Circuit Judge*, 152.

DIVORCE.

Evidence examined and *held* that the amount of alimony awarded by the circuit court on granting a divorce was proper. *Burke* v. *Burke*, 295.

DOMICILE.

1. Where the place of residence of a person, not a party to the suit, is at issue, testimony by the supervisor that such person claimed a homestead in the township, and made and deliv-

DOMICILE—Continued.

ered to him a statement of his taxable property in the township, is relevant to the issue. *Loeser* v. *Jorgenson*, 220.

2. Testimony that the mortgagor of chattles registered as a voter in a certain township the day after the mortgage was given, and three days later voted there, tends to show his intent, and is therefore admissible on the question of his residence. *Id.*

DOWER.

Dower may be barred by adverse possession. *Butcher* v. *Butcher*, 390.

See ADVERSE POSSESSION (1).

DRAINS.

1. 2 Comp. Laws, § 4366, as amended by Act No. 272, Pub. Acts 1899, and 2 Comp. Laws, § 4369, providing for the completion of drains begun and uncompleted because of defects in the proceedings, should be construed together, and, as so construed, authorize a county drain commissioner to complete a drain, after a tax for its construction has been declared void, for the reason that the drain was not completed at the time the tax was levied, though the proceeding instituted by the taxpayer attacked the payment of the tax only, and the drain commissioner had certified that the drain had been completed. *Pollock* v. *Sowers*, 368.

2. Where, in proceedings to enforce a drain tax, the court found that the assessment was irregular in form; that the taxes were not placed on the tax roll under the proper heading; that the benefit to the taxpayer from the drain was slight, because it had not been completed, and that therefore it would be unjust to decree the tax against the land,—such finding did not constitute a judgment that the tax was wholly void, or that, if benefits were actually received when the drain should be completed, complainant's land would not be subject to proper assessment therefor, so as to preclude a completion of the drain and reassessment of the costs as authorized by 2 Comp. Laws, §§ 4366, 4369. *Id.*

3. The fact that a public drain contractor becomes delinquent, and fails to complete the drain through complainant's land as specified in the contract, will not exempt such lands from taxation for the subsequent completion of the drain by other contractors under subsequent proceedings. *Id.* 369.

4. A public drain, the avowed purpose of which is to reclaim land by lowering the level of a navigable lake, is not authorized, under section 4339 of the Compiled Laws, which prohibits impairing the navigability of waters by such drains. *Cole* v. *Dooley*, 419.

5. A board of review, appointed by the judge of probate on appeal from the apportionment of the drain commissioner, has power to add lands to the assessment district laid out by the commissioner. *Murphy* v. *Dobben*, 565.

DRAINS—Continued.

6. Where persons, whose lands were added to the assessment district by a board of review, are not objecting, the action of the commissioner in disregarding the board's apportionment and making the assessment according to his own, will not be sustained on the theory that no notice was given such persons, where the record shows an adjournment for the purpose of giving notice, though no notice is shown. *Id.*

7. That the board of review, appointed by the judge of probate and required to make such changes in the assessment of the drain commissioner for construction of a ditch as they deem just and equitable, merely orders certain changes in the assessment of certain lands, without referring in their report to the lands, the assessment on which is not changed, is immaterial. *Id.*

8. Where plaintiff, in an action against the township treasurer to recover drain taxes paid under protest, joined the drain commissioner as required by section 1 of Act No. 141, Pub. Acts 1899, and afterwards discontinued as to the commissioner at the treasurer's request, the treasurer waives compliance with the statute. *Id.*

9. The rule in equity that one who stands by and sees an improvement completed without protest will not be relieved of his share of the burdens, does not apply in an action at law to recover a tax erroneously spread, and paid under protest. *Id.*

DRUGGISTS.

Sale of intoxicants, see INTOXICATING LIQUORS (1).

DURESS.

Duress exists when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. *Knight* v. *Brown*, 396.

EASEMENTS.

1. The owner of the fee, over which a private way passes, has a right to use the way for any purpose not inconsistent with the right of the owner of the easement. *Township of Oneida* v. *Allen*, 224.

2. Where a strip of land, dedicated as an approach to a cemetery, has been used by defendant and his grantors, for more than 15 years, as a private way to his adjoining farm, and it does not appear that the original dedication intended to exclude such use, the defendant's continued use of the approach will not be enjoined. *Id.*

See WATERS AND WATERCOURSES (3).

ELECTIONS.

1. Where the name of Christian Ott is erroneously printed O. H. Christian on a township ticket, and several ballots are cast before the mistake is discovered and corrected on the re-

ELECTIONS—Continued.

mainder of the official ballots, Ott is not entitled to have votes cast for Christian counted for him, though no person by that name resides in the township, and the copy of the ballot was not filed for two days, as required by 1 Comp. Laws, § 3660. *Ott* v. *Brissette*, 717.

2. In the absence of fraud, the determination of a political convention as to who are its nominees is final, and mandamus will not be granted to compel the printing on the official ballot of a name not certified, on the theory that relator received a majority of the votes of the convention, the chairman having ruled otherwise, and no appeal having been taken from his ruling. *Jennings* v. *Board of Election Com'rs of Delta Co.*, 720.

EMINENT DOMAIN.

A contract, whereby a municipality relinquishes its right to exercise the power of eminent domain, is void as being against public policy. *Leggett* v. *City of Detroit*, 247.

Additional servitude, see HIGHWAYS AND STREETS (1).

EQUITY.

1. Where, if a certain person had a right to inherit from a testator, the construction of the will was necessary, a court of equity, having obtained jurisdiction for that purpose, may determine the question of heirship. *Van Derlyn* v. *Mack*, 146.

2. One who makes a mere protest, and waits until an expensive improvement is completed, cannot invoke the aid of a court of equity to undo the expensive work. *McKee* v. *City of Grand Rapids*, 200.

3. Equity will not grant relief which, under the evidence, is wholly impracticable. *Id.*

4. A township is a proper complainant in a suit in equity to enforce rights pertaining to lands purchased by the board of health for a cemetery under the provisions of 2 Comp. Laws, §§ 4414, 4415. *Township of Oneida* v. *Allen*, 224.

5. An objection that the township board of health is a necessary party to a suit by the township to enforce rights relative to a cemetery, and has not been joined, should be timely made, and the court may permit an amendment therefor if necessary. *Id.*

6. One who comes into equity to have a deed and contract declared to be a mortgage must be prepared to do equity, and will be required to pay legal interest although the contract rate was usurious. *Malone* v. *Danforth*, 228.

7. Answering to an original bill in the nature of a bill of review filed by a person not a party to the suit, waives the right to appeal from the order permitting such bill to be filed. *Leggett* v. *City of Detroit*, 247.

8. Where complainant had conveyed a portion of his premises to defendant, in consideration that defendant would pay a mort-

EQUITY—Continued.

gage, covering the land conveyed as well as other land retained by the grantor, a suit at law, to recover damages of the grantee for failure to pay the mortgage, would not afford an adequate remedy, as the complainant had a right to have the premises conveyed to the grantee first sold on a foreclosure of the mortgage. *Mowry* v. *Mowry*, 277.

9. A bill to set aside a conveyance of real estate, and avoid a transfer of personal property, though not sustained as to the land, and there is an adequate remedy at law as to the personalty, should not be dismissed on the merits, where the bill alleges that the property was obtained by fraud, through a conspiracy, and that an accounting is necessary. *Lyon* v. *Clark*, 438.

10. An answer on the merits waives the defect of multifariousness in the bill. *Id.*

11. Pleadings and evidence in a suit for injunction examined and *held* proper to reject an amended answer offered after the proofs were closed setting up a prescriptive right inconsistent with the original answer. *Pluchak* v. *Crawford*, 509.

12. A landowner, seeking to enjoin the collection of a tax on real estate, cannot prevail on showing that a part of the tract is exempt, though such a showing would be sufficient at law; in order to be entitled to relief in equity he should do equity by paying or offering to pay that portion of the tax justly assessable to the unexempt part. *Grand Rapids, etc., R. Co.* v. *City of Grand Rapids*, 588.

Deed as mortgage, see MORTGAGES (3).

Estoppel to invoke invalidity of assessment for street improvement, see MUNICIPAL CORPORATIONS (8).

Time to file opinion, see COURTS (2).

ESTATES OF DECEDENTS—See EXECUTORS AND ADMINISTRATORS; WILLS.

Contracts to devise or bequeath, see WILLS.

ESTOPPEL.

In a suit to enjoin the foreclosure of a mortgage, evidence reviewed and *held* that, by some arrangement between the mortgagee and her son, the mortgagor, the debt was regarded as paid and she was estopped to assert its existence as to one who advanced money upon the strength of her representation to him that it was paid. *Peirson* v. *Peirson*, 180.

See EQUITY (2).

To change rate of interest specified in mortgage, see MORTGAGES (6).

To invoke defect in plea of limitations, see LIMITATION OF ACTIONS (4).

To invoke invalidity of tax for public improvement, see DRAINS (9); MUNICIPAL CORPORATIONS (8).

To object to erroneous joinder of parties, see PARTIES.

EVIDENCE.

1. Where no order discharging a prisoner on *habeas corpus* proceedings is found, parol evidence is competent to show the ground on which the discharge was based. *Friesenhan* v. *Maines*, 10.

2. It was not prejudicial error to ask a witness if it was necessary, in lining out a fence; to cut out the overhanging branches of a large tree, where the witness understood the inquiry was whether a person could sight through along the line without cutting out the branches. *Newberry* v. *Bunda*, 69.

3. Where plaintiff claims that he purchased the right to occupy land at the time that he bought the buildings thereon, the bill of sale to plaintiff's vendor and the chattel mortgage back are admissible to show that he had no title to the land, and that his purchase was with knowledge that the buildings had always been treated as personal property. *Thurkettle* v. *Frost*, 115.

4. An agreement by the grantee in a deed to pay a mortgage on the land may be shown by parol. *Mowry* v. *Mowry*, 277.

5. The fact that a physician treated other persons than the deceased in the same house is irrelevant in a suit to recover for his services. *Kwiecinski* v. *Newman's Estate*, 287.

6. Where nothing suspicious appears on the face of a deed beyond the fact that an erasure is manifest, the presumption commonly is that the alteration was made before the deed was executed. *Newland* v. *First Baptist Church Society of Bellevue*, 335.

7. Expressions of pain, vocal or otherwise, made to physicians called by plaintiff, not to give medical aid, but to make up medical testimony, are inadmissible. *Comstock* v. *Township of Georgetown*, 541.

8. In an action against a township for injury from the breaking of a bridge, witnesses may not testify that the bridge was reasonably safe for public travel; that being the question for the jury. *Id.*

Admissions, statements in furtherance of interest, see BANKS AND BANKING (4).

Ancient plats, see COVENANTS (4).

In criminal cases, see CRIMINAL LAW.

Objections, see SAVING QUESTIONS FOR REVIEW.

Parol evidence to vary deed, see COVENANTS (3).

Res gestæ, transactions of bank officer, see BANKS AND BANKING (3).

EXECUTORS AND ADMINISTRATORS.

1. The failure of a person to compensate an employé for his services by leaving, at his death, a business to the employé, as had been agreed upon, entitles the employé to recover the

EXECUTORS AND ADMINISTRATORS—Continued.

value of his services as a claim against the estate. *Shane* v. *Shearsmith's Estate*, 32.

2. Where, on the trial of a suit against an estate for a balance due as wages, the court charged the jury that "an express agreement must be found before any additional compensation can be given," it was unnecessary to give a request that "the fact that the business of decedent increased under claimant's management is no evidence that deceased promised to pay claimant more than the wages he was receiving." *Id.* 33.

3. A claim for an equitable lien upon a house and lot for the purchase money or a portion thereof, furnished by complainant in her individual capacity, cannot be litigated in a suit by her as executrix of her husband's will, although her husband purchased the property with her money and took the title in the name of the defendant. *Peirson* v. *McNeal*, 158.

4. While an administrator may not admit a liability against the estate, he must, in the trial of a case, be bound by the rules of law which regulate the practice in court. *Farnsworth* v. *Fraser*, 297.

See LIMITATION OF ACTIONS (2, 3).

Bonds on appeal from probate court, see APPEAL AND ERROR (7); MANDAMUS.

Claim against estate for work and labor, see WORK AND LABOR.

Costs, see COSTS.

EXEMPTIONS.

Whether a fraudulent vendee is entitled to claim the exemption which his fraudulent vendor is entitled to under 3 Comp. Laws, § 10326, or not, no duty to make the selection is imposed by statute on an officer attaching the property on a claim against the vendor, and the vendee must notify the officer, and demand the right of selection, or be held to waive it. *Williams* v. *Brown*, 570.

From taxation, see TAXATION (17).

FACTORS.

1. A wrongful sale by defendants of a machine consigned to them by plaintiffs for sale on commission was not ratified by conduct indicating a willingness to let the sale stand if defendants would pay plaintiffs the value of the machine less their commissions. *Brown* v. *Foster*, 36.

2. Defendants, having received from plaintiffs a threshing machine for sale on commission, without authority sold it to a person on condition that it should prove satisfactory. It not being satisfactory, plaintiffs offered the purchaser to exchange another machine for it, but the offer was not accepted. *Held*, that such offer was not a ratification of the sale. *Id.*

Conversion by partner selling on commission, see PARTNERSHIP (2).

FALSE IMPRISONMENT.

1. An unlawful detention following a lawful arrest by a sheriff does not make him a trespasser *ab initio*, unless the original arrest was made with the intent of being used as a cover for a subsequent wrong. *Friesenhan* v. *Maines*, 10.

2. Where a petition for *habeas corpus* showed that the prisoner had been detained an unreasonable time without an opportunity of giving bail, and made no claim that the arrest was illegal, and no testimony was taken, and no order discharging the prisoner could be found, but it was shown by parol that he had been discharged on the ground of an unreasonable detention, the discharge was not an adjudication that the arrest was illegal. *Id.*

3. In an action for false imprisonment, plaintiff's subsequent admission of guilt of the charge on which he was arrested is admissible in mitigation of damages, although he was discharged on *habeas corpus* on the ground of an unlawful detention. *Id.*

4. In an action for false imprisonment, plaintiff is not entitled to recover attorney fees incurred in *habeas corpus* proceedings for his release, where such proceedings were instituted by his father without his consent, and the attorneys were not employed by him. *Id.*

5. Where a confessed seducer brought an action for false imprisonment because he was detained in jail two days without being brought before a magistrate, it was permissible for defendant's counsel to indulge in severe criticism in his argument to the jury. *Id.*

6. A justice of the peace is not civilly liable for issuing a warrant and authorizing the detention of the person complained against, where the offense named is within his general jurisdiction, though the complaint and warrant do not describe the offense with sufficient particularity to withstand inquiry on habeas corpus. *Gardner* v. *Couch*, 358.

7. A justice of the peace, acting under authority conferred upon him by a city charter and ordinances to try and punish vagrancy, is not liable to one so tried and punished, though there are errors and irregularities in his proceedings. *Id.*

FIRE INSURANCE—See INSURANCE.

FISH.

Where a lake is so situated that fish from a river migrate to and from it at different periods of the year, the fact that it is wholly located on defendant's land, which he has posted, and that he himself has stocked the lake with fish acquired from private sources, does not deprive the public of its right to take fish therefrom, nor entitle him to take fish therefrom by means other than a hook and line, in violation of 2 Comp. Laws, § 5849. *People* v. *Horling*, 406.

FORGERY—See CRIMINAL LAW (20).

FRAUD.

1. Where there is a substantial conflict in the evidence upon a question of fraud, it should be submitted to the jury. *McMillan* v. *Reaume*, 1.

2. Evidence in an action, on the ground of fraud, against a land company and its agent to recover money paid for a tax title examined, and *held* to warrant recovery against both on the ground of collusion in misrepresenting facts. *Sudworth* v. *Morton*, 575.

3. Where, in an action to recover money alleged to have been paid for a tax title in reliance on fraudulent representations, the evidence warrants a finding that both defendants engaged in a common enterprise to obtain the money so paid, the acts of each are admissible against the other. *Id.*

4. One who has placed money in the hands of another for the purpose of perpetrating a fraud on the creditors of a third person will not be assisted by the law to recover it. *Bryant* v. *Wilcox*, 669.

5. In an action for fraud, in falsely representing to plaintiff that defendant was a sincere believer in Christian Science, and thereby inducing him to pay defendant for instruction in the art of healing by that science, evidence that, some two years before, defendant had had superfluous hairs removed from her face by material means, does not tend to show her lack of sincerity. *Meyer* v. *Knott*, 714.

See INSURANCE (6).

By bank officers in connection with note, see BILLS AND NOTES (5).

Damages for fraud in sale of real estate, see DAMAGES (1).

Jurisdiction of equity, see EQUITY (9).

Pleading and proof, see PLEADING (5).

Recovery of purchase price of mine, see ASSUMPSIT (3).

FRAUDS, STATUTE OF.

1. A verbal agreement to convey lands in payment for services previously rendered is invalid under the statute of frauds, and void for all purposes. *Rodgers* v. *Lamb's Estate*, 241.

2. An oral promise by the indorser of a note held by a bank that he would deposit its value to the credit of the bank with its New York correspondent if the bank would send the note to him, is void under the statute of frauds, in the absence of proof of an actual delivery of the note in pursuance thereof. *Crawford* v. *Steel*, 610.

FRAUDULENT CONVEYANCES.

1. One who takes goods in payment of a past-due indebtedness will not be protected against a defect in the title of his vendor on the ground that he is a *bona fide* purchaser. *Kops Bros. Co.* v. *Smith*, 28.

FRAUDULENT CONVEYANCES—Continued.

2. Plaintiff consigned pianos to its agent for sale on commission to persons desiring to use them in their homes. The agent sold them on credit, without security, to an insolvent trader, who two days later transferred them to defendant in part payment of an indebtedness. Plaintiff's name was on the pianos. The agent and trader attempted to conceal from plaintiff the fact that defendant had them. In replevin for the pianos, *held*, that there was sufficient evidence of fraud to justify the submission of the question to the jury. *Id.*

3. Section 9520, 3 Comp. Laws, making every sale of goods unaccompanied by immediate delivery and followed by an actual and continued change of possession presumptively fraudulent and void as against the vendor's creditors, applies to prior, as well as subsequent, creditors of the vendor. *Williams* v. *Brown*, 570.

GARNISHMENT.

A garnishee defendant who has disclosed that B. claims the fund, vouched him in, paid the fund into court, and been discharged, as provided by the statute (1 Comp. Laws, § 1017), may plead the judgment thereafter rendered in bar of any further proceedings against him on the part of B., though he prompted the creditors to bring the garnishment proceedings, and prior thereto B. had brought trover against him for the fund. *Bryant* v. *Wilcox*, 669.

GUARANTY.

1. One who guarantees the payment of county funds, to be deposited in an unincorporated bank, is liable to the county therefor, although the contract to deposit in such bank was prohibited by statute and void. *Buhrer* v. *Baldwin*, 263.

2. Where a contract of guaranty recites a consideration, no notice of acceptance is necessary in order to bind the guarantor. *Id.* 264.

3. Where a county treasurer gave a check for the amount due the county from a bank to his successor, who deposited the check in the same bank, the transaction was not such a payment as would release one who had guaranteed the payment of the fund. *Id.*

HABEAS CORPUS—See CRIMINAL LAW (16).

Dismissal on habeas corpus as adjudication of legality of arrest, see FALSE IMPRISONMENT (2).

HAWKERS AND PEDDLERS.

Act No. 137 of the Public Acts of 1895, attempting to extend to the whole State Act No. 204 of the Public Acts of 1889, regulating hawkers and peddlers in the Upper Peninsula, is invalid for failure of its title to express its purpose, and the attempted repeal therein of the general statute on the same subject (1 How. Stat. §§ 1256–1266, 2 Comp. Laws, chap. 136), is ineffectual. *People* v. *De Blaay*, 402.

Class legislation, see CONSTITUTIONAL LAW (6).

HEALTH.

1. Where a physician entered into a contract with a township board of health to care for indigent persons affected by contagious diseases at a specified price per visit and mileage, at a time when the county was liable to pay for such services on their allowance by the local board of health, the physician had a vested right to payment for such services, though Act No. 7 of the Public Acts of 1903, authorizing boards of supervisors to pass on the reasonableness of claims for such services, took effect before such claim was allowed by the local board. *Kapp* v. *Board of Auditors of Washtenaw Co.*, 431.

2. Boards of supervisors have no power, under Act No. 7, Pub. Acts 1903, to reject a claim for services rendered by order of a board of health, without giving the claimant an opportunity to be heard and to present proof in its support. *City of Monroe* v. *Board of Sup'rs of Monroe Co.*, 638.

3. A claim presented to a board of supervisors by a city for the services of a "special policeman" in "smallpox cases," cannot be peremptorily rejected on the ground that the claim shows on its face that it was for "policing" the city. *Id.*

See EQUITY (4, 5).

HIGHWAYS AND STREETS.

1. The use of the highways by street-railway companies is a legitimate use of the highways, and does not create an additional servitude. *Smith* v. *Jackson, etc., Traction Co.*, 20.

2. The legislature has control over State and Territorial roads, and may authorize the construction of street railways over them. *Id.*

3. The provisions of 2 Comp. Laws, § 6446, authorizing the construction of street railways over the streets and highways of any township upon such terms and conditions as may be agreed upon by the company and the township board, are broad enough to include State and Territorial roads, and it is unnecessary to obtain the consent of the highway commissioner to the construction of a street railway over such roads. *Id.* 21.

4. Where plaintiff testified that he knew of a defect in a sidewalk several weeks before he was injured thereon, and that he knew repairs had been recently made in the vicinity, defendant's motion for a directed verdict, on the ground that plaintiff's negligence contributed to the injury, was properly denied, as the jury might find that plaintiff had a right to believe, and did believe, that the defect had been remedied. *Hunter* v. *Village of Durand*, 53.

5. A request, in an action for personal injuries, which implies an obligation on plaintiff's part to exercise more than ordinary diligence, is properly refused. *Id.* 54.

6. Evidence that an unsafe hole in a sidewalk has been in existence for two or three months, and that it was obvious to persons passing over it, justifies the jury in finding that the municipality was negligent. *Id.*

HIGHWAYS AND STREETS—Continued.

7. 1 Comp. Laws, § 3441, making it the duty of a municipality to keep its streets in a condition reasonably safe and fit for travel, makes it liable only for its own negligence or the negligence of some one for whose conduct it is legally responsible, and not for the negligence of a contractor who is not its agent, nor engaged in performing a duty imposed by law upon the municipality. *Thompson* v. *City of West Bay City*, 95.

8. The courts and the common council of Detroit have concurrent jurisdiction in vacating streets. *Detroit Real Estate Investment Co.* v. *Wayne Circuit Judge*, 108.

9. A city council may refuse to vacate a street except upon a specified condition. *Id.*

10. When a common council has acted upon a petition for the vacation of a street, the parties cannot begin another proceeding for the same purpose in the courts, unless there is some change in the circumstances to justify it. *Id*

11. A city is not liable for injuries to a person, received by a fall caused by his cane going through a crack between two planks with decayed edges, where the walk was in a reasonably safe condition for persons not using canes. *Harden* v. *City of Jackson*, 271.

12. Where a street undergoing repairs by a contractor is left open for travel, the city must see that it is and remains reasonably safe for travel, notwithstanding the effect of storms that may reasonably and ordinarily be expected at that season of the year. *Beattie* v. *City of Detroit*, 319.

13. It is not negligence per se for one knowing of defects in a sidewalk to attempt to pass over it. *Oesterreich* v. *City of Detroit*, 415.

14. In an action for injuries to a pedestrian by a defect in a city sidewalk, evidence reviewed, and *held* insufficient to show plaintiff's contributory negligence as a matter of law. *Id.*

15. Where a pedestrian was injured by the tipping up of a plank which was a part of a defective sidewalk, the fact that she might have seen and avoided holes in the walk was insufficient to render her chargeable with negligence in failing to discover that the plank on which she stepped would tip up and cause her injury. *Id.*

16. One whose frontage on a street would be lessened by the raising of the grade of a railroad crossing the street in the block in which his lots are located, and whose passage out of the block in the direction of the railroad would thereby be cut off, increasing the cost of trucking to and from his warehouses on the lots, and depreciating the value of his property, suffers a special damage different from that of the public, authorizing him to maintain a suit for injunction. *Dean* v. *Ann Arbor R. Co.*, 459.

17. Power in the charter of Ann Arbor to designate grades of railroads coming into the city, and to establish a grade for

HIGHWAYS AND STREETS—Continued.

streets and sidewalks, does not authorize the city to in effect vacate part of a street by allowing a railroad to cross it on an embankment above the grade of the street, thereby cutting off an abutting owner's access to his property, without providing him compensation. *Id.*

18. Where packages plaintiff was carrying in her arms became disarranged, and while she was rearranging them, her attention being diverted, she came closer to a defective gutter than she thought she was, and stepped into it, her contributory negligence is a proper question for the jury. *Herring* v. *City of St. Joseph*, 480.

19. In an action against a city for injuries on an alleged defective sidewalk, an instruction that the city was required to keep its walks "in suitable repair," so that persons traveling over them, using ordinary care, might do so in safety, is erroneous, as imposing a higher degree of care on the city than is required by the statute (1 Comp. Laws, § 3441). *Caldwell* v. *City of Detroit*, 667.

See DEDICATION.

Estoppel to invoke invalidity of assessment for street improvement, see MUNICIPAL CORPORATIONS (8).

Release of assessments, see MUNICIPAL CORPORATIONS (6).

Township and county road systems, see STATUTES (2).

HOMICIDE.

1. Where, on a trial for murder, the respondent claimed the killing was in self-defense, it was permissible for the people to show that the deceased said, as he approached respondent and was within four or five feet of him, that he intended to bid respondent "Good night." *People* v. *Farrell*, 127.

2. A respondent, on trial for murder, cannot show that deceased at one time committed a specific act of violence not observed by the respondent, though he may have been informed of it before the killing of deceased. *Id.*

3. Where, on a trial for murder, there is some evidence tending to establish insanity, it is error to refuse a request that, if respondent was laboring under such a defect of mind and reason as not to know the nature and quality of the acts he was doing, and incapable of forming a criminal intent, he should be acquitted, and that it was incumbent upon the people to prove beyond a reasonable doubt that he had the capacity to form an intent to commit the crime. *People* v. *Muste*, 216.

HUSBAND AND WIFE.

1. Section 10924 of the Compiled Laws, excepting "married women" from the persons who are thereby authorized to enter into a statutory arbitration, has no application to an agreement for a common-law arbitration. *Hoste* v. *Dalton*, 522.

HUSBAND AND WIFE—Continued.

2. Section 8690 of the Compiled Laws, providing that a married woman shall have complete power to contract with relation to her own property, empowers a married woman to enter into an agreement for a common-law arbitration. *Id.*

INDETERMINATE SENTENCE — See CONSTITUTIONAL LAW (7); CRIMINAL LAW (13, 15–17).

INDICTMENTS AND INFORMATIONS.

1. Evidence that respondent's saloon was kept open by his agent was not at variance with an information charging, in the language of the statute, that he "did not then and there keep his saloon closed, but, on the contrary, he did then and there keep his said saloon open," as respondent was held responsible, not for the act of his agent in opening, but for his own neglect to keep it closed. *People* v. *Possing*, 303.

2. An information charging larceny "from the residence" of M., sufficiently charges the offense denounced by 3 Comp. Laws, § 11551, prohibiting larceny by stealing "in any building" on fire. *People* v. *Klammer*, 399.

INDUSTRIAL HOME FOR GIRLS.

Aiding subject to leave State, see CRIMINAL LAW (11).

INFANTS.

A suit, commenced by a minor by his next friend, may be prosecuted by the minor on his arriving at his majority by amending the record, but a judgment in his favor will not be reversed for failure to amend, unless such failure was prejudicial to the defendant. *Bernard* v. *Pittsburg Coal Co.*, 281.

Adverse possession against, see ADVERSE POSSESSION (2).

INJUNCTION.

Review of refusal to punish for violation, see APPEAL AND ERROR (16).

Right to enjoin interference with access to street, see HIGHWAYS AND STREETS (16).

INSANE PERSONS.

1. A probate judge will not be required to proceed under Act No. 217, Pub. Acts 1903, and determine the sanity of an alleged insane person, where the two physicians appointed by him to make an examination of the alleged lunatic have not certified to her insanity. *Grinky* v. *Wayne Probate Judge*, 49.

2. A conveyance by an insane person not under guardianship is not absolutely void, but merely voidable. *Wolcott* v. *Connecticut General Life-Ins. Co.*, 309.

3. Evidence examined and *held* to show that an assignment of a land contract by a lunatic was ratified by him after his restoration to reason. *Id.*

INSTRUCTIONS TO JURIES—See TRIAL.

INSURANCE.

1. In an action on a fire-insurance policy, defended on the ground that additional insurance had been procured contrary to the conditions of the policy, evidence reviewed and *held* insufficient to warrant a jury in finding that the secretary of the company consented to the additional insurance. *A. M. Todd Co.* v. *Farmers' Mut. Fire-Ins. Co.*, 188.

2. The fact that the soliciting agent of a mutual fire-insurance company, three or four years after forwarding an application to the company, assisted the insured in procuring other insurance, does not constitute a waiver of a condition in the mutual policy prohibiting the procurement of additional insurance. *Id.*

3. Breach by the insured of a condition prohibiting the procurement of additional insurance renders the policy not merely voidable, but void. *Id.*

4. The collection of assessments on a mutual fire-insurance policy, without knowledge that there has been a breach of condition by procuring additional insurance, does not constitute a waiver. *Id.*

5. Section 5180, 2 Comp. Laws, providing that no policy of fire insurance shall be declared void for breach of condition, unless the loss occurred during the breach or by reason of the breach, does not apply to the breach of a condition against procuring additional insurance, where the loss occurred while the additional insurance was in force. *Id.*

6. Though a note given in payment of the first premium on a life policy received by defendant on her application was obtained by fraud of plaintiff's agent, retention of the policy for an unreasonable time, and failure to notify the company that she repudiated the transaction, waive the fraud, and bind defendant to pay the note, though the policy provides that nonpayment of a premium when due shall terminate the company's liability; there being a provision for reinstatement, including the right to payment of a specified sum at the end of 10 years. *National Life & Trust Co.* v. *Omans*, 365.

INTEREST.

1. An agreement, made before interest becomes due, to compound it, is void. *Gay* v. *Berkey*, 658.

2. An agreement to pay interest on interest, made after the interest becomes due, is valid; the forbearance to enforce payment and extension of time being a sufficient consideration. *Id.*

3. The fact that two persons, in their dealings with a corporation in which each was interested, assented to settlements, with annual rests and compound interest, is insufficient to show that in their dealings with each other they made an agreement to pay it, or that they settled on that basis as to mutual accounts of their business dealings. *Id.*

Connecticut rule, application, see ACCOUNT (2).

Estoppel to charge rate specified, see MORTGAGES (6).

Forfeiture for usury, see USURY.

INTOXICATING LIQUORS.

1. A druggist, who habitually sells intoxicating liquors as a beverage, may be prosecuted under the local option act or general liquor law for keeping a place where intoxicating liquors are sold unlawfully. *People* v. *Congdon*, 133.

2. In a prosecution for keeping a saloon open on Sunday, it is no defense that the saloon was opened by respondent's bartender without authority and contrary to his instructions. *People* v. *Possing*, 303.

3. An information in the language of the statute for violating the liquor law is sufficient. *Id.*

JUDGMENTS.

1. The denial of a mandamus is res judicata if the court passes upon the merits, but not if the writ was denied because no case was made which appealed to the discretionary power of the court, or because the relator had a manifest legal remedy, or because mandamus was not a proper remedy. *Hoffman* v. *Silverthorn*, 60.

2. Where several issues are presented, and a general judgment is rendered, the party asserting that a particular issue was determined by the judgment has the burden of proving it. *Id.*

3. Where there is no evidence before the court to show that, in denying a mandamus, the court passed upon the merits, such proceedings are not res judicata. *Id.* 61.

4. The decision of a question of law, arising upon the construction of a city charter, is not binding upon one who was not a party to the suit. *Willsie* v. *Common Council of Ionia*, 445.

Refusal of council to vacate street as res judicata, see HIGHWAYS AND STREETS, (10).

Res judicata, see also DRAINS (2).

JURISDICTION.

In equity, see EQUITY (9).

Of proceedings to vacate streets, see HIGHWAYS AND STREETS (8).

Waiver of lack, see PROCESS.

JURY.

1. On the trial of accused for perjury in giving false testimony on his own trial for bribery, jurors who have sat in a trial at which another than accused was convicted of bribery in connection with the same matter are not disqualified, respondent having been acquitted of the bribery, and that adjudication being conclusive as to respondent's connection with the corrupt plan, if any existed. *People* v. *Albers*, 678.

2. A juror who has sat in the trial of another person for a crime arising out of the same matter cannot be asked whether he formed any opinion in the previous case as to the truth or falsity of the testimony of a witness who testified therein and who is also a proposed witness in the prosecution on trial, as

JURY—Continued.

such a question violates the statute (3 Comp. Laws, § 10239) prohibiting a juror being questioned regarding his verdict. *Id.* 679.

3. Jurors cannot be asked on their voir dire whether, from the testimony presented in the previous trial of another for bribery arising out of the same conspiracy, they formed an opinion respecting the guilt of accused, since such question would open the door to inquiries which would disclose the precise grounds upon which they reached the conclusion of guilt. 3 Comp. Laws, § 10239. *People* v. *Mol*, 692.

4. Where several are charged with bribery arising out of the same conspiracy, and the same evidence is relied on to sustain a conviction against each, jurors who have sat in the trial of certain of the conspirators previously tried are subject to challenge for cause. *Id.*

JUSTICES OF THE PEACE.

1. A plea of the general issue in justice's court, without the notice and bond prescribed by 1 Comp. Laws, §§ 782–786, to a declaration in trespass averring that defendant cut and carried away trees owned by and standing "on the land of" plaintiff, does not admit title in plaintiff. *Maynard* v. *Reynolds*, 42.

2. Under 1 Comp. Laws, § 720, providing that when suit is brought upon contract against two or more joint defendants, one of whom shall not be found in the county where suit is brought, the justice shall, within four days from the return day of the writ, issue one or more alias writs of summons, it is not necessary that the officer's return should state that he had used due diligence to obtain personal service, and that, being unable to find the defendant, he had left a copy of the summons at his last place of abode. *Brown* v. *Knop*, 234.

3. A plaintiff in justice's court may adjourn the case without waiting an hour for the defendant to appear. *Id.*

4. On certiorari to a justice's court, it will be presumed that the agent of the plaintiff, in the absence of the defendant, proved his authority to appear, if there is no showing in plaintiff's application or in the return of the justice to the contrary. *Id.*

5. 1 Comp. Laws, § 720, providing for the issuing of alias writs of summons in certain cases in justices' courts, "within four days from the return of the writ," authorizes an alias to issue on the return day of the writ. *Id.* 235.

6. On appeal from justice's court, an amendment denying the execution of the instrument sued on is properly denied, where the question was not raised below, except by an unsworn notice filed with the plea, and defendants allowed judgment there to go practically by default. *Naftzker* v. *Lantz*, 441.

7. Under 2 Comp. Laws, §§ 782–784, providing for transfer to the circuit court of causes begun before justices where the title to land comes in question, a justice does not lose jurisdiction

JUSTICES OF THE PEACE—Continued.

by the filing of a notice and bond and the deposit of a sum not sufficient to pay the accrued costs on a day between the return and adjourned day. *Hinchman* v. *Spaulding*, 655.

Liability, see FALSE IMPRISONMENT (6, 7).

Waiver of disqualification, see CRIMINAL LAW (11).

LACHES—See WATERS AND WATERCOURSES (1).

Enforcement of trusts, see TRUSTS (2).

LANDLORD AND TENANT.

Entry by the lessor upon the rented premises, for the purpose of repairing a building damaged by fire, and from which the lessee has removed, does not amount to an eviction which will relieve the lessee from paying rent during the repairs, where the lessee retains the key, suggests certain changes in the building, and moves into it after its completion. *Schloss* v. *Schloss*, 289.

Recovery of rent paid, see ASSUMPSIT (2).

LARCENY—See INDICTMENT AND INFORMATION (2).

Evidence of other larcenies, see CRIMINAL LAW (1, 2).

Restitution, see CRIMINAL LAW (19).

LEGISLATURE.

Control over highways, see HIGHWAYS AND STREETS (2, 3).

LICENSE.

1. One building a portion of a line fence by agreement with the adjoining proprietor has an implied license to trim trees to such an extent as is necessary to the construction of the fence. *Newberry* v. *Bunda*, 69.

2. Whether it was necessary to the building of a line fence, to cut back overhanging branches close to the body of a tree standing three feet from the line, is a question of fact. *Id.*

LIFE INSURANCE—See INSURANCE.

LIMITATION OF ACTIONS.

1. Where plaintiff, before her right of action was barred by the statute of limitations, brought suit in *assumpsit* for fraud in the sale of real estate, which action was defeated on the ground that she had mistaken her form of remedy, and not upon the merits, a second action in tort for the same fraud, begun within one year after the final determination of the former suit, was not barred by the statute. 3 Comp. Laws, § 9738. *McMillan* v. *Reaume*, 1.

2. A claim against an estate for work and labor for a period of ten years, terminating more that six years before the death of the deceased, and not shown to be a mutual, open account, is barred by the statute of limitations. *Rodgers* v. *Lamb's Estate*, 241.

LIMITATION OF ACTIONS—Continued.

3. A promise by an employer, after the termination of the service, to convey land at her death in payment of the services, does not interrupt the running of the statute of limitations on the claim for labor. *Id.*

4. The defect of failure to plead exclusive possession in a plea of limitations cannot be taken advantage of by complainant who alleges in his bill that he has been excluded by defendant during the whole period. *Butcher* v. *Butcher*, 390.

5. Limitations do not run in favor of the trustee of an express trust except where he repudiates the trust, and assumes an adverse position with notice to the cestui que trust. *Thorne* v. *Foley*, 649.

See ADVERSE POSSESSION (1); WATERS AND WATERCOURSES (1).

MALICIOUS PROSECUTION.

1. Where defendant, in an action for malicious prosecution, based upon an arrest in proceedings to compel him to keep the peace, claimed the advice of counsel constituted a defense, it was proper to refuse to direct a verdict in his favor, as it was for the jury to determine whether he truly stated the facts to counsel, and whether he was actually in fear that the plaintiff would execute his threat if he was not restrained by legal proceedings. *Thurkettle* v. *Frost*, 115.

2. In an action for malicious prosecution, the jury, in determining the question of probable cause, may consider all the facts and circumstances concerning the dispute between the parties, whether the defendant fully and fairly stated all the facts to his counsel and acted in good faith on his advice, and whether he willfully withheld any material fact from the justice in making the complaint. *Id.* 116.

3. In an action for malicious prosecution, plaintiff's previous good reputation is admissible as bearing upon the question of probable cause. *Id.*

4. The fact that the defendant had other land which he might use than that from which he was trying to evict the plaintiff is inadmissible to show malice. *Id.*

5. In an action for malicious prosecution, the fact that the plaintiff was convicted in the criminal proceedings, is conclusive proof of probable cause, unless the conviction was procured by false or fraudulent testimony or other unlawful means, although the judgment was subsequently reversed by a higher court and the plaintiff acquitted and discharged. *Thick* v. *Washer*, 155.

MANDAMUS.

Where a probate judge, on entering an order removing an administrator, fixed the penalty of the bond for an appeal from such order in an unwarranted amount, and upon the theory that it should be sufficient to secure payment of any sum found due the estate upon an accounting, it was not neces-

MANDAMUS—Continued.

sary for the administrator to present a proper bond to the probate judge before applying to the circuit court for a writ of mandamus to compel him to fix a proper penalty for the bond. *Fleming* v. *Ottawa Probate Judge*, 140.

Denial as res judicata, see JUDGMENTS (1, 3).

Not available where appeal lies, see APPEAL AND ERROR (6).

To review discretion of commissioner of State land office, see TAXATION (1).

MARRIED WOMEN—See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. The acceptance of a certain sum at regular monthly periods for services is not conclusive that the amounts received were in full compensation for the services. *Shane* v. *Shearsmith's Estate*, 33.

2. An employé assumes the risk of all such dangers incident to the employment as he knows to exist or should acquaint himself with. *Harrison* v. *Detroit, etc., Ry.*, 78.

3. A motorman, killed by an electric shock due to a trolley pole coming in contact with a high-tension wire while he was removing it from its socket, assumed the risk, where it appeared that, from the length of his employment, he must have known the danger from the high-tension wire, and that the wire was within reach of the trolley pole if removed from the socket, and it was not necessary that the company should instruct him that electricity would arc if the end of the pole should come within one-half inch of the high-tension wire. *Id.*

4. A railroad company was not negligent, in using a step which was in common use, without evidence that it was so dangerous that an ordinarily prudent employer would discard it, although it projected 15 inches beyond the side of the car. *Turner* v. *Detroit Southern R. Co.*, 142.

5. Where steps, projecting 15 inches beyond the cars, but not so far as the widest portions of the engines, had been used on defendant's railroad for four years, and also on other roads, without injuring anyone, defendant was not negligent in failing to apprehend that the steps would strike some one standing near the track. *Id.* 143.

6. The fact that a railroad tie, which had been left by a fellow-servant of the plaintiff too near the track, was struck by a projecting step on a car and thrown against the plaintiff, affords no evidence that defendant should have apprehended danger to its employés from such projecting steps. *Id.*

7. A jury have a right to infer that directions, given by one servant to another in the presence of the master, who makes no comment, are approved by him. *Sipes* v. *Michigan Starch Co.*, 258.

8. Failure to cover and properly guard set screws, which the factory inspector has ordered covered, is evidence of negligence. 2 Comp. Laws, § 5349. *Id.*

MASTER AND SERVANT—Continued.

9. As the assumption of risk is the result of a contract of employment, and the employer cannot legally contract to violate a statute, the servant does not assume the risk due to an omission of a statutory duty on the part of the employer. *Id.*

10. It cannot be said, as a matter of law, that a servant should have known of that which could not lawfully exist. *Id.*

11. Where a servant was injured by an exposed set screw in a revolving shaft, which, according to some of the testimony, he could not have seen in the dim light, and which had been left exposed in violation of a statutory duty, and he had been directed by a fellow-servant, in the presence of the vice-principal, to stand in a position where his clothes could be caught by the set screw, a refusal to direct a verdict for the defendant on the ground of contributory negligence was proper. *Id.*

12. Where, in an action for injuries to a servant due to alleged defective machinery, plaintiff testified that the brake attached to a steam hoist gave way and that he heard the teeth rubbing against the foot brake, defendant is not entitled to a directed verdict because plaintiff testified, on cross-examination, that the engineer's taking his "foot off released the brake," where it appeared from the evidence that, if certain notches in the brake bar had performed their intended office, the brake would not have been released when the engineer took his foot off. *Bernard* v. *Pittsburg Coal Co.*, 279.

13. Plantiff's testimony on direct examination, that the brake, "gave way," was not destroyed by his cross-examination to the effect that the engineer evidently put his foot down and caused the brake to move, and that was what caused the machinery to move, where it appeared, from further cross-examination, that the plaintiff did not intend to testify that the engineer loosened the brake after he had set it. *Id.*

14. The court will not direct a verdict for defendant on the ground that the plaintiff, a fireman, was negligent in obeying the directions of his superior fellow-servant, an engineer, in oiling a derrick chain, although there was a safer method than the one chosen by the engineer. *Id.* 280.

15. Plaintiff was not negligent, in not closing the doors of a derrick to guard against the contingency of a fall, which was so remote that no ordinary man could have foreseen it. *Id.*

16. A servant does not assume the risk of a defect in machinery of which he has no knowledge and of which he is not bound to know as a matter of law. *Id.*

17. A brake bar is admissible in evidence for the purpose of showing the method of its operation, without evidence to show that it was in the same condition as when the plaintiff was injured by reason of an alleged defect in it. *Id.*

18. It is not competent to show how a brake bar worked a year after the accident, where it appears that it had a new catch plate and was therefore a different appliance. *Id.*

MASTER AND SERVANT—Continued.

19. Where defendant introduced in evidence the original declaration, which had been amended, for the purpose of showing the plaintiff was not injured in the manner claimed at the trial, it was competent for the plaintiff to introduce a letter, written by him to his counsel at the time the suit was commenced, to show that he did not make the admission in the original declaration. *Id.*

20. If, without fault on his part, an employé is injured, he may recover against the master who is negligent, even though the negligence of a fellow-servant contribute to the injury. *Lockwood* v. *Tennant*, 305.

21. The master is not obliged to make his premises perfectly safe, and furnish the best material, but his duty is discharged if he make the premises reasonably safe. *Id.*

22. The furnishing by a master of inch instead of two inch planks for a scaffold is not of itself negligent, where enough are furnished, and the scaffold may be made reasonably safe by doubling them. *Id.*

23. Where, on complaint being made, the master orders such material as is on hand for scaffolding to be used until suitable material can be procured, and afterwards furnishes suitable material, he is not obliged to specifically order its substitution in order to relieve himself of liability. *Id.*

24. A scaffold builder in the employ of a building contractor is the fellow-servant of a brick carrier employed by the same contractor. *Landowski* v. *Chapoton*, 429.

25. Where a building contractor furnished competent scaffold builders and sufficient good material for the construction of the scaffold, he was not liable for injuries to a servant, caused by the breaking of a center board, weakened by a knot, negligently used in constructing such scaffold. *Id.*

26. In an action for injury to a section hand by the derailment of a hand car, evidence *held* sufficient to establish negligence of defendant in permitting an open rack car to be loaded with loose planing mill refuse, from which short pieces of hardwood flooring could fall on the track, one of which caused the derailment in question. *McLean* v. *Pere Marquette R. Co.*, 482.

27. Where a railroad company permitted planing mill refuse to be loaded loose on an open rack car, so that, as the car was being transported, some of the material would drop from the car, and might be drawn onto the rail and lodge there by the suction of the train, and plaintiff, a section hand, was injured by the derailment of a hand car, caused by the lodgment on the rail of one of the pieces of wood so transported, there being no other possible theory of the cause of the accident, the rule that the happening of an accident was not of itself evidence of negligence does not apply. *Id.*

28. Where defendant negligently permitted planing mill refuse to be loaded loose on an open rack car, and plaintiff, a section hand, was injured by the derailment of a hand car, caused by

MASTER AND SERVANT—Continued.

certain of such refuse falling on the track, the fact that, as the train containing the loaded car passed plaintiff, he saw it, and thought it was dangerous to so load such material, he never having seen it loaded in such manner before, did not render him guilty of contributory negligence, as a matter of law, in immediately following the train containing such car on his hand car, under the direction of his foreman. *Id.*

29. Plaintiff having a right to assume that defendant had furnished a proper car, and loaded it in a proper manner, the danger was not so obvious that he assumed the risk. *Id.*

30. A station agent's actions and contracts within the scope of his authority bind the company. *Id.*

31. Where a railroad station agent was intrusted by his master to select proper cars for the transportation of property over its railroad, and he negligently ordered an open rack car for the transportation of planing mill refuse to be transported loose, and plaintiff, a section hand, was injured by the derailment of a hand car, caused by the falling of certain of the refuse on the rail, the station agent, in selecting such car, etc., was not plaintiff's fellow-servant, since the railroad's duty to select reasonably safe cars could not be delegated. *Id.* 483.

MAXIMS.

He who seeks equity must do equity, see EQUITY (6, 12).

MISTAKE.

Excuse for usurious contract, see USURY.

MORTGAGES.

1. Complainant's husband purchased a lot subject to a mortgage which he assumed and agreed to pay. Defendant was an indorser upon the note secured by the mortgage. Upon foreclosure sale, complainant gave a mortgage upon her land to secure the deficiency and $700 borrowed money. This mortgage was also foreclosed and the land purchased by defendant. Complainant sought to redeem upon the payment of the $700 and interest, claiming that by the sale of her property the defendant's debt was paid by her and she should be subrogated to the mortgagee's claim against defendant. *Held*, that she was surety for her husband whose duty it was to pay the debt, and her bill was without equity. *Dunning* v. *Gaige*, 122.

2. In an action to set aside assignments of certain mortgages, evidence reviewed, and *held* to sustain a finding that the assignments had been delivered to the assignee prior to the assignor's death. *Peirson* v. *McNeal*, 158.

3. Complainant, being the owner of the equity of redemption of certain premises, agreed to convey them to defendant, if the latter would advance money sufficient to redeem, and allow him to repurchase within two years upon payment of advances, interest, and expenses. Defendant was authorized to sell within two years, deduct from proceeds of sale his advances,

MORTGAGES—Continued.

interest, and expenses, and account to complainant for the balance. Thereafter the complainant conveyed by warranty deed to defendant's wife subject to the mortgage. *Held*, that the transaction should be treated as a mortgage and complainant's right to repurchase did not lapse at the end of two years. *Malone* v. *Danforth*, 227.

4. A mortgagee in possession is not entitled to reimbursement for expenditures for repairs not necessarily made to save the estate from loss and injury. *Barnard* v. *Paterson*, 633.

5. A mortgagee in possession is not entitled to compensation for collecting rents, where he collects them for his own benefit, and there is no express agreement that he shall be compensated for such services, and no evidence from which such an agreement may be inferred. *Id.*

6. Two years after certain mortgages matured the mortgagee's agent furnished defendants a statement of account, in which interest on the overdue principal was computed at the rate of 7 per cent. per annum, and defendants' solicitors objected to such statement only in so far as it contained charges for disbursements, and requested a corrected statement, eliminating such items. Nearly two years later another statement was rendered, in which interest was also computed at 7 per cent. *Held*, that complainant, having induced defendants to remain her debtor in the expectation that interest would be charged at a rate not exceeding 7 per cent., was estopped from thereafter claiming a higher rate. *Id.*

See ESTOPPEL.

Deed as mortgage, see DEEDS (4).

MUNICIPAL CORPORATIONS.

0. Failure of plaintiff to verify a claim, presented to a village council for injuries due to a defective sidewalk, was waived where the village council, without objection to the lack of verification, referred it to an investigation committee, who subjected the plaintiff to a painful physical examination. *Hunter* v. *Village of Durand*, 53.

1. The city charter of West Bay City, providing that owners and occupants of adjacent property shall build, rebuild, and maintain sidewalks, that the council may, by a two-thirds vote, pay such part of the expenses as it deems advisable, and that the building, rebuilding, and repairing shall be done under the direction of the common council, does not make it the duty of the city to construct sidewalks. *Thompson* v. *City of West Bay City*, 94.

2. A city is not liable for an injury due to the negligence of a contractor in improperly constructing a barrier to prevent people walking on a new cement sidewalk, where the duty of building the sidewalk was not imposed by law upon the city. *Id.*

3. An ordinance requiring the work of building sidewalks to be done under the supervision of the city engineer, and obligat-

MUNICIPAL CORPORATIONS—Continued.

ing the city to pay one-third of the cost, does not make the city responsible for the negligence of one building a sidewalk under a contract with the owner of the adjacent land, where the charter makes it the duty of the owner of the land to build the sidewalk. *Id.*

4. A city charter, requiring the council to see that all ordinances relating to the keeping of sidewalks free from ice, snow, and obstructions are strictly enforced, does not make the city liable for the negligence of a contractor in erecting a barrier across a sidewalk, when the contractor is employed by the owner of the adjacent property to build the sidewalk. *Id.* 95.

5. The board of water commissioners of the city of Detroit, required by the charter of the city to "furnish a full supply of water for public and private use in said city," is entitled to receive pay for furnishing water to the board of education of Detroit, as the latter is a distinct entity although coextensive with the city. Act No. 90, Laws 1853. *Board of Water Com'rs of Detroit* v. *Board of Education of Detroit*, 245.

6. A condition subsequent in a deed to a city that the grantor shall be released from future assessments for opening streets is void. *Leggett* v. *City of Detroit*, 247.

7. Evidence examined and *held* to show that notice of claim for injury was served upon the corporation counsel. *Beattie* v. *City of Detroit*, 319.

8. An abutting owner, having knowledge of defects in the proceedings to improve a street and failing to make them known, while he stands by and sees the improvement made and the city obligate itself for payment, is estopped to set up the defect in a bill to restrain collection of the special tax, though he remonstrated against the improvement on general grounds. *Stewart* v. *City of Detroit*, 381.

9. Notice to municipal officers of a claim for personal injuries is sufficient if it describes the time, place, cause, and nature of the injury in general terms. *Oesterreich* v. *City of Detroit*, 416.

10. The statute requiring that notice of a claim for personal injuries be served on a municipal corporation before suit, being in derogation of a common right, is strictly construed. *Id.*

11. Under sections 83, 92, and 93 of the charter of Ionia (Act No. 246, Local Acts 1891), the board of public works has authority to appoint officers and agents without the approval of the common council. *Willsie* v. *Common Council of Ionia*, 445.

Injuries from defective streets and sidewalks, see HIGHWAYS AND STREETS.

Vacation of streets, see HIGHWAYS AND STREETS (8–10).

NAVIGABLE WATERS.

A stream and lake, which were used for floating logs as long as any were tributary, and since then for navigation by skiffs and steamers, are navigable. *Cole* v. *Dooley*, 419.

NEGLIGENCE.

In an action against the owner of a steamboat for negligently killing a laborer by collision with a dock, evidence examined and *held* to make a proper case for the jury. *King* v. *Ann Arbor R. Co.*, 487.

See BRIDGES; CARRIERS; HIGHWAYS AND STREETS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS; STREET RAILROADS.

NEW TRIAL.

A new trial will not be granted because the jury took less than five minutes to reach a verdict. *Farnsworth* v. *Fraser*, 297.

Refusal discretionary, see APPEAL AND ERROR (15).

NOTICE—See ADVERSE POSSESSION (2); CHATTEL MORTGAGES (1).

NUISANCE.

A private person can only maintain a bill to abate a nuisance to the public health when the nuisance causes special damage to him as a private person, separate from that done to the public. *McKee* v. *City of Grand Rapids*, 200.

See WATERS AND WATERCOURSES (2).

PARTIES.

Plaintiff, who himself brings in a party defendant, has no right to insist that such defendant should not have been made a party. *Hoffman* v. *Silverthorn*, 61.

See COUNTIES (1, 2); EQUITY (4); INFANTS.

PARTNERSHIP.

1. A member of a partnership engaged in selling farm implements, and in the sale of threshing machines on commission, who, by the articles of copartnership, was to have charge of the "canvassing part of the business," the other members to "look after the buying and selling of stock," could, by reason of his general authority as a partner, bind the firm to an agreement with the owner of machinery that it should not be delivered to a purchaser until the purchase price was secured. *Brown* v. *Foster*, 35.

2. Where a threshing machine received by a partnership to be sold on commission was delivered to a purchaser in violation of the terms of the agreement under which they received it, and was subsequently taken into possession by one of the firm, his possession was the possession of the firm, and its wrongful delivery by him to another was a conversion by the firm. *Id.* 36.

Admission of relation, see PLEADING (2).

PENALTIES.

Construction of penal statutes, see STATUTES (12); USURY.

PERJURY.

1. The acquittal of one accused of crime is not a bar to his subsequent prosecution for perjury as a witness at the trial, where, though his testimony was material, its falsity was not, legally speaking, inconsistent with his innocence. *People* v. *Albers*, 678.

2. Where perjury is assigned on accused's denial that V. sent him to bribe R., the testimony of S. that he, S., requested V. to have accused see R. in relation to the matter, is inadmissible as hearsay, though it corroborates V.'s testimony that he did send accused to R. as alleged. *Id.* 679.

3. Where accused is acquitted of an attempt to bribe in connection with a corrupt conspiracy and is subsequently prosecuted for perjury committed at the trial, evidence, otherwise inadmissible, cannot be admitted on the assumption that he made himself a party to the conspiracy and thereby opened the door to such testimony, as the former acquittal conclusively negatives such assumption. *Id.*

4. One accused of perjury is entitled to show that his reputation for truth and veracity is good. *Id.*

5. Where, in a prosecution of accused for offering a bribe to R., R. testified that accused offered him a bribe for his vote, and told him that V. had sent him there, accused's evidence in rebuttal, in which he denied that V. had in fact sent him to R., was material, and, being false, was sufficient to sustain an indictment for perjury. *Id.* 680.

PHYSICIANS AND SURGEONS — See EVIDENCE (5); HEALTH; WITNESSES (3).

PLEADING.

1. Under a declaration alleging performance of a statutory requirement that a claim against a village shall be verified, evidence of waiver is admissible. *Hunter* v. *Village of Durand*, 53.

2. Under Circuit Court Rule No. 8 and 1 Comp. Laws, § 826, failure to deny on oath the execution of the written instrument sued on, at the time of entering the plea, admits, not only its execution, but its delivery and the partnership of defendants; it purporting to be signed by a partnership. *Naftzker* v. *Lantz*, 441.

3. Refusal of amendment of the declaration, asked for after plaintiff has rested and the court is about to direct a verdict, is not error. *Prochaska* v. *Fox*, 520.

4. Cir. Ct. Rule 7, subd. *b*, requiring notice of affirmative defense relied upon to defeat or avoid the legal effect of the cause of action set forth by plaintiff, has no application to actions of trover and replevin where the declaration does not allege plaintiff's source of title. *Williams* v. *Brown*, 569.

5. A declaration for fraud, alleging that false representations were made to plaintiff who paid his money relying thereon, is supported by proof that the representations were made to

PLEADING—Continued.

and the money paid by plaintiff's duly authorized agent. *Sudworth* v. *Morton*, 575.

6. Where a declaration is sufficient to sustain a judgment, and its only fault is that it should be more specific, defendant may not object to the admission of any evidence under it, but, if desiring it to be made more specific, must demur to it. *Thick* v. *Detroit, etc., Ry.*, 708.

Estoppel to invoke defect in plea of limitations, see LIMITATION OF ACTIONS (4).

In equity, see EQUITY (11).

In justice's court, see JUSTICES OF THE PEACE.

PRESCRIPTION — See EASEMENTS (2); WATERS AND WATERCOURSES (7).

PRINCIPAL AND AGENT.

In the absence of authority conferred, or a valid usage, an agent cannot sell property on credit. *Kops Bros. Co.* v. *Smith*, 28.

Authority of agent, see CONTRACTS (1).

Ratification, see FACTORS (1, 2).

PRINCIPAL AND SURETY—See MORTGAGES (1).

PRIVATE ROADS—See EASEMENTS (1, 2).

PROBATE COURTS.

Bond on appeal from, see APPEAL AND ERROR (7); MANDAMUS.

PROCESS.

Objections to the jurisdiction of the court over the person of defendant are waived by pleading the general issue and going to trial on the merits. *Clute* v. *Everhart*, 5.

Alias writs in justice's court, see JUSTICES OF THE PEACE (2, 5).

PUBLIC POLICY—See ARBITRATION AND AWARD (4); EMINENT DOMAIN.

RAILROADS.

1. In an action against a railroad company for the death of a person by being struck by an engine backing across a street on which deceased was driving in a closed wagon, and attempting to cross the track just after a gravel train going in the same direction had passed, which the locomotive was backing out to assist over a grade, evidence examined, and the question whether deceased was guilty of contributory negligence *held* to be for the jury. *Barnum* v. *Grand Trunk Western R. Co.*, 580.

2. *Held* further, that negligence of the defendant cannot be in-

RAILROADS—Continued.

ferred from the mere fact that the engine immediately followed the train. *Id.*

Injuries to servants, see MASTER AND SERVANT.

Taxation of railroad property, see TAXATION (17).

RECORDS—See CHATTEL MORTGAGES (1).

REFORMATION OF INSTRUMENTS.

1. Equity has power to correct a written conveyance so as to carry out the intention of the grantor where a mistake has been made by the scrivener. *Newland* v. *First Baptist Church Society of Bellevue*, 335.

2. Evidence examined and *held* sufficient to support a finding that the grantor in a deed intended to convey a life estate only, and that the deed failed of such purpose by mistake of the scrivener. *Id.*

REMAINDERS—See WILLS (3).

REPLEVIN.

1. Where certain turkeys were shown to have been shut up by defendant before the issuance of a writ of replevin therefor, and defendant's testimony tended to show that he had let them out, and that they went towards plaintiff's residence, and plaintiff's testimony tended to show that they never came home, defendant was not entitled to a directed verdict on the ground that the property was not in his possession at the time the writ issued. *Clute* v. *Everhart*, 5.

2. A defendant in replevin who was not the owner of the property, nor entitled to its possession, and who waived a return, and defended on the ground that he did not have possession at the time the writ issued, was not entitled to a judgment for its value. *Id.*

RES JUDICATA—See DRAINS (2); JUDGMENTS.

REVIEW, BILL OF.

To review tax sale, see TAXATION (20).

SALES.

1. Refusal by the purchaser to carry out a contract for sale of railroad ties justifies the seller in treating the contract as broken and suing for damages, without a delivery or formal offer of delivery. *Thick* v. *Detroit, etc., Ry.*, 708.

2. Plaintiff, in an action for refusal of defendant to carry out a contract for the purchase of railroad ties, may show that, though he did not have the ties, he was able to procure them. *Id.*

3. Evidence, in an action for refusal of defendant to carry out a contract to purchase railroad ties, that some of the ties defendant afterwards contracted to purchase from another were a part of the lot for which plaintiff had contracted with which

SALES—Continued.

to fill defendant's order, is inadmissible; it not being contended there were not some good ties in the lot. *Id.*

4. Where plaintiff's contract to sell and deliver ties made no provision for inspection, it is not changed, as to plaintiff's duty to deliver them without a prior inspection, by defendant's compliance with plaintiff's request, made on account of the demand of the person from whom plaintiff was obtaining the ties, that an inspector be sent; plaintiff having refused to abide by his inspection, and defendant having refused to send another inspector. *Id.* 709.

5. A contract to furnish railroad ties of a certain quality, to be paid for cash on delivery, entitles the buyer to inspect before paying, and an offer to ship, with sight draft attached to bill of lading, unaccompanied by an offer of inspection, is not a tender of performance. *Id.*

Bona fide purchasers, see FRAUDULENT CONVEYANCES (1, 2).

Right of agent to sell on credit, see PRINCIPAL AND AGENT.

SAVING QUESTIONS FOR REVIEW.

One cannot urge on error that certain evidence was not admissible under the pleadings, unless such objection was made on the trial. *Loeser* v. *Jorgenson*, 220.

SHERIFFS AND CONSTABLES.

Assignment of bond by deputy, see ARREST (1).

SIDEWALKS—See MUNICIPAL CORPORATIONS.

SPECIFIC PERFORMANCE.

1. Specific performance is a remedy of grace rather than of right, and will be refused whenever enforcement would be inequitable. *Rathbone* v. *Groh*, 373.

2. Specific performance of an option to purchase real estate will be denied where the rights of a bona fide purchaser have intervened and complainant will suffer little if any loss and has an adequate remedy at law. *Id.*

STATE LEGISLATURE.

Control over highways, see HIGHWAYS AND STREETS (2, 3).

STATE PUBLIC SCHOOL.

Right to sue and be sued, see CONSTITUTIONAL LAW (5).

STATE ROADS—See HIGHWAYS AND STREETS.

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

1. The provision of Act No. 217, Pub. Acts 1903, requiring the certificate of two physicians that an alleged insane person is insane, is sufficiently expressed in the title of the act, viz.:

STATUTES—Continued.

"To revise and consolidate the laws organizing asylums * * * and to provide for the apprehension of persons believed to be insane, and for their care and custody." *Grinley* v. *Wayne Probate Judge*, 50.

2. The provisions of Act No. 335, Local Acts 1901, amending Act No. 419, Local Acts 1899, relating to a system of county roads for Saginaw county, are inconsistent with the provisions of sections 26 and 27, Act No. 230, Pub. Acts 1895, providing for a township road system, and therefore repeal by implication the last-named act so far as it applies to Saginaw county. *Board of Sup'rs of Saginaw Co.* v. *Hubinger*, 72.

3. The presumption is against making a statute irrepealable. *Id.*

4. The title of Act No. 232 of the Public Acts of 1903, i. e., "to revise and consolidate the laws providing for the incorporation of manufacturing and mercantile companies," etc., sufficiently indicates the purpose of the law to repeal existing laws covering the same subjects. *Grimm* v. *Secretary of State*, 134.

5. Act No. 232 of the Public Acts of 1903 was designed to provide a general law, under which the corporations named in it might be organized and brought under one general rule, instead of incorporating them under several laws as they were required to do before the act became a law, and as such embraces but one object. *Id.*

6. A general statute of local application cannot be extended in its operation to the whole State by an act having a title merely indicating a purpose to amend the local statute. *People* v. *De Blaay*, 402.

7. Where an act attempting to extend a law of local application to the whole State is ineffectual because of a defect in its title, the provisions therein repealing the existing general statute on the same subject are likewise ineffectual, and the general statute stands unrepealed. *Id.*

8. Though as a general rule an unconstitutional law cannot be made valid by amendment, such a law may be re-enacted after the unconstitutional features have been eliminated, and the fact that the Constitution requires that laws amended be re-enacted and published at length presents no obstacle to that course. *Id.* 403.

9. Statutes are given only a prospective application unless the legislative intent that they shall be retroactive is clearly manifest. *In re Lambrecht*, 450.

10. A statute will be given an interpretation leading to absurd and mischievous consequences only when no other is possible. *Id.*

11. A statute repeals a prior statute in so far as it is in conflict therewith. *Id.* 451.

12. Penal statutes will not be enlarged by construction. *Van Camp* v. *Michigan Cent. R. Co.*, 467.

13. The fact that the words in the provision of Act No. 272, Pub.

STATUTES—Continued.

Acts 1899, chap. 5, § 5, authorizing the board of review to add lands to an assessment district for the construction of a ditch, are in brackets, is immaterial; they having been in the act as signed by the governor. *Murphy* v. *Dobben*, 565.

STIPULATIONS.

Oral stipulations between counsel to admit the genuineness of certain signatures are unenforceable. *Sudworth* v. *Morton*, 575.

STREET RAILROADS.

Instructions in an action against a street-railway company for injury to a boy on the track examined and *held* to properly submit the issue of contributory negligence where plaintiff was injured because his cart, to which he was tied, caught in the track. *Quirk* v. *Rapid Ry.*, 494.

Additional servitude, see HIGHWAYS AND STREETS (1).

Injuries to servants, see MASTER AND SERVANT.

Permission of highway officers to build, see HIGHWAYS AND STREETS (3).

STREETS—See HIGHWAYS AND STREETS.

SUBROGATION—See MORTGAGES (1).

SUMMONS—See PROCESS.

SURETYSHIP—See PRINCIPAL AND SURETY.

TAXATION.

1. Section 131 of the general tax law (Act No. 141, Pub. Acts 1901), requiring the commissioner of the State land office to issue a certificate showing a homestead entry only when, "in his judgment, the application is made in good faith," vests in the commissioner a discretion that will not be reviewed on mandamus. *Beebe* v. *Com'r of State Land Office*, 48.

2. A recital in a deed issued by the auditor general that a former deed was erroneously released is, at most, but evidence of the fact, and is not conclusive. *Hoffman* v. *Silverthorn*, 60.

3. An application to purchase land bid in by the State for taxes, which is not accompanied by a sufficient deposit, does not give the purchaser any right to a deed. *Id.* 61.

4. An application to the auditor general for the purchase of State tax land must be accompanied by a sufficient deposit, and if it is not sufficient, and the applicant makes up the amount at a later date, he must also deposit sufficient to pay the interest to such later date. *Id.*

5. A deed of State tax land for a less sum than was due the State, because of an error in computation by the auditor general's office, is void as against the owner of the original title. *Id.*

6. Where the purchaser of State tax land releases his interest to

TAXATION—Continued.

the State, it is the duty of the auditor general to convey the land to the original owner, who has made a complete application which is still pending, rather than to redeed it to the purchaser on his original application. *Id.*

7. Section 2871, 1 Comp. Laws, providing that suit may be brought by a village for the collection of taxes on personal property whenever the treasurer of the village shall be unable to collect the tax, permits such action to be brought during the life of the tax warrant. *Village of Chelsea* v. *Holmes*, 195.

8. Under 1 Comp. Laws, § 3863, providing that taxes shall become a debt to the township, ward, or city from the persons to whom they are assessed, a suit should be brought by the city and not the ward to recover taxes assessed in a ward for city purposes and made collectible by the city treasurer, although each ward has a supervisor and a separate tax roll. *City of St. Joseph* v. *Vail*, 276.

9. Where the owners of lots fronting on a lake conveyed to plaintiff the portion of the lots that was covered by water, the deeds reciting that it was the intention of the grantors to convey all their rights to the water and the soil under water in the lake belonging and appurtenant to the described premises, and thereafter the lots were assessed to the grantors under a description excepting the riparian rights, plaintiff was properly assessed on the remainder as that part of the same lots lying in F. Lake, including all the riparian rights belonging and appurtenant thereto. *Newaygo Portland Cement Co.* v. *Township of Sheridan*, 475.

10. Where, after the conveyance of that part of certain lots fronting on a lake that was under water, the remainder of the lots were assessed by number, with the addition "excp't rip'in r'g't," such abbreviations sufficiently excepted the riparian rights of the owners of the remainder of the lots. *Id.*

11. Where certain lots fronted on a lake, and that part of the soil under water was conveyed to plaintiff, and the remainder of the lots assessed to the owners under a description consisting of the lot number and the abbreviations "excp't rip'in r'g't," an assessment of the part conveyed to plaintiff as unplatted lands in the village, consisting of that part of the following described premises lying in F. Lake, including all the riparian rights belonging to and appurtenant to said premises, followed by a recital of the numbers of the lots, etc., if defective, was cured by 1 Comp. Laws, § 3922, providing that no tax assessed shall be held invalid on account of any irregularity, informality, omission, or want of any matter of form or substance that does not prejudice the property rights of the person whose property is taxed, etc. *Id.*

12. A decree for the sale of land for taxes, rendered before the expiration of the five days' notice provided by the statute (1 Comp. Laws, § 3889), is premature and therefore void. *Bending* v. *Auditor General*, 500.

13. A decree for the sale of land for taxes, rendered at a time

TAXATION—Continued.

when the land is held as State tax land under a decree and sale for the taxes of a prior year, is void. *Id.*

14. Intervening petition by the aggrieved owner is the proper remedy for raising the question of the validity of a decree for the sale of land for taxes, unless the rights of third parties have intervened. *Id.*

15. Where a tax sale purchaser sold the timber on the land to a third person before any steps were taken by the original owner to have the tax sale set aside, the purchaser of such timber being entitled to defend his rights in an original proceeding, the original owner was not entitled to maintain a petition in the tax-sale proceedings to set aside the decrees, but was compelled to institute an original suit for that purpose. *Id.*

16. A landowner who pays no taxes, and takes no proceedings to protect his title for ten years, is guilty of such laches as to bar his right to question the validity of tax sales, though he petitions within eight months after he learns that certain persons had bought the land six, and the timber thereon two, years before. *Id.*

17. Under 2 Comp. Laws, § 6277, a parcel of land owned by a railroad and occupied by side tracks and a coal dock belonging to the road, the spaces between the tracks being occasionally and necessarily used for the storage of bulky articles, is "actually used for railroad purposes," and is exempt from general taxation. *Grand Rapids, etc., R. Co.* v. *City of Grand Rapids*, 587.

18. Lands owned by a railroad, but in possession of private individuals, and used exclusively by them in their individual business for wood and coal yards and sheds and storage of grain, etc., are neither "actually occupied" by the railroad nor "necessary or in use in the proper operation" of the road within section 6277, 2 Comp. Laws, and are therefore properly taxable as other real estate under the general law. *Id.*

19. A parcel of land described according to a plat, except parts used for the right of way of two named railroads, is sufficiently identified, there being a presumption that the rights of way are matter of record. *Id.*

20. Where complainant, in a bill to review a decree for the sale of land for taxes, though he fails to make a case, obtains a longer time in which to redeem than he would have had if he had not filed the bill, it is error to dismiss the same without costs to defendants. *Phelps* v. *O'Connor*, 625.

TENANCY IN COMMON.

In the absence of an agreement, one tenant in common in lands cannot recover of his co-tenant for services rendered in connection therewith. *Gay* v. *Berkey*, 658.

TENDER.

Necessity, see SALES (1).

TERRITORIAL ROADS—See HIGHWAYS AND STREETS.

TIME.

It is a general rule that when an act is to be done within a certain number of days from a day, the day of the date is excluded. *Brown* v. *Knop*, 234.

TORTS.

Waiver and suit in assumpsit, see ASSUMPSIT (1).

TOWNSHIPS—See EQUITY (4).

Boards: Authority over highways, see HIGHWAYS AND STREETS.

Liability for injuries, from defective bridges, see BRIDGES.

——from defective highways, see HIGHWAYS AND STREETS.

TRESPASS.

1. Where plaintiff brought an action for trespass in cutting trees located in the highway, he could recover only by proving title to the land on which the trees stood. *Maynard* v. *Reynolds*, 42.

2. The branches of a tree projecting over a boundary line may not be cut beyond the division line by the adjoining proprietor without license. *Newberry* v. *Bunda*, 69.

Pleading in justice's court, see JUSTICES OF THE PEACE (1).

TRIAL.

1. Requests to charge, which assume disputed facts or the existence of evidence not in the record, are properly refused. *Hunter* v. *Village of Durand*, 54.

2. Where, in an action for personal injuries, the court gave defendant's request that plaintiff could not recover for the aggravation of an existing disease, it was not error to add, as a reason for the ruling, that no such claim was made in the declaration. *Id.*

3. The argument of counsel to the jury, in an action against a street railway for personal injuries, in which he urged that the jury should not defeat the honest claim of a poor man, by the lies and perjury resorted to by a corporation, and censured the defendant for making a motion to take the case from the jury, was improper. *Hillman* v. *Detroit United Ry.*, 184.

4. A charge that the only issue in the case was one of defective machinery was not error, where it appeared from the entire charge that the jury could not have understood from such statement that they should disregard any of the defendant's claims. *Bernard* v. *Pittsburg Coal Co.*, 280.

5. In order to determine whether an instruction is misleading, the charge must be considered as a whole. *Beattie* v. *City of Detroit*, 320.

6. There is no error in the court's recalling the jury and giving

TRIAL—Continued.

further instructions in the absence of counsel. *National Life & Trust Co.* v. *Omans*, 365.

7. Where a proper request has been refused and language employed in its stead which is calculated to induct the jury into the very error which the charge requested was designed to guard against, a conflicting instruction will not cure the error unless it clearly appears that the jury could not have been misled. *McDonald* v. *City Electric R. Co.*, 393.

8. Argument against the jury's endeavoring to foreclose an appeal by giving a small verdict *held* rendered innocuous by the prompt action of the court. *Quirk* v. *Rapid Ry.*, 494.

9. Requests to charge that are sufficiently covered by the general charge are properly refused. *Comstock* v. *Township of Georgetown*, 542.

10. Failure of counsel to acquiesce in the rulings of the court is to be condemned. *Oliver* v. *Jessup's Estate*, 642.

11. An instruction that in weighing the testimony of the witnesses any interest of the witnesses may be considered, but in the same connection cautioning the jury against drawing an unfair inference because the witnesses are in defendant's employ, does not invade the province of the jury. *Lovely* v. *Grand Rapids, etc., R. Co.*, 653.

Argument in false imprisonment, see FALSE IMPRISONMENT (5).

Necessity of request, see DAMAGES (1).

TRUSTS.

1. Where a legatee, entitled to the income of a trust fund, filed a bill against the trustee, making the persons entitled to the principal after the death of the first-named legatee parties, who by their answer consented that the court should appoint some suitable person as trustee, and complainant died pending the suit, which was revived in the name of his executor, it was competent for the court, on finding the trustee guilty of misappropriating the fund, to decree that the fund should be paid into court, subject to a further hearing and adjudication. *Cropsey* v. *Johnston*, 16.

2. A bill on behalf of certain cestuis que trust, against defendant as the alleged trustee, alleged that year by year the original trustee and his successors in office represented to such cestuis que trust and their heirs and representatives, both expressly and by implication, that the title to the property was vested in such trustee and his successors by virtue of the statute of limitations; and that a certain decree quieting such title was a final adjudication and determination of all the rights of such cestuis que trust, their heirs and representatives, and was an absolute bar to any proceedings by them or for their benefit to recover the premises. The bill also set up the recent discovery of a certain ancient deed to defendants, which was unrecorded, but which, if recorded, would only have shown that defendants held subject to a different trust than that claimed by complainants, and adverse to them.

TRUSTS—Continued.

Held that a delay of more than 45 years by complainants in bringing suit was such laches as deprived them of relief. *Thorne* v. *Foley*, 649.

Limitations in favor of trustee, see LIMITATION OF ACTIONS (5).

USURY.

Where neither the borrower nor the lender of money was able to figure the interest due on the notes, whereupon the parties went to L., and had him figure the interest, and on the basis of his conclusion a new note was erroneously given for more than was justly due on the notes, but the lender had no intention of taking usury, and as soon as he learned of the mistake indicated his willingness to correct the same, he was not subject to a forfeiture of all interest due on the debt for taking usury, as provided by 2 Comp. Laws, § 4857, but was entitled to the allowance of his claim against the debtor's estate to the extent of the amount due, with legal interest. *Becker* v. *Headsten*, 478.

See EQUITY (6).

VARIANCE.

Between information and proof, see INDICTMENT AND INFORMATION.

VESTED RIGHTS—See CONSTITUTIONAL LAW; HEALTH.

WAIVER.

Admissibility of evidence under pleading, see PLEADING (1).

Disqualification of justice, see CRIMINAL LAW (11).

Fraud in inception of note, see INSURANCE (6).

Lack of jurisdiction, see PROCESS.

Multifariousness in bill, see EQUITY (10).

Objection to delay in filing opinion, see COURTS (3).

Right to appeal from order allowing bill of review, see EQUITY (7).

Tort, see ASSUMPSIT.

Verification of notice of claim for injury, see MUNICIPAL CORPORATIONS (0).

WAREHOUSEMEN.

1. Defendant, a warehouseman, agreed to store plaintiff's goods in a certain building and the plaintiff had them insured as located in said building. The warehouseman, however, placed them in another building, where they were destroyed by fire. *Held*, in an action to recover their value, that it was immaterial whether or not they would have been damaged if stored in the building agreed upon. *Hudson* v. *Columbian Transfer Co.*, 255.

WAREHOUSEMEN—Continued.

2. A warehouseman, who stores goods in a different building from that agreed upon, is liable to the owner in case of their loss by fire. *Id.*

WATERS AND WATERCOURSES.

1. Where obstructions to the natural flow of water in a stream have been permitted to remain over 15 years, a riparian owner's remedy for their removal is barred by the statute of limitations and by laches. *McKee* v. *City of Grand Rapids*, 200.

2. A city cannot divert water from one side of the river, to the injury of a riparian owner, into a channel on the opposite side, for the purpose of abating a nuisance in such channel, where there is another practicable way which will not damage landowners. *Id.*

3. The lower and servient estate must receive the surface waters which flow naturally from the dominant estate. *Cranson* v. *Snyder*, 340.

4. The husbandman may improve his farm by filling up sag holes, pools, and basins to prevent water accumulating or remaining thereon, although the result is to cause the water to flow upon the land of an adjoining owner. *Id.*

5. A landowner cannot, by artificial drains or ditches, collect waters from natural receptacles and cast them in a body upon the land of an adjoining owner. *Id.*

6. A landowner is entitled to cultivate his land in the manner usual in good husbandry, though the result may be to leave furrows which will cause the water to move off more rapidly than it would were the land in its natural state. *Id.*

7. Complainant, who has acquired a prescriptive right to maintain tile ditches and drains over defendant's land by defendant permitting them to exist and cast water on his land for 20 years, is entitled to maintain them and to enter on defendant's land for the purpose of repairing or relaying them with tile of no greater capacity than that originally laid. *Id.*

See MUNICIPAL CORPORATIONS (5).

WILLS.

1. A will bequeathing to testator's son $5,000 in cash arising from the former's property, "such as windmill stock or any other source," to be controlled by a trustee for said son, a specified amount, whether arising from dividends on said stock or from money at interest, to be paid to him annually, did not give the trustee, who received the fund in cash, a right to purchase windmill stock from another son, by connivance and collusion with him, at a price in excess of its value. *Cropsey* v. *Johnston*, 16.

2. Statements by a person, since deceased, to the effect that plaintiff, who was in his employ, understood that he was to be rewarded in the end, that he (deceased) had promised to leave the business with plaintiff, and that plaintiff knew well

WILLS—Continued.

enough what he was working for, are sufficient to justify a finding that decedent agreed to compensate plaintiff for his services by leaving him the business. *Shane* v. *Shearsmith's Estate*, 32.

3. Where a will devises the homestead to the widow for life, remainder to "my children hereinafter named," and all testator's children are subsequently named in the will, the estate goes to them all share and share alike. *Sondheim* v. *Fechenbach*, 384.

4. A codicil is treated as a part of the will. *Id.*

5. Not only the four corners of the instrument, but the amount of testator's estate and his surroundings, are to be considered in determining the meaning of ambiguous provisions in a will. *Id.*

6. Evidence examined and *held* that a bequest contained in a codicil was intended as a substitute for a similar one of less amount to the same heir in the body of the will, the instrument being ambiguous. *Id.*

Construction, see EQUITY (1).

Unsigned codicil as evidence, see WORK AND LABOR (2).

WITNESSES.

1. In a suit by an executrix to set aside an assignment of certain mortgages by the deceased to the defendant, the testimony of the defendant as to the delivery of the assignments by the deceased to her is equally within the knowledge of the deceased and inadmissible. 3 Comp. Laws, § 10212. *Peirson* v. *McNeal*, 158.

2. Where testator devised his entire property to his wife, and appointed her executrix, a suit brought by her as executrix to set aside assignments of certain mortgages on the theory that the mortgages equitably belonged to her, was an action for her personal benefit, and not for the benefit of the estate, and hence, she being the real party in interest, was precluded by 3 Comp. Laws, § 10212, from testifying to facts equally within the knowledge of her deceased husband. *Id.*

3. A physician is a competent witness to prove the value of items appearing in his books which had been admitted in evidence without objection, in a proceeding by him to recover from the estate of a deceased person the value of medical attendance and services rendered the decedent. *Kwiecinski* v. *Newman's Estate*, 287.

4. A party who introduces testimony equally within the knowledge of a deceased person cannot complain because the opposite party examines the witness further upon the subject. *Id.*

5. Under Act No. 30, Pub. Acts 1903, providing that no person who shall have acted as agent in the making or continuing of a contract with any person who may have died shall be a competent witness in any suit involving such contract, complainant's natural father was incompetent to testify to an

WITNESSES—Continued.

agreement made between him and complainant's foster father for her benefit when she was a child two years of age, by which deceased agreed to make complainant his heir. *Albring* v. *Ward*, 352.

6. Under 1 Comp. Laws, § 3846, a tax statement made by a taxpayer may not be used on his cross-examination as a witness on the issue of the value of the property in question. *Williams* v. *Brown*, 570.

Credibility, instructions, see TRIAL (11).

WORK AND LABOR.

1. Where a claim is made against the estate of a deceased person, on the theory that the services rendered decedent and his wife became more onerous after the execution of a contract and lease, and decedent orally promised further compensation, evidence of what the entire services, including those compensated by the lease, were worth, is inadmissible. *Oliver* v. *Jessup's Estate*, 642.

2. An unsigned codicil is likewise inadmissible to show the value of the alleged additional services, in the absence of evidence as to the circumstances under which it was written, or whether decedent expected it to take the place of the lease or whether it was intended as a voluntary gift. *Id.*

3. Evidence examined in a case where a claim was made against the estate of a deceased person for compensation for additional services of a more onerous nature performed after the execution of a contract and lease, and *held* that a verdict for $930 was excessive. *Id.*

Claim against decedent's estate, see LIMITATION OF ACTIONS (2, 3).

Recovery for services to decedent, see EXECUTORS AND ADMINISTRATORS (1); WILLS (2).

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