MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JANUARY 1 TO MAY 11, 1905

HERSCHEL BOUTON LAZELL
STATE REPORTER

VOL. 139
FIRST EDITION

CHICAGO
CALLAGHAN & CO.
1906

Copyright, 1906, for the State of Michigan, by George A. Prescott, Secretary of State.

Rec. Sept. 17, 1906

PRINTED AND BOUND BY
LAWRENCE & VAN BUREN PRINTING CO.
LANSING, MICHIGAN.

SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
JOSEPH B. MOORE, LAPEER, ...	Dec. 31, 1905

ASSOCIATE JUSTICES.

WILLIAM L. CARPENTER, DETROIT, . .	Dec. 31, 1907
AARON V. McALVAY, MANISTEE, . . .	Dec. 31, 1907
CLAUDIUS B. GRANT, MARQUETTE, . . .	Dec. 31, 1909
CHARLES A. BLAIR, JACKSON, ...	Dec. 31, 1909
ROBERT M. MONTGOMERY, GRAND RAPIDS,	Dec. 31, 1911
RUSSELL C. OSTRANDER, LANSING, . . .	Dec. 31, 1911
FRANK A. HOOKER, CHARLOTTE, . . .	Dec. 31, 1913

CLERK—CHARLES C. HOPKINS, LANSING.

CRIER—MOSES R. TAYLOR, LANSING.

ATTORNEY GENERAL—JOHN E. BIRD, ADRIAN.

Pursuant to Act No. 182, Public Acts 1893, the Justices reside at Lansing during their terms of office.

CIRCUIT JUDGES.

1.	GUY M. CHESTER,	HILLSDALE.
2.	ORVILLE W. COOLIDGE,	NILES.
3.	ROBERT E. FRAZER, GEORGE S. HOSMER, HENRY A. MANDELL, JOSEPH W. DONOVAN, MORSE ROHNERT, FLAVIUS L. BROOKE,	DETROIT.
4.	JAMES A. PARKINSON,	JACKSON.
5.	CLEMENT SMITH,	HASTINGS.
6.	GEORGE W. SMITH,	PONTIAC.
7.	CHARLES H. WISNER,	FLINT.
8.	FRANK D. M. DAVIS,	IONIA.
9.	JOHN W. ADAMS,	KALAMAZOO.
10.	BYRON A. SNOW, EMMET L. BEACH,	SAGINAW.
11.	JOSEPH H. STEERE,	SAULT STE. MARIE.
12.	ALBERT T. STREETER,	HOUGHTON.
13.	FREDERICK W. MAYNE,	CHARLEVOIX.
14.	FRED J. RUSSELL,	HART.
15.	GEORGE L. YAPLE,	MENDON.
16.	JAMES G. TUCKER,	MT. CLEMENS.
17.	ALFRED WOLCOTT, WILLIS B. PERKINS,	GRAND RAPIDS.
18.	THEODORE F. SHEPARD,	BAY CITY.
19.	AARON V. McALVAY,	MANISTEE.
20.	PHILIP PADGHAM,	ALLEGAN.
21.	PETER F. DODDS,	MT. PLEASANT.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	MAIN J. CONNINE,	OSCODA.
24.	WATSON BEACH,	LEXINGTON.
25.	JOHN W. STONE,	MARQUETTE.
26.	FRANK EMERICK,	ALPENA.
27.	LEWIS G. PALMER,	BIG RAPIDS.
28.	CLYDE C. CHITTENDEN,	CADILLAC.
29.	GEORGE P. STONE,	ITHACA.
30.	HOWARD WIEST,	LANSING.

31.	EUGENE F. LAW, HARVEY TAPPAN,	PORT HURON.
32.	NORMAN W. HAIRE,	IRONWOOD.
33.	FRANK SHEPHERD,	CHEBOYGAN.
34.	NELSON SHARPE,	WEST BRANCH.
35.	STEARNS F. SMITH,	OWOSSO.
36.	JOHN R. CARR,	CASSOPOLIS.
37.	JOEL C. HOPKINS,	BATTLE CREEK.
38.	HARRY A. LOCKWOOD,	MONROE.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

ALFRED J. MURPHY AND JAMES PHELAN.

SUPERIOR COURT OF GRAND RAPIDS, RICHARD L. NEWNHAM.

JUDICIAL CIRCUITS.

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

TABLE OF CASES REPORTED.

PAGE

Ablard *v.* Detroit United Railway 248
Addison, Lester *v.* 232
Adrion, Hanselman *v.* 546
Alden, Garr *v.* 440
Alderton *v.* Williams 296
Allen, *In re* 712
Ann Arbor Railroad Co., Weaver *v.* 590
Apley, Kenney *v.* 320
Arbeiter Unterstuetzungs Verein, Kern *v.* 333

Babcock, Rogers *v.* 94
Barker, Grand Lodge, Independent Order of Odd Fellows *v.* 701
Battle Creek *v.* Haak 514
Bay City, Bialy *v.* 495
Bay County Supervisors *v.* Edmunds 466
Beecher, Frohlich *v.* 278
Benzie Circuit Judge, Louisell *v.* 40
———, Vincent *v.* 90
Bialy *v.* Bay City 495
Blanchard *v.* Detroit & Mackinac Railway Co. 694
Bliss, Truax *v.* 153
Board of Assessors of City of Detroit, Duluth & Atlantic Transportation Co. *v.* 1
———, Teagan Transportation Co. *v.* 1
———, Wolverine Steamship Co. *v.* 1
Board of Education of Detroit, Lewis *v.* 306
———, Whitehead *v.* 490
Board of Inspectors of Election for the Fourth Election District of the Second Ward of the City of Detroit, City of Detroit *v.* 548

PAGE
Board of Supervisors of Bay County *v.* Edmunds ... 466
Bradley *v.* Williams ... 230
Brandenburg, Harris *v.* ... 382
Briggs, Powers *v.* ... 664
Brigham *v.* Reau ... 256
Brown *v.* Harris ... 372
Buhler *v.* Trombly ... 557, 569
Buxton *v.* Emery ... 341

Cadillac State Bank *v.* Wexford Circuit Judge ... 126
Cady *v.* St. Clair Circuit Judge ... 618
Canal Construction Co. *v.* Schlickum ... 246
Carr, Sheldon *v.* ... 654
Cass Farm Co. *v.* City of Detroit ... 318
Cavanagh, Reynolds *v.* ... 387
Central Savings Bank *v.* O'Connor ... 82
Chicago, Kalamazoo & Saginaw Railroad Co., Howe *v.* ... 638
C. H. Little Co., People, *for Use of*, *v.* Grant ... 26
City of Battle Creek *v.* Haak ... 514
City of Bay City, Bialy *v.* ... 495
City of Detroit *v.* Board of Inspectors of Election for the Fourth Election District of the Second Ward of the City of Detroit ... 548
———, Cass Farm Co. *v.* ... 318
———, Cutcher *v.* ... 186
———, Forbes *v.* ... 280
———, Power *v.* ... 30
City of Port Huron, Palmer *v.* ... 471
Clute *v.* Ionia Circuit Judge ... 337
Coffee *v.* Pere Marquette Railroad Co. ... 378
Coffman, Woodruff *v.* ... 634
Cole, People, *for Use of* Cook, *v.* ... 312
Conroy *v.* Detroit United Railway ... 173, 174
Cook, People, *for Use of*, *v.* Cole ... 312
Cooper *v.* Lawson ... 628

PAGE
Costigan, Weber *v.* 146
Coulter *v.* Minion 200
Cresswell *v.* Robertson 416
Cummings *v.* Dixon 269
Cutcher *v.* City of Detroit 186

Dalton, Murphy *v.* 79
Dean, Wetmore *v.* 627
Dehn, National Cash Register Co. *v.* 406
Delano, Lasley *v.* 602
Detroit *v.* Board of Inspectors of Election for the Fourth Election District of the Second Ward of the City of Detroit 548
———, Cass Farm Co. *v.* 318
———, Cutcher *v.* 186
———, Forbes *v.* 280
———, Power *v.* 30
Detroit & Mackinac Railway Co., Blanchard *v.* 694
———, Johnson *v.* 287
Detroit & Northwestern Railway, Randall *v.* 477
Detroit Board of Assessors, Duluth & Atlantic Transportation Co. *v.* 1
———, Teagan Transportation Co. *v.* 1
———, Wolverine Steamship Co. *v.* 1
Detroit Board of Education, Lewis *v.* 306
———, Whitehead *v.* 490
Detroit, Mt. Clemens & Marine City Railway, Mannel *v.* 106
Detroit United Railway, Ablard *v.* 248
———, Conroy *v.* 173, 174
———, Shaller *v.* 171
———, Walters *v.* 303
Dixon, Cummings *v.* 269
Dolan, Oliver Chilled Plow Works *v.* 668
Duluth & Atlantic Transportation Co. *v.* Board of Assessors of City of Detroit 1
Dunkley-Williams Co., Wilkinson *v.* 621

PAGE
Edmunds, Board of Supervisors of Bay County *v.* ... 466
Emery, Buxton *v.* ... 341
Employers' Liability Assurance Corp. *v.* Grand Rapids Bridge Co. ... 351
Estate of Jewell, Jewell *v.* ... 578
Estate of Sowders, Finn *v.* ... 623
Evening News Ass'n, Great Western Smelting & Refining Co. *v.* ... 55

Fairbairn *v.* Houghten ... 72
Fairfield *v.* Hart ... 136
F. & F. Lumber Co. *v.* Township of Thompson ... 698
Farmers' Mutual Fire-Insurance Company of Calhoun County, Martin *v.* ... 148
Finn *v.* Sowders' Estate ... 623
Fitzpatrick, Napper *v.* ... 139
Fletcher *v.* Johnson ... 51
Forbes *v.* City of Detroit ... 280
———, Freud *v.* ... 280
Forest Township, Laing *v.* ... 159
Frank, Schellenberg *v.* ... 183
Freud *v.* Forbes ... 280
Frohlich *v.* Beecher ... 278
———, Kellogg *v.* ... 612
Fryszka *v.* Prybeski ... 461

Garr *v.* Alden ... 440
Garrison *v.* Union Trust Co. ... 392
George D. Sisson Lumber & Shingle Co. *v.* Haak ... 383
Goldsmith *v.* Lichtenberg ... 163
Grand Lodge, Independent Order of Odd Fellows *v.* Barker ... 701
Grand Rapids Bridge Co., Employers' Liability Assurance Corp. *v.* ... 351
Grant, Lever *v.* ... 273, 277
———, People, *for Use of* C. H. Little Co., *v.* ... 26

PAGE

Great Western Smelting and Refining Co. *v.* Evening News Ass'n 55
Green, Howatt *v.* 289

Haak, City of Battle Creek *v.* 514
———, George D. Sisson Lumber & Shingle Co. *v.* .. 383
Haberkorn, Simons *v.* 130
Hall *v.* Marshall 123
Halladay, Love *v.* 575
Hallwood Cash Register Co. *v.* Wayne Circuit Judge. 198
Hammond *v.* Tuttle 699
Hanselman *v.* Adrion 546
Harris *v.* Brandenburg 382
———, Brown *v.* 372
Hart, Fairfield *v.* 136
Hathaway *v.* Washington Milling Co. 708
Hayward *v.* School District No. 9 of the Township of Hope 539
Hopper *v.* Livingston Circuit Judge 100
Houghten, Fairbairn *v.* 72
Howatt *v.* Green 289
Howe *v.* Chicago, Kalamazoo & Saginaw Railroad Co. 638
Hubert *v.* Traeder 69

Ideal Manufacturing Co. *v.* Wayne Circuit Judge .. 92
Independent Order of Odd Fellows, Grand Lodge, *v.* Barker 701
In re Allen 712
——— Toepel 85
——— Tubbs 102
Ionia Circuit Judge, Clute *v.* 337

Jacobson, McCall Co. *v.* 455
Jewell *v.* Jewell's Estate 578
Johnson *v.* Detroit & Mackinac Railway Co. 287
———, Fletcher *v.* 51

PAGE
Kalkaska Circuit Judge, Pere Marquette Railroad Co. *v.* 436
Kaufman *v.* Leonard 104
Kellogg *v.* Frohlich 612
Kenney *v.* Apley 320
Kent Circuit Judge, Smith *v.* 463
———, Valley City Desk Co. *v.* 194
Kern *v.* Arbeiter Unterstuetzungs Verein 233
Klersy, Trombly *v.* 209, 311

Lafferty *v.* Lafferty 176
Laing *v.* Township of Forest 159
Lamb *v.* Lamb 166
Lamphere, Maney *v.* 429
Lasley *v.* Delano 602
Lavine, Massi *v.* 140
Lawson, Cooper *v.* 628
Lehmann, Nowack *v.* 474
Leihy, Mercer *v.* 447
Leonard, Kaufman *v.* 104
Lester *v.* Addison 232
Letts *v.* Trevallick 143
Lever *v.* Grant 273, 277
Lewis *v.* Board of Education of City of Detroit 306
Lichtenberg, Goldsmith *v.* 163
Line *v.* Spies 484
Lingle *v.* Owosso Sugar Co. 203
Little (C. H.) Co., People, *for Use of*, *v.* Grant 26
Liverpool & London & Globe Insurance Co., Wolverine Lumber Co. *v.* 435
Livingston Circuit Judge, Hopper *v.* 100
Log-Owners' Booming Co., Rickels *v.* 111
Longwell, Scott *v.* 12
Louisell *v.* Benzie Circuit Judge 40
Love *v.* Halladay 575
——— *v.* Ramsey 47
Lumber (F. & F.) Co. *v.* Township of Thompson 698

PAGE
McCall Co. *v.* Jacobson 455
McDonald *v.* Smith 211
———, Smith *v.* 225
McDonell *v.* Union Trust Co. 386
McKenna, Wisconsin & Michigan Railway Co. *v.* 43
McPhee, People *v.* 687
Maney *v.* Lamphere 429
Mannel *v.* Detroit, Mt. Clemens & Marine City Railway 106
Manzer *v.* Phillips 61
Marshall, Hall *v.* 123
Martin *v.* Farmers' Mutual Fire-Insurance Company of Calhoun County 148
Massi *v.* Lavine 140
Mercer *v.* Leihy 447
Minion, Coulter *v.* 200
Moebs (William D. C.) Co., Sloman *v.* 334
Montcalm Circuit Judge, Wells *v.* 544
Morrice *v.* Sutton 643
Mumford *v.* Starmont 188
Murphy *v.* Dalton 79

Napper *v.* Fitzpatrick 139
National Cash Register Co. *v.* Dehn 406
Norn, Sachs *v.* 357
Nowack *v.* Lehmann 474

O'Connor, Central Savings Bank *v.* 82
Odd Fellows, Grand Lodge, *v.* Barker 701
Oliver Chilled Plow Works *v.* Dolan 668
Owosso Sugar Co., Lingle *v.* 203

Pacifico, Voigt Brewery Co. *v.* 284
Page Woven Wire Fence Co. *v.* Pool 706
Palatine Insurance Co., Wolverine Lumber Co. *v.* 432
Palmer *v.* City of Port Huron 471
Parkinson *v.* Parkinson 530
Peck, People *v.* 680

PAGE
People *v.* McPhee 687
——— *v.* Peck 680
——— *v.* Sanders 442
——— *v.* Schneider 673
———, *for Use of* C. H. Little Co., *v.* Grant 26
———, ———Cook, *v.* Cole 312
Pere Marquette Railroad Co. *v.* Kalkaska Circuit Judge 436
———, Coffee *v.* 378
———, Village of Plymouth *v.* 347
Pheatt *v.* Reau 256
Phillips, Manzer *v.* 61
Place *v.* Place 509
Plymouth *v.* Pere Marquette Railroad Co. 347
Pontiac, Oxford & Northern Railroad Co., Stone *v.* .. 265
Pool, Page Woven Wire Fence Co. *v.* 706
Port Huron, Palmer *v.* 471
Power *v.* City of Detroit 30
Powers *v.* Briggs 664
Prybeski, Fryszka *v.* 461

Ramsey, Love *v.* 47
Randall *v.* Detroit & Northwestern Railway 477
Reau, Brigham *v.* 256
———, Pheatt *v.* 256
Recor *v.* St. Clair Circuit Judge 156
Reynolds *v.* Cavanagh 387
Rhoades *v.* Seidel 608
Rickels *v.* Log-Owners' Booming Co. 111
Robertson, Cresswell *v.* 416
Rogers *v.* Babcock 94
Royal Neighbors of America. Wilson *v.* 423

Sachs *v.* Norn 357
St. Clair Circuit Judge, Cady *v.* 618
———, Recor *v.* 156
Sanders, People *v.* 442
Schellenberg *v.* Frank 183

PAGE
Schlickum, Canal Construction Co. *v.* 246
Schneider, People *v.* 673
School District No. 9 of the Township of Hope, Hayward *v.* 539
Scott *v.* Longwell 12
Seidel, Rhoades *v.* 608
Shaller *v.* Detroit United Railway 171
Sheldon *v.* Carr 654
Sherman *v.* Sherman 180
Simons *v.* Haberkorn 130
Sisson (George D.) Lumber & Shingle Co. *v.* Haak 383
Sloman *v.* William D. C. Moebs Co. 334
Smith *v.* Kent Circuit Judge 463
——— *v.* McDonald 225
——— *v.* Smith 133
———, McDonald *v.* 211
Sowders' Estate, Finn *v.* 623
Spies, Line *v.* 484
Standard Oil Co., Stowell *v.* 18
Starmont, Mumford *v.* 188
Stone *v.* Pontiac, Oxford & Northern Railroad Co. 265
Stowell *v.* Standard Oil Co. 18
Strong *v.* Weber 512
Sutton, Village of Morrice *v.* 643
Sweet *v.* Western Union Telegraph Co. 322

Teagan Transportation Co. *v.* Board of Assessors of City of Detroit 1
Thompson Township, F. & F. Lumber Co. *v.* 698
Toepel, *In re* 85
Township of Forest, Laing *v.* 159
Township of Thompson, F. & F. Lumber Co. *v.* 698
Traeder, Hubert *v.* 69
Trevallick, Letts *v.* 143
Trombly *v.* Klersy 209, 311
———, Buhler *v.* 557, 569
Truax *v.* Bliss 153
Tubbs, *In re* 102

PAGE
Tuttle, Hammond *v.* 699

Union Trust Co., Garrison *v.* 392
———, McDonell *v.* 386

Valley City Desk Co. *v.* Kent Circuit Judge 194
Van Haaften *v.* Van Haaften 479
Village of Morrice *v.* Sutton 643
Village of Plymouth *v.* Pere Marquette Railroad Co. 347
Vincent *v.* Benzie Circuit Judge 90
Voigt Brewery Co. *v.* Pacifico 284

Walters *v.* Detroit United Railway 303
Washington Milling Co., Hathaway *v.* 708
Wayne Circuit Judge, Hallwood Cash Register Co. *v.* 198
———, Ideal Manufacturing Co. *v.* 92
Weaver *v.* Ann Arbor Railroad Co. 590
Weber *v.* Costigan 146
———, Strong *v.* 512
Wells *v.* Montcalm Circuit Judge 544
Western Union Telegraph Co., Sweet *v.* 322
Wetmore *v.* Dean 627
Wexford Circuit Judge, Cadillac State Bank *v.* 126
Whitehead *v.* Board of Education of Detroit 490
Wilcox *v.* Wilcox 365
Wilkinson *v.* Dunkley-Williams Co. 621
William D. C. Moebs Co., Sloman *v.* 334
Williams, Alderton *v.* 296
———, Bradley *v.* 230
Wilson *v.* Royal Neighbors of America 423
Wisconsin & Michigan Railway Co. *v.* McKenna ... 43
Wolverine Lumber Co. *v.* Liverpool & London & Globe Insurance Co. 435
——— *v.* Palatine Insurance Co. 432
Wolverine Steamship Co. *v.* Board of Assessors of City of Detroit 1
Woodruff *v.* Coffman 634

TABLE OF CASES CITED.

PAGE

Abel *v.* Kennedy, 3 G. Greene (Iowa), 47 517
Adams *v.* Brenan, 177 Ill. 194 310
Adler *v.* Whitbeck, 44 Ohio St. 539 677
Albring *v.* Ward, 137 Mich. 352 568
Aldine Press *v.* Estes, 75 Mich. 100 317
Aldrich *v.* Annin, 54 Mich. 230 178
——— *v.* Chubb, 35 Mich. 359 216
Allen *v.* Cadwell, 55 Mich. 8 291
Allison *v.* People, 45 Ill. 37 516
American Exchange Nat. Bank *v.* First Nat. Bank, 27 C. C. A. 277 457–459
American Express Co. *v.* Iowa, 196 U. S. 133 336
Amsby *v.* Dickhouse, 4 Cal. 102 517
Anderson Carriage Co. *v.* Pungs, 134 Mich. 474 301
Angell *v.* Cortwright, 111 Mich. 223 161
Ann Arbor Fruit & Vinegar Co. *v.* Railroad Co., 136 Mich. 599 .. 291
Annis *v.* People, 13 Mich. 511 340
Antoni *v.* Belknap, 102 Mass. 193 542
Appeal of Harris, 58 Conn. 492 457–459
Appeal of Merriman, 108 Mich. 454-462 ..... 516, 527
Arnold, Ex parte, 128 Mo. 261 553
Ashman *v.* Railroad Co., 90 Mich. 567 317
Ashton *v.* Railway Co., 78 Mich. 587 239
Atchison, etc., R. Co. *v.* Clark, 60 Kan. 826 7
Atlas Mining Co. *v.* Johnston, 23 Mich. 36 21
Attorney General, *ex rel.* Kies, *v.* Lowrey, 131 Mich. 639 493
———, State, *ex rel.*, *v.* Investment Co., 64 Ohio St. 283 691
Auditor General *v.* Calkins, 136 Mich. 1 473
——— *v.* Sparrow, 116 Mich. 574, 593 698

Babcock *v.* Chase, 92 Hun (N. Y.), 264 572
Bailey *v.* Beck, 21 Kan. 462 516
Baldwin *v.* City of Hastings, 83 Mich. 639 151
——— *v.* Telegraph Co., 45 N. Y. 744 333
Ballock *v.* State, 73 Md. 1 691
Baltimore, etc., R. Co. *v.* Voigt, 176 U. S. 498 ..... 599, 600, 602
Bank of the Metropolis *v.* New England Bank, 1 How. (U. S.) 234, 6 How. (U. S.) 212 ..... 402, 403
Barlow *v.* State, 2 Blackf. (Ind.) 114 517
Barnum *v.* Andrews, 106 Mich. 81 386
Barton *v.* Holmes, 16 Iowa, 252 515
Batterson *v.* Railway Co., 49 Mich. 184 119
Bay County *v.* Bullock, 51 Mich. 544 ..... 466, 470
Becker *v.* Benefit Society, 144 Pa. St. 232 245
——— *v.* Insurance Co., 48 Mich. 610 245
Bedell *v.* Railway, 131 Mich. 668 255

PAGE

Beecher *v.* City of Detroit, 92 Mich. 268 34
——— *v.* Common Council of Detroit, 114 Mich. 228 6
Belles *v.* Burr, 76 Mich. 1 492
Bennett *v.* Hickey, 110 Mich. 628 311
——— *v.* State, 3 Ind. 167 517
Bigelow *v.* Bigelow, 95 Me. 17 ..... 572, 573
——— Gregory, 73 Ill. 197 49
Billings *v.* Billings, 10 Cush. (Mass.) 178 475
Birchard *v.* Booth, 4 Wis. 67 516
Black *v.* Dawson, 82 Mich. 485 317
——— *v.* Singley, 91 Mich. 50 125
Board of State Tax Com'rs *v.* Board of Assessors of Grand Rapids, 124 Mich. 498 504
——— *v.* Quinn, 125 Mich. 128 ..... 248, 506
Bodkin *v.* Telegraph Co., 31 Fed. 134 333
Boehme *v.* City of Monroe, 106 Mich. 401 473
Bolton *v.* Railroad Co., 95 Mich. 202 119
Bork *v.* Martin, 132 N. Y. 280 607
Borough of New Brighton *v.* Presbyterian Church 96 Pa. St. 331 271
Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.), 83 517
Bowden *v.* Voorheis, 135 Mich. 648 68
Boyd *v.* Fire Ass'n, 116 Wis. 155 587
Boydan *v.* Haberstumpf, 129 Mich. 137 65
Bradley *v.* Railway Co., 94 Mich. 35 174
Bradt *v.* Rommel, 26 Minn. 505 517
Bragaw *v.* Supreme Lodge Knights of Honor, 128 N. C. 354 245
Brennan *v.* O'Brien, 121 Mich. 496 21
Brewster *v.* Thompson, 1 N. J. Law, 32 517
Briesenmeister *v.* Knights of Pythias, 81 Mich. 525 227
Briggs *v.* Milburn, 40 Mich. 512 216
Brisbin *v.* Cleary, 26 Minn. 107 553
Brooks *v.* Allen, 146 Mass. 201 462
Brown *v.* City of Grand Rapids, 83 Mich. 101 33
——— *v.* Napper, 125 Mich. 117 140
——— *v.* Nehmer, 128 Mich. 690 248
———, State, ex rel , *v.* Brown, 31 Wash. 405 135
Bryce *v.* Railway Co., 119 Iowa, 274 697
Buchan's Estate, *In re*, 100 Mich. 219 386
Buckley *v.* Railway Co., 18 Mich. 121 304
Bulen *v.* Granger, 58 Mich. 274 456
Bull *v.* Commonwealth, 14 Grat. (Va.) 613 517
Burlington *v.* Bumgardner, 42 Iowa, 673 678
Burns *v.* Martin, 45 Mich. 25 169
——— *v.* Paine, 8 Tex. 159 517
Bush *v.* Sprague, 51 Mich. 41 217
Butler *v.* White, 25 Minn. 432 178
Butt *v.* Tuthill, 10 Iowa, 585 517
Butterfield *v.* Seligman, 17 Mich 95 81
Buttles *v.* De Baun, 116 Wis. 326 587
Byrne *v.* Hume, 84 Mich. 185 537

Cahill *v.* Eastman, 18 Minn. 324 15
Cahn *v.* Telegraph Co., 46 Fed. 40 333
Calhoun *v.* Hays, 8 Watts & S (Pa.) 127 220
Calkins *v.* Bump, 120 Mich. 335 50

PAGE

Campau *v.* Campau, 19 Mich. 116 534
——— *v.* Dubois, 39 Mich. 274 263
Campbell *v.* Miller, 3 Mart. (La.) 623 517
——— *v.* Remaly, 112 Mich. 214 208
Carlisle *v.* Tuttle, 30 Ala. 613, ... 457, 459
Carpenter *v.* Carpenter, 119 Mich. 167 169
——— *v.* Judge of Superior Court of Grand Rapids, 126 Mich. 8 .. 197
——— *v.* Smith, 40 Mich. 639 541
——— *v.* Willey, 65 Vt. 168 518
Carr *v.* Leavitt, 54 Mich. 540 606
Carroll *v.* Bank, 30 W. Va. 518 404
Case of Clayton, 1 Merivale, 604 ..... 28, 29
Case of Hamilton, 51 Mich. 174 714
Castro *v.* Gill, 5 Cal. 40 517
Cattermole *v.* Ionia Circuit Judge, 136 Mich. 274 197
Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa, 153 38
Central Savings Bank *v.* O'Connor, 132 Mich. 578 85
Chadbourn *v.* Franklin, 5 Gray (Mass.), 312 517
Chafey *v.* Mathews, 104 Mich. 103 222
Challiss *v.* Baker, 12 Kan. 253 39
Chandler *v.* Barker, 2 Har. (Del.) 387 515
——— *v.* Chandler, 24 Mich. 176 134
Chapel *v.* Smith, 80 Mich. 100 118
Chapin *v.* Perrin, 46 Mich. 130 147
Chapman *v.* Commonwealth, 25 Grat. (Va.) 742 29
——— *v.* Telegraph Co., 90 Ky. 265 333
Chauvin *v.* Railway, 135 Mich. 85 255
Cheney *v.* Holgate, Brayt. (Vt.) 171 517
Chesapeake, etc., R. Co. *v.* Patton, 9 W. Va. 648 518
Chicago *v.* Banker, 112 Ill. App. 94 678
——— *v.* Collins, 175 Ill. 445 678
Chicago, etc., R. Co. *v.* Hough, 61 Mich. 507 349
——— *v.* Joliet, etc., R. Co., 105 Ill. 388 349
Child *v.* City of Jackson, 93 Mich. 503 386
Childs *v.* O'Donnell, 84 Mich. 533 666
Cicotte *v.* County of Wayne, 44 Mich. 173 239
Cincinnati Cooperage Co. *v.* Bate, 96 Ky. 356 49
Cire *v.* Rightor, 11 La. 140 517
City Council of Augusta *v.* Hudson, 94 Ga. 135 517
City of Burlington *v.* Bumgardner, 42 Iowa, 673 678
City of Chicago *v.* Banker, 112 Ill. App. 94 678
——— *v.* Collins, 175 Ill. 445 678
City of Colorado Springs *v.* Duff, 15 Colo. App. 437 516
City of Detroit *v.* Daly, 68 Mich. 509 34
——— *v.* Lothrop Estate Co., 136 Mich. 265 5
City of Grand Rapids *v.* Bennett, 106 Mich. 528 349
——— *v.* Railroad Co., 58 Mich. 641 349
City of Kalamazoo *v.* Francoise, 115 Mich. 554 473
City of Kansas City *v.* Ward, 134 Mo. 172 473
City of Kinsley *v.* Morse, 40 Kan. 588 516
City of Lexington *v.* McQuillan's Heirs, 9 Dana (Ky.), 513 9
City of Monroe *v.* Board of Sup'rs of Monroe Co., 137 Mich. 638 .. 308
City of Pekin *v.* Winkel, 77 Ill. 56 515
City of Pontiac *v.* Carter, 32 Mich. 164 271
City of Valparaiso *v.* Adams, 123 Ind. 250 272
City of Winston *v.* City of Salem, 131 N. C. 404 ..... 9, 11

PAGE

Clark *v.* Manchester, 64 N. H. 471 518
Clay *v.* City Council of Montgomery, 102 Ala. 297 518
Clayton's Case, 1 Merivale, 604 ..... 28, 29
Cleland *v.* Borough of Carlisle, 186 Pa. St. 110 516
Cleveland, etc., R. Co. *v.* Curran, 19 Ohio St. 1 600
Cluggage's Lessee *v.* Swan, 4 Bin. (Pa.) 150 517
Clum *v.* Smith, 5 Hill (N. Y.), 560 517
Cobb *v.* Knapp, 71 N. Y. 350 453
Cochran *v.* Street, 1 Wash. (Va.) 79 517
Cockrill *v.* Joyce, 62 Ark. 216 398
Cody *v.* City Nat. Bank, 55 Mich. 379 ..... 399, 404
Coit *v.* City of Grand Rapids, 115 Mich. 493 ..... 161, 653
Cole *v.* Cole, 5 Sneed (Miss.), 59 ..... 482, 483
Collar *v.* Collar, 86 Mich. 507 607
Collins *v.* Rea, 127 Mich. 273 623
Colorado Springs *v.* Duff, 15 Colo. App. 437 516
Commercial Bank *v.* Armstrong, 148 U. S. 50 400
Commercial Bank of Bay City *v.* Chatfield, 121 Mich. 641 21
Commissioners of Parks & Boulevards of Detroit *v.* Chicago, etc., R. Co., 91 Mich. 291 349
——— *v.* Michigan Central R. Co., 90 Mich. 385 349
Common Council of Detroit *v.* Board of Assessors of Detroit, 91 Mich. 78 11
Comstock *v.* City of Grand Rapids, 54 Mich. 641 33
Cone *v.* Dunham, 59 Conn. 145 (8 L. R. A. 647, and note) 587
Conklin *v.* Hill, 2 How. Prac. (N. Y.) 6 516
Conner *v.* Winton, 8 Ind. 315 517
Consolidated Ice Machine Co. *v.* Trenton Hygeian Ice Co., 57 Fed. 898 516
Converse *v.* Meyer, 14 Neb. 190 ..... 220, 221
Cook *v.* Bell, 18 Mich. 387 162
——— *v.* Castner, 9 Cush. (Mass.) 266 517
——— *v.* Woodley, 2 N. J. Eq. 209 587
Corning *v.* Woodin, 46 Mich. 44 155
Cortelyou *v.* McCarthy, 37 Neb. 742 516
County of Bay *v.* Bullock, 51 Mich. 544 ..... 466, 470
Coup *v.* Railway Co., 56 Mich. 111, 115 599
Cowperthwaite *v.* Jones, 2 Dall. (U. S.) 55 515
Craig *v.* Bradley, 26 Mich. 369 229
Crawford *v.* Linn County, 11 Or. 482 9-11
Cresinger *v.* Reed, 25 Mich. 450 228
Crippen *v.* Hope, 38 Mich. 344 133
Croasdale *v.* Tantum, 6 Houst. (Del.) 218 518
Cumming Township *v.* Shick, 94 Mich. 222 355
Cummins *v.* Crawford, 88 Ill. 312 517

Daeters *v.* Daeters (N. J. Ch.), 38 Atl 950 511
Dages *v.* Sanilac Circuit Judge, 122 Mich. 490 197
Dailey *v.* Accident Ass'n, 102 Mich. 289 356
——— *v.* King, 79 Mich. 568 229
Dana *v.* Tucker, 4 Johns. (N. Y.) 487 ..... 516, 517
Davies *v.* City of Saginaw, 87 Mich. 439, 449 33
Davis *v.* Township of Frankenlust, 118 Mich. 494 622
Dayton *v.* Fargo, 45 Mich. 153 162
Dean *v.* Mumford, 102 Mich. 510 537
Deming *v.* Foster, 42 N. H. 165 460

PAGE

De Neufville *v.* Railway Co., 81 Fed. 13, 26 C. C. A. 306 241
Deppe *v.* Railroad Co., 38 Iowa, 592 516
Derham *v.* Derham, 123 Mich. 451 490
Desmond *v.* Myers, 113 Mich. 437 607
Detroit *v.* Daly, 68 Mich. 509 34
——— *v.* Lothrop Estate Co., 136 Mich. 265 5
Detroit Citizens' St. Ry. *v.* Common Council of Detroit, 125 Mich. 694 8
Detroit Citizens' Street Ry. Co. *v.* Board of Public Works, 126 Mich. 554 110
Detroit City Ry. *v.* Mills, 85 Mich. 634 108
Detroit Com'rs of Parks & Boulevards *v.* Chicago, etc., R. Co., 91 Mich. 291 349
——— *v.* Michigan Central R. Co., 90 Mich. 385 349
Detroit Common Council *v.* Board of Assessors of Detroit, 91 Mich. 78 11
Detroit Transportation Co. *v.* Board of Assessors of Detroit, 91 Mich. 382 6
Devecmon *v.* Shaw, 69 Md. 199 573
Dickson *v.* Harris, 60 Iowa, 727 476
Dodge *v.* Carroll, 59 N. H. 237 ..... 516, 517
Dollard *v.* Roberts, 130 N. Y. 269 632
Donovan *v.* Bissell, 53 Mich. 464 510
Dorr *v.* Fenno, 12 Pick. (Mass.) 521 515
Doty *v.* Gillett, 43 Mich. 203 462
Downer *v.* Baxter, 30 Vt. 467 517
Drosdowski *v.* Order of Chosen Friends, 114 Mich. 180 ..... 457, 458
Duhon *v.* Landry, 15 La. Ann. 591 517
Dunn *v.* Hall, 8 Blackf. (Ind.) 32 ..... 516, 517
Dunton *v.* Dunton, 18 Vict. 114 573
Durgin *v.* Smith, 133 Mich. 331 50

Earle *v.* Angell, 157 Mass. 294 572
Eaton *v.* Walker, 76 Mich. 579 50
Edinger *v.* Heiser, 62 Mich. 598 606
Elam *v.* Commercial Bank, 86 Va. 92 518
Elliott *v.* Van Buren, 33 Mich. 52 642
Ellis *v.* Whitehead, 95 Mich. 105 ..... 486, 488, 489
Empson Packing Co. *v.* Vaughn, 27 Colo. 66 516
Equitable Loan & Security Co. *v.* Waring, 117 Ga. 599 691
Estate of Buchan, *In re*, 100 Mich. 219 386
Estate of Snyder, *In re*, Wilcox (Pa. Lack. Co.), 190 517
Etson *v.* Railway Co., 110 Mich. 494 ..... 174, 175
Evans *v.* Johnson, 39 W. Va. 299 370
Ex parte Arnold, 128 Mo. 261 553

Farmers' Mut. Fire-Ins. Co. *v.* Crampton, 43 Mich. 421 227
Farnam *v.* Brooks, 9 Pick. (Mass.) 242 587
Farnsworth, *In re*, 5 Biss. (U. S.) 223 398
Felt *v.* Evaporator Co., 52 Mich. 602 667
Fenet *v.* Wilson, 3 Hill (S. C.), 340 465
Ferris *v.* Assurance Co., 118 Mich. 485 425
——— *v.* Board of Education of Detroit, 122 Mich. 315 494
Filer *v.* Smith, 102 Mich. 99 64
Fire Insurance Ass'n *v.* Wickham, 141 U. S. 564 165
First Nat. Bank of Baltimore *v.* Gerke, 68 Md. 456 672

PAGE

First National Bank of Barnesville *v.* Telegraph Co., 30 Ohio St. 555 333
First Nat. Bank of Marquette *v.* Crowley, 24 Mich. 492 616
First Nat. Bank of Ovid *v.* Steel, 136 Mich. 588 521
First Nat. Bank of Sturgis *v.* Watkins, 21 Mich. 483 161
Fisher *v.* Transportation Co., 136 Mich. 218 54
Fiske *v.* People, *ex rel.* Raymond, 188 Ill. 206 310
Fitzpatrick *v.* Hoffman, 104 Mich. 228 82
Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350 ..... 349, 350
Flynn *v.* Third Nat. Bank, 122 Mich. 642 241
Folmsbee *v.* City of Amsterdam, 142 N. Y. 118 272
Forbes *v.* Howard, 4 R. I. 364 516
Fort Smith *v.* Ayers, 43 Ark. 82 677
Fountain *v.* Ware, 56 Ala. 558 220
Fowler *v.* Colton, 1 Pin. (Wis.) 331 515
Frankford, etc., R. Co. *v.* City of Philadelphia, 58 Pa. St. 119 676
French *v.* Ryan, 104 Mich. 625 222
Friedman *v.* Horning, 128 Mich. 606 248
Fuller *v.* City of Jackson, 82 Mich. 481 220
——— *v.* Swensberg, 106 Mich. 305 263
Fulliam *v.* City of Muscatine, 70 Iowa, 436 516

Gale *v.* Railroad Co., 53 How. Prac. (N. Y.) 385 517
Gartside Coal Co. *v.* Maxwell, 22 Fed. 197 50
Gemberling *v.* Lazarus, 100 Mich. 324 ..... 355, 386
Gibbons *v.* Hecox, 105 Mich. 509, 513 397
Gifford *v.* Roberts, 125 Mich. 408 464
Gill *v.* Middleton, 105 Mass. 477 ..... 610, 611
Glover *v.* Reid, 80 Mich. 232 537
Godfrey *v.* Soniat, 33 La. Ann. 915 517
Goodrich *v.* City of Detroit, 123 Mich. 559 ..... 34, 36
Gorham *v.* Gross, 125 Mass. 232 15
Gorman *v.* Newaygo Circuit Judge, 27 Mich. 138 81
Goulet *v.* Perry, 123 Mich. 264 387
Gow *v.* Lumber Co., 109 Mich. 45 50
Graham *v.* Alexander, 123 Mich. 168 476
——— *v.* Moffet, 119 Mich. 303 ..... 201, 202
Grand Rapids *v.* Bennett, 107 Mich. 528 349
——— *v.* Railroad Co., 58 Mich. 641 349
Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393 622
Grasser & Brand Brewing Co. *v.* Rogers, 112 Mich. 112 29
Green *v.* Brooks, 81 Cal. 328 572
——— *v.* Gill, 47 Mich. 86 386
Gregor *v.* Cady, 82 Me. 131 610
Griffin *v.* Wattles, 119 Mich. 346 199
Grinnell *v.* Phillips, 1 Mass. 530 515
Gristock *v.* Insurance Co., 87 Mich. 428 356
Grover *v.* Fox, 36 Mich. 461, 472 636
Guard *v.* Risk, 11 Ind. 156 516
Guggenheim *v.* Railway Co., 66 Mich. 150 381
Gumberg *v.* Treusch, 103 Mich. 554 221
Gurley *v.* Clarkson, 30 S. W. (Tex. Civ. App.) 360 517
Gwaltney *v.* Wheeler, 26 Ind. 415 607

Haddon *v.* Hemingway, 39 Mich. 617 537
Hagan *v.* Railroad Co., 86 Mich. 615 317

PAGE

Hahn *v.* Fredericks, 30 Mich. 223 ---- 616
Haight *v.* Turner, 21 Conn. 593 ---- 516
Haines *v.* Saviers, 93 Mich. 440 ---- 355, 386
Hale *v.* Equitable Aid Union, 168 Pa. St. 377 ---- 245
Haley *v.* Cusenbary, 30 S. W. (Tex. Civ. App.) 587 ---- 517
Hall Lumber Co. *v.* Gustin, 54 Mich. 624 ---- 145
Hallwood Cash Register Co. *v.* Millard, 127 Mich. 316 ---- 410
Hamer *v.* Sidway, 124 N. Y. 538 ---- 572
Hamilton *v.* Railroad Co., 36 Iowa, 31 ---- 516
——— *v.* Smith, 39 Mich. 231 ---- 221
——— *v.* Wilson, 61 Kan. 511 ---- 9
Hamilton's Case, 51 Mich. 174 ---- 714
Handley *v.* Leigh, 8 Tex. 129 ---- 516
Hannum *v.* Inhabitants of Belchertown, 19 Pick. (Mass.) 311–313 ---- 516
Hanson *v.* Roberdeau, Peake, N. P. 120 ---- 453
Harding *v.* Harding, 22 Md. 337 ---- 511
Harmon *v.* Metcalfe, 134 Mich. 643 ---- 147
Harris' Appeal, 58 Conn. 492 ---- 457, 459
Harrison *v.* Metz, 17 Mich. 377 ---- 711
Harrow Spring Co. *v.* Harrow Co., 90 Mich. 147 ---- 300
Hartford Steam Boiler Inspection & Ins. Co. *v.* Cartier, 89 Mich. 41 ---- 356
Harvey *v.* Jones, 3 Humph. (Tenn.) 157 ---- 515
Hatch *v.* Brown, 63 Me. 410 ---- 220
Haun *v.* Wilson, 28 Ind. 296 ---- 517
Hayward *v.* Gunn, 82 Ill. 385 ---- 587
Heath *v.* Conway, 1 Bibb. (Ky.) 398 ---- 515
Hebel *v.* Insurance Co., 33 Mich. 400 ---- 363
Hedges *v.* Hibbard, 46 Mich. 551 ---- 386
Heller *v.* Railway Co., 109 Mich. 53 ---- 596, 599
Helwig *v.* Lascowski, 82 Mich. 619 ---- 686
Henderson *v.* Stevenson, L. R. 2 H. L. Sc. App. 470 ---- 670
Henkel *v.* Welsh, 41 Mich. 664 ---- 100
Henshaw *v.* Foster, 9 Pick. (Mass.) 312, 320 ---- 553, 555
Hewitt *v.* Morley, 111 Mich. 187 ---- 317
Hibbard *v.* Telegraph Co., 33 Wis. 558 ---- 333
Hipes *v.* Cochran, 13 Ind. 175 ---- 457, 459
Hitchcock *v.* Pratt, 51 Mich. 263 ---- 185
Holden *v.* City of Alton, 179 Ill. 318 ---- 310
Holmes, People, *for Use of*, *v.* Sheehan, 118 Mich. 539 ---- 29
Hommel *v.* Devinney, 39 Mich. 522 ---- 291, 292
Hoover *v.* Town of Mapleton, 110 Iowa, 571 ---- 516
Hopper *v.* Livingston Probate Judge, 137 Mich. 124 ---- 101
Houk *v.* Allen, 11 L. R. A. 706, note ---- 516
Howard *v.* McCall, 21 Grat. (Va.) 205 ---- 517
Hubbard *v.* Garner, 115 Mich. 406 ---- 387
——— *v.* Long, 105 Mich. 442 ---- 217
Hudson *v.* McKale, 107 Mich. 22 ---- 208
Hughes *v.* Jordan, 118 Mich. 27 ---- 140
Hulet *v.* Barnett, 10 Ohio, 459 ---- 517
Hull *v.* Wayne Circuit Judge, 87 Mich. 497 ---- 103
Hunt *v.* Sackett, 31 Mich. 18 ---- 81
Hunter's Adm'rs *v.* Miller's Ex'rs, 45 Ky. 619 ---- 672
Hunton *v.* Hertz & Hosbach Co., 118 Mich. 475 ---- 478

PAGE

Hurt *v.* Salisbury, 55 Mo. 310 49
Hyde *v.* Shank, 77 Mich. 517 133

Illinois Cent. R. Co. *v.* Able, 59 Ill. 131 515
——— *v.* Beebe, 174 Ill. 13 600
——— *v.* Read, 37 Ill. 484 600
——— *v.* Souders, 79 Ill. App. 41 518
Indianapolis, etc., R. Co. *v.* Beaver, 41 Ind. 493 600
——— *v.* Horst, 93 U. S. 291 600
In re Buchan's Estate, 100 Mich. 219 386
——— Farnsworth, 5 Biss. (U. S.) 223 398
——— Merriman's Appeal, 108 Mich. 454-462 516
——— Silverthorn, 73 Mich. 644 714
——— Synder's Estate, Wilcox (Pa. Lack. Co.), 190 517
——— Voting Machine, 19 R. I. 729 554
International, etc., R. Co. *v.* Gordon, 72 Tex. 44 518
Irwin *v.* Schlief, 48 Mich. 237 ..... 355, 386
Ives *v.* Williams, 53 Mich. 636 119

Jacobs *v.* Dooley, 1 Idaho, 41 517
Janes *v.* Hoehn, 3 Ohio C. C. 433 518
Jewett *v.* Morris, 41 Mich. 689 91
Jobe's Adm'r *v.* Weaver, 77 Mo. App. 665 516
Johnson *v.* Insurance Co., 39 Mich. 33 82
——— *v.* Perry, 2 Humph. (Tenn.) 569 516
——— *v.* Railway Co., 46 Fed. 347 516
——— *v.* Reformers, 135 N. C. 385 245
——— *v.* Schultz, 74 Mich. 75 65
——— *v.* Southern Pacific Co., 196 U. S. 1 696
Juneau Bank *v.* McSpedon, 15 Wis. 629 220
Just *v.* Township of Wise, 47 Mich. 511 309

Kaiser *v.* Savings Bank, 56 Iowa, 108 49
Kalamazoo *v.* Francoise, 115 Mich. 554 473
Kalbitzer *v.* Goodhue, 52 W. Va. 435 245
Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90 586
Kansas City *v.* Ward, 134 Mo. 172 473
Kansas City Suburban Belt R. Co. *v.* Kansas City, St. Louis & Chicago R. Co., 118 Mo. 599 349
Kelley *v.* Guy, 116 Mich. 43 476
Kellogg *v.* Putnam, 11 Mich. 344 145
———, State, *ex rel.*, *v.* Mercantile Ass'n, 45 Kan. 351 690
Kelly *v.* Reynolds, 39 Mich. 464 537
——— *v.* Wayne Circuit Judge, 90 Mich. 264 145
Kepple *v.* City of Keokuk, 61 Iowa, 653 272
Kern *v.* Kern, 51 N. J. Eq. 582 483
Kern Brewing Co. *v.* Insurance Co., 127 Mich. 39 164
Kerr *v.* Kingsbury, 39 Mich. 150 542
Kies, Attorney General, *ex rel.*, *v.* Lowrey, 131 Mich. 639 493
Kimball *v.* Kimball, 16 Mich. 211, 219 586
Kinsey *v.* Kinsey, 37 Ala. 393 511
Kinsley *v.* Morse, 40 Kan. 588 516
Knapp *v.* Knapp, 95 Mich. 478 537
Kraatz *v.* Electric Light Co., 82 Mich. 457 239
Kray *v.* Muggli, 84 Minn. 90 118

PAGE

Kruse *v.* Humpert, 21 Ky. Law Rep. 985 49
Kunkel *v.* Hughes, 6 Pa. Dist. R. 356 518

Lacas *v.* Railway Co., 92 Mich. 412 317
Lachance *v.* Auditor General, 77 Mich. 563 ..... 88, 89
Ladd *v.* Wilson, 1 Cranch (U. S.), 305 516
La Fernier *v.* Soo River Lighter & Wrecking Co., 129 Mich. 596 .. 24
Lafler *v.* Fisher, 121 Mich. 60 68
Lafoon *v.* Shearin, 95 N. C. 391 517
Laird *v.* Coach, 112 Mich. 628 387
Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162 600
——— *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604 349
——— *v.* Perkins, 25 Mich. 329 599
Lamb *v.* Hinman, 46 Mich. 112 573
Lane *v.* Pere Marquette Boom Co., 62 Mich. 69 155
Lange *v.* Perley, 47 Mich. 355 426
Langrick *v.* Gospel, 48 Mich. 185 537
La Pontney *v.* Cartage Co., 116 Mich. 514 255
Larned *v.* Briscoe, 62 Mich. 393 272
Larzelere *v.* Kirchgessner, 73 Mich. 276 ..... 65, 68
Laubach *v.* O'Meara, 107 Mich. 29 248
Laundry License Case, 22 Fed. 703 ..... 676, 677
Lawson *v.* Railway Co., 64 Wis. 447 600
Lechleiter *v.* Broehl, 17 Bradw. (Ill. App.) 490 517
Lee *v.* Clute, 10 Nev. 149 516
Leeson *v.* Anderson, 99 Mich. 247 165
Lefler *v.* Telegraph Co., 131 N. C. 355 331
Leighton *v.* Sargent, 31 N. H. 119 518
Leisy *v.* Hardin, 135 U. S. 100 336
Lexington *v.* McQuillan's Heirs, 9 Dana (Ky.), 513 9
Libbey *v.* Tolford, 48 Me. 316 610
Lindauer *v.* Teeter, 41 N. J. Law, 255 517
Lindell *v.* Rokes, 60 Mo. 249 573
Lindsey *v.* Leighton, 150 Mass. 285 632
Lingham *v.* Eggleston, 27 Mich. 324 616
Lingle *v.* Owosso Sugar Co., 139 Mich. 203 363
Little *v.* Macadaras, 29 Mo. App. 332 611
Locke *v.* Wayne Circuit Judge, 62 Mich. 408 89
Loomis *v.* Rogers Township Board, 53 Mich. 135 309
Losee *v.* Buchanan, 51 N. Y. 470 15
——— *v.* Clute, 51 N. Y. 494 24
Louden *v.* City of East Saginaw, 41 Mich. 18 161
Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126 601
Lovell *v.* Willard, 28 Mich. 346 476
Loverin *v.* McLaughlin, 161 Ill. 417 49
Lucker *v.* Liske, 111 Mich. 686 64
Ludwig *v.* Stewart, 32 Mich. 27 711
Luebe *v.* Thorpe, 94 Mich. 271 21
Luft *v.* Lingane, 17 R. I. 420 ..... 516, 518
Lyng *v.* Michigan, 135 U. S. 161 336

McClane's Adm'x *v.* Shepherd's Exec., 21 N. J. Eq. 76 587
McConnell *v.* Denham, 72 Iowa, 494 178
McCormick *v.* City of Monroe, 64 Mo. App. 197 517
McCormick Harvesting Machine Co. *v.* Cusack, 116 Mich. 647 ..... 414, 415

PAGE
McCormick Harvesting Machine Co. *v.* Waldo, 128 Mich. 135 .. 59
McCray *v.* Stewart, 16 Ind. 377 517
McCreery *v.* Green, 38 Mich. 172 ..... 155, 301
McDonald *v.* Ortman, 88 Mich. 645 317
——— *v.* Smith, 139 Mich. 211 226
MacDonald *v.* U. S., 63 Fed. 426 691
McDonnell *v.* Stage Co., 120 Cal. 476 516
McGar *v.* Borough of Bristol, 71 Conn. 652 272
McGinley *v.* Trust Co., 168 Mo. 257 632
McGinnis *v.* Washington Hall Ass'n, 12 Grat. (Va.) 602 .... 457, 458
Mackay *v.* City and County of San Francisco, 113 Cal. 392 38
Mackin *v.* Refrigerator Co., 100 Mich. 276 711
McKenzie *v.* Railroad Co., 137 Mich. 112 599
McKisson *v.* Davenport, 83 Mich. 211 711
McMillan *v.* Railroad Co., 16 Mich. 102 ..... 304, 305
McNamara *v.* Dratt, 40 Iowa, 413 516
Macomb *v.* Wilkinson, 83 Mich. 486 476
Macumber *v.* Booming Co., 52 Mich. 195 119
Mahoney *v.* Railway Co., 110 Cal. 471 255
Mann *v.* Railroad Co., 135 Mich. 210 599
——— *v.* Tyler, 56 Mich. 564 627
Manning *v.* Gasharie, 27 Ind. 399 ..... 457, 459
Manor *v.* Railway Co., 118 Mich. 1 255
Marshall *v.* Welwood, 38 N. J. Law, 339 15
Marshall & Bruce Co. *v.* City of Nashville, 109 Tenn. 495 310
Martin *v.* Ehrenfels, 24 Ill. 187 516
——— *v.* Roe, 7 El. & Bl. 237 542
Marvin *v.* Yates, 26 Wash. 50 518
Marvin Safe Co. *v.* Emanuel, 21 Abb. N. C. (N. Y.) 181 412
Mason *v.* Howes, 122 Mich. 329 388
——— *v.* Russell's Heirs, 1 Tex. 721 517
Mast (P. P.) & Co. *v.* Easton, 33 Minn. 161 586
Mathewson *v.* Hoffman, 77 Mich. 420 118
Matter of St. Joseph's Asylum, 69 N. Y. 353 37
Mattingly *v.* City of Plymouth, 100 Ind. 545 272
Maxted *v.* Fowler, 94 Mich. 106 ..... 201, 442
Maynards *v.* Cornwell, 3 Mich. 311 363
Mayor, etc., of Alexandria *v.* Patten, 4 Cranch (U. S.), 317 .. 28
Melzer *v.* Car Co., 76 Mich. 94 711
Merchants', etc., Bank *v.* Stone, 38 Mich. 779 50
Merchants' Nat. Bank *v.* Greenwood, 16 Mont. 395 179
Merkle *v.* Township of Bennington, 68 Mich. 142 302
Merrill *v.* Newton, 99 Mich. 229 386
Merriman's Appeal, 108 Mich. 454–462 ..... 516, 527
Merton *v.* O'Brien, 117 Wis. 437 587
Mertz *v.* Railway, 125 Mich. 11 255
Messenger *v.* Fourth Nat. Bank, 48 How. Prac. (N. Y.) 542 517
Michie *v.* Ellair, 54 Mich. 518 291
Michigan Mut. Fire-Ins. Co. *v.* Wayne Circuit Judge, 112 Mich. 270 ..... 158, 197
Michigan Savings Bank *v.* City of Detroit, 107 Mich. 246 161
Michigan Southern, etc., R. Co. *v.* McDonough, 21 Mich. 165, 193 .. 599
Millard *v.* Lenawee Circuit Judge, 107 Mich. 134 364
Miller *v.* Voorheis, 115 Mich. 356 201
Millikin *v.* Shapleigh, 36 Mo. 596 404
Monaghan *v.* Insurance Co., 53 Mich. 238, 245 683

PAGE

Monroe *v.* Board of Sup'rs of Monroe Co., 137 Mich. 638 308
Montgomery St. Ry. *v.* Mason, 133 Ala. 508 518
Moon *v.* McKinstry, 107 Mich. 668 201
Mooney *v.* Davis, 75 Mich. 188 224
Moore *v.* Crawford, 130 U. S. 122 607
——— *v.* Railroad Co., 24 Abb. New Cas. (N. Y.) 77 517
——— *v.* Railway Co., 100 Mo. App. 665 516
Morgan *v.* Botsford, 82 Mich. 153 386
Morman *v.* Harrington, 118 Mich. 623 201
Morrison *v.* Insurance Co., 59 Wis. 162 ..... 220, 221
Mortlock *v.* Williams, 76 Mich. 568 165
Moses *v.* Cromwell, 78 Va. 671 517
——— *v.* Railroad Co., 23 N. Y. Supp. 23 ..... 516, 518
Muench *v.* Valley Nat. Bank, 11 Mo. App. 144 398
Munch *v.* Shabel, 37 Mich. 166 145
Mundy *v.* Foster, 31 Mich. 313 370
Murphy *v.* Dobben, 137 Mich. 565 161
——— *v.* McGraw, 74 Mich. 318 82
——— *v.* Murphy, 1 S. Dak. 316 516
Myers *v.* Building Ass'n, 117 Mich. 389 222

National Cash Register Co. *v.* Blumenthal, 85 Mich. 464 ..... 409, 410
Necker *v.* Harvey, 49 Mich. 517 24
Neely *v.* State, 60 Ark. 66 ..... 453, 454
New Brighton *v.* Presbyterian Church, 96 Pa. St. 331 271
New York, etc., R. Co. *v.* Blumenthal, 160 Ill. 40 600
Niccolls *v.* Foster, 89 Ill. 386 517
Nicholson *v.* City of Detroit, 129 Mich. 246 ..... 492, 494
Northern Cent. R. Co. *v.* Canton Co., 30 Md. 347 542
Nowlin *v.* Snow, 40 Mich. 699 ..... 201, 216
Nugent *v.* Teachout, 67 Mich. 571 82

O'Barr *v.* Alexander, 37 Ga. 195 517
O'Brien *v.* Evans, 107 Mich. 625 387
O'Neill *v.* James, 138 Mich. 567 24
Opinion of the Judges, 7 Me. 495 553
Opinion of the Justices to the House of Representatives, 178 Mass. 605 555
Opp *v.* Wack, 52 Ark. 288 370
Orange Belt R. Co. *v.* Craver, 32 Fla. 28 516
Osborn *v.* Potter, 101 Mich. 300 542
Oswego Starch Factory *v.* Dolloway, 21 N. Y. 449 7
Otsego Lake Township *v.* Kirsten, 72 Mich. 1, 6 683
Owen *v.* Christensen, 106 Iowa, 394 516
Owens *v.* McNally, 113 Cal. 444 568

Page Woven Wire Fence Co. *v.* Pool, 129 Mich. 57, 133 Mich. 323 706
Palmer *v.* Insurance Co., 54 Conn. 488 356
——— *v.* People, 138 Ill. 356 516
Parker *v.* Railway Co., L. R. 2 C. P. D. 423 670
Parshall *v.* Railway Co., 35 Fed. 649 516
Patterson *v.* Stewart, 38 Mich. 402 537
Pekin *v.* Winkel, 77 Ill. 56 515
Peninsula Iron & Lumber Co. *v.* Township of Crystal Falls, 60 Mich. 510 33

PAGE
Peninsular Railway Co. *v.* Howard, 20 Mich. 25 151
Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126 15
People *v.* Aplin, 86 Mich. 393 ..... 20, 152
——— *v.* Barker, 60 Mich. 277 152
——— *v.* Cicott, 16 Mich. 283, 297 556
——— *v.* Elliott, 74 Mich. 264 691
——— *v.* Evans, 72 Mich. 387 340
——— *v.* Hawkins, 106 Mich. 484 445
——— *v.* Henry, 129 Mich. 100 686
——— *v.* Hux, 68 Mich. 477 627
——— *v.* Jones, 24 Mich. 215 340
——— *v.* Keefer, 97 Mich. 15, 19 683
——— *v.* Lonsdale, 122 Mich. 388 686
——— *v.* Peckens, 153 N. Y. 593 222
——— *v.* Railway Co., 92 Mich. 522 108
——— *v.* Rush, 113 Mich. 539 21
——— *v.* Smith, 107 Mich. 584 713
———, *for Use of* Holmes, *v.* Sheehan, 118 Mich. 539 29
People's Savings Bank *v.* Building Co., 8 Colo. App. 354 241
Peoria & Pekin Union R. Co. *v.* Peoria & Farmington R. Co., 105 Ill. 110 349
Perkins *v.* Perkins, 12 Mich. 456 134
Persinger *v.* Jubb, 52 Mich. 304 538
Peter *v.* Thickstun, 51 Mich. 589 165
Peters *v.* Youngs, 122 Mich. 484 140
Peterson *v.* Fowler, 76 Mich. 258 239
Petley *v.* Wayne Circuit Judge, 124 Mich. 14 196
Petrie *v.* Torrent, 88 Mich. 43 606
Phelps *v.* Abbott, 114 Mich. 88 476
Phillips *v.* Stewart, 69 Mo. 149 518
——— *v.* Town of Scales Mound, 195 Ill. 353 518
Phippen *v.* Morehouse, 50 Mich. 537 82
Picard *v.* McCormick, 11 Mich. 68 201
Pingree *v.* Auditor General, 120 Mich. 95 8
——— *v.* Gas. Co., 107 Mich. 156 156
Pixley *v.* Clark, 35 N. Y. 520 17
Pleasants *v.* Heard, 15 Ark. 403 518
Plumer *v.* Abbey, 39 Mich. 167 386
Pokrefky *v.* Firemen's Fund Ass'n, 121 Mich. 456 245
Polhemus *v.* Ann Arbor Savings Bank, 27 Mich. 44 220
Ponca *v.* Crawford, 23 Neb. 662 515
Pontiac *v.* Carter, 32 Mich. 164 271
Poppe *v.* Poppe, 114 Mich. 649 143
Postmaster General *v.* Furber, 4 Mason (U. S.), 335 28
Powell *v.* Powell, 27 Miss. 783 482
Powers *v.* City of Grand Rapids, 98 Mich. 393 34
P. P. Mast & Co. *v.* Easton, 33 Minn. 161 586
Pratte *v.* Coffman, 33 Mo. 71 517
Prentis *v.* Bates, 88 Mich. 567 667
——— *v.* ———, 93 Mich. 234 344

Radley *v.* Seider, 99 Mich. 431 66
Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357 ..... 599, 600, 602
Randall *v.* Grover, 1 N. J. Law, 151 517
Rathbone *v.* Sanders, 9 Ind. 217 404

PAGE
Rawson *v.* McElvaine, 49 Mich. 194 627
Raymond *v.* Proprietors of Crown & Eagle Mills, 2 Metc. (Mass.) 319 453
——— *v.* White, 119 Mich. 443 299
Reed *v.* Thompson, 88 Ill. 245 517
Reg. *v.* Foulkes, L. R. 2 C. C. R. 150 597
——— *v.* Harris, 10 Cox, C. C. 352 691
——— *v.* Reason, 23 L. J. Rep. (N. S.) part 3, p. 11 597
Rew *v.* Barker, 2 Cow. (N. Y.), 408 147
Ripley *v.* Case, 78 Mich. 126 82
——— *v.* Seligman, 88 Mich. 177 293
Ritchie *v.* Richards, 14 Utah, 345 553
——— *v.* Stenius, 73 Mich. 563 486
Robbins *v.* Windover, 2 Tyler (Vt.), 11 518
Robinson *v.* Fair, 128 U. S. 53 ..... 535, 537
——— *v.* Haug, 71 Mich. 38 679
——— *v.* Hook, 4 Mason (U. S.), 152 587
Robson *v.* Dayton, 111 Mich. 440 387
Roby Lumber Co. *v.* Gray, 73 Mich. 356 133
Rosecrants *v.* Shoemaker, 60 Mich. 4 68
Rouse *v.* Railway Co., 128 Mich. 149, 135 Mich. 545, 547 255
Rowe *v.* Canney, 139 Mass. 41 517
Rumford Chemical Works *v.* Finnie, 2 Flip. (U. S.) 459 518
——— *v.* Ray, 19 R. I. 456 39
Rumsey *v.* Settle's Estate, 120 Mich. 372 589
Runge, State, *ex rel.*, *v.* Anderson, 100 Wis. 523, 531 ..... 552, 556
Russel *v.* Sweezey, 22 Mich. 235 ..... 291, 292
Russell *v.* Railway Co., 157 Ind. 305 ..... 599, 600-602
Russellville *v.* White, 41 Ark. 485 677
Rutland *v.* Hathorn, 36 Ga. 380 517
Rylands *v.* Fletcher, L. R. 1 Ex. 265, L. R. 3 H. L. 330 15

St. Clair *v.* Railway Co., 29 Mo. App. 76 518
St. Johnsbury *v.* Thompson, 59 Vt. 300 677
St. Joseph's Asylum, Matter of, 69 N. Y. 353 37
St. Martin *v.* Desnoyer, 1 Minn. 156 ..... 516, 518
Sands *v.* Davis, 40 Mich. 14 263
Sanitary Dist. of Chicago *v.* Cullerton, 147 Ill. 385 516
Sawyer *v.* Railroad Co., 37 Mo. 240 517
Scheel *v.* City of Detroit, 130 Mich. 51 374
Schneider *v.* City of Detroit, 135 Mich. 570 319
Schoepper *v.* Chemical Co., 113 Mich. 582 ..... 21, 24
Scholtz *v.* Smith, 119 Mich. 634 248
Schoolfield *v.* Brunton, 20 Colo. 139 516
Schroeder *v.* Car Co., 56 Mich. 132 711
Schwamb Lumber Co. *v.* Schaar, 94 Ill. App. 544 518
Scott *v.* Donald, 165 U. S. 58 336
Seager *v.* Cooley, 44 Mich. 14 291
Seymour *v.* Farquhar, 93 Ala. 292 677
Shepherd *v.* Inhabitants of Camden, 82 Me. 535 510
——— *v.* Shepherd's Estate, 108 Mich. 82 587
Shippy *v.* Village of Au Sable, 85 Mich. 280 317
Shrock *v.* Shrock, 67 Ky. 682 511
Silverthorn, *In re*, 73 Mich. 644 714
Simonds *v.* Cash, 136 Mich. 508 201
Simons *v.* Paper Co., 77 Mich. 185 456

PAGE
Simson *v.* Ingham, 2 Barn. & C. 65 ... 28
Sing Cheong Co. *v.* Yung Wing, 59 Conn. 535 ... 457, 458
Skinn *v.* Reutter, 135 Mich. 57 ... 25
Skinner *v.* Lucas, 68 Mich. 424, 434 ... 464
Slais *v.* Slais, 9 Mo. App. 97 ... 483
Smedley *v.* Soule, 125 Mich. 192 ... 490
Smith *v.* Commissioners, 50 Ohio St. 628 ... 271
——— *v.* Culbertson, 9 Rich. Law (S. C.), 106 ... 517
——— *v.* Jones, 15 Mich. 281 ... 178
——— *v.* Land and House Property Corp., L. R. 28 Ch. Div. 15 ... 232
——— *v.* McDonald, 139 Mich. 225 ... 512
——— *v.* Runnells, 94 Mich. 617 ... 170
———, State, *ex rel.*, *v.* Anderson, 26 Fla. 240 ... 553
Snyder's Estate, *In re*, Wilcox (Pa. Lack. Co.), 190 ... 517
Stackable *v.* Stackable's Estate, 65 Mich. 515 ... 626
Stahelin *v.* Sowle, 87 Mich. 134 ... 456
Stallman *v.* Kimberly, 53 Hun (N. Y.), 531, 121 N. Y. 393 ... 105
Stambaugh *v.* Snoblin, 32 Mich. 296 ... 711
Standard Life & Accident Ins. Co. *v.* Board of Assessors of Detroit, 95 Mich. 466 ... 7
Stanley *v.* Stanley, 32 Wash. 489 ... 515
——— *v.* Sutherland, 54 Ind. 339 ... 517
Stanton *v.* Hitchcock, 64 Mich. 316 ... 125
Starling *v.* Royal Templars, 108 Mich. 440 ... 245
State *v.* Freeman, 5 Conn. 348 ... 516
——— *v.* Millican, 15 La. Ann. 557 ... 517
——— *v.* Moren, 48 Minn. 555 ... 691
——— *v.* Mumford, 73 Mo. 647 ... 691
——— *v.* Runyon, 41 N. J. Law, 98 ... 9
——— *v.* Shaw, 9 S. C. 94, 138 ... 552, 554
———, *ex rel.* Attorney General, *v.* Investment Co., 64 Ohio St. 283 ... 691
———, ——— Brown, *v* Brown, 31 Wash. 405 ... 135
———, ——— Haughey, *v.* Ryan, 182 Mo. 349 ... 89
———, ——— Kellogg, *v.* Mercantile Ass'n, 45 Kan. 351 ... 690
———, ——— Runge, *v.* Anderson, 100 Wis. 523, 531 ... 552, 556
———, ——— Smith, *v.* Anderson, 26 Fla. 240 ... 553
State Railroad Tax Cases, 92 U. S. 575 ... 39
State Savings Bank *v.* Buhl, 129 Mich. 193 ... 156
Steel *v.* Clinton Circuit Judge, 133 Mich. 695 ... 199
Steele *v.* Thompson, 42 Mich. 594 ... 68
Steele's Heirs *v.* Logan, 3 A. K. Marsh. (Ky.) 394 ... 517
Sterling *v.* City of Detroit, 134 Mich. 22 ... 374
Sterner *v.* Haas, 108 Mich. 488 ... 280
Stirling *v.* Heintzman, 42 Mich. 449 ... 286
Stock *v.* Township of Jefferson, 114 Mich. 357 ... 622
Stone *v.* Covell, 29 Mich. 359 ... 302
——— *v.* Mississippi, 101 U. S. 814 ... 690
Stoney Creek Woolen Co. *v.* Smalley, 111 Mich. 321 ... 216
Strauss *v.* Mutual Reserve Fund Life Ass'n, 126 N. C. 971, 128 N. C. 465 ... 245
Strudgeon *v.* Village of Sand Beach, 107 Mich. 500 ... 642
Studley *v.* Hall, 22 Me. 198 ... 518
Stull *v.* Stull, 197 Pa. St. 243 ... 516
Styles *v.* Village of Decatur, 131 Mich. 443 ... 641
Sudworth *v.* Marton, 137 Mich. 575 ... 220

PAGE
Sullens *v.* Railway Co., 74 Iowa, 659 516
Sullings *v.* Shakespeare, 46 Mich. 408 152
Supreme Lodge Knights of Honor *v.* Nairn, 60 Mich. 44 244
Sutton *v.* Van Akin, 51 Mich. 465 216
Sword *v.* Keith, 31 Mich. 247 370

Talbot Paving Co. *v.* Gorman, 103 Mich. 403 374
Talbott *v.* Stemmons' Ex'r, 89 Ky. 222 573
Tanner *v.* Merrill, 108 Mich. 58 164
Taylor *v.* Everett, 2 How. Prac. (N. Y.) 23 517
——— *v.* Giger, Hardin (Ky.), 595 517
——— *v.* McConnell, 53 Mich. 587 623
Temple *v.* Mead, 4 Vt. 535 554
Thomas *v.* Dansby, 74 Mich. 398 65
Thompson *v.* Marley, 102 Mich. 476 ..... 663, 664
——— *v.* Richards, 14 Mich. 172 219
Tillotson *v.* Cheetham, 3 Johns. (N. Y.), 95 147
——— *v.* Webber, 96 Mich. 144, 154 698
Tinkle *v.* Dunivant, 84 Tenn. 503 515
Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80 600
Totten *v.* Burhans, 91 Mich. 495 216
Towl *v.* Bradley, 108 Mich. 409 ..... 20, 683
Town of Russellville *v.* White, 41 Ark. 485 677
Township of Cumming *v.* Shick, 94 Mich. 232 355
Township of Otsego Lake *v.* Kirsten, 72 Mich. 1, 6 683
Trevelyan's Adm'r *v.* Lofft, 83 Va. 146 ..... 457, 458
Trowbridge *v.* City of Detroit, 99 Mich. 443 36
Trust Co. *v.* Floyd, 47 Ohio St. 525 49
Tucker *v.* Town Council of South Kingstown, 5 R. I. 558 518
Tunison *v.* Weadock, 130 Mich. 141 255
Turner *v.* Ottawa Circuit Judge, 123 Mich. 617 197
——— *v.* Water Co., 25 Cal. 397 516

Union Nat. Bank of Chicago *v.* Muskegon Circuit Judge, 117 Mich. 678 364
U. S. *v.* Olney, Deady (U. S.), 461 691
——— *v.* Wardwell, 5 Mason (U. S.), 82 29
Union Ben. Society *v.* Martin, 113 Ky. 25 245
Union Mutual Ass'n *v.* Montgomery, 70 Mich. 587 244

Valparaiso *v.* Adams, 123 Ind. 250 272
Van Middlesworth *v.* Van Middlesworth, 32 Mich. 183 386
Vance *v.* W. A. Vandercook Co., 170 U. S. 438 ..... 336, 337
Van Ness *v.* Pacard, 2 Pet. (U. S.) 137 542
Vickrey *v.* State Savings Ass'n, 21 Fed. 773 403
Village of Ponca *v.* Crawford, 23 Neb. 662 515
Village of St. Johnsbury *v.* Thompson, 59 Vt. 300 677
Vining *v.* Millar, 116 Mich. 144 208
Voigt *v.* City of Detroit, 123 Mich. 547 34
Voting Machine, *In re*, 19 R. I. 729 554

Wagner *v.* Gladwin Circuit Judge, 131 Mich. 129 309
Wales *v.* Lyon, 2 Mich. 276 239
Walker *v.* Casgrain, 101 Mich. 604 201
——— *v.* City of Detroit, 136 Mich. 6 473
——— *v.* Douglas, 70 Ill. 448 672

PAGE

Walker *v.* Kennison, 34 N. H. 257 ... 518
Wall *v.* Trumbull, 16 Mich. 228 ... 89
Wallace *v.* Stone, 107 Mich. 190 ... 400
Walling *v.* Michigan, 116 U. S. 446 ... 337
Walton *v.* Oliver, 49 Kan. 107 ... 49
Ward *v.* Blackwood, 48 Ark. 396 ... 518
Warner *v.* Warner, 54 Mich. 494 ... 511
Watkins *v.* Green, 101 Mich. 493 ... 263
Watson *v.* Kent Circuit Judge, 125 Mich. 182 ... 102
——— *v.* Reed, 15 Wash. 440 ... 515
Wattles *v.* Wayne Circuit Judge, 117 Mich. 662 ... 364
Webber *v.* Hayes, 117 Mich. 256 ... 155
Webster *v.* Bailey, 31 Mich. 36 ... 201
——— *v.* Symes, 109 Mich. 1 ... 24
Weiser *v.* Welch, 112 Mich. 134 ... 66
Welch *v.* Whelpley, 62 Mich. 15 ... 572, 573
Wertheimer *v.* Saunders, 95 Wis. 573 ... 611
Wertin *v.* Crocker, 47 Mich. 642 ... 355, 386
Wesleyan Seminary *v.* Fisher, 4 Mich. 515 ... 299
Western Electric Co. *v.* Hart, 103 Mich. 482 ... 229
Western Transportation Co. *v.* Scheu, 19 N. Y. 408 ... 7
Western Union Tel. Co. *v.* Barefoot, 97 Tex. 159 ... 332
——— *v.* Cooper, 71 Tex. 507 ... 332
——— *v.* Elliott, 7 Tex. Civ. App. 482 ... 331
——— *v.* Graham, 1 Colo. 230 ... 333
——— *v.* Houghton, 82 Tex. 561 ... 331
——— *v.* Mitchell, 91 Tex. 454 ... 332
——— *v.* State, 146 Ind. 54 ... 39
——— *v.* ———, 64 N. H. 265 ... 37
——— *v.* Young, 77 Tex. 245 ... 330, 331
Wheeler *v.* Baker, 132 Mich. 507 ... 164
——— *v.* Order of Iron Hall, 110 Mich. 437 ... 245
Wheelock *v.* Brinckerhoff, 13 Johns. (N. Y.) 481 ... 464
White *v.* Solomon, 164 Mass. 516 ... 411
——— *v.* White, 5 Rawle (Pa.), 61 ... 517
Wickes *v.* Pulfrey, 131 Mich. 407 ... 387
Wilkin *v.* Keith, 121 Mich. 67 ... 140
Willcox *v.* Hines, 100 Tenn. 538 ... 610
Williams *v.* City of Saginaw, 51 Mich. 120 ... 33
——— *v.* Montgomery, 60 N. Y. 648 ... 517
——— *v.* Railroad Co., 133 Mich. 448 ... 462
——— *v.* Robb, 104 Mich. 242 ... 374
——— *v.* Stein, 38 Ind. 89 ... 553
——— *v.* Viselich, 121 Cal. 314 ... 473
Willing *v.* Swasey, 1 Browne (Pa.), 123 ... 517
Wilson *v.* Berryman, 5 Cal. 44 ... 516
——— *v.* Railroad Co., 129 Fed. 774, 783 ... 599
Winnipiseogee Lake Cotton & Woolen Manfg. Co. *v.* Gilford, 64 N. H. 514 ... 38
Winston *v.* City of Salem, 131 N. C. 404 ... 9, 11
Winters *v.* De Turk, 7 L. R. A. 658 ... 370
Wist *v.* Grand Lodge A. O. U. W., 22 Or. 271 ... 244, 245
Wixom *v.* Bixby, 127 Mich. 479–486 ... 516, 527
Wolford *v.* Powers, 85 Ind. 294 ... 572
Wolverine Lumber Co. *v.* Insurance Co., 139 Mich. 432 ... 435
Wolverton *v.* McCabe, 81 Mich. 265 ... 374

PAGE

Wood *v.* Boylston Nat. Bank, 129 Mass. 358 403
——— *v.* Rice, 24 Mich. 423 119
——— *v.* Wells, 103 Mich. 323 222
Wooden *v.* Shotwell, 23 N. J. Law, 465 691
Wright *v.* Wilson, 17 Mich. 199 170
——— *v.* Wright, 99 Mich. 170 568
Wyman *v.* Colorado Nat. Bank, 5 Colo. 30 404

Yaner *v.* People, 34 Mich. 286 340
York *v.* Ingham Circuit Judge, 57 Mich. 421 91
Young *v.* Kelsey, 46 Mich. 414 627
Youngs *v.* Adams, 113 Mich. 199 ..... 486, 489

LAWS CITED AND CONSTRUED.

CONSTITUTION OF UNITED STATES.

	PAGE
Art. 1, § 10	245
14th Amend.	245

CONSTITUTION OF MICHIGAN (1835).

	PAGE
Art. ii. § 2	551

CONSTITUTION OF MICHIGAN (1850).

	PAGE
Art. iv. § 11	551
Art. iv. § 43	245
Art. vi. § 12	464
Art. vi. §§ 26, 32	679
Art. vii. § 2	549, 551
Art. x. § 2	467
Art. xiv. § 11	7

COMPILED LAWS OF 1857.

	PAGE
Vol. 1, chap. 58	241

HOWELL'S STATUTES.

	PAGE		PAGE
Vol. 1, chap. 164	242	Vol. 3, chap. 226, § 2	536, 537
——— ——— § 1, subd. 3	243	——— ——— §§ 5, 18	536
——— ——— § 4	244		

COMPILED LAWS OF 1897.

	PAGE		PAGE
§§ 221	464	§§ 9425	177
425, 504	465	9443	531, 536
552	311	9444	531
669	101	9458	538
674	101, 102	9518	217
713	464	9520	363
2108	713, 714	9523	208, 363
2431	700	9721	510
2783	270	9728, 9739	585
2908	652	9740	589
3195	473	9990–9993	464
3406, 3414	35	10054	162
3750–3758	550	10139	459
3834	3	10212	169, 293, 626
3876	159	10243	132, 133
4018	336, 337	10246	132
4673	542	10353	464
5031	105	10421	520
5379	336	10424	490
5511	695, 696	10642	157
5512	695	10710 et seq.	278
6446	109	10717	279
7441–7446	241	10891 et seq.	88
7990–8000	701	10958	464
8920, 8922	126	11013–11102	534

COMPILED LAWS OF 1897—Continued.

	PAGE
§§ 11153 et seq.	183
11175	184–186
11176	184, 185
11282, 11285, 11287, 11288	464
11344 et seq.	688
11346	689
§§ 11570	681
11612	444
11693	713, 714
11828	87, 88
11832	87

SESSION LAWS.

	PAGE
1865, Act 199	701
1883, Act 94	26
—— Act 124, § 23	34
1885, Act 217	337
1887, Act 42	235, 241
—— Act 489 (Local), § 44	35
1889, Act 236, § 23	35
1893, Act 118, § 29	713
—— Act 206	504
—— —— § 11	3
1895, Act 3, chap. 7, § 15	270
—— Act 229, § 11	3
1897, Act 61	550
1899, Act 26	20, 24
—— Act 154	504
—— —— §§ 152, 153	504–507
—— Act 155	710
—— —— § 1	711
—— Act 243	147, 182
1901, Act 130, § 53	159
1903, Act 30	626
—— Act 55	170
—— Act 234	550
—— Act 496 (Local)	466

SUPREME COURT RULES.

	PAGE
No. 8	181
No. 13	309
No. 15	181
No. 40	681

CIRCUIT COURT RULES.

	PAGE
No. 7	13
No. 12	197
No. 12 *b*	196
No. 25	145
No. 41 *a*	220
No. 46 *c*	309

CHANCERY RULE.

	PAGE
No. 15 *a*	145

JANUARY TERM, 1905.

TEAGAN TRANSPORTATION CO. *v.* BOARD OF ASSESSORS OF CITY OF DETROIT.

DULUTH & ATLANTIC TRANSPORTATION CO. *v.* SAME.

WOLVERINE STEAMSHIP CO. *v.* SAME.

139	1
140	2176
139	1
141	9
141	10
141	11
139	1
148	1231
148	232

1. TAXATION—SITUS OF PROPERTY—NAVIGATION COMPANIES.
   Under section 3834, 1 Comp. Laws, where the only business a corporation transacts at the place named as its office in its articles of incorporation is the annual meeting of stockholders, its residence for the purpose of taxation is the place where its principal business is conducted, such as receiving and disbursing its funds.

2. SAME—UNIFORMITY—CONSTITUTIONAL PROVISIONS.
   The proviso of section 3834, 1 Comp. Laws, that "the personal property of all corporations of the State for the purpose of maritime commerce and navigation shall be assessed only in the city, village, or township which is stated in their articles of association to be the location of their general office for business," attempts to confer on such corporations the special privilege of fixing the situs of their property for the purpose of taxation, in violation of section 11, of article 14, of the State Constitution, requiring a uniform rule of taxation.

Certiorari to Wayne; Mandell, Frazer, Brooke, Donovan, Rohnert, and Hosmer, JJ. Submitted October 4, 1904. (Calendar Nos. 20,618, 20,614, and 20,615.) Decided January 30, 1905.

Separate applications for mandamus by the Teagan Transportation Company, the Duluth & Atlantic Transportation Company, and the Wolverine Steamship Company to compel the board of assessors of the city of De-

troit to strike certain assessments from the tax rolls. To review orders denying the writs, relators bring certiorari. Affirmed.

Graves & Hatch, for relator Teagan Transportation Co.

Angell, Boynton, McMillan & Bodman, for other relators.

Timothy E. Tarsney, for respondent.

CARPENTER, J. Writs of certiorari bring before us for review three mandamus proceedings determined in the circuit court for the county of Wayne. Each of the above-named relators is a corporation engaged in transporting goods by water, and each asks for a mandamus (which the lower court refused to grant) compelling respondent to strike from the assessment rolls an assessment on account of certain steamboats owned by it. Said steamboats during the season are engaged in navigating the Great Lakes, and are seldom in the city of Detroit. In the articles of incorporation of the first two relators the township of Hamtramck, Wayne county, is named as the location of their general offices for business. In the articles of incorporation of the last-named relator, viz., the Wolverine Steamship Company, the village of Utica, Macomb county, is named as the location of its general office for business. At the place named as the location of their offices relators never had any regular business office. All they did there was to use the office or house of another for their annual stockholders' meeting, and in case of the Teagan Transportation Company also for the first meeting of the directors elected at said stockholders' meeting. Substantially all the other business of said Teagan Transportation Company which was not done on its boats was done in the city of Detroit. The management of the ordinary business of the last two named relators was carried on by their agent at Cleveland. Their funds,

however, except those required "to pay the ordinary running expenses of the boats and the officers and crew," were received and disbursed by their treasurer at Detroit; and it may be inferred that this official at Detroit decided any business matters "outside the ordinary course" not necessary—that is, as we infer, which he may decide to be not necessary—to submit to the board of directors.

The question of whether relators' property is taxable in the city of Detroit depends upon the constitutional validity and construction of section 3834, 1 Comp. Laws. That section reads:

"All corporate property, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation. The place where its office is located in its articles of incorporation shall be deemed its residence: *Provided*, Its business is actually transacted at such office; but if it shall establish its principal office in any other place than the place named in its articles of incorporation, then the place where it transacts its principal business shall be deemed its residence for all the purposes of this act. If there be no principal office in this State, then at the place in this State where such corporation or agent transacts business: *Provided, further*, That all the personal property of all corporations heretofore or hereafter organized under the laws of this State for the purpose of engaging in maritime commerce or navigation shall be assessed only in the city, village, or township, which is stated in their original articles of association or in any amendment thereof heretofore or hereafter made to be the location of their general office for business."

This section was section 11 of the general tax law passed in 1893. See Act No. 206, Pub. Acts 1893. As originally enacted, the section contained no special provision for the taxation of property of corporations engaged in navigation. The proviso relating to the taxation of such property (the last proviso above quoted) was put in the section by amendment in 1895. See Act No. 229 of the Public Acts of 1895. It is obvious that, if this proviso is constitutional, relators' property was not taxable in Detroit, but was tax-

able at the place named for the location of its general office for business. The contention of respondent's counsel that this property is taxable in Detroit compels them to affirm these two propositions: (1) That the proviso is unconstitutional; (2) that the statute, with the proviso eliminated, properly construed, makes relators' property taxable in the city of Detroit. We will consider each of these questions, but, as we should not determine a statute to be unconstitutional until it is shown that such determination is necessary to a disposition of the case, we will consider them in inverse order.

2. If we eliminate the proviso, the constitutionality of which is in question, the statute made the property taxable "where its office is located in its articles of incorporation: * * * *Provided*, Its business is actually transacted at such office; but if it shall establish its principal office in any other place than the place named in its articles of incorporation, then the place where it transacts its principal business shall be deemed its residence for all the purposes of this act. If there be no principal office in this State, then at the place in this State where such corporation or agent transacts business."

The court below, by a majority opinion, denied the mandamus. It must be assumed that the court found as a fact that relator's business was not actually transacted at the office named in their articles of incorporation, and was transacted at the city of Detroit. We cannot review this finding of fact if there was evidence to support it. We can only inquire whether there was such evidence. It appears that all that was done at the office named in the articles of incorporation was to hold the annual meeting of stockholders, and in the case of the Teagan Transportation Company also the first annual meeting of directors elected by the stockholders. Unless we decide that the holding of annual meetings of stockholders and directors is the principal business of said corporations, we must hold that that principal business was not transacted at the place named in the articles of incorporation. It is true that we

held in the *City of Detroit* v. *Lothrop Estate Co.*, 136 Mich. 265, that the principal business was done at the office where the manager resided, and where the managers and shareholders "meet to do whatever is necessary for them to do." This by no means decides that the annual meeting of stockholders constitutes the principal business of the corporation. To so hold would, in my judgment, clearly frustrate the legislative purpose. It is said that the personal property of the corporation should be taxable at the place "where its office is located in its articles of incorporation: * * * *Provided*, Its business is actually transacted at such office." By "business" the legislature meant something more than the annual meeting of stockholders and newly chosen directors. If it did not, other and more appropriate language would surely have been used. We come, then, to the question, Had the lower court the right to infer that the relator corporations did such business in the city of Detroit as to make their personal property taxable there? We have shown that substantially all the business of relator the Teagan Transportation Company was done in Detroit; that the treasurer of the other relators resided in Detroit, had (and, it may be inferred, there exercised) superior powers of business management, and that he there received and disbursed the funds of said corporation except those disbursed for the ordinary running expenses of their boats. If the holding of annual meetings of stockholders and directors did not constitute the principal business of the corporations (and we have stated that in our judgment it did not), it follows that the personal property of the corporation was taxable either at the place where it established an "office for the transaction of its principal business, or, if it had no principal office, then at the place in this State where such corporation transacts business." It is immaterial whether we say that the place where the corporation did its business in Detroit was "its principal office for the transaction of business," or whether we say that it had no principal office in that city. The fact that it transacted

business of the character already stated—business which was obviously more than clerical—made that the place where its personal property was taxable under the hypothesis that the proviso of 1895 was unconstitutional. We come to the consideration of the question:

1. Is the provision that "The personal property of all corporations heretofore or hereafter organized under the laws of this State for the purpose of engaging in maritime commerce or navigation shall be assessed only in the city, village, or township which is stated in their original articles of association or in any amendment thereof heretofore or hereafter made," constitutional? It will be noticed that this provision is not confined to "vessel property," so called, but extends to all the personal property of corporations "engaged in maritime commerce or navigation." While the personal property of individuals is taxable at their place of residence, and while the property of other corporations is taxable at the place of their principal business office, corporations engaging in maritime commerce or navigation may have their property taxed at whatever place they may choose to designate in their articles of incorporation. As the rate of taxation varies much in different localities, it gives to the latter corporations the right to select that place in which the rate of taxation is lowest. It thus gives to them the privilege of paying less taxes than must be paid by other corporations or by individuals engaged in precisely the same business. Neither can it be said that individuals have the same right to select the place in which their property will be taxed because it will be taxed at the place in which they may choose to reside. It is true that individuals may determine where they will reside, and corporations in general may determine where they will do business, but, in order to make their property taxable at that place, the individuals must actually reside there (see *Beecher* v. *Common Council of Detroit*, 114 Mich. 228), and the corporations must actually do business there (see *Detroit Transportation Co.* v. *Board of Assessors of Detroit*, 91 Mich.

382). Neither such corporations nor individuals have the same right to determine the situs for the taxation of their personalty as this statute undertakes to give to corporations engaged in maritime commerce and navigation.

The question arises whether such a law does not violate the provision contained in section 11, art. 14, of our Constitution, requiring a uniform rule of taxation. In *Western Transportation Co.* v. *Scheu*, 19 N. Y. 408, and *Oswego Starch Factory* v. *Dolloway*, 21 N. Y. 449 (cases relied on by relators), laws like that under consideration were enforced; but those cases throw no light on the constitutional question before us. There no constitutional question was raised—perhaps none could be raised—and no such question was considered by the court.

In Cooley on Taxation, after demonstrating the proposition that perfect uniformity and perfect equality in taxation is unattainable, it is said:

"But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made—whether it be because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for, if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment." 1 Cooley on Taxation (3d Ed.), p. 260.

In the note to this text is the following quotation from the opinion of the court in *Atchison, etc., R. Co.* v. *Clark*, 60 Kan. 826 (47 L. R. A. 77):

"Absolute equality in taxation is, of course, unattainable; but a law the manifest purpose and legitimate result of which is discrimination and inequality cannot be sustained."

In *Standard Life & Accident Ins. Co.* v. *Board of Assessors of Detroit*, 95 Mich. 466, this court held that

a law which subjected banks and insurance companies to a higher rate of taxation than that of other individuals and corporations was unconstitutional.

In *Pingree* v. *Auditor General*, 120 Mich. 95 (44 L. R. A. 679), and *Detroit Citizens' St. Ry.* v. *Common Council of Detroit*, 125 Mich., at page 694, similar decisions were made.

It follows from these decisions that, if the legislature had attempted to impose an onerous burden of taxation upon the property of corporations engaged in maritime commerce and navigation, such legislation would be void. But the act in question, instead of imposing an onerous burden upon such corporations, confers upon them a special privilege.

The question arises—and this is a question not argued by counsel, but which must necessarily be determined before we adjudge the law unconstitutional—whether the act can be sustained as a partial exemption from taxation. It cannot be supposed that the legislature enacted this law upon the ground that the property of corporations engaged in maritime commerce and navigation should be exempt. So far as that property consists of vessels engaged in commerce, it in no respect differs from vessels belonging to individuals engaged in commerce. So far as it consists of other tangible or intangible personal property, it in no manner differs from such property belonging to other individuals and corporations. This law cannot be sustained as a law partially exempting property from taxation unless the legislature has power to single out individuals or corporations from the class to which they belong, and capriciously exempt them from taxation. We are forced to say that the legislature has not that power.

In 1 Cooley on Taxation (3d Ed.), pp. 381, 382, it is stated:

"It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of ca-

pricious legislative favor. Such favoritism could make no pretense to equality. It would lack the semblance of legitimate tax legislation."

See *Hamilton* v. *Wilson*, 61 Kan. 511 (48 L. R. A. 238); *City of Lexington* v. *McQuillan's Heirs*, 9 Dana (Ky.), 513. We are bound, therefore, to declare that the constitutional provision requiring uniformity of taxation prevents the legislature enacting a law which it must be presumed was intended to and does tax property at a rate different from that imposed on all property of precisely the same class. Tested by this principle, the law (the proviso) under consideration is unconstitutional, for, as we have already shown, it clearly taxes (and we must assume that the legislature intended that it should tax) the property of corporations engaged in maritime commerce and navigation at a rate different from all other property of the same class. But it is said that this result is brought about in an unusual manner, viz., by selecting the situs for taxation. And it is earnestly contended that the constitutional requirement of uniformity does not affect the legislative power to determine that situs. If this argument is sound, it leads to some peculiar consequences. In the case before us it permits a particular class of corporations to have their property assessed for taxation at that place in the State where taxation is lowest. If relators' argument is sound, it would be competent for the legislature to declare that such property should be taxed at that municipality in the State whose rate of taxation was highest. If such a law were passed, would it not be clear that relators could successfully maintain that their property was taxed at a rate higher than that imposed on other property of the same class?

In support of their argument that the requirement for uniformity does not affect the power of the legislature to determine the situs for taxation, relators cite *State* v. *Runyon*, 41 N. J. Law, 98; *Crawford* v. *Linn County*, 11 Or. 482; *City of Winston* v. *City of Salem*, 131 N. C. 404. What is decided in *State* v. *Runyon*, supra, is

sufficiently shown by the following quotation from that opinion:

"The framers of the constitutional amendments did not aim at the impossible. They contented themselves with the accomplishment of so much of good as was attainable under the single requirement that 'property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.' In other respects the legislative power over taxation was left unimpaired. If property be such in its nature as, upon ordinary principles of taxation, to be capable of having a twofold situs for taxation, the legislature may select either as the place where the tax shall be laid."

Conclusive proof is furnished that the court did not intend by this statement to assert the proposition contended for by relators by other language in the opinion, which I quote:

"The object of this constitutional provision was the equalization of taxation in its relation to the several parts of the State, and the prevention of unjust discriminations in the apportionment of the public burdens among its citizens liable to taxation."

In *Crawford* v. *Linn County*, supra, it was held that the constitutional provision requiring uniformity was not violated by a law which taxed mortgages covering land in two or more counties at the place where the mortgagee resides, and which taxed other mortgages where the mortgaged land was situated. This decision proceeded upon the ground that the court could not say that this determination of situs was favorable or burdensome to either of these two classes of mortgagees. And it was said, "If the court could know judicially that the one or the other were hurt, it would be sufficient." It is true that it is said in this opinion, "A limitation on the power of the legislature to fix rates of assessment and taxation has nothing to do with the power of the legislature to fix the situs of personal property for the purposes of taxation." If by this the court intended to assert the proposition contended for by relators, it has no more than stated a dictum.

In *City of Winston* v. *City of Salem*, supra, it was decided that a law which made personal property generally taxable at one's place of residence and the personal property of partnerships and corporations taxable at their places of business was constitutional. It may be said in this case, as was said in the case of *Crawford* v. *Linn County*, that the court could not judicially know that this method of taxation discriminated in favor of or against either of these classes of taxpayers. In saying in its opinion that the constitutional provision requiring uniformity left the legislature "free, as always heretofore, to prescribe regulations as to the situs of personal property," the court went far beyond the requirements of the case, and, like the Oregon case, has merely stated a dictum.

We are bound to say from this examination of authorities that there is nothing but dicta to sustain relators' contention. We are therefore free to determine on principle whether the constitutional requirement of uniformity affects the legislative authority to determine the situs for the taxation of personal property. This is not a difficult inquiry, especially if the proposition be stated in different, but in equivalent, language, viz., can the legislature, in determining the situs for the taxation of personal property, disregard the constitutional provision requiring uniformity? The legislature derives its authority to determine the situs for the taxation of personal property—and it certainly has that authority (see *Common Council of Detroit* v. *Board of Assessors of Detroit*, 91 Mich. 78 [16 L. R. A. 59])—not from any express constitutional grant, but from the grant of general authority to legislate. The provision requiring uniformity of taxation is a constitutional limitation on that authority. To contend that in determining such situs the legislature may ignore the constitutional requirement of uniformity is to contend that in exercising its general authority the legislature may ignore the constitutional limitation on that authority. This argument nullifies all constitutional limitations on legislative authority, and is therefore unsound. We are

therefore forced to conclude that the legislature, in determining the situs for the taxation of personal property, must regard the constitutional requirement of uniformity, and the disregard of that requirement makes the law under consideration unconstitutional and void. We do not, by our decision, negative relators' claim that it is unjust that their property (which, like much other property similarly located, receives no benefit from the expenditures of municipal tax in Detroit) should contribute toward their payment. Neither do we declare that it is beyond the power of the legislature to enact a law which will remedy this injustice. What we do say is that any such law—unlike that before us—must regard the constitutional requirement of uniformity.

It follows that the lower court was right in refusing a mandamus, and their decision is affirmed, with costs.

MOORE, C. J., and GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

SCOTT *v.* LONGWELL.

1. WATERS AND WATERCOURSES—PERCOLATION—ACTIONS—PLEADING—DEFENSES UNDER GENERAL ISSUE.

   In an action for injuries to plaintiff's land by water from defendants' mill race, the right under a deed and by prescription to do the acts complained of are affirmative defenses, which, under Cir. Ct. Rule No. 7, cannot be shown under the general issue.

2. SAME—PERCOLATION FROM MILL RACE—CARE REQUIRED.

   The owner of a mill race must use care "proportionate to the danger" to prevent the water from escaping and percolating through the banks to the injury of adjacent property owners.

3. SAME—ADJOINING LANDOWNERS—DAMAGES—DUTY TO LESSEN.

   Even if it be the duty of the owner of property adjacent to a mill race to construct a drain on his property to prevent in-

jury from percolation of the water through the banks, he is only bound to use ordinary care.

Error to Van Buren; Carr, J. Submitted October 7, 1904. (Docket No. 38.) Decided January 30, 1905.

Case by Charlotte Scott against George W. Longwell, Sr., and the First National Bank of Paw Paw for damages caused by flooding. There was judgment for plaintiff, and defendants bring error. Affirmed.

Thomas J. Cavanaugh, for appellants.

David Anderson, for appellee.

CARPENTER, J. Defendants maintain an artificial mill race in the village of Paw Paw. Plaintiff is the owner of residence property adjacent to said race. Twice—once in 1897, and again in 1902—the water was out of said mill race for several months. When the water was let in, and for several months thereafter, the water from said race, as we must assume from the verdict in this case, seeped through the banks into plaintiff's cellar, and on her land. To recover damages for said flooding, plaintiff brought this suit, and recovered a verdict and judgment in the court below. We are asked to reverse that judgment on several grounds.

It is contended that the only ground upon which plaintiff can recover is that of negligence, and that no negligence is averred in the declaration. It is a sufficient answer to this complaint to say that, in our judgment, defendants' negligence is averred in the declaration.

Defendants urge that they had a right to do the acts complained of as wrongful, by virtue of a reservation in a certain deed, and that by prescription they had a right to flood the land of plaintiff. It is a sufficient answer to these claims to say that they afforded affirmative defenses, and were not, therefore, under Circuit Court Rule 7, admissible under defendants' plea of the general issue.

Complaint is made because the trial court did not give the following instructions to the jury, preferred by defendants:

"You are further instructed that the defendants had a legal and lawful right to keep and maintain the mill race, and keep and maintain the water therein, for the purpose of operating their mill; and if you find from the evidence that they did so keep and maintain the same, and did keep and maintain water therein for the purpose of operating their flouring mill, and that the same was kept in an ordinarily prudent manner, and that the defendants at no time were guilty of negligence in maintaining and keeping water therein or in repairing the same, then plaintiff cannot recover, and your verdict should be for defendants.

"If you find from the evidence that the defendants were using their property, to wit, the milling property and mill race, in an ordinarily prudent manner, then any injury that might befall any property next adjoining said mill race on account of any water percolating or seeping through the banks or bottom would, in law, be a mere incident to the proper use of such milling property and race; and, unless the defendants were guilty of negligence in repairing said race, or in keeping or maintaining water therein, your verdict should be for defendants.

"You are further instructed that no damages can be recovered by the plaintiff in this case on account of the fact that the defendants maintained or kept the mill race, and that such mill race contained water that percolated or seeped through the bottom or sides of said race and undermined plaintiff's house, so long as said water was in said race for a lawful purpose, and was being used by defendants for a lawful purpose, and did not escape therefrom on account of the negligent conduct of defendants."

In our judgment, under the peculiar circumstances of this case, the giving of these requests would have misled the jury and diverted them from the precise question in controversy. To make this clear, a somewhat more detailed statement of the case is necessary. Plaintiff complains of being damaged by the escape of water from the race, not on ordinary occasions, but on two extraordinary occasions. It is shown that, preceding each of these occasions, the race had been emptied for several months; that

on the second of these occasions defendants scraped the bottom of the mill race, and cleaned out the rubbish which had accumulated therein. The undisputed testimony—and it comes from defendants' millwright who planned the improvements—is that "a mill race, when first constructed, is likely to leak, and after it has stood for some time the mud will work so it will be water-tight. The effect of drawing off the water would be nearly the same as scraping—as a new construction. So that, after it stands awhile empty, when the water is turned back in it will seep—water-soak—through, to a certain extent, on account of the ground cracking deep if left dry for some time. If dry a short time and scraped, it would have the same effect as a new construction." This testimony affords the explanation of plaintiff's injury, for her property was not flooded, except when the water was turned in after the race had for a long time stood empty, on the occasions specified. This testimony is also important as indicating the obligation imposed upon defendants.

The precise obligation imposed by law upon one who collects waters in an artificial reservoir is a subject of grave dispute. In *Rylands* v. *Fletcher*, L. R. 1 Ex. 265, L. R. 3 H. L. 330, it was declared that no amount of diligence is a legal excuse, if such water escapes and damages another. The correctness of this doctrine has been much discussed by law writers and courts. It has been approved in Massachusetts (see *Gorham* v. *Gross*, 125 Mass. 232); and Minnesota (see *Cahill* v. *Eastman*, 18 Minn. 324). It has been disapproved in other States. See *Losee* v. *Buchanan*, 51 N. Y. 470; *Pennsylvania Coal Co.* v. *Sanderson*, 113 Pa. St. 126; *Marshall* v. *Welwood*, 38 N. J. Law, 339.

We need not, however, in this case, as we shall point out, undertake to determine its correctness. According to all authorities, there is imposed upon a person who collects water in an artificial reservoir an obligation to use care "proportioned to the danger of injury from the escape." See Cooley on Torts (2d Ed.), p. 680. If we im-

pute to defendants, as we must, under the law (see Pollock on Torts [Webb's Am. Ed.], pp. 26, 27), a knowledge and skill possessed by competent millwrights, we must presume that they knew that the water would escape through the banks of the race which had been so long empty, and they were bound to take precautions to prevent it. If there was any evidence that precaution was taken, it is to be found in the following testimony of defendant Longwell:

"I used all the caution and judgment that I could to do a good job, and did not for a moment apprehend that I was doing any one any harm. There was rat holes along there—muskrat holes, we call them. We tried to fill them up, and did, with the dirt we scraped from the sides. I instructed Mr. Goss and John Chapman to take their hoes and shovels and dig the dirt that was scraped up on the sides, and level it off, poke it up under the sod and grass that grew long there, and to look out for all rat holes that they could find, and fill them up."

In view of the undisputed fact that such a race was likely to leak on account of the scraping and cracks, I think that we could safely say, as a matter of law, that defendants were negligent in not taking proper precautions to prevent the water escaping. At any rate, defendants were bound to use care proportioned to the danger. If the question of defendants' negligence was one for the jury, the material circumstances to be considered by the jury were these: The probability of the escape of the water, and the precautions taken by defendants to prevent such escape. None of these circumstances are contained in defendants' requests. But on the other hand, the jury are asked to consider in that connection circumstances wholly immaterial, and circumstances which would operate prejudicially in favor of defendants, viz., the lawfulness of their purpose in maintaining the race, and the care used in operating their mill. Even if defendants were entitled to have the jury charged that their obligation was only that of ordinary care—that is, the care that an ordinarily prudent person should have exercised under the circumstances—the instructions preferred are faulty, in that they under-

take to state those circumstances, and state them incorrectly, to plaintiff's prejudice.

It is also complained that the court erred in refusing to give this request preferred by defendant:

"If it is shown in the case that the plaintiff has sustained an injury under such circumstances, in view of the instructions heretofore given you, that the defendants should be held liable, and that it further appears to you that such injury might have been diminished or obviated at a moderate expenditure of money or labor, or by opening an old drain or constructing a new one from the house, then it was the plaintiff's duty to have made the injury as light as possible, and in no way to aggravate it."

If it be true that, to lessen the damages, plaintiff was under an obligation to construct a drain on her own property, or do some similar affirmative act (and this has been denied. See *Pixley* v. *Clark*, 35 N. Y. 520), it is certainly true that she was bound to do no more than a person of ordinary prudence would have done. She was not held to the high obligation required in said request; that is, she was not bound to make the injury as light as possible, even though, as a person of ordinary prudence, she could have discovered no way to do so.

There is no other complaint which demands discussion.

The judgment is affirmed, with costs.

MOORE, C. J., and GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

139 18
149 [10]382

139 18
j153[11]422

139 18
f155 [9] 77

STOWELL *v.* STANDARD OIL CO.

1. JURORS—VOIR DIRE—DISCRETION OF COURT.
   On the trial of an action for damages resulting from an explosion caused by adulterated kerosene oil sold by defendant, it is within the discretion of the court to allow counsel for plaintiff to ask jurors on the voir dire whether they would consider it negligent to extinguish a lighted lamp by blowing across and down the chimney.

2. SAME — CHALLENGE FOR CAUSE — OVERRULING — HARMLESS ERROR.
   The overruling of a challenge of a juror for cause, if error, is harmless, where the party challenging had exercised but one peremptory challenge when the panel was completed.

3. NEGLIGENCE—SALE OF ADULTERATED KEROSENE—ACTION FOR DAMAGES—EXPERT EVIDENCE.
   On the trial of an action for damages resulting from an explosion caused by adulterated kerosene oil sold by defendant, it was proper to allow an expert witness to describe the process of producing kerosene oil from petroleum, with the purpose of showing that gasoline is the lighter product, since it tended to show what the substance sold was.

4. SAME—PROPERTIES OF KEROSENE.
   For a like reason it was competent to show that gasoline would throw off a vapor at a lower temperature than kerosene oil of the legal test standard, and that oil of the legal test would not ignite under the conditions shown to exist, and that, if mixed with gasoline or other similar substance, it might do so.

5. WITNESSES — EXAMINATION — EXPERTS — HYPOTHETICAL QUESTIONS.
   A question to an expert witness calling for an opinion on a state of facts not known to him, or stated hypothetically in the question, is properly excluded.

6. HARMLESS ERROR—REJECTION OF EVIDENCE.
   The erroneous rejection of testimony is harmless where the fact is sufficiently shown by the same witness elsewhere.

7. NEGLIGENCE — SALE OF ADULTERATED KEROSENE — STATE OIL INSPECTOR—CROSS-EXAMINATION.

On the trial of an action for damages resulting from an explosion caused by adulterated kerosene oil sold by defendant, where a deputy oil inspector has testified as a witness for defendant, a rigid cross-examination is justified, and comment on his loose method of conducting inspections is within the proper bounds of argument.

8. SAME—PLEADING.

Under a declaration alleging that kerosene oil sold by defendant was "adulterated," it may be shown that the adulteration was the result of improper manufacture as well as by admixture after manufacture.

9. SAME—SUFFICIENCY OF EVIDENCE.

In an action for damages arising from negligence, the fact that plaintiff's case rests largely upon inferences to be drawn from facts proved is not fatal to it, where it does not rest upon mere conjecture.

10. SAME—LIABILITY OF WHOLESALER.

The seller of an article of commerce, not in itself dangerous, is not responsible for consequences to a purchaser from his vendee resulting from defects unknown to the original seller.

11. SAME—STATUTORY PROVISIONS.

The manufacturer or wholesaler of kerosene oil, which is inferior to the test required by Act No. 26, Pub. Acts 1899, is liable for resulting damages to a consumer.

Error to Clinton; Stone, J. Submitted October 19, 1904. (Docket No. 53.) Decided January 30, 1905.

Case by Elmer Stowell against the Standard Oil Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

H. E. & E. L. Walbridge (*Alfred D. Eddy* and *John D. Conely*, of counsel), for appellant.

Lyon & Moinet, for appellee.

MONTGOMERY, J. The plaintiff's declaration counts upon an alleged unlawful sale to Martin & Green, a firm of grocers, of a quantity of kerosene oil adulterated with

benzine or other dangerous substance; that this mixture was sold and delivered to Martin & Green to be resold by them; that Martin & Green resold a quantity thereof to the plaintiff; that plaintiff's daughter, Verna Stowell, made use of the same for illuminating purposes; that while attempting to blow out the flame of the lamp in which the oil was being used the same exploded without fault on her part; that in attempting to extinguish the flame caused by the explosion plaintiff suffered severe personal injuries; and that the property of plaintiff, fully described in the declaration, was also damaged.

The plea was the general issue, with notice that defendant would prove that the oil sold to Martin & Green was tested and approved by the deputy State oil inspector, as required by Act No. 26 of the Public Acts of 1899.

To avoid repetition, the questions raised which merit discussion will be considered in the order in which they arose on the trial. On the examination of certain of the jurors on the voir dire, the plantiff's counsel inquired of individual jurors as to whether the juror would consider it negligent to extinguish a lighted lamp by blowing across and down the chimney. These questions were objected to, but allowed by the court. We cannot say that the trial judge did not exercise a proper discretion in permitting these questions to be answered as an aid to the counsel for the plaintiff in exercising his peremptory challenges. *Towl* v. *Bradley*, 108 Mich. 409.

On the jurors' answering these questions in the negative, the defendant's counsel challenged one of the jurors for cause. The challenge was not sustained, and error is assigned on this ruling. It is doubtful if, in the case of any juror, the examination, taken as a whole, showed any such settled conviction on this question as would disqualify the juror. A complete answer is that the defendant was not harmed by the ruling, as but one peremptory challenge was exercised, and we are satisfied that the defendant could have amply protected itself in all doubtful cases by the exercise of its remaining peremptory challenges. *Peo-*

ple v. *Aplin*, 86 Mich. 393; *People* v. *Rush*, 113 Mich. 539; *Luebe* v. *Thorpe*, 94 Mich. 271; *Atlas Mining Co.* v. *Johnston*, 23 Mich. 36; *Brennan* v. *O'Brien*, 121 Mich. 496; *Commercial Bank of Bay City* v. *Chatfield*, 121 Mich. 641.

The seventeenth, eighteenth, and nineteenth assignments of error depend for their force upon the main question, to be discussed under another head.

Assignment 20 is based upon an objection to a question put to an expert—Dr. Palmer—asking for a brief description of the process of producing kerosene oil from petroleum, offered with the purpose of showing that gasoline was the lighter product. The objection stated was that the testimony was immaterial; "that the question they [the plaintiff] allege is that it [the oil in question] didn't come up to the standard of the test; that is the issue involved." It is argued in this court that there was no showing that gasoline was mixed with the kerosene sold to Martin & Green, and that for this reason the testimony was not competent or material. The objection to this question made in the court below did not foreshadow this position, but, on the contrary, rested upon the claim that the testimony had no bearing upon the question whether the oil came up to the standard of the test. It is clear that the inquiry was preliminary, and that, standing alone, it did not prove the plaintiff's contention; but we are not prepared to say that it was wholly immaterial on that question. The testimony as to the qualities of the products of petroleum may have furnished some aid to the jury in determining what the substance sold to plaintiff was. *Schoepper* v. *Chemical Co.*, 113 Mich. 582. For a like reason we think it was competent to show that gasoline would throw off a vapor at a lower temperature than kerosene oil of the legal test standard, and to show by expert testimony that oil of the legal test would not ignite under the conditions and circumstances shown to exist, and that, if mixed with gasoline or other similar substance, it might.

Error is assigned upon a ruling excluding certain hypothetical questions put to the plaintiff's witness Dr. Palmer on cross-examination. The court correctly ruled that the questions called for an expression of opinion upon a state of facts not known to the witness, or stated to him hypothetically in the question.

Otto L. Sprague, a deputy oil inspector, was called by the defendant. His testimony tended to show that he had assumed to inspect the oil shipped into St. Johns by the defendant, and that on making an inspection or test he left with defendant's agent, Cyrus L. Smith, a card reading as follows, all being duplicates except date:

"Michigan legal test, 120 degrees flash. Approved Oct. 2, 1902.

"O. L. SPRAGUE,
"Deputy State Oil Inspector."

The witness testified that this card was at different times delivered to Mr. Smith in advance of an actual test. That at times he went to St. Johns, obtained a sample of oil, and at the same time delivered the card, stating that, if he found the oil not up to standard, he would notify him. It also appeared that at times he had authorized Smith to remove the oil from the tank cars, retaining a sample for use in making the test, and it was clearly open to inference that the oil in question was inspected in this manner. The witness testified that this card did not take the place of the certificate intended under the law to be delivered to the owner of the oil. This statement of the witness the court, on motion of plaintiff's counsel, struck out. Error is assigned on the ruling. While the statement might well have been allowed to stand, we cannot see how its exclusion harmed the defendant in view of the fact that the witness was permitted to testify that he did furnish certificates of inspection to defendant.

Error is also assigned upon certain rulings permitting questions to be put to the witness Sprague relating to the accuracy of his report to the State oil inspector, as the report related to his charges for expenses. A rigid cross-

examination was justifiable in this case. The loose method of conducting these inspections exhibited either ignorance of or indifference to the requirements of the law, and any false statements contained in the report might properly be made the subject of comment, and would bear upon the credibility of the witness. Not only was this inquiry proper, but it follows also that the comment of plaintiff's counsel upon the conduct of the deputy inspector and defendant's agent Smith were within proper bounds of argument.

The defendant contends that the court should have directed a verdict in its favor. The contentions under this head may be subdivided into three:

1. That there was no evidence of adulteration.
2. That the evidence shows that the oil in question answered the legal requirements of flashing at 121 degrees or above.
3. That, as there was no privity of contract between the plaintiff and defendant, no recovery could be had, in the absence of showing that defendant had actual knowledge of the inferior quality of the oil, or had reason to know of it.

As to the first contention, it is said there is no allegation in the declaration that the oil was improperly manufactured or refined, but that it proceeds upon the theory that the oil had been adulterated by admixture with gasoline after its manufacture. We think this is too narrow and technical a view of the averments of the declaration. The gist of the charge in various counts in the declaration is selling a substance as kerosene oil of the standard test, and not adulterated with gasoline or other more inflammable material, whereas the oil was not of the standard test, but was adulterated, etc. The declaration uses the word "adulterated" as descriptive of the substance sold, and, if the plaintiff's theory of the case be maintained, the term is not inapt to describe that substance. It is equivalent to saying that there was mixed with kerosene oil gasoline or benzine. This does not import that the kerosene

was once pure, and of the standard test, and that gasoline had been added. The substance was accurately described if the admixture was a result of the process of manufacture.

The second contention depends upon the question whether the jury were bound to accept as conclusive the testimony of the deputy oil inspector as to the test made, and the testimony of defendant's agent Smith as to the fact that the oil sold to Martin & Green was the inspected oil in its original purity. It is manifest that the so-called inspection fell far short of compliance with the statute, and there was enough in the record to justify the court in submitting the question of the credibility of the witness Sprague to the jury. It is true the plaintiff's case rested largely upon inferences to be drawn from the facts proved; but it often occurs that a case meritorious in itself cannot be otherwise established. In such case the law does not permit a failure of justice unless the case rests upon mere conjecture, which we think is not the case here. *Schoepper* v. *Chemical Co.*, 113 Mich. 582; *La Fernier* v. *Soo River Lighter & Wrecking Co.*, 129 Mich. 596; *Webster* v. *Symes*, 109 Mich. 1.

The rule contended for by the defendant's counsel that a seller of an article of commerce, not in itself dangerous, is not responsible for consequences to a purchaser from his vendee resulting from defects in the article sold, which defects were unknown to the original seller, is supported by abundant and convincing authority, and has been recently affirmed by this court. *Losee* v. *Clute*, 51 N. Y. 494; *Necker* v. *Harvey*, 49 Mich. 517; *O'Neill* v. *James*, 138 Mich. 567.

Does the present fall within the principle of these cases? The statute (Act No. 26, Pub. Acts 1899) provides for an inspection of kerosene oil, and makes it lawful to sell approved, inspected oil. It also renders it unlawful to sell rejected or condemned oil. The act also makes it an offense for any person to sell or attempt to sell any illuminating oils, whether manufactured in this State or not,

before having th seame inspected as provided in this act. This statute was evidently enacted not alone for the protection of the direct purchaser of illuminating oil, but for the benefit of the consumer as well.

In Pollock on Torts (Webb's Am. Ed.), p. 24, the rule is stated as follows:

"The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury."

A well-recognized exception to the rule of nonliability to a remote purchaser exists in case of a sale of an article dangerous in itself. See *Skinn* v. *Reutter*, 135 Mich. 57 (63 L. R. A. 743), and cases cited. The legislature of this State has recognized and treated illuminating oil not tested and shown to be nonigniting at a temperature of less than 121 degrees, as a dangerous substance, and one who sells it without inspection brings himself within the principle of this exception to the general rule. The case was a proper one for the jury. The charge of the circuit judge fairly submitted the questions of fact. We discover no error.

Judgment affirmed.

MOORE, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

PEOPLE, *for Use of* C. H. LITTLE CO., *v.* GRANT.

1. PAYMENT—APPLICATION—TIME FOR MAKING.
   Though a debtor may designate to which of several accounts a payment shall apply, in the absence of such designation the creditor may make the application at any time before suit.

2. SAME—ELECTION.
   Where credit for a payment is entered on a general account, and a statement thereof rendered to the debtor, this is an election to apply the payment to the extinguishment of items antecedently due in the order of time in which they stand in the account, and the creditor cannot thereafter make another application.

Error to Wayne; Frazer, J. Submitted November 30, 1904. (Docket No. 260.) Decided January 30, 1905.

Assumpsit by the people of the State of Michigan, for the use and benefit of the C. H. Little Company, against James Grant as principal, and Julius Porath and John A. Mercier as sureties, upon a statutory bond. There was judgment for plaintiff on a verdict directed by the court, and defendants bring error. Reversed.

John E. Moloney, for appellants.

Willard E. Warner, for appellee.

MONTGOMERY, J. This is an action of assumpsit, brought in the name of the people of the State of Michigan, for the use and benefit of the C. H. Little Company, a corporation, against James Grant as principal, and Julius Porath and John A. Mercier as sureties, upon a statutory bond, under the provisions of Act No. 94 of the Public Acts of the State of Michigan for the year 1883, and the amendments thereto, given in connection with a contract made between the city of Detroit and James Grant on the 16th day of August, 1901, for the repaving

of an alley in said city of Detroit, known as "Alley No. 45," between Beaubien, St. Antoine, Congress, and First streets. Upon this job the plaintiff company furnished materials to the amount of $130.83.

During the paving season of 1901 defendant James Grant entered into eight contracts with the city of Detroit, seven for the paving of streets and alleys and one for the building of two sewers. The first contract was entered into on the 19th day of June, 1901, and the last contract on the 15th day of October, 1901. Most of the materials used upon these several jobs were purchased from the plaintiff company. The company kept a regular set of books, and all materials furnished to defendant Grant, irrespective of where deliveries were made, or upon what jobs, were charged in this account, and all payments made by him were credited therein to the general account at the time of payment. Monthly balances were struck, and monthly statements of account were rendered to the defendant Grant, in which payments made during the current month were credited to the general account.

The last material was furnished on alley 45 on the 17th day of October, 1901, and all materials furnished on this job were charged upon the books of the plaintiff company in Grant's general account. At that time Grant owed the C. H. Little Company upon general account, including all materials furnished on alley 45, the sum of $1,629.62, and after that time and up to the 1st day of February, 1902, paid to the C. H. Little Company upon general account the sum of $1,800. During the same period the plaintiff company continued to furnish materials to the defendant Grant upon his other contracts, which were charged to the general account.

It appears that when the accounts were rendered to Mr. Grant no objection to the accounts rendered were made by him. On the 24th of June, 1903, C. H. Little & Co. notified defendant Grant that they would apportion the payments made from time to time and credited to him on account of certain specific items, leaving the account here

in question unpaid, and brought this suit to enforce payment. The circuit judge directed a verdict in favor of the plaintiff, and defendant brings error.

The sole question for consideration is whether the creditor, C. H. Little & Co., had the right in June, 1903, to make the application of the payments previously made which was attempted. The rule of the common law as to application of payments is in most points clearly settled. It is, of course, clear that the debtor may, at the time of making payment, make his election as to the application. It is equally clear that the creditor may, in the absence of an application by the debtor, make such application as he chooses. Under the civil law this application must have been made at the time of the payment, but under the common law it is now settled that this is not necessary; some cases holding that the application must be made within a reasonable time, but the clear weight of authority is to the effect that it may be made at any time before suit. *Mayor, etc., of Alexandria* v. *Patten*, 4 Cranch (U. S.), 317 (1 Am. Lead. Cas. 268, and note).

There remains the question as to the effect of entering the credit for payments in a general account and rendering a statement to the debtor showing such application. It seems that the mere entry of a credit to a particular account is not a conclusive application of the payment in the absence of notice to the debtor. *Simson* v. *Ingham*, 2 Barn. & C. 65. But when such credit is made, and an account rendered to the debtor showing such application, it is too late to make a new election. So it is held in numerous cases that, where a credit is entered to a general account, and an account thereof rendered to the debtor, this is an election to apply the payment to the extinguishment of items antecedently due in the order of time in which they stand in the account.

The leading case to this point is *Clayton's*, decided by Sir William Grant as Master of the Rolls, and reported in 1 Merivale, 604. The case was followed and fully approved by Judge Story in *Postmaster General* v. *Fur-*

ber, 4 Mason (U. S.), 335, and again by the same learned jurist in *United States* v. *Wardwell*, 5 Mason (U. S.), 82. In the case last cited Judge Story states that the doctrine of *Clayton's Case* "stands upon irresistible reasoning." The doctrine of these cases was approved in *Chapman* v. *Commonwealth*, 25 Grat. (Va.) 742, in an opinion notable for the learning displayed. See, also, *Grasser & Brand Brewing Co.* v. *Rogers*, 112 Mich. 112.

The counsel for plaintiff contends that the holding of this court in *People, for Use of Holmes,* v. *Sheehan*, 118 Mich. 539, makes for a different rule. Counsel has certainly misapprehended the ruling in that case. An examination of the record discloses that the trial judge held that "the payments should be applied to the charges in their order of time." This court said:

"Counsel for defendants also alleges error upon the application of payments, but cites no authority which prevents the application of payments by the parties to the contract under the usual rule, or, if they fail to specify how all payments should be applied, justifies any other rule than that followed by the learned circuit judge."

In so far as the holding of this case is in point, it supports the defendants' position in the present case.

We think that, after crediting the payment made in the manner stated, and notifying the debtor of such credit, it was too late to attempt another application.

The judgment is reversed, and a new trial ordered.

MOORE, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

139 30
158 524

POWER *v.* CITY OF DETROIT.[1]

1. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENT DISTRICT—DISCRETION OF COUNCIL—REVIEW BY COURT.

   On a bill to set aside an assessment of benefits made in proceedings to open a street, evidence examined and *held*, that the establishment of an assessment district 300 feet in width on each side of the street, the whole length thereof, as newly opened, and assessing the whole expense to the property benefited, instead of a portion to the city at large, was not an abuse of discretion.

2. SAME—BUILDINGS ON LAND TAKEN—FUND ARISING FROM SALE.

   Where a building on land taken for a street is sold, but the assessment of benefits is made without deducting the money so received from the expense, as required by Act No. 236, Pub. Acts 1889, the assessment is not wholly void, but the court may direct the making of the proportionate reduction and allow the assessment as amended to stand.

3. SAME—TIME OF PAYMENT—DETROIT CHARTER.

   Assessments of benefits for opening streets in the city of Detroit are properly made payable all at one time, notwithstanding section 3406, 1 Comp. Laws, directs that such assessments shall be levied and collected as near as may be in the same manner that is provided in the charter of the municipality for levying and collecting the expense of grading streets, and the charter of Detroit provides (Act No. 489, Local Acts 1887, § 44) that grading assessment rolls shall be made in four parts, the charter provision not being applicable.

4. SAME — CONTEST — REDUCING ASSESSMENT — INTEREST AND PENALTIES.

   Where a lot owner refuses to pay any portion of his assessment for a street improvement, and litigates the whole of it, he is liable for such penalties and interest as are fixed by law on such portion of the assessment as is held valid on final determination, though the original assessment was reduced.

Cross-appeals from Wayne; Rohnert, J. Submitted January 3, 1905. (Docket No. 1.) Decided February 4, 1905.

[1] Rehearing denied September 21, 1905.

Bill by William H. Power and others against the city of Detroit and Albert Stoll, receiver of taxes, to set aside an assessment of benefits on opening a street. From the decree rendered, all parties appeal. Modified.

Walker & Spalding, for complainants.

A. B. Hall (*Timothy E. Tarsney*, of counsel), for defendants.

MOORE, C. J. This is a suit to set aside assessments made on complainants' lands because of the opening of Warren avenue. The decree below sustained the assessments, providing, however, for their reduction by their respective proportions of the sum of $850 unlawfully included in the original assessment, and further provided that the assessments so reduced might be paid without interest or penalties within 60 days after the final determination of the cause.

Complainants claim the decree should set aside the assessments. The defendants claim that, while the pro rata reduction of the assessments was proper, the payment of interest as well as penalties should have been required.

The case was originally heard by Judge Frazer, who entered a decree setting aside the assessments on the ground that the council had grossly abused its discretionary power in so constituting the assessment district as to impose the entire expense of opening the street upon a part only of the property specially benefited. One of the main items of the evidence on which this decree was based was a plat put in evidence by the complainants purporting to show the boundary line of the assessment district.

After the appeal of the case to the Supreme Court it was discovered that most of the irregularities in the district boundary as shown by this map did not exist. It was then stipulated the case should be remanded and reheard. From a decree rendered by Judge Rohnert all parties appeal.

The complainants contend:

1. That the assessments should be canceled: (*a*) Because the evidence shows a clear abuse of discretion by the common council in imposing the entire expense of the street opening upon a local district so narrow as to include but a small part of the property specially benefited, and without making any deduction either on account of the general benefit to the public at large from the improvement or on account of the fact that $850 of the expense had already been reimbursed to the city by the sale of a building taken in the street opening proceedings. (*b*) Because, irrespective of abuse of discretion, the assessment of the entire award without deduction of the amount received from the building sale is illegal. (*c*) Because the assessment roll was made in one part, payable at once, instead of in four parts, so as to spread the payment of the assessments over four years.

2. That, even if the assessments at the reduced amount were properly sustained, the inclusion in the original assessment of the amount of $850 derived from the building sale was admittedly illegal, and the city, therefore, would have no right to either interest or penalties on the amount that could have been rightfully assessed until that amount was ascertained by competent authority, and opportunity afforded to pay it.

These contentions will be taken up in the order presented.

Judge Rohnert, who heard the case, was of the opinion that no abuse of discretion was shown on the part of the common council which would justify him in setting aside the assessment. The assessment district, as fixed by the council, was approximately 300 feet in width on each side of Warren avenue, the whole length thereof as newly established. After the award for damages was made, a building was sold for $850, which was upon the property taken. For some reason there was a failure to deduct this amount from the amount of the assessment. None of the complainants made any tender of any portion of the assessment. It is the claim of the complainants that, because of the peculiar position of this street to that portion of the city, large areas of property outside of the assessment district were substantially benefited, and that it was a great abuse of discretion not to make the assessment dis-

trict larger, or else to require the city at large to share in the expense.

A like claim to this has been made in a number of cases heretofore heard in this court. In *Brown* v. *City of Grand Rapids*, 83 Mich. 101, it was said:

"The determination of these two bodies—the commissioners who made the assessment roll and the common council of the city of Grand Rapids—cannot now be inquired into, unless it appears that they acted in bad faith. It is not for this court to set its judgment up in opposition to that of the board of commissioners and the council, and to say that this parcel of land or that is assessed too much or too little. The assessments were to be made according to benefits to each parcel of property, and there is nothing in the record showing that the commissioners did not assess the complainant's lands in accordance with their best judgments. Where provision is made by law for a review of assessment proceedings, and a body appointed with the power to set the assessment aside or correct the error complained of, and the party wholly fails to appear before such body, or take any steps to have such correction made, he is not in a position to appeal to the courts for redress in the absence of fraud or bad faith"—citing *Williams* v. *City of Saginaw*, 51 Mich. 120; *Comstock* v. *City of Grand Rapids*, 54 Mich. 641; *Peninsula Iron & Lumber Co.* v. *Township of Crystal Falls*, 60 Mich. 510.

In the case of *Davies* v. *City of Saginaw*, 87 Mich. 439, 449, this court said:

"In matters involving the discretion or judgment of the common council, where no bad faith or fraud is alleged, parties cannot go behind the recorded vote to show either want of knowledge or of good judgment. * * * The resolution of the council fixing the assessment district and declaring that the sum of $8,544.97 should be assessed upon the property of that district was a legal determination, under the charter, that the benefits conferred upon that district were equal to such amount; and the spreading of the aggregate amount upon the assessment roll, and the confirmation of that roll by the council, determined that the proportion of the aggregate benefit received by each parcel was equal to the burden imposed, and, in the absence of fraud, oppression, or manifest mistake, such determinations are conclusive."

See, also, *Beecher* v. *City of Detroit*, 92 Mich. 268; *City of Detroit* v. *Daly*, 68 Mich. 509.

In *Powers* v. *City of Grand Rapids*, 98 Mich. 393, the following language was used:

"It cannot be said that the improvement does not benefit complainant's property, and the measure of that benefit is for the council and commissioners. These officers acted within the scope of their powers, and the record contains no evidence of fraud, corrupt motive, or intentional favoritism. The presumption is that in making the district and the assessment the officers of the municipality acted in good faith, and have correctly and faithfully exercised the discretion reposed in them. In such case, where mistake or abuse of discretion is not manifest or demonstrable, the determination of the municipal officers in whom such discretion is vested is conclusive, and it is not reviewable by the courts. 1 Dill. Mun. Corp. § 94."

See, also, *Voigt* v. *City of Detroit*, 123 Mich. 547; *Goodrich* v. *City of Detroit*, 123 Mich. 559. We think the trial judge was right in refusing to set aside the assessment upon the ground of an abuse of discretion.

Are counsel right in saying that, irrespective of abuse of discretion, the assessment of the entire award without deduction of the amount received from the building sale is illegal? It is argued:

"The power of the court is limited to setting aside the action complained of. It may not substitute its own discretion for that of the council, and determine the just amount to be assessed on the district. It may not, when the determination of the council is illegal because of the imposition of a greater sum than they might lawfully impose, decree that the imposition shall be reduced to the lawful limit, for this is to determine that the just amount is the full amount that the council might impose, and to usurp the power of the council to determine that just amount. * * * It is not certain that, because the council once decided to impose an amount illegally excessive, it would a second time decide to impose the same amount less the illegal excess."

Section 23, Act No. 124, Pub. Acts 1883, as amended

by Act No. 236, Pub. Acts 1889 (1 Comp. Laws, § 3414), in part is as follows:

"In case there is on the private property taken a building or other structure, the same shall be sold by or under the direction of the common council, board of trustees, or board of supervisors; the amount produced by the sale shall belong and be paid to the fund for paying the compensation awarded for the property taken, and the common council * * * shall cause such amount to be credited and applied in reduction pro rata of the assessment and apportionment made to pay for the property taken, provided that such assessments equal the amount awarded for the property taken."

This amount should have been deducted from the assessment levied. It is clear any injustice done the complainants can be remedied by a simple mathematical calculation as provided for by the court below.

The next question is, Should the assessment be set aside because the assessment roll was made in one part, payable at once, instead of in four parts, so as to spread the payment of the assessments over four years? The argument of counsel for complainants is that section 15 (§ 3406, 1 Comp. Laws) of the street opening law provides that "the assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceedings, as near as may be, as is provided in the charter of the municipality for assessing, levying, and collecting the expense of a public improvement when a street is graded;" while section 44, Act No. 489, Local Acts of 1887, provides that, where a street is graded, the assessment roll shall be made in four parts; therefore this assessment should have run through four years. We do not think this conclusion necessarily follows. In the case of the grading of a street the charter provides for the issuing of bonds payable in one, two, three, and four years, corresponding to the times when the assessments will be due. In the case of street openings there is no such provision, and the law provides for the payment of the awards within a year from the time when the award is con-

firmed. We think the provision quoted relates to the general method of levying and collecting the taxes. See *Trowbridge* v. *City of Detroit*, 99 Mich. 443; *Goodrich* v. *City of Detroit*, 123 Mich. 559.

The remaining question is, Are counsel right in saying "that, even if the assessments at the reduced amount were properly sustained, the inclusion in the original assessment of the amount of $850 derived from the building sale was admittedly illegal, and the city therefore would have no right to either interest or penalties on the amount that could have been rightfully assessed until that amount was ascertained by competent authority, and opportunity afforded to pay it?" Counsel say in the brief:

"The provisions of the charter regarding general taxes and special assessments show clearly that the former are, while the latter are not, subject to the addition of interest and penalties. After providing explicitly for interest and penalties upon general taxes, and for the collection of these additions as well as the original tax by the sale of real estate against which the tax is assessed, the charter passes to the subject of special assessments, and as to them provides merely (section 181) that in default in payment 'they are to be collected by such proceedings as are or shall be prescribed by law' or ordinances, and that sales for any unpaid assessment are to be made in like manner and with like effect as are sales for a general tax."

Section 181, charter of Detroit, reads:

"Assessment rolls to defray the expense of constructing lateral sewers, side and cross walks, paving, grading, macadamizing, graveling, or otherwise improving streets, lanes, or alleys, or for defraying the expense of any local improvements properly payable from the proceeds of special assessments, shall be placed in the hands of the receiver of taxes for payment, as may be provided by ordinance or resolution of the common council, for the space of thirty days, after which warrants for the collection of the same may be issued, and such proceedings for the collection thereof be had as are or shall be prescribed by law, or by any ordinance or resolution of the common council and sales of any real or personal estate for any unpaid assess-

ment shall be made in like manner, and with like effect, as in case of sales for the nonpayment of the general tax."

We think this charter provision is broad enough to authorize the ordinances which provided for penalties and interest in cases like this.

It is said, however, by counsel, that, if—

"The power to impose interest or penalties on such an assessment exists, there is no liability for interest or penalties on the amount of an assessment which includes an unlawful addition, and, inasmuch as the taxpayer could not, by the tender of anything less than the full original assessment, secure a discharge of his liability, there is no duty to make tender, and there is no liability for any interest or penalties until the amount of the assessment is reduced by competent authority, and the taxpayer thereby enabled to discharge his liability. The ground of this proposition is clear. There can be no liability for interest until the taxpayer is in default in performance of his duty. The assessment in question is excessive through an admittedly illegal addition. It was not his duty to pay it, nor was it his duty to tender the amount of the original assessment, less his proportionate part of the illegal addition. The duty to pay and the right to a cancellation of the assessment upon payment are correlative. No officer could have accepted such a tender if made, nor have issued thereon a receipt for the payment of the assessment or canceled it on the assessment roll"—citing *Matter of St. Joseph's Asylum*, 69 N. Y. 353, and other cases.

Some of the cases cited are where a tender of the legal portion of the tax had been made. It must be admitted, after an examination of the authorities, that they are not uniform. We have already stated no tender of payment of any portion of the assessment was made. It has also been said that the amount to be deducted because of the wrongful inclusion of the $850 could be easily determined by a mathematical calculation. The question is a new one in this State.

In *Western Union Telegraph Co.* v. *State*, 64 N. H. 265, it was held upon appeal from an assessment that the tax was too large by two-fifths, and the same was reduced to three-fifths. The plaintiff had not offered to pay any

part of either tax, and the question was whether it should be required to pay interest under the laws of New Hampshire. The court said:

"It would be unjust to require the plaintiffs to pay interest on the two-fifths that are abated and disallowed. But the plaintiffs claim that they should not be required to pay any interest, as the final determination of their assessment was not made till June, 1886, and none could accrue under the statute till the December after; but we think that when the State board of equalization made their assessment, and certified it to the State treasurer, they made the assessment required by the statute, and that it was not the intention of the legislature to give the plaintiffs the use of the money justly due the State on or before December 1, 1884 and 1885, one and two years' interest as a compensation for taking the appeal. All other taxpayers either paid their taxes on or before the 1st of December of these years, or became liable to pay interest thereafter till they did pay them, and justice requires that the plaintiffs should pay interest on their just and equal portion of the public burden due the State. * * * Had the plaintiffs tendered or offered to pay, when due, the sum afterwards found to be their proportional share, and the State had declined or neglected to take the same, a different case would be presented [citing cases]. A taxpayer appealing from an excessive assessment may be unable to determine the exact amount which would be found by the appellate court to be his share of the public expense. He may be unable to protect himself against the interest that will accrue after the 1st of December by paying the exact amount of his tax debt before it is ascertained. But this is not a reason for giving him an exemption that is not enjoyed by his neighbors who do not appeal. * * * The appealing taxpayer can protect himself against interest by paying enough of the amount assessed and afterwards recovering any excess that may be abated."

This case was afterwards approved in the case of *Winnipiseogee Lake Cotton & Woolen Manfg. Co.* v. *Gilford*, 64 N. H. 514. See, also, *Mackay* v. *City and County of San Francisco*, 113 Cal. 392.

In the case of *Cedar Rapids, etc., R. Co.* v. *Carroll County*, 41 Iowa, 153, the court said:

"It is urged that the penalties are onerous, inequitable, and oppressive; that they have accrued while plaintiffs were in good faith contesting the rights of the defendant to enforce them; and that the questions of law involved were doubtful, and justified the plaintiffs in resisting the payment of the taxes. That plaintiffs will suffer a hardship in the payment of these heavy penalties is very apparent. That the questions involved in the cause were doubtful, and the litigation has been prosecuted in good faith, may be conceded, but these things give us no authority to annul a statute and remit a penalty explicitly provided for, and in which defendant has a vested right. The delay incident to the progress of this cause, especially in this court, has been great, and plaintiff has been subjected thereby to suffer from the enormous increase of the penalties. This is no ground for relief. It is an incident of litigation, the risk of which parties are required to assume."

In the case of *Western Union Telegraph Co.* v. *State*, 146 Ind. 54, the court said:

"In the event that one is called upon to pay a tax which he believes to be illegal, he has two courses open to him. He may resist payment at the hazard of all penalties in case the decision shall be against him; or he may pay the tax under protest, and then, in case the decision is in his favor, demand the return of his money. See *Rumford Chemical Works* v. *Ray*, 19 R. I. 456. No one need pay any penalty except through his own wrongful act.

"The government is in need of its revenues, and these revenues will be paid promptly by all good citizens. In case of failure to comply with such duty such penalties will be imposed as will, in the judgment of the lawmaking power, best compel compliance with the law in each case, to the end that all the property owners of the State may bear their equal share of the public burden. Such penalties, as we have seen, are never imposed upon those that pay their taxes when due. The imposition of the penalty being an effort on the part of the lawmakers to compel good citizenship on the part of all taxpayers, that none may shirk the common duty."

See *Challiss* v. *Baker*, 12 Kan. 253; also *State Railroad Tax Cases*, 92 U. S. 575, for an interesting discussion of some of the principles applicable to this case.

The reasoning of these cases appeals to us. We can see no valid reason why the taxpayer who neglects or refuses to pay any portion of his assessment and litigates all of it should not be required to pay such penalties and interest as are fixed by law upon such portions of the assessment as are held to be valid.

A decree will be entered in accordance with this opinion. The defendants will recover costs.

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

LOUISELL *v.* BENZIE CIRCUIT JUDGE.

MANDAMUS—QUESTIONS CONSIDERED.

An information for forgery was quashed, and defendant remanded to the sheriff for 24 hours in which to allow the prosecuting attorney to file new information, or take such other steps as he might deem proper. The prosecuting attorney then swore to a complaint charging defendant with obtaining money by false pretenses on the alleged forged check, and such proceedings were had that defendant was bound over for trial. Subsequently the prosecuting attorney made an informal ex parte motion to vacate the order quashing the information, and, on its denial, brought mandamus. *Held*, that the prosecuting attorney, by causing the accused to be bound over for trial for obtaining money by false pretenses, acquiesced in the quashal of the prior information, and the motion to vacate the order to quash being oral and without notice to the accused, the application for mandamus would be denied, without considering the legal sufficiency of the information for forgery.

Mandamus by M. E. Louisell, prosecuting attorney of Benzie county, to compel Clyde C. Chittenden, circuit judge of Benzie county, to vacate an order quashing an

information. Submitted January 3, 1905. (Calendar No. 20,873.) Writ denied February 4, 1905.

M. E. Louisell, in pro. per.

M. G. Paul, for respondent.

BLAIR, J. One William Peak was arraigned by petitioner, as prosecuting attorney, before respondent, upon an information charging that on the 25th day of October, A. D. 1904, he "feloniously did then and there utter and publish as true a certain false, forged, and counterfeit order for the payment of money, commonly called a check, which said false, forged, and counterfeited order for the payment of money, commonly called a check, is as follows, to wit:

" 'TRAVERSE CITY, MICH., Oct. 16, 1904. No.———.
" 'Traverse City State Bank. Pay to the order of Hannah & Lay Merc. Co., $66.00, Sixty-six dollars.
[Sig.] " 'NORTHERN MICH. TRANSP. CO.
[Indorsed] " 'HANNAH & LAY MERC. CO.
" 'JAMES MCDONALD.' "

Counsel for Peak moved to quash this information, substantially for the reason that inasmuch as October 16, 1904, the date of the check, was Sunday, the check was void, and not the subject of forgery, whereby the uttering and publishing thereof was not a crime.

The court adopted this view, and entered an order quashing the information, and remanding the defendant to the custody of the sheriff "for a period of twenty-four hours, in which to allow the prosecuting attorney to file new information, or take such other steps as he may deem proper."

Within the 24 hours allowed by the order, petitioner himself swore to a complaint charging defendant, Peak, with obtaining money by false pretenses upon this same check. A warrant was issued, and such proceedings had thereon that Peak was bound over to the next term of court, commencing January 16, 1905, for trial. After

Peak had been bound over for trial on the charge of obtaining money by false pretenses, and on or about the last day of the November term of court, petitioner made an informal, ex parte motion to vacate the order quashing the information for uttering the forged check. This motion was denied, and respondent returns that his reasons for such denial were: (1) Because his decision was correct, as a matter of law; (2) because petitioner acquiesced in respondent's action, and procured defendant, Peak, to be bound over for trial on a charge of false pretenses growing out of the same transaction, before making his motion to vacate; (3) because said motion was oral, informal, and ex parte, without notice to defendant, Peak, or his counsel, and after the jury had been discharged.

In view of the fact that petitioner has caused Peak to be bound over for trial, and can try him at the present January term of the Benzie circuit court for the offense of obtaining money under false pretenses upon the same check he was charged with uttering as forged, as well as for the other reasons assigned by respondent for his action under the second and third headings, we do not feel inclined to consider the question of the legal sufficiency of the information for uttering the forged check, but will deny the application for the writ.

MOORE, C. J., and MCALVAY, GRANT, and HOOKER, JJ., concurred.

WISCONSIN & MICHIGAN RAILWAY CO. *v.* MCKENNA.

1. DEEDS—DELIVERY—WHAT CONSTITUTES.
   Where a deed was executed by certain of the grantors named therein and delivered to the common agent of the grantors and grantee on the understanding that it was not to be delivered to the grantee without the signature of the remaining grantor, and that the consideration was not to be paid until such signature was obtained, there was no delivery of the deed to the grantee.

2. STATUTE OF FRAUDS—SALE OF LAND—PART PERFORMANCE.
   The execution of a deed by a part of the vendors in an oral executory contract for the sale of an interest in land, and its delivery to a common agent of the vendors and purchaser, on the agreement that he is to procure its execution by the remaining vendor, and deliver it when complete to the purchaser, and the deposit at the same time by the purchaser of the purchase price in the hands of the agent, does not, the remaining vendor having refused to execute, constitute such a part performance as to take the executory contract out of the statute of frauds, though the purchaser, by consent of the vendors, took possession in expectation of performance, and expended a small sum of money on the land.

3. SPECIFIC PERFORMANCE—SALE OF LAND—PART PERFORMANCE.
   A deed was executed by some of the vendors in an oral executory contract to convey the land, and delivered to the common agent of the parties, on the understanding that he should procure the signature of the remaining vendor, who was to receive no consideration, and the consideration then on deposit in the agent's hands was to be paid to the others. The remaining vendor refused to execute the deed, whereupon the purchaser tendered the consideration to the others, waiving the signature of the vendor who refused to execute. *Held*, that the tender did not take the executory contract out of the statute of frauds, so as to support a bill for specific performance by the purchaser.

4. SAME—PART PERFORMANCE—POSSESSION—EQUITIES.
   Where a contract between a railroad company and a landowner for a conveyance of a right of way over land was executory and within the statute of frauds, the mere entry on the land by

the company with the consent of the owner, and the excavation of a small quantity of earth, was not a sufficient part performance to warrant specific performance at the suit of the company, condemnation being available.

Appeal from Dickinson; Stone, J. Submitted January 4, 1905. (Docket No. 2.) Decided February 4, 1905.

Bill by the Wisconsin & Michigan Railway Company against Mary T. McKenna, Thomas McKenna, and John K. Stack for the specific performance of a contract. From a decree dismissing the bill, complainant appeals. Affirmed.

L. D. Eastman (*E. Clark Eastman,* of counsel), for complainant.

F. D. Mead, for defendants.

HOOKER, J. Thomas McKenna was the owner in fee of the premises in question, subject to the rights of Mary McKenna (his wife), and John K. Stack, who were owners, respectively, of 21/24 and 3/24 of the ores and minerals upon said premises, with the right to enter, mine, and carry away the same.

The complainant, a railroad company, sought to acquire a right of way over said lands for its track, and to that end began proceedings for condemnation under the statute. At the time the cause came on for hearing before the circuit court, negotiations for a settlement were pending, and it was announced by counsel that an amicable adjustment of the matter was probable. The negotiations were continued until July 14, 1903, when, all the parties except Stack being present, and he being represented by counsel, an agreement was made and reduced to writing by the terms of which a deed of the right of way to complainant was made in consideration of $2,500, which was to be paid for the same. Mrs. McKenna was to receive the entire sum and Stack nothing. The writing was executed by the McKennas, and was placed in the hands of Mr.

Flannigan, their counsel, whose clerk was to take it to Mr. Stack, to be signed by him, and on its return Mr. Flannigan was to deliver it to the complainant, and to deliver to Mrs. McKenna the complainant's check for $2,500, which, in pursuance of the agreement, it deposited with him for the payment of the consideration. The clerk was to be paid for his service by complainant. There was no doubt in the minds of any of the parties that Stack would sign the paper, and, the check being deposited, it was orally agreed that the complainant might enter on the premises and begin work at once. It accordingly entered, and did a small amount of work, before learning of the refusal of Stack to sign and the repudiation of the contract by Mrs. McKenna, who drove the men from their work with a pistol. Stack refused to sign for some reason not given, and, the money not being paid to Mrs. McKenna, who demanded it, she repudiated the agreement, and concluded to double her price for the right of way, and so informed the complainant. After this refusal and Mrs. McKenna's repudiation of the agreement, the complainant offered to waive the signature of Stack, and to take the deed, and pay over the price to the McKennas without it, claiming the right to do so, but this was refused.

Complainant has filed the bill in this cause for specific performance, and an injunction which was issued has been continued to the hearing of the cause upon the filing of a bond conditioned to prosecute the condemnation proceedings to conclusion, and pay the compensation that should be therein awarded if its bills should be dismissed. The circuit court determined that the complainant had not acquired title to the right of way, and denied specific performance, but continued the injunction for a time, to give opportunity for condemnation, in case the Supreme Court should affirm the decree. The complainant has appealed.

The parties made an oral contract for the sale of this right of way, and the defendant went into possession under it, and deposited the consideration with Mr. Flannigan, the attorney of the McKennas, who was selected for the pur-

pose. The deed which was to convey the right of way was never fully executed by the grantors named in it as contemplated by all, for the reason that Stack refused to sign it. We are of the opinion that there was no delivery of the deed to the complainant by the McKennas, who signed it, as Flannigan had no authority to deliver it without the signature of Stack, or to deliver the check to the McKennas without such signature to the deed, until it was given by letter after this suit was commenced.

The situation, then, is that the parties made an oral executory contract for the sale of an interest in land. It was, when made, within the statute of frauds, and cannot be enforced specifically unless it has been taken out of the statute by part performance. The only thing that has been done by the complainant was to take possession in expectation of performance, and expend a small sum upon the land, and to make a deposit with a common agent of the consideration. The defendants have done nothing toward executing the contract except to yield possession in the expectation that a deed would be made, which, owing to Stack's refusal, was not completed. In other words, the contract was not executed because the consideration has not been paid or the deed delivered. It remains an executory contract within the statute of frauds, because not in writing.

The only question left is whether equity may treat the possession given as such part performance as to justify specific performance. It is said the offer to deliver the check was a waiver of complainant's claim to Stack's signature as a condition precedent to the delivery of the deed, but that does not make the executory contract valid. The contract being executory and oral, neither party could compel the other to perform. The tender of a deed would not make it valid, nor would the tender of the consideration; and neither, unless accepted, would be available in support of a claim of part performance. Hence we must say that the direction to Flannigan, the common agent, to deliver the check to Mrs. McKenna, even if she were informed of

it, did not affect her right to refuse performance, and, if the complainant is to prevail, it must be upon the ground that the change of possession entitles it to specific performance.

The mere putting a vendee in possession is not sufficient to give a right to specific performance. It is not equities arising out of the contract, but equities based upon what has been done by way of executing it, and in reliance upon it by the acquiescence of the other party, that courts of equity act upon in such cases; and, as indicated by the learned circuit judge, there is little beyond the mere fact of the entry by the complainant shown. The possible excavation of a little dirt, involving at most the expenditure of a few dollars, is the extent of the injury to the complainant, and even that will not be lost if it shall succeed in obtaining the right of way in the proceedings for condemnation, which we understand to be yet pending.

The decree will be affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and BLAIR, JJ., concurred.

LOVE *v.* RAMSEY.

1. ASSUMPSIT—GOODS SOLD—PLEADING—ISSUES.
   In assumpsit on the common counts for goods sold, where plaintiff's proofs show that the goods were sold to defendant individually, and defendant claims that he ordered the goods for a corporation, as its manager, the question for determination is whether the contract was with defendant individually or as representative of the corporation, and the question whether defendant is liable as a stockholder, because of informal organization of the corporation, is not involved.

2. CORPORATIONS—DEFECTIVE ORGANIZATION—LIABILITY OF STOCKHOLDERS.
   One who deals with a corporation, charged with knowledge

that it is not in fact a de jure corporation, is estopped to deny its legality, and cannot hold its manager liable individually or its stockholders liable as partners.

3. SALE — ACTION FOR PRICE — PARTIES TO CONTRACT — EVIDENCE OF ACCOUNT.

In an action for the price of goods sold, where defendant claimed they were sold to a corporation of which he was manager, plaintiff's books of account, showing that the goods were charged to the defendant individually, with evidence that defendant knew they were so charged and made no objection, are admissible.

4. ACCOUNT STATED—WHAT CONSTITUTES.

Where the debtor objected, when the account was rendered, that the account should be charged to a corporation of which he was manager, instead of to him individually, the creditor cannot claim an account stated on the ground that the debtor did not object to the amount.

Error to Ionia; Davis, J. Submitted January 4, 1905. (Docket No. 5.) Decided February 4, 1905.

Assumpsit by William Love against William J. Ramsey for goods sold and delivered. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Reversed.

Plaintiff sued defendant in justice's court to recover for a small bill of lumber claimed to have been sold by him to defendant. The declaration is on the common counts. A bill of particulars was furnished, setting forth the amount and price of the lumber. The theory of the declaration and bill of particulars and the evidence adduced on behalf of the plaintiff is that the sale was made to the defendant personally, and that the contract was made with him. The defendant claims that he was the agent of the Sunfield Manufacturing Company, and that as the secretary and manager of that company he ordered the goods. Upon the trial the articles of the Sunfield Manufacturing Company were produced. Its capital stock was $10,000, with 1,000 shares of the par value of

$10 each. When organized only 350 shares were subscribed. Some time afterward 150 additional shares were subscribed. The court directed a verdict for the plaintiff upon the ground that the corporation was not legally organized, and that, therefore, the defendant, as a stockholder and manager, made himself liable for the goods.

A. A. Ellis, for appellant.

R. A. & W. E. Hawley, for appellee.

GRANT, J. (*after stating the facts*). 1. The declaration is not based upon the theory that the credit was given to the corporation, and that in consequence of its illegal character the defendant is liable. Neither is any such theory suggested in the testimony of the plaintiff or his clerk, the sole witnesses to establish the sale. Both testified that the goods were ordered by Ramsey in his own name, and that they knew nothing about the Sunfield Manufacturing Company, or the defendant's connection with it, until some time after the sale. In the cases cited by the plaintiff (21 Am. & Eng. Enc. Law [2d Ed.], pp. 879, 880; *Bigelow* v. *Gregory*, 73 Ill. 197; *Hurt* v. *Salisbury*, 55 Mo. 310; *Kaiser* v. *Savings Bank*, 56 Iowa, 108; *Loverin* v. *McLaughlin*, 161 Ill. 417; *Trust Co.* v. *Floyd*, 47 Ohio St. 525 [12 L. R. A. 346]; *Kruse* v. *Humpert*, 21 Ky. Law Rep. 985; *Cincinnati Cooperage Co.* v. *Bate*, 96 Ky. 356; *Walton* v. *Oliver*, 49 Kan. 107) the declarations set forth the special ground of liability against the directors or stockholders. No averment of liability because the corporation was not legally organized is even suggested in the declaration now before us.

Whether, under the proper form of action and a proper declaration, the defendant is liable, it is not necessary to determine. It is sufficient to say that under the declaration and proofs the sole question was whether the contract was between the plaintiff and defendant. Under the decisions of this court the members of a corporation are not

liable where it is a corporation de facto, though not de jure, and the plaintiff has dealt with it as a corporation. Before the goods in this case were sold, articles of incorporation had been duly filed in the proper offices, and the company held itself out as a legally organized corporation, and did business as such. It was in the power of the creditors dealing with it to examine these articles and ascertain the character of its organization. All are presumed to know the law, and when one deals with a corporation knowing that it is not in fact a de jure corporation, he as well as the corporation is estopped to deny its legality, and cannot hold its manager liable individually or its stockholders liable as partners. *Merchants', etc., Bank* v. *Stone*, 38 Mich. 779; *Calkins* v. *Bump*, 120 Mich. 335; *Eaton* v. *Walker*, 76 Mich. 579 (6 L. R. A. 102); *Durgin* v. *Smith*, 133 Mich. 331; *Gartside Coal Co.* v. *Maxwell*, 22 Fed. 197; *Gow* v. *Lumber Co.*, 109 Mich. 45. The stockholders, of course, can be compelled to pay the full amount of stock subscribed. Under the declaration and proofs the only question for the jury to decide was, Did the plaintiff contract with the defendant in his individual capacity?

2. In view of a new trial two other questions may properly be decided, although they were not directly passed upon by the court below. Upon the trial defendant conceded that the amount and price of the goods were correct, and that they were delivered; the sole question being, To whom was the credit given? Plaintiff was permitted to produce his books of account showing that the goods were originally charged to the defendant. They were competent, as there was testimony to show that the defendant saw these entries, and made no objection to their being charged to him.

3. Plaintiff claimed the right to a verdict and judgment upon an account stated. The bill was rendered to Mr. Ramsey, and to it he made no objection. He asserted that he did make objection when he first found that it was charged to him, and instructed plaintiff's clerk that it should be charged to the Sunfield Manufacturing Com-

pany, and that the clerk replied that it made no particular difference to whom it was charged. If the jury should believe this testimony of the defendant, a rendition of the account and its acceptance without objection would not become an account stated and binding upon him. The theory of an account stated is that the minds of the parties have met when it has been rendered by one and received and accepted without objection by the other. 1 Am. & Eng. Enc. Law (2d Ed.), p. 442; 1 Cyc. 364.

Judgment reversed, and new trial ordered.

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

FLETCHER v. JOHNSON.

CONTRACTS — PUBLIC POLICY — CHILLING BIDDING — ENFORCEMENT IN EQUITY.

Where two persons, each desiring to purchase the same property, which is to be offered at public sale, agree that one shall purchase for the benefit of both, thereby preventing competitive bidding between themselves, the contract is contrary to public policy, and cannot be enforced in equity.

Appeal from Alpena; Emerick, J. Submitted January 4, 1905. (Docket No. 8.) Decided February 4, 1905.

Bill by Frank W. Fletcher against William H. Johnson for the specific performance of a contract. From a decree dismissing the bill, complainant appeals. Affirmed.

Charles R. Henry, for complainant.

Joseph H. Cobb, for defendant.

HOOKER, J. Complainant seeks by the bill in this cause the specific enforcement of a contract for the purchase,

for complainant's benefit, of certain shares of stock in a corporation. The corporation referred to is the Alpena Water Company, and both parties were at the time of the transaction stockholders therein, and each was apparently desirous of obtaining a majority of the stock of the corporation.

James D. Turnbull was at one time a stockholder, and owned at the time of his death 210 shares of this stock, of the par value of $10,500. This, with other stocks, had been assigned by him to the Alpena National Bank as security for a large indebtedness. Turnbull was also indebted to defendant, Johnson, who was a director and vice-president of the bank. In addition to the indebtedness mentioned, Turnbull was liable to Johnson as accommodation indorser upon paper of his held by the bank. To secure Johnson, as well as for the purpose of affording additional security to the bank, Turnbull had executed to Johnson a bill of sale covering a large amount of forest products, in trust for such purposes, which trust Johnson accepted. The complainant asked the bank to give him notice when it should determine to dispose of the water stock. About December 1, 1901, the board of directors of the bank considered the steps necessary to be taken in order to foreclose and cut off the equity of the Turnbull estate in these stocks to enable it to realize thereon in payment of its claims, and it was decided that the stocks should be offered at public sale, the proceeds to be accounted for to the estate after satisfying the obligations. Upon learning this the complainant telephoned Johnson to call upon him, and an interview was had, at which complainant told him that he knew that the complainant wanted to obtain this stock, and asked what they better do, and whether he should "go in there and bid against him" (Johnson). This resulted in an agreement that, if complainant would not bid against Johnson, the latter would buy the stock from the bank, one-half on complainant's account. The stock was not sold at public sale, but Johnson obtained the bank's interest, and afterwards ad-

justed the matter with the estate in a way to perfect his title to this stock. Complainant gave him his check for half of the cost of his purchase, and defendant accepted it, though he afterwards returned it, and refused to give complainant any of the stock. Upon hearing the cause, the court dismissed the bill, holding that the contract between the parties was opposed to public policy, and void. The complainant has appealed.

The evidence fairly shows that each of these persons desired the stock, or at least that the other should not have it all. Apparently it was a question of control of the company. To avoid competition between them, they agreed that one should bid for both, and that there should be no bidding against each other, and that the stock should be divided and the expense shared equally.

The question is resolved into this: May two persons, who desire to purchase the same property, which is to be offered for sale, agree between themselves that one shall purchase for the benefit of both, thereby preventing competitive bidding between themselves. The authorities are, perhaps, not in entire harmony upon this subject, but there is a near approach to uniformity upon the proposition that when the object of the contracting parties is to prevent competition at the sale, to the end that the property may be bought for less than its value, the contract is void. The cases cited by the complainant's counsel do not question that rule. The only reason that can be given for its non-application to the present case is that the parties did not design to buy the property for less than its value; in other words, it was their design to avoid paying an exorbitant price, liable to be bid by reason of their respective interests and necessities.

We think that the cases cited by counsel do not establish such a distinction, for none of them turn upon that point alone. The validity of the contract cannot depend on the price paid at the sale, but must rest on the terms of the agreement. Here no price was agreed upon to be bid, nor is there anything to indicate that each party did not

desire to buy as cheaply as possible. The only inducement to the contract was a prevention of competition, which was expressly agreed upon.

In the case of *Fisher* v. *Transportation Co.*, 136 Mich. 218, a similar promise was held void on the ground that it was contrary to public policy. That case recognizes the rule that, where the circumstances show that the consideration for the promise is, in whole or in part, an attempt to prevent competition at a public sale, the contract is void. That was the express consideration here.

Upon the hearing the testimony showed certain conduct and conversations by and between these parties relating to the delivery and reception of the check, and counsel for the complainant claimed that a new contract was inferable therefrom, and amended his bill to conform to such claim. Upon an examination of the proof we are unable to find any intention on the part of Johnson to make a new contract. If at that time he accepted the check with an intention to deliver the stock, it was, in our opinion, a mere carrying out of the original contract. Even if we could assert the fiction of a legal inference against what we believe the proof shows to have been the fact, it would be an extraordinary spectacle for a court of equity to endeavor thus to avoid the consequences of an illegal contract, so far carried out as to have effected the object of preventing competition. The proof would have to be pretty clear to divorce the subsequent transactions from the earlier, and justify the conclusion that an entirely new and distinct contract was in contemplation by the parties, in no part resting upon the illegal consideration.

We are of the opinion that the learned circuit judge was right in his conclusion that the complainant could not be granted the relief sought.

The decree is affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and BLAIR, JJ., concurred.

GREAT WESTERN SMELTING & REFINING CO. *v.* EVENING NEWS ASS'N.

1. TROVER — CONVERSION — WHAT CONSTITUTES—REPUDIATION OF CONTRACT—NECESSITY OF DEMAND.

   Where defendant ordered some stereotype metal from another, with whom it had an understanding that the price thereof should be applied on the latter's account with defendant, and the latter transferred the order to plaintiff, which had no knowledge of the understanding referred to, and shipped the metal to defendant, accompanied with a cash invoice, whereupon defendant immediately melted the metal, supposing, in good faith, that it was its own, under the special arrangement with the person from whom it had ordered it, but afterwards, on learning the terms upon which the metal had been shipped by plaintiff, repudiated the entire transaction, and insisted that it had no contract relations with plaintiff, its conduct constituted an unlawful conversion, for which trover would lie without any prior demand or refusal.

2. SAME—ESTOPPEL.

   Where defendant insisted that it had never bought property of plaintiff, and declined to recognize any claim on plaintiff's part against it, it was estopped, when sued for conversion of the property, to assert that plaintiff had sold the property to it, and could sue only in assumpsit for its value.

Error to Wayne; Frazer, J. Submitted January 4, 1905. (Docket No. 11.) Decided February 4, 1905.

Trover by the Great Western Smelting & Refining Company against the Evening News Association. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

Jonathan Palmer, Jr., and *John M. Parker*, for appellant.

Rolland J. Cleland, for appellee.

BLAIR, J. On the 26th day of September, 1900, defendant sent to one I. M. Jacobson, of Toledo, Ohio, who previous to that time had been engaged in the brokerage business, the following order:

"*Dear Sir:* We are pleased to inform you that we are in a position to place an order with you for one ton No. One Stereotype Metal, which kindly ship immediately. We trust that we may be favored with the lowest market price, although we want a first-class article. Kindly acknowledge order and state when shipment will be made.

"Yours very truly,

"THE EVENING NEWS ASS'N,

"H. S. SCOTT, Business Manager."

This order was on the 27th day of September, 1900, forwarded to the plaintiff, with the following indorsement thereon:

"I herewith transfer the above formal order to the Great Western Smelting and Refining Company, of Chicago.

[Signed] "I. M. JACOBSON."

Defendant and appellant induced the judge, upon its motion, to strike out this indorsement, for the reason that the signature of Jacobson was not properly proved.

On the 1st day of October, 1900, plaintiff shipped the stereotype metal, and on the same day mailed the following invoice:

"CHICAGO, October 1st, 1900.

"DETROIT EVENING NEWS ASS'N,

"Detroit, Mich.

"Bought of Great Western Smelting & Refining Company, Manufacturers of Metals, 173–199 West Kinzie Street. Terms Cash. Shipped via ———.

2,055 lbs. No. 1 Stereotype, 7½, $154.13."

—Which was received by defendant either on the 2d or 3d day of October, but, whether before or after the receipt of the metal, the record does not disclose with certainty.

On the 3d of October, 1900, defendant mailed to plaintiff the following letter:

"DETROIT, MICH., Oct. 3, 1900.
"GREAT WESTERN SMELTING & REFINING Co.,
"173 W. Kinzie St.,
"Chicago, Ill.

"*Gentlemen:* We return herewith your bill for metal received today in response to our order upon I. B. Jacobson, of Toledo. We ordered this metal from Mr. Jacobson on the special understanding that it should apply on his advertising account with us, in fact, it was due to this advertising that we tendered him this order—in a reciprocal way. You will, therefore, kindly look to him for payment of the account. As we are writing him by this mail, he will probably take care of the matter promptly. Hoping that you have not been misled in regard to it, we are,

"Yours very truly,
"THE EVENING NEWS ASS'N,
"H. S. SCOTT, Business Manager."

On October 4, 1900, plaintiff replied to defendant's letter of the 3d, as follows:

"CHICAGO, Oct. 4th, 1900.
"THE EVENING NEWS ASS'N,
"Detroit, Mich.

"*Gentlemen:* Replying to yours of the 3rd inst. your order to Mr. Jacobson reads plainly that you are in position to place an order with him for 1 ton No. 1 stereotype metal to be shipped immediately, and makes no mention of payment to be taken out in advertising, which order was duly transferred to us. We shall, therefore, look to you for payment of this shipment, and if this is not satisfactory, please return same to us at once, and oblige. Inasmuch as you have returned our invoice, we take it that you have not taken the stock from the depot, in which event, please do not take it out, but return to us the shipping bill, and oblige,

"Yours respectfully,
"GREAT WESTERN SMELTING & REFINING Co. R."

Defendant did not reply to this letter of October 4th and no communications passed between the parties, so far as the record discloses, until the 24th of October, when plaintiff returned the invoice inclosed in the following letter:

"CHICAGO, Oct. 24, 1900.

"DETROIT EVENING NEWS ASS'N,
"Detroit, Mich.

"*Gentlemen:* Inasmuch as we have received no notice of return of metal sent you under order to Mr. Jacobson, we return herewith invoice covering same.

"Respectfully yours,
"GREAT WESTERN SMELTING & REFINING CO. R."

On the 25th of October defendant replied as follows:

"DETROIT, MICH., Oct. 25, 1900.
"MANAGER'S OFFICE.

"GREAT WESTERN SMELTING & REFINING CO.,
"173 West Kenzie Str.,
"Chicago, Ill.

"*Gentlemen:* Replying to your favor of October 24th, inclosing invoice of metal which you claim to have shipped us, we beg to say that we have never to our knowledge ordered goods from your concern, nor shall we recognize that you have any claim against us.

"We know, of course, that you refer to the shipment of metal which we ordered from I. B. Jacobson, of Toledo, who was at the time indebted to us, and from whom we ordered this metal to equalize our account. If you furnish this metal on Mr. Jacobson's order, you must look to him for payment, for if you look to us, we can only refer you to our attorney in any future reference to the matter. The metal was placed in use immediately on arrival, as we were short at the time, and before we had any knowledge of the peculiar action (to say the least) of Mr. Jacobson in the matter.

"Yours very truly,
"THE EVENING NEWS ASS'N.
"H. S. SCOTT, Business Manager."

Upon receipt of defendant's letter of October 25th, plaintiff placed the matter in the hands of its attorneys, who, having demanded of defendant payment for the metal or the return of the metal, and having been refused, brought an action of trover in justice's court for the alleged conversion of the metal. Plaintiff, having been defeated in justice's court, appealed to the circuit court, where verdict and judgment were rendered in its favor by direction

of the court, and defendant brings the case to this court on writ of error.

Upon the conclusion of the proofs in the circuit court, it was agreed between the parties that they would submit the question whether the action of trover was an appropriate action, under the circumstances of this case, upon briefs, to the court, and that the court might direct a verdict in accordance with his determination of this question of law. The plaintiff claims that, under the rule adopted by this court in *McCormick Harvesting-Machine Co.* v. *Waldo*, 128 Mich. 135, the action of trover was the only action which would lie. On the other hand, defendant maintains that trover would not lie under the circumstances of the case, and that, if plaintiff had any cause of action at all, it should have been brought in assumpsit.

The relations of these parties must be determined from the writings which passed between them, and it is apparent that, instead of there being a mutual understanding between the parties as to the terms of their dealing, there was a mutual misunderstanding. When the defendant received the stereotype metal, it understood it was receiving metal which had been shipped to it by Jacobson, either as his own, or which he had purchased and agreed to pay for under a special arrangement that defendant should pay Jacobson by giving him credit on his advertising account. As a matter of fact, it did not receive property of Jacobson, but it received the property of another, the plaintiff, who had no knowledge whatever of the special agreement with Jacobson, and who shipped the metal to the defendant on the express understanding that it was to be paid for in cash. The defendant at once upon receiving this metal melted it up, along with other metal which it had on hand, and put it into use, perhaps before receiving the invoice from plaintiff, and in ignorance of plaintiff's rights; but the defendant's good faith or innocent mistake could not confer title to the plaintiff's property, and, if it melted up the plaintiff's metal, supposing that it was its own under the special arrangement with Jacobson, and

afterwards, upon learning the terms upon which this metal was shipped by plaintiff, repudiated the entire transaction, and insisted that it had no contract relations with plaintiff at all, this conduct on its part constituted an unlawful conversion, for which, in our opinion, trover would lie without showing demand or refusal. The plaintiff never intended to give the defendant possession of the metal, or to convey the title to the metal to the defendant upon the basis of the special arrangement with Jacobson; and, when the defendant received the metal, not in accordance with the plaintiff's terms, although then unknown, but in hostility thereto, and in derogation of the plaintiff's rights, it converted the plaintiff's property to its own use as much as though it had taken the property which plaintiff had shipped to another, supposing in good faith that it had a right to take it, and had melted it up and applied it to its own uses. There seems to us to be no middle ground here. The defendant must have received this property in accordance with the plaintiff's right to payment for the property under the terms of sale, or it must have received it in derogation of those rights.

The defendant contends that the conduct of the plaintiff in charging the metal on its books to the defendant, and in demanding payment for the metal, and sending back the invoice, and some other circumstances disclosed by the record, show that the plaintiff treated the property as sold to the defendant, and are inconsistent with its right to bring action in trover for the conversion thereof. We think the defendant does not occupy a position to raise this question. After insisting throughout that it never bought any metal of the plaintiff, and declining to recognize any claim on the part of plaintiff against it, it cannot, when the plaintiff takes it at its word and brings suit for conversion of the property, reply that the plaintiff sold the property to it, and could only sue in assumpsit for the value of the property. It is estopped from setting up such a defense.

We think, under the stipulation of counsel, the court properly directed a verdict for the plaintiff, and the judgment will be affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and HOOKER, JJ., concurred.

MANZER v. PHILLIPS.

139 61
e152 *515

139 61
158 *529

1. INTOXICATING LIQUORS — CIVIL-DAMAGE ACT — ACTIONS — EVIDENCE—CURE OF ERROR.
   In an action under the civil-damage act, error in the admission of testimony as to the amount spent by plaintiff's husband in defendant's saloon is cured by subsequently charging the jury that no recovery can be had for such money.

2. SAME—ACTION BY WIFE—CHILDREN.
   Cross-examination of plaintiff as to her husband's earnings and business does not entitle plaintiff to show that she has children who contribute to the earnings of the family.

3. SAME—AGGRAVATION OF DAMAGES.
   It is not competent to show an aggravation of injuries to plaintiff's feelings by showing the presence of her children when she was informed of her husband's debauch.

4. SAME—EVIDENCE—PLAINTIFF'S CHILDREN.
   The admission, though indirectly, of testimony that plaintiff had children, was reversible error.

5. SAME—EVIDENCE—FINANCIAL CIRCUMSTANCES.
   Evidence of the property and financial condition of plaintiff's husband is admissible as showing plaintiff's means of support.

6. SAME—DAMAGES—INSTRUCTIONS.
   Where plaintiff's testimony showed that her husband provided for her as well after the debauch complained of as formerly, and that the only real difference that the loss of the money spent on the debauch made was that plaintiff would have that much less money if her husband should die before her, the court should have charged that plaintiff had failed to show any injury to her person, property, or means of support, and could not recover for those items.

7. SAME—WANTON SALE—EXEMPLARY DAMAGES.

Where liquor was sold to a person known to be intoxicated, the jury may find that such sale was wanton, and may award exemplary damages, although the saloon keeper did not know the person had a wife and could not anticipate the particular injury suffered by reason of the sale complained of.

Error to Shiawassee; Smith, J. Submitted January 5, 1905. (Docket No. 16.) Decided February 4, 1905.

Case by Mary Manzer against Anna Phillips and others under the civil-damage act. There was judgment for plaintiff, and defendant brings error. Reversed.

John T. McCurdy, for appellants.

Albert L. Chandler, for appellee.

BLAIR, J. This is an action under the civil-damage act, brought by Mary Manzer against Anna Phillips, a saloon keeper, and Austin Phillips and George Setzer, her bondsmen. It is the contention of plaintiff, and there was evidence tending to prove, that on the 4th day of August, 1903, her husband, then being a person in the habit of getting intoxicated, visited the saloon of defendant Anna Phillips, and while there became so intoxicated as to be unconscious for several hours upon liquors sold him by said defendant or her servants, during which period of time he either lost or had taken from him the sum of $110. Plaintiff seeks to recover in this action damages under the statute on account of injuries sustained by reason of the unlawful sales to her husband. Plaintiff recovered judgment, and defendants appeal.

The first assignment of error relates to the admission of testimony as to the amount of money spent by Manzer at Phillips' saloon between the 4th day of May and the 4th day of August, 1903. Any error that may have been committed in admitting this testimony was cured by the action of the court in subsequently charging the jury that no recovery could be had for such money.

Error is also assigned upon the ruling of the court in admitting evidence that Mrs. Manzer had two children. As to this action of the court, the record is as follows:

"*Q.* Were your children present when the neighbors came in and were relating what had taken place—they were relating what had taken place?

"*A.* Yes, sir.

"*Mr. McCurdy:* I object to that as incompetent, inadmissible, and an improper method of getting in inadmissible testimony. I move to strike out the answer. The question itself is improper.

"*The Court:* I will strike out the answer if you want to strike out the answer. That is as far as I will go, if you want it stricken out.

"*Q.* They were not?

"*A.* Yes, they were. I said, 'Yes, sir.'

"*Mr. McCurdy:* I now renew my motion to have that answer stricken from the record, and the jury instructed that they should pay no attention to it.

"*The Court:* I think I will deny the motion. (Defendant excepted.)

"*Q.* How did you feel at having that knowledge come home to you, under the circumstances there as you have related at your home?

"*Mr. McCurdy:* I object to it as incompetent and inadmissible.

"*The Court:* She may answer it. (Exception for defendant.)

"*A.* Well, I felt pretty bad over it."

Plaintiff contends that this testimony was properly received and retained, because:

"The record discloses that plaintiff had two grown-up sons, who were present in court as witnesses at the trial. These two sons were present when the neighbors came in with newspaper clippings that had been written about Manzer's debauch at the saloon, and when their father and neighbors discussed the loss of the money in the presence of their mother. Counsel for the plaintiff and defendant both referred to these young men in their argument and examination upon the trial. Before calling these young men upon the witness stand, and also to prove further the transaction at their home as related by the witness, plaintiff was asked if these two boys were present when she

heard of the transaction in Phillips' saloon. No other use was made of this testimony, and such evidence was held competent in the case of *Lucker* v. *Liske*, 111 Mich., at page 686, citing *Filer* v. *Smith*, 102 Mich. 99."

We understand plaintiff's counsel to mean by this either that the occurrence of the neighbors coming in with clippings to report concerning Manzer's debauch was competent evidence under the authorities cited, and that the boys' presence at the occurrence was drawn out for the purpose of identifying the transaction and calling them as witnesses later on, or that the fact that the notification was in presence of her children added to her grief, humiliation, and mortification, and so was competent as bearing upon injuries to feelings. There is nothing in the record to indicate that the boys were present as witnesses, nor were they called as witnesses, so far as the record discloses. Page 39 of the record, referred to by plaintiff's counsel, so far as it relates to this subject, is as follows:

"*Q.* You were speaking about his earning more money now than he did formerly. You may state whether or not you haven't boys that are grown up, and assist in earning this money at the present time.

"*Mr. McCurdy:* I object to it as incompetent, and an improper way of getting inadmissible evidence before the jury.

"*The Court:* I think, *in view of the cross-examination*, she may answer it. (Exception for defendant.)

"*A.* Yes, sir.

"*Q.* Are these the two boys that you speak of?

"*A.* Yes, sir."

Recross-examination by Mr. McCurdy:

"*Q.* These two young men are 18 or 19 years old, are they?

"*A.* No, sir.

"*Q.* How old are they?

"*A.* One 15; the other 17."

We do not find anything in the cross-examination of Mrs. Manzer to warrant the court's action, unless it was the answers drawn out that Mr. Manzer made a little

more money ditching than when first married, and had more jobs owing to the clearing up of the country. No reference was made in the cross-examination of Mrs. Manzer to the children, but the questions by defendant's counsel were confined entirely to her husband's earnings and business. We do not think such questions authorized the bringing in of the children, otherwise it would be competent in any case where defendant's counsel sought to inquire into the husband's earnings to show that there were children who contributed to those earnings, however slightly.

Neither do we think that it was competent to show an aggravation of the injuries to plaintiff's feelings by showing the presence of her children, when she was informed of her husband's misfortune. The difference between the children being present or absent, so far as concerns the mother's feelings, would be one of degree, and not of principle, and the rule which would admit testimony that she had children who were present would admit proof that she had children, although not present.

It has been held repeatedly by this court that testimony that plaintiff had children was inadmissible in cases of this nature. *Larzelere* v. *Kirchgessner*, 73 Mich. 276; *Johnson* v. *Schultz*, 74 Mich. 75; *Thomas* v. *Dansby*, 74 Mich. 398; *Boydan* v. *Haberstumpf*, 129 Mich. 137. In the case last cited the trial court struck out the testimony, and endeavored to cure the error in its admission in his charge; but this court, not being satisfied that the error was without prejudice, reversed the case. The fact that the testimony was introduced indirectly, instead of directly, in this case, does not alter the rule. The mischief is the same in the one case as in the other. We do not intend to intimate that the children could not have been called as witnesses to material facts in the case, or that there might not be cases in which the presence of the children would be part of the res gestæ, and so admissible, but we find nothing in this case to authorize the taking of this testimony. We should not be inclined to reverse the case for this error in view of the amount of the judgment—$300—if we were

satisfied that the verdict was not affected by the error. But we are satisfied from the testimony of the plaintiff herself that this verdict could only be awarded properly on the basis of damages for injuries to her feelings and exemplary damages, and we therefore hold the admission of this evidence to have been reversible error.

We find no error in the rulings of the court admitting evidence of Manzer's property and financial condition as showing the plaintiff's means of support. See *Weiser* v. *Welch*, 112 Mich. 134.

Defendants' counsel requested the court to charge the jury as follows:

"I charge you that plaintiff has not, under the evidence in this case, proven such a state of facts as shows that she has sustained any injury to her person, property, or means of support in consequence of the sale of any liquor to her husband by the defendants. Therefore she cannot recover for any of those elements in this action."

The court refused this request, and submitted the question to the jury. We think this was error. *Radley* v. *Seider*, 99 Mich. 431. In that case the wife testified "that her husband provided the necessary food and clothing; that he was always a good provider in those particulars; and added: 'The complaint that I made is this: That, if my husband was more saving, I would have more money left, in case he was taken off, for my support. * * * The only manner in which I considered myself damaged is by reason of his spending his money, and of his abuse to me.'"

Mr. Justice HOOKER, speaking for the court, said:

"We find no evidence, however, that she was injured in her means of support. She expressly disavows such injury, except that resulting from prospective want in case she should survive her husband. This is purely speculative. She may not survive him, and, if she were sure of doing so, she could have no assurance that he would die possessed of property. The court should have instructed the jury that there could be no recovery for injury to her means of support."

In the present case the plaintiff testified:

"*Q.* After the loss of the money, if it was lost down here, your husband continued to run the home up there and look after the property just the same as he had before that time?

"*A.* Why, yes.

"*Q.* There wasn't any difference that you could see, was there?

"*A.* We had to get along.

"*Q.* As a matter of fact, there was no difference up there after the 4th of August than there had been previous to that time, was there?

"*A.* No.

"*Q.* Your husband continued to manage the place, look after his family, and support them, just the same after that date as he had before that time, didn't he?

"*A.* Yes. * * *

"*Q.* So that the only loss that you can see whereby you were injured is, in case your husband should die before you die, there wouldn't be this $110 left for your support and maintenance, isn't that true? Your answer is 'Yes,' isn't it?

"*A.* Yes."

And again she testified—and this was her last word upon the subject:

"*Q.* Mrs. Manzer, during all of the summer, from May right up to and including the present time, your husband, Michael Manzer, has been a good provider for you, and has furnished you with necessary food and clothing, hasn't he?

"*A.* Yes, sir.

"*Q.* He has always been a good provider for you, hasn't he?

"*A.* Very good.

"*Q.* And he has been just as good from May up to the present time as he has been before, hasn't he?

"*A.* Yes, sir.

"*Q.* And he has provided you with necessary food and clothing, hasn't he, suitable to your station and condition in life?

"*A.* Yes, sir.

"*Q.* You haven't any cause of complaint to make on those grounds, have you?

"*A.* No.

"*Q.* And in these particulars—that is, as regards your clothing and your food and the necessaries of life—he has provided you with those just as well during the past summer, and from May up to the present time, as he has before; is that correct?

"*A.* Yes, sir."

Defendant also alleges that the court erred in submitting the question of exemplary damages to the jury, for the reason that there was no proof that defendants knew that Manzer had a wife, or that they had any notice not to sell to him.

The rule contended for by defendants obtained at a time when this court held that exemplary damages in this class of cases "were punitory in their character, and designed to punish the defendant for some positive wrong he had willfully inflicted upon or caused the plaintiff, or for some very gross neglect of her rights in furnishing liquor to her husband." *Larzelere* v. *Kirchgessner*, 73 Mich. 276; *Rosecrants* v. *Shoemaker*, 60 Mich. 4; *Steele* v. *Thompson*, 42 Mich. 594. This doctrine has since been repudiated by this court, and exemplary damages under the civil-damage act now fall under the general rule. *Bowden* v. *Voorheis*, 135 Mich. 648.

In *Lafler* v. *Fisher*, 121 Mich. 60, it was held that, where liquor is sold to a person known to be intoxicated, the jury would have a right to find that such sale was wanton, and therefore an occasion for exemplary damages, it not being necessary that the wrong-doer should be able to anticipate the particular injury to make him liable. Under that decision the present case was a proper case for exemplary damages, and the court committed no error in submitting the question to the jury.

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

MOORE, C. J., and MCALVAY, GRANT, and HOOKER, JJ., concurred.

HUBERT v. TRAEDER.

1. HUSBAND AND WIFE—JOINT TENANCY—SURVIVORSHIP.
   Neither the contract nor the will of a husband can affect the title to lands owned by himself and wife as joint tenants.

2. CANCELLATION OF DEED—EVIDENCE.
   On a bill to set aside a deed appearing to have been given by an aged woman, without advice of counsel, in settlement of a groundless claim of the grantee, evidence examined, and *held*, that a decree granting the relief prayed was proper.

Appeal from Wayne; Donovan J. Submitted January 5, 1905. (Docket No. 18.) Decided February 4, 1905.

Bill by Louisa Hubert against Anthony Traeder and Mary Traeder to set aside a deed. From a decree for complainant, defendants appeal. Affirmed.

M. B. Breitenbach, for complainant.

James H. Pound, for defendants.

HOOKER, J. Louisa Hubert, a woman of advanced years, and relict of Edward Hubert, filed the bill in this cause to cancel a deed whereby she conveyed the premises in controversy to Anthony Traeder. It is undisputed that this deed was executed in the office of Traeder's attorney, and it is claimed by the defendants that it was in settlement of then pending litigation between the parties, involving their respective claims to the premises. The complainant asserts that the deed was procured through fraud. The circuit court granted the prayer of the bill, and the defendants (husband and wife) have appealed.

Traeder's claim to the premises had its inception in an arrangement made between him and Edward Hubert under which he moved upon the premises with his wife and children, and performed farm labor, for which he was to

receive as compensation shelter and food for his family, $50 per annum for clothing, and ultimately the farm. No witness testifies to the terms of the agreement; such proof as the record contains consisting of statements of Hubert, in relation to the subsisting arrangements between himself and Traeder, made to third parties while Traeder lived upon the place. They are substantially that Traeder was to work the farm without wages, and have it after Hubert should be through with it; that he was to have house rent and $50 a year. There seems no doubt that such an arrangement was made between them. Traeder commenced work in May, 1901, and in September, 1901, Edward Hubert died, leaving a widow, the complainant. Before his death, Hubert made a will, in which he provided that his personal and real estate should go to the complainant, and at her death to Anthony Traeder. This will was admitted to probate. It was not long after his death that a controversy arose between complainant and the Traeders, in which the present solicitors were counsel for the respective parties. Apparently neighbors and friends took an interest, and the matter culminated in an attempt to settle the differences. Accordingly the parties went to the defendants' lawyer, who prepared the deed in controversy, and it was duly executed and delivered. Some time after, the parties being again in a quarrel, this bill was filed; and pending the suit the complainant married, and brought her husband to the home occupied by defendants, to live with her.

The record does not show that Mrs. Hubert took any part in the original contract with Hubert, unless it is to be inferred from the relations of the parties. At that time the title to the farm was in Hubert and his wife jointly, and it follows that upon his death the property passed to the complainant. His contract and his will were ineffective to vest any title to the land in Traeder. Apparently none of the parties understood this, and the complainant testified that, in the talk between the parties, Traeder often said to her that she had only a dower interest, or a

third interest, in the place. It is urged that this was a fraudulent means of procuring the deed from her, and that Traeder knew that it was false.

We are impressed with the unfairness of the settlement made between these parties. It is satisfactorily shown that the Traeders made the arrangement with Hubert in the belief that he owned the farm, and could make the agreement that was made; but, as we have intimated, the death of Hubert put an end to his interest in the farm, of which Mrs. Hubert became at once the sole owner in fee, discharged of all her husband's obligation to Traeder.

If it be admitted that this was hard upon Traeder, in that the consideration for his contract and services had in part failed, it was not, upon this record, chargeable to this complainant, who is not shown to have been a party to that contract.

We are not advised by the record that Traeder had a tangible claim of any kind against Mrs. Hubert, or that there was any legitimate reason for a controversy over her right to these premises. At the time of this settlement she was 65 years old, or thereabouts. The contract that she was said to have made was of that kind which most persons recognize as unfortunate and ill-advised, and, while courts cannot refuse to recognize their validity when clearly shown, they are not called upon to do so where they are unconscionable or when they are made under extraordinary circumstances or mistake of fact.

It is not improbable that this old lady was unaware of the true state of this title, or that her adversaries were insisting that it was less than a perfect title in fee, as she states. We cannot suppose that they were ignorant of it, for their counsel must have known it. With certain defeat staring them in the face, they succeeded in obtaining a settlement very advantageous to them. They say that this settlement was sought by her, and not by them, but that is not plausible. Her counsel were not consulted, and she is made to say that she did not want them to know

of it. All this may be true, and yet the influence that brought it about may have been adroit, to the verge of fraud. We feel that it was so. It was too successful to have been entirely free from guile.

The learned circuit judge who saw the witnesses and parties reached this conclusion, which, in our opinion, the testimony fairly warranted.

The decree is affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and BLAIR, JJ., concurred.

FAIRBAIRN *v.* HOUGHTEN.

CONTRACTS—CONSTRUCTION.

Defendant was elected manager of a corporation, and given a mortgage on the corporate property to secure advances to be made by him under an agreement "that he will furnish money for the prosecution of the business of said company, and for paying up the outstanding accounts of said company, which are now due, less stockholders' notes, which are to run one year, and shall not exceed $15,000." *Held*, that defendant was not required to pay stockholders' notes from the amount advanced by him.

Appeal from Wayne; Donovan, J. Submitted January 5, 1905. (Docket No. 19.) Decided February 4, 1905.

Bill by Thomas Fairbairn and others against Henry Houghten and another for an accounting. From a decree for complainants, defendants appeal. Reversed, and bill dismissed.

James H. Pound, for complainants.

Fred C. Harvey, for defendants.

McALVAY, J. The complainants Thomas Fairbairn, Isaac N. Payne, Judson Mayhew are directors, and Samuel A. Baugh is a stockholder, of the complainant corporation the Detroit Pressed Brick Company. This company was organized March 10, 1890, with a capital stock of $100,000, of which $40,000 was paid in, and afterwards stock sold and stock dividends increased the entire amount of stock taken to $65,155. Real estate was purchased, and buildings and machinery placed thereon, and the corporation proceeded to do business. The venture from the first was not successful. It early became necessary to borrow money, and afterwards mortgages upon the company's real estate to secure Robert Houghten for $4,000, State Savings Bank for $4,000, and Detroit Fire & Marine Insurance Company for $6,000, aggregating $14,000, were given to these creditors. The indebtedness of the company in October, 1894, was from $28,000 to $30,000, and was made up of the real-estate mortgages $14,000, certain stockholders' notes, and current floating indebtedness. On October 29, 1894, the directors of the company appointed a committee of three "to confer with Henry Houghten, and with full power to make arrangements with him to take charge of the affairs of the Detroit Pressed Brick Company." The committee appointed included complainants Fairbairn and Mayhew.

Henry Houghten is the principal defendant in this suit. He made a proposition in writing to this committee as follows:

"To the Committee of the Board of Directors of the Detroit Pressed Brick Co.

"I hereby make the following proposition to said committee:

"1st. I will take charge of the business of said Company at a compensation of $2,500.00 per year, including office rent and clerk hire.

"2nd. I will furnish money for the running of the business and paying up of the outstanding accounts less stockholders' notes which are to run one year, said sum

not to exceed $15,000 and the sum due J. W. Frisbie (to wit) $5,600.

"3rd. I will require a mortgage upon the real and personal property of said Company to secure such sum as he [I] may advance for the purpose of said business.

"4th. The office furniture is to become the property of J. W. Frisbie.

"5th. That this agreement is to take effect from Nov. 1st, 1894. H. HOUGHTEN."

On November 7, 1894, the committee reported to a meeting of the directors an agreement with Henry Houghten. This report was not in writing. It was adopted, "and the president and secretary were instructed to execute said agreement in writing, to be in duplicate." The agreement so authorized and executed is as follows:

"Articles of agreement entered into this seventh day of November, 1894, between Henry Houghten of the City of Detroit, and the Detroit Pressed Brick Co. (a corporation of the same place), by its President and Secretary, they having been duly authorized by the Board of Directors to execute the same, *Witnesseth:*

"1. That Henry Houghten hereby agrees to take charge of the business of said Company as its General Manager at the compensation of $2,500 per year, which is to include office rent, clerk hire, and services of the Secretary and Treasurer.

"2. That he will furnish money for the prosecution of the business of said Company and for paying up the outstanding accounts of said Company which are now due, less stockholders' notes which are to run one year, and shall not exceed $15,000.

"3. That the said Detroit Pressed Brick Company shall execute a mortgage of $10,000 upon its real estate and $10,000 upon its personal property to run for one year to secure the said Henry Houghten for all sums that he shall advance for said Company.

"4. That the said parties agree that the office furniture of said company shall become the property of J. W. Frisbie as a consideration of his bringing about this agreement.

"5. It is mutually agreed that this agreement shall take effect from Nov. 1st, 1894.

"In witness whereof we, the parties hereto, set our hands and seal this 7th day of November, 1894.

"H. HOUGHTEN.
"DETROIT PRESSED BRICK CO.
"J. W. FRISBIE, President.
"ISAAC N. PAYNE, Secretary."

The president and secretary at the same meeting were authorized to and did execute the chattel and real-estate mortgages mentioned in said agreement of $10,000 each. J. W. Frisbie, president and director, resigned, to take effect on adjournment of the meeting, which resignation was accepted. Defendant Henry Houghten was elected director to fill the vacancy caused by such resignation, and was elected president to fill the unexpired term of Mr. Frisbie. A short time after the agreement was executed and delivered to Houghten, he returned with his attorney, and asked to have an interlineation made in it. The meeting had adjourned. No one was present except Mr. Payne, who consented, and wrote in paragraph 2, in the last line, after the word "year," the words "or until said company may meet them."

Houghten at once entered upon his duties as general manager under the agreement above set forth. He furnished money, as appears by annual report April 1, 1895, to the amount of $10,268.04, and by annual report April 1, 1896, $22,116.27, principal and interest.

At the annual meeting of the directors held April 10, 1895, he was re-elected president of the company. At a meeting of the directors held November 22, 1895, by resolution "it is agreed by the board of directors of the Detroit Pressed Brick Co. that the mortgages heretofore given to Henry Houghten by said company shall be security for all advances made by him for said company up to the amount of the face of the mortgages." Houghten was elected president and general manager in 1896 at the annual meeting, which was the only meeting of the directors held that year. At a board meeting January 14, 1897, the president informed the directors of a demand from the

Detroit Fire & Marine Insurance Company for immediate payment of $650 interest on its mortgage, and a committee was appointed to raise the money. This committee reported at a meeting held February 14, 1897, and the president was authorized to raise the amount by mortgage on the company's Franklin street lot. At the annual meeting April 15, 1897, Houghten was again elected president and general manager at a salary of $2,000. April 27, 1897, Houghten reported at a meeting of the directors the details of his foreclosure sale of the mortgage on personal property, realizing $6,250. Directors Payne, Julien, and Fairbairn were "authorized to take proper steps to wind up the Detroit Pressed Brick Co. and have the corporation dissolved." This committee never reported any action. At the annual meeting of April, 1898, Fairbairn, Mayhew, Payne, and Baugh were dropped out of the board of directors, and a new committee was appointed. Houghten was engaged "general manager at a salary of $50 a month until the company's affairs are wound up." On April 19, 1898—the last meeting of the directors recorded—the company leased all interest remaining in the plant to Houghten for not more than one year at $50 per month.

The foregoing is a brief statement of all record of the proceedings taken by the company material to this case, including and subsequent to the time of making the contract with defendant Houghten.

It is claimed on the part of complainants that Houghten, under his contract, was obligated to pay the stockholders' notes amounting to $6,001; that he fraudulently absorbed the assets of the company by his conduct in managing its affairs and illegally foreclosing his mortgage. The bill is filed praying for an accounting with Houghten, that he pay the indebtedness according to contract, and for a receiver to wind up the affairs of the corporation and distribute the proceeds.

A large amount of testimony was taken in this case, from which the court found—and, we think, properly—that there was no fraud on the part of Houghten relative

to the foreclosure of the mortgages on the real and personal property. The court, construing the contract further, found that by its terms Houghten agreed to pay the stockholders' notes—in fact all of the floating indebtedness of the company.

The only important question to determine is whether this construction of the contract is correct. The question arises under the second paragraph of the contract:

"That he will furnish money for the prosecution of the business of said company and for paying up the outstanding accounts of said company which are now due, less stockholders' notes which are to run one year, and shall not exceed $15,000."

(The interlineation in this paragraph hereinbefore referred to was unauthorized and void.) The defendant had been approached by a committee "with full power to make arrangements with him to take charge of the affairs of the company." He had submitted in writing his proposition:

1. To take charge of the business of the company at a compensation of $2,500 per year, including office rent and clerk hire.
2. To furnish money for the running of the business and paying up the outstanding accounts, less the stockholders' notes, which are to run one year, said sum not to exceed $15,000, and the sum due J. W. Frisbie, to wit, $5,600.
3. To require a mortgage upon real and personal property to secure his advances.

The parties got together at the company's office November 7th, and the committee verbally reported an agreement, which report was adopted, and the execution of the agreement authorized. The contract and the mortgages were then executed and delivered. The proofs show almost without dispute that the amount of the stockholders' notes was $6,001, and also that the sum due stockholder Frisbie was not included with the stockholders' notes, and was to be paid at once. The bookkeeper testified that this Frisbie indebtedness appeared on the books separate from the stockholders' notes. The contract was prepared by

Mr. Payne as he understood it, and was read, and agreed upon without change. It appears to us clear from the agreement itself that Houghten was to furnish money to the amount of $15,000, and all evidence supports such construction. This money was to be furnished "for the prosecution of the business of said company, and for paying up the outstanding accounts of said company which are now due, less stockholders' notes, which are to run one year." The fair construction of this clause of the agreement does not include the stockholders' notes. They were deducted from the outstanding accounts then *due*, and were "to run a year." Any other construction would be strained. This is the construction given to this agreement by the parties. Houghten, as general manager at a salary of $2,500 per year, entered upon his duties. He paid all the outstanding accounts of the company then due, including the Frisbie indebtedness. He advanced money for the prosecution of the business until the amount he put in under this agreement was more than $15,000, as stipulated, and the resolution of November 22, 1895, declared that the mortgages given him should "be security for all advances made by him to the company up to the amount of the face of the mortgages." The question of the payment of the stockholders' notes by him was not raised at any meeting of the directors, as appears from the record of their proceedings, although a majority of these complainants were at all times members of the board. The complainants claim that they understood that Houghten was to pay the stockholders' notes. The understanding of the parties was merged in this written agreement, our construction of which is that he did not agree to pay these notes.

Much of the testimony in the record relates to the conduct of Houghten on foreclosing his mortgages. The records show without dispute that he realized from his sales of the properties all that they were reasonably worth. The finding of the trial judge in this matter has already been sustained.

In accordance with the view of this court that defendant Houghten was not, by his contract, bound to pay the stockholders' notes, so called, and that he did perform on his part as agreed, the decree of the court below is reversed, and the bill of complaint dismissed, with costs of both courts.

MOORE, C J., and GRANT, BLAIR, and HOOKER, JJ., concurred.

MURPHY v. DALTON.

1. ASSUMPSIT—ADVANCES UNDER CONTRACT—ABANDONMENT—RECOVERY UNDER COMMON COUNTS.

   Where plaintiff made advances to defendant on a contract which was abandoned, it was proper for plaintiff to sue on the common counts in assumpsit for the recovery of the advances.

2. SAME—DECLARATION—MONEY LENT—VARIANCE.

   Where plaintiff sued on the common counts in assumpsit, furnishing a bill of particulars for "money lent," and the evidence showed that the money had been advanced to defendants to enable them to manufacture lumber on an understanding that it was to be sold by plaintiff on commission that plaintiff might get back his advances, there was no variance.

3. SAME—VIOLATION OF CONTRACT BY PLAINTIFF.

   Where plaintiff, after making advances to defendant under a contract, violated the same, but the contract was not abandoned, plaintiff could not recover the advances on the common counts in assumpsit.

Error to Wexford; Chittenden, J. Submitted January 6, 1905. (Docket No. 25.) Decided February 4, 1905.

Assumpsit by Joseph Murphy and Fred A. Diggins, copartners as Murphy & Diggins, against John Dalton for money had and received. There was judgment for

defendant on a verdict directed by the court, and plaintiffs bring error. Reversed.

Plaintiffs' declaration is upon the common counts in assumpsit. A bill of particulars was furnished, which specified four items "of money lent defendant by plaintiffs," giving dates. With the plea of the general issue defendant gave notice that the items mentioned in the bill of particulars were paid to defendant upon a certain contract dated February 2, 1900, by which defendant agreed to manufacture and sell to plaintiffs a certain amount of lumber at stipulated prices; that said plaintiffs refused to perform the contract; that defendant performed his part of the contract, and claimed to recoup damages for the nonperformance of the contract by the plaintiffs. Upon this contract the first item of $350 was paid by plaintiffs to defendant. The theory of the plaintiffs is that, on account of the inability of the defendant to perform that contract and deliver the lumber within the time specified, it was mutually abandoned; that it was understood that the money so advanced should be repaid to the plaintiffs; and that another parol agreement was made between them by which plaintiffs agreed to furnish defendant money required to manufacture the lumber, and that the plaintiffs should handle the lumber on commission—at least enough of it to get back the advances which had been made. They gave testimony in support of this theory. The defense claimed that the first contract was never abandoned, and that all the sums advanced were advanced upon that contract, which the plaintiffs had failed to keep. The court directed a verdict for the defendant, for the reason that the money so advanced was not a loan, and that there was a fatal variance between the pleadings and the proofs.

E. Eugene Haskins, for appellants.

Charles A. Withey (*J. E. Richardson*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). Under the plaintiffs' proofs the first contract was mutually abandoned. Even if nothing were said about the repayment of the $350 advanced upon it the law implies a promise to repay under such circumstances, and a declaration upon the common counts in assumpsit is sufficient.

The further theory of the plaintiffs is that the defendant, after receiving the money under the parol contract as advances, deliberately violated it, and sold the lumber to other parties.

In *Hunt* v. *Sackett*, 31 Mich. 18, the parties exchanged horses, one paying boot money. Plaintiff sought to recover on the common counts, without tendering back the boot money.

In *Gorman* v. *Newaygo Circuit Judge*, 27 Mich. 138, the declaration was upon the common counts. The defense set up a contract that plaintiff had refused to carry out. Plaintiff then filed an amended declaration setting up a breach of the contract. The court said that the contract remained open, and still in force, and that the amended declaration was the introduction of a new cause of action.

In *Butterfield* v. *Seligman*, 17 Mich. 95, there was no breach of contract. The defendant sold certain lands to plaintiff, with a special written agreement that, if a good title could not be made, he was to return to plaintiff $625. A good title could not be made. It was held that the declaration should have been based upon the special contract.

These and similar cases do not apply. If the defendant received the money of plaintiffs upon the contracts, and one was mutually abandoned, and the other repudiated by the defendant, he had money which in equity and good conscience belonged to the plaintiffs, and the law implies a promise to pay it back. The objection is technical. It is true that plaintiffs did not lend or loan the defendant money within the strict definition of the term "loan." More appropriate language might have been used in de-

scribing the transaction. But the parties thoroughly understood what was meant, and the defendant, by his plea and notice, is shown to have fully understood the declaration and the items in the bill of particulars. He was not, therefore, taken by surprise. Under plaintiffs' theory and proofs the defendant has money in his hands, advanced to him, part upon a contract mutually abandoned and part upon a contract repudiated by him. If the jury believed the evidence on the part of the plaintiffs, they were entitled to recover under the principle of the following cases: *Johnson* v. *Insurance Co.*, 39 Mich. 33; *Phippen* v. *Morehouse*, 50 Mich. 537; *Nugent* v. *Teachout*, 67 Mich. 571; *Murphy* v. *McGraw*, 74 Mich. 318; *Ripley* v. *Case*, 78 Mich. 126; *Fitzpatrick* v. *Hoffman*, 104 Mich. 228.

If the first contract was still in existence, and had been violated by the plaintiffs, and all the advances were made under it, then the defendant was entitled to recover. The issue was one for the jury.

Judgment reversed, and new trial ordered.

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

---

139 82
158 3254

CENTRAL SAVINGS BANK *v.* O'CONNOR.

1. APPEAL AND ERROR—RETRIAL—AMENDMENTS—DISCRETION.
   Permission to amend in the trial court after reversal and remand for new trial is discretionary with the trial court.

2. SAME—DENIAL OF AMENDMENT—HARMLESS ERROR.
   The denial of an application to amend a plea was not prejudicial where defendants were permitted to make a full statement on the trial of all the defenses claimed, and a verdict was directed because the defenses were not available on the merits.

3. EVIDENCE—PAROL—VARYING WRITTEN CONTRACT.

Promissory notes in common form cannot be defeated by parol evidence of a contemporaneous agreement not to enforce them in a certain contingency. *Central Savings Bank* v. *O'Connor*, 132 Mich. 578, followed.

Error to Wayne; Frazer, J. Submitted January 4. 1905. (Docket No. 9.) Decided February 4, 1905.

Assumpsit by the Central Savings Bank against George M. O'Connor and William J. Hammond on promissory notes. There was judgment for plaintiff on a verdict directed by the court, and defendants bring error. Affirmed.

Charles W. Casgrain and *E. A. Fink*, for appellant.

Bowen, Douglas, Whiting & Murfin, for appellee.

MCALVAY, J. The Central Savings Bank, plaintiff, sued defendants, George M. O'Connor and William J. Hammond, in assumpsit, upon two promissory notes aggregating, with interest, $1,736.39.

Under a plea of the general issue defendants gave notice that as a special defense they would show that these notes were given for the amount of a certain chattel mortgage upon the property of the J. R. Pearson Company, a Michigan corporation, and certain accounts, assigned to defendants by plaintiff; that O'Connor was the maker and Hammond the indorser of said notes; that the notes were delivered to plaintiff on a parol understanding that in case the J. R. Pearson Company should be forced into bankruptcy by any of its creditors, and adjudicated a bankrupt, the notes would be null and void; and that the J. R. Pearson Company was afterwards adjudicated a bankrupt by the United States district court for the Eastern district of Michigan, in bankruptcy.

Defendant Hammond, a judgment creditor of the J. R. Pearson Company, upon a justice's court judgment for $400, had levied upon the stock of goods covered by the

mortgage above mentioned, and subject to it. He purchased the mortgage and the note which it secured, and also certain accounts which it held, and which had been assigned to it by the J. R. Pearson Company, giving the notes in suit in payment therefor.

This case was before this court in the January term, 1903, and is reported in 132 Mich. 578, and was reversed and remanded for a new trial, because the trial court committed an error in practice in entering a judgment for plaintiff non obstante veredicto when there was no verdict to support it.

Before the second trial defendants sought to amend their plea by a notice that they would show a partial failure of consideration for said notes. The motion to amend the plea was denied. The trial court allowed the attorney for the defendants, in opening his case to the jury, to make a full and complete statement of all defenses claimed. The plaintiff then asked the court to direct a verdict in its behalf. Thereupon the court clearly and concisely stated the case to the satisfaction of the counsel on both sides, and decided that the defense was not admissible, and directed a verdict for the plaintiff for the amount claimed.

Error is assigned by defendants for the refusal to allow an amendment to the plea, and also for excluding the defense offered and directing a verdict for the plaintiff.

The application to amend the plea came very late, and appeared to the trial court to be an attempt to change the issue after the case had been heard in this court and remanded for a new trial. To deny the amendment was a matter of discretion, and did not in any manner prejudice defendants, for the reason that their broadest claims were allowed to be stated, and, all being considered, the learned trial judge determined that the defense was not available.

The principal error relied upon is as to the instruction of the court to the jury to return a verdict for the plaintiff. The defendants, by the proposed amendment to their plea, and in their opening statement to the jury, offered to show that defendant O'Connor had bid in the property

of the J. R. Pearson Company at an execution sale under the Hammond judgment subject to the chattel mortgage, and for the purpose of discharging the lien of said mortgage these notes were given to the plaintiff; that they were given in reliance upon the representation by plaintiff that said mortgage would remain a valid lien upon said property; that plaintiff agreed to defend against bankruptcy proceedings against the J. R. Pearson Company, and aid in preventing an adjudication; that plaintiff failed to do this, and the J. R. Pearson Company was adjudged a bankrupt. This offer was made to show a partial or total failure of consideration. Upon an examination of the whole record we do not find that any situation is presented different from that when this case was here before. This was an attempt to show by parol a contemporaneous agreement to defeat the undertaking in writing. The questions here presented were thoroughly discussed in the opinion of this court by Justice MONTGOMERY in *Central Savings Bank* v. *O'Connor*, 132 Mich. 578, to which reference is had.

The judgment is affirmed, with costs.

MOORE, C. J., and GRANT, BLAIR, and HOOKER, JJ., concurred.

In re TOEPEL.

1. CORONERS — FRAUDULENT CLAIMS — PRESENTATION TO COURT — PUNISHMENT.

The presentation and allowance of a coroner's claim for an inquest on the body of an alleged deceased stranger, under section 11828, 3 Comp. Laws, not being subject to review by the auditor general, such claim, when filed, is a proceeding depending in the circuit court, within section 10891, 3 Comp. Laws, authorizing punishment of coroners for misbehavior in

office, willful negligence, or violation of duty therein, as to any cause or matter depending in a court of record.

2. SAME—ALLOWANCE OF CLAIM—JUDICIAL ACT.
The determination and allowance of such claim involves the exercise of judicial discretion and judgment by the court, and is therefore a judicial act.

3. SAME—CONTEMPT—PRIMA FACIE CASE.
Affidavits charging the presentation by a coroner of fraudulent claims against the State to the circuit court for fees and expenses in holding an inquest on the body of an alleged stranger, under section 11828, 3 Comp. Laws, examined, and *held* to establish a prima facie case of misconduct on the part of the coroner, warranting the issuance of an order to answer why he should not be punished for contempt.

4. SAME—PRESENTATION TO COURT—SUFFICIENCY.
It appearing from the affidavits that the claim found its way into the hands of the judge, and was supported by the coroner's certificate, which could only have been made for presentation to the court, and that the amount of the bill was receipted for by defendant, the affidavits were not objectionable for failure to affirmatively allege that the claim was ever presented to the court.

5. SAME—AUDITING CLAIM—RECORD.
Where a coroner presented a fraudulent claim against the State to the circuit judge for allowance, the contempt of court was complete on presentation of such claim; and it was not, therefore, material that the order allowing it was not entered of record.

6. SAME—CONTEMPT—DISQUALIFICATION OF JUDGE.
The judge who allowed a fraudulent coroner's claim is not disqualified from acting in proceedings to punish the coroner for contempt in presenting the fraudulent claim.

Habeas corpus proceedings by Otto T. Toepel to obtain his release from the county jail of Wayne county. Submitted January 3, 1905. (Calendar No. 20,859.) Prisoner remanded February 8, 1905.

Alex. J. Groesbeck and *Edwin Henderson*, for petitioner.

Allan H. Frazer, for respondent.

MONTGOMERY, J. The petitioner sued out a writ of habeas corpus to review a sentence of Judge Donovan, imposed upon the petitioner for an alleged contempt of court. The questions involved relate to the jurisdiction to punish the petitioner for the act recited.

The petitioner is coroner of the county of Wayne, and entitled, as such, to hold inquests upon dead bodies. 3 Comp. Laws, § 11832. By the provisions of section 11828, 3 Comp. Laws, the expense of an inquest upon the dead body of a stranger shall be paid by the State if the justice or coroner shall certify that, to the best of his knowledge and belief, the person found dead was a stranger not belonging to this State; the account of such expenses and fees being first allowed by the circuit court for the county.

On the 18th of November last, certain affidavits were presented to Judge Donovan, tending to show that in August last there was presented to Judge Donovan by petitioner an itemized bill for fees and expenses in holding an inquest upon the body of one Thomas E. Cummiskey; that this bill was made out against the State, and included charges for holding a post mortem, and was accompanied by a certificate of the coroner that the deceased person was a stranger not belonging to this State. The affidavits also showed, at least prima facie, that the deceased, Thomas E. Cummiskey, was not in fact a stranger, but that he lived in Detroit; that he was removed from his home, on Smith avenue, to St. Mary's Hospital, on the 28th of June, 1904, and died in the hospital August 18th of diabetes; that in fact no post mortem was held.

Upon filing these affidavits an order was entered that an attachment issue to bring the present petitioner before the court to answer for the alleged misconduct of practicing fraud and dishonesty upon the court, and deception, misbehavior, willful neglect and violation of duty, and in, by such misrepresentations, corrupt practices, and collusive behavior in and about his duties as coroner, securing allowances of claims against the State of Michigan by the

court in certain cases presented to the court for its action and approval under section 11828, 3 Comp. Laws; being matters depending in the court and triable therein.

The respondent was brought before Judge Donovan, and an order was entered directing that interrogatories be prepared, and that answers be made to them. The respondent moved to quash the proceedings. This motion was overruled. Thereupon the respondent refused to answer the interrogatories on the ground that the court had no jurisdiction to enter the order requiring him to make answer. Testimony was taken to further substantiate the charges, a sentence of imprisonment was imposed, and the respondent taken into custody. He thereupon sued out the present writ.

Numerous questions are raised and discussed in the brief of petitioner's counsel. In so far as they are deemed worthy of separate discussion, we follow the order of the brief.

It is first contended that a contempt of the nature described is not punishable under chapter 301, 3 Comp. Laws, under which it is said the proceedings were taken. Section 1 of this chapter confers upon the courts of record power to punish by fine and imprisonment, or either,—

"Any neglect or violation of duty or any misconduct by which the rights or remedies of a party in a cause or matter depending in such court or triable therein may be defeated, impaired, impeded, or prejudiced, in the following cases:

"(1) All * * * coroners * * * for any misbehavior in such office or trust, or for any willful neglect or violation of duty therein."

It is clear that, when a claim is presented to the circuit court for allowance, it is depending in that court. It is also clear that the presentation of a false claim for allowance may prejudice the rights of the State. This is made manifest when it is considered that the allowance by the circuit court is not open to review by the auditor general. *Lachance* v. *Auditor General*, 77 Mich. 563.

It is insisted, however, that the allowance of a claim against the State by the court acting in these cases is not a judicial act; citing the *Lachance Case*. Whatever may be the character of the act of the court, it is a court matter—made so by the statute—and as the court may render a decision which will formally dispose of the matter, it is a matter there depending, but we think it is also a matter to be judicially determined. It has never been considered that the circuit court was authorized to act without proof in some form in these cases. The determination of the allowance involves the exercise of judicial discretion and judgment. We think the act was, in this sense, judicial. *Wall* v. *Trumbull*, 16 Mich. 228; *Locke* v. *Wayne Circuit Judge*, 62 Mich. 408. In any view, the matter was committed to a court, and properly so committed, within the holding in *Locke* v. *Wayne Circuit Judge*, supra. It was competent, therefore, for the legislature to authorize a proceeding to punish a contempt of the court, committed while the court was considering that matter. The case is quite unlike that of *State, ex rel. Haughey*, v. *Ryan*, 182 Mo. 349, which was determined, *first*, on the invalidity of the act creating a board of mediation and arbitration, and conferring judicial power therein; and, *second*, on the ground that the circuit court has no power to punish for contempt, except for the maintenance of its own authority.

It is urged that the affidavit upon which the order in this case issued did not make out a prima facie case. The statements in the affidavits have been briefly recited above. We think they did make out a prima facie case.

It is contended, in particular, that the affidavits did not show affirmatively that the claim of respondent was ever presented to the court. The affidavit does, however, show that the claim found its way into the hands of the judge, and no other inference is open than that it was filed with the purpose of having action taken by the court. It further appears that the claim was supported by the certificate of respondent, which could only have been made for

presentation to the court, and that the amount of the bill was receipted for by respondent. The inference is clear that the account was presented on his behalf, and no other inference is open. The affidavits show that Cummiskey was not a stranger, and, as Toepel certified that he was, this prima facie showed that he had made a false statement in that regard.

It is next urged that the circuit court for Wayne county never audited the bill. This is based upon the showing that the order was not entered of record. We do not find it necessary to determine whether the order can be held to be a court order, and the omission to record it a mere irregularity, open to correction, for, in our view, the contempt was complete on the presentation of this false and fictitious claim.

It is contended that Judge Donovan was disqualified from acting in the matter of the contempt proceedings. Without entering at length into the reasons for our conclusion, we state that the matter has had our consideration, and we do not find that he was disqualified, as a matter of law.

The prisoner will be remanded.

MOORE, C. J., and MCALVAY, GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

VINCENT *v.* BENZIE CIRCUIT JUDGE.

1. MANDAMUS — SETTING ASIDE IRREGULAR ORDERS — PRACTICE — VACATION OF DECREES—NOTICE.

   A purchaser of land, the title to which was quieted prior to his purchase, is entitled to a mandamus directing the judge to set aside an order, granted without notice to the purchaser and without his knowledge, vacating the decree quieting title.

2. DECREE—IRREGULARITY—SETTING ASIDE—NOTICE.

The fact that a decree quieting title was irregular does not entitle the party against whom it was rendered to have the same set aside without serving proper notice on parties interested in sustaining the same.

Mandamus by William Vincent to compel Clyde C. Chittenden, circuit judge of Benzie county, to vacate an order setting aside a decree. Submitted January 3, 1905. (Calendar No. 20,838.) Writ granted February 11, 1905.

Louisell & Nevius, for relator.

J. J. Tweddle (*D. G. F. Warner*, of counsel), for respondent.

PER CURIAM. One Emily A. Macauley commenced suit in the circuit court for the county of Benzie, in chancery, against Saunders D. Bruce and Cora E. Hale, for the purpose of quieting title to certain real estate. Said Cora E. Hale filed an answer and cross-bill, and in August, 1903, obtained a decree quieting her title and setting aside complainant's title. Subsequently the proceedings were regularly enrolled, and the land purchased by relator.

In June, 1904, complainant Macauley petitioned for an order setting aside said decree and permitting her to amend her bill of complaint. This petition, which did not conform to the rules of practice, was heard and granted without notice to or knowledge of relator. In our judgment, relator is entitled to a mandamus compelling respondent to set aside said order. See *York* v. *Ingham Circuit Judge*, 57 Mich. 421.

In reaching this conclusion, we have not overlooked respondent's contention that the decree set aside was irregularly obtained. It is by no means clear that complainant Macauley could take advantage of these irregularities. And if she could, they did not justify her in departing from proper practice, and in failing to serve notice upon relator. See *Jewett* v. *Morris*, 41 Mich. 689.

The mandamus should issue.

139 92
155 462

IDEAL MANUFACTURING CO. *v.* WAYNE CIRCUIT JUDGE.

LABOR UNIONS—STRIKES — PICKETING — INJUNCTION — TEMPORARY RELIEF—ORDER TO SHOW CAUSE.

Where, on an application for injunction to restrain a labor union from interfering with relator's workmen, the bill and affidavits established a case showing an interference with relator's rights by picketing its premises, and by making threats against its employés, and actual violence towards them, it was improper to deny temporary relief until defendant had been brought into court on an order to show cause.

Mandamus by the Ideal Manufacturing Company to compel Joseph W. Donovan, circuit judge of Wayne county, to issue a temporary injunction. Submitted February 14, 1905. (Calendar No. 20,959.) Writ granted February 14, 1905.

George F. Monaghan, for relator.

Samuel E. Jones, for respondent.

PER CURIAM. The relator asks for a writ of mandamus requiring the respondent to issue an injunction restraining certain members of the Metal Polishers' Union (defendants in a suit instituted by relator) from interfering with free access to relator's works of the workmen employed by relator, and free departure therefrom to their homes, by any unlawful conduct of defendants, by actual violence or threats. The bill of complaint, and affidavits accompanying the same, which were presented to respondent, made out a case showing an interference with the rights of relator by picketing relator's premises, and by making threats against relator's employés, and by actual violence towards them. Upon presentation of this bill, and on an application for a preliminary injunction, the respondent declined to issue an injunction, but suggested that an order to show cause issue.

If we were able to say that the discretion of the circuit judge was used in this way for a purpose recognized by proper practice, we would not interfere with the exercise of such discretion except in the clearest case. It is manifest, however, that the purpose of the respondent was not to issue an order to show cause for the purpose of ascertaining the truth or falsity of the allegations in the bill and affidavits, but rather for the purpose of bringing in the defendants, in order that respondent might instruct them as to their duties, and thus pour oil on the troubled waters. While this course may be commendable in a case where the parties are before the court, it is clear that protection to persons and property ought not to be withheld on the assumption that those engaged in unlawful action may be brought to submit voluntarily to an influence which, however potent, has no recognized place in the regular and orderly proceedings of courts. Being satisfied from the return that it was this mistaken practice which induced the respondent to withhold the remedy sought, we think it should be said that he failed to exercise the discretion which the law required of him in the circumstances.

The writ will issue, requiring respondent to issue a temporary injunction, or if, in his judgment, an order to show cause should issue, that he accompany the same by an injunction or restraining order to be continued in force until the hearing of the order to show cause, and decision of such matter.

ROGERS *v.* BABCOCK.

1. LANDLORD AND TENANT — AGENCY — RATIFICATION — HOLDING OVER.

Before expiration of an annual lease the lessee stated to the lessor's supposed agent, who called, under the lessor's direction, to inspect the heating plant, that he would remain if provision was made for heating, and on assurances supposed by him to be made with authority, he continued to occupy the premises beyond the term. *Held*, that the lessor, by subsequently reiterating the assurances, ratified the agreement of the agent, and, having failed to supply the furnace agreed on as a condition to the continuance of the lease, he relieved the lessee from the payment of further rent on vacating the premises.

2. SAME—SURRENDER OF PREMISES.

Where a tenant, before leaving the premises, told a relative of the landlord, who had been authorized to make certain repairs, that he intended to vacate, and requested him to take care of the house, which he promised to do, there was a surrender, so far as giving up the premises were concerned, since the tenant was justified in intrusting them to the care of such person as agent.

Error to Wayne; Donovan, J. Submitted October 4, 1904. (Docket No. 66.) Decided February 27, 1905.

Assumpsit by Lincoln S. Rogers against Adelbert H. Babcock for rent. There was judgment for defendant, and plaintiff brings error. Affirmed.

Graves, Hatch, Millis & Goodenough, for appellant.

Alex. J. Groesbeck and *Thomas J. Navin*, for appellee.

MONTGOMERY, J. This is an action to recover a balance claimed to be due for the rental of a house and lot in the city of Detroit, and also for damages resulting to

the premises during the term through the negligence of the tenant. In May, 1900, the premises were let by a written lease for the term ending May 1, 1901, with the privilege granted to the tenant of renewing the lease for the further period of one year. The premises were in fact occupied by the defendant up to January 27, 1902, when the defendant proceeded to pack and store his household goods, and went South with his family. Because of the house being unoccupied, the water pipes froze, and caused very considerable damage. The rent had been paid up to February 1st. It is to cover the rent for the remainder of the term to May 1st and the damages occasioned by the freezing of the water pipes that this action is brought. On the trial a verdict was rendered in favor of the defendant, and from the judgment entered upon this verdict plaintiff brings error.

Numerous questions are presented in the brief of appellant's counsel, but we think that all may be considered under two or three heads.

It is clear that, in the absence of any agreement modifying the terms of the written lease, the holding over by defendant would have constituted him a tenant for one year from May 1, 1901, and the first question presented, therefore, is whether there was a modification of this agreement. The plaintiff is a resident of New York City. In February, 1901, defendant wrote plaintiff, referring to the fact that the natural gas pressure had become very low, and of the possibility of its being cut off entirely, stating he had been compelled to put in coal grates, and, in addition, to keeping the furnace going to its fullest capacity, had difficulty in keeping warm; that a grate had been put in the dining room at a cost of $20, for which a bill was sent; and the letter concluded:

"If the gas is exhausted next winter, as it bids fair to be, I am told it will be necessary to have a new furnace for coal, as the life has been entirely taken out of the present one by the use of gas."

There was no answer to this letter, but in April one

John O. Teagan, the plaintiff's brother-in-law, a resident of Detroit, called upon the defendant, and then the subject of putting in a new furnace was discussed, and, according to the testimony of defendant, it was stated by him that he would remain through the winter, provided provision was made for heating the house satisfactorily. Mr. Teagan admits that there was talk about putting in a furnace, but states that he had at that time no authority in the furnace matter. Even though Teagan may not in fact have had authority to make the arrangement which the defendant testified to at this time, it is certainly open to grave question whether he had not the apparent authority. He came to deal with defendant in response to his letter relating to the subject of heating the house, at least so far as the grates were concerned, and with no statement from the plaintiff limiting his authority. It would seem that the defendant therefore would have the right to assume that he was acting with authority in whatever he did on the occasion in question. But whether this be so or not, we think it very clear that the plaintiff fully ratified the agreement with Teagan. On the 7th of May defendant wrote plaintiff as follows:

"As I told your cousin when he called, I would remain through next winter, if I can know that the house will be satisfactorily heated; but do not want until cold weather to learn what you will do, and wish you would write me now, and, if you will provide another furnace, kindly give me your assurance to that effect.

"Very truly yours,
"A. H. BABCOCK. R."

And to this plaintiff replied:

"I note what you say regarding the furnace, and will give you my assurance that if it is found necessary, a new furnace shall be put in before next winter. I desire, however, that the present furnace be thoroughly examined by the makers, and have written to Mr. Teagan, requesting that he have a man sent up there. I am of the opinion that either the chimney or the pipe is stopped up, which prevents draught. Again I say that if this furnace can-

not be made to give sufficient heat, I will have a new one put in."

(It is evident that the *cousin* referred to in the letter of May 7th is plaintiff's brother-in-law, Teagan.)

It would be difficult to find a much clearer case of ratification than that shown by these letters. It must have been evident to plaintiff that assurances had been given by Teagan to defendant, and that it was because of those assurances that the defendant had continued to occupy the premises after May 1st.

It is sought by plaintiff's counsel to maintain that this agreement contained in the letter of May 14th was nudum pactum, because at that time defendant had entered upon a new term, and plaintiff was not bound to make repairs under the terms of the lease. But this condition loses sight of the doctrine of ratification. Defendant had in fact had assurances that plaintiff would make the furnace right, and it was in pursuance of assurances supposed by him to be made with authority that he had continued to occupy the premises. Plaintiff reiterated the assurances, and affirmed what his supposed agent had already done. Ratification relates to the time of the performance of the acts ratified, and the present case is as though the original contract or agreement between Teagan and defendant had been made with full authority on the part of Teagan. 1 Am. & Eng. Enc. Law (2d Ed.), p. 1213. We think, then, the case should be determined upon the assumption that there was the agreement substantially as reiterated in the letter of plaintiff under date of May 14th. Following upon this agreement, under date of September 4th, defendant wrote plaintiff as follows:

"I would say that the supply of natural gas was permanently discontinued last month and public notice given, and I would ask that you give the matter of a furnace your attention at once, as I want to put in a supply of coal before there is a raise in price, but at the same time, I do not want to do anything until the matter of furnace is attended that I may act accordingly."

And in reply to this, plaintiff wrote to defendant:

"I am writing Mr. J. O. Teagan today to make arrangements for perfecting the heating apparatus of the house. You can rest assured the furnace will be properly and promptly attended to and can go ahead and order your coal. I wish you would call Mr. Teagan up on your 'phone at his home or office and give him the name of the furnace and any such other information he may want."

On November 5th defendant wrote to plaintiff:

"Regarding the furnace would say that we are having a cool spell just now and I am unable to satisfactorily heat the house with the furnace alone, having to call on the grates for warmth. I will wait for some pretty cold day when I will have your brother-in-law, Mr. Teagan, come up and try his hand at running the furnace and give it a good test."

To this plaintiff replied:

"As to the furnace if it does not work properly, we will see that it is made to do the work as it is intended to do. You indicate the correct course. Call up Mr. Teagan and have him take a hand at it."

Again, under date of December 2d, defendant wrote to plaintiff:

"As the furnace will burn the coal about as fast as one can put it in, but although a good fire can be obtained it seems impossible to get the proper amount of heat from it and even in the present weather we fall back on the grates. It has been explained to me that furnaces that have used natural gas are afterwards useless with coal, as the gas seems to take life out of the iron and I know that in my own house where I formerly used natural gas, my tenant has just told me of his inability to make it work with coal, and very likely the same trouble exists there as with my furnace. Kindly let me hear from you in regard to the matter."

The testimony on behalf of defendant tended to show that, notwithstanding the efforts to put this heating apparatus in condition, the means provided were wholly insufficient to heat the house, and finally, on the 27th of

January, he decided it was impossible longer to occupy the house, and that he called up Mr. Teagan, told him in substance it was impossible for him longer to occupy it, and that he was going to leave with his family for the South, and asked him to see that the water was drawn from the pipes; that he had employed Leonard Bros. to pack the furniture, and that he would leave the key with them after they had moved out of the house, and that Mr. Teagan promised to do this. Mr. Teagan's testimony is not materially different.

Upon this branch of the case it is again urged by appellant that Teagan was without authority. It is said that he had not been given authority to accept a surrender of these premises. We think this contention may be accepted as correct; but the circuit judge was of the opinion that, as Teagan had charge of the matter of putting this furnace in condition, it was proper for defendant to intrust to him the duty of seeing that the water pipes were properly protected. The plaintiff's failure to recover upon this branch of the case did not result from the fact that there was a surrender in law and an acceptance, but from the fact that the defendant intrusted to the plaintiff's agent, Teagan, the duty of seeing that the water pipes were protected. It is not the theory of the defendant that his tenancy was terminated by a technical surrender, but that, the plaintiff having failed to make the furnace do the work contemplated and agreed upon as a condition to the continuance of the lease, this relieved him from the payment of further rent, authorized him to leave the premises, and that in leaving the premises he was justified in intrusting their care to the one who had been commissioned by the plaintiff to see that the furnace was put in condition. We think this view of the case was justified by the facts and relations of the parties, and that, therefore, it was not error to charge that, if defendant called upon Mr. Teagan, and if defendant, before leaving the premises, told him that he intended to do so, and that Leonard Bros. were to do the packing, and asked Teagan

if he would take care of the house, and see that the water was drawn from the pipes, and that Mr. Teagan, understanding this, said he would do so, this was a surrender, so far as giving up the premises was concerned. See *Henkel* v. *Welsh*, 41 Mich. 664. We gather that the jury must have found that the furnace did not answer to the terms of the agreement, and that for this reason the defendant was justified in leaving the premises, and, this being so, the rent would, of course, cease.

The other questions presented in the case seem to us not to merit special discussion. We are convinced that substantial justice was done, and the judgment will be affirmed.

MOORE, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

---

139 100
f151 113

139 100
f157 223

HOPPER *v.* LIVINGSTON CIRCUIT JUDGE.

APPEAL AND ERROR—TIME TO APPEAL—PROBATE COURTS.

Where no effort to appeal from an order of the probate court is made until nearly 11 months after it was entered, and 85 days after the Supreme Court has decided that appeal is the proper remedy, and no cause is shown for the delay, it is improper for the circuit court to grant an appeal out of time under section 674, 1 Comp. Laws.

Mandamus by Hiram Hopper to compel Stearns F. Smith, circuit judge of Livingston county, to vacate an order allowing an appeal from the probate court. Submitted January 3, 1905. (Calendar No. 20,815.) Writ granted February 27, 1905.

William P. Van Winkle and *Louis E. Howlett*, for relator.

Shields & Shields, for respondent.

MOORE, C. J. An understanding of this case will be aided very materially by referring to the case of *Hopper* v. *Livingston Probate Judge*, 137 Mich. 124. The opinion in that case was filed July 7, 1904. It is held therein that the order of the probate judge was an appealable one, and not reviewable upon mandamus. No action was taken by Mr. Hopper after that opinion was filed until the 1st day of October, 1904, when he filed a petition in the circuit court for permission to appeal from the order of the judge of probate, claiming the right to do so under section 674, 1 Comp. Laws. On October 24, 1904, the circuit judge made an order allowing George Hopper to take an appeal from the order of the judge of probate made November 7, 1903.

Section 669, 1 Comp. Laws, requires appeals from the order of the probate court to be made within 60 days after the date of the order. It will be observed here that nearly 11 months had elapsed before an effort was made to appeal the case. It is claimed that section 674, 1 Comp. Laws, which reads,

"If any person aggrieved by any act of the judge of probate, shall, from any cause, without default on his part, have omitted to claim or prosecute his appeal according to law, the circuit court, if it shall appear that justice requires a revision of the case, may, on the petition of the party aggrieved, and upon such terms as it shall deem reasonable, allow an appeal to be taken and prosecuted with the same effect as if it had been done seasonably,"

—Authorizes the making of such an order as was made by the circuit judge. It is said that inasmuch as George Hopper was advised by his attorneys that mandamus was the proper remedy to review the order of the probate judge, and as he pursued that remedy, his failure to appeal the case was no fault of his. Whatever force there may be in this argument is lost when we take into consideration that this court held on July 7, 1904, that mandamus was not the proper remedy, and appeal was, and yet no effort was made to appeal the case until 85 days thereafter had elapsed.

No attempt is made to explain this delay. Section 674, 1 Comp. Laws, was not intended to excuse such delays as this record discloses. See *Watson* v. *Kent Circuit Judge*, 125 Mich. 182.

The order of the circuit judge granting the appeal should be vacated, and the appeal dismissed.

McALVAY, GRANT, BLAIR, and HOOKER, JJ., concurred.

In re TUBBS.

BAIL—MURDER CASE—REFUSAL—HABEAS CORPUS.

Where the circuit judge, in refusing bail to one accused of murder, apparently finds that the proof is evident and the presumption great that accused is guilty as charged, and the evidence taken before the examining magistrate supports such finding, this court will not interfere by habeas corpus proceedings.

Habeas corpus proceedings by George Tubbs, Levi Tubbs, and Charles Tubbs to obtain their release upon bail from the county jail of Eaton county. Submitted January 3, 1905. (Calendar No. 20,887.) Prisoners remanded February 27, 1905.

Frank A. Dean and *Garry C. Fox*, for petitioners.

Elmer N. Peters, Prosecuting Attorney (*Lewis J. Dann*, of counsel), for respondent.

PER CURIAM. The petitioners were charged in a proper complaint with the commission of the crime of murder in the first degree. An examination was had, and a large amount of testimony was taken. The justice of the peace found that there was probable cause to believe that the

crime was committed and that the petitioners were guilty thereof, and bound them over to the circuit court for trial without bail. The petitioners then petitioned the circuit judge to be admitted to bail. Arguments were had before said judge, the testimony examined by him, and bail refused. The circuit judge must have based his refusal of bail upon a finding that the proof was evident and the presumption great that the petitioners were guilty of the crime of murder. Not satisfied with the ruling of the circuit judge, the petitioners now bring their case before this court by the writ of habeas corpus, thus virtually asking a review and a reversal of the conclusion reached by the circuit judge.

The courts of several States hold that the appellate court will not interfere with the decision of the circuit court, except where the discretion to admit to bail has been exercised in an arbitrary, unjust, or oppressive manner, or where the refusal is manifestly erroneous. 5 Cyc. 90, note 72. See, also, *Hull* v. *Wayne Circuit Judge*, 87 Mich. 497. In refusing bail, the circuit judge said that he did not deem it advisable to state at length the reasons for his denial; that the case might soon be tried, and any reason given might be misunderstood or misconstrued and result in harm. He thereupon entered an order denying the application. We think there was sufficient evidence in the testimony taken before the examining magistrate and submitted to the circuit judge to justify his finding. We do not think it a case where this court should interfere.

The prisoners will be remanded, and the application for bail denied.

KAUFMAN *v.* LEONARD.

1. STATUTES—CONSTRUCTION—FOLLOWING PARENT STATE.
The construction placed upon a statute by the courts of the State from which it is copied will be followed by this court.

2. WAREHOUSEMEN—LIEN—REVIVAL AFTER REMOVAL OF GOODS.
Where a warehouseman allows goods to be taken away without payment of storage and repair charges, and they are subsequently returned to him for storage, he can retain them until he is paid in full. Section 5031, 2 Comp. Laws.

Error to Wayne, Mandell, J. Submitted January 4, 1905. (Docket No. 10.) Decided February 27, 1905.

Replevin by Adelaide Kaufman against Henry J. Leonard and Thomas Y. Leonard, copartners as Leonard Brothers. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Affirmed.

The household goods of the plaintiff and her husband were damaged by fire. They were subsequently taken to the warehouse of the defendants, who conducted a general storage and warehouse business, repaired, and subsequently restored to the plaintiff and her husband without paying the storage and repair charges, amounting to $67.15. Subsequently plaintiff and her husband separated, divorce proceedings were instituted, and an injunction obtained restraining her husband from interfering with the goods. By consent of the solicitors, the goods were again stored in the warehouse of the defendants. Plaintiff demanded possession. She paid the charges for the last storage. Defendants claimed lien upon the goods for the first storage. She refused to pay this, and brought replevin for the goods. The court directed a verdict for the defendants, and subsequently entered judgment for the amount of the lien, as provided by the statute.

Oscar M. Springer, for appellant.

Harlow P. Davock and *Ransom G. George*, for appellees.

GRANT, J. (*after stating the facts*). Did the defendants, as warehousemen, have a lien upon the goods for the first storage? is the only question presented. Plaintiff's counsel contends that, by surrendering the goods without payment, the lien was waived. The defendants' counsel contend that under the statute (2 Comp. Laws, § 5031) they had a general lien for all charges against the goods. The statute reads as follows:

"Every warehouseman shall have a lien on all goods, wares, merchandise, and other personal property deposited and stored with him, for his storage charges, and for all moneys advanced by him for cartage, labor, insurance, weighing, coopering, and other necessary expenses to or on such property; and such lien shall extend to and include all legal demands for storage and expenses paid as above, which he may have against the owner of said property; and it shall be lawful for him to detain said property until such money is paid."

Our statute was copied substantially from that of New York. Under the well-established rule, the construction placed upon the statute by the courts of that State will be followed by the courts of this State. The New York courts have decided that the lien is general, and attaches to any goods in the possession of the warehouseman to secure payment for all his charges. *Stallman* v. *Kimberly*, 53 Hun (N. Y.), 531, approved by the New York court of appeals in 121 N. Y. 393.

Judgment affirmed.

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

MANNEL *v.* DETROIT, MT. CLEMENS & MARINE CITY RAILWAY.

1. EMINENT DOMAIN — HIGHWAYS — ADDITIONAL SERVITUDE — STREET RAILWAYS.

The use of the streets of a city for a street railroad is not an additional servitude.

2. STREET RAILROADS—ESTABLISHMENT—REGULATION—CHANGE IN ROAD—MANNER OF GRANTING AUTHORITY.

An ordinance regularly passed and accepted is necessary, under section 6446, 2 Comp. Laws, to grant the right to build and operate a street railway in the streets of a city, but after a city has thus granted the right to operate a car line, subject to a provision that the location of poles, side tracks, spurs, and switches shall be under the control of the council, it may, by a mere motion adopted by the council, authorize the company to change the location of a curve in the track connecting a street with a cross street, since the duty of the council in this respect is ministerial and might be delegated to a committee or a city officer.

Appeal from St. Clair; Law, J. Submitted January 5, 1905. (Docket No. 14.) Decided February 27, 1905.

Bill by William Mannel against the Detroit, Mt. Clemens & Marine City Railway to restrain the changing of a curve in defendant's track. From a decree dismissing the bill, complainant appeals. Affirmed.

Thomas Wellman, for complainant.

Byron R. Erskine, for defendant.

MCALVAY, J. Complainant in this case is the owner of certain lots at the intersection of Broadway and Water streets, in Marine City, St. Clair county, which he occupies for residence and business purposes. The corner building is, and has been for several years, used and occupied for a grocery store. Complainant's son resides back

of the store building. The complainant's home is next south of the store. The defendant company operates an electric street railway along Broadway and Water streets, under and by virtue of an ordinance of the city of Marine City. Shortly before the filing of the bill of complaint and issuing of the injunction in this case, defendant company applied to the common council of said city for permission to change the alignment of the curve of its track at the corner of said Broadway and Water streets, and, claiming such permission had been legally granted, changed or lengthened the curve around said corner of complainant's lot, thus bringing the track much nearer complainant's property, and making it necessary, in order to get space enough for the passage of vehicles between the rail and the curb, to cut 3.3 feet from the corner of the walk, leaving a space at that point of but 7.6 feet from the rail to the curb.

Defendant company claims that this change was made with the express permission of the common council, and under the supervision of the proper officers of the municipality; that the change was necessary, and that the city council acted within its authority in allowing the change to be made.

Complainant in his bill claims that the proceedings of the council were irregular; that the change is an invasion of his rights in damaging his property and business by bringing the track so near his premises that his teams and dray teams cannot get to his place to receive or deliver goods without danger and inconvenience; that the corner is so unsafe that farmers cannot bring teams there, and all persons are in danger of injury by being caught in the narrow place at the corner by a passing car; also that the close proximity of the track to the corner is a serious menace to all persons coming there. He asked for and was granted a temporary injunction, and prayed that such injunction might be made perpetual, to restrain defendant from bringing the rail of the track nearer than eight feet from the curb line of the street. This curb line at the cor-

ner was an angle before it was cut back 3.3 feet and rounded off. The temporary injunction was afterwards modified by consent, without prejudice, to allow filling in around the track to make it safe for public travel.

Defendant further claims that complainant practically acquiesced in this change; that the original curve was dangerous, being too short, and was only temporary; that the change was good railroading, and made the corner more convenient to the public; and that complainant has abundant room on both streets for business purposes.

Complainant appeals from a decree of the circuit court denying the relief sought, and dismissing the bill without prejudice as to any remedy for damages at law.

This court has held repeatedly that the use of the streets of a city for street railway purposes was not an additional servitude, and that the grant of a right to construct and operate a street railway, with all necessary poles, wires, side tracks, etc., along the public streets, was within the powers of the municipality granted by the legislature, and that the location and construction of the road and changes relative thereto within the limits of a city were subject to the control and approval of the municipal authority, provided that the railroad so constructed and operated would not be a public nuisance, or for any special reason require the interference of a court. *Detroit City Ry.* v. *Mills*, 85 Mich. 634; *People* v. *Railway Co.*, 92 Mich. 522 (16 L. R. A. 752).

The dispute in this case does not arise upon any question as to the legality of the original grant to the defendant, but it is claimed that the action of the common council in granting the request to change the curve was irregular and void; that the resolution submitted was never acted upon; that the action was taken upon a motion that the request of the Rapid Railway Company be granted. It appears from the record that the request of the defendant company was the matter before the council at the time, although the name Rapid Railway Company was used in the motion; and the record also shows that this curve of

defendant company's road was the curve acted upon and permission granted to change, and the defendant company's road is a part of what is known as the "Rapid Railway System." The contention is that this permission to change the curve could only be given by an ordinance regularly enacted and accepted in writing by the defendant, for the reason that the statute under which defendant is authorized to act, being section 6446, 2 Comp. Laws, provides this method for street railway companies to obtain the right to construct and maintain car lines in cities and villages. This is true as to the original or subsequent grant of a right to construct or maintain a street railway, or any material portion of it, through and upon the streets of a city.

There are, however, certain things to be done in the operation and maintenance of such a road, which are incidental. The ordinance granting defendant certain rights in the streets of Marine City provided that "the location of all poles, and the location and construction of all side tracks, spurs, switches, * * * shall be under the control and subject to the approval of the common council." This ordinance made no provision for curves. It would be unreasonable to suppose the legislature intended that a railroad must turn from one street into another at right angles. It is reasonable, therefore, to hold that this was one of the incidentals to the construction of this railway, which was to be under the control of the common council. The common council, under the authority of the statute referred to, had entered into a contract with defendant company to construct and maintain its railway upon and along the streets of Marine City. By the terms of this contract certain matters incidental to this construction and maintenance were left under the direction and control of the council.

This court holds that the construction of curves to connect one street with another was one of those matters entirely under the control of the council, such control to be exercised in a reasonable and consistent manner, and by

proper action of the council through its proper officers. The care and control of the streets, under the charter of Marine City, was placed by the legislature in the council. The council, by ordinance, having granted to defendant the right under the statute to construct and maintain its railway upon certain streets in a certain manner, no further grant was necessary, but it was contemplated in the ordinance that those things usual and necessary to be done were to be left under the control of the council. It was not necessary to enact an ordinance. The council, by resolution or motion, could grant permission to change this curve. The duty of the council in respect to the location and construction of this curve was ministerial, and could be delegated to the committee on streets, or to a proper official. *Detroit Citizens' Street Ry. Co.* v. *Board of Public Works*, 126 Mich. 554.

The proofs show that it was necessary to lengthen this curve; that the old curve was too short, and was not safe. The council carefully investigated the subject, and gave its permission to lay this curve under the supervision and control of the committee on streets. The proofs also show the condition on both streets at this corner, as far as the surface of the streets is concerned, is smoother and better for travel than before the curve was moved, and that there is ample room in front and at the side of complainant's store to deliver or take away his goods, if reasonable care is exercised.

Whether the complainant has been damaged in his business and property by reason of the close proximity of the rail to the curb at his corner, is not necessary to determine in this suit.

The decree is affirmed, with costs.

MOORE, C. J., and GRANT, BLAIR, and HOOKER, JJ., concurred.

RICKELS v. LOG-OWNERS' BOOMING CO.

1. ADVERSE POSSESSION—RIPARIAN RIGHTS.

In order to sustain a claim of riparian right by prescription, the claimant must show an exclusive enjoyment of the water, substantially in the way claimed, by claimant or his grantors, adverse to the right of defendant, and without interruption, for a period of at least 15 years.

2. WATERS AND WATERCOURSES — OBSTRUCTIONS — BOOMING COMPANIES—DAMAGES TO CROPS—PLEADING—VARIANCE.

A count against a booming company for damages for injury to crops of a riparian proprietor by flooding, examined in connection with the evidence introduced thereunder, and *held*, that there was a material variance justifying an instruction for defendant as to that count.

3. SAME — LIABILITY OF BOOMING COMPANY — ACTS OF PREDECESSORS.

Where, in an action against a booming company for damages by flooding, plaintiff, by his declaration, limits himself to the positive wrongful acts of defendant, makes no complaint of any acts of omission, and does not allege that defendant was guilty of continuing unlawful obstructions, it is not error to instruct that defendant is not responsible for the acts of its predecessors, but only for its own acts.

4. SAME—CLOSING ARTIFICIAL CHANNEL.

The court may properly instruct, in such a case, that defendant had a right to close any artificial openings, basins, or channels, provided that it did not by such acts crowd the natural channel so that it could not have its ordinary free flow to the lake.

5. SAME—ACTIONS—ISSUES.

Where plaintiff in an action for flooding does not sue as a riparian proprietor, but his complaint is for an obstruction of his drain by positive acts of defendant beginning in 1901, it is immaterial whether the river prior to 1893 flowed naturally in a stream of a certain width.

6. SAME—LIABILITY—INSTRUCTIONS.

In such case the jury are properly instructed that plaintiff is entitled to recover if defendant crowded the natural channel

or changed or obstructed the natural flow of the water so as to impede or hinder the natural drainage of plaintiff's land, and thereby injure his crops.

Error to Muskegon; Russell, J. Submitted January 6, 1905. (Docket No. 27.) Decided February 27, 1905.

Case by Ebel Rickels against the Log-Owners' Booming Company for damages for flooding plaintiff's land. There was judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff is the owner of certain lowlands lying on either side of Four-Mile creek, a small stream that flows into the Muskegon river a short distance above Muskegon Lake. The creek before it reaches the river expands into a small lake, known as Peck's or Sanford's Bayou, which empties into the river about a mile from plaintiff's land through an outlet some 20 feet in width. In its natural state the creek was very crooked, and ran along in the center of the valley which it drains between bluffs from 40 to 50 feet high; the width of the lowland between the bluffs being from 20 to 30 rods.

Just at the lower or west line of his land plaintiff built a roadway running entirely across the lowland from highland to highland; the only opening being that left for the creek. The creek coming from above strikes this roadway at about the middle line of the lowland where it has been diverted from its original course through the center of the valley, and runs along the upper side of the roadway until it reaches the south bank or bluff. It then runs along the line of the bluff some 60 rods, where it is diverted towards the center of the valley and continues its original course. Along the west line of the land adjoining Rickels is a similar embankment, and still farther down the stream is another roadway, each about a foot higher than the adjacent land, and extending entirely across the valley with openings for the creek.

The lands of plaintiff along the creek are adapted to the raising of celery, which plaintiff had grown upon the lands for five years prior to 1901 without detriment from water thereon. The land was quite low and swampy, and, in order to fit it for the cultivation of celery, the creek bed was lowered 2 or 3 feet, and the land was ditched, and the muck taken from the ditches, thrown upon the land, and spread so as to raise the surface of the soil. The ditches run into the creek, the current of which continued to flow during the entire period covered by the suit.

In 1901 the water in the creek and in the land rose gradually until it was about 4 inches higher than in the preceding year. The water continued to rise at the rate of 4 inches a year during the ensuing two years, so that in the summer of 1903 it stood from 12 to 15 inches higher than in the summer of 1900. The result of this rise of the water was to seriously injure plaintiff's crops of celery, and he brings this action to recover his damages for such injuries; alleging that defendant was responsible for the rise of the water, through its conduct of its operations in running logs down the Muskegon river.

Defendant contended, and gave evidence tending to show, that during the years 1902 and 1903 there was an exceptional rainfall, and that the waters in the Muskegon marsh, in Muskegon Lake, and in Lake Michigan were all unusually high.

The Muskegon river has been used for many years for the driving of logs. The first corporation organized for that purpose was the Muskegon Booming Company, which was incorporated in 1864. In 1894, on the expiration of the charter of the Muskegon Booming Company, a new corporation was organized under the corporate name of the Muskegon River Booming Company, which operated for about one year. In 1895 the defendant was incorporated, and leased the property and rights of the Muskegon River Booming Company, and used them in its business; commencing operations in October, 1895.

The Muskegon river, through that portion of Muskegon

county involved in this case, flows through an extensive marsh, and has many outlets and channels, through which the water flows from the river into the marsh, and so into Muskegon Lake. For the purpose of facilitating the floating of logs down the river, the Muskegon Booming Company at an early day made certain improvements, extending some miles up the river. They constructed dikes at various points to straighten and confine the channel, and dredged out and deepened the channel, and made sorting and rafting and coupling basins. About the year 1879 they began the making of a sorting basin, commencing a little above Peck's Bayou, and extending down below the railroad bridge. The river bed opposite the bayou was dredged out and widened to a width of about 150 feet, with the channel next to the south bank, through which the bayou discharged the waters of Four-Mile creek. The company dredged out the entire width of the basin to a depth sufficient to float the logs and enable the men to handle them. Every year the company sent its dredge in, and cleaned the basin and channel out to a depth that would allow the proper sorting and driving of the logs. The use of this sorting basin having become unnecessary through the diminished supply of logs, the company in 1893 ceased to dredge it out and abandoned it. From that time on that part of the river, partly through natural causes and partly through the acts of defendant's predecessors, gradually filled up, leaving the original channel open for the water to pass down on the south side. As the old sorting ground filled up, the action of the river current formed, out of the sand, bark, and other debris that came down, a bed along the north side of the channel. In order to prevent this bed or bank from washing away, the Muskegon Booming Company, and afterwards the defendant, placed brush along the bed or bank, trailing downstream, and forming a dike down to below the railroad bridge, substantially parallel to, and from 30 to 50 feet from, the south bank at Peck's Bayou. At a point a short distance above Peck's Bayou defendant constructed a wing

dam of brush and other materials, extending from near the dike to the north bank of the sorting basin, which prevented the water flowing through a cut excavated by a dredge by its predecessors. Defendant also put in a brush dam at a point between the railroad bridge and the highway bridge to cut off another dredged channel. Neither of these brush dams extended out into the south or original channel. Some time from 1878 to 1882 the Muskegon Booming Company cut a channel through the marsh from the Muskegon river, at a point about a half mile above Peck's Bayou, to a stream known as "Cedar Creek." This was an artificial cut made for the purpose of driving logs through Cedar creek into Muskegon Lake, and when open it carried the greater portion of the river. This Cedar creek channel was used by the Muskegon Booming Company for several years, but in the later 80's was closed by a dam across its upper end, and remained closed till 1895, when it was again opened. The defendant used the Cedar creek channel for two or three years. In the spring of 1899 or 1900 it attempted to close it again, but abandoned its attempts in a few days. In the fall of 1902 it renewed its attempts, but did not complete the work until the spring of 1903.

James E. Sullivan, for appellant.

William Carpenter (*Nims, Hoyt, Erwin, Sessions & Vanderwerp*, of counsel), for appellee.

BLAIR, J. (*after stating the facts*). The plaintiff's declaration contains two counts. In the first count, after certain preliminary recitals, the pleader alleges that:

"Whereas, also, the waters of said Four-Mile creek flow into a branch of Muskegon river westerly or lower down the river than the land of this plaintiff, and this branch of Muskegon river flows into Muskegon Lake through two channels, known as the north or Blacksmith Shop channel and the south channel; the said north channel

being the main channel, and in its natural state it carries the larger volume of water. The said south channel is an artificial channel, through which the water did not flow unless diverted therein by artificial means. At a point about one hundred rods above the mouth of Four-Mile creek there is a channel or branch leading out of Muskegon river known as the Cedar creek channel, and by far the larger part of the waters of Muskegon river in its natural state flows through said Cedar creek channel into Muskegon Lake. Only a small portion of the waters of Muskegon river flow through the north channel and the south channel, so called, in their natural state; the current of said Cedar creek channel being very strong, and said channel being very deep, in its natural state, and adapted to the running and driving of logs therein.

"For that whereas, also, the said defendant, at the time of the grievance hereinafter mentioned and for a long time previous thereto, has been and is now a corporation engaged in the business of running, driving, and rafting logs in Muskegon Lake, Muskegon river, and its tributary, and it became and was the duty of said defendant to so conduct its business in the natural channels of said Muskegon river and its tributaries so as not to dam, back up, and impede the flow of the water in said Four-Mile creek so as to cause it to stand on the lowland of said plaintiff, and so as to injure his said land, and to cause the same to be sour and worthless, and of little value for the cultivation of celery.

"Yet, notwithstanding its duty in that regard, the said defendant, contriving and wickedly intending to injure said plaintiff, on, to wit, the 1st day of April, 1901, did construct a dam across the north channel, hereinbefore mentioned, by driving a row of spiles across said channel, filling in said channel in front of said spiles with logs, driftwood, brush, and other substances; and also on, to wit, the day and years last aforesaid, the said defendant constructed a dam across the main channel of Muskegon river at a point about the head of said Cedar creek channel, said dam consisting of two rows of driven spiles across said river, and of logs, brush, driftwood, and dirt placed in the bed of said river between and about said rows of spiles, and has continued to maintain and still maintains said two dams just hereinbefore mentioned, by means whereof the said defendant has caused the greater part of the waters of Muskegon river to flow through said artificial channel hereto-

fore mentioned, and through the channel of that branch of said river into which said Four-Mile creek empties, and thereby has caused the waters of said Muskegon river and the waters of said Four-Mile creek unnaturally to set back and overflow, and flood the lowlands of this plaintiff heretofore mentioned, thereby raising the water on said lands of this plaintiff to a height of, to wit, twelve inches. And by its unlawful construction of the two dams aforesaid, and by its unlawful continuance of said dams, said defendant has unlawfully kept said lowlands overflowed and unnaturally submerged by water to a depth of, to wit, twelve inches, thereby rendering said lowlands, and the cultivated part thereof, to be greatly soured, cold, and too low for the growing of celery," etc.

At the close of the testimony the court instructed the jury that there was no evidence in the case to sustain this first count, to which ruling plaintiff duly excepted, and upon which he assigns error in this court. Plaintiff gave no evidence, as to the "North or Blacksmith Shop Channel," alleged in the first count to be "the main channel," that in its natural state it carries the larger volume of water, as he admits in his brief he did not try "to show whether the river runs on the north side or the south side." Neither did the plaintiff produce any evidence to maintain his allegation that "the said south channel is an artificial channel, through which the water did not flow unless diverted therein by artificial means."

The undisputed evidence, however, disclosed that the south channel was the main and natural channel opposite Peck's Bayou, and the swings of the highway and railway bridges were over this channel, through which the water flowed unless diverted by artificial means. There was a like failure on the part of the plaintiff to produce evidence tending to show that "by far the larger part of the waters of Muskegon river, *in its natural state*, flows through said Cedar creek channel into Muskegon Lake." On the contrary, the undisputed evidence showed that the Cedar creek channel was an artificial channel, and that no part of "the waters of the Muskegon river, in its natural state," flowed through this channel.

The allegation that "defendant constructed a dam across the main channel of the Muskegon river at a point about the head of said Cedar creek channel" was likewise not sustained by the proofs. The dam in question was constructed across the Cedar creek channel, and not across the main channel of the Muskegon river.

But plaintiff's counsel contends in his brief that these artificial cuts "by reason of time became endowed with all the rights of law concerning water flowing through natural channels. I think, if the artificial channels were kept open by the other companies so as to drain our land for so long a time as to give us a right by prescription, that the defendant was also bound to keep them open, or at least not to build onto the banks so as to impede the flow of the river."

In order to sustain the plaintiff's claim of rights by prescription, it is essential that the evidence should tend to show an exclusive enjoyment of the water substantially in the way claimed by the plaintiff or by his grantors, adverse to the right of the defendant, and without interruption, for a period of at least 15 years. *Mathewson* v. *Hoffman*, 77 Mich. 420 (6 L. R. A. 349); *Chapel* v. *Smith*, 80 Mich. 100; *Kray* v. *Muggli*, 84 Minn. 90 (54 L. R. A. 473).

The evidence falls far short of showing such an adverse, exclusive, and uninterrupted enjoyment as the law requires. The Cedar creek channel was cut through the marsh in 1882. A dam was constructed across its head in the later 80's, and was maintained there until 1895—the year when plaintiff purchased his lands on Four-Mile creek. So far as any prescriptive rights in the maintaining of an open channel through the Cedar creek cut were concerned, they were simply inchoate when the dam was constructed, in the later 80's, and the interruption of their growth prevented their ripening into vested rights. We think there was a material variance between the declaration and the proofs, and that the court was justified in instructing the jury that the plaintiff was not entitled to recover on his first count.

Wood v. *Rice*, 24 Mich. 423; *Batterson* v. *Railway Co.*, 49 Mich. 184; *Macumber* v. *Booming Co.*, 52 Mich. 195; *Ives* v. *Williams*, 53 Mich. 636; *Bolton* v. *Railroad Co.*, 95 Mich. 202.

In the second count of his declaration the plaintiff alleges that, as the owner of the lands on Four-Mile creek, he was—

"Entitled to have the waters from time to time collected and being in and upon the said lands drained and carried away from the same through a certain drain or creek therein called Four-Mile creek, and from thence through Muskegon river and Muskegon Lake into Lake Michigan. Yet the said defendant on, to wit, the 1st day of April, 1901, wrongfully placed large quantities of spiles, earth, rubbish, and other matter so as to obstruct said drain, and wrongfully stopped up and obstructed the said drain, and continued the same so stopped up and obstructed, whereby large quantities of water which from time to time during that time collected, were in and upon the said land of the plaintiff, were obstructed and prevented from running away from the same through the said drain or creek and rivers as they otherwise would have done, and were penned and driven back upon the said land of the plaintiff, and accumulated thereon, and by reason thereof the said land of the plaintiff is rendered wet and swampy and unproductive," etc.

The court submitted the case to the jury on this count, charging them in the language of plaintiff's first request to charge, as follows:

"The plaintiff in this cause had the right to have his land mentioned in the declaration drained through Four-Mile creek, so called, Sanford's Bayou, so called, and Muskegon river, as it was wont to run into Muskegon Lake, and the defendant had no right to change or obstruct the natural flow of the water of Muskegon river past Sanford's Bayou, or past the place where it entered into Muskegon river, and so as to impede or hinder the natural drainage of the plaintiff's land; and if you find that the defendant by any artificial means in Muskegon river raised the water so as to injure the crops of celery on the land of plaintiff during the seasons of 1901, 1902, 1903, or any of them, then the plaintiff is entitled to recover."

The court, however, limited or qualified this instruction, and, plaintiff's counsel contends, practically abrogated it, by subsequent instructions to the effect that the defendant was not responsible for any of the improvements made or obstructions placed in the river by others, but only for its own acts since 1896; that it had a right to close up any artificial openings from the Muskegon river, and any artificial channels or basins made in that river, provided that it did not crowd the natural channel of the river so that it could not have its ordinary free flow down to the lake; and that all the plaintiff was entitled to was a fair flow of the river in its natural bed.

Plaintiff's position, as stated in his brief, is as follows:

"Under the second count of our declaration, we claim we had the right to prove that Four-Mile creek and Muskegon river was a natural drain to our land, and that the defendant obstructed the drain. Now, it is plain from the proofs that from time out of mind up to the year 1893 that the water from Four-Mile creek flowed uninterruptedly into the Muskegon Lake through the Muskegon river channel at least 150 feet wide at the bridge, and that up to the year 1901 the water never had raised on plaintiff's lands so as to do any damage. Now, the whole Muskegon river was part of the drain, including with it Cedar creek channel; and when this channel was closed off so as to prevent the water flowing out through it, and as the channel in the main river was so narrowed that the water could only pass below Peck's Bayou in a stream of about 30 feet wide, where it was to run in 150 feet, there were such artificial obstructions in the drain that we claim they did flood our lands, and we had the right to have the jury consider these artificial obstructions that had been placed there, including the obstructions placed in the Cedar creek channel. * * * That is, the whole artificial impediment placed there prevented the water from flowing out through the Cedar creek channel as it was wont to flow, and through the main river as it was wont to run, made a dam surrounding Four-Mile creek."

It is not apparent how the acts of defendant's predecessors could have injured plaintiff, since they were all committed prior to October, 1895, and counsel concedes "that

up to the year 1901 the water never had raised on plaintiff's lands so as to do any damage." Again, plaintiff's counsel alleges in his brief: "We showed by the celery planters on the creek that there had never been any trouble of water standing on the land till the year 1901." Moreover, the plaintiff, by his allegations in the count of the declaration now under consideration, has limited himself to the positive wrongful acts of the defendant. He makes no complaint of any acts of omission on the part of defendant, but solely of acts of commission, and attributes his injuries to such acts. He does not allege that defendant was guilty of continuing unlawful obstructions or damming up artificial channels, but charges it with wrongfully placing large quantities of earth, spiles, rubbish, and other matter so as to obstruct his drain, consisting of Four-Mile creek and Muskegon river. We think the court committed no error in charging the jury that under such a count the defendant was not responsible for the acts of its predecessors, but only for its own acts.

Neither was the court in error in charging the jury that defendant had a right to close up any artificial openings, basins, or channels, provided that it did not by such acts crowd the natural channel so that it could not have its ordinary free flow down to the lake.

We think the court was correct in saying to the jury that all the plaintiff was entitled to was "a fair flow of the river in its natural bed." The declaration made the Muskegon river a part of the drain, and this must be held to mean the river in its natural state at the time of the acts complained of. The essence of the complaint is that plaintiff had a drain which properly drained his lands prior to the unlawful interference of defendant, but, owing to the obstructions placed in the drain by defendant in 1901 and afterwards, the drain thereafter ceased to properly drain his lands. The plaintiff does not sue as a riparian proprietor of lands on the Muskegon river, and is not entitled to recover in this case upon the theory of injuries to his rights as such proprietor. His complaint is for an ob-

struction of his drain by positive acts of the defendant, beginning in 1901, and this necessarily implies an obstruction of the drain as it existed at the time the acts were committed. We think, therefore, that whether the river "from time out of mind, up to the year 1893," flowed by Peck's Bayou in a stream 150 feet wide, was wholly immaterial under this second count. We do not find in the evidence, fairly considered, however, any substantial support for plaintiff's claim that it did so flow, and we think the jury would not have been warranted in finding from the testimony in the case that the river from "time out of mind" had flowed naturally at a width of 150 feet past Peck's Bayou. On the contrary, it was practically undisputed that, when left to itself and affected only by natural causes, the river flowed in the south channel, where it was flowing at the time of the injuries complained of, at a width of somewhere from 30 to 60 feet. But however this may be, the question was fairly submitted to the jury as to whether the defendant by its acts crowded the natural channel of the river so that it could not have its ordinary free flow down to the lake; and the jury were expressly instructed that if the defendant did crowd the natural channel, or changed or obstructed the natural flow of the water of Muskegon river past Sanford's Bayou, so as to impede or hinder the natural drainage of the plaintiff's land, and thereby injured his crops of celery, the plaintiff was entitled to recover. This, we think, under any possible view of the testimony, was all that plaintiff was entitled to.

The judgment is affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and HOOKER, JJ., concurred.

HALL v. MARSHALL.

1. HOMESTEAD—WIDOW—MORTGAGES—SECRET MARRIAGE.
   Where the wife of a mortgagor, who was secretly married, and did not join in the mortgage, had not lived on the mortgaged property prior to the execution of the mortgage, she was not entitled to homestead therein as against the mortgagee, who was ignorant of her marriage.

2. MORTGAGES — EXECUTION — WIFE — FAILURE TO JOIN — SECRET MARRIAGE—DOWER.
   Where a mortgagor's marriage to defendant was concealed without fraudulent purpose, and defendant did not join in the mortgage, such concealment was not a fraud on the mortgagee, so as to deprive defendant of her dower in the mortgaged premises.

3. SAME—SUBROGATION.
   Where at the time a mortgage was executed by deceased he had contracted a secret marriage with defendant, who did not join in the mortgage, but the proceeds of the loan were used in part to take up two existing valid mortgages, the mortgagee therein was subrogated to the liens of the former mortgages, defendant was entitled to dower in the surplus arising after payment of the amount covered by such prior mortgages and the remainder of the fund belonged to the mortgagee.

Cross-appeals from Wayne; Hosmer, J. Submitted January 19, 1905. (Docket No. 90.) Decided February 27, 1905.

Bill by Theodore P. Hall against Kate L. Marshall and others to determine the lien of certain mortgages and for their foreclosure. From the decree rendered, complainant and defendant Kate L. Marshall appeal. Affirmed.

Gray & Gray, for complainant.

Julian G. Dickinson, for defendant.

MONTGOMERY, J. William S. Marshall died intestate April 7, 1903. At this date he was the owner of a house and lot in the city of Detroit worth $5,500, subject to the lien of complainant's mortgage, which is the subject-matter of this proceeding.

In March, 1882, Mr. Marshall, his wife, Elizabeth, joining, gave to complainant a mortgage for $1,700, covering the house and lot referred to. On April 1, 1885, an additional mortgage was given for $300. On November 10, 1885, the amount due on these mortgages, viz., $2,091.50, was covered by a new mortgage for $4,500, the complainant advancing an additional sum of $2,408.50. Mrs. Marshall having died in 1884, the two last-named mortgages were executed by Marshall alone, he being to all appearances a widower. He, in fact, was a single man at the date of the $300 mortgage, but complainant ascertained for the first time after Mr. Marshall's decease that he had been married to defendant in September, 1885.

Defendant claiming the premises as a homestead, this bill was filed to have complainant's lien determined, and for a foreclosure and sale. It was alleged in the bill that in any view of the case, if the mortgage of November 10, 1885, should be held void, the two previous mortgages should be treated as subsisting liens, a proposition so plainly equitable that it appears not to be seriously contested.

The circuit judge decreed a sale, and directed the surplus, over and above the amount due by the terms of the first two mortgages, to be brought into court, that the rights of the contesting parties to the fund be determined. This order was carried into effect, and a surplus fund of $2,032.80 was paid into the hands of the register. The final decree determined that the defendant was entitled to dower rights in this surplus, and awarded her the sum of $506.25 on this account, but denied her claim that the premises were at the date of the mortgage a homestead, and awarded the remainder of the fund to complainant. Both parties appeal.

The complainant contends that defendant acquired no dower rights by her marriage, and defendant, on the other hand, contends that she not only acquired dower rights but homestead rights as well, and that, as a consequence, the mortgage of November 10, 1885, should be held void. Defendant further contends that, if this is not held, it should be held that her dower rights attached to the entire property, and is not limited to the surplus arising after satisfying existing incumbrances.

The most important question presented is whether at the date of the execution of the $4,500 mortgage the defendant had, as against one accepting in good faith a conveyance or mortgage from her husband, acquired a homestead right in the premises. The evidence is that she had not at the date of this mortgage lived upon the premises. She had never seen them at this time, and did not see them for years afterwards. She continued to reside in Ohio, and for years bore her maiden name. During all the years prior to Mr. Marshall's death she never visited Detroit but once. This was in June, 1887. On this occasion she stopped at a hotel, but she went with her husband to the house in question, remained for about an hour, during which time the subject of a legal separation or divorce was discussed. She testifies that she then declared to her husband that she intended to remain in the house, but yielded to persuasion and left, returning to her home in Cincinnati. We think these facts bring this case clearly within the holdings in *Stanton* v. *Hitchcock*, 64 Mich. 316, and *Black* v. *Singley* 91 Mich. 50. The defendant had not, before the date of the mortgage, so occupied these premises as to entitle her to claim homestead rights as against one who was ignorant of her marriage.

The complainant contends that defendant was not entitled to dower, and bases this contention on the claim that the concealment of her marriage operated as a fraud upon the complainant. We do not discover any evidence of a

fraudulent purpose, and think the circuit judge correctly held her entitled to dower.

The only question remaining is whether the circuit judge erred in limiting her claim to dower to the surplus over and above the reinstated mortgages. Under the provisions of sections 8920 and 8922, 3 Comp. Laws, it is clear that, had the two first mortgages continued to be subsisting liens, the defendant would be entitled on foreclosure to dower in the surplus arising on a sale on foreclosure only. By the decree of the circuit judge, which we fully approve, these mortgages were reinstated, and we see no reason why the natural and equitable sequence should not be that the dower right acquired by the defendant is that, and that only, which she would have been able to assert had they never been discharged.

The decree will stand affirmed, without costs to either party.

McALVAY, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

CADILLAC STATE BANK *v.* WEXFORD CIRCUIT JUDGE.

ATTORNEY AND CLIENT—AUTHORITY — REPRESENTATION OF GARNISHEE—CASE MADE.

That the attorney who appears in behalf of a garnishee and excepts to judgment being entered against the garnishee has hitherto acted as attorney for the principal defendant, and is not the regularly retained attorney for the garnishee, a bank, is no reason why the circuit judge should refuse to make a finding of facts and law at the request of such attorney, or refuse to settle and sign a case made on like request.

Mandamus by the Cadillac State Bank to compel Clyde C. Chittenden, circuit judge of Wexford county, to sign a case made. Submitted January 10, 1905. (Calendar No. 20,890.) Writ granted February 27, 1905.

D. E. McIntyre (*E. F. Sawyer*, of counsel), for relator.

Fred S. Lamb, for respondent.

OSTRANDER, J. The material facts in this matter are that on February 4, 1904, one John L. Rathman recovered judgment in the circuit court for the county of Wexford against Richard H. Tuttle and Len Starks, copartners as R. H. Tuttle & Co., for $166.72 damages and $48.35 costs. This judgment is unappealed from and unsatisfied. On the 1st day of March, 1904, at the suit of the same plaintiff, a writ of garnishment issued out of the same court, directed to the sheriff of Wexford county, against the relator, as garnishee of R. H. Tuttle & Co., the defendants in the principal action. To this writ the cashier of the Cadillac State Bank made disclosure, in which he stated that the books of the bank showed a credit balance in favor of R. H. Tuttle & Co. in the sum of $250; that as to whether that money was the property of Richard H. Tuttle and Len Starks he was not able to state, but says that he is informed, and has reason to believe, that the money is the property of the L. Starks Company, of Grand Rapids, Mich., a corporation, and is claimed by the L. Starks Company as the property of that company. He further states that the relator, the Cadillac State Bank, had no other property, money, goods, chattels, or effects in its hands or under its control belonging to said R. H. Tuttle & Co., or to Richard H. Tuttle, or to Len Starks, nor at the time of the service of the writ was it indebted to R. H. Tuttle & Co. or Richard H. Tuttle and Len Starks further than set forth.

With the filing of this disclosure, which was made April 1, 1904, all proceedings in the garnishment suit stopped until September 27, 1904, when plaintiff in the primary action moved the court to render judgment against the Cadillac State Bank as garnishee upon the affidavit for garnishment and the disclosure filed, basing his motion on the files and records in the case of *Rathman* v. *R. H. Tuttle & Co.* and the files and records in the garnishment proceeding. This motion was noticed for hearing on the 8th of October, was brought on to be heard on that day, and rendition of judgment was objected to on the part of the Cadillac State Bank by E. F. Sawyer, its attorney, for the reason that the disclosure was conditional, and not absolute, and that without an issue framed under the statute, and tried, the bank would not be protected against the demand of any proper claimant for the money. The court, overruling this objection, ordered judgment entered, and judgment was on the 8th day of October entered against the Cadillac State Bank, garnishee defendant, for the sum of $222.16, the amount of the judgment in the primary case and costs and interest at 5 per cent., and also a motion fee of $10.

After the judgment was rendered, a stay of 80 days was allowed by the court to enable the relator, the garnishee defendant, to review the proceedings in this court, and the necessary supersedeas bond was filed. Relator desired to present the case in this court on a case made after judgment, and to that end prepared a "case" and noticed the application for settlement upon the attorney for the plaintiff in the primary case, but the same was carried along from time to time until December 6th, when it was taken up and argued. The circuit judge declined to sign the case made because there was no finding of facts or of law, and because none had been requested by either party, and thereupon the attorney for relator prepared a short finding of facts and a conclusion of law, which, on the 8th of

December, was presented to the court with the request that he sign the same or amend them. So far the facts are undisputed.

The answer of the respondent sets out the following additional facts: He denies that on the 8th of October the garnishee defendant appeared and objected to any judgment being rendered against it, but admits that E. F. Sawyer, who claimed to be there for the Cadillac State Bank, but had at all times theretofore been the attorney for Richard H. Tuttle, and tried the main case for R. H. Tuttle & Co., argued the matter; says that Mr. Sawyer is not the regular attorney for the bank, had never entered his appearance as attorney for the Cadillac State Bank. He denies that upon rendering judgment in the garnishment case the Cadillac State Bank, by its counsel, excepted, and says that the Cadillac State Bank, relator, by its counsel, made no request for findings of facts and law. He says he refused to sign the case made presented to him for settlement because there was no finding of fact or law made; that the attorney for the plaintiff in the primary cause objected to the settlement because there were no findings of fact and law; that he stated to the attorneys at that time that there should be a request filed asking for a finding of facts and law upon which the court could act, and that no such request has been filed by either party. He admits that a purported statement of facts and law was presented to him, and he refused to sign those findings, or any others, at that time, and says that the bank, relator, has never requested him to make any findings except as presented by E. F. Sawyer as aforesaid. He assigns as a further reason for not signing the findings of fact and law that there was a judgment standing against R. H. Tuttle & Co., and that he would not evade the rules of the court in order to assist R. H. Tuttle & Co. in avoiding payment of an honest judgment. He admits that the proposed "case" attached to relator's petition is the one presented to him for signature on the 6th of December, 1904; admits that the purported finding of facts and law

so attached to the petition is the one presented to him for his signature on the 8th of December, 1904.

There are various other papers on file in connection with this proceeding, among them the copy of the stenographer's minutes as to what took place upon the occasion of settling the answer of respondent. It is not considered.

There was no trial of the garnishment case. There was a judgment, based upon the files and records of the court. There is no reason why the relator, the garnishee defendant, should not test the validity of this judgment in this court, and by a case made if he prefers that practice. There is no reason shown why the court should not have settled and signed the case made which was proposed to him by counsel for relator.

A writ of mandamus will issue as prayed.

MOORE, C. J., and CARPENTER, MONTGOMERY, and HOOKER, JJ., concurred.

SIMONS *v.* HABERKORN.

TRIAL—INSTRUCTIONS—NECESSITY—SUFFICIENCY.

In an action on a building contract, after the evidence was in, court and counsel engaged in a colloquy as to allowing the written specifications to go to the jury, in which defendant stated that he wished them instructed that the writings did not constitute all the contract, to which the court replied, "Certainly this writing is not the complete contract; the jury will so understand it." Defendant also stated that he would ask the court to charge as to the implied provision that work done under the contract "must be done in good workmanlike manner," and the court answered, "The jury will so understand it." On the following day the jury were sent out without instructions, defendant's requests having been refused. *Held*, that there was no compliance with sections 10243–10246, 3 Comp. Laws, making the jury judge of the facts, and requiring the court to instruct them as to the law of the case.

Error to Wayne; Donovan, J. Submitted January 10, 1905. (Docket No. 31.) Decided February 27, 1905.

Assumpsit by George M. Simons, by next friend, against James H. A. Haberkorn for work and labor done. There was judgment for plaintiff, and defendant brings error. Reversed.

Edward A. Barnes and *U. Grant Race*, for appellant.

Charles C. Simons, for appellee.

MOORE, C. J. Plaintiff, a minor, and one Decker were in business in Detroit under the name of the Peninsular Wire Works. They made a contract with the defendant for the construction, for $130, of a wire screen around a two-story porch on a residence in Detroit, the screen to be made of large panels of wire mesh in channel iron frames overlaid with wire cloth, to be of materials specified in a written proposition. They proceeded with the work. Defendant and the supervising architect were dissatisfied with it, claiming the workmanship was faulty, and was ineffective to keep out mosquitoes and other insects, and that the doors did not work properly. Decker terminated his connection with the business, and plaintiff, with one assistant, undertook to make the work right, and claims he did so. Defendant claimed he failed to do so. Plaintiff demanded payment, which was refused, and suit was brought.

Whether the work was properly done is the controverted question of fact in the case, about which the testimony was very conflicting.

After the testimony was all in, the following occurred:

"It was agreed that the argument to the jury should be limited to fifteen minutes on each side. The court then inquired of the jury how many of their number had sat on juries before, and ascertained that there were several who had upon one or more prior occasions acted as jurors.

"*The Court:* The charge will be one word. I will charge you the first thing on Monday at two o'clock.

(Thereupon counsel for plaintiff and for defendant made their arguments to the jury.)

"*The Court:* Mr. Simons, do you wish these written specifications to go to the jury?

"*Mr. Simons:* Yes, sir.

"*The Court:* Mr. Barnes, have you any objections?

"*Mr. Barnes:* I have no objections provided the jury have proper instructions regarding them. I shall want them instructed that these specifications do not constitute all the contract.

"*Mr. Simons:* The plaintiff does not claim that they constitute the whole of the contract; only that they are a part of it.

"*The Court:* Certainly this writing is not the complete contract; the jury will so understand it.

"*Mr. Barnes:* I shall also ask the court to charge with respect to certain implied provisions of every contract; that the work must be done in good workmanlike manner.

"*The Court:* There jury will so understand it."

Whereupon the court adjourned to Monday, October 12th, on which day, before the charge of the court, counsel for defendant presented to the court certain requests to charge. Thereupon the court charged the jury as follows:

"Gentlemen of the jury, I decline to give the requests to charge. Go.

"*Mr. Simons:* Does your honor direct that the specifications be given to the jury?

"*The Court:* Yes, they are there.

"*Mr. Barnes:* My requests are refused?

"*The Court:* Yes, I told you the other day, and we agreed upon the charge we are now giving.

"*Mr. Barnes:* I was not a party of any such agreement.

"*The Court:* The record will show what was said on Saturday.

"*Mr. Barnes:* Note an exception to the refusal of the court to give the defendant's first and second requests to charge."

Sections 10243 to 10246, 3 Comp. Laws, declare and establish the practice in charging or instructing juries. The provisions clearly recognize that it is the function of the jury to pass upon questions of fact. They with equal

clearness recognize the duty of the trial judge to instruct the jury as to the law of the case. See the many cases cited in the note to section 10243, and especially *Crippen* v. *Hope*, 38 Mich. 344; *Roby Lumber Co.* v. *Gray*, 73 Mich. 356; *Hyde* v. *Shank*, 77 Mich. 517. We do not think it can be said that the colloquy which occurred between counsel and the judge, to which the jury might or might not have paid any attention, was in any proper sense, as contemplated by the statute, an instruction to the jury as to the law which should govern them in passing upon the facts.

Because of the failure to instruct the jury as to the law, the case is reversed, and a new trial ordered.

CARPENTER, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

SMITH *v.* SMITH.

139 133
143 2 34

139 133
146 232

139 133
158 1223

1. APPEAL AND ERROR — QUESTIONS CONSIDERED — APPEAL FROM ORDER AFTER DECREE.

   An appeal from an order reducing the amount of alimony previously granted by a decree of divorce does not bring up the original decree.

2. DIVORCE—ALIMONY—REDUCTION—REMARRIAGE OF HUSBAND.

   Where a divorce was granted to a wife on her cross-bill, and she was awarded permanent alimony, not shown to be beyond her necessities, and 12 days thereafter complainant married a woman with whom he had been keeping company for 2 years before the divorce, and it was this conduct that alienated the affections of complainant's daughter from him, after which defendant discouraged the daughter's association with complainant, neither complainant's subsequent marriage nor the alienation of the daughter's affections justified an order reducing the decree for permanent alimony.

Appeal from Wayne; Donovan, J. Submitted January 10, 1905. (Docket No. 34.) Decided February 27, 1905.

Bill by Edwin W. Smith against Elma L. Smith for a divorce: On petition for an order reducing the amount of alimony. From an order awarding a gross amount, defendant appeals. Reversed.

Orla B. Taylor and *Fred C. Harvey*, for complainant.

Allan H. Frazer, for defendant.

CARPENTER, J. In March, 1903, a decree of divorce was granted in this case on the cross-bill of defendant. That decree gave defendant the custody of the only child of the parties, and awarded her permanent alimony of $75 per month. May 25, 1904, on the petition of complainant, an order was made materially reducing the permanent alimony awarded defendant. From this order defendant appeals to this court.

We cannot on this record review the original decree. We must assume that the award of alimony in that decree was in every respect proper. The question for our consideration is this: Have such new facts arisen since the decree as to justify its modification? *Perkins* v. *Perkins*, 12 Mich. 456; *Chandler* v. *Chandler*, 24 Mich. 176.

We proceed to inquire what new facts have arisen since the rendition of the decree. If there has been any change in complainant's financial circumstances, that change has improved his financial ability. There has been no change in defendant's necessities. Upon the oral argument it was urged that her condition of health has improved since the decree was rendered, but later it was conceded that this claim was not supported by the record. It cannot, therefore, be considered. It does appear that since the decree was rendered complainant has married, and that his daughter has lost her affection for him. Unless we

hold that this marriage and diminished affection are such new facts as justify a reduction of the alimony, the order appealed from should be reversed. There can be no doubt that complainant had the right to remarry; there can be no doubt that by remarrying he has increased his necessities, and to that extent diminished his ability to pay the alimony awarded defendant. But as it was a voluntary act of his, and an act which the testimony shows he contemplated at the time he obtained his divorce, we do not think that he should be permitted to say that it is a fact arising since the decree which warrants a reduction of defendant's alimony. It may be said in this case, as was said by the supreme court of Washington in *State, ex rel. Brown*, v. *Brown*, 31 Wash. 405 (62 L. R. A. 974):

"If his monthly income after divorce was sufficient to support himself alone and pay his divorced wife the alimony allowed, he could not by his subsequent marriage set aside the decree, or be heard to say that the additional burdens which he himself thereby assumed made him unable to comply with the decree. The divorced wife and minor child have a fixed and prior claim upon the earnings of appellant, which appellant for his own comfort may not take away."

Is the modification of the decree justified by the fact that complainant's daughter lost her affection for him? Complainant contends that defendant is responsible for this loss of his daughter's affection. A careful examination of the record convinces us that the cause of the loss of the daughter's affection is the fact that complainant 12 days after his divorce married a woman with whom he had been keeping company for a period of 2 years before his divorce. We do not agree with complainant that this conduct would not have disturbed the daughter if her mother had not brought it to her attention. We credit the testimony which shows that it was brought to her notice by the children at school, and that she grieved bitterly because they taunted her. It is but natural that this conduct of complainant should create in defendant, as well as in her daughter, a

feeling of resentment. It induced, and naturally induced, defendant to believe that for the daughter's own good she should not associate with her father; and if, as we may infer from the record, in consequence of this she discouraged such association, that is a circumstance justly chargeable to complainant's conduct, and is not, therefore, a fact which justifies the reduction of alimony.

It follows, therefore, that the order appealed from must be set aside.

MOORE, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

FAIRFIELD *v.* HART.

1. TRIAL TO COURT—FINDINGS OF FACT—PROPOSALS.
   Proposed findings of fact, which are not statements of ultimate facts but are rather recitals of proofs, are objectionable in form.

2. APPEAL AND ERROR—FINDINGS OF FACT—CONCLUSIVENESS.
   Findings by the trial judge, on conflicting evidence, in a case tried without a jury, are conclusive on error.

3. ARCHITECTS' SERVICES—ACTION—EVIDENCE—SUFFICIENCY.
   Testimony by defendant that he agreed to pay plaintiff, an architect, the "usual commission" for certain plans, if accepted, does not support a finding of fact that defendant agreed to pay the usual commission, the plans not being accepted.

4. SAME—CONCLUSIONS OF LAW—SUPPORT BY FINDINGS.
   A finding of fact that defendant agreed to pay the "usual commission" for certain plans does not support a conclusion of law that plaintiff is entitled to recover a specific sum, though there is evidence undisputed that that sum is a fair price for the plans furnished.

5. SAME—FAILURE TO EXCEPT.
   Where there is no claim by exception or assignment of error

that the conclusion of law is not supported by the findings of fact, and there is evidence undisputed that the amount of the judgment was a fair price for the services rendered, failure of the evidence to support a finding that defendant agreed to pay the usual price for such services is immaterial.

Error to Kent; Perkins, J. Submitted January 12, 1905. (Docket No. 51.) Decided February 27, 1905.

Assumpsit by George W. Fairfield against George A. Hart for services rendered. There was judgment for plaintiff, and defendant brings error. Affirmed.

Peter Doran, for appellant.

Holmes & Holmes, for appellee.

OSTRANDER, J. This case, which originated in justice's court, was appealed to the circuit court, and there tried before the court without a jury. Written findings of fact and of law were made and filed, which findings and conclusion defendant sought to have amended. The proposed amendments, which were refused, appear in the record. If adopted, they would reverse the findings of fact made by the court and require a conclusion of law favorable to defendant. Many of the amendments proposed are objectionable in form, as being recitals of proof rather than statements of ultimate facts. Exceptions were taken to the findings of fact and to the conclusion of law, as well as to the refusal of the court to amend as requested. It is not claimed that the finding of facts made by the court does not support the conclusion of law and the judgment for $120 which was entered.

No extended discussion of the points made would be of interest or benefit to the profession. Plaintiff, an architect, sued for the value of certain plans for cottages, claimed by him to have been made for and furnished defendant, at his request. The declaration was oral, on the common counts, and especially for the professional services of an architect. The plea was the general issue.

On the part of the defendant, it was and is urged that the testimony does not show a contract—a meeting of the minds of plaintiff and defendant in a definite and enforceable agreement. We think that the testimony of plaintiff tended to show, and, if believed, did show, an employment to make plans for 10 cottages; that no price was agreed upon; that the construction was to be cheap; that the work was performed; that $12 each for the plans was a reasonable price. There was considerable proof taken upon the proposition that the plans were not of value because the cottages indicated by them could not be built within the limits of cost fixed by defendant. But plaintiff did not testify, or admit, that any precise cost or range of cost was stated by defendant. It was for the court to find the fact, and there was testimony which would have supported a finding for either contestant. We cannot weigh the evidence. If the court believed the plaintiff, as he evidently did, the findings of fact are all of them warranted, excepting one. We find no proof offered on the part of the plaintiff to support the finding that defendant agreed to pay plaintiff for the plans "the usual commission." That proof was found in defendant's testimony, but is coupled with the further statement that payment was to be made only if plans were accepted. They were not accepted. Even if plaintiff had so testified the finding of fact does not support the conclusion of law that plaintiff is entitled to recover $120, or at the rate of $12 a plan. As has been stated, however, it is not claimed by appellant, by exception or assignment of error, that the conclusion of law is not supported by the findings of fact, and there was proof, not disputed, that $12 a plan was a fair price for those furnished.

The first four assignments of error are based upon rulings admitting or excluding testimony. We have considered them. As to the first, we do not think there was any ambiguity in the letter sought to be explained, and the ruling was error. But it is quite clear that the answer given could not have prejudiced defendant. It was rather

a statement of intentions and of a business custom than an explanation of the language of the letter. The other exceptions are not well taken.

The judgment is affirmed, with costs.

MOORE, C. J., and CARPENTER, MONTGOMERY, and HOOKER, JJ., concurred.

NAPPER v. FITZPATRICK.

139 139
e143 637

JUDGMENTS—RES JUDICATA—DEFECTS IN TAX SALE.

139 139
157 416

The validity of a tax deed is established by the decree in the tax sale proceedings, and the contesting owner cannot retry that issue by a subsequent action of ejectment against the tax sale purchaser on a ground since discovered.

Error to Alpena; Emerick, J. Submitted January 17, 1905. (Docket No. 57.) Decided February 27, 1905.

Ejectment by Robert Napper against John E. Fitzpatrick and others. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Affirmed.

O'Brien & Francis, for appellant.

Black & Roberts (*McFarlan & Wilson*, of counsel), for appellees.

GRANT, J. Plaintiff acquired title in fee from the original owner of the lands in controversy by the foreclosure of a mortgage. Taxes were not paid, and the defendants Brown and Cullen acquired the tax title upon the usual petition by the auditor general for the foreclosure of tax liens, and petitioned for a writ of assistance. To this the plaintiff appeared and filed an answer, contesting the va-

lidity of the decree and deed. The reason then assigned was that the decree was prematurely entered. The court entered a decree for the petitioners, granting the writ of assistance. Plaintiff appealed, and the decree was affirmed by this court. *Brown* v. *Napper*, 125 Mich. 117. Plaintiff afterwards instituted this action of ejectment, alleging another objection to the validity of the defendants' deed, namely, that they did not pay certain other taxes which were then due and a lien upon the lands, and which should have been included in the purchase price, under *Hughes* v. *Jordan*, 118 Mich. 27, and *Wilkin* v. *Keith*, 121 Mich. 67.

The issue involved in the proceedings for the writ of assistance was the validity of the tax deed. Plaintiff should have interposed then all the objections he had to the validity of the deed. Its validity is res adjudicata by that decision. He is not now entitled to retry that issue on grounds which he may have since discovered. The case is expressly ruled by *Peters* v. *Youngs*, 122 Mich. 484.

Judgment is affirmed.

McALVAY, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

MASSI *v.* LAVINE.

CANCELLATION OF INSTRUMENTS—EQUITY—CLEAN HANDS.

A bill to cancel a deed alleged to have been made by complainant to defendant conveying property worth $2,500 to avoid a liability of $115 is properly dismissed, it appearing that complainant was accustomed to business affairs, and there being no fiduciary relation between the parties.

Appeal from Houghton; Streeter, J. Submitted January 18, 1905. (Docket No. 70.) Decided February 27, 1905.

Bill by August Massi and another against Morris Lavine and another for the cancellation of a deed. From a decree dismissing the bill, complainants appeal. Affirmed.

The purpose of this suit is to obtain the cancellation of a deed made by complainants to defendant Morris Lavine. Complainants' claim is: That Mr. Massi was one of the sureties upon the bond of one Mrs. Lamorand as administratrix, the bond being in the sum of $500. That he received a letter from a firm of lawyers saying that:

"She [the administratrix] has not gone ahead with this estate and has not paid our client's claim. If she does not do so, of course we will fall back on the bondsmen for payment of the same, and we thought it would be for your interest for us to write this letter, and notify you that we expect to collect this claim in full. Kindly let us hear from you what Mrs. Lamorand intends to do."

That defendant Morris read this letter, and told the complainants that they should transfer this property to some one else, or they would have trouble, and would surely lose their property. That they were finally induced by defendant Morris to deed the property to him, upon his promise to deed it back after the trouble was over. That the consideration was $2,500. That it was agreed that $1,000 should be considered paid, whereas in fact nothing was paid; that three notes, of $500 each, running from one to three years, should be given by the defendant Morris to the complainant. That the transaction was carried out, and the deed executed and delivered. That complainant August tendered back the notes, and demanded the execution of a deed from defendants, and that they refused. The claim of the defendant Morris is that the sale was a bona fide transaction; that he paid $600 in cash at the time of the execution of the deed; that the property was subject to a mortgage of $200, which he assumed; that complainant August owed him $200, which was canceled as a part of the consideration; that soon after the transaction complainant wanted money, and it was agreed

that, if Mr. Lavine would pay Mr. Massi $1,200 for the notes, they should be surrendered; that defendant raised the money, paid it to complainant, and received the notes, which he destroyed. The case was heard upon pleadings and proofs taken in open court, and the bill dismissed.

Louis N. Legris (*P. H. O'Brien*, of counsel), for complainants.

W. A. Burritt, for defendants.

GRANT, J. (*after stating the facts*). The main issue of fact in the case is, Was the sale a bona fide one, and the consideration paid, or was the title transferred to assist the complainant August Massi to avoid the payment of a debt? Upon this the testimony was in direct conflict. There is no room to find that either is mistaken. Either the one or the other has committed perjury. Each has produced some corroborating evidence to support his version. We find it unnecessary to determine this controversy, as the case must be determined upon the complainants' own evidence.

No fiduciary or confidential relation existed between Mr. Massi and Mr. Lavine. They were dealing with each other at arm's length. They had had various business transactions together for some years. The land conveyed is conceded to be worth $2,500, the consideration expressed in the deed. The bond signed by Mr. Massi with another bondsman was for $500. He claims that he was threatened only with the payment of $115. This was contingent upon his principal, the administratrix, not performing her duty. The letter which he relies upon as containing the threat to enforce the claim against him only asked him to see that the administratrix performed her duty. He apparently took no steps to that end. He was accustomed to business affairs. He had 80 acres of land besides that involved in this suit, which he did not transfer. I can reach no other conclusion from his own testimony than that he conveyed this land, worth $2,500, to avoid a

liability of only $115. He does not come into court with clean hands, and equity will leave him in the bed he chose to make. Under his own testimony, he is not entitled to relief. The record does not justify a finding that this is a case where the stronger has overpowered the weaker, or the superior has taken advantage of the inferior, and by his persuasion and influence has procured an unlawful act to be done. The case falls within *Poppe* v. *Poppe*, 114 Mich. 649.

The decree is affirmed, with costs.

McALVAY, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

LETTS *v.* TREVALLICK.

EQUITY—PRACTICE—ISSUE—JOINDER—NOTICE TO TAKE TESTIMONY—TIME—OBJECTIONS.

Where a suit in chancery was at issue as to one defendant when complainant served notice of his intention to take testimony in open court, as authorized by Chancery Rule 15*a*, and such defendant made no application to have the case referred to a commissioner to take testimony, he was not entitled to object that the service of the notice to take testimony was premature because no order pro confesso had been entered against the other defendants.

Appeal from Wayne; Frazer, J. Submitted January 18, 1905. (Docket No. 62.) Decided February 27, 1905.

Bill by Charles E. Letts against Roberta Trevallick and others to remove a cloud from the title to land. From a decree for complainant, defendant Trevallick appeals. Affirmed.

Complainant, the owner in fee simple of the lands de-

scribed in this bill of complaint, filed the bill against the defendants to remove a cloud from title caused by the existence of tax leases issued by the city of Detroit for unpaid taxes. Defendant Prentis filed a disclaimer. Defendants Chase and Dedine were duly defaulted September 22, 1903. Defendant Trevallick answered. The bill alleges that one Elisha Forsyth in his lifetime claimed title by virtue of certain tax leases; that he is dead, and that defendants Dedine and Trevallick are his heirs; that said Forsyth in his lifetime and neither of the defendants ever attempted to take possession of said land; and that said leases constitute a cloud upon complainant's title. Defendant Trevallick admits that she has never been in possession, but alleges, on information and belief only, that said Elisha did take possession of and occupied said premises, and was in possession and occupation for a long time previous to his death. The bill was filed May 7, 1903. To the answer a replication was duly filed August 6, 1903. On the same day complainant filed notice of an intention to take testimony in open court under the statute, but did not file proof of the service of this notice upon the two defendants who had appeared. Upon the hearing on February 10, 1904, counsel for defendant Trevallick objected to any evidence, on the ground that complainant had not obtained the right to take evidence in open court. Counsel for the complainant stated that proof of service was then being made out, and would be duly served, which was done on the same day. The court then announced that they could proceed with taking testimony. Complainant then gave evidence to establish the allegations of the bill. The defendant introduced no testimony, and decree was entered for the complainant.

Walker & Spalding, for complainant.

B. T. Prentis, for appellant.

GRANT, J. (*after stating the facts*). Defendant insists that the case was not in position for hearing, because,

when the notice of the intention to take testimony in open court was filed and served, the case was not at issue as to all the defendants, the order pro confesso as to defendants Chase and Dedine not having been entered. Counsel for defendant relies upon *Kelly* v. *Wayne Circuit Judge*, 90 Mich. 264, and *Hall Lumber Co.* v. *Gustin*, 54 Mich. 624. In *Kelly* v. *Wayne Circuit Judge* the question was raised by mandamus to strike the case from the docket, because the case was not at issue. In *Hall Lumber Co.* v. *Gustin* the question was raised by a motion to suppress ex parte depositions which had been taken before the time for claiming an examination in open court had expired. We fail to find any evidence that the defendant was prejudiced by this mere irregularity. We think the case is clearly within *Kellogg* v. *Putnam*, 11 Mich. 344; *Munch* v. *Shabel*, 37 Mich. 166. Under Cir. Ct. Rule 25 the court has the power to order the testimony taken orally in open court. The same rule is applicable in courts of chancery. Chancery Rule 15*a*. The case was at issue as to defendant Trevallick. If defendant's solicitor knew that the notice was prematurely filed, it was his duty, if he desired to have it referred to a commissioner to take testimony, to enter an order to that effect. If he supposed that the proceedings were regular, then he clearly cannot claim that his client was prejudiced or taken by surprise, for he had ample time to prepare for the hearing.

The decree is affirmed, with costs.

McALVAY, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

139 146
152 237

WEBER *v.* COSTIGAN.

1. APPEAL AND ERROR — DECISIONS REVIEWABLE — CONSENT DECREES.

   An appeal does not lie from a decree or order of the circuit court in chancery to procure a review of provisions contained in such order or decree which were assented to by the appealing party.

2. SAME—TRANSFER OF JURISDICTION—SUPERSEDEAS BOND— MODIFICATION OF ORDER APPEALED FROM.

   An appeal without supersedeas bond does not deprive the circuit court in chancery of jurisdiction to enter an order nunc pro tunc modifying the order appealed from so as to show that it was entered by consent of the parties in open court. Act No. 243, Pub. Acts 1899.

3. SAME—CERTIFICATE.

   An order of the circuit judge in a chancery case, modifying the order appealed from so as to show that it was entered by consent of the parties, amounts to a certificate of the fact that the order appealed from was a consent order.

Appeal from Wayne; Brooke, J. Submitted January 18, 1905. (Docket No. 66.) Decided February 27, 1905.

Bill by Joseph F. Weber against Theresa L. Costigan and others for the foreclosure of a mortgage. From an order confirming commissioner's sale, defendant Costigan appeals. Affirmed.

Jasper C. Gates, for complainant.

George W. Bates, for appellant.

MONTGOMERY, J. This is an appeal taken from an order confirming a sale under a chancery decree. The order appealed from was entered April 11, 1904. The notice of appeal was filed on the 18th of May, 1904. On the 19th of May a motion was entered to amend the order of

April 11th, and enter the same as of May 4, 1904, and incorporate therein a statement that the order was entered by consent of the solicitors of record of both parties, given in open court. This motion was supported by the affidavit of complainant's solicitor showing that such consent to said order was given. The statements contained in this affidavit are not controverted. The return to the appeal was made to this court on the 6th day of June, 1904. On the 11th day of June the motion to amend the order of April 11th so as to show that the same was entered upon consent of parties in open court was granted.

It is clear that an appeal does not lie from a decree or order of the circuit court in chancery to procure a review of provisions contained in such order or decree which were assented to by the appealing party. *Chapin* v. *Perrin*, 46 Mich. 130.

It is contended, however, that, as the appeal was taken before the order nunc pro tunc was entered, the cause was so far removed from the circuit court in chancery that no valid order could be made therein. Under the statute as it now reads, an appeal from a chancery decree does not operate as a supersedeas unless a bond be filed. Act No. 243, Pub. Acts 1899; *Harmon* v. *Metcalfe*, 134 Mich. 643. The circuit court in chancery may therefore enforce its decree, and no good and adequate reason is suggested why the court may not, at least as a preliminary to the enforcement of the decree, amend the same to conform to the fact. This has been done in proceedings at law in numerous instances. *Tillotson* v. *Cheetham*, 3 Johns. (N. Y.) 95; *Rew* v. *Barker*, 2 Cow. (N. Y.) 408, and cases cited. In case such an amendment occurs after the case has been removed by writ of error, it is true, it may be necessary to have a new return, but this is not uncommon. This court has in several unreported cases remanded records for the purpose of permitting amendments. In the present case by a further return of the register the proceedings by which the amendment was allowed are before us. Upon a showing such as is contained in the affidavit of the com-

plainant's solicitor, it cannot be doubted that the court would, even had a supersedeas bond been filed, have remanded the record to permit the amendment. There is no occasion to do so in this case, for the control of the court below was not suspended, and furthermore the order of the circuit judge would, at the least, amount to a certificate to the fact that the order appealed from was a consent order.

The decree is affirmed.

McALVAY, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

---

139 148
155 231

MARTIN *v.* FARMERS' MUTUAL FIRE-INSURANCE COMPANY OF CALHOUN COUNTY.

1. JURORS—DISQUALIFICATION—INTEREST IN RESULT OF ACTION.
In an action against a mutual fire-insurance company, members thereof, liable to be assessed to pay the loss if the company should be defeated, are interested, and incompetent as jurors.

2. SAME—OBJECTION—WAIVER.
Plaintiff challenged a disqualified juror for cause, and, on the overruling of the challenge, exercised a peremptory challenge. Thereafter, and while plaintiff still had two peremptory challenges, four other jurors, disqualified for the same reason, were called, and plaintiff neither challenged for cause nor exercised his peremptory challenges. *Held*, that he did not thereby waive his objections to the disqualified jurors.

Error to Calhoun; Hopkins, J. Submitted January 18, 1905. (Docket No. 69.) Decided February 27, 1905.

Assumpsit by John F. Martin against the Farmers' Mutual Fire-Insurance Company of Calhoun County on a policy of insurance. There was judgment for defendant, and plaintiff brings error. Reversed.

Hatch & Page, for appellant.

William H. Porter, for appellee.

MCALVAY, J. Plaintiff brought suit in justice's court against defendant company upon a policy of insurance, claiming damages for injury to his horse by lightning, and recovered judgment for $125. Defendant appealed to the circuit court for Calhoun county, where, upon trial, a jury rendered a verdict in its favor of no cause of action, and judgment was accordingly entered. Plaintiff brings the case to this court by writ of error.

In April, 1897, plaintiff, who lived upon a farm in Emmet township, Calhoun county, made application in writing for insurance on his farm property. A policy was issued upon such application in the sum of $1,000, and he became a member of defendant company. Having changed his residence and removed his personal farm property to Marengo township on November 28, 1899, his original application and the insurance policy were changed to cover the property at its new location, the amount of insurance being increased to $1,225. Having leased his farm on shares for one year, he moved to the city of Marshall, December 12, 1901, taking with him his household goods and the horse in question. May 31, 1902, on application, the amount of his insurance was reduced to $800, of which the amount on live stock and farm implements was $150. Plaintiff paid his assessments, and was a member in good standing July 17, 1902, when the injury to the horse occurred. The insurance policy refers to the application, and makes it a part of the policy, and by the terms of both writings the insurance is subject to the provisions of the charter and by-laws of the company.

Defendant company by its articles of incorporation was authorized to insure buildings and contents belonging to its members within the limits of villages and cities, when such buildings were detached risks, not less than 80 feet from all other risks. There was a provision by by-law No. 19:

"All members holding policies on live stock and other personal property are hereby insured at all times and in all places in said county of Calhoun while on or about their business in connection with farming."

Plaintiff claims that when the last change was made in the policy he instructed the secretary of the company to cut off all property that was not insured where he lived, and that the secretary told him that he was insured on horse and buggy anywhere in the county. He also claims that the company is estopped from denying that the policy covered the horse at the time of injury, on account of waiver of the forfeiture of the policy, and also on account of receiving certain assessments after the change in the policy, and after knowledge of the claim for injury to the horse. Plaintiff also claims that he was within the provisions of by-law No. 19, the horse being where it was while on or about his business of farming. The proof is clear that the buildings in Marshall, where plaintiff lived, were not detached risks under the charter, being less than 80 feet from other risks.

Defendant positively denies the claim of plaintiff as to what occurred when the policy was changed May 31, 1902, claiming that the secretary told plaintiff that, if the buildings were not detached, none of the property would be insured, and on this date plaintiff said they were not detached, and then the change was made; the household goods were cut off, and plaintiff said he would keep a colt, a mare, and some tools on the farm, and the amount in the policy was left as plaintiff elected. An issue of fact was raised as to what actually occurred. The first assessment referred to was made May 31, 1902, and paid later. The second one was in November, 1902, on the full amount of the policy, and was also paid.

The errors relied upon relate, first, to the action of the court in allowing four members of defendant company in good standing, having policies in force, to sit on the jury. In securing a jury, five members of the company were called. Plaintiff raised the question as to the first one

that it was a mutual company and the juror was interested, and asked to have him excused for cause. The court held the challenge not good, and the plaintiff took exception. The juror was then challenged peremptorily. One other peremptory challenge was used by plaintiff. The record does not show that this challenge for cause was repeated, but it does show that there were four members of the company left to try the case. It is claimed that plaintiff waived any objection by passing the jury for cause and afterwards accepting the jury.

A motion for a new trial based upon this ground was denied, for the reason that two of these declared that they "were free from bias and prejudice," "and it is assumed that both the plaintiff and his attorney so regarded them;" that the other two were not examined as to bias and prejudice; that plaintiff still had two unexhausted peremptory challenges at the time he announced himself satisfied. The court indicated that being a member of this company did not disqualify, if the juror stated he could fairly try the case without bias or prejudice, and the court so held.

The fact that these jurors were members of this mutual fire-insurance company, liable to be assessed and to pay if this case went against the company, disqualified them from sitting. Two peremptory challenges remained to get rid of four jurors, under the ruling of the court. The question is whether plaintiff waived his objection to these jurors by not making specific objections to each one, getting the ruling of the court and exceptions, and then exhausting the two remaining peremptory challenges, and whether he waived all objection by accepting the jury.

A party having knowledge of the fact that a juror is interested in the result of a case should bring the matter to the attention of the court. This is indicated in the case of *Peninsular Railway Co.* v. *Howard*, 20 Mich. 25, where, in a condemnation proceeding before a probate judge, two stockholders of the company served on the jury, but the fact of their interest did not come to the knowledge of the defendant until the jury were sworn and

had proceeded to view the premises to make inquest of damages. This court held that the confirmation must be set aside for the reason that no legal jury was impaneled.

In the case of *Sullings* v. *Shakespeare*, 46 Mich. 408, this court laid down the rule that overruling a challenge for cause and compelling a party to resort to a peremptory challenge does not prejudice him, where, when the jury is accepted, he still has peremptory challenges which he does not use. In that case the court said:

"If, by the overruling of the challenge, anything could be inferred in the cause prejudicial to the rights of the plaintiff by compelling him to exhaust his peremptory challenges on persons liable to other objections, the case would be different."

This rule was followed in *People* v. *Barker*, 60 Mich. 277; *People* v. *Aplin*, 86 Mich. 393.

It may be that plaintiff's attorney was not as diligent as he might have been in making the record show beyond question that he did not waive his objections to these jurors; but in view of the fact that the court held the ground of challenge for cause not good, and that it was not necessary to multiply the exceptions upon the same point, and that he had but two peremptory challenges to use upon four disqualified jurors, we cannot presume that he waived his client's rights and consented to try a case with a jury one-third of which was directly interested in the result of the suit, and personally liable to pay a part of the judgment in case of recovery by plaintiff.

In denying the motion for a new trial, the trial judge went upon the theory that the two jurors who had stated that they were without bias or prejudice, although members of the company, were qualified to act, and stated that for the purpose of the motion he assumed that plaintiff so regarded them, and also that plaintiff should have exhausted his peremptories upon the other two. He does not intimate that he was mistaken in his ruling upon the trial that the objection to these jurors was not well taken. The disqualification of a judge or juror to sit in a case is a

question of vital interest to more than the parties to a suit. It involves the administration of justice before disinterested, unprejudiced, and impartial tribunals. The court erred in holding the challenge for cause not sufficient, and also that plaintiff had waived his objection. A new trial should have been granted. The court erred in denying it.

As there must be a new trial, it is necessary to refer briefly to the other errors claimed. We think that the court fairly submitted the case to the jury in his charge, and we do not find error in his refusal to grant plaintiff's requests to charge, or in the refusal to submit the case upon the theory of waiver of forfeiture.

For reasons herein expressed, the judgment of the court below is reversed, and a new trial ordered, with costs of this court to plaintiff.

GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

TRUAX v. BLISS.

1. EVIDENCE—OPINIONS OF THIRD PARTIES.
   The conclusion reached by an arbitrator, to whom the differences between plaintiff and defendant were submitted under an agreement that his decision should not be binding, is not admissible.

2. OVERPAYMENT—RIGHT TO RECOVER.
   Money paid by mistake in excess of the amount due may be recovered.

Error to Lenawee; Chester, J. Submitted January 13, 1905. (Docket No. 53.) Decided February 27, 1905.

Assumpsit by Jerome Truax against Almond L. Bliss for money alleged to have been paid under a mistake.

There was judgment for plaintiff, and defendant brings error. Reversed.

Fellows & Chandler, for appellant.

J. W. Helme, for appellee.

MOORE, C. J. This is an action brought for money claimed to have been paid under a mistake. The plaintiff claimed to have overpaid the defendant $272. The transaction came about in this manner: Mr. Truax, the plaintiff, applied to the defendant for a loan of $700. Defendant let him have $500, and indorsed his note for $200 at the bank. The loan was secured by a deed to the defendant of a small piece of land, which he was to sell, and by a bill of sale of plaintiff's furniture in an hotel, which plaintiff rented from Dr. Baker. The land was sold for $650. The defendant claimed that at the time of the sale of the real estate he loaned plaintiff $150, and afterwards loaned him $50. The plaintiff denies this. He insists that defendant wrote him that he must have his pay, and that plaintiff requested Dr. Baker to go and see him and pay him; that he did so, and overpaid the amount for which this suit was brought; that when plaintiff found out about the overpayment, upon the refusal of defendant to rectify the mistake, this suit was brought.

Counsel for appellant say: "We shall urge but two questions upon this record: *First.* Did the plaintiff have the right to show that he and defendant had agreed to make a statement in writing to one Shattuck of their respective claims, with the understanding that Shattuck's decision should not be binding, and to show what that decision was? *Second.* Was there anything to go to the jury?"—and answers both of them in the negative.

As to the first question, the record shows as follows (Mr. Truax testifying):

"After my business was over the next fall, I insisted then on a settlement, and finally offered to arbitrate it. He wouldn't arbitrate, at first, and have it binding. Said

he didn't think he had anything to arbitrate. I finally made a proposition that we would arbitrate and not have it binding. Then it might convince one or the other of us that we were wrong. So I named Henry S. Shattuck, and Bliss says: 'Very well. We will make our statement to Mr. Shattuck and let him find what the difference is between us.' I went and saw Shattuck, and he communicated to Bliss to have him make his written statement, and I would mine. Bliss said for Shattuck to tell me to make out a written statement, and leave it with him, and that he would do the same. I made out my statement, and left it with Shattuck. Mr. Bliss finally filed a statement with Mr. Shattuck. After Shattuck saw the statements he said: 'I don't feel competent—.'

"(Objected to as immaterial.)

"*The Court:* I think, excepting that which was in the presence of Mr. Bliss, or communicated to him, it is good.

"*Mr. Fellows:* I think all of this matter is immaterial. This is not a suit brought upon an arbitration.

"*Witness* (continuing): Mr. Shattuck made a finding of differences between us."

Then follows the finding, which ends, "Making balance due, $290.47." This finding, against the objection of counsel, was allowed to go to the jury. It is said by the plaintiff that the finding was a mere mathematical computation, which the plaintiff was entitled to have go to the jury; citing *McCreery* v. *Green*, 38 Mich. 186. He further contends that, if error, it was not prejudicial error; citing *Lane* v. *Pere Marquette Boom Co.*, 62 Mich. 69. We cannot agree with counsel in either of these contentions. Plaintiff was making one claim as to the controlling facts. Defendant disputed this claim, the one opposing the other. To allow the result reached by a third person in relation to the matter in controversy to be read to the jury was to permit them to consider hearsay testimony which the counsel, by offering, and the circuit judge, by receiving, had characterized as material evidence for them to consider. This is not allowable, under *Corning* v. *Woodin*, 46 Mich. 44; *Webber* v. *Hayes*, 117 Mich. 256.

The next question is, Was there anything to submit to the jury? If it is true that the plaintiff paid to defend-

ant, through the agency of Dr. Baker, more than was due him, and, when he learned of the mistake, sought to obtain repayment, which was refused, we do not think the defendant can now be heard to say he will not repay. See *Pingree* v. *Gas Co.*, 107 Mich. 156; *State Savings Bank* v. *Buhl*, 129 Mich. 193 (56 L. R. A. 944), and the many cases cited therein. There was no serious dispute about certain sums of money having been paid by the plaintiff. The defendant, however, claims that, as to two of these payments, he loaned to plaintiff sums of money equal to them. This was denied by the plaintiff, and presented a question of fact for the jury.

For the reason stated, the judgment is reversed, and a new trial ordered.

CARPENTER, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

RECOR *v.* ST. CLAIR CIRCUIT JUDGE.

MANDAMUS—WHEN LIES—APPEALABLE ORDER—QUASHING GARNISHMENT.

Under section 10642, 3 Comp. Laws, an order quashing a writ of garnishment, and releasing the garnishee from further liability, with costs to defendant, is in effect a final judgment against plaintiff in the garnishment proceeding, reviewable on error, and hence mandamus does not lie to review such order and to compel the circuit judge to vacate the same.

Mandamus by Edward C. Recor to compel Harvey Tappan, circuit judge of St. Clair county, to vacate an order quashing a writ of garnishment. Submitted January 17, 1905. (Calendar No. 20,742.) Writ denied February 27, 1905.

Henry Baird (*Frank T. Wolcott*, of counsel), for relator.

John B. McIlwain and *William Baird*, for respondent.

MCALVAY, J. Application for a mandamus is made by relator to require the circuit judge of St. Clair county to vacate a certain order quashing a writ of garnishment, and releasing the garnishee defendant from further liability in a certain case pending in said court, wherein relator was plaintiff in an action against Arabella Recor, principal defendant, and the Commercial & Savings Bank of St. Clair, Michigan, garnishee defendant. Relator, before applying to this court, made a motion in the circuit court, before the respondent, to vacate the order hereinbefore referred to. This motion was denied, and the petition in this proceeding was filed in this court.

The order sought to be vacated is as follows:

"The motion made in the above-entitled cause by the defendant Arabella Recor, to quash the writ of garnishment, came on to be heard; and, after hearing, * * * due deliberation being had, it is ordered and adjudged that the writ of garnishment issued in the above cause be, and the same is hereby, quashed, and the garnishee defendant released from further liability in the premises—the reasons for said order being fully set forth in an opinion filed in this cause, and made a part hereof—with costs to the defendant to be taxed, including an attorney fee of $10.

"It is further ordered that the plaintiff have 45 days in which to remove said cause to the Supreme Court, on giving a bond in the sum of $100, to be approved by the clerk of this court, to indemnify defendants from any costs in the premises.

"HARVEY TAPPAN,
"Circuit Judge."

The question to determine is whether mandamus is the proper remedy to review the action of the circuit judge. Section 10642, 3 Comp. Laws, referring to "Proceedings

by Garnishment in Circuit Courts," provides that "any judgment or final order in a suit in garnishment may be set aside or removed to the Supreme Court in like manner and with the same effect as in other personal actions."

The order referred to adjudged that the writ of garnishment be quashed, and the garnishee defendant released from further liability, with costs to the defendant to be taxed, including an attorney's fee of $10. This is, in effect and in fact, a judgment against the plaintiff, and in favor of the garnishee defendant, finally disposing of the garnishment proceeding, with costs and attorney's fee against the plaintiff to be taxed; and defendant, upon applying to the court, would be entitled to execution upon this judgment. The statute above quoted applies, and the plaintiff could have the case reviewed in this court upon writ of error. This is not a case where delay is calculated to produce injury, and comes within the rule established by this court in *Michigan Mut. Fire-Ins. Co.* v. *Wayne Circuit Judge*, 112 Mich. 270.

The writ is therefore denied, with costs.

GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

LAING *v.* TOWNSHIP OF FOREST.

1. TAXATION — PAYMENT UNDER PROTEST — RIGHT TO RECOVER — ASSIGNMENT.

   The right to recover illegal taxes paid under protest given by Act No. 130, Pub. Acts 1901, may be assigned and the assignee may recover though he is a stranger to the tax roll.

2. SAME—FRAUD.

   That the illegality which justifies recovery consists of fraudulent alterations in the tax roll by the supervisor, does not make the action one for fraud and deceit so as to render it unassignable.

Error to Genesee; Wisner, J. Submitted January 17, 1905. (Docket No. 60.) Decided February 27, 1905.

Assumpsit by Paul L. Laing against the township of Forest for taxes paid under protest. There was judgment for plaintiff, and defendant brings error. Affirmed.

Black & Roberts, for appellant.

McFarlan & Wilson, for appellee.

OSTRANDER, J. A number of persons owning property taxable in the township of Forest, in the county of Genesee, in this State, whose names and descriptions of whose property appeared upon the assessment and tax rolls of that township for the year 1903, and against whom upon said rolls various taxes were laid, paid the taxes under written protests. Each specified substantially the same grounds of protest.

Section 53 of the tax law, being section 3876 of the Compiled Laws of 1897, as amended by Act No. 130 of the Public Acts of 1901, reads, so far as it is necessary to consider the same, as follows:

"Any person may pay the taxes, or any one of the several

taxes on any parcel or description of land, or on any undivided share thereof, and the treasurer shall note across the face of the receipt in ink any portion of the taxes remaining unpaid. He may pay any tax, whether levied on personal or real property, under protest, to the treasurer, specifying at the time in writing, signed by him, the grounds of such protest, and such treasurer shall minute the fact of such protest on the tax roll and in the receipt given. The person paying under such protest may, within thirty days and not afterwards, sue the township for the amount paid, and recover, if the tax is shown to be illegal for the reason shown in such protest. * * *."

Within the time limited each of the protesting taxpayers assigned, in writing, to the plaintiff, all right, title, and interest in and to the moneys so paid under protest, and also assigned and set over their several rights of action to sue for and recover the same. The plaintiff was not one of the protesting taxpayers, but was a member of a firm joining in the protest. The trial resulted in a verdict and judgment for the entire amount of the taxes paid, with interest. Testimony was introduced on the trial tending to show that a certain assessment of $300 against the supervisor had been fraudulently stricken from the roll after it passed the board of review, that there had been 30 or 40 other and material fraudulent alterations in assessment values as fixed by the board of review, and that certain of the taxes were illegally raised. When the assignment to plaintiff, heretofore referred to, was offered in evidence, it was objected to on the part of the defendant for the reason that the cause of action was not assignable, "and particularly for the reason that plaintiff claims under said assignment, among other things, the right to recover for the fraudulent acts of the supervisor, rendering the entire tax roll of the township of Forest for the year 1903 void; also for the reason that the declaration contains no count or allegation permitting the plaintiff to recover in any event on the ground of fraud." The objection was overruled, and defendant excepted. At the close of the testimony it was moved in behalf of defendant that a verdict be directed for

defendant for the reason that the cause of action as alleged and proved was not assignable, because the attempted assignment was to the plaintiff, a stranger to the tax record. This motion was overruled, and these rulings are the foundation for the three assignments of error upon which the case is brought to this court.

It is contended in the brief for appellant that the right to sue in cases like this is by the statute given to the person paying under the protest; that the language of the statute by necessary implication limits the right to sue to "the person paying under such protest;" that plaintiff as an individual had paid no tax under protest; and, consequently, was not one of the persons permitted to sue. This statute, or a similar one, has received practical construction in the following cases, in each of which the action was brought by a taxpayer for himself and as assignee for other taxpayers. *Baldwin* v. *City of Hastings*, 83 Mich. 639; *Michigan Savings Bank* v. *City of Detroit*, 107 Mich. 246; *Angell* v. *Cortright*, 111 Mich. 223; *Coit* v. *City of Grand Rapids*, 115 Mich. 493; *Murphy* v. *Dobben*, 137 Mich. 565.

Before any statute like the one in question was passed, it was the settled law of the State that one paying taxes under duress—threatened or actual levy—might sue for the money so paid. *First Nat. Bank of Sturgis* v. *Watkins*, 21 Mich. 483.

In *Louden* v. *City of East Saginaw*, 41 Mich. 18, plaintiff, for himself and as assignee of other taxpayers, sued to recover money paid under compulsion. And in the last-mentioned case it seems to have been recognized by the court that the action might be brought at any time within six years after such payment of the money. This being the law of the State, the legislature, in 1882, provided by a statute similar to the one now under consideration for a payment of taxes under protest, for a short period in which to sue for the recovery of the money, and for limiting the grounds of recovery to the reasons stated in the protest. The statute rather

limits than extends the rights of the taxpayer, and is designed to secure expedition and precision. It must be construed with reference to the law in force when it was passed and the evident purpose of the legislature. So construed, it will not be held that it limits in any way action for the recovery of money thus paid under protest to the person actually assessed or actually paying the money, nor that it interferes with or limits the operation of the general statute regulating the assignment of rights of action and suits by assignees thereof. 3 Comp. Laws, § 10054; *Cook* v. *Bell*, 18 Mich. 387.

As to the objection that the cause of action in this case was not assignable because a fraudulent alteration of the roll was the basis of plaintiff's recovery, appellant contends that the case is ruled by *Dayton* v. *Fargo*, 45 Mich. 153, and like authorities. Counsel do not distinguish between actions brought purely to recover damages arising out of fraud and deceit and those, like the present one, brought to recover money in the hands of defendant which of right belonged to plaintiff's assignors. The fact that the fraudulent conduct of a township officer rendered the taxes illegal is certainly a good ground of protest. By the terms of the statute the township is sued "for the amount paid," and recovery is had "if the tax is shown to be illegal for the reason shown in such protest." The action is for money paid to defendant under conditions which require it to be returned.

The judgment ought not, for the errors assigned, to be reversed, and it is therefore affirmed, with costs.

MCALVAY, GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

GOLDSMITH *v.* LICHTENBERG.

1. APPEAL AND ERROR—BILL OF EXCEPTIONS—ESSENTIALS.
   Where the error assigned is the direction of a verdict, the bill of exceptions should contain the substance, at least, of all the testimony.

2. PAYMENT—DISCHARGE OF DEBT—ACTION.
   The retention and use of a check accompanied by a letter stating that it is in full of a certain account does not preclude action for a balance in fact due.

Error to Wayne; Donovan J. Submitted January 19, 1905. (Docket No. 86.) Decided February 27, 1905.

Assumpsit by William E. Goldsmith against F. William Lichtenberg and Christian J. Lichtenberg, copartners as Lichtenberg & Sons, for goods sold and delivered. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Reversed.

E. M. Vining and *Lehmann & Riggs*, for appellant.

Bowen, Douglas, Whitney & Murfin, for appellees.

OSTRANDER, J. The bill of exceptions in this case leaves something to be desired. It is certified that it contains all the testimony taken bearing upon or material to any of the assignments of error. No witness except the plaintiff was sworn. A verdict for defendants was directed, and the substantial error assigned in this order and direction of the court.

In such cases it is usual, and, indeed, generally necessary, to incorporate in the bill of exceptions the substance, at least, of all the testimony, since error is not presumed, but must be made affirmatively to appear. But the record sets out so much of the discussion indulged in upon

the trial and so much of the testimony that with the charge given by the learned trial judge no doubt remains concerning the precise question upon which the case turned or the ground of the ruling made by the court. The court held, and counsel for plaintiff challenge and counsel for defendants support the ruling, that the case is ruled by *Tanner* v. *Merrill*, 108 Mich. 58 (31 L. R. A. 171); *Kern Brewing Co.* v. *Insurance Co.*, 127 Mich. 39; *Wheeler* v. *Baker*, 132 Mich. 507, and like cases.

The foundation for this ruling is the retaining and cashing of a check sent by defendants to plaintiff on January 9, 1901, in a letter which reads as follows:

"Inclosed please find statement and check for $556.22, an amount in full for a car of potatoes. As we informed you, this car was rejected at Indianapolis by the party, Mr. Sheidle, to whom it had been sent. The writer went down to Indianapolis to resell it, and we just received statement for same; it was resold to Mr. Newman."

The statement inclosed with this letter seems to have been an account of expenses, switching charges, and shortages. The testimony of the plaintiff tends to show a sale to defendants on track at Canton, Mich., of a certain quantity of potatoes at an agreed price per bushel, the billing of the car and potatoes by defendants' orders to Indianapolis, a claim made by defendants, after such shipment, that the potatoes were handled by them on commission, demand of payment, and refusal to pay until the potatoes were sold, followed later by the letter and remittance already referred to. Plaintiff testified, also, that upon receiving the check he telephoned defendants that he would accept it as part payment, and demanded the balance due him. He testified further that, after receiving the check, when he demanded payment of the balance claimed by him to be due, defendants, or one of them, told him he would get no more; that defendants still owed him something more than $100. The record therefore shows, and this is confirmed by the briefs of counsel, that plaintiff claimed to have made an absolute sale of the potatoes to defendants.

Defendants claimed that the potatoes were handled on commission. It was held by this court in *Peter* v. *Thickstun*, 51 Mich. 589, that where a check had written upon its face the words, "Payment in full for shingles shipped to me in cars," etc., and was received and indorsed by defendant and cashed, it would not be given the effect of a receipt in full; but that the party receiving it had a reasonable time to make objections to the account in payment of which the check was sent. So, also, *Mortlock* v. *Williams*, 76 Mich. 568. If there was a sale as claimed by the plaintiff, defendants owed him for 901¾ bushels of potatoes at 75 cents per bushel. Defendants, on the other hand, had remitted the money to plaintiff upon the theory of their agency. That plaintiff ever accepted the check or the money as payment in full, or held it without protest for an unreasonable time, is negatived. It has been repeatedly held that a new and valuable consideration is required to support the agreement of a creditor to accept from his debtor as payment in full a sum less than that admitted to be owing. *Fire Insurance Ass'n* v. *Wickham*, 141 U. S. 564; *Leeson* v. *Anderson*, 99 Mich. 247. The decisions of this court, relied upon by defendants in error, hold that, when the amount of the demand is disputed and unliquidated, but it is agreed to accept in full a smaller sum than is demanded, payment according to such agreement discharges the debt, even when a part of the agreement is to liquidate or agree to the amount actually owing. But an agreement to pay and to accept a particular sum in full of the debt, followed by payment and acceptance of the sum agreed upon, have always been, in such cases, essential and controlling facts. In *Tanner* v. *Merrill* a receipt in full was given, and no money was paid until after an agreement was reached to give such receipt—to settle. In *Kern Brewing Co.* v. *Insurance Co.* plaintiff accepted a draft and signed a receipt in full, the giving of the receipt being a condition to the payment of the money, and the whole transaction amounting to an agreement to pay and to accept the sum actually paid. In *Wheeler* v.

Baker a stated sum was agreed to be paid and accepted, and was paid and accepted, in full settlement. There is in this record nothing showing or tending to show any agreement in fact between the parties on the one side to pay, on the other to receive, the sum of money which was paid in settlement.

Judgment is reversed, with costs, and a new trial granted.

MCALVAY, GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

LAMB *v.* LAMB.

1. BOUNDARIES — ACTUAL LOCATION — AGREEMENT FOR SURVEY — QUESTION FOR JURY.

   On an issue as to the location of a boundary line, evidence examined and *held*, that it was a question for the jury whether plaintiff had agreed, before he had occupied up to the actual boundary for more than 15 years, to have the line fixed by a survey.

2. SAME—INSTRUCTIONS.

   In ejectment, involving the location of a boundary line, the evidence was conflicting as to whether plaintiff had agreed with defendant, at a time before plaintiff had occupied up to the fence for more than 15 years, that the line should be fixed by a survey; and the court charged that unless the jury found that the land claimed by plaintiff was occupied up to the fence, as a line claimed by plaintiff's grantors and defendant, for more than 15 years, and that there was no agreement that the fence was maintained at any other place than the true line, the line would not be fixed by adverse possession. *Held*, that the instruction could not have been misunderstood, and was sufficiently favorable to defendant.

3. SAME—ORAL AGREEMENT FOR SURVEY—STATUTE OF FRAUDS.

   Where one occupied up to a certain boundary line under a claim of ownership for more than 15 years, an oral agreement to have the line surveyed could not affect his title up to the line to which occupation was had.

4. EJECTMENT—OUSTER—PLEADING.
In ejectment, involving the location of a boundary line, the plea alleged an agreement to fix a boundary line, and that defendant, in reliance on the agreement, entered on the lands occupied by the owner of the lands described in the declaration, for the purpose of erecting a fence on the boundary line as located by the survey. *Held*, that plaintiff had a right to treat such entry under claim of right as an ouster and that an objection that the evidence failed to show an ouster was not available to defendant.

5. ACKNOWLEDGMENTS—CERTIFICATE—AUTHORITY OF NOTARY.
Where the caption of an acknowledgment showed that it was taken in the county of Calhoun, State of Michigan, and the notary's name was followed by the words, "Notary Public in and for Eaton Co.," it was not objectionable on the ground that it did not show that the notary was one for Eaton county, Mich.

6. SAME.
Under the statute, a notary public of one county may take acknowledgments in another.

7. TENANCY IN COMMON—RECOVERY BY ONE AGAINST STRANGER.
Though the deed to plaintiff in ejectment from several tenants in common was not properly executed by some of them, he was, as against defendant, who had no interest, entitled to recover the entire premises, under Act No. 55, Pub. Acts 1903.

Error to Calhoun; Hopkins, J. Submitted January 19, 1905. (Docket No. 78.) Decided February 27, 1905.

Ejectment by Charles R. Lamb against Sanford Lamb. There was judgment for plaintiff, and defendant brings error. Affirmed.

John C. Patterson and *Harley J. Cortright*, for appellant.

Hatch & Page, for appellee.

MONTGOMERY, J. This is an action of ejectment to recover a strip of land claimed by plaintiff to be a portion of his farm, adjoining defendant's land; the defendant claiming that the land in dispute in fact belongs to his farm. The dispute is determined when the true boundary line is

ascertained. The jury found for plaintiff, and defendant brings the case here; alleging error committed in rulings in relation to the admissibility of evidence, in the charge as given, and in the court's refusal to direct a verdict.

The testimony shows that as early as 1859 to 1861 (the precise date is not fixed) the defendant and plaintiff's predecessor in title, Mrs. Snyder, joined in building a fence, and that there was no dispute about that fence being on the line until 1894. That fence still remains. From the time of its construction up to the date of the controversy, at some date after 1894, the two parties occupied up to the line of this fence, and remained in undisturbed possession. Moses Moist succeeded to the title of Mrs. Snyder, and continued to occupy and cultivate up to this line, and remained in undisturbed possession until his death. The defendant was permitted to testify that he had an agreement with Moist that the line should be established by a survey, and it is therefore argued that the possession of Moist was not adverse. The defendant does not fix the time of this alleged agreement with Moist, but in view of his statement in another place, "Until 1894 there wasn't any dispute about that being the line, not until Moist got it," it is manifest that it was a question for the jury as to whether the agreement, if any, was made at a date which would color the possession of plaintiff's predecessors during the time the statute of limitations was claimed to be running. There is no doubt as to the character of the occupancy, except such as arises out of the claim of an agreement which characterized the possession of plaintiff's grantors. The circuit judge charged, in substance, that unless the jury found that the land now claimed by plaintiff was occupied up to this fence, as a line claimed by plaintiff's grantors and defendant, for more than 15 years, and should also find that there was no agreement that the fence was maintained at any other place than the true line, the line would not be fixed by adverse possession. This instruction could not have been misunderstood by the jury, and was sufficiently favorable to the defendant.

In what we have said, we must not be understood as affirming the admissibility of the defendant's testimony in this case as against the objection of plaintiff's attorney that it should be excluded under the statute (section 10212, 3 Comp. Laws). What we hold is that, assuming his testimony to be competent, the construction of the evidence as a whole was for the jury, and left it open for the jury to find that there had been an occupancy under a claim of ownership up to this line for more than 15 years before any question was raised by defendant. If this was the fact, something more than an agreement to have a survey made would be necessary, to divert the title of plaintiff's grantors. *Burns* v. *Martin*, 45 Mich. 25.

It is claimed that the evidence fails to show an ouster by defendant, and that the action cannot be maintained for this reason. We do not think this objection open to the defendant under the pleadings. In some jurisdictions the plea of not guilty admits possession by the defendant. 7 Enc. Pl. & Prac. 341. While this may not be the effect of a plea of general issue under our practice, yet it is settled by our decision in *Carpenter* v. *Carpenter*, 119 Mich. 167, that an ouster may be admitted by the pleadings. The pleadings will be scanned to ascertain whether the plea admits or assumes the defendant's possession. In this case the plea sets out an agreement to fix a boundary line which should thereafter remain the permanent boundary line between the parties, and states that defendant, relying upon said agreement, did enter upon the lands occupied by the owner of the lands described in the plaintiff's declaration for the purpose of erecting a fence upon the boundary line between the said lands and the lands owned by defendant, as located by said survey, as he lawfully might do. There was evidence of an attempt to construct a fence on a new line by defendant. Plaintiff had the right to treat this as an ouster. The plea makes it manifest that defendant's entry was under a claim of right. See 21 Am. & Eng. Enc. Law (2d Ed.), p. 1018; 6 Am. & Eng. Enc. Law, p. 245.

It is next claimed that plaintiff failed in proving title to himself. Plaintiff offered a certified copy of a deed from the heirs of Moses Moist, with the following acknowledgment:

"STATE OF MICHIGAN, COUNTY OF CALHOUN—SS.:

"On this third day of December, in the year one thousand nine hundred and one before me, a Notary Public in and for Eaton County, personally appeared William H. Moist, Margaret C. Moist, Harvey Moist, Adaline B. Moist, Margaret Kimler, Ella G. Moist, Isabelle Phillips, Mary A. Cortwright, Lucinda De Peel, to me known to be the same persons described in and who executed the within instrument, who severally acknowledged the same to be their free act and deed.

"ISAAC N. GILMAN,
"Notary Public in and for Eaton Co."

This was objected to for the reason that the certificate does not show that the notary was a notary public for Eaton county, Mich. Under the statute, a notary public of one county may take acknowledgments in another. He is, in effect, a notary of such other county for the occasion. This certificate indicates that in Calhoun county, Mich., one assuming to act as a notary public took this acknowledgment. If he had subscribed his name as notary public, it would have been sufficient. *Smith* v. *Runnells*, 94 Mich. 617; *Wright* v. *Wilson*, 17 Mich. 199.

It is next objected that, as to certain heirs named in the deed, they assumed to act by attorney, whose powers were not shown to be broad enough to authorize the conveyance. If this be granted, the conveyance was good as to some of the grantors, and the objection is rendered unavailing by Act No. 55, Pub. Acts 1903.

The rulings in admitting testimony and in rejecting offered testimony have been fully considered, and no error is found. The case was fairly presented to the jury, an apparently just verdict rendered, and the judgment is affirmed.

MCALVAY, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

139 171
140 569

SHALLER *v.* DETROIT UNITED RAILWAY.

TRIAL—INSTRUCTIONS—DUTIES OF JURY.

Where the jury had had some experience in court during the term at which the case was tried, and could be presumed to know that no juror should find a verdict not based on his own convictions, derived from the whole case, and the court charged them to engage in no discussion that would tend to prevent their agreeing, consider the evidence and the facts, and reach a verdict, if they could, such as should thereafter satisfy their individual consciences, it was not error to refuse a request that it was the duty of the jury to consider the testimony, and to reconcile their opinions if able to do so, but that no individual was required to surrender his individual opinion.

Error to Oakland; Smith, J. Submitted January 19, 1905. (Docket No. 73.) Decided February 27, 1905.

Case by John Shaller against the Detroit United Railway for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Brennan, Donnelly & Van De Mark and *James H. Lynch*, for appellant.

Abbott & Abbott and *Lehmann & Riggs*, for appellee.

OSTRANDER, J. In this case a single error is assigned by the defendant, appellant. It is based upon the refusal of the circuit judge to charge the jury, as requested, that:

"In this case it is the duty of the jury to consider the testimony, and, in cases of difference of opinion, to reconcile such differences, if they are able to do so. But in order to do so, no individual is required to surrender his individual opinion, and this is as true as to the amount of damages as well as any other question."

The action is for damages for personal injuries arising out of the negligence of the defendant company. Liabil-

ity of defendant was conceded, and no proofs were introduced by it as to the character or extent of the injuries. The testimony on the part of plaintiff tended to show a collision October 31, 1902, of cars, upon one of which he was a passenger, by which he was thrown from his seat, injuring his hip and ankle; that the injury to his ankle was continuing; that he suffered more or less pain, and that he could not use the ankle as he used to do. The ankle was exhibited to the jury, and medical men gave testimony concerning the nature and extent of the injuries. The jury were limited to consideration of an award for past and future pain and suffering. They returned a verdict for $725. The circuit judge concluded his charge with the following:

"Take the case, and take your own time for considering it, no matter how much time is required. Engage in no discussion that will tend to prevent your agreeing; consider the evidence and all the facts, and reach a verdict, if you can, such as shall hereafter satisfy your individual consciences, and the court will be satisfied."

It appears from statements made by the court in his charge that this jury had served some time during the term at which this case was tried.

It is undoubtedly true that "no juror should find a verdict which is not based on his own convictions, derived from the whole case." It is a reasonable presumption that jurors, especially after some experience in court, know this. We think that the trial judge fairly cautioned the jury in what he said to them upon this point, and that the refusal to give the more pointed and suggestive request preferred on the part of defendant is not such manifest error as ought to reverse the judgment.

It is therefore affirmed, with costs.

MCALVAY, GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

139 173
f143 449

CONROY v. DETROIT UNITED RAILWAY.

139 173
d147 174
139 173
f154 422

CARRIERS—INJURIES TO PASSENGERS—STREET RAILROADS—SUDDEN JERKS—EVIDENCE.

Where plaintiff, a passenger on an open street car, arose as the car was approaching his destination, and stood with one foot on the platform and the other on the car step, with his hand on the rail, and, as the car stopped with a sudden jerk, he was thrown to the ground and injured, he was not entitled to recover, in the absence of evidence as to the cause of the jerk.

ON MOTION FOR REHEARING.

CARRIERS—INJURIES TO PASSENGERS—STREET RAILROADS—SUDDEN JERKS—EVIDENCE—SUFFICIENCY.

In an action against a street-railway company for injuries to a passenger caused by the stopping of the car by a sudden jerk, testimony that the jerk was caused by the sudden application of the brake, from witnesses who failed to testify that they saw the motorman apply the brake, but inferred the cause from what happened, was insufficient to show the cause of the jerk, or that the application of the brake was negligently made.

Error to Wayne; Donovan, J. Submitted January 19, 1905. (Docket No. 88.) Decided February 27, 1905. Rehearing denied July 21, 1905.

Case by Joseph Conroy against the Detroit United Railway for personal injuries. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Plaintiff, a resident of Detroit, was returning to his home one evening about 10 o'clock on a car of the defendant. He had informed the conductor where he desired to alight. The car was an open one, with seats running across, and steps on each side. When near the middle of the block, the signal, by ringing the bell, was given by

the conductor for a stop at the next cross street, where plaintiff was to alight. Immediately upon ringing the bell, the plaintiff arose, went to the edge of the car, put one foot on the step, the other on the platform, and his hand on the rail. While in that position there was a sudden jerk of the car, which plaintiff claims threw him from the car, in consequence of which he received an injury. The court directed a verdict for the defendant.

Lehmann & Riggs, for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

GRANT, J. The circuit judge, in directing a verdict, held that the case was ruled by *Etson* v. *Railway Co.*, 110 Mich. 494, as no one pretended to know what was the cause of the jerk which caused the plaintiff's fall. The ruling was correct. See, also, *Bradley* v. *Railway Co.*, 94 Mich. 35. The cause of the jerk in this case is as problematical as it was in either of those above cited. It is common knowledge that, in order to serve the public, street cars must be started and stopped with some celerity, the tendency of which is to throw one when standing. It was entirely unnecessary for the plaintiff to leave his seat, and stand with one foot upon the running board, when the car was running at full speed. He had ample time to arise and alight after the car stopped. Whether this action on his part was negligence, we find it unnecessary to determine.

Judgment affirmed.

MCALVAY, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

ON MOTION FOR REHEARING.

PER CURIAM. A rehearing is asked in this case mainly because the court erred in holding that the cause of the jerk which caused the plaintiff to fall was as problematical as it was in the case of *Etson* v. *Railway Co.*, 110 Mich. 494. In that case the car had nearly stopped between the two crossings, then gave a sudden jerk, and suddenly

went ahead again, in consequence of which plaintiff was thrown from the platform. The only difference between the two cases is that one was a jerk after the car had nearly stopped, the other was a jerk when the car was being stopped for the next crossing. If it may fairly be inferred that the jerk was caused by the application of the brake, it might have been inferred in the other case that it was caused by the removal of the brake and the application of the electric current. In either case it is not evidence of negligence, for the reasons stated in the opinion in the *Etson Case*, and also in the opinion in this case.

The witness Woodworth, on whose testimony counsel for plaintiff mainly relies for the statement that the jerk was caused by the sudden application of the brakes, did not testify that he saw the motorman apply the brake; and, from his sitting position in the rear of the car, it is very doubtful if he could. On his cross-examination he testified that he did not see the motorman reverse the car.

"I do not know whether he did reverse it or not.

"*Q.* So that on this car you had a jolt when it was reversed?

"*A.* It might have been; yes, sir."

Plaintiff testified that the car had slackened a little when he put his foot down, and that, when the motorman put on the brake full force, "the car raised off the track." He did not see the motorman, and evidently could not tell what caused the sudden jerk and raising of the car. He inferred the cause solely from what happened, and not from what he saw. If, however, it be conceded that the car was suddenly stopped by the application of the brake, there is nothing to indicate that it was done in a negligent manner.

Rehearing denied.

LAFFERTY *v.* LAFFERTY.

ATTACHMENT—LEVY—ABANDONMENT—WHAT CONSTITUTES.

Pending a suit at law, in which defendant's land was attached, defendant died, and the suit was revived against his administrator. Judgment was entered for plaintiff. An execution was issued, and levy made on the land. Subsequently the property was released from the levy, the execution returned unsatisfied, and plaintiff proved his claim in the probate court against defendant's estate as an absolute claim, without anything to indicate an intention to retain his lien. Over a year afterwards, the estate proving insolvent, the probate court certified the judgment back to the circuit, and plaintiff filed a bill in aid of execution to reach the land originally attached. *Held,* that the release of the levy amounted to an abandonment of the attachment levy placing plaintiff in the list of general creditors.

Appeal from Wayne; Hosmer, J. Submitted January 19, 1905. (Docket No. 75.) Decided February 27, 1905.

Bill in aid of execution by Edward Lafferty against Sophia Lafferty and others. From a decree dismissing the bill, complainant appeals. Affirmed.

The bill in this case was filed in aid of an execution. Complainant brought suit at law against one Peter Lafferty, and attached the land described in the bill. Peter Lafferty died while suit was pending. An administrator was appointed, and the suit revived against him. On May 14, 1902, judgment was entered for the plaintiff, the complainant here. On July 11, 1902, an execution was issued, and levy made upon this land.

On September 12th the writ was returned with the following indorsed thereon by the sheriff:

"At direction of plaintiff's attorney, I have this day released the property levied upon July 11th, A. D. 1902,

under the within execution and hereby return the same unsatisfied."

On the same day the judgment obtained by the complainant was duly certified to the probate court. The estate of Mr. Lafferty was insolvent, and on July 6, 1903, the probate court certified said judgment back to the circuit court, certifying that the estate was closed, the final account allowed; that the estate was insolvent; and that no part of complainant's judgment had been paid. On July 13, 1903, upon filing the above certificate of the probate court, the circuit court entered an order that the complainant (the plaintiff there) have execution of said judgment. A second writ of execution was issued, and a second levy made, after which this bill was filed. Mr. Peter Lafferty and his wife, defendant Sophia, had conveyed these lands to their sons, Richard and Grant, which deed, it is claimed, is void as to creditors. The case was heard upon pleadings and proofs, and the bill dismissed, for the reason that, in the opinion of the court below, the return by the sheriff, the release of the execution levy, and the proving of the judgment in the probate court, released the attachment.

Dwight C. Rexford, for complainant.

John E. Moloney, for defendants.

GRANT, J. (*after stating the facts*). If the reason given by the court below for its decision is sound, there is no occasion to discuss the other questions raised by the record. Complainant contends that the abandonment is largely a question of intent; that complainant's attorney in the suit at law testified, that, in ordering the execution returned and the levy discharged, he did not intend to release the lien of the attachment. Secret intent will not control where the acts clearly show the opposite intent. The plaintiff in the attachment suit evidently proceeded under 3 Comp. Laws, § 9425, which gave the power to

the plaintiff to proceed to judgment after the death of the defendant by reviving the suit against the administrator. *Smith* v. *Jones*, 15 Mich. 281.

After taking judgment, three courses were open to him:

1. He could levy and sell, then prove the deficiency realized from the sale against the estate.
2. He could present a contingent claim against the estate, in which event he would be compelled to realize from his security first, and then proceed against the estate for the residue.
3. He could abandon his lien and levy upon the real estate, and present the judgment for allowance against the estate, in which case he would take his chances with other creditors, and receive his pro rata of the entire estate.

He took the third course. Under his contention he would be entitled to share pro rata with the other creditors on the full amount of his claim, and then have his lien left to apply upon the payment of the residue. This course would give him an unfair advantage over other creditors, contrary to *Aldrich* v. *Annin*, 54 Mich. 230. After the levy the chief purpose of the attachment had been accomplished, viz., to secure and preserve a lien until a levy could be made. After the levy the only function left for the attachment to perform was to fix the date from which the title which the attaching creditor might acquire by sale should run.

It is unnecessary to determine whether the attachment was merged in the levy. We think it clear that the release and return of the levy by the direction of the complainant, his proving the claim against the estate, not as a contingent claim, but as an absolute claim, unsecured, without anything to indicate his intention to retain his lien, and the continuance of that condition for more than a year, amounted to an abandonment of the attachment levy, and placed him in the list of general creditors. *Butler* v. *White*, 25 Minn. 432; *McConnell* v. *Denham*, 72 Iowa, 494.

"An attaching creditor * * * may waive by delay,

by conduct which indicates an abandonment of his rights, by claiming benefits, or by prosecuting other judicial proceedings which are inconsistent with the continuation of the attachment." 4 Cyc. 630.

Counsel for complainant cite *Merchants' Nat. Bank* v. *Greenhood*, 16 Mont. 395. The facts in that case afford a sound basis for the language of the court in regard to abandonment, but are in no wise the parallel of the facts in this. Immediately after the return of the execution in that case unsatisfied the plaintiff filed a bill in equity to sustain his rights by virtue of the attachment levy, and the court say:

"Instead of abandoning the attachment in fact, the respondent at once came into the court of equity to render more completely available its attachment lien."

The case was submitted and argued in the court below and is argued here upon the theory that it was necessary to preserve the attachment lien as a basis for the second levy. We have therefore disposed of the case upon that basis.

The decree is affirmed, with costs.

MCALVAY, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

SHERMAN *v.* SHERMAN.

139 180
148 582

1. APPEAL AND ERROR — CHANCERY PRACTICE — PREMATURE APPEAL.

   A claim of appeal and filing bond prior to the settlement of a chancery case is irregular.

2. SAME—MOTION TO DISMISS—WAIVER OF DEFECT.

   By taking no steps to procure dismissal of a premature appeal, until after appellant moves for further time for settlement of the case, appellee, who had full knowledge of the facts, waives the irregularity.

3. SAME—FAILURE TO FILE RECORD—DISMISSAL.

   Failure to file the record below within 40 days after filing a bond merely having effect to stay proceedings, does not require dismissal of the appeal. Supreme Court Rules 8 and 15. Act No. 243, Pub. Acts 1899.

4. SAME—EXTENSION OF TIME TO SETTLE CASE.

   Where complainant is an old man and files his bill to set aside a deed given in consideration of life support, which he alleges he has not received, an extension of time to defendant to settle his case on appeal will be conditioned on payment of a reasonable sum per month for complainant's support.

Bill by John Sherman against John Carr Sherman to set aside a deed. From a decree for complainant, defendant appeals: On motion by defendant for an extension of time to perfect an appeal, and motion by complainant to dismiss said appeal. (Calendar No. 20,995.) Submitted January 24, 1905. Decided February 27, 1905.

Person & Person, for complainant.

Arthur J. Tuttle, for defendant.

PER CURIAM. The decree in the above-entitled cause was entered by the circuit court for the county of Ingham, in chancery, on the 11th day of October, 1904. The testimony in the suit was taken in open court. The defendant,

John Carr Sherman, filed his claim of appeal in said cause on the 3d day of November, 1904, served the same, and filed his bond on appeal, duly approved by the court, on the 14th day of November, 1904. Soon after the entry of the decree, the defendant applied to the court stenographer for a transcript of the testimony taken in the case, for the purpose of settling the case for appeal. He also paid to the stenographer his fees for transcribing his minutes of the testimony, but, owing to his official duties, the stenographer has been unable to furnish the transcript until late in January, 1905, and after the motions hereinafter referred to. The circuit judge extended the time for a settlement of the case from time to time until the 1st day of February, 1905. The defendant, being unable to settle his case before the court within the statutory period, filed a motion in this court on January 16, 1905, for an order extending the time to make and settle the case for review in this court. On the 23d of January, 1905, the complainant filed his motion in this court to dismiss the defendant's appeal for the reasons that said appeal was prematurely taken, and that the appellant had failed to file the record and proceedings in the court below within 40 days after the filing and approval of the appeal bond, in violation of Rules 8 and 15 of this court.

The showing made by the defendant unquestionably entitles him to an order extending the time for the settlement of the case for review, unless the appeal must be dismissed upon complainant's motion. We do not think that, under the circumstances of this case, complainant's motion should be granted. The practice pursued by defendant in claiming his appeal and filing his bond prior to the settlement of the case was irregular. Complainant knew, however, that defendant was proceeding in good faith, and with the utmost diligence, to procure the testimony for settlement of the case, and that he was obtaining orders from the court extending the time for that purpose. Complainant, knowing of such orders, and permitting them to be entered, and taking no steps to procure the dismissal

of the appeal until defendant made his motion for an extension of time, must be deemed to have waived the right to complain on the ground that the appeal was premature.

Under the provisions of Act No. 243 of the Public Acts of 1899, the motion to dismiss the appeal on the second ground is not well founded. If a bond is required, except to stay proceedings, such bond is not required till after the settlement of the case, and where orders have been regularly entered extending the time for settlement of the case, and the appeal may be perfected later on, it would not be proper to dismiss the appeal because no return has been made after the filing of a bond, which, under the statute, has the effect of staying proceedings merely.

We feel inclined, however, in view of the fact that the complainant is a very old man, and his bill of complaint is founded upon the failure of defendant to furnish him with proper support and maintenance in accordance with the written agreement in pursuance of which he conveyed all of his property to the defendant, to grant defendant's application for an extension of time to settle the case, upon condition that he pay to the complainant for his support and maintenance during the pendency of the appeal the sum of $40 per month from and after the 1st day of February, 1905, and that he give security that he will continue so to do; such security to be approved by the circuit judge. Upon this condition an order will be entered granting an extension of 60 days from and after the 10th day of February, 1905, in which to settle the case on appeal, and the complainant's motion will be denied.

SCHELLENBERG *v.* FRANK.

1. LANDLORD AND TENANT — SUMMARY PROCEEDINGS — RECOVERY ON BOND—ELECTION.

   By bringing suit on the appeal bond given by defendant in summary proceedings for the possession of leased premises, complainant elects his remedy and cannot afterwards maintain suit in trespass for treble damages under section 24, chap. 308, 3 Comp. Laws, though certain items of damages recoverable under the statute are not recoverable in suit on the bond.

2. SAME—CONSTITUTIONALITY OF STATUTE.

   Section 25, chap. 308, 3 Comp. Laws, providing for an election of remedies, is constitutional, since it merely prescribes the conditions under which a landlord may pursue the statutory remedy.

3. SAME—SINGLE DAMAGES.

   Where plaintiff has sued on the bond pursuant to section 25, he can recover neither single nor treble damages under section 24.

Error to Wayne; Rohnert, J. Submitted February 8, 1905. (Docket No. 102.) Decided February 27, 1905.

Trespass quare clausum fregit by Harry L. Shellenberg and another against Max Frank. There was judgment for defendant on a verdict directed by the court, and plaintiffs bring error. Affirmed.

Fred H. Warren, for appellants.

Adolph Sloman (*A. J. Groesbeck*, of counsel), for appellee.

CARPENTER, J. Plaintiffs, owners of a house in the city of Detroit, leased the same to defendant. Defendant not yielding possession at the expiration of his tenancy, proceedings to obtain possession under chapter 308, 3

Comp. Laws, were instituted by plaintiffs. Plaintiffs obtained judgment of restitution before a circuit court commissioner. Defendant appealed from this judgment to the circuit court. The trial in that court also resulted in a judgment for plaintiffs. Suit was then brought against defendant and his sureties on the statutory bond which defendant had filed to obtain his appeal. In that suit plaintiffs recovered a judgment for the rental value of the premises up to the time of the rendition of judgment of restitution in the circuit court. That judgment was satisfied. Plaintiffs then instituted this suit in trespass to recover treble damages, under section 24 of said chapter 308 of the Compiled Laws of 1897. The items for which plaintiffs demand compensation in this suit are the rental value of the property during the time the same remained vacant after said judgment of restitution, and certain damages to the house while defendant occupied it. The trial court directed a verdict for defendant. From the judgment on said verdict, plaintiffs appeal to this court.

The trial court directed a verdict upon the ground that their former suit on the appeal bond prevented plaintiffs from maintaining this suit. The correctness of this decision, which is challenged by plaintiffs, depends upon the construction and constitutionality of the following portion of section 25 of said chapter:

"If the complainant obtain restitution of said premises he may, at his election, sue and recover on said bond, or bring his action against the defendant, under section twenty-four of this chapter."

It is clear that this language gives a landlord an election of remedies, and that, having successfully maintained a suit on the bond, he has not the same right, which otherwise he would have, to maintain suit under section 24. This principle is recognized by plaintiffs, but they contend that, notwithstanding the suit on the bond, they may still recover, under section 24, for such items of damages as could not be and were not recovered in the suit on the bond. According to this contention, the language, "he

may, at his election, sue and recover on said bond, or bring his action against the defendant, under section twenty-four," permits a landlord, under certain circumstances, to maintain both actions. The language is not susceptible of any such construction. The only election contemplated is an election between the two specified remedies, and the only construction which can be given the statute requires us to hold that, by suing on the bond, plaintiffs made an election which prevents their suing under section 24. The circumstance that plaintiffs might recover under section 24 for items of damages which could not be compensated in the suit on the bond was one to be considered by them before they made their election, but it does not affect the consequences of the election which we must hold they have deliberately made.

Plaintiffs contend that, as thus construed, that part of section 25 which provides for an election of remedies is unconstitutional. A clear conception of the statute removes all doubt of its constitutionality. By section 24 the legislature has given the landlord a new remedy. By section 25 he is denied the right to use that remedy if he sues on the appeal bond. To assert that the legislature has no authority to compel a landlord to make such an election is to deny to the legislature authority to prescribe the conditions under which one may use a statutory remedy. The authority to prescribe such conditions is implied in the constitutional grant of authority to legislate. In our judgment, therefore, the statute is constitutional.

Some of the items of damages sought to be recovered by plaintiffs cannot be trebled, under section 24. They seek to recover compensation for those items as "other damages" specified in said section. See *Hitchcock* v. *Pratt*, 51 Mich. 263. We are called upon to determine whether the principles of this decision permit plaintiffs to recover in this suit single damages for these items. It is idle to urge that plaintiffs might have recovered these damages at common law. According to the common law, they could not have recovered in the form of action they

have adopted in this suit. Under their declaration, plaintiffs' right to recover such single damages is based on and depends upon section 24. Without availing themselves of the provisions of section 24, plaintiffs can recover in this suit neither treble nor single damages. Our conclusion that plaintiffs' election has deprived them of the right to sue under section 24 is therefore just as fatal to their claim for single damages as it is to their claim for treble damages.

It follows that the judgment of the court below should be affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and BLAIR, JJ., concurred.

CUTCHER *v.* CITY OF DETROIT.

1. HIGHWAYS AND STREETS — OBSTRUCTIONS — RAILWAY TRACKS — PERSONAL INJURIES.

   For a city to leave unused railway tracks in a street, lightly covered so as to be invisible, but a dangerous obstruction in wet weather, is negligence as a matter of law.

2. SAME — NOTICE OF DEFECT.

   Where railroad side tracks were left in a street 2½ years after being disconnected from the main track, and were a dangerous obstruction, the city must be presumed to have had notice of the defect.

Error to Wayne; Hosmer, J. Submitted February 8, 1905. (Docket No. 104.) Decided February 27, 1905.

Case by Joseph D. Cutcher against the city of Detroit for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

The city of Detroit by virtue of its charter lawfully permitted the Detroit Transit Railway Company to run its track along Guoin street, and to run a side track or switch from the main line, near the center of the street, onto the premises of a manufacturing company. The street was not paved. In course of time the manufacturing company made changes which rendered this side track unnecessary. The frogs were taken up, and the rails permitted to remain in the street. They were about level with the surface of the street. Cinders had been thrown upon the street, on and around the rails. In wet weather the wheels, under heavy loads, would sink into the ground. This state of affairs existed for 2½ years. Plaintiff had never driven over this particular spot before. As he approached the rails he stood up upon his wagon in order that he might the better see where to drive. One of the wheels struck a rail, and slued around with such suddenness and force as to throw him from his wagon, and he was injured. The question of defendant's negligence was left to the jury, who rendered a verdict for the plaintiff.

Henderson & Martindale (*Edwin Henderson*, of counsel), for appellee.

P. J. M. Hally (*Timothy E. Tarsney*, of counsel), for appellant.

GRANT, J. (*after stating the facts*). The sole question raised by the defense is that the court erred in not directing a verdict for the defendant for the reason that no negligence was shown. The learned counsel for defendant cite no cases in support of their contention. Perhaps no parallel case can be found.

Evidently such a hidden obstruction, considering the character of the soil, is dangerous in wet weather. The rails should have been taken up when the side track was discontinued. If the side track had been in use, any one could see that it was connected with the main track, and

would naturally take steps to cross it as near as possible at right angles. We think such an act was negligence, as a matter of law, and that the condition had existed so long that the city, as a matter of law, must be presumed to have had notice of it.

Judgment affirmed.

MOORE, C. J., and CARPENTER, MCALVAY, and BLAIR, JJ., concurred.

MUMFORD *v.* STARMONT.

1. FALSE IMPRISONMENT — STREET CAR EMPLOYÉS — ARREST BY POLICE—DANGEROUS CONDITION OF RAILWAY.

   Municipal officers cannot justify their arrest of a street car motorman on the ground that the overhead system of the railway was so out of repair as to be a public nuisance, and had been so declared by the common council, and that operation of the cars increased the danger from it, where, at the time of the arrest, the controller of the car had been taken from the motorman and the car could not be started without it, and the whole system might have been stopped by detaching the feed wires.

2. SAME—EVIDENCE.

   Plaintiff in false imprisonment may state that he felt humiliated by the arrest.

3. SAME.

   In false imprisonment by a street car motorman for arrest to prevent him from running his car, it is proper to exclude evidence that he was subsequently complimented by his employer for his effort to run the car.

4. SAME.

   Defendant cannot show that it was the custom to search prisoners, and that plaintiff was not searched.

5. SAME—DAMAGES—INSTRUCTIONS.

   An instruction basing plaintiff's recovery on what an average

man would suffer from a similar injury, rather than on what plaintiff actually suffered, is not prejudicial where there is nothing to indicate that plaintiff suffered less than the average man.

Error to Ingham; Wiest, J. Submitted January 6, 1905. (Docket No. 23.) Decided February 28, 1905.

Case by Wheeler Mumford against Adolph M. Starmont and James F. Hammell for false imprisonment. There was judgment for plaintiff on a verdict directed by the court, and defendants bring error. Affirmed.

O. J. Hood (*Russell C. Ostrander* and *Black & Reasoner*, of counsel), for appellants.

O. G. Tuttle and *Searl & Monfort*, for appellee.

HOOKER, J. The defendants were respectively chief of police and mayor of the city of Lansing. The plaintiff recovered a verdict and judgment for $100 against them, and they have brought the case to this court by writ of error.

The action was for false imprisonment, based upon an arrest and detention of the plaintiff by the police, under directions of the defendants. The record shows that the plaintiff was a motorman upon a street car operated upon the streets of Lansing. There was proof tending to show, and the court charged the jury, that the overhead system of the street railway was so out of repair as to be dangerous to persons and horses using the streets, owing to the frequent falling of the wires, and that it was a public nuisance. The common council had, by resolution, so declared it, and directed that it be abated. There was evidence to the effect that the running of trolley cars increased the danger by causing the wires to break and fall. The mayor thereupon gave notice to the railway company that it must cease running cars while the wires remained in this dangerous condition. The cars were stopped, and did not run again that day. Some of the feed wires were

cut. On the evening of that day the plaintiff learned of the difficulty between the city and the company, but having been ordered to report for duty on July 2d, the next day, he did so, and ran his car south on Washington avenue. On his return trip he met two cars at the intersection of the Michigan avenue branch with the Washington avenue line, being the principal business corner of the city. He stopped his car and started to take his controller cranks to the other end of the car, when defendant Starmont took them. The plaintiff took hold of the rope to reverse the trolley, when defendant Starmont took hold of him, and handed him over to a policeman, giving orders to hold him until Starmont should direct his discharge. He was taken to the police station, and, with other motormen who had been arrested, had an interview with the city attorney, who told them that they had resisted an officer and broken city ordinances, that unless they should promise not to run the cars again they would have to be arraigned for trial, and asked them to decide. Plaintiff said that he would run a car every 15 minutes if given the opportunity, for such were his instructions. Before dinner the men were discharged, after being taken before a magistrate. The defendants stated that it was their intention to stop the cars, and that to accomplish that it was necessary to restrain the motormen for a time. The judge directed the jury to find a verdict for the plaintiff, and assess his damages, which was done. Counsel have discussed several assignments of error, among them the following:

1. That the court should have directed a verdict for the defendants.

2. That, if not, the cause should have been left to the jury upon the question of plaintiff's right to recover.

The testimony conclusively shows that the defendants took the cranks or controllers used in starting plaintiff's car, and that without them he could not have afterwards started the car. Notwithstanding this, they took plaintiff into custody and detained him at the police station for several hours, in a vain attempt to secure a promise that

he would not run the car if discharged. Then he was discharged. The car was stopped, and could not be run so long as the police retained custody of it, and there was no justification, so far as the facts disclosed by this record go, for the arrest and detention. The taking of the plaintiff before a magistrate was a further wrong, for there was no ground for the claim that he had been guilty of the offense of resisting an officer. The only thing that he is shown to have done after the controllers were taken from him prior to his arrest was to reverse the trolley of the car. That put the car in readiness to be run, but nothing more, and plaintiff made no effort to start the car. Indeed, he could not have started it, for the policemen had the necessary appliances. The only excuse for the detention of the plaintiff was that he would not promise not to run the car if liberated, and that it was more convenient to arrest and detain all of the motormen than to put a man in charge of each car, it appearing that seven or eight motormen were thus treated.

The defendants seek to justify their action upon the ground that the condition of the overhead construction of the street railway line was a public nuisance, in that it was a menace to persons using the highway, and that it was the defendants' duty, both by virtue of their office, and by reason of the action of the common council which had declared it a nuisance, to abate the danger by preventing the operation of cars until the wire should be replaced by new. Defendants had forbidden and prevented the railroad company from making temporary repairs, being apparently of the opinion that they would be ineffective.

The condition of the wire was not admitted to be so bad as to make the same a nuisance, and it is not clear that the judge was justified in instructing the jury that it was a nuisance; but these defendants cannot complain of such instruction, for the reason that it is what they claimed, and was distinctly favorable to them. Apparently the judge chose to eliminate that question, in view of his intention to direct a verdict for plaintiff.

The undisputed facts in the case are that the defendants

arrested and detained the plaintiff, as a means of preventing the running of cars, or, as they state, abating a nuisance. If the circumstances shown were such as to justify the abatement of a nuisance, it could have been done by removing the dangerous wires, or by cutting the same off from the power house from whence the current was furnished. The stopping of the cars was not essential to this. If the danger existed only by reason of the running of the cars, cutting the wire would have been an effective method of stopping the cars, or they might have been stopped by taking possession of or disabling them without cutting the feed wire. Either of these methods would have been preferable to the wholesale arrest of the motormen. The evidence shows that the plaintiff's car was disabled through the seizure of the controllers. Counsel cite no case recognizing the method taken of abating a nuisance, or preventing injury to citizens, where the person arrested is not chargeable with a public offense or threatened breach of the peace. The conduct of the defendants was so clearly in excess of necessity that we find it unnecessary to discuss at length the authority of municipal officers as to summary abatement of nuisances. Under the admitted facts the court could have done no less than to direct a verdict for the plaintiff. This being so, it becomes unnecessary to refer to the other questions pertaining to that subject, and it is only necessary to inquire whether errors were committed in relation to the amount of damages suffered.

We think it was not error to allow the plaintiff to state that he felt humiliated by the arrest. It was not error to exclude evidence that subsequently he was complimented by his employer for his effort to run the car. Neither was it error to exclude evidence that it was the custom to search prisoners, which custom was not followed in this case. The court was justified in saying that there was no evidence tending to show that plaintiff resisted an officer.

In the course of his instructions, the court said to the

jury that they should give the plaintiff actual damages, and that they were to say "what damage, if any, the average man would suffer, and to award plaintiff, if anything, such an amount as would compensate him for his *actual damages* sustained, and no more." In one instance he varied this by saying:

"The sense of shame and mortification, of wrong and of outrage, for which the plaintiff may recover, is not limited to the actual time he was under restraint, but includes all such sense of shame, mortification, wrong, and outrage as it can be said the average man under like circumstances might have expected to experience for all time, arising from such arrest and detention as has been shown. No witness has placed a money standard on injured feelings, humiliation, sense of outrage, and mental suffering arising from an unlawful arrest and imprisonment, and no witness can do so. To do that is solely your province. The law has no other remedy for an action for wrong than to compensate, so far as it can by way of money, for the injury done by one man to another. The facts and circumstances surrounding the doing of the unlawful act are to be considered by you, and you are to consider as best you can, from all the evidence, what sense of shame, mental suffering, humiliation, and sense of outrage the average man under similar circumstances might reasonably be expected to sustain, and award the plaintiff the amount thereof as his damages in this case."

It is insisted that the measure of damages should not have been what the average man would suffer under the same circumstances, but what the plaintiff had suffered. Undoubtedly the latter is the rule, but in this case there is nothing to indicate that this plaintiff suffered less than the average man, and no injury is discernible from the instructions. We fail to discover any unfairness in the charge.

The judgment is affirmed.

CARPENTER, MCALVAY, GRANT, and BLAIR, JJ., concurred.

139 194
f151 127

VALLEY CITY DESK CO. *v.* KENT CIRCUIT JUDGE.

MANDAMUS—SETTING ASIDE DEFAULT—REMEDY BY ERROR.

The action of the circuit judge in refusing to set aside a default and judgment on the ground that under the facts shown the court had no jurisdiction will not be controlled by mandamus, the question being determinable on error.

Mandamus by the Valley City Desk Company to compel Alfred Wolcott, circuit judge of Kent county, to set aside a default and judgment. Submitted January 10, 1905. (Calendar No. 20,888.) Writ denied February 28, 1905.

Carroll & Nichols, for relator.

Stuart & Heald, for respondent.

OSTRANDER, J. Petition for an order to show cause why a default (and judgment based thereon) entered against the relator should not be set aside.

The Travelers' Insurance Company, of Hartford, Conn., began suit by summons in the circuit court for the county of Kent against Hayden, Appleyard, Davidson, and Johnson. The original summons, or an alias summons, was personally served upon each of the defendants. Declaration was filed in that case on March 23, 1904. All of the defendants in that case were defaulted for not pleading. March 11, 1904, the same plaintiff, by its attorney, Henry T. Heald, filed an affidavit in garnishment in the same court, in which it was averred that relator and one Herpolsheimer were indebted to the defendants in the principal action. Relator was described in the affidavit as "a corporation." A writ of garnishment was issued, returnable March 31, 1904, which was served upon relator on the 11th of March, 1904, through its secretary and treasurer, Alonzo N. Hodges. The affidavit for the writ of garnish-

ment names Valley City Desk Company (relator), names William G. Herpolsheimer, and says that both the relator and the said Herpolsheimer "severally, and not jointly," have property, goods, money, chattels, etc., and are indebted, etc., to the principal defendants. Herpolsheimer made a disclosure, relator did not; and upon an affidavit made on the 2d of April, 1904, by the attorney for the plaintiff, an order was entered (on that date) entering the appearance of relator and defaulting it for want of disclosure. The principal case, coming on to be heard, was tried November 21, 1904, which was at the September, 1904, term of the Kent county circuit court, and resulted in a judgment being ordered against the principal defendants for $868.57.

The court having announced that such judgment would be rendered, the following took place:

"*Mr. Heald:* We would like a judgment against the Valley City Desk Company, a garnishee defendant. (A default was duly entered.)

"*The Court:* Do they make a disclosure?

"*Mr. Heald:* No, they made no disclosure. They defaulted.

"*The Clerk:* It has been filed, but they are unable to find it just at present.

"*Mr. Heald:* The original affidavit was defaulted.

"*The Clerk:* The docket shows it was returned and filed.

"*Mr. Heald:* I judge that was filed direct by the sheriff, instead of coming through the office; and at the time I made the default affidavit I came over especially to see if that was in the files, and it was in the files at that time.

"*The Clerk:* It was filed on April 2d.

"*Mr. Heald:* Here is a copy of it that I made.

"*The Court:* Copy of the service?

"*Mr. Heald:* Yes.

"*The Court:* I suppose the statute entitles you to a judgment for the same amount. Judgment against the Valley City Desk Company, garnishee defendant, for $868.57."

The record shows that on the same date a judgment was entered against the relator for $868.57, together with

costs to be taxed, and awarding execution. November 23, 1904, the relator made and filed a motion, based upon an affidavit, to set aside the default and judgment, and noticed its motion for hearing on the 28th of November.

The special reasons assigned in the motion are:

1. That the affidavit of Mr. Heald, upon which the writ of garnishment was issued, was void, and conferred no jurisdiction upon the court.
2. Because the relator had no notice or knowledge of any writ having been served upon it or any of its officers.
3. Because the judgment against relator was made and entered before any judgment had been entered against the principal defendants, and because it does not appear that any judgment had ever been entered against the principal defendants.

On November 25, 1904, a judgment was entered against the principal defendants, the concluding sentence and recital in which is: "It is further ordered that said judgment stand entered nunc pro tunc of November 21, 1904." Later, and on December 15th, relator's motion to set aside the default and judgment was denied.

Various reasons are assigned in the petition, and some of the facts upon which they are based are admitted in the answer, which would be persuasive, undoubtedly, unless the circuit court is concluded in the premises by the provisions of Cir. Ct. Rule 12, subd. *b*. It is urged that he is not so concluded, because the default was not regularly entered.

The provision of the rule referred to is as follows:

"But in cases where personal service shall have been made upon a defendant, and proceedings taken after default on the strength thereof, his default shall not be set aside unless the application shall be made within six months after such default is regularly entered."

The words "after such default is regularly entered" were added to the rule November 20, 1903. 131 Mich. xxxv. Before this amendment it was held in *Petley* v. *Wayne Circuit Judge*, 124 Mich. 14, in a case in which

the circuit judge vacated a judgment and set aside a default, that he had exceeded his authority, distinguishing the case from *Turner* v. *Ottawa Circuit Judge*, 123 Mich. 617, in which case a default was improperly entered; and in *Carpenter* v. *Judge of Superior Court of Grand Rapids*, 126 Mich. 8, it was held that the entry of a judgment is the taking of a proceeding within the meaning of Cir. Ct. Rule 12, and the default should not be set aside unless application was made within six months after service. Both of these cases were mandamus cases.

Without entering into a discussion of the points relied upon by the relator, it seems sufficient to say that the court below asserts and retains jurisdiction, that the facts relied upon by relator are claimed to show a want of jurisdiction, and that the questions mooted can be determined upon writ of error; and, following the decision in *Cattermole* v. *Ionia Circuit Judge*, 136 Mich. 274; *Michigan Mut. Fire-Ins. Co.* v. *Wayne Circuit Judge*, 112 Mich. 270; *Dages* v. *Sanilac Circuit Judge*, 122 Mich. 490, the application of relator should be denied.

MOORE, C. J., and CARPENTER, MONTGOMERY, and HOOKER, JJ., concurred.

HALLWOOD CASH REGISTER CO. *v.* WAYNE CIRCUIT JUDGE.

MANDAMUS — SETTING ASIDE DEFAULT — DISCRETION OF COURT — REMEDY BY ERROR.

Where the circuit judge has acted on a motion to set aside a default and permit the filing of an amended plea, by granting the motion on condition that defendant appear and plead to the merits, mandamus will not lie to compel him to vacate the conditions, as the court's exercise of discretion will not be interfered with, and any error in the decision may be reviewed by allowing the case to go to judgment and raising the question by writ of error or case made.

Mandamus by the Hallwood Cash Register Company to compel Henry A. Mandell, circuit judge of Wayne county, to set aside a default. Submitted January 10, 1905. (Calendar No. 20,855.) Writ denied February 28, 1905.

Henry C. Walters, for relator.

Clark, Jones & Bryant, for respondent.

HOOKER, J. The defendant attempted to file a plea to the jurisdiction in an action at law, but it was not lawfully verified, owing to an error in the venue, and the failure of the Ohio notary to attach a certificate of his official character. This plea was treated by the plaintiff's counsel as no plea, and the default of defendant for want of appearance and plea was regularly entered. 1 Green, New Prac. pp. 210, 211, and cases cited.

A motion to set aside this default, and another to set it aside and permit the filing of an amended plea, were made on March 17th. The former was denied, and the latter granted upon condition that defendant appear and plead to the merits. In November we denied a mandamus to compel the judge to make an unqualified order setting aside

the default. We have now another application, based upon the second motion, designed to compel the judge to vacate the conditions contained in his order.

The judge does not manifest an indisposition to try this cause. He has not refused to hear and decide these motions. Counsel are here upon the proposition that he has not decided them correctly. This record presents no case for remedy by mandamus, *first*, because we should not interfere with the exercise of discretion; and, *second*, because the defendant can raise the question upon writ of error or case made, if he is willing to allow the case to go to judgment. Apparently he wants to get the case reviewed on the jurisdictional question while reserving the right to try the merits if ultimately defeated. That, however, is not one of his rights, as we have frequently held. The questions are fully considered in the late cases of *Griffin* v. *Wattles*, 119 Mich. 346, and *Steel* v. *Clinton Circuit Judge*, 133 Mich. 695, where the authorities are collected. As in the latter case, which is substantially on all fours with this case, the court has decided the question of jurisdiction. The only way in which this conclusion can be avoided is to say that this court will by mandamus compel the trial court to proceed *properly* in a case. The rule is that, where a court refuses to proceed with a case, it may be compelled to do so, and decide it. With this rule has gone the other rule that this court will not direct such court how to decide it, but will leave that to the trial court. It is only by introducing the word "properly" into the former rule, and thus enlarging the remedy, that there is occasion to vary the latter. When this is done, the writ of mandamus is made to perform the office of an appeal, which all of the authorities agree cannot properly be done. Want of discrimination, or willingness on the part of counsel to have the rule enlarged, and the proposition that the court should not raise questions in a cause, may have led to some decisions which do violence to these principles, while the principles themselves are persistently reasserted and reiterated. It is plain in this case, as already stated,

that the circuit judge has decided the question before him, and we have no occasion to set the court in motion. His error, if there be one, we cannot correct upon mandamus, because, if for no other reason, it is within defendant's power to review it at a proper time in another manner, if it has confidence enough in the justice of its claim to stand upon it. If not, it must consent to make its defense upon the merits.

The writ is denied.

MOORE, C. J., and CARPENTER, MCALVAY, and GRANT, JJ., concurred.

COULTER *v.* MINION.

1. FRAUD — MISREPRESENTATIONS — OPINIONS — STATEMENTS OF FACT.

   Where defendant, to facilitate an exchange of property, induced complainant to lend money on the security of the land exchanged, to discharge a mortgage on the land received by defendant in exchange, his representations as to the value of the land on which the security was taken were statements of fact and not mere expressions of opinion.

2. SUBROGATION—MORTGAGES—FRAUD.

   Complainant, having been fraudulently induced to advance money on worthless security, which was used to discharge a mortgage on defendant's land, is entitled to be subrogated to the rights of the mortgagee in the discharged mortgage.

Appeal from Kent; Wolcott, J. Submitted January 10, 1905. (Docket No. 30.) Decided February 28, 1905.

Bill by Mary E. Coulter against Irvin W. Minion and another for subrogation to the rights of a mortgagee of property obtained by defendants through fraud. From a decree dismissing a bill, complainant appeals. Reversed, and decree entered for complainant.

Taggart, Denison & Wilson, for complainant, cited:

Graham v. *Moffett*, 119 Mich. 303; *Simonds* v. *Cash*, 136 Mich. 508; *Morman* v. *Harrington*, 118 Mich. 623; *Walker* v. *Casgrain*, 101 Mich. 604; *Picard* v. *McCormick*, 11 Mich. 68; *Webster* v. *Bailey*, 31 Mich. 36; *Nowlin* v. *Snow*, 40 Mich. 699; *Maxted* v. *Fowler*, 94 Mich. 106; *Moon* v. *McKinstry*, 107 Mich. 668; *Miller* v. *Voorheis*, 115 Mich. 356.

Grove & McDonald, for defendants.

HOOKER, J. Minion, being the owner of a farm in Barry county, negotiated an exchange for residence property in Grand Rapids with Lloyd, from whom he was to receive $250 in cash, as the difference in value of the properties. There was a mortgage of $1,200 upon the Grand Rapids property, and the plan was for Lloyd to borrow $1,450 on the farm, of which sum $1,200 was to be applied on the mortgage and the remainder was to go to Minion. Minion negotiated this loan with the complainant, though only $1,200 was finally borrowed, he taking a second mortgage for $250 upon the farm; and the deal was consummated, and the $1,200 was used in paying off the mortgage on the Grand Rapids property. The farm turned out to be of but little value, and Lloyd abandoned it, as not worth his investment in it. The complainant filed the bill in this cause, asking that she be subrogated to the rights of the mortgagee in the Grand Rapids property, who received her money by reason of Minion's fraud in inducing her to take the mortgage. We find ample evidence of overreaching on the part of Minion, and it is unnecessary to discuss the evidence showing it. There are some legal questions, however, which should be referred to.

The circuit judge held that the representations made by Minion were matters of opinion merely, and dismissed the bill. Minion's representation of the value was more than the expression of an opinion, under the circumstances shown. *Picard* v. *McCormick*, 11 Mich. 68; *Nowlin* v.

Snow, 40 Mich. 701. Under such circumstances, the representation is a fraudulent statement of fact. His reference of complainant to Averill for information was no more than an effort to avoid the consequences of his fraud, and does not help his case. See *Graham* v. *Moffett*, 119 Mich. 303. This sufficiently covers the claim that complainant cannot recover for the reason that she relied on Averill's statement.

It is contended that this is not a case for subrogation, but we think otherwise. Minion caused this loan to be made through fraud. It was understood that he was to have the money applied to the release of a mortgage on property that he had acquired from the mortgagor, and it was so applied. Such mortgage having been discharged by the mortgagee, Minion has reaped the benefit of his fraud at the expense of complainant, unless a court of equity can give to the complainant redress through subrogation. We are of the opinion that it is a proper case for equity to thus intervene. The authorities cited in complainant's brief cover the question and support our conclusion.

The decree is reversed, and a decree will be entered granting the prayer of the bill, with the costs of both courts.

MOORE, C. J., and CARPENTER, MONTGOMERY, and OSTRANDER, JJ., concurred.

139 203
139 363
139 203
142 429

LINGLE v. OWOSSO SUGAR CO.

CHATTEL MORTGAGES—FILING—PRIORITY.

Under section 9523, 3 Comp. Laws, providing for the filing of chattel mortgages, an unfiled mortgage on a growing crop, taken in good faith and without knowledge of a previous one, has priority over a mortgage contained in a lease of the land which is not filed.

Error to Shiawassee; Smith, J. Submitted January 10, 1905. (Docket No. 38.) Decided February 28, 1905.

Trover by Ann E. Lingle against the Owosso Sugar Company. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Reversed.

Watson & Chapman, for appellant.

G. R. Lyon and *Charles M. Hamper*, for appellee.

HOOKER, J. The plaintiff owned a farm on section 30, in Caledonia township. On the 13th day of March, 1903, Marble made a contract with the defendant to raise 30 or 40 acres of beets on this section. The land was not more specifically described, but it is perhaps a reasonable inference that he designed to rent the land from the plaintiff, which he did on March 31st, by taking a written lease (acknowledged as of that date, though dated March 20, 1903) for 70 acres, upon which the beets in controversy were afterwards raised. The contract with defendant was in writing, and attempted to vest title to the beets in the defendant. The important provisions of this contract are as follows:

"OWOSSO SUGAR MEMORANDUM.

"Agreement concerning raising and delivery of sugar beets for campaign of 1903.

"This agreement made this March 13th, 1903, day of 19— by and between J. L. Marble (hereinafter called the grower, and Owosso Sugar Company, hereinafter called the Company).

"*Witnesseth*, that the said parties each in consideration of the premises and agreements of the other, agreed as follows: The grower, during the year commencing with the spring of 1903, is, in compliance with the terms hereof, to plant, cultivate, and harvest in a good and husbandlike manner for the company, thirty to forty acres of sugar beets, on the following described lands, to wit: In section thirty, township of Caledonia, seven north, range three east, in county of Shiawassee, State of Michigan.

"SEED.

"The beets shall be raised from seed furnished by the company. At least fifteen pounds of seed per acre shall be planted. Seed shall be paid for by the grower to the company at the rate of fifteen cents per pound, and payment therefor deducted from the first payment of beets delivered. The title to said seed and to said crop of beets from the time when the same begins to grow shall be and remain in the company.

* * * * * *

"All directions given by the company as to the seeding, cultivating, harvesting, care, and delivering of beets shall be carefully followed and delivered by the grower. The company shall unload beets delivered in car-load lots without cost to the grower.

* * * * * *

"The company shall pay for beets delivered at the rate of four dollars and fifty cents per ton for beets testing twelve per cent. of sugar and thirty-three and one-third cents per ton more for each one per cent. of increase above twelve per cent., and thirty-three and one-third cents per ton less for each one per cent. of decrease below twelve per cent. The company will not be liable to receive or pay for beets containing less than ten per cent. of sugar, or for beets which are rotten or otherwise unfit or undesirable

for making sugar. An additional price of twenty-five cents per ton will be paid by the company for sugar beets delivered after December first.

"In case the company's factory shall be destroyed by fire or otherwise or from any cause so injured as to be incapacitated for work all beets not delivered shall be properly cared for by the grower and delivered as and where ordered by the company, and in that case any extra necessary expense of delivery shall be borne by the company.

"No agent of the company has any authority to change or alter the terms or conditions of this contract."

On the other hand, the lease of the land contained a security clause to secure the rent, $500 per year, and a provision relating to the raising of beets as follows:

"It is hereby provided that in case said land is used for the production of sugar beets, said beets shall be delivered to the Owosso Sugar Beet Company and an order shall be given to the party of the first part on said company for the proceeds to the amount of $500 the first year, $500 the second year, and $300 the third year on or before December 15th of each year. * * *

"And for the purpose of securing the payment of the said rent above reserved and taxes, the said party of the second part hereby covenants and agrees that the said party of the first part, her heirs, executors, and assigns, shall have a lien in the nature and to the effect of a chattel mortgage upon all the produce of the said tillable land, whether harvested or not, and the said party of the second part hereby sell and mortgage to the said party of the first part, her heirs, executors, administrators and assigns, the said produce, and in case said party of the second part shall fail or neglect to pay the same as above covenanted and agreed, the said party of the first part, her heirs, executors, administrators and assigns shall have the right and power to take the possession of the said produce wherever it may be found, and sell the same at private sale or public auction at the best prices she can obtain therefor, after giving at least ten days' previous notice of the time and place of said sale by posting a written or printed notice thereof in three or more public places in said township of said county, and out of the money to arise from such sale thereof if sufficient there shall be to pay and retain the amount of said rent and taxes due, together with any and all costs and charges of

such sale, and shall pay the surplus moneys, if any, to said party of the second part."

This lease was recorded in the register of deeds' office on October 17, 1903, and filed in the township clerk's office October 27, 1903.

Defendant furnished seed, and Marble planted it. As the crop grew, he applied to defendant for money to aid in caring for it, and this was advanced to him, and for it he gave obligations, of which the following is a copy:

"OFFICE OF OWOSSO SUGAR COMPANY.

$83. OWOSSO, MICH., June 12, 1903.

"On demand after date, I promise to pay to the order of the Owosso Sugar Company, eighty-three dollars, no one-hundredths, with interest at 6 per cent. per annum, at its office in Owosso, Michigan, the sum above mentioned having been advanced to enable me to plant, cultivate, and harvest sugar beets as per contract with the Owosso Sugar Company, No. 725. Therefore to secure the payment of the said sum, I hereby sell, transfer, and set over to said Owosso Sugar Company all the sugar beets raised upon the lands mentioned in said contract, and authorize the said company to deduct the amount above mentioned with interest thereon, from the first moneys due or payable to me. In case of neglect to cultivate, harvest, or deliver the crop the said company is authorized so to do and charge the expense thereof to me, deducting the same from the first moneys due or owing as above.

"JAMES L. MARBLE."

Several similar writings were given by Marble to the defendant.

On December 14, 1903, Marble gave the following order to the plaintiff:

"To OWOSSO SUGAR COMPANY,

"Owosso, Michigan:

"Please pay to Ann E. Lingle the sum of $500 out of the first moneys due me on my crop of beets grown under contract with you during the season 1903 on land located in the south half of section 30, township of Caledonia, Shiawassee county, State of Michigan.

"Dated December 14, 1903.

[Signed] "JAMES L. MARBLE."

On November 5th Marble gave a writing to the defendant as follows:

"In order to avoid any delay on account of any bad weather or shortage of teams I hereby authorize the Owosso Sugar Company to remove to their sheds whenever they deem it advisable the crop of sugar beets grown by me for them under contract 725, on section 30, Caledonia township, Shiawassee county, Michigan.

"Dated November 5, 1903.

[Signed] "JAMES L. MARBLE."

The defendant caused the beets to be drawn away on Sunday, about November 8th, and paid for the drawing to Marble and others, who furnished teams—some 16 in all. Defendant refused to pay the plaintiff's order upon the ground that nothing was due or owing from it to Marble upon the beets. The advancements made amounted to $1,019.29, while the beets brought but $824.92.

The defendant's claim rests upon two classes of instruments: (1) The original contract; (2) the several chattel notes. We may eliminate any claim of lien based upon the former, for it covered only the seed, amounting to $67.50, which is an amount too small to affect the plaintiff's right of recovery. By this we mean that, if this were the only claim of the defendant, the remainder of the purchase price of the beets would more than pay her mortgage, and she would be entitled to recover, while, if the defendant's claim arising upon the chattel notes is to be sustained, it will absorb the entire value of the beets, leaving nothing for the plaintiff, without allowing defendant anything for the claim under the contract. This relieves us from the necessity of considering the question whether one can give a valid mortgage upon a crop to be planted upon land in which he has no interest at the time of giving the mortgage.

At the time that the chattel notes were given, the plaintiff's lease was a valid outstanding mortgage, as between the parties to it. It is asserted, without contradiction, that the defendant first received notice of it after the

money was advanced to Marble, for which he gave the notes; and, as already stated, the lease was not then recorded. 3 Comp. Laws, § 9523, provides that chattel mortgages not filed, nor accompanied by immediate change of the possession of the property mortgaged, shall be *absolutely void* as against subsequent mortgagees in good faith. Defendant being such a mortgagee in good faith, its claim has priority over the mortgage of the plaintiff, although the defendant's mortgage was not filed. *Hudson* v. *McKale*, 107 Mich. 22; *Campbell* v. *Remaly*, 112 Mich. 214; *Vining* v. *Millar*, 116 Mich. 144.

Of the chattel notes, all but two were given before defendant is shown to have had notice of the plaintiff's mortgage. With these two omitted, they aggregate $924.88, being more than the value of the beets. The court should have directed a verdict for the defendant.

We have not discussed the evidence tending to show an agreement between the parties that the defendant was to deduct its advancements, before the plaintiff should receive pay for her rent, from the money that should become due for the purchase price of the beets. There was testimony in the case which required the submission to the jury of the questions of agency and estoppel, unless the verdict was to be directed for the defendant.

The judgment is reversed, and a new trial ordered.

MOORE, C. J., and CARPENTER, MONTGOMERY, and OSTRANDER, JJ., concurred.

139 209
p141 75
f141 376

TROMBLY v. KLERSY.[1]

MORTGAGES — ENFORCEMENT — PROMISE TO FORBEAR — CONSIDERATION—EVIDENCE—SUFFICIENCY.

Where, at the time of the making of a loan secured by a mortgage, there was no arrangement that the mortgage should not be paid according to its terms, evidence of subsequent statements by the mortgagee that he did not expect the mortgagor to pay the principal, and that he would have the money after the mortgagee's death, did not establish a binding promise on the mortgagee's part to forbear collection of the debt, there being no consideration to support it.

Appeal from Wayne; Frazer, J. Submitted January 11, 1905. (Docket No. 46.) Decided February 28, 1905.

Bill by Robert Trombly, guardian of Joseph Buhler, an incompetent, against Andrew Klersy and another for the foreclosure of certain mortgages. Defendants filed an answer in the nature of a cross-bill claiming an agreement for the cancellation of said mortgages at the death of the mortgagee, and prayed for specific performance. From a decree for defendants, complainant appeals. Reversed, and decree entered for complainant.

De Forest Paine, for complainant.

William Look (*Henry F. Chipman*, of counsel), for defendants.

HOOKER, J. Complainant, in the capacity of guardian of one Joseph Buhler, an incompetent person, filed the bill in this cause to foreclose three mortgages given by Andrew Klersy to said Joseph Buhler. The defendants, husband and wife, contest the cause upon the ground that Buhler is under contract obligations to cancel said mortgages upon his death, and that only the interest is his due

[1]Rehearing denied December 30, 1905.

upon the mortgages, and a cross-bill was filed praying for a specific performance of the contract. Andrew Klersy married Buhler's niece, at Buhler's house. According to Klersy's testimony, the three mortgages were given to secure three loans amounting to $12,000, and Klersy testified that when given there was no arrangement that they should be canceled, or that they should not be paid according to their terms. There is testimony in the case that Buhler and his wife have often said that he did not expect the defendant to pay the principal of these mortgages, and that Klersy would be his heir and have the money after Buhler's death; that he would make a will to that effect; and that a will (not produced) had been made.

Our examination of the proof compels us to say that there is no testimony showing a valid and binding promise to cancel the mortgages or forbear collection of the principal. If it could be said that such a promise was made, no consideration is shown to support it.

It is urged that this money was given to the defendant, but there is no testimony supporting the claim. The most that can be said is that Buhler stated that he should make a gift by canceling the mortgages. This he never did. Counsel strive to maintain their claim upon the theory that, by making a will to that effect, the gift vested, but it is a sufficient answer to say that, if a will could have that effect, there is no proof of such an existing will. Upon the proof, we are constrained to reverse the decree. A decree will be entered here, in accordance with the prayer of the bill, for the amount of the three mortgages, with interest. Complainant will recover costs of both courts.

MOORE, C. J., and CARPENTER, MONTGOMERY, and OSTRANDER, JJ., concurred.

139 211
e139 226
139 211
f150 1244
139 211
158 2135

McDONALD *v.* SMITH.

1. FRAUD—PLEADING—DECLARATION—WAIVER.
That a declaration for fraud does not expressly charge that the alleged false representations induced plaintiff to part with his property is not available after plea of the general issue, where there is a sufficient charge by inference.

2. SAME—EXPRESSION OF OPINION—ACTIONABLE DECEIT.
A representation that a worthless medicine, in the manufacture of which plaintiff was induced to invest, is a sure cure for a certain malady, is not a mere expression of opinion, but is a misrepresentation of fact, and is actionable.

3. SAME—SUFFICIENCY OF EVIDENCE.
In an action for fraudulent conspiracy, whereby plaintiff was induced to invest in the manufacture of a worthless medicine, evidence examined and *held*, to justify a finding that plaintiff in error was a party to the conspiracy.

4. SAME—STATUTE OF FRAUDS.
Where a corporation, in the worthless stock of which plaintiff was induced to invest, was only an instrument in the scheme of fraud by which defendants obtained plaintiff's property, the statute (§ 9518, 3 Comp. Laws) requiring representations "made concerning, etc., any other person * * * to be made in writing," has no application.

5. SAME—ACTION—EVIDENCE—OBJECTIONS.
An objection that certain acts of misconduct shown have no relation to the fraud complained of, must be made on the ground of relevancy, and not on the ground that they are not averred in the declaration.

6. SAME—EVIDENCE—ADMISSIBILITY UNDER PLEADING.
Specific acts of misconduct relevant to prove a charge of fraud may be shown, though not averred in the declaration. Plaintiff is not required to plead his evidence.

7. SAME—UNPERFORMED PROMISES.
Plaintiff may show that as a part of the fraudulent scheme complained of defendants made him certain promises and failed to perform them, though the promises were void as against public policy.

8. SAME—INSTRUCTIONS.

A charge that the jury may consider a promise and its nonperformance as evidence in the case is not equivalent to charging that the breach of the promise, standing alone, is evidence of the fraud forming the basis of the action.

9. SAME—NECESSITY OF REQUEST.

Where evidence of a promise and of its nonperformance is admitted on the issue of fraud, defendant, if he wishes a charge that the promise and nonperformance are not of themselves evidence of the fraud, should prefer an appropriate request.

10. SAME—ADMISSION OF EVIDENCE—HARMLESS ERROR.

The admission of evidence of declarations respecting past transactions made by other parties to an alleged conspiracy is harmless to defendant, who shows the same matters by his own testimony.

11. EVIDENCE—MATTER OF RECORD—PROOF BY PAROL.

Parol evidence is inadmissible to prove the transfer of an interest in land.

12. SAME—PREJUDICIAL EFFECT.

Parol evidence of a transfer of land is not prejudicial, where the deed is subsequently put in evidence.

13. FRAUD — INDUCING CONVEYANCE OF PROPERTY — PERSON ENTITLED TO RECOVER.

A party may recover damages for fraud inducing a conveyance of property, although the property conveyed stood in the name of, and was conveyed by, another, where such conveyance was made on behalf of the defrauded party.

14. SAME—DECLARATION—SUFFICIENCY.

An objection that the property alleged to have been conveyed by plaintiff, as a result of an alleged fraudulent conspiracy, is not specifically described in the declaration, must be taken by special demurrer, it being described generally as a house and lot in a certain city.

15. DEPOSITIONS—USE BY ADVERSARY.

A party may use depositions taken by his adversary. Circuit Court Rule 41 *a*.

16. SAME—THEORY OF ADMISSIBILITY—HARMLESS ERROR.

Permitting a party to read depositions taken by his adversary, on the theory that they constitute his own cross-examination of the adversary's witness, instead of evidence offered by himself, is not ground for reversal, where there is nothing in the

depositions which would not be admissible if the party offered them as his own evidence

17. WITNESSES—CONTRADICTION.
A party may maintain the truthfulness of his own testimony although it is contradictory to the testimony of his witnesses.

18. APPEAL AND ERROR — RECORD — NECESSITY OF SHOWING ERROR.
Where a party reads from the depositions of his adversary, his failure to read the direct examination of the witnesses cannot be held prejudicial on error, where the direct examination is not shown by the record.

19. DEPOSITIONS—USE BY ADVERSARY—OMISSIONS.
Where a party reads the cross-examination of witnesses from depositions taken by his adversary, the latter, if he wishes their direct examination read, should read it himself.

20. CONSPIRACY—FRAUD—LIABILITY.
Persons who conspire to perpetrate a fraud are responsible for false representations made in furtherance of that scheme, although not expressly authorized by all the conspirators.

21. EVIDENCE—HARMLESS ERROR.
The improper admission of a note in evidence is harmless where no recovery is allowed on it.

22. INSTRUCTIONS—ISSUES—INCORRECT STATEMENT.
Error in respect to nonessential matters in stating plaintiff's claims is not available to defendant on error, where he did not direct the court's attention to the misstatement at the time, and before the case was submitted to the jury.

23. FRAUD—EXPRESSION OF OPINION—ACTIONABLE DECEIT.
An offer to buy stock, accompanied by the statement that the party had investigated it enough to know that he wanted some of it, by which it was falsely implied that the party knew facts making the stock valuable, was more than a mere expression of opinion, and was actionable.

24. SAME—MISREPRESENTATIONS—INDUCEMENT.
A fraudulent misrepresentation inducing plaintiff to invest in more stock of a corporation is actionable, though he had previously invested therein.

25. SAME—DEFINITION—INSTRUCTIONS.
A charge on the issue of fraud that a statement must be intended to deceive, calculated to deceive, and must actually deceive, sufficiently charges that it must be material.

26. INSTRUCTIONS—CORRECT IN SUBSTANCE—REVERSAL.
The court will not reverse a case because of error in the charge arising from a technical omission in a definition substantially correct.

27. SAME—WEIGHT OF EVIDENCE—FAILURE TO TESTIFY.
A charge that the jury should give such weight as they saw fit to defendant's failure to take the stand, while not strictly accurate, was *held* not to be erroneous when considered with a part of the charge, immediately following, which placed on plaintiff the burden of establishing his claim by a fair preponderance of evidence.

28. APPEAL AND ERROR—AFFIRMANCE ON CONDITION—REMITTITUR—DAMAGES IMPROPERLY ALLOWED.
In an action for fraud, a judgment for plaintiff, which, while otherwise correct, improperly included damages for a conveyance which was established by incompetent evidence, was affirmed on condition of a remittitur of the value of the property claimed to have been conveyed.

Error to Hillsdale; Chester, J. Submitted January 12, 1905. (Docket No. 47.) Decided February 28, 1905.

Case by John P. McDonald against George N. Smith, Albert B. Cummins, and Darius W. Gunn for fraud. There was judgment for plaintiff, and defendant Smith brings error. Affirmed conditionally.

F. M. Hall and *F. A. Lyon* (*Dallas Boudeman*, of counsel), for appellant.

Frankhauser & Cornell (*Grant Fellows*, of counsel), for appellee.

CARPENTER, J. Plaintiff brings this suit to recover damages resulting from an alleged fraud perpetrated by defendants. It is plaintiff's claim that he was the victim of a fraudulent conspiracy planned and executed by defendants and their confederates. This scheme of fraud, which plaintiff claims is established by the testimony, may be briefly described as follows:

A corporation was formed, called the "B–T Company,"

whose sole property consisted of a formula for the manufacture of a worthless medicine called the "Hog Cholera Medicine." Partly by false representations, and partly by promises which were never intended to be, and which were not, performed, defendants and their confederates induced plaintiff to believe that said worthless medicine was a sure cure for the disease known as "hog cholera," and to invest from time to time in the stock of said company money and property of the aggregate value of $7,300. Said money and property did not go to the corporation—whose organization was merely a step in the scheme of fraud—but went directly to defendants or to their confederates. The liability of defendant Smith is asserted, not on the ground that he himself defrauded plaintiff, but on the ground that he was a party to a fraud perpetrated by his codefendants and their confederates. The evidence that those codefendants and their confederates conspired to defraud plaintiff is very convincing, and there is evidence that Smith was on terms of familiar intimacy with them at the time they were most active in perpetrating the fraud. It also appears that certain stock in the Hillsdale Manufacturing Company, which was the first property fraudulently obtained from plaintiff, passed almost immediately to the ownership of defendant Smith. Smith contends that he paid full value for this stock. He paid for it in part by a transfer of land in which he had a mortgage interest subject to redemption. If we value this property—and we must so value it—at what was unpaid on the mortgage, Smith paid for the stock only two-thirds of its value. We are therefore bound to say that defendant Smith acquired this stock for two-thirds of its value. Later, when plaintiff was contemplating his last investment in the worthless stock, defendant Smith told him that he had investigated the matter, and would buy his stock at 150 per cent. of its par value. It is impossible to believe that this offer—which plaintiff could not accept because of an arrangement he had made with defendant Cummins—was made in good faith. Still later, defendant Smith, as plaintiff's testimony tends to

prove, purchased, for less than its value, a note given by plaintiff and his mother to secure payment of part of an obligation arising from the last fraudulent transaction. (This note is involved in the succeeding suit, and the particulars relative to its execution will there be more fully explained.) On this issue plaintiff obtained in the lower court a verdict and judgment against all the defendants. We are asked to review that judgment upon a writ of error taken out by defendant Smith. He makes numerous complaints, which, so far as needful, will be stated and discussed in this opinion.

1. It is contended that the declaration, notwithstanding the fact that defendant has pleaded the general issue, was insufficient to justify the introduction of any testimony. Defendant's principal objection to the declaration—and his other objections are of like character—is that it contains no averment that the alleged false representations induced plaintiff to part with his property. The declaration, which consists of 56 printed pages, does, however, clearly state a cause of action. If the averment in question is not charged in precise language, it is charged by inference. We therefore hold that defendant should have raised this objection —and this is true of the remainder of his objections to the declaration—by special demurrer, and that it cannot be considered after he pleaded the general issue. See *Briggs* v. *Milburn*, 40 Mich. 512; *Aldrich* v. *Chubb*, 35 Mich. 359; *Sutton* v. *Van Akin*, 51 Mich. 465.

2. Appellant claims that a verdict should have been directed in his favor. We dispose of these claims by saying:

(*a*) It cannot be said that all the alleged false representations were expressions of opinion and therefore not actionable. Some of them, particularly the representation that the worthless medicine was a sure cure for hog cholera, were, under our decisions, misrepresentations of fact and actionable. See *Nowlin* v. *Snow*, 40 Mich. 699; *Totten* v. *Burhans*, 91 Mich. 495; *Stoney Creek Woolen Co.* v. *Smalley*, 111 Mich. 321.

(*b*) The evidence justified the jury in finding that defendant Smith was a party to the fraudulent conspiracy.

(*c*) As the evidence in this case justified the inference that the corporation whose worthless stock plaintiff acquired was only an instrument in the scheme of fraud by which defendants and their confederates obtained plaintiff's property for their own exclusive use, the statute (section 9518, 3 Comp. Laws) requiring representations "made concerning, etc., any other person * * * be made in writing," has no application. See *Bush* v. *Sprague*, 51 Mich. 41.

3. It is contended that the court erred in many particulars in admitting testimony offered by plaintiff.

(*a*) Complaint is made because the court permitted plaintiff to prove various acts of misconduct on the part of defendant not charged in the declaration. Plaintiff did not claim that any of these acts which were not averred constituted—and none of them did constitute—a cause of action. It is possible that some of these acts had no relation to the fraud complained of. If so, evidence to prove such facts should have been objected to on the ground of irrelevancy. That objection is not raised by defendant's complaint that they are not averred in the declaration, nor by any other complaint in defendant's brief. Assuming those acts of misconduct to be, as most of them were, relevant evidence to prove the charge of fraud, the complaint under consideration is answered by the elementary rule that the plaintiff should not state in his declaration evidence which he intends to offer in support of its averments.

(*b*) Plaintiff was permitted to prove that, in connection with the other fraudulent representations, defendants promised him that he should be secretary and treasurer of the newly-formed corporation, and receive therefor a salary of $1,200 per year. Complaint is made because plaintiff was permitted to prove that this promise was not in fact performed. In support of this complaint defendant relies upon *Hubbard* v. *Long*, 105 Mich. 442. In that case plaintiff charged that defendant had fraudulently in-

duced him to purchase stock in a bona fide and operating corporation. He was promised a position in this corporation at a salary of $25 per week. He was permitted to prove the breach of this promise, and what he had been earning before he purchased his stock. This court held it was error to permit this testimony to be introduced, on the ground that a breach of promise "is not of itself either fraud or the evidence of fraud." That decision does not apply in a case like that at bar, where a fraud has been accomplished, in part by false representations and in part by false promises. In such a case the promises must be admitted in evidence, because they are inseparably connected with the representations of fact. After a defrauded party has proved those promises, he is the victim of a legal snare, if denied the right to prove that they were never performed. Such a denial would compel the jury to act upon the assumption that the promises were performed, and thus defeat plaintiff in his justifiable attempt to obtain redress.

In this connection we should not overlook the contention of defendant, sustained by authority (see 1 Cook, Stock, Stockh. & Corp. Law [3d Ed.], § 622) and upheld by the trial court, that the promise to employ plaintiff was contrary to public policy, and therefore void. If this contention is sound, the promise to employ plaintiff was a nullity, and for that reason could not be the basis of an action; but it was none the less inseparably connected with the false representations of fact, and, under the foregoing reasoning in this opinion, was admissible in evidence. If plaintiff proved such a promise, he had a right, under our reasoning, to show that it was not performed. For, although the promise was unenforceable, the jury might infer that defendant performed it, and plaintiff had a right to rebut this inference.

At this point we should notice defendant's complaint that the trial judge charged the jury that the breach of this contract could be used as evidence of fraud. What the trial court charged was this: "You may consider

this [referring to the promise and its nonperformance] evidence in this case." Surely this was not equivalent to saying that the breach of the contract, standing alone, was evidence of fraud. Had defendant wished to raise that question, he should have preferred some appropriate request. Our attention is called to no such request.

(*c*) Complaint is made because plaintiff was permitted to prove declarations respecting past transactions made by other parties to the alleged conspiracy. These declarations related to defendant Smith's acquisition of the stock in the Hillsdale Manufacturing Company. We are bound to say that their admission, if erroneous, was not prejudicial, because the declarations merely tended to prove facts which we must regard as established by defendant's own testimony.

(*d*) In support of his claim that he was fraudulently deprived of certain property, plaintiff was permitted to give oral testimony, against defendant's objection, of the conveyance of a house and lot in Hillsdale valued at $2,100, a land contract covering land in Benzie county valued at $440, and of a peach farm valued at $150. Defendant is right in saying that these transfers could not be proved by oral testimony. See *Thompson* v. *Richards*, 14 Mich. 172. The testimony showing the transfer of the Hillsdale property was not prejudicial, because a deed conveying it was subsequently put in evidence. We find, however, no written evidence in the record of the transfer of the land contract or of the peach farm. Their values constituted a part of the damages claimed and awarded. We are, therefore, compelled to say that the oral evidence to prove their transfer, viz., the transfer of the land contract and peach farm, was not only erroneously admitted, but, as hereafter pointed out, requires the reversal of the judgment, unless plaintiff remits therefrom the amount of those items and the interest thereon.

The Hillsdale house and lot stood in the name of and was conveyed by plaintiff's sister. Two objections are urged to the admission of this conveyance in evidence:

First. That, as the property did not belong to plaintiff, no damage resulted to him from its loss. This objection was answered in *Sudworth* v. *Morton*, 137 Mich. 575, where this court said of a similar objection: "The money was paid for the plaintiff, and between him and the defendants, it was his money that they received."

Second. It is objected that this property was not particularly described in the declaration. We answer this by saying it was there described in general language as a house and lot situated in the city of Hillsdale, and, if defendant had desired to have a more specific description, he should have specially demurred to the declaration. See *Fuller* v. *City of Jackson*, 82 Mich. 481.

(*e*) Plaintiff was permitted, against objection, to read on the trial his cross-examination of two witnesses whose depositions had been taken by defendants. Though these depositions had been taken by defendants, Circuit Court Rule 41*a* gave plaintiff a right to read them. See *Fountain* v. *Ware*, 56 Ala. 558; *Hatch* v. *Brown*, 63 Me. 410; *Juneau Bank* v. *McSpedon*, 15 Wis. 629; *Morrison* v. *Insurance Co.*, 59 Wis. 162; *Converse* v. *Meyer*, 14 Neb. 190; *Calhoun* v. *Hays*, 8 Watts & S. (Pa.) 127.

Appellant complains because the trial court decided that plaintiff had a right to read this testimony, on the theory that it was his cross-examination of witnesses produced by defendants. He contends that this theory was unsound, and asserts that plaintiff was bound to use these depositions as evidence offered by himself, and authorities are cited which sustain this contention. See *Fountain* v. *Ware; Hatch* v. *Brown*, supra. If this contention is sound, it discloses error in the views of the trial court; but that does not justify a reversal of the judgment, unless it led to some result prejudicial to defendants. See *Polhemus* v. *Ann Arbor Savings Bank*, 27 Mich. 44. Defendant's brief points out nothing in the testimony read by plaintiff which would not have been admissible if he had offered it as his own evidence. Our own examination of such testimony discovers nothing not so admissible. The most

questionable part of this testimony was a letter written by one of the witnesses to plaintiff, in which the writer admits the worthlessness of the hog cholera medicine. We think it was necessary, and therefore proper, to read this letter, to enable the jury to understand the material testimony of said witness with which said letter was inseparably connected.

It is true that plaintiff was permitted to maintain the truthfulness of his own testimony notwithstanding the fact that it was contradicted by the testimony read from these depositions. Defendants cannot complain of this, for plaintiff would have had the same right if he had offered this testimony himself.

It is also true that plaintiff did not read from the depositions the direct examination of the witnesses. As that direct examination is not shown by the record, we cannot say that this omission was injurious to defendants. It may also be said that defendants should themselves have read this direct examination if it was to their interest to have it read. See *Morrison* v. *Insurance Co.; Converse* v. *Meyer*, supra. We conclude, therefore, that no injury resulted to defendants from the reading of these depositions.

4. Refusal of Defendant's Requests. Defendant in his brief contends that the court erred in refusing his requests to charge. Several of those requests asked the court to direct a verdict for defendant. It follows, from the former part of our opinion, that these were properly refused. One of these requests asserts that defendants were not responsible for false representations, unless made "by authority of all the defendants." If defendants conspired to perpetrate a fraud on plaintiff—and the jury had a right to find that they did—they would be responsible for false representations made in furtherance of that scheme, though not expressly "authorized by all the defendants," and therefore this request was properly denied. See *Gumberg* v. *Treusch*, 103 Mich., at page 554; *Hamilton* v. *Smith*, 39 Mich., at page 231.

Other requests sought to point out variances between the allegations of the declaration and plaintiff's proofs. One of these alleged variances related to the note involved in the next suit, and this is sufficiently answered by saying that plaintiff was not permitted to recover for said note. It is sufficient to say of the other objections of variance that defendant points out no substantial difference between the allegations in the declaration and plaintiff's proofs. We conclude that there was no error in the refusal of defendant's requests to charge.

5. Charge of the Court. Defendant charges that the trial court did not correctly state plaintiff's claim to the jury. The errors of statement pointed out in defendant's brief relate to matters not of the essence of plaintiff's claim. His complaint may be answered by quoting from a former opinion of this court:

"If the statement of the court was incorrect, it was counsel's duty then and there, before the case was finally submitted to the jury, to direct the attention of the court to the fact. Not having done so, it must be presumed that the court was correct, and counsel cannot now be permitted to contend otherwise." *Wood* v. *Wells*, 103 Mich., at page 323.

The court charged the jury, in effect, that fraud might be predicated upon defendant Smith's proposition to buy plaintiff's stock, accompanied by his statement that "he had investigated it enough to know that he wanted some of it." Defendant contends that this representation was a mere expression of opinion, and therefore not actionable. The rule that expressions of opinion do not constitute actionable fraud (*Myers* v. *Building Ass'n*, 117 Mich. 389; *Chafey* v. *Mathews*, 104 Mich. 103 [27 L. R. A. 558]), which is a rule subject to exceptions (see *French* v. *Ryan*, 104 Mich. 625), "is applicable only when the opinion stands by itself as a distinct thing." See *People* v. *Peckens*, 153 N. Y. 593. And it has been said by an eminent jurist:

"It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the

statement of a fact. * * * If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." Lord Bowen, in *Smith* v. *Land and House Property Corp.*, L. R. 28 Ch. Div. 15.

The statement of defendant under consideration is something more than a mere expression of opinion. His statement, coupled with his offer to buy, falsely implied that defendant knew facts which proved the stock to be valuable. The foregoing authorities and sound principle justify our holding such a representation actionable. What defendant said was equivalent to the false statement that he had knowledge of facts which proved said stock to be worth more than par. Had he made that false statement, his liability would be clear. If we hold that he is not liable because he conveyed this thought in guarded language, we point out a way by which unscrupulous men may accomplish fraud without responsibility.

It is also contended that the charge of the court under consideration was erroneous because defendant's representation and offer to purchase the stock worked no prejudice to plaintiff, as he had made his investments before this offer was made. It is true that he had before that time invested in the stock, but after that he made another investment, and it is to be presumed that the court, in saying that fraud might be predicated on this conduct of defendant Smith's, referred to the subsequent investment.

In charging the jury, the court defined fraud "as a false statement or statements made for the purpose of inducing another to part with money or other valuable things, which statements are calculated to influence the person to whom they are made, and which statements do actually deceive the person to whom they are made, and thereby induce him to part with money or other valuable things." Defendant contends that this definition is faulty because it omits to state that the representation must be

material and relate to a fact, either present or past. By instructing the jury that the statement must be intended to deceive, calculated to deceive, and must actually deceive, the court sufficiently informed them that it must be material. Nor is it true, as we have just shown, that fraudulent statements must always relate to facts, and, if it were, we would not reverse the case because of such a technical omission in a definition which is substantially correct.

Complaint is made because the court charged the jury:

"The defendant Gunn has been represented by counsel, and was present in court the first day of this trial, and has since been absent. The defendant Smith has been in court during the trial, but has seen fit to decline to take the stand, and I charge you, gentlemen, that the unexplained failure of Gunn and Smith to take the stand and give evidence here may be given by you such weight as you see fit. And it is a legitimate fact for you to consider in determining the merits of this case."

It was not strictly accurate to tell the jury to give "such weight as you see fit" to the failure of defendants to take the stand. If this expression stood alone, it might lead the jury to the erroneous belief that they might infer from defendants' silence some essential fact which they could not infer from the testimony. But taking this language in connection with that part of the charge immediately following, which placed the burden upon the plaintiff of establishing "the claim which he asserts by a fair preponderance of the evidence," we think the jury would understand that they could consider defendants' failure to give testimony only in drawing inferences from and in weighing plaintiff's testimony. So understood, the charge was not erroneous. In *Mooney* v. *Davis*, 75 Mich. 188, defendant, though in court during trial, saw fit to offer no testimony. It was held that it was not error for the court to charge the jury that defendant's silence "may be considered by you as to one of the facts in this case as to

whether the position of the plaintiff is in accordance with the facts."

No other complaint in appellant's brief demands consideration. We conclude, therefore, that if plaintiff chooses to remit from his judgment $590, the aggregate values of the land contract and peach farm, together with interest thereon, the judgment should be affirmed; otherwise, it should be reversed. In either event, appellant is entitled to costs.

MOORE, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

SMITH v. McDONALD.

139 225
139 s512
139 225
148 7394
139 225
f152 7180

1. FRAUD—PLEADING.

A notice of special defense setting up in detail a representation of plaintiff, charging that it was false and fraudulent, and was intended to and did deceive defendant, sufficiently avers fraud.

2. SAME.

A further averment that plaintiff and certain named associates had procured the organization of a corporation for the pretended purpose of manufacturing medicine, and that the stock issued by the corporation was of no value, sufficiently averred organization of the corporation as a step in the scheme of fraud, although it did not, in precise language, charge fraud in such organization.

3. APPEAL AND ERROR—QUESTIONS CONSIDERED.

Questions not raised in the lower court will not be considered on error.

4. FRAUD—EVIDENCE—SUFFICIENCY—INSTRUCTIONS.

A request that it would take "the same amount of proof" to establish plaintiff's complicity in the fraud alleged as it would to establish the fraud against plaintiff alone was properly refused, and a charge that defendant must establish plaintiff's complicity in the fraud by a preponderance of the testimony was properly given in lieu thereof.

5. SAME—WAIVER—INSTRUCTIONS.

A request to charge that defendant waived fraud if he gave the note in suit after he "believed" he had been defrauded does not present the question of the entertainment of a settled conviction by defendant that he had been defrauded, but to raise such question the request should have used the word "knew" instead of "believed."

6. SAME.

A request to charge, in effect, that defendant could not complain of a fraud, if, at the time he executed the note, he entertained a settled conviction that he had been defrauded, is satisfied by a charge to the effect that, if defendant knew, when he signed the note, that he had been defrauded, plaintiff could recover.

7. SAME—DILIGENCE—PARTY DEFRAUDED.

The defense of fraud is not defeated by the fact that the party defrauded should, in the exercise of ordinary diligence, have known of the fraud when he entered into the fraudulent transaction complained of by him.

Error to Hillsdale; Lockwood, J., presiding. Submitted January 12, 1905. (Docket No. 48.) Decided February 28, 1905.

Assumpsit by George N. Smith against John P. McDonald and Mary McDonald on a promissory note. There was judgment for defendants, and plaintiff brings error. Affirmed.

F. M. Hall and *F. A. Lyon*, for appellant.

Frankhauser & Cornell (*Grant Fellows*, of counsel), for appellees.

CARPENTER, J. Plaintiff and the first-named defendant were the principal parties in the preceding case. *McDonald* v. *Smith*, ante, 211. The controversy in this suit arises out of the alleged scheme of fraud described in that case. In the final alleged fraudulent transaction defendant incurred an obligation of $550. To secure its payment he gave on May 14, 1900, two notes, one of $300 and one of $250. October 6, 1900, he took up these notes,

received credit of $90, and gave one note of $460, executed by himself and his mother, his codefendant, Mary McDonald. This note was subsequently transferred to plaintiff, and is the subject-matter of this suit.

Defendants claimed that plaintiff's participation in the scheme of fraud described in the preceding suit prevented his recovery on this note. The evidence to prove this charge does not differ materially from that introduced in the preceding case. This issue was submitted to a jury, who rendered a verdict for defendants. Nearly all the questions discussed in this case were considered and decided adversely to appellant in the preceding case. Those questions we will not consider. We proceed, however, to consider certain questions not raised in that case.

It is contended that the notice of special defense attached to defendants' plea of the general issue did not warrant the introduction of any testimony tending to prove fraud. We sufficiently answer this contention by saying that the notice sets up in detail the representation of plaintiff that he had investigated the stock and was willing to buy it at $150 per share. It charges this representation and offer to be false and fraudulent, and avers that it was intended to deceive defendant and did result in his deception. According to our former opinion, this was a sufficient averment of fraud to warrant the introduction of testimony.

It is also contended that the averments in the notice were not sufficient to warrant the introduction of testimony tending to prove fraud in the formation of the corporation for the manufacture of the hog cholera medicine. It is true that the notice did not in precise language charge fraud in the organization of such company. It did, however, aver that plaintiff and certain named associates had procured its organization "for the pretended purpose of manufacturing the hog cholera medicine," and that the stock issued by said corporation was of "no value." We think under our decisions (see *Briesenmeister* v. *Knights of Pythias*, 81 Mich. 525; *Farmers' Mut. Fire-Ins. Co.*

v. *Crampton*, 43 Mich. 421; *Cresinger* v. *Reed*, 25 Mich. 450) this sufficiently informed plaintiff that defendant claimed that the organization of the corporation was a step in the scheme of fraud.

Plaintiff's counsel insist the defendant could not complain of the fraud because he had not returned or tendered the certificates of stock which he was fraudulently induced to acquire. We are referred to no assignment of error, and we can find none, which shows that this point was raised in the lower court. We therefore decline to consider it.

The trial court did not err in refusing to give the following request preferred by plaintiff:

"It takes the same amount of proof to establish the complicity of this plaintiff in the fraud practiced by Cummins and Gunn that it would to establish fraud against him if he were alone charged with fraud."

To be informed that it took the same "amount of proof" to establish plaintiff's complicity in the fraud as it would to establish fraud against him would not have aided the jury, since it cannot be presumed that they knew what amount of proof was necessary to establish the latter charge. The trial court adopted the proper practice when he refused this request, and told the jury in effect that defendant must establish plaintiff's complicity in the fraud by a preponderance of the testimony.

Complaint is made because the court refused to give the jury the following request preferred by plaintiff:

"That if the note in question was given by the defendant after he believed he had been defrauded he thereby waived such fraud, and he cannot now urge such fraud in defense of this action."

It appears from the testimony that when the first-named defendant signed the note he knew that some of the fraudulent representations were false, but he still believed others, and the most material of them, to be true. He testifies that when he gave the note he "still had confidence in the B-T" (the corporation to manufacture the

medicine). If by the request under consideration plaintiff intended to have the jury instructed that the first-named defendant could not complain if at the time the note was executed he entertained a settled conviction that he had been defrauded, he should have used the word "knew" instead of "believed," and, if so, he cannot complain because the trial court charged, in effect (in accordance with our decisions, *Craig* v. *Bradley*, 26 Mich. 369; *Dailey* v. *King*, 79 Mich. 568; *Western Electric Co.* v. *Hart*, 103 Mich., at page 482), that if defendant when he signed the note *knew* that he had been defrauded plaintiff should recover.

But this was not the thought that plaintiff designed to convey to the jury by the request. His thought is made clear by his contention that one who "has notice of such facts as by the exercise of ordinary diligence and prudence he should have known of the fraud, then he is presumed to have knowledge of such fraud, and must exercise the same degree of diligence as though he had actual knowledge." This contention assumes that the defrauded party owes to the party who defrauded him a duty to use diligence to discover the fraud. There is no such obligation. One who perpetrates a fraud cannot complain because his victim continues to have a confidence which a more vigilant person would not have.

The rule contended for by plaintiff, which requires the same diligence from all persons, has no application to cases of fraud. If it had, the very persons, viz., the credulous and unwary, who are the usual victims of fraud, would be at a disadvantage, and would often be denied redress.

We do not think it necessary to consider any other complaint in plaintiff's brief.

Judgment is affirmed, with costs.

MOORE, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

139 230
141 583
139 230
145 12

BRADLEY *v.* WILLIAMS.

1. TAXATION — SALES — NOTICE — MISDESCRIPTION OF OWNER'S ESTATE.

A notice of the sale of land for taxes, personally served upon the owner, is good though addressed to him as mortgagee instead of owner.

2. SAME—SUFFICIENCY OF NOTICE.

The statute does not require a tax sale purchaser to exhibit to the owner with his notice a certified copy of his deed and a certificate that the report of sale has become absolute.

Appeal from Muskegon; Russell, J. Submitted February 9, 1905. (Docket No. 23.) Decided February 28, 1905.

Petition by William Bradley against John Williams and another for a writ of assistance. From a decree for petitioner, defendants appeal. Affirmed.

Stephen H. Clink, for petitioner.

F. W. Cook, for defendants.

HOOKER, J. John Williams, being owner in fee of certain premises, failed to pay the taxes for the year 1897, and James P. Cross purchased them at delinquent tax sale, and the sale was duly confirmed. On December 14, 1901, a notice intended to be in compliance with the statute was personally served upon Williams. It is alleged that this notice was insufficient for the reason that it was addressed to "John Williams, *mortgagee* of land herein described," instead of "John Williams, owner," etc. Subsequently Cross sold his interest in the land to Bradley, who, on November 13, 1903, filed a petition for a writ of assistance, making Williams and his tenant, Brustad, parties. They answered, and upon the hearing the prayer

of the petition was granted, with costs, and the defendants have appealed.

Two points are involved: (1) The inaccuracy in the notice already mentioned; (2) the failure of Mr. Cross to exhibit to Mr. Williams a certified copy of his deed, and a certificate that the "report of sale has become absolute." It is conceded that the notice would have been good had it been addressed to "Mr. Williams, owner," or to "Mr. Williams," or even had it not been addressed to any one; but it is contended that the misdescription of the estate or interest of Mr. Williams invalidated the notice. This is overtechnical. The law was intended to protect landowners against the loss of land through ignorance or forgetfulness of the fact of its sale for taxes. Mr. Williams was informed by this notice of the fact that his land had been sold, and that was sufficient.

The statute does not require the service of evidence of the sale or confirmation, as in foreclosure cases. It prescribes a form which was followed, and the statute was fully complied with.

The order of the circuit court is affirmed.

MOORE, C. J., and CARPENTER, MCALVAY, and GRANT, JJ., concurred.

LESTER *v.* ADDISON.

EXEMPTIONS—EXECUTION SALE—CONVERSION—EVIDENCE.

In trover against a sheriff for selling exempt property on execution, evidence examined, and *held* that, on plaintiff's own showing, the property was not sold on execution, but on foreclosure of a chattel mortgage, and that a verdict was properly directed for defendant.

Error to St. Joseph; Yaple, J. Submitted February 16, 1905. (Docket No. 172.) Decided February 28, 1905.

Trover by Bernard H. Lester and another against William R. Addison. There was judgment for defendant on a verdict directed by the court, and plaintiffs bring error. Affirmed.

George H. Arnold, for appellants.

R. R. Pealer and *George E. Miller*, for appellee.

HOOKER, J. On July 5, 1901, execution was issued on a judgment obtained by Ederheimer, Stein & Co. against the plaintiffs. On July 5, 1901, this execution was levied by Ammon Hahn, deputy sheriff under the defendant, upon a stock of goods owned by the plaintiffs, and on July 10th they were excluded from possession. On July 17th the inventory and appraisement were completed, and plaintiffs were told to be on hand that afternoon to care for exemptions. They came at the designated time and began to take out exemptions, when the defendant announced that he had a chattel mortgage upon all the goods, and that he would not permit exemptions to be removed from the store, whereupon no further attempt to select them was made. Hahn set aside goods alleged to amount to $510 for exemptions, and then sold the stock to the execution creditors for $25, subject to the exemptions and mort-

gage. An hour or so later the defendant sold all of the goods to Muncey at chattel mortgage sale, leaving a deficiency upon the mortgage. An action of trover was brought against the sheriff for the exemptions, and at the close of plaintiffs' evidence a verdict was directed for the defendant.

Upon the plaintiffs' own showing, their exemptions were not sold on execution, and were sold on the foreclosure of the mortgage. There was no unlawful conversion by the defendant. It is unnecessary to discuss other points.

No error is found, and the judgment is affirmed.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

KERN *v.* ARBEITER UNTERSTUETZUNGS VEREIN.[1]

1. PLEADING — DEMURRER — PLEADING OVER — QUESTIONS CONCLUDED.

   Where defendant pleads issuably after his demurrer is overruled he cannot thereafter again raise the questions settled by the ruling, on the demurrer.

2. MUTUAL BENEFIT ASSOCIATIONS — LOCAL SOCIETIES — WITHDRAWAL—SUIT BY MEMBERS—PARTIES.

   A local society of a mutual benefit association, by a majority of a quorum, voted to withdraw from the general association, and its officers assumed afterwards to audit and pay from its funds a death claim on a certificate issued by the general association, whereupon certain members of the society filed a bill to restrain such payment. *Held*, that the general association was not a necessary party.

3. SAME—RIGHT OF MEMBERS TO MAINTAIN SUIT.

   Allegations that it was the duty of the local officers to institute proceedings to collect the benefit from the general association, which they refused to do, but, on the contrary, assumed

[1]Rehearing denied May 12, 1905.

authority to pay it themselves from the funds of the local society, state sufficient reasons why it was necessary for complainants to sue, and sufficiently show that it would have been an idle ceremony to demand that defendant's officers act in the matter.

4. SAME — PAYMENT BY LOCAL SOCIETY — CONSTITUTIONAL PROVISION.

A provision in the constitution of the local society authorizing it to aid the widows and orphans of deceased members entitled to benefits could not be invoked to authorize the payment of the benefit.

5. SAME—CONTRACT OF INSURANCE—CONSTITUENTS.

The constitutions of the general association and of the constituent local societies of a mutual benefit association, as well as the benefit certificates, form parts of the insurance contracts with the members.

6. SAME—BY-LAWS—CONSTITUTIONALITY.

Both the State (art. 4, § 43) and Federal (art. 1, § 10, and Amend. 14) Constitutions are "laws," within 1 How. Stat. chap. 164, § 4, giving mutual benefit associations power to make regulations for their own government not contrary to the laws of the United States or this State.

7. SAME—LOCAL SOCIETY—RIGHT TO WITHDRAW.

A local society of a mutual benefit association cannot, by resolution, withdraw from the association and assume the payment of the benefit certificates issued to the members of the local society by the association, where such action impairs the obligations of the contracts of the association and society with its members.

Appeal from Saginaw; Beach, J. Submitted November 17, 1904. (Docket No. 202.) Decided March 7, 1905.

Bill by Rudolph Kern and others against the Arbeiter Unterstuetzungs Verein and others to restrain the payment of a benefit certificate. From a decree for complainants, defendants appeal. Affirmed.

F. E. Emerick and *James H. Davitt*, for complainants.

L. T. Durand and *F. A. Rockwith*, for defendants.

MOORE, C. J. The complainants are members of the defendant corporation. The bill in this case was filed to obtain an injunction restraining the Arbeiter Unterstuetzungs Verein, and the other defendants, who are its officers, from a claimed misappropriation of $500 which complainants and the other members of the verein had paid into its treasury. A restraining order was issued on filing the bill, and at the hearing a final decree granting a perpetual injunction was rendered. The appellant defendants bring the case here by appeal.

The circuit judge filed a written opinion, which states so clearly the issue involved that we quote from it as follows:

"Complainants filed a bill in this court against the defendant, asking for an injunction restraining the Arbeiter Unterstuetzungs Verein, of Saginaw City, Michigan, from paying to the beneficiaries of Charles Stocker moneys in their possession or under their control which had been paid in by members of the Arbeiter Unterstuetzungs Verein as dues or otherwise.

"It is claimed in the bill filed that the defendant the Arbeiter Unterstuetzungs Verein is a corporation organized under the laws of the State of Michigan, pursuant to Act No. 42 of the Public Acts of 1887.

"The Allgemeiner Arbeiter Bund, a State corporation, organized under the laws of the State of Michigan, is composed of the different arbeiter societies in the State of Michigan; being 81 similar associations. No person can become a member of the State bund unless he is a member of the local association. The bund issues to every member who is in good standing in one of the local societies a benefit certificate payable to the beneficiaries named in the certificate, upon the payment of annual dues to the local society of eight dollars; five dollars of the dues to belong to the death fund for bund dues, and three dollars to the general fund.

"It is further claimed that the defendant society, its trustees or officers, have no right to pay the claim or benefits out of any of the fund contributed as herein by the complainants or any members of the association.

"It is further claimed that Charles Stocker was a member in good standing on the 13th day of September, 1903;

that he died, and that his heirs or other lawful beneficiaries, after filing with the State bund proofs of death, are entitled to the death benefit of $500; that the heirs or beneficiaries have no right to demand or be paid this amount from the local society.

"It is further claimed that since the death of Charles Stocker a resolution was passed by the local society to pay the death-benefit claim out of the funds in the hands of the local society, which should be paid only by the State bund, as the local society never issued a benefit certificate to Charles Stocker, deceased; that there are now 944 members of the Arbeiter Unterstuetzungs Verein of Saginaw City, and that there are 9,500 members of the Allgemeiner Arbeiter Bund, being the State society; that if the local society pays its dues, as provided by the by-laws, to the State bund—being ten cents for each and all members in good standing—it would only cost the local society $94.40; but, if the full amount of said death benefit is paid by the local society, it will cost said local society $500, or more than ten times as much as they are legally liable to pay or contribute.

"It is further claimed that it would be a gross breach of trust by defendant, which would result in great and irreparable loss and damage to the complainant and other members of the local society, and that the bill is filed in behalf of the complainants and other members of the society, as they are too numerous to be made all parties complainant or defendant. And they pray that this suit may be treated and regarded as commenced and carried on in behalf of all such persons, as well as in the names of the complainants, and that the defendants may be perpetually restrained and enjoined from paying the heirs or other beneficiaries of the late Charles Stocker anything out of money in their possession or under their control which has been paid in by members of the Arbeiter Unterstuetzungs Verein, as dues or otherwise, and that the defendants be authorized, when properly required, to pay over to the Allgemeiner Arbeiter Bund of the State of Michigan, out of the funds in its hands, towards paying the Stocker benefit certificate, the sum of ten cents for each member of said defendant society.

"A demurrer to said bill was filed, and an order was made requiring the complainants to amend their bill, and the same was amended pursuant to said order.

"An answer has been filed by the defendants, claim-

ing that they have full power and authority to pay the benefit certificate, as they are no longer members of the State bund; that they are a separate and distinct corporation, and, under the constitution and by-laws of the State bund and the constitution and by-laws of the defendant society, they have a right to withdraw from said bund, as they have done, and they were not a member of the State bund when said bill was filed. That the reason for withdrawing from said bund is the fact that for the past 15 years the local society has paid into the State bund, on account of benefits arising from the deaths of members of the several societies, the aggregate sum of $86,516.50, and that they have only received through the bund, as benefits, the sum of $57,400. That they have paid $29,116.50 in excess of any and all benefits derived through the affiliation.

"It is conceded that the local society, as long as they remained a member of the State bund, have paid each year the sum of five dollars per member as dues, and they believe that it is for the best interests of the members of the local society to no longer remain a member and be affiliated with the State bund. That a committee on constitution and by-laws was appointed, which on the 5th day of July, 1903, reported to the society, in writing, the changes that were necessary to be made for the purpose of carrying into effect the withdrawal of said local society from said bund. That due notice was given to all the members of the local society, by postal cards being sent to each member, and that only seven of the postal cards were returned as not having been received by the members to whom they were addressed. That there were 309 members present at said meeting. That 222 voted in favor of withdrawing from the State bund, and 78 voted against it. That at the same meeting the report of the committee to amend the constitution and by-laws was adopted unanimously. This meeting was held on August 5, 1903. That due notice was given to the State bund, notifying them of the action taken by the local society, and that since that time they have had no further transaction or business connection with the State bund. And that they have a right to pay the benefit certificate held by the heirs or beneficiaries of Charles Stocker, deceased. That a resolution was passed directing the society to pay over from its treasury the sum of $500 for the benefit of the widow and children of said Charles Stocker, deceased.

"It is further claimed by the defendants that it is within the corporate power of the defendant corporation to take care of all such claims arising on account of the death of its members; that it is eminently fitting and proper that it should do so, under the act of its incorporation, its constitution, and by-laws.

"Testimony was taken in open court, and the only question for me to pass upon is, Has the local society a right to pay the death-benefit certificate that was issued by the State bund to Charles Stocker, in which bund the local society is a member, and Charles Stocker being a member of the local society? It is not claimed that the benefit certificate was ever surrendered and canceled by Charles Stocker in his lifetime, and a new certificate issued by the local society pursuant to their amended constitution and by-laws. If this had been done, it would present a different question. But what right has the local society to pay a certificate which is issued by the State bund, and where it is claimed by the complainants in this particular case they would be paying a little over five times as much in paying this certificate through the local society as they would through the State bund?"

The circuit judge held the local society had no right to pay the death-benefit certificate issued by the State society, and so decreed.

The claim of the defendants and appellants is that the decree is erroneous, for the following reasons:

1. That said bund is not made a party to this litigation; has not asked for any such decree; has not recognized said Stocker benefit certificate as a binding obligation upon it; and has made no assessment to meet it, nor taken any steps in the matter, unless to pay the expenses incurred on the part of complainants in this suit.

2. That three members of the board of trustees were omitted as parties to this suit.

3. That neither the civil nor the property rights of complainants are involved in this litigation, nor is any fraud charged or claimed by the bill.

4. That no request has been made to the defendant corporation, its officers, its board of trustees, or any of them, to have the action relative to said withdrawal, or to the passage of said resolution for said Stocker's dependents, either rescinded or reconsidered, or to have them, or either

of them, institute any legal proceedings whatever to test the legality thereof, or to restrain the payment of such money.

5. That the action of said society in withdrawing from said bund and revising its constitution, as stated, was legal and valid, and had the effect to then and there sever its relations with the bund, and to annul the obligations of the bund upon certificates, including the one in question.

6. That because of such withdrawal defendant corporation had the right to provide for the payment to the dependents of its members who held bund certificates at the time of withdrawal of the amount called for by such certificates, either by the issue of new certificates, or by the passage of a resolution to that effect before the new certificates had been prepared.

7. That under article 8 of the constitution of defendant corporation, providing:

"Section 1. Widows and orphans of deceased members who were entitled to benefits, shall, if they apply for the same and the treasury permits, be aided in the judgment of the society"—as well as under other provisions, the society possessed the power to pass the resolution in question for the Stocker dependents, or to give them any sum of money, or other relief whatsoever, which, in the judgment of the society, it was proper to afford, having in view its financial ability to do so. As already stated, the corporate power to do this is not questioned by the bill.

8. That the bill is multifarious, in seeking the distinct and different kinds of relief granted by the decree.

As to reasons 1 and 8, it may be said they were assigned as reasons in the demurrer, and were overruled by the judge. From that decision no appeal was taken.

In *Kraatz* v. *Electric Light Co.*, 82 Mich. 457, it was said:

"It is claimed by plaintiff's counsel that, inasmuch as the defendant did not choose to stand upon its demurrer, but pleaded issuably after it was overruled, it could not thereafter again raise the questions settled by the overruling of the demurrer; citing *Ashton* v. *Railway Co.*, 78 Mich. 587; *Cicotte* v. *County of Wayne*, 44 Mich. 173; *Peterson* v. *Fowler*, 76 Mich. 258. See, also, *Wales* v. *Lyon*, 2 Mich. 276. This position is undoubtedly correct,

under all our previous holdings, and this disposes of all the questions raised upon the declaration."

We think that principle applicable to the case at bar, where it may be said that it is not essential to a just decree between appellants and appellees that the bund be made a party.

As to reason 4, this appeared in the demurrer to the original bill, and the court held it good. Thereupon the complainants amended their bill by adding the following:

"Complainants did not ask defendant Arbeiter Unterstuetzungs Verein, or any of the other defendants named in the original bill in this cause, to institute suit or take any legal action to prevent the wrong and injury which they themselves threatened to do to these complainants and their rights, as set out in the original bill, because it would have been idle and useless to do so, for the reasons following: (*a*) Said defendants were duly notified of the death of Charles Stocker, and upon such notice it was their duty, through the president and secretary of the Arbeiter Unterstuetzungs Verein, to give notice of the same to the Allgemeiner Arbeiter Bund, but defendants neglected and refused to do so, and on the contrary passed the resolution referred to in paragraph 8 above; thus showing a definite and deliberate purpose on their part to ignore the rights of complainants as members of the Arbeiter Unterstuetzungs Verein, and as members of the Allgemeiner Arbeiter Bund of Michigan. (*b*) Because said defendants themselves then threatened and intended, and still threaten and intend, to do injury and wrong to complainants, which complainants ask this court to protect them from; and it would have been idle then, and would be idle now, to ask defendants to take legal action against themselves. (*c*) The rights which complainants ask this court to protect and enforce are not rights which belong or ever belonged to the defendant Arbeiter Unterstuetzungs Verein, or any other of the defendants, but, on the contrary, are rights which belong and always belonged to those complainants and the other members of the Arbeiter Unterstuetzungs Verein, in whose behalf, as well as in behalf of complainants, this bill is filed."

These allegations were sustained by the testimony. It is clear, too, from the attitude of the defendants in the

original bill, that they have no sympathy with the position taken by the complainants.

In 2 Cook on Stock, Stockh. & Corp. Law, § 741, it is said:

"There are occasions when the allegation that the stockholder has requested the directors to bring suit, and they have refused, may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request; and, even if they did, the court would not allow them to conduct the suit against themselves. Nevertheless, instead of this allegation, the complainant must allege the facts which excuse such a demand or request to the directors, and these facts must be stated with particularity and definiteness."

See, also, Clark on Corp. pp. 395–398; *De Neufville* v. *Railway Co.*, 81 Fed. 13, 26 C. C. A. 306; *People's Savings Bank* v. *Building Co.*, 8 Colo. App. 354; *Flynn* v. *Third Nat. Bank*, 122 Mich. 642. We think the allegations of the amended bill of complaint and the testimony bring the case within these authorities.

As to reason 7, we think it very clear that, in taking the action it did, the defendant corporation was not proceeding under section 1, art. 8, of its constitution, which authorizes the giving of aid to widows and orphans, but was in fact undertaking to pay out of its funds, to the beneficiaries named in a certificate issued by the bund, the obligation named therein. This, then, brings us to the important question in the case; that is, Did the defendant corporation have the right, by a much less than a majority vote of its membership, to sever its relations with the State bund?

The Allgemeiner Arbeiter Bund of Michigan was founded January 1, 1870, and reincorporated in 1887 under Act No. 42 of that year (2 Comp. Laws 1897, §§ 7441–7446). Defendant Arbeiter Unterstuetzungs Verein was originally incorporated September 11, 1871, under chapter 58, 1 Comp. Laws 1857, and was reincorporated Decem-

ber 19, 1892, under chapter 164, 1 How. Stat. It became a member of the bund in 1872. One of the articles of reorganization (No. 4) contains the following:

"The foregoing is a reorganization of the Workingmen's Relief Association of Saginaw City, Michigan, incorporated 1871, and the persons executing the same are members of said Workingmen's Relief Association, being the society hereby reorganized as the Arbeiter Unterstuetzungs Verein."

When the Allgemeiner Arbeiter Bund was reorganized, in 1887, the defendant verein became one of the subscribers to the articles of reincorporation. At this time there were 48 local societies. This number had increased, when the defendant corporation sought to sever its connection with the bund, to 82, with upwards of 9,400 members. The defendant corporation had at the last-named time 940-odd members. The individuals composing the local societies are members of the bund from whom they receive insurance certificates, the bund being the insurer. For the purpose of providing a fund to pay this insurance, each corporate member of the union is required to pay upon the death of a member of the bund an amount equal to 10 cents for each of its own members.

Article 10 of the constitution of the bund provides:

"To have a surer rule and a payment of the bund moneys, the bund shall furnish, of sufficient numbers, printed heir or death certificates, to be sent to all of the local societies for their members. Each member shall, in this certificate, name or designate with the full name of the person or persons to whom after his death the money shall be paid. * * *

"By the death of a member of the bund, the bund shall send, after the lapse of thirty days from the date of the official notice, including also a certificate accompanying said official notice, such sum of money to said society, payable to the order of the person named in the certificate, according to art. V, paragraph nine of the by-laws. If there are no legal heirs living, then the money on death fund reverts to the bund."

The certificates issued to the complainants, and to Mr.

Stocker as well, were issued under the provisions of this article. It will be seen that the members of the various local societies had the benefit of certificates of insurance issued by the bund, which embraced in its membership upwards of 9,000 persons. It will also be noted that, if one local society could go out without consulting the bund, any number might do so, and thus impair the security furnished by the insurance. If, too, the local society could undertake, with its membership of a little more than 900, to stand in the place of the bund, with its membership of more than 9,000, it would greatly lessen the value of the insurance.

Article 2 of the constitution of the bund, § 3, provides that "only an incorporated arbeiter mutual association, which warrants or guarantees aid to its members, in case of sickness or death of its members, shall be received into this association."

Article 2 of the verein constitution sets forth that the "object of the society is: Section 1. Assistance of the sick and suffering as also to provide for decent burial of its members. Sec. 2. To provide for the widows and orphans of deceased members. Sec. 3. Care for proper administration of the estates of deceased members. Sec. 4. To promote the social intercourse of the members."

The object and purpose of the bund are thus stated:

"*Third.* The object and purpose of such association is the general welfare of the members of the societies forming such association, and the extending to them and their families, in case of death, such material aid as may be fixed from time to time by the constitution and by-laws of the association."

While the purposes and objects of the verein are defined in subdivision 3, § 1, of chapter 164, 1 How. Stat., as follows:

"*Third.* The purposes and objects for which said corporation is formed which shall be to provide for the relief of distressed members, the visitation of the sick, the burial of the dead, and such other benevolent and worthy pur-

poses and objects as affect the members of the corporation, the period for which said corporation is formed, which period shall not exceed thirty years."

Counsel claim (we quote from the brief) that—

"By adopting their several constitutions, and thereby assuming towards each other and their members the relations and obligations described, these corporations have put a practical construction upon those statutes, and that construction gives no support to the conduct or contention of these defendants. On the contrary, it plainly forbids what they are attempting to do. No doubt, the constitution of the verein and the constitution of the bund, as well as the beneficiary certificate, form parts of such insurance contracts. Niblack on Acc. Ins. & Ben. Soc. (2d Ed.) p. 271; *Supreme Lodge Knights of Honor* v. *Nairn*, 60 Mich. 44; 3 Am. & Eng. Enc. Law (2d Ed.), p. 1059; *Union Mutual Ass'n* v. *Montgomery*, 70 Mich. 587; *Wist* v. *Grand Lodge A. O. U. W.*, 22 Or. 271.

"The peculiar character of the case makes it necessary to look upon both of these constitutions in this light, for each is so drawn with reference to the other as to require them to be considered together. And on the principle of the authorities cited, not only the articles of association of the bund, but also its constitution, is a part of the contract between it and the corporations associating. Thus viewed, they certainly do not warrant the secession of August 5th, nor the amendments of the verein constitution which followed. * * * The language in which such power is reserved must be read in the light of the statute under which the verein is incorporated. Section 4 of chapter 164 provides that:

"'Said corporation shall have full power and authority to make and establish rules and regulations for the regulating and governing of the affairs and business of said corporation and members thereof, not contrary to the laws of the United States or this State, to decide as to the necessary qualifications for and who shall be eligible to membership therein, to provide for the election of members and to designate, elect, or appoint in such manner as they see fit, by their rules and regulations, such officers, under such names and style as they shall decide, who shall exercise such powers and such supervision, control, and management of the affairs of such corporations as shall be delegated to them respectively, by the constitution, rules, regulations, and by-laws of said corporations.'

"Both the State (article 4, § 43) and the Federal (article 1, § 10) Constitutions prohibit laws impairing the obligation of contracts, and under the latter the State is forbidden to deprive any person of property without due process of law. Amend. 14. These rules form a part of the laws of the United States and of this State, within the meaning of the above statute. General power to make changes in the constitution and by-laws will not authorize amendments which materially impair prior insurance contracts or change the scheme of insurance. Niblack on Acc. Ins. & Ben. Soc. (2d Ed.) §§ 25, 26, pp. 58–62; *Strauss* v. *Mutual Reserve Fund Life Ass'n*, 126 N. C. 971, 128 N. C. 465 (54 L. R. A. 605); *Bragaw* v. *Supreme Lodge Knights of Honor*, 128 N. C. 354 (54 L. R. A. 602); *Johnson* v. *Reformers*, 135 N. C. 385; *Pokrefky* v. *Firemen's Fund Ass'n*, 121 Mich. 456; *Starling* v. *Royal Templars*, 108 Mich. 440; *Wheeler* v. *Order of Iron Hall*, 110 Mich. 437; *Becker* v. *Insurance Co.*, 48 Mich. 610; *Kalbitzer* v. *Goodhue*, 52 W. Va. 435; *Union Ben. Society* v. *Martin*, 113 Ky. 25; *Hale* v. *Equitable Aid Union*, 168 Pa. St. 377; *Becker* v. *Benefit Society*, 144 Pa. St. 232; *Wist* v. *Grand Lodge A. O. U. W.*, 22 Or. 271."

It is apparent that the attempted action of the defendant corporation very greatly changes and impairs the obligations of the contract which resulted from the complainants becoming members of the local society, and receiving certificates of insurance from the bund.

It is said by counsel for defendant that article 16 of the constitution of the bund entitled the society to withdraw at its discretion. It reads:

"This union cannot be dissolved as long as fifteen associations belong to it, and each association which steps out of the union of the 'Allgemeiner Arbeiter Bund' declares thereby that it gives up all claim to the property or possessions."

We think this should be read in connection with sections 41 and 42 of article 9, which read:

"If an association should not pay its pledges within two months, it is the duty of the treasurer to make it known to such association, and if the association does not pay its

pledge within a month after said notice, it becomes the duty of the president to suspend said association.

"If at any time an association of the union is suspended and fails within four months to comply with the pledge toward the union, the said association shall be dropped by the executive committee of the union. It has, however, the privilege of appeal to the union."

When so read, we do not think it can be said that it was contemplated any local society could withdraw at its discretion.

The decree is affirmed.

CARPENTER, GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

CANAL CONSTRUCTION CO. *v.* SCHLICKUM.

TAXATION — COMPELLING ASSESSMENT — MANDAMUS — LAPSE OF TIME.

Where, pending certiorari to review a mandamus directing a supervisor to spread certain taxes upon his assessment roll for a certain year, the time when the tax could be spread on the roll for that year elapsed, the Supreme Court, on sustaining the legality of the tax, will direct that the assessment be spread on the roll for the ensuing year.

Certiorari to Saginaw; Beach, J. Submitted January 3, 1905. (Calendar No. 20,840.) Decided March 7, 1905.

Mandamus by the Canal Construction Company to compel Charles Schlickum, supervisor of Blumfield township, to spread a certain tax. To review an order granting the writ, respondent brings certiorari. Affirmed.

James H. Davitt, for relator.

William G. Gage (*G. W. Davis*, of counsel), for respondent.

MOORE, C. J. This is certiorari for the purpose of reviewing the action of the circuit judge of Saginaw county in granting relator a writ of mandamus directing the respondent, as supervisor of the township of Blumfield, to spread upon the assessment roll of said township drain taxes for the construction of Cheboygan creek drain in the sum of $8,500.48.

The record shows that prior to July 20, 1903, the drain commissioners of Saginaw and Bay counties had established a drain known as "Cheboygan Creek Drain," located in the townships of Blumfield and Buena Vista, in Saginaw county, and the township of Portsmouth, in Bay county. In July, 1903, the contract for constructing the drain was awarded to the relator for $20,600. The amount apportioned to Blumfield as its part of the cost of the drain was $8,500.48, which amount was properly reported to the board of supervisors, who directed its assessment. The respondent, who is supervisor of Blumfield, declined to spread these taxes, claiming various reasons, going to the validity of the tax, for refusing to do so. The relator made a request of Mr. Gibson, the present drain commissioner of Saginaw county, to take steps to compel respondent to assess these taxes; but Mr. Gibson, for reasons which do not appear on the record, but possibly because his predecessor had laid out the drain, declined to commence litigation, whereupon the relator commenced these proceedings.

A hearing was had before the circuit judge, who found that relator had a contract for the construction of said Cheboygan creek drain; that the board of supervisors of Saginaw county by proper resolution directed the respondent to spread said taxes upon the assessment roll of 1903, and that the respondent had refused to do so. The circuit judge directed the respondent to assess the taxes on the assessment roll of the township of Blumfield for the year 1904.

A number of reasons are urged against the validity of this assessment. The principles involved have been dis-

cussed at length in several recent cases. Without going into details, we shall content ourselves with saying the case is controlled by *Laubach* v. *O'Meara*, 107 Mich. 29; *Scholtz* v. *Smith*, 119 Mich. 634; *Board of State Tax Com'rs* v. *Quinn*, 125 Mich. 128; *Friedman* v. *Horning*, 128 Mich. 606; *Brown* v. *Nehmer*, 128 Mich. 690.

Inasmuch as the time has gone by when the tax could be spread on the 1904 roll, it is directed that the supervisor of the township spread the assessment on the roll for 1905.

Judgment is affirmed.

CARPENTER, MCALVAY, GRANT, and BLAIR, JJ., concurred.

ABLARD *v.* DETROIT UNITED RAILWAY.

139 248
j148 118

1. STREET RAILWAYS—NEGLIGENCE—INJURY TO TRAVELERS.
   A motorman who runs his car on a dark, stormy night twice as fast as, under his own testimony, he should, to enable him to control it and prevent accidents, and depends on his gong to warn travelers, is negligent.

2. SAME—RIGHTS IN HIGHWAY.
   Street-railway companies do not possess an exclusive right to that portion of the highway covered by their tracks, but the ordinary traveler has a right to use every portion of the highway, including the space between the rails, until it becomes necessary for him to yield the track to the cars.

3. SAME—TRAVELERS—NEGLIGENCE.
   In using the track of a street railway, it is the duty of the traveler to maintain such a reasonable watchfulness for the approach of a car as, under the circumstances of the particular case, an ordinarily prudent man would. He is not required to be constantly looking back, but has a right to rely to some extent upon the exercise of proper caution on the part of the motorman in controlling his car in accordance with his legal duty and giving notice of its approach.

4. SAME.

It is not negligent per se for a traveler to drive his team along the track of a street railway in the night-time, though there is room in the street for him to drive off the track out of danger from cars.

5. SAME—INJURIES TO TRAVELER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether plaintiff, injured by a street car approaching from the rear and colliding with his moving van while driving astride the track, was negligent, *held*, properly submitted to the jury.

Error to Wayne; Donovan, J. Submitted January 4, 1905. (Docket No. 6.) Decided March 7, 1905.

Case by Thomas Ablard against the Detroit United Railway for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Corliss, Andrus, Leete & Joslyn, for appellant.

Allan H. Frazer and *William H. Turner*, for appellee.

BLAIR, J. About half past 9 in the evening of June 20, 1902, Thomas Ablard, the plaintiff, was injured on Forest avenue, in the city of Detroit, by a collision between a street car and his moving van. After loading his van with furniture from a house on Mt. Elliott avenue, about half a block north of Forest avenue, plaintiff drove south to Forest avenue, turned west on that street, and drove on west, with the wheels of his van "straddling," the north rail of the north track of defendant's street railway on Forest avenue. When he had just passed Galster street, some 1,900 feet west of Mt. Elliott avenue, his van was struck by a street car approaching from behind on the same track over which he was driving. The defendant maintained double tracks on Forest avenue. On the south track its cars run in an easterly direction. Westbound cars use the north track. Plaintiff was familiar with this street, and with the operation of defendant's

cars thereon, and knew that they ran pretty frequently going both ways. The street was well paved, and was 70 feet wide between the property lines. The space between the north curb and the north rail was 12 feet 8 inches wide. There was an electric tower light a block east of the place of the accident. The night was dark, and it was raining slightly, but where vision was unobscured the plaintiff's van could be seen, according to the estimates of different witnesses, from one to three blocks, or, according to the motorneer, one and one-half blocks away. The van was about 11 feet high, 16 feet 4 inches long, with a top 20 feet long, 6 feet 8 inches wide at the tires of the rear wheels, and 7 feet 8 inches from the outside of the rear hubs. The load of furniture weighed some 3,000 pounds, and prevented the driver from looking back through the van. Plaintiff sat in the middle of the seat when driving, and when he wished to look back had to move to one side.

The only point raised by defendant's counsel in his printed brief and on the oral argument in this court is that upon the record plaintiff was guilty of contributory negligence, and that the court should have directed a verdict for the defendant. We do not think that the court would have been warranted in directing a verdict for the defendant on the ground of plaintiff's contributory negligence under the circumstances of this case.

The plaintiff testified in his own behalf as follows:

"*Q.* Did you in going up Forest look back?
"*A.* We always look back.
"*Mr. Leete:* I move to strike that out.
"*The Court:* Strike it out.
"*A.* Well, I looked back.
"*Q.* Also ahead?
"*A.* Yes, sir.
"*Q.* What do you do also with reference to keeping track of any car coming behind you?
"*A.* We were always watching.
"*Mr. Leete:* I move to strike that out also.

"*The Court:* What you were always doing is not evidence of what you did on that night.

"*Q.* What did you do on this occasion?

"*A.* I was watching for the car.

"*Q.* Did you see this car?

"*A.* No, sir.

"*Q.* When you last looked, will you state whether any car had come around the turn?

"*A.* There was none that I could see.

"*Q.* Did you see any?

"*A.* No, sir, I did not.

"*Q.* Will you state whether you did anything with reference to listening for the bell?

"*A.* Yes, sir; I listened.

"*Q.* Did this motorman sound a bell?

"*A.* I did not hear any. * * *

(On cross-examination.)

"*Q.* Were you singing that night?

"*A.* Just a little bit of a hum that I have.

"*Q.* Singing so the people on the streets in the houses could hear you?

"*A.* No, sir; because I couldn't sing if I wanted to sing. * * *

"*Q.* Now, were you not singing so that you could be heard in the houses near by?

"*A.* Not that I know of. They might have heard me.

"*Q.* You were not thinking of listening for the gong of a car while singing that way?

"*A.* Yes, sir; we were always listening. * * *

"*Q.* And not thinking of listening for any particular alarm that might be given?

"*A.* I was always watching. That was an instinct that we had—that we were always watching.

"*Q.* Well, that singing would not help your hearing.

"*A.* And did not injure. That humming that I was doing would not injure my hearing at all. * * *

"*Q.* What was the reason you could not see it when it was a half block behind you?

"*A.* Because from the last time I looked it came upon me so quick."

Defendant's motorman, Fred Schultz, testified:

"The night I had the accident was a dark, rainy night. The rain came upon my vestibule from the west. It beat

upon the front window. In operating the car before the accident I wiped the window about 10 minutes before on Kercheval avenue. After I had cleaned the window at that time I was running the car. I had no opportunity after that up to the time of the accident to clean the window. The effect of the rain coming on the window of the vestibule was to blur the glass. Going along Forest avenue I was on the north track. I came onto Forest avenue at Mt. Elliott, going towards the west. The night, aside from the rain, was dark. As I got along near Moran street coming towards Galster or Collins, I was operating my car the right way, occupying the vestibule and keeping a lookout. Between those streets I was sounding the gong. The gong is sounded with the foot. I could see, when operating the car going west, under the conditions I have described, ahead of me about 60 or 70 feet. When I first discovered that there was any obstruction on the track, I was about near Galster. Then I noticed a dark object up in front of me. I could not distinguish what it was. It appeared to be about 60 or 70 feet ahead."

Witness further testified that when he was off the car he could see about a block and a half down the street.

"That it took about a minute and a half to run from Mt. Elliott avenue to the place where I struck Mr. Ablard's van. I knew at the time and before that wagons, carriages, and people were liable to be ahead of me at any spot or place on the track. I looked out for them for myself. My life is in my hands. It was raining, and that obscured my vision looking through the glass to a certain extent. I could see about 60 or 70 feet ahead of me. That is all I could see, and after that dark. I could not distinguish whether there was any object on the track or not. The headlight gave a view 20 feet ahead."

Witness further testified that, taking in consideration the distance the car would slide, it required 125 feet in which to stop it.

"*Q.* Now, then, at what rate would you have to run in order to control your car so that you could stop after you saw an object and save it from damages?

"*A.* About seven or eight miles an hour.

"*Q.* So that on this night that you say was dark and

rainy, and the rain on your glass, by running your car seven or eight miles an hour, you could have it under such control that, so far as you could see, you would be able to stop the car, and avoid the collision?

"*A.* Yes, sir.

"*Q.* Why didn't you do that?

"*Mr. Leete:* He has already told you he had a gong for a signal.

"*Q.* And then you preferred simply to rely on your gong?

"*A.* Yes, sir. * * * I was running about ten miles an hour on six points at the time of the collision. There are six points, and I had her up to the limit. That is, at the time I shut her off she was running on six points, and at full speed; the same speed that I would run on a sunshiny day up there."

The motorman testified that he rang the gong, but plaintiff gave evidence tending to show that no gong or bell was rung. If the testimony of the motorman that he ran from Mt. Elliott avenue to the place of the accident, some 1,900 feet, in about a minute and a half, is correct, then his car was moving at the rate of nearly 14½ miles an hour; and some of the witnesses on plaintiff's behalf put the speed at 15 miles or more. It is apparent that at this rate of speed he was running about twice as fast as he should have run, under his own testimony, to enable him to control his car so as to prevent an accident, with the limited vision afforded him. He also makes it clear that he expected to find people upon the track, but relied upon his gong to warn them off the track, knowing that, if they did not heed the warning, he must inevitably collide with them. If he traveled 1,900 feet in a minute and a half, he was traveling about 21 feet a second, and if, therefore, he could only see this large van some 60 or 70 feet ahead of him, the driver of the van would have less than four seconds in which to get off the track, provided the warning was given at the precise instant of discovery. The probability would be infinitely great of a collision under such circumstances, and it is apparent from the testimony

of the motorman himself that his conduct of the car was extremely negligent.

It has been repeatedly held by this court that street-railway companies do not possess an exclusive right to that portion of the highway covered by their tracks, but that the ordinary traveler upon the highway has a right to use every portion of the highway, including the space between the rails, until it becomes necessary for him to yield the track to the cars of the company. In using the track of the street-railway company, however, it is the duty of the traveler to keep in mind the fact that cars will be likely to follow and overtake him, and to maintain such a reasonable watchfulness for the approach of a car as, under the circumstances of the particular case, an ordinarily prudent man would. It was not negligence per se for the plaintiff to drive his team along the track of the street railway in the night-time, although there was room for him to have driven off the track, and where he could not have been struck by an approaching car. Whether the plaintiff looked back for the car as often as a reasonably prudent man should, we think was properly submitted to the jury under the circumstances of this case. We do not think he is required to be constantly looking back, or that he is necessarily negligent for not seeing the car. He has a right to rely to some extent upon the exercise of proper caution on the part of the motorman in controlling his car in accordance with his legal duty, and giving notice of its approach.

It was the duty of the motorneer to have the car under such control as to admit of its being stopped after he became able to discover objects on the track, and before a collision with such objects should occur, and it was his duty to give timely warning of his approach.

If the motorneer had performed his plain legal duty, under the decisions of this court, he would have been able, after discovering plaintiff's position, to have stopped his car and avoided a collision. He chose, however, to run at such a rate of speed, when his vision was limited by

the darkness and the rain, that, as testified by himself and uncontestably shown by the result, he could not stop his car in time to avoid the collision.

We do not think it can be said, under such circumstances, that plaintiff was bound to take into consideration that the car which struck him might be run at such a reckless rate of speed; and the jury might well have found that, if the car had been run at the rate of speed at which the motorman said he could control it in time to prevent an accident, its approach would have been observed by plaintiff. Plaintiff testified that he looked for the car, and that the last time he looked, no car was in sight, and that he was constantly watching and listening for its approach, and that the only reason he did not see it in time was because it came so quick after he looked the last time. We think that the question of contributory negligence was properly submitted to the jury. *Rouse* v. *Railway Co.*, 128 Mich. 149, 135 Mich. 545, 547; *La Pontney* v. *Cartage Co.*, 116 Mich. 514; *Manor* v. *Railway Co.*, 118 Mich. 1; *Mertz* v. *Railway*, 125 Mich. 11; *Tunison* v. *Weadock*, 130 Mich. 141; *Bedell* v. *Railway*, 131 Mich. 668; *Mahoney* v. *Railway Co.*, 110 Cal. 471; *Chauvin* v. *Railway*, 135 Mich. 85 (97 N. W. 160).

The judgment is affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and HOOKER, JJ., concurred.

BRIGHAM *v.* REAU.

PHEATT *v.* SAME.

139 256
145 301

1. EVIDENCE—TITLE TO LAND—PAROL TESTIMONY.
   Parol evidence that defendants' ancestor deeded the premises in suit to defendants, and an unprobated will of such ancestor making no mention of the property, are not admissible to prove title in defendants.
2. ADVERSE POSSESSION—CHARACTER OF POSSESSION.
   Entry under a deed conveying land described as a single tract gives possession coextensive with the deed.
3. TENANTS IN COMMON—OUSTER—ADVERSE POSSESSION.
   Where a tenant in common conveys the entirety of the property by warranty deed to bona fide purchasers, who go into possession after an examination of the title, and then by like deed convey to others, who go into possession, there is an ouster of the cotenants sufficient to set the statute of limitations in motion as a basis for title by adverse possession.
4. SAME—EVIDENCE.
   Evidence in a suit to quiet title examined, and *held*, to show title by adverse possession.

Appeal from Monroe; Lockwood, J. Submitted January 6, 1905. (Docket No. 24.) Decided March 7, 1905.

Bills by Charles O. Brigham and Sarah C. Pheatt and others against Isadore Reau and others to quiet title to land and to restrain certain actions of ejectment. From decrees for complainants, defendants appeal. Affirmed.

De Forest Paine, for complainants.

Willis Baldwin and *Thornton Dixon*, for appellants.

MCALVAY, J. In these suits complainants filed bills in equity against defendants to quiet title and to restrain an ejectment suit brought by defendant Isadore Reau against the Erie Shooting Club, complainants' tenant, to recover an undivided one-tenth interest in a part of the land in controversy. The cases were heard on pleadings

and proofs taken in open court. The testimony was taken in the Brigham case, and by agreement is accepted as the testimony in the Pheatt case. From decrees entered in both cases in favor of complainants granting the relief prayed for, some of the many defendants have appealed.

The land in litigation is described as the east three-quarters of the north half of the southwest quarter, and the northwest quarter of the southeast quarter, of section 15, township eight south, of range eight east, in Monroe county, containing about 100 acres. The north half of this land is the subject of the suit brought by Pheatt and others, and the south half is the subject of the suit brought by Brigham. John B. Reau is the common grantor and source of the record title of all the parties to these suits. John B. Reau acquired title to this property in 1821 and 1853. He died in 1873, without having parted with the title, as far as appears from the records of Monroe county, although it is claimed by complainants that he deeded the property in dispute to his daughters. Ten children survived him, one of whom died without issue. Alexander Knaggs, through whom title of record comes to complainants, acquired title at least from three of the surviving daughters, amounting to a one-third interest. The defendants, except the Erie Shooting Club, all claim as heirs or through heirs of the common grantor. It will not be necessary to designate the relationship of these numerous descendants to their ancestor, nor the share in the premises claimed by each. Suffice it to say that his heirs emulated with success the example of their sire as to the number of children in each family, and altogether claim to represent an undivided two-thirds of the title to the lands. All defendants have not appealed from the decrees of the court below. Those who claim to represent an undivided 34-63 interest are before this court.

On September 7, 1874, two of the daughters of the common grantor, Victoria and Margaret, and the children of a third daughter, Matilda, then deceased, describing themselves as "heirs of John B. Reau," conveyed by quit-claim to Alexander Knaggs the land in question, de-

scribed as the north part of the east three-quarters of the southwest quarter, and the north part of the northeast quarter of the southeast quarter, of section 15, in township eight south, of range eight east, and also by metes and bounds as follows: "Bounded on the north by the north half of said section 15, east by the east half of the southeast quarter of said section, south by land of Samuel Mulholland, and west by the west quarter of southwest quarter of said section, owned by Francis Rowe, containing ninty-nine acres, more or less;" and said deed contained the following recital: "This deed is given to correct error in deed from the parties of the first part to said party of the second part, dated April 19, 1861, and recorded in the office of register of deeds for said county in Book 62, folio 81." This deed to Knaggs was duly recorded September 19, 1874. It is claimed by complainants that the daughter of John B. Reau, Julia Pettee, through whom defendant Baldwin claims title, joined in the old deed to Knaggs, which was corrected by the deed of September 7, 1874. Knaggs and (second) wife, by warranty deed June 23, 1877, consideration $800, conveyed the north half, or 50 acres, of these premises to Oliver Hall, and on the same date, by warranty deed, consideration $800, conveyed the south half thereof to Charles Dohm. In this deed, by mistake, the whole of the northwest quarter of the southeast quarter of section 15 was conveyed; but Dohm afterwards deeded the north half to Hall. Both of these deeds were promptly recorded. Hall and wife, who claimed to own the fee, by warranty deed, consideration $1,500, on November 28, 1879, conveyed the said north half of these premises to Zebulon C. Pheatt, now deceased.

The complainants in the Pheatt case are the widow and sole heirs of said Zebulon C. Pheatt. Charles Dohm and wife, who claimed to own the fee, by warranty deed, consideration $1,400, conveyed the south half of said premises to Mary L. Brigham December 3, 1879, who, May 15, 1901, by warranty deed, consideration $1, conveyed the same to her husband, Charles O. Brigham, complainant.

Brigham and Pheatt in 1879 went into possession of the lands purchased by them and made large improvements. They built a dyke, cut a ditch, put up a windmill, and planted a peach orchard on the higher land. As to whether this was an absolute possession of the entire premises will be considered later. It is conceded in both cases that the possession of complainants as to all but the N. W. ¼ of the S. E. ¼ of section 15 has been adverse as to all the defendants, and all claim to the other description is abandoned.

The contention of complainants is that possession of the entire premises by them and their grantors since September 7, 1874, has been adverse, hostile, and exclusive, visible and notorious.

A claim is also made that the common grantor deeded these premises to his daughters, who conveyed to Alexander Knaggs; and a paper purporting to be a last will and testament of John B. Reau, which disposed of other lands, and not mentioning these, and some other writings, were offered to sustain such claim. For the purpose of showing title such proof was not competent. Other evidence, however, showing how this land was treated by the members of this family, and their understanding as to whom it belonged, was properly considered as bearing upon their subsequent conduct.

Brigham and Pheatt were charter members of the Bay Pointe Shooting Club, organized in March, 1879, and upon its organization leased the 40 acres now in dispute to the club, which at once went into possession and placed signs on the northwest corner and down the west side, reading as follows:

> LANDS OF THE
> BAY POINTE SHOOTING CLUB
> TRESPASSERS WILL BE PROSECUTED.
> A. J. KEENEY, President.

The Erie Shooting Club succeeded to the possession of the Bay Pointe Club, and like signs were posted by it, and it has continued its possession up to the present time.

We do not think that it appears from the record that title to this land was in the daughters of John B. Reau. The bills of complaint do not plant the case upon such title based upon a lost deed, nor is there sufficient evidence to establish a lost instrument conveying the property to them. The cases must be determined, then, upon the nature of the possession of complainants.

Defendants contend that complainants were in possession as tenants in common with them. The answers of all of the defendants to the bills of complaint in both cases are based solely upon the ground of ownership of an interest in the land and joint occupancy of the same with complainants, and claiming that complainants' remedy is at law.

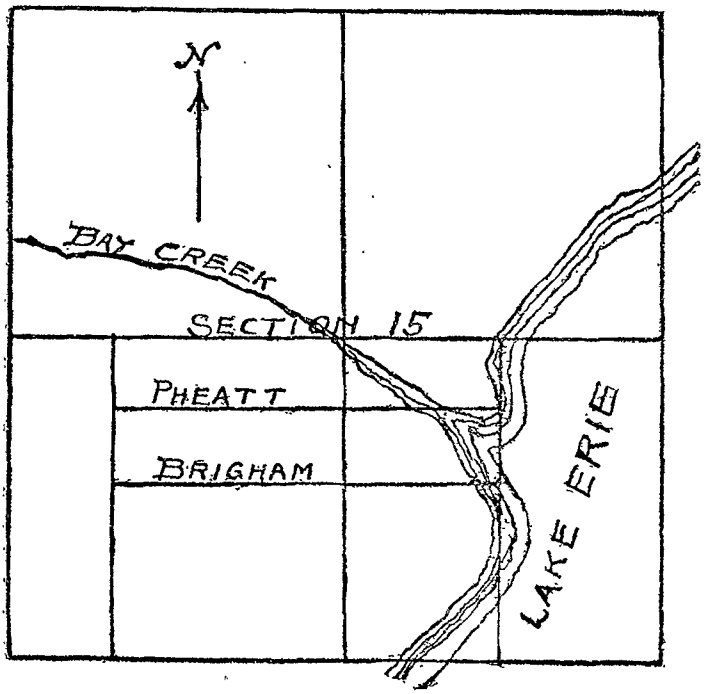
The record shows that Knaggs went into possession under the deed of September 7, 1874, about the beginning of the year 1877, and cultivated part of these premises, and pastured his cattle on the 40 acres in dispute. It is also shown that this deed to him was to correct an error in a deed from the same parties to him, dated April 19, 1861. It does not appear that under the old deed he was ever in actual possession. Knaggs deeded to Dohm and Hall, and they to complainants, so that whether or not the possession of complainants has been exclusive and hostile as to defendants, it has been actual, continuous, and open.

The question is raised as to whether the possession of the complainants and their grantors has extended to the 40 acres in dispute, and whether such possession has been exclusive and hostile. The description in the deed to Knaggs, September 7, 1874, which can be considered good as conveying all of this land, is a description by metes and bounds. The description by sectional subdivisions is indefinite and uncertain. It is as follows:

"The north part of the east three-quarters of the southwest quarter, and the north part of the northeast quarter of the southeast quarter of section 15."

The land could not be surveyed or set off by this description, and no part of the northeast quarter of the northeast quarter of this section is claimed by any of the parties to these suits. The portion in dispute is the northwest quarter of the southeast quarter of section 15. The other description is as follows:

"Bounded on the north by the north half of said section 15, east by the east half of the southeast quarter of said section, south by land of Samuel Mulholland, and west by the west quarter of the southwest quarter of said section, owned by Francis Rowe, containing 99 acres, more or less."



The accompanying diagram of the section, which is a copy of a part of an exhibit in the case, and admitted to be a correct outline of the premises, if used in applying this description, shows that the premises are described

with reasonable certainty, except on the south side, which requires extraneous evidence to show the Samuel Mulholland land. The land came to Knaggs as one description. He occupied and cultivated that part in the southwest quarter of the section. He deeded to Hall and Dohm, using sectional subdivisions to describe the land. These descriptions were used by them two years later, when they deeded to Pheatt and Brigham. They bought the lands for the special purpose of improving them. This was a joint enterprise while it continued. The description in dispute was leased by them in 1879 to the Bay Pointe Shooting Club, which occupied until 1889, when the Erie Shooting Club succeeded by lease to its rights. The possession and occupancy by Knaggs under this deed and the proofs in the case must be considered as a possession and occupancy of the whole premises conveyed to him by one description, and, as far as his possession is concerned, it is not necessary to invoke or discuss the rule of constructive possession. The premises were described in his deed as a single tract, and his entry, when made, gave him possession coextensive with the deed. After the transfers were made to Dohm and Hall, the lands were farmed and pastured until the purchase by Pheatt and Brigham. They exercised possession over the whole property, actually cultivating the larger piece and renting the disputed portion to the shooting clubs. The possession of these clubs under them was of such a nature that no constructive possession need be claimed. If it were necessary, the deed to each of the 50 acres of land, as two distinct parcels, where it appears they had theretofore been used together for farming purposes in raising crops and pasturing cattle, and were adapted to such uses, the entry upon and improving the larger portion would be constructive possession of the other.

The defendants claim that the statute of limitations has not run against them; that the possession of complainants has been their possession. It is probably true that the possession of Knaggs as against his children by

his first wife, who was one of the heirs of John B. Reau, would not be adverse; but from the proofs in this case we hold that Dohm and Hall, being bona fide purchasers by warranty deeds conveying the entirety of the premises to them for value, going into possession as they did after examining the title, under those deeds claiming to be sole owners of the fee, and transferring the title by like deeds to Pheatt and Brigham for valuable consideration after they had been diligent in examining the title, transferred to Pheatt and Brigham a title and possession upon which they might rely and assert as the foundation of an adverse holding against these defendants, and under which the statute would begin to run. We hold that under the circumstances of this case the entry of Pheatt and Brigham in December, 1879, operated as an ouster of all cotenants. They went into possession as strangers to the interests of the other tenants, and under claims which denied their existence and validity. *Campau* v. *Dubois*, 39 Mich. 274; *Sands* v. *Davis*, 40 Mich. 14; *Watkins* v. *Green*, 101 Mich. 493; *Fuller* v. *Swensberg*, 106 Mich. 305.

The statute of limitations having begun to run against defendants as cotenants of complainants at least as early as December, 1879, unless the same has been suspended by actual entry on their part or acknowledgment of their claims by complainants, sufficient time had elapsed prior to the ejectment suit by Isadore Reau and the filing of the bills of complaint in these cases to bar defendants' rights in the premises. The proofs are quite extensive upon this question. As a matter of law, if the acts and conduct of any of these defendants amounted to an entry into possession of these premises, and an occupation thereof jointly with complainants, such entry and possession would suspend the running of the statute, and would inure to the benefit of all tenants in common. A very careful examination of all evidence does not satisfy us that any such entry or joint possession has been shown. The discovery that John B. Reau had not parted with his title was in the nature of a surprise to his sons Christ and Francis B.

They took no affirmative action, and in leasing assumed no responsibility as owners. The sister, Julia B. Pettee, 84 years old at the time of hearing in the court below, had joined in the deed of 1861 to Alexander Knaggs. She testifies that all the lands between the portions given to Christ and Francis B. Reau and the lake belonged to the girls. When the lands were divided it was given to them by their father as their share. The presumption is strong that this was with the knowledge of the whole family. She refused to sell any land included in the transfer to Knaggs, but was induced, upon certain representations made by defendant La Pointe, to transfer part of the land described in the deed to Knaggs to defendant Baldwin. All of these defendants had resided for years contiguous to, or in the vicinity of, this land. All knew of the Pheatt and Brigham occupancy of the larger piece. The occupancy by the shooting clubs for all the years since 1879 by posting of notices around this land and keeping watchmen was open, adverse, and inconsistent with the rights of defendants. We agree with the learned circuit judge that the evidence in the case clearly establishes title in the complainants and their grantors by adverse possession.

The decrees of the court below in both cases are affirmed, with costs.

MOORE, C. J., and GRANT, BLAIR, and HOOKER, JJ., concurred.

STONE *v.* PONTIAC, OXFORD & NORTHERN RAILROAD CO.

139 265
140 587
139 265
e144 272

1. EQUITY—PARTIES—STOCKHOLDERS' BILL.
   Stockholders who are alleged to have participated in the wrongful acts complained of are proper parties to a stockholders' bill against the corporation and its officers and stockholders, though no specific relief against them is prayed.

2. SAME—MULTIFARIOUSNESS—MISJOINDER OF COMPLAINANTS.
   A stockholders' bill, alleging violation of a contract with complainant S., and praying that one of the officers be required to account for official misconduct, that the officers refund certain unauthorized salaries, that certain unauthorized dividends be refunded, that certain acts of the directors be set aside, and that a receiver be appointed, is not multifarious because it joins with S. certain stockholders whose interests in the corporation were acquired after the making of such contract with S.

3. SAME—BILLS—MULTIFARIOUSNESS—MATTERS CONSIDERED.
   Though the prayer of a bill is not controlling in determining the question of multifariousness, it is to be considered.

4. SAME—REMEDY AT LAW.
   That the violation of a contract with complainant is one of the wrongful acts complained of does not relegate complainants to their remedy at law.

5. SAME—MULTIFARIOUSNESS.
   A bill is not rendered multifarious by introducing averments of fact and a prayer for relief based thereon to which complainant is not entitled.

Appeal from Oakland; Smith, J. Submitted January 17, 1905. (Docket No. 59.) Decided March 7, 1905.

Bill by Charles H. Stone, individually and as executor of the last will and testament of Augusta W. Stone, deceased, and others, against the Pontiac, Oxford & Northern Railroad Company and others for an accounting, and for the appointment of a receiver. From an order overruling demurrers, defendants appeal. Affirmed.

Angell, Boynton, McMillan & Bodman (*Howard Mansfield*, of counsel), for complainants.

John H. Patterson and *Henry M. Campbell*, for defendants.

MONTGOMERY, J. This is an appeal from an order of the circuit court, in chancery, of Oakland county, overruling demurrers separately by the railroad company and by the individual defendants Sanford and Carroll.

It is difficult to state the contents of the bill within reasonable limits without incurring the risk of omitting matter deemed material by counsel, but we think the salient features may be stated as follows: Complainants are stockholders in the defendant corporation. All the stock held by them was derived by complainant Stone, either as an individual or in a representative capacity, by virtue of a contract signed June 19, 1902, by all of the defendants except Margaret Porter, W. C. Sanford, and Frank H. Carroll. This contract provided, amongst other things, that 4,000 shares of stock in defendant company should be placed in escrow with a trust company named, and that unless prior to the 5th of January, 1903, the sum of $280,000 should be paid to complainant Stone, the stock should be delivered to him, and that in the meantime no act should be committed which would impair the value of the stock. The bill alleges unlawful and unauthorized acts of the defendant Hugh Porter and other defendants which in this interim did impair the value of the stock. The bill also alleges prior and subsequent maladministration of the affairs of the company by defendant. The bill prays that defendant Porter account for his official misconduct, that defendants Porter and O'Brien be required to refund certain unauthorized salaries drawn by them under the pretended authority of a vote of the board of directors which was without validity, that the amount of a dividend declared without lawful authority be refunded, that certain illegal acts of the board of directors be set aside, and that

the affairs of the corporation be wound up through a receiver. There was also a prayer for general relief.

The defendants Sanford and Carroll interposed a separate demurrer, on the ground that it appears by the bill that they have no interest in the matters set forth in the bill. The demurrer of the railroad company rests upon two grounds: *First*, that the bill is multifarious; and, *second*, that complainants have an adequate remedy at law.

As to the demurrer of the defendants Sanford and Carroll, the bill alleges their participation in the wrongful acts charged, and, notwithstanding the fact that no specific relief is charged against them, we think they are proper parties to the bill.

The claim is made that there is a misjoinder of complainants, inasmuch as complainant Stone seeks relief for the violation of the agreement of June 19, 1902, and complainants Barbour and Sells rest their claims on their ownership of stock acquired January 5, 1903. No different question is presented by this contention than that which is involved in the main issue, which is whether this is a bill to enforce the contract of June 19, 1902, in any such sense as is claimed by defendant. If such is the purpose of the suit, it may follow that the bill is multifarious, and that the demurrer should be sustained on this ground. We are, however, upon full consideration, agreed that the bill should not be so read.

It is true the contract is set out, and in the view of complainants this was certainly proper, if not essential, as showing the relations of complainants to the stock, and as showing that complainants from the date of such contract had an equitable interest in the 4,000 shares of stock, or, at the least, that they occupied such a position with reference thereto that defendants are not in position to assert that the present holders of that stock are estopped from asserting the misconduct of defendants and predicating a claim for relief thereon. That the averments of the contract are introduced for this purpose is evidenced by the

prayer, and, while the prayer is not controlling in determining the question of multifariousness, it is to be considered. 14 Enc. Pl. & Prac. 203.

The same considerations furnish an answer to the contention that complainants should seek their remedy at law.

It is also contended that the bill challenges transactions which preceded the settlement of June 19, 1902, and which were adjusted by that settlement; that, if complainants seek to occupy the position of stockholders, they must accept the condition of the company as it existed at that time; and that the introduction of these averments renders the bill multifarious.

If the defendant is right in asserting that complainants are not in position to question the dealings of the individual defendants with the corporation which occurred prior to June, 1902 (a point which we do not decide), the bill is not rendered multifarious by introducing such averments, or prayer for relief to which complainants are not entitled. 1 Daniell's Chancery Pl. & Prac. 346, note; 14 Enc. Pl. & Prac. 205.

Our conclusion is that the demurrers were properly overruled. The order will be affirmed, with costs, and the cause remanded.

McALVAY, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

CUMMINGS *v.* DIXON.

139 269
149 317

1. MUNICIPAL CORPORATIONS—STREETS—CHANGE IN GRADE—DAMAGES TO ADJACENT PROPERTY.

139 269
e156 512

In the absence of a statute giving a right to recover therefor, damages suffered by an adjacent property owner because of a change in the grade of a street cannot be recovered.

2. SAME.

Under the general village law (§§ 2783, 2784, 1 Comp. Laws), a property owner is entitled to damages for the change in a street grade only when the prior grade in conformity to which his improvements were made was established by competent municipal authority in the prescribed manner.[1]

Error to Montcalm; Davis, J. Submitted January 18, 1905. (Docket No. 72.) Decided March 7, 1905.

Trespass quare clausum fregit by Edward C. Cummings against Thomas T. Dixon and another. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

Nims, Hoyt, Erwin, Sessions & Vanderwerp (*L. A. Lyon*, of counsel), for appellant.

A. B. Goodwin and *Chaddock & Scully*, for appellees.

MONTGOMERY, J. This case presents a question of great importance to municipalities. The action is brought in trespass against the president and street commissioner of the village of Carson City to recover damages sustained by plaintiff by excavations made in Main street, in said village, to make the grade conform to the grade established by the village authorities by regular action taken

[1] As to damages to abutting owner by first grading of street, including question what is regarded as establishing a grade, see note to *Hickman* v. *Kansas City*, (Mo.) 23 L. R. A. 658.

in the year 1900. The plaintiff's contention is that the action taken to establish this grade was unlawful, and wholly ineffectual, for the reason that it constituted an attempt to change a previously established grade without first making compensation to the plaintiff, who had made valuable improvements upon his property relying upon the existing grade.

The facts are not in dispute. The street in question had existed as a highway for many years. In 1887 the village of Carson City was incorporated. The road had been previously worked by township authorities. In 1887–88, after the incorporation of the village, some steps were taken looking to the establishment of a grade, but these proceedings are conceded to have been irregular, and to have lacked both formality and finality. A curb line was established, and a curb built; the street was worked and graded; but the requirements of the charter were not observed. The plaintiff thereafter built a building upon his property, and claims to have suffered damages by reason of the grade of 1900 having provided for a cut in front of his premises of from 12 to 20 inches.

By the terms of Act No. 3, Pub. Acts 1895, providing for the incorporation of villages, all villages theretofore incorporated under general or special laws were reincorporated under said act of 1895. Section 15, of chapter 7, of this act, being 1 Comp. Laws, § 2783, reads as follows:

"The council shall have authority to determine and establish the grade of all streets, avenues, alleys, and public grounds within the village, and to require improvements and buildings, adjacent to, or abutting upon, such streets, alleys, or grounds to be made and constructed in conformity with such grade; and the council may change or alter the grade of any street, alley, or public ground, or of any part thereof whenever in their opinion the public convenience will be promoted thereby. Whenever a grade shall be established or altered a record and diagram thereof shall be made in the book of street records in the office of the clerk."

The succeeding section provides:

"Whenever the grade of any street or sidewalk shall have been heretofore or shall hereafter be established, and improvements shall thereafter be made by the owner or occupant of the adjacent property in conformity to such grade, such grade shall not be changed without compensation to the owner for all damages to such property resulting therefrom."

The question presented is, When is a grade to be said to have been established, within the meaning of this last section? The contention of the plaintiff is that a grade is established when, by long user, it has become fixed, and when improvements have been made by the village authorities on a certain grade. The defendant, on the other hand, contends that, before such grade can be said to be established, legal action by the constituted authorities must have been had. If acting under the present law, this action must have been by the common council; if under the previous charter, equally formal action was required.

The question presented is not free from difficulty, nor can it be said that authority is wholly lacking to sustain plaintiff's contention; but in construing and applying such authorities care must be taken to consider the peculiar wording of the statutes under consideration in each, as well as the attitude of the court upon the question of liability of the municipality for a change of grade in the absence of statute.

It is to be kept in mind that it is fully settled by our adjudications that, in the absence of a statute giving a right to recover therefor, damages suffered by an adjacent owner by reason of a change in grade cannot be recovered for. *City of Pontiac* v. *Carter*, 32 Mich. 164. Cases which make for a different rule cannot be of aid in solving the question before us. Of this class are *Smith* v. *Commissioners*, 50 Ohio St. 628, and *Borough of New Brighton* v. *Presbyterian Church*, 96 Pa. St. 331; the former having been determined upon common-law principles and being plainly in conflict with our own decisions, and the latter having been rested upon the terms of the

State Constitution. In *McGar* v. *Borough of Bristol*, 71 Conn. 652, it was held that a change from the natural grade was a change from a "well-settled" grade. The case does not deal with the question before us. *Folmsbee* v. *City of Amsterdam*, 142 N. Y. 118, sustains the plaintiff's contention, and holds that a grade may be established within the meaning of a statute similar to ours by user. On the other hand, in the well-reasoned case of *Kepple* v. *City of Keokuk*, 61 Iowa, 653, a provision in all essential particulars corresponding to our statute was construed, and it was held that the word "established" should be construed with reference to the well-understood manner in which the grade of streets is established.

It is pointed out that when the statute is followed the owner of property may, by reference to the record, ascertain the grade, and know where the surface will be when brought to that grade, and build with reference to it. In *City of Valparaiso* v. *Adams*, 123 Ind. 250, a statute was considered which gave a right to damages when there was a change of grade after the "city authorities have once established the grade." It was held that until proceedings are had by the common council directing that the grade of a certain street be established, or that the grade of a street already established be approved and adopted in some authoritative way, it cannot be decreed that the city authorities have ever established the grade of the street within the meaning of the statute; citing *Mattingly* v. *City of Plymouth*, 100 Ind. 545. We think the general understanding accords with the holding in *Kepple* v. *City of Keokuk*, supra. The establishment of a grade of a street takes place when corporate action is had to that end, and this usually—if not necessarily—is a matter of definite record. *Larned* v. *Briscoe*, 62 Mich. 393. The establishment of the grade may, and usually does, precede actual grading of the street, and it is a fact of some significance that the adjacent owner may make his improvements to conform to the established grade at once it is established. The term is to be construed in connection with the preceding section, and with reference to the au-

thority vested in the council under its prior charter. So construed, we are satisfied that the legislature did not intend to so far depart from the common law as to give a right to recover damages except in case of a change from a grade deliberately established by competent municipal authority in the prescribed manner. The circuit judge held this opinion, and directed a verdict for defendant. The judgment entered on that verdict is affirmed.

MCALVAY, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

---

139 273
e152 668

LEVER v. GRANT.

1. DEDICATION—INTENT—RESERVATIONS.
   Land was platted along a street of half width which had been dedicated by the owner of the adjoining plat, the dedicator reserving as a private right of way the strip necessary to complete the street of full width. The plat showed the strip marked "Private Way." The circumstances indicated an intention to reserve title to the strip in the dedicator in order that he might receive compensation when it should be condemned for widening the street. *Held*, that the fee to the strip was reserved to the maker of the plat and the lot owners were given access to the street over it.
2. TAXATION—APPURTENANCES—OWNER OF FEE.
   The fee of a strip of land which the maker of a plat reserves as a private way is properly assessable to him, though the lot owners have a right of way over it as an appurtenance to their lots which is assessed to them as a part of the value of their lots.
3. EASEMENTS—TERMINATION—SALE OF SERVIENT ESTATE.
   An easement appurtenant to certain lots on a plat is terminated by a sale by the plat maker, before sale of the lots, of his interest in the servient estate.

ON MOTION FOR REHEARING.

TAXATION—DEED—EFFECT.
   Under section 173 of the charter of Detroit (1893), a tax deed is prima facie evidence of the regularity of all the tax proceedings.

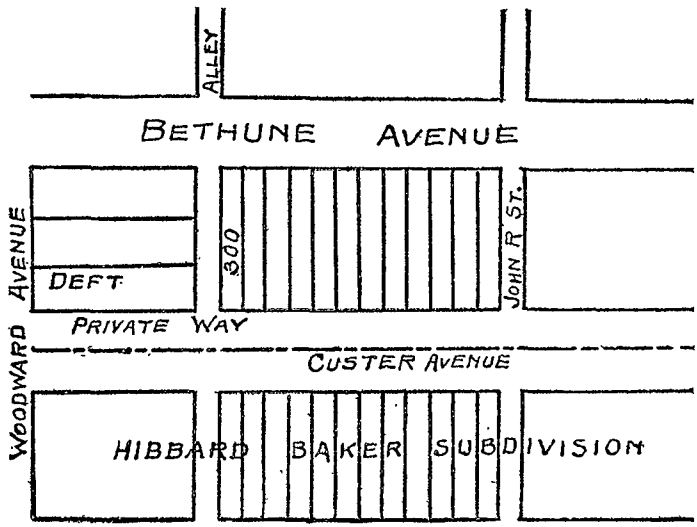
Appeal from Wayne; Mandell, J. Submitted February 9, 1905. (Docket No. 130.) Decided March 7, 1905. Rehearing denied June 8, 1905.

Bill by Elmer T. Lever against Archibald Grant to restrain an obstruction of an alleged right of way. From a decree for complainant, defendant appeals. Reversed.

John W. McGrath, for complainant.

John J. & Robert T. Speed, for defendant.

HOOKER, J. On February 21, 1884, one Hibbard Baker platted certain land including a public street called "Custer Avenue," which was upon the extreme north side of the plat. It was only one-half of the width of the street at other points. Subsequently, and upon March 27, 1885, Hamlin & Brown, owners of land north of and bordering upon this portion of Custer avenue, made a plat of such land. The diagram includes so much of both plats as is necessary to show the situation:



The dedication of the Hamlin & Brown plat was shown by the following language upon the plat:

"And we do hereby dedicate to the perpetual use of the public the streets and alleys as shown thereon, reserving to ourselves, our heirs and assigns, the reversion or reversions thereof whenever discontinued by law, excepting the north 30 feet of Custer avenue, which we reserve as a private right of way. Witness," etc.

Sales were made by Hamlin & Brown of many of the lots in their plat before 1890, and most of the others afterwards. The plat shows a strip of ground 30 feet wide adjoining Custer avenue on the north, marked "Private Way." The three most westerly lots front Woodward avenue and the southerly one is owned by the defendant, while the complainant owns the first lot east of an alley, by which it is separated from defendant's parcel. The defendant has fenced in that portion of the land marked "Private Way" which lies south of his lot, and complainant's bill is filed to compel him to remove this fence. Complainant prevailed in the circuit court, and defendant has appealed.

The defendant claims to own the parcel inclosed in fee. It was assessed for city taxes for the year 1890, and duly sold and bid in by defendant for delinquent taxes for that year, and defendant obtained a city tax lease thereof for 99 years. Again, on the 13th of March, 1894, Brown conveyed to Hamlin this parcel, and he in turn deeded it to the defendant on the same day. Immediately thereafter defendant fenced the land.

Complainant's parcel was deeded to him as lot 300, according to the plat, by a grantee of Hamlin & Brown, who bought of them in 1899. The complainant claims that the effect of the plat was the dedication of this private right of way, throughout its entire length, as an appurtenance of the several lots in the addition. Defendant, on the other hand, contends that the private way was reserved in fee to the persons who made the plat, and that he has acquired their title through the tax deed and other deeds referred to. At the time the Hamlin & Brown plat was made, the land proposed to be platted was bounded

upon the south by a street (Custer avenue) of half width, dedicated the year before by the Hibbard Baker plat. To make it a street of the usual width, it was necessary to take land belonging to Hamlin & Brown. Apparently they were unwilling to dedicate this land, perhaps for the reason that it would have been without compensation. The plat shows what they did, and we must determine its effect upon the title.

It is a reasonable supposition that there was an intention to keep this strip of land with a view to its ultimate condemnation for widening Custer avenue. If this is so, it is reasonable to say that they undertook to reserve this title to themselves, so that they would receive the compensation when it should be condemned. If it was intended to convey the fee to the prospective purchasers of the lots, the proprietors might as well have dedicated the street to the public, for it is improbable that they reserved a right of way for themselves merely, when a public street would do as well, or that they intended to convey a fee to subsequent purchasers as a gratuity. We are therefore of the opinion that this plat indicates a reservation of the title in fee to the makers of the plat, and that it was the intention of the owners to give the lot owners access to Custer avenue over this land. It may be that its effect was to give all purchasers of lots a right of way over the entire strip. That, however, is not an important question here, for it cannot affect the result. The strip being reserved in fee by the owners of the land, it was subject to taxation like other land. The plat shows that it was not a part of the respective lots. At the most it was an easement appurtenant to them. If it be said that such appurtenance was included in the assessment of a lot, it still left the fee to be assessed to the true owner and this was presumably done. Being sold for taxes to the defendant, he acquired all of the estate that was assessed, if the proceedings were regular. They are not before us, and we do not pass upon the effect of this tax deed, it being unnecessary to a disposition of the cause.

It clearly appears that in 1894, while Hamlin & Brown still owned the premises now claimed by the complainant, they sold to the defendant's grantor their interest in the parcel involved here. This must have deprived the lots then owned by them of an appurtenant easement. If not, it is not apparent how it could be done. We conclude, therefore, that, although purchasers of lots from Hamlin might, under the terms of their deeds, have an easement over this entire strip (which we do not decide) by reason of the sale with reference to the plat, such right would depend upon the grantors' ability to convey such easement, which they could not do in this case, because they had already parted with all interest in the land.

We are therefore constrained to reverse the decree and dismiss complainant's bill, with costs of both courts.

MOORE, C. J., and CARPENTER, MCALVAY, and GRANT, JJ., concurred.

ON MOTION FOR REHEARING.

HOOKER, J. This cause was decided upon the assumption that the complainant's rights to relief (if he would otherwise have had any) were cut off by a deed from his grantor prior to his conveyance to him. It now appears by stipulation of counsel that said deed was subsequent to the time that he acquired title. A rehearing is asked in view of this correction. This makes it necessary to consider the effect of the tax deed under which the defendant claims title. No question is raised over the regularity of the tax proceedings, which are not included in the record. But the tax deed, which was offered in evidence, is prima facie evidence of the regularity of all of the proceedings (see Detroit charter [1893], § 173), and we must hold therefore that the complainant is not entitled to the relief asked in his bill.

The rehearing is denied.

MOORE, C. J., and CARPENTER, MCALVAY, and GRANT, JJ., concurred.

139 278
d156 320

FROHLICH *v.* BEECHER.

MECHANICS' LIENS — STATEMENT OF CLAIM — FAILURE TO FURNISH—FORFEITURE.

A lienor who fails to furnish the owner with the statement of his claim, provided by section 10717, 3 Comp. Laws, within five days after demand, forfeits his lien, though the owner is not prejudiced.

Appeal from Wayne; Donovan, J. Submitted February 10, 1905. (Docket No. 140.) Decided March 7, 1905.

Bill by Edward Frohlich against George L. Beecher and Charles B. Ward to enforce a mechanic's lien. From a decree dismissing the bill, complainant appeals. Affirmed.

The object of this bill is to enforce a mechanic's lien, under chapter 296, 3 Comp. Laws. Defendant Beecher was the owner of the premises on which the building was erected. He made a contract with defendant Ward, giving him (Ward) the exclusive control of the lands, with the privilege of selling them and erecting such a house thereon as the purchaser might require. The contract covered other lots besides the one here in controversy. Beecher was to advance money at his own discretion for the purpose of building the house. At the time the lien was filed, Ward had assigned to Beecher all his right and interest in the property. Complainant had a contract with Ward "to get out the sash, doors, and inside finish according to specifications and instructions given by him, and was to receive a lump price for the entire work covered by the bid." Subsequently Ward gave complainant an order for glass, and another for paint. Ward became embarrassed financially, and temporarily dis-

appeared. Complainant then filed a claim of lien. Immediately after serving notice upon the defendant Beecher of his claim of lien, Mr. Beecher, through his attorneys, demanded an itemized account, under section 8 of the lien law (section 10717, 3 Comp. Laws). No itemized account was received until about 10 months afterwards. Issue was duly joined, proofs taken, and the petition dismissed.

Wilkinson & Younglove, for complainant.

Gray & Gray, for defendant Beecher.

GRANT, J. (*after stating the facts*). Section 8, above mentioned, provides:

"Each person claiming a lien as aforesaid shall, from time to time, whenever required by such owner, part owner, or lessee, or his agent, and within five days from demand thereof, furnish such person demanding the same, a written statement of the amount of work and materials furnished to date of statement, and then unpaid, as nearly as can then be ascertained, under penalty of a forfeiture of his lien."

It seems conceded that the above clause has never been construed by this court. The lien is created solely by the statute, and there must be a substantial compliance with its provisions in order to secure and maintain it. The law expressly requires the claimant to furnish a written statement of the work and materials which are the basis of his claim within five days after demand, and upon failure to serve such statement the lien is lost. The legislature can attach any requirements and provide any penalties it chooses to statutes of this character. It has very properly and in unmistakable language required the service of this written statement when demanded. In equally unmistakable language it has provided that the penalty for failure shall be the loss of the lien. It is no reply to this to say that the landowner has not been prejudiced by the failure

to comply with the statute. The claimant cannot excuse his failure to comply with the plain requirements of the law by raising that issue for the court to determine. The law does not provide for any such issue. The case is within the principles of *Sterner* v. *Haas*, 108 Mich. 488.

The decree is affirmed, with costs.

CARPENTER, MCALVAY, MONTGOMERY, and HOOKER, JJ., concurred.

---

139 280
144 1 8
144 10
f144 1 11

139 280
156 1389

FORBES *v.* CITY OF DETROIT.

FREUD *v.* FORBES.

1. NUISANCES—ENCROACHMENT ON STREET—ABATEMENT—SUIT BY PRIVATE PERSON.

   Show cases and bays, extending along the whole front of a building and upwards of two feet into the street, constitute a nuisance which an adjoining owner specially injured may maintain suit to abate.

2. LICENSES—OCCUPANCY OF STREET—REVOCATION.

   Where a city council gives an abutting owner permission to occupy a portion of the street by show cases and bays, expressly reserving the right to remove them at any time, the revocation of the license will not be enjoined though the owner will sustain considerable loss thereby without fault on his part.

Appeal from Wayne; Brooke, J. Submitted February 10, 1905. (Docket Nos. 141, 142.) Decided March 7, 1905.

Bill by Jeannette Fisher Forbes against the city of Detroit and D. W. H. Moreland, commissioner of public works, to restrain the revocation of a building license. From a decree dismissing the bill, complainant appeals. Affirmed.

Bill by Leopold Freud against Jeannette Fisher Forbes

to abate a nuisance. From a decree for complainant, defendant appeals. Affirmed.

Ransom G. George (*C. D. Joslyn*, of counsel), for appellant.

Keena, Lightner & Oxtoby, for complainant Freud.

Timothy E. Tarsney (*John W. McGrath*, of counsel), for defendant city.

HOOKER, J. Mrs. Forbes was for many years the owner of a triangular lot situate at the junction of Lafayette and Michigan avenues, in the city of Detroit. Upon this lot was a building the walls of which were built upon the street line. This building did not extend to the point of the triangle, but the space not occupied by the building was covered by stone steps, which extended beyond the lot limits at all points. There were also areas under the sidewalks of both streets with steps downward, outside the building, and in one place the walk was raised several inches, to accommodate a steam boiler in the area used for heating the building.

Mrs. Forbes, having a chance to rent, provided she would make improvements to the building, including show cases or bay windows to extend over the sidewalks, asked the council for the privilege, and procured a consent, best shown by the records of the council. At this time there were some show cases in the street at the Majestic Building. The subject of Mrs. Forbes' application was referred to a committee, and the following report was made, viz.:

"TO THE HONORABLE THE COMMON COUNCIL.

"*Gentlemen:* Your committee on streets, to whom was referred the resolution presented by Ald. Joy, granting permission to Edwin B. Forbes to construct permanent show cases and bays on both sides of the Dime Savings Bank Building, respectfully reports that we have carefully considered same, and find that said resolution provides for the construction of permanent show cases, to which your committee is unanimously opposed. We understand since the resolution was presented that it is the object of the owners of the building to take away the big

stone stairway in front of the main entrance, as well as the small stone steps on Lafayette and Michigan avenues; also to close up the passageways and areas that are now built along each side of the building, if they are given permission to construct show cases and bays on the Lafayette and Michigan avenue sides of this building, the work to be done under the supervision of the department of works, and so forth, subject to removal at any time when directed by the common council. Your committee can see no objection to the granting of this request, as we believe it will be a vast improvement over the present appearances, and we therefore offer the following resolution."

The resolution, which was adopted, is as follows:

"*Resolved*, that the department of public works be and is hereby authorized to issue a permit to Edwin B. Forbes to construct show cases and bays on both sides of the Dime Savings Bank Building, at the intersection of Lafayette and Michigan avenues: *Provided*, however, that said Forbes removes said areas and passageways on said building, and also removes the stone steps at the entrance thereof and those located on the Lafayette and Michigan avenue sides; and further *provided*, that said work shall be performed under the supervision of the department of public works and in accordance with the plans submitted to and approved by the department; and *provided, further*, that no rights in the public street shall be considered waived by this permission, which is granted expressly on the condition that said show cases and bays and all obstructions in connection therewith shall be removed at any time when so directed by the common council."

Mrs. Forbes claims that the consideration for the permission was the removal of all previously existing encroachments upon the street.

Mrs. Forbes proceeded to build bay windows on both fronts, extending into the streets two or three feet, and covering nearly the whole of the lower story, on both fronts. Before they were completed one of the aldermen called the attention of the council to the magnitude of the encroachment upon the streets, and the permanent character of the work that was being erected; whereupon the council by resolution revoked the permit theretofore

granted, and directed the board of public works to remove the obstruction to the streets, if not removed by Mrs. Forbes within 10 days. Notice of this action was served, whereupon she filed a bill to restrain such action, upon which a temporary injunction was issued against the city, and she proceeded with the construction of the windows. About the same time Leopold Freud, who occupied the adjoining building, filed a bill against Mrs. Forbes to abate an alleged nuisance, consisting of the windows which were near to his front door.

Upon the hearing of these causes, which we understand were heard together, the court dismissed Mrs. Forbes' bill against the city, and granted a decree as prayed in the bill of Freud. Mrs. Forbes has appealed both cases, and they have been heard together in this court.

We are of the opinion that the encroachment upon the street was a nuisance, which specially affected and injured Freud, thereby giving him the right to ask that it be abated.

The express terms of the license give the right to the city to terminate it at will, and although it would have been better for Mrs. Forbes had the council not granted it in the first place, thus preventing her from the loss that she will suffer by its revocation, that cannot deprive the city of its reserved right, even if its power to grant the privilege be unquestioned. The action of the council is perhaps subject to some criticism, for the failure to fully understand and limit the proposed improvement in the first instance; but there is no indication of bad faith, and it is commendable that action was taken as soon as the misunderstanding developed, instead of permitting more expense to be incurred. There is a manifest propriety in denying the privilege of encroachment upon streets. While Mrs. Forbes is a sufferer without apparent fault upon her part, we see no way of relieving her.

The decrees must be affirmed.

CARPENTER, MCALVAY, GRANT, and MONTGOMERY, JJ., concurred.

VOIGT BREWERY CO. *v.* PACIFICO.

1. PARTIES—AMENDMENT—NEW PLAINTIFF.
   Where an action is begun in a name that imports a limited partnership, an amendment is not allowable which introduces an individual trading under that name.
2. SAME—FAILURE TO NAME PLAINTIFF—PLEA IN ABATEMENT.
   Naming a limited partnership, which in fact has no existence, instead of the individual trading under that name, is not a misnomer, but a failure to name the true plaintiff, which is fatal upon trial, though not pleaded in abatement.

Error to Wayne; Hosmer, J. Submitted February 10, 1905. (Docket No. 134.) Decided March 7, 1905.

Summary proceedings by the Voigt Brewery Company, Limited, against Louis (Luciano) Pacifico to recover the possession of a certain building. There was judgment for defendant on verdict directed by the court, and complainant brings error. Affirmed.

Bowen, Douglas, Whiting & Murfin, for appellant.

James H. Pound, for appellee.

HOOKER, J. Chester, the owner of a tenement in Detroit, leased it from month to month to Pacifico, a saloon keeper. Pacifico purchased beer of the Mutual Brewery Company of Detroit, and was indebted to it for money advanced to pay his license as a saloon keeper. Mr. Voigt was a brewer doing business under the name of the Voigt Brewery Company, Limited; and in June, 1903, an agent of Voigt (one Preetz) induced Pacifico to sell Voigt's beer. It was agreed that Voigt should lease the place of Chester, fit up the saloon with better fixtures, and advance Pacifico some money. Chester was to indorse a note

therefor, and should receive $32 per month from Pacifico for rent, and he (Pacifico) should sell the Voigt beer. Voigt took a lease from Chester, running to the Voigt Brewery Company, Limited; and Pacifico signed a note for $416, in which Chester was payee, which, being indorsed in blank by Chester, was handed over with the lease to Voigt's agent. These papers were executed and delivered at a meeting of all the parties. Pacifico remained in the premises, but a few days later concluded not to sell Voigt's beer, refused to receive the fixtures, repudiated the arrangement, and refused to pay rent to Voigt. Thereupon Voigt caused a notice to quit to be served. This notice was signed, "The Voigt Brewery Co., Limited." The foregoing is the substance of the complainant's evidence. No testimony was offered by the defendant, and the court directed a verdict for the defendant upon motion, the ground of which was that the evidence showed that there was no party complainant before the court, in whose favor a judgment could be rendered.

When this motion was made, counsel for the complainant stated that this question was not raised upon the trial before the commissioner, and asked leave to amend the process to make it run in the name of Edward W. Voigt, doing business as the Voigt Brewery Company, Limited. The court said:

"This is not an ordinary suit at common law. The right does not extend, as in the case of an ordinary personal action. There is no sufficient complaint filed in the court below to authorize the commissioner to start a suit in behalf of Edward W. Voigt, and I do not think, under these circumstances, that an amendment can be allowed so as to give validity to the process which would originally be void. I have a grave doubt whether, in the case which Mr. Pound has cited, that an amendment would be, in any event, proper; and, in a case of this description, it seems to me it would be statutory, and I think it would be better, to start an action. Well, gentlemen of the jury, for the reasons that I have assigned, you will render a verdict for the defendant."

The record shows that there was no such partnership as the Voigt Brewery Company. There was then an action begun without a party plaintiff, for there was no such person as the Voigt Brewery Company. It was not and could not be the name of a natural person. See *Stirling* v. *Heintzman*, 42 Mich. 449. The trial judge thought that the case could not proceed for want of a party plaintiff, and it did not err in holding that one could not be introduced by amendment under such circumstances. Id. Again, if the Voigt Brewery Company had been a valid copartnership, and was correctly named as plaintiff, an amendment by substituting the name of a single person would have been the substitution of a different party, not the same party in interest. This is not a question of misnomer, as possibly it might be called if the proposal had been to amend by substituting the names of all the copartners, as copartners, for the partnership name of an existing copartnership. It is a failure to name the true plaintiff, and need not be raised by plea in abatement. Like a case of nonjoinder or misjoinder of a plaintiff, it is fatal upon the trial.

The judgment is affirmed.

CARPENTER, MCALVAY, GRANT, and MONTGOMERY, JJ., concurred.

JOHNSON *v.* DETROIT & MACKINAC RAILWAY CO.

RAILROADS—KILLING STOCK—CATTLE GUARD—SUFFICIENCY.

A cattle guard, so narrow that it does not fill the space necessary to be left between the "glance fences" to allow passage of the trains, does not comply with the statute though it is of a pattern approved by the railroad commissioner.

Error to Iosco; Connine, J. Submitted February 17, 1905. (Docket No. 186.) Decided March 7, 1905.

Case by Nelson Johnson against Detroit & Mackinac Railway Company for killing cattle. There was judgment for plaintiff, and defendant brings error. Affirmed.

Charles R. Henry, for appellant.

Jahraus & Rawden, for appellee.

HOOKER, J. A former opinion in this cause has disposed of many questions that might otherwise require consideration upon this record. It will be found in 135 Mich. 353. As will be seen from that case, the plaintiff had recovered a verdict and judgment against the defendant railroad company for the loss of stock killed by defendant's train. According to the brief of the defendant, the negligence relied on was (1) that the cattle guard was allowed to remain dented and flattened so that cattle could cross it; (2) that the "glance fence" did not extend up to the cattle guard, but left a strip of ground shown to be nine inches wide, thus affording opportunity for the cattle to pass. The glance fence was a fence built parallel with the railroad. Theoretically, it should be built close to the cattle guard; and in this case it was inclined so as to accommodate the wider portions of the cars, above the running gear. In this case the inclination from the track was about 45 degrees. The defendants urged that the

glance fence was set as close to the cattle guard as the passage of trains would permit, and that was all that the law required, that this pattern of guard was made of a certain standard width, and that the approval of such pattern by the railroad commissioner precluded the claim that it should have been wider, so that it could extend far enough to make it practicable to build the glance fence up close to it. It would be unreasonable to suppose that the installation of a cattle guard, with nothing to prevent cattle passing by the side of it, would be a compliance with the statute. It was the manifest intention that the gap should be closed, except a sufficient space for the passage of trains, and that the portion thus left open should be protected by a cattle guard of approved pattern. If there was a strip broad enough for cattle to walk upon, the law was not complied with. There was no error in submitting to the jury the question whether this glance fence and cattle guard were negligently constructed.

Counsel complains that the court instructed the jury that it was defendant's duty to put in such a cattle guard as would prevent cattle from passing, which made defendant an insurer. An examination of the portions of the charge complained of does not establish this claim.

Error is assigned upon the alleged charge that the opinions of experts in relation to the safe condition of the guard "were not binding upon the jury." This is not a full quotation of the language of the judge. When read with other comments accompanying it, no fault can be found with it. The same language was approved on the former hearing.

There are a few other assignments of error, but our examination convinces us that they are baseless, and that no useful purpose would be subserved by discussing them.

The judgment is affirmed.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

HOWATT *v.* GREEN.

1. ADVERSE POSSESSION — HOSTILITY OF POSSESSION — NOTICE TO OWNER.

   When land is sold by one not in possession the purchaser is bound to ascertain the rights of the possessor.

2. SAME—RIGHTS OBTAINED BY PURCHASER.

   The suggestion that the purchaser of land from one out of possession acquires all the latter's rights, including the right to be informed of the possessor's hostile holding cannot be entertained.

3. SAME—SOURCE OF KNOWLEDGE.

   The knowledge of the hostile character of the possession of land necessary to set the statute of limitations in motion in favor of an adverse possessor need not proceed from the possessor nor any other particular source, it being sufficient if it come to the owner of the record title from any source whatsoever.

4. SAME—SETTING STATUTE IN MOTION.

   Where, when one purchased the legal title to land, another was in exclusive possession claiming ownership under a recorded warranty deed purporting to convey title in fee to him, such purchaser was charged with notice of the extent of the possessor's interest and the source of his title, and limitations then began to run in favor of the adverse possessor against the purchaser, although the latter did not actually know of the hostile possession, and although the hostile character of such possession was not known to his grantor, against whom it was originally merely permissive.

5. SAVING QUESTIONS FOR REVIEW — TESTIMONY — TRANSACTIONS WITH PERSON SINCE DECEASED.

   By failing to object to the introduction of testimony, its incompetency, under section 10212, 3 Comp. Laws, because relating to a transaction with a deceased person, is waived.

6. WITNESSES—CREDIBILITY.

   In a suit to remove a cloud from complainant's title, circumstances *held* to discredit the uncorroborated, though not directly contradicted, testimony of defendant's mediate grantor as to a lost lease.

Appeal from Chippewa; Steere, J. Submitted January 10, 1905. (Docket No. 40.) Decided March 7, 1905.

Bill by Charles Howatt and another against John H. Green and another to quiet title to land. From a decree for complainants, defendant Green appeals. Affirmed.

Lanning, McMahon & Lyon, for complainants.

Oren, Webster & Carleton, for appellant.

CARPENTER, J. This is a bill to remove a cloud from complainants' title to lot 2 of Fourchette's Addition to the City of Sault Ste. Marie. Complainants claim title by record and by adverse possession. Defendants claim title by record, and deny complainants' adverse possession. As we believe that complainants have acquired title by adverse possession, it is unnecessary to determine, and we will not determine, who holds the record title.

The facts respecting adverse possession are these: The original patent was granted May 6, 1873, to John Baptiste Le May, alias John Baptiste Kebec. September 3, 1873, Le May transferred the land by warranty deed to Richard Payment (defendants' mediate grantor). At the time of this conveyance one Michael Frichette or Fourchette (complainants' mediate grantor) was in possession of the land, claiming to own the same by a warranty deed of record given by one who does not appear to have had the title. Frichette continued to occupy the land under this claim of ownership until a short time before his death, in 1890, when he conveyed the same by warranty deed to his daughter, Victoria Roberts. Since that time the property has been in the possession of the various immediate and mediate grantees of said Frichette, who have paid the taxes assessed upon it, and who claim and have claimed to own it.

Frichette's possession of this land, which dates from 1851, presumably originated in the permission of the owner. It

is contended that such owner never had knowledge of Frichette's hostile claim, and that the principle that possession does not in such cases become adverse until the owner has such knowledge (see *Ann Arbor Fruit & Vinegar Co.* v. *Railroad Co.*, 136 Mich. 599 [66 L. R. A. 431]), is a complete answer to complainants' claim of adverse possession. Assuming that there was no knowledge of Frichette's adverse possession before, the question arises whether such knowledge was not acquired at the time of Payment's purchase in 1873. At that time Frichette was in possession of the land, claiming to be the owner. We have held that, when land is sold by one not in possession, the purchaser is bound to ascertain the rights of the possessor. See *Allen* v. *Cadwell*, 55 Mich. 8; *Michie* v. *Ellair*, 54 Mich. 518; *Seager* v. *Cooley*, 44 Mich. 14; *Hommel* v. *Devinney*, 39 Mich. 522; *Russel* v. *Sweezey*, 22 Mich. 235.

Upon the argument, counsel for defendants indicated his doubt of the application of the principle of these cases to the case at bar, suggesting that Payment acquired by his deed all of Le May's rights, included in which was the right to be informed of Frichette's hostile holding. We cannot accept this suggestion. Its force as an argument is based, in our judgment, upon the implied proposition that the information which charges an owner with knowledge that the possession originally rightful has become hostile must proceed from some particular source. This proposition is not sound. Knowledge is requisite in such cases, not because of the demerits of the adverse possessor, but because otherwise the rightful owner would be deprived of his property without any opportunity to assert his rights. It is not therefore necessary that that knowledge proceed from any particular source. It is not necessary that the adverse possessor give notice. If the owner acquire knowledge, no matter how, that the possession is hostile, the statute of limitations commences to run. See *Ann Arbor Fruit & Vinegar Co.* v. *Railroad Co.*, supra. It follows that any circumstance brought to the

owner's knowledge which proves to him that the possessor asserts a hostile title starts the running of the statute of limitations. It follows, too, that his accession to Le May's title did not exempt Payment from the consequences of any knowledge which proved to him that Frichette asserted a hostile claim.

Rejecting, as we must, therefore, the suggestion of defendants' counsel under consideration, no reason occurs to the court why such a purchaser as Payment is not presumed to know what all purchasers are presumed to know. Frichette was in exclusive possession, claiming to be the owner of this land. There was on record a warranty deed which purported to convey the title in fee. If Frichette's possession had at that time ripened into a complete title, no one would maintain that Payment did not have constructive notice of that title. Shall we then say that possession is constructive notice where the possessor's title is complete, but is not where that title is incomplete? Surely no such distinction can be maintained. Payment could not in law, then, be ignorant—and he was not in fact ignorant—of Frichette's exclusive possession of the land. With knowledge of this possession, it was Payment's duty to inquire of Frichette the extent of his interest and the source of his title, and he is chargeable with what he would have learned had he made this inquiry. See *Hommel* v. *Devinney* and *Russell* v. *Sweezey*, supra. We are by no means certain that Payment did not make this inquiry and learn the exact facts. But it is immaterial whether he did or not, since, as already stated, the law presumes such knowledge. We are bound to say, therefore, that Payment had notice at the time of his purchase in 1873 of Frichette's hostile holding, and, unless something occurred to prevent it, that the statute of limitations commenced to run at that time, and, long before this suit was commenced, made complainants' title unassailable by defendants.

It is claimed by defendants that at the time of Payment's purchase he made an arrangement with Frichette which prevented the operation of the statute of limitations. In a deposition, introduced in evidence in the court below without objection, Payment testified that at the time of his purchase he took steps to remove Frichette, and finally entered into a written lease, executed in duplicate, by which Frichette was to have possession of the property during his life and pay the taxes assessed against the property, and that he (Payment) had this lease until 1899, when it was destroyed by fire in his office and residence. Complainants urge that this testimony was prohibited by section 10212, 3 Comp. Laws, and that the court cannot therefore consider it. We think it a sufficient answer to this contention to say that, by failing to object to the introduction of this evidence, complainants waived the statutory prohibition and made the testimony admissible. *Ripley* v. *Seligman*, 88 Mich. 177.

If this testimony of Payment is credited, it affords a complete answer to complainant's claim of adverse possession. If such testimony is discredited, complainants' claim is established. The vital question in this case, then, is whether said testimony is entitled to credence. The trial court, as we infer, decided that it was not. We approve that decision. Ordinarily we do not state our reasons for crediting or discrediting a witness. But since in this case we discredit a witness who is not directly contradicted, we deem it proper to depart from our usual practice and state our reasons for not believing Payment's testimony respecting the execution of a lease by himself and Frichette.

If this testimony were true, we would expect it to be corroborated by some accompanying circumstance. The witness refers to no such corroborating circumstance, and the record shows none. No one appears to have known of any steps taken by Payment to oust Frichette. No one appear to have ever read or heard of this lease. Payment transferred his title by warranty deed in 1879, on which day it

came back to Payment's wife. If this life lease was in existence it lessened Payment's title, and it is therefore difficult to understand why it was not mentioned in his warranty deed. This life lease was the only evidence which proved that the party in possession did not own the land, and it is therefore singular that it was not shown to Payment's immediate and mediate grantees, and that they did not take it as part of their evidence of title.

There are other circumstances which make Payment's testimony appear improbable. It is to be presumed that he made his arrangement with Frichette knowing that Frichette claimed the title, and for the purpose of having conclusive evidence to defeat that title. By leaving Frichette in possession during his life with the obligation of paying the taxes, there was, so far as the world was concerned, the same indicia of ownership as before. If, for the purpose of defeating Frichette's title, Payment made this arrangement, he would naturally have taken some step to make that arrangement notorious. He might have had the lease attested by reliable subscribing witnesses, and had it acknowledged and recorded. He appears to have done nothing of this nature. He appears to have neglected all these precautions, and does not explain his neglect.

Neither is there a sufficient explanation why Payment did not assert a claim after Frichette's death, and before the lease was destroyed by fire. Frichette died in 1890. The lease was not destroyed, according to Payment's testimony, until 1899. During this long interval of nine years the title acquired by Payment was, as Payment knew, in his wife. He was acting for her, and the situation made it his duty to assert her title. He knew that some other person was paying taxes on the land, but he says that he did not learn of Frichette's death until 1902. This last statement is scarcely credible, for he swears he "went to the Soo several times to see and look over the land," and the testimony shows that Frichette resided, at the time of his death, on property adjacent to that in contro-

versy. If we believe that Payment was ignorant of Frichette's death until 1902, that continued ignorance is inconsistent with his possession of the lease. If he had, as he testifies he had, the lease which gave his wife the right of possession on Frichette's death, his vigilance and diligence should have discovered that death, and asserted her title some time during the nine years which intervened before the lease was destroyed.

In short, it may be said of this testimony of Payment that it is precisely such testimony as might have been fabricated. It is not corroborated by a single circumstance, and it is intrinsically improbable. We cannot, therefore, believe that the lease upon which defendants rely to answer complainants' claim of adverse possession was ever executed.

It follows that, in our judgment, complainants have acquired a valid title by adverse possession, and the decree appealed from should be affirmed, with costs.

MOORE, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

139 296
147 S481
139 296
150 U330

ALDERTON *v.* WILLIAMS.[1]

1. CONTRACTS—INDEFINITENESS.
   A contract, by which it is agreed to change a heading mill into a stavemill, and carry on the business of manufacturing staves, is not void for indefiniteness in that it fails to specify the kind of machinery to be bought or the kind of staves to be manufactured.

2. SAME—MUTUALITY.
   A contract, by which one party agrees to change his heading mill into a stavemill, and carry on the business of manufacturing and selling staves, and establish a general store in connection therewith, and buy his supplies as far as possible from the other party, the other agreeing to advance the necessary money to carry out the enterprise and take his pay from a share of the profits, does not lack mutuality.

3. SAME—UNCERTAINTY.
   A contract to carry on the business of manufacturing and selling staves as long as sufficient timber is to be had in the locality for that purpose is not void for uncertainty.

4. SAME—CONSIDERATION—FAILURE—ONE OF SEVERAL STIPULATIONS.
   That one of several promises forming the consideration of a contract is unenforceable does not invalidate it.

5. JOINT ENTERPRISE—WHAT CONSTITUTES.
   Where one party agreed to establish and conduct a business and the other agreed to furnish a certain amount of money to assist it and take a stipulated portion of the net profits until paid, the business is properly described as a joint enterprise, though the parties are not partners and the title to the mill and business remained with the first party.

6. SAVING QUESTIONS FOR REVIEW.
   The objection that evidence admitted on behalf of defendants denied allegations in the declaration which they had by their pleadings admitted to be true cannot be raised for the first time on error.

7. DAMAGES—JOINT ADVENTURE—BREACH OF CONTRACT.
   Where a joint adventure fails because one of the parties fails to

[1] Rehearing denied May 12, 1905.

advance funds as agreed, the other is not limited in his damages to the excess of interest he would have had to pay on borrowing the money elsewhere, but he may recover substantial damages, including expense for machinery and labor incurred in performing his part of the agreement.

8. TRIAL—INSTRUCTIONS—NECESSITY OF REQUEST.
A judgment will not be reversed for the failure of the court to direct the attention of the jury to specific items of damages as to which the evidence was conflicting, where no specific instruction thereon was asked.

9. DAMAGES—JOINT ADVENTURE—BREACH OF CONTRACT.
Where a joint adventure involving the remodeling of a mill fails because one of the parties refuses to advance funds as agreed, the measure of the other's damages is not affected by defects in his title to the machinery, where there is no privity between the first party and the alleged real owner of the machinery.

10. VARIANCE—WAIVER.
A variance between the pleadings and proofs will be deemed waived when brought to the attention of the court for the first time by a request to charge after the close of the evidence.

Error to Mecosta; Palmer, J. Submitted January 18, 1905. (Docket No. 67.) Decided March 7, 1905.

Assumpsit by George A. Alderton against Charles F. Williams and Lafayette C. Williams upon promissory notes. There was judgment for defendants, and plaintiff brings error. Affirmed.

James H. Davitt, for appellant.

F. A. Lyon and *M. Brown*, for appellees.

CARPENTER J. This is the second time this suit has been before us. Our first decision will be found reported in 130 Mich. 626.

Plaintiff sues to recover $5,000, which he claims to have advanced as surety for defendants in payment of six notes on which he and defendants were the joint makers. After the former judgment was reversed in this court, defend-

ants elected to waive the benefit of their plea of the general issue, admitted the facts alleged in plaintiff's declaration, and relied upon the facts stated in an accompanying notice for their defense. Those facts may be briefly stated as follows: Defendants, as owners of a heading mill in the village of Beaverton, Gladwin county, Mich., agreed with plaintiff to remodel said mill into a stavemill, and to carry on the business of manufacturing and selling staves; to establish and conduct in connection therewith a general store; to buy the merchandise for this store, "as far as they reasonably could do," at a grocery run by plaintiff in Saginaw under the firm name of George A. Alderton & Co.; to carry on said stave business "so long as they could get sufficient timber for that purpose in the locality of said mill;" and to make repayment of plaintiff's advances by giving him 10 per cent. of the net profits of said business. In consideration of these agreements made by defendants, plaintiff agreed to advance from time to time the sum of $20,000, to be repaid as aforesaid. That defendants changed their heading mill into a stavemill, and performed their other agreements. That plaintiff, after advancing the $5,000 involved in suit, refused to make further advances, in consequence of which the venture utterly failed, to defendants' damage.

The issue thus made was tried before a court and jury; defendants offering testimony which tended to establish the claim stated in their notice, and the plaintiff offering testimony denying the same. The case was submitted to a jury, who rendered a verdict of no cause of action. Plaintiff asks us to reverse the judgment entered on said verdict for various reasons, which, so far as needful, will be considered and discussed in this opinion.

Plaintiff insists that the contract relied upon by defendants is void for indefiniteness and want of mutuality. It is true that in certain particulars the contract is indefinite. For instance, it does not appear precisely what kind of machinery is to be bought or what kind of staves manufactured. It is impossible to believe that such indefi-

niteness would present an obstacle to the proper performance of the contract. We are referred to no authority, and we believe there is no authority, which holds that indefiniteness in details of this character makes an entire contract void. If it did, nearly every complicated contract would be void. Nor is the contract void for want of mutuality. The agreement of one party is the consideration for the agreement of the other, and just what each agreed to do clearly appears.

Neither can it be said that there was such an uncertainty as to the duration of the stave business as to render the contract void. The business was to be carried on "so long as they could get sufficient timber for that purpose in the locality of the mill." In *Raymond* v. *White*, 119 Mich. 443, where it was agreed that certain payments should be made "as long as defendant should continue to use" the inventions of plaintiff, this court held that "the time that the contract was to continue was not uncertain."

In this connection, we should notice plaintiff's contention that the agreement that defendants should buy from him supplies, "as far as they reasonably could do," is not enforceable. If so, this is only one of several agreements made by defendants which constituted the consideration for plaintiff's agreement, and it would not, therefore, affect the latter's obligation to perform his agreement. See *Wesleyan Seminary* v. *Fisher*, 4 Mich. 515.

Defendants obtained a verdict upon the assumption that they and plaintiff entered into a joint enterprise. Plaintiff contends that this assumption is erroneous. He insists that, according to the testimony of defendants, the parties were not engaged in a joint enterprise. It is true that the contract establishhd by defendants' testimony did not create a partnership between themselves and plaintiff, and that the mill continued to be the mill of defendants. But it is none the less true that that contract made plaintiff and defendants jointly interested in the business of manufacturing and selling staves, and this business may properly be described as a joint enterprise.

Plaintiff insists that defendants, in introducing evidence that the indebtedness sued for was payable only from the profits of the stave business, were denying the allegations of the declaration which they had by their pleadings admitted to be true. A diligent examination of the record fails to show that this objection was made in the trial court, and therefore we cannot consider it.

The trial court charged that, if the business venture failed by reason of plaintiff's breach of contract, defendants could recover as damages "whatever loss was occasioned to them by reason of such breach. * * * The damages must be such as grow directly out of the breach," and "would be limited to the actual outlay on expense incurred in changing over the heading business to the stave business, on account of the contract relations requiring that to be done. * * * Of course, you may take into account not only the expense * * * of changing over this mill as far as machinery is concerned, but the necessary labor, its fair value according to the proof, * * * that would be an element of damage, also." Notwithstanding the various objections urged by plaintiff, we think he cannot complain of this charge.

In *Harrow Spring Co.* v. *Harrow Co.*, 90 Mich. 147, we said in a case like that at bar, "the injured party is clearly entitled to recover his damages for expenses incurred in good faith in anticipation of performance by the other party." This decision answers, with one exception, all of plaintiff's objections to the above charge. That exception arises from his contention that the measure of damages where one fails to advance money as agreed is the excess in interest which the borrower is compelled to pay to procure the money elsewhere. This principle is applied, as appears from the cases cited by appellant, where the defaulting party failed to advance money which he had promised to *loan*. In such cases the law presumes that the borrower can obtain money elsewhere, and the increased rate of interest therefore furnishes full compensation for his damages. Those cases and the principle underlying

them have no application to the case at bar. Here plaintiff defaulted, not in making an agreed loan, but in contributing to a joint adventure. Even if defendants had the right to do so, it cannot be presumed that they could have obtained such a contribution from some other source. And we have held that, when a joint adventure fails because one of the parties refuses to advance his agreed money contribution, he is liable for substantial damages. See *McCreery* v. *Green*, 38 Mich. 172. We do not discuss plaintiff's objections to certain of defendants' testimony which tended to prove damages. For, assuming the rule of damages announced by the trial court to be correct—and we have held that it was correct—the testimony was properly admitted.

Plaintiff complains because the court did not of his own motion direct the attention of the jury to specific items of damages, concerning which there was a conflict of testimony. The charge of the court gave the jury a correct general rule by which they should determine the allowance or disallowance of these items. There is nothing to show, and we cannot presume, that the jury erred in applying that rule. Had the plaintiff desired a more specific charge concerning any of these items, he should have requested it, and, as he did not do so, he cannot now complain. See *Anderson Carriage Co.* v. *Pungs*, 134 Mich. 474.

Defendants' title to a part of the machinery damaged by the breach of contract was defective, and plaintiff complains because the trial court ruled that this circumstance could not be considered in reducing damages. Is plaintiff in a situation to question that title? There is no privity between plaintiff and the real owner of the property. He is not liable to such owner. Up to the time of trial such owner had never asserted his title, and he may never assert it. If defendants' title is defective, they would be liable to the real owner for the damages caused by plaintiff's breach of the contract, while plaintiff would be under no such liability. It follows that the flaw in defend-

ants' title was an immaterial circumstance. It did not lessen defendants' loss, and it should not lessen plaintiff's liability.

Complaint is made because the court did not give the following instruction preferred by plaintiff:

"The notice of recoupment alleges that plaintiff 'was doing a wholesale grocery business under the firm name of George A. Alderton & Co.' But the proofs show that the firm of George A. Alderton & Co. was composed of George A. Alderton, Albert Alderton, and John McPhillips. This allegation relates to the consideration of the contract, for the alleged breach of which defendants make their claim of damages, and there is therefore a fatal variance between the pleading and the proof, and for that reason defendants cannot be allowed anything under their claim for recoupment."

Plaintiff must have known precisely what business defendants intended to describe. He was not, therefore, misled by the slightly inaccurate description in defendants' notice. He did not raise the objection until he preferred this request at the conclusion of the trial. We have held "that where testimony was introduced, and the party relying upon a variance made no objection on that ground until his request to charge, when it was brought to the attention of the court for the first time, it was too late, and the objection would be deemed waived." *Merkle* v. *Township of Bennington*, 68 Mich. 142; *Stone* v. *Covell*, 29 Mich. 359. No other complaint demands discussion.

The judgment is affirmed, with costs.

MCALVAY, GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

WALTERS v. DETROIT UNITED RAILWAY.

CARRIERS OF GOODS—LIABILITY—CONTINUANCE—NOTICE TO CONSIGNEE.

The obligation of a carrier who holds goods after transit, awaiting delivery, continues until the consignee has been notified of their arrival and has had reasonable time, in the common course of business, to take them away after such notification, though the consignee knows the probable date of shipment and probable date of arrival.

Error to Oakland; Smith, J. Submitted February 10, 1905. (Docket No. 137.) Decided March 7, 1905.

Case by Guy A. Walters and Charles M. Smith, copartners as Guy A. Walters & Company, against the Detroit United Railway for goods destroyed while in transit. There was judgment for plaintiffs, and defendant brings error. Affirmed.

Brennan, Donnelly & Van De Mark and *James H. Lynch*, for appellant.

Rockwell & Zimmerman (*S. W. Smith*, of counsel), for appellees.

CARPENTER, J. On the 7th of April, 1903, plaintiffs purchased at the village of Trenton, Wayne county, certain furniture for a drug store. They placed that property in the custody of defendant's agent at Trenton, with instructions to ship the same over defendant's railway—defendant is a common carrier of merchandise—to them at Pontiac, Oakland county, on Friday, April 10th. Had the goods been sent as directed, they would, according to the usual custom, known to plaintiffs, have reached Pontiac on Saturday, the 11th, or Monday, the 13th, of April. The goods were in fact shipped on the 8th and arrived in Pontiac on the 9th. They were placed in defendant's

warehouse, and were there destroyed by fire Tuesday, April 14th, before notice of their arrival was given to plaintiffs. Plaintiffs brought suit and recovered judgment upon the ground that defendant's liability as common carrier continued at the time the goods were destroyed. Defendant insists that a verdict should have been directed in its favor.

There was no evidence of defendant's negligence. If, at the time the goods were destroyed by fire, defendant continued to hold them under its responsibility as a common carrier (that is, as an insurer against all injuries except acts of God), it was liable. If it did not so hold them, it was not liable. Jurists have not agreed as to the obligation of a carrier who holds goods after transit, awaiting delivery. Respecting this question,—

"Three distinct views have been taken: * * *

"*First.* That when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended, also, and he is responsible as warehouseman only. * * *

"*Second.* That merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business. * * *

"*Third.* That the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time, in the common course of business, to take them away after such notification." See opinion of COOLEY, J., in *McMillan* v. *Railroad Co.*, 16 Mich. 102.

In this case Justice CHRISTIANCY concurred with Justice COOLEY in holding that the view last stated was correct, while Chief Justice MARTIN concurred with Justice CAMPBELL in holding that the view first stated was correct. In the subsequent case of *Buckley* v. *Railway Co.*, 18 Mich. 121, a majority of the court, consisting of Justices GRAVES, COOLEY, and CHRISTIANCY, concurred in holding that the liability of a common carrier continued a reasonable time after the goods were placed in the ware-

house. There was no occasion for them to decide, and they did not decide, whether that reasonable time commenced to run at the time the goods were placed in the warehouse, or at the time notice was given to the consignee. We are unable to find that this precise question has ever been determined by this court. It is necessary for us to determine it now. Without undertaking to repeat the arguments of Justice COOLEY, which are familiar to all careful students of the Michigan Reports, it is sufficient to say that they are so clear and forceful that we have no hesitancy in declaring that the carrier's obligation continues until the lapse of a reasonable time after he has notified the consignee of the arrival of the goods. This conclusion disposes of the case, and results in an affirmance of the judgment.

In stating this conclusion, we have not overlooked defendant's contention that the rule does not apply where, as in this case, plaintiffs knew the probable date of shipment, and the probable time of arrival of the goods. To insist that this circumstance exempts the carrier from liability is to deny the existence of the rule we have just declared. To be more precise, it is to insist that the second, and not the third, of the rules heretofore stated, is the correct one. This is clearly shown by quoting from the opinion of Justice COOLEY in *McMillan* v. *Railroad Co.*, supra:

"The rule as secondly above stated proceeds upon the idea that the consignee will be informed by the consignor of any shipment of freight, and that it then becomes the duty of the former to take notice of the general course of business of the carrier, the time of departure and arrival of trains, and when, therefore, the receipt of the freight may be expected, and to be on hand, ready to take it away when received."

And the same learned jurist, in stating why that rule should be rejected, states a sufficient reason for denying the present contention of defendant:

"To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting

the consignment, seems to me to be imposing a burden upon him, without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice, than to be subjected to the numberless inquiries and examinations of his books which would otherwise be necessary, especially at important points."

In support of its position, defendant cites several cases decided by courts who deny the rule declared to be law in this State. It is scarcely necessary to say that decisions of a court denying the rule afford no aid in construing it.

Judgment affirmed, with costs.

MCALVAY, GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

---

139 306
144 340

LEWIS *v.* BOARD OF EDUCATION OF CITY OF DETROIT.

139 306
f155 1561

139 306
158 75

1. CERTIORARI—PRACTICE—QUESTIONS CONSIDERED.

On certiorari to review the action of the lower court this court can reverse only for objections presented by the record to the court below and assigned by the petition for the writ.

2. MANDAMUS—PRACTICE—ISSUES—PLEADINGS — REPLICATION AND REJOINDER.

The only pleadings contemplated by our mandamus practice are the petition and answer, replication and rejoinder being unauthorized.

3. SAME—DETERMINATION OF ISSUES.

Where no issues are framed, mandamus proceedings are disposed of on the issue raised by the petition and answer, it being assumed that all averments of fact in the answer and all material allegations in the petition, not specifically answered by the respondent, are true as alleged. Circuit Court Rule 46 *c*.

4. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS —UNION LABOR CLAUSE.

The board of education of the city of Detroit has no power to require contractors constructing public buildings to employ union labor exclusively.

Certiorari to Wayne; Hosmer, Donovan, Frazer, and Rohnert, JJ. Submitted February 7, 1905. (Calendar No. 20,752.) Decided March 7, 1905.

Mandamus by Henry B. Lewis to compel the board of education of the city of Detroit to award a contract to relator. There was an order granting the writ, and respondent brings certiorari. Affirmed.

George F. Monaghan, for relator.

James H. Pound, for respondent.

CARPENTER, J. Certiorari to review mandamus proceedings. Relator was the lowest bidder—he was, in fact, the only bidder—for the steelwork of a school building which respondent had decided to erect. Later respondent adopted the recommendation of a committee that the contract be awarded to relator. Still later respondent passed the following resolution:

"*Resolved*, that all contracts for the erection of the Goldberg school [the school for which relator had made his bid] be awarded to the lowest bidders for the several classes of work: *Provided*, they agree to insert in their contracts an agreement to employ union labor exclusively, and that where the lowest bidder refuses to insert such clause in his contract, the contract be awarded to the next higher bidder who will agree to insert such clause in his contract."

Relator formally offered, and respondent formally refused to sign, the contract according to his proposal, with the union labor clause stricken out. Relator thereupon commenced these proceedings in the Wayne circuit court. A hearing was had before Judges Hosmer, Donovan, Frazer, and Rohnert, who granted a mandamus directing

said respondent to execute said contract with the union labor clause omitted. Those proceedings are brought to this court for review.

We must determine at the outset precisely what objections are open to our consideration. It is quite clear that we are not at liberty to look through this record for the purpose of ascertaining what, if any, valid objections might be made to the order of the trial court. We have a right to reverse such order only for objections presented by the record to the court below, and objections assigned by respondent's counsel when he obtained the writ of certiorari. See *City of Monroe* v. *Board of Sup'rs of Monroe Co.*, 137 Mich. 638. The petition upon which the writ of certiorari was granted assigns no error but this: "They do not believe the decision of the circuit court in this case to be according to law, and they pray * * * that the decision * * * may be reversed, vacated, and set aside." Under these circumstances, it is no injustice to the respondent if we look at the brief accompanying said petition, to ascertain its objections. In that brief it is said:

"Really, there are but these two points to decide in this case: *First.* Has the board of education of the city of Detroit the discretionary power to authorize it to segregate the labor it wishes to buy, so that it may buy a standard kind or class; not, however, presuming to dictate as to individuals? *Second.* Even if the respondent was wrong, upon the facts shown, of but a single bid, should not the order of the circuit court to the board of education have been to readvertise for proposals to be made in the open market, without any limitations thereon whatsoever?"

Under the rules applicable to certiorari proceedings, we can reverse the order of the lower court only on one of these two grounds.

Turning now to the record in the court below, we find in respondent's answer that only the first of these grounds is urged as a reason why the writ should not issue. It is true, other reasons are stated in a rejoinder of respondent

to a replication of relator, but neither this replication nor this rejoinder was authorized by proper practice. See Circuit Court Rule 46*c*; Supreme Court Rule 13; *Just* v. *Township of Wise*, 47 Mich. 511. To make this clear, we undertake to state the practice to be pursued in mandamus proceedings: Our practice in these proceedings was designed to be simple and expeditious. The only pleadings contemplated are relator's petition and respondent's answer or return. If relator desires to controvert the facts stated in the answer, issues may be framed under the direction of the trial court. While, for the purpose of framing these issues, the trial court may permit relator to file a replication (see *Wagner* v. *Gladwin Circuit Judge*, 131 Mich. 129), the more common and expeditious practice is to dispense with the replication altogether and to state such issues in the form of questions on the coming in of the answer. See *Just* v. *Township of Wise*, supra. If no issues are framed—and none were in this case—the proceeding is disposed of on the issue raised by the petition and answer. In determining this issue, it is assumed that all averments of fact in the answer (see *Loomis* v. *Rogers Township Board*, 53 Mich. 135), and "all material allegations of the petition * * * not specifically answered by the respondent," are "true as alleged." See Circuit Court Rule 46, subd. *c*. It follows that the trial court in this case was not called upon to examine respondent's rejoinder, and it is not to be presumed that it did examine it, for the purpose of finding issues not made by the petition and answer.

We conclude, therefore, that the only ground upon which we may reverse the order of the lower court is that respondent had discretionary power to insert the union labor clause in relator's contract. Had it? It is respondent's purpose, as shown by the resolution heretofore quoted, to have its work performed by union labor, even though it increased the cost to the taxpayers. We are all of the opinion that it cannot effect this purpose, and that it has no power to require contractors constructing public

buildings to employ union labor exclusively. The reasons for this conclusion are so clearly stated in a similar case by the supreme court of Illinois, in *Adams* v. *Brenan*, 177 Ill. 194 (42 L. R. A. 718), that we content ourselves with quoting from that opinion:

"The contract tends to create a monopoly, and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished, and the degree of skill required in workmanship; but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work, and such a provision is illegal and void. * * * No question concerning the merits of labor or trades unions is in any way involved in this case. The right of organization for mutual benefit in all lawful ways is not denied. The question is whether the board of education has a right to enter into a combination with such an organization for the expenditure of the taxpayers' money for the benefit of members of the organization, and to exclude any portion of the citizens following lawful trades and occupations from the right to labor. It has no such right."

See, also, *Holden* v. *City of Alton*, 179 Ill. 318; *Fiske* v. *People, ex rel. Raymond*, 188 Ill. 206 (52 L. R. A. 291); *Marshall & Bruce Co.* v. *City of Nashville*, 109 Tenn. 495. It follows that we cannot reverse the order of the circuit court.

This case should not be regarded as authority for the proposition that mandamus is a proper remedy in a case of this nature. For the reasons heretofore stated, we are not at liberty to consider that question, and therefore we do not consider it.

The decision is affirmed, with costs to relator.

MOORE, C. J., and MCALVAY, GRANT, and BLAIR, JJ., concurred.

139 311
f155 25

TROMBLY *v.* KLERSY.

APPEALS—CHANCERY—PAYMENT OF FEE—DISMISSAL.

The payment, within 30 days, of the statutory register's fee by a chancery appellant is mandatory, and an appellee who has done nothing to waive the right is entitled to a dismissal of the appeal after the statutory period. Section 552, 1 Comp. Laws.

Motion by Robert Trombly, guardian of Joseph Buhler, an incompetent, against Andrew Klersy to dismiss an appeal. Submitted February 27, 1905. (Calendar No. 20,981.) Motion granted March 7, 1905.

De Forest Paine, for the motion.

William Look, contra.

PER CURIAM. Defendant sought to appeal from an order of the circuit court in chancery appointing a receiver of the defendant's property. Complainant moves to dismiss the appeal because the defendant failed to pay the fee within 30 days, as provided by section 552, 1 Comp. Laws. The payment of this fee is mandatory. *Bennett* v. *Hickey*, 110 Mich. 628. The complainant has done nothing to waive the appeal. The motion is therefore granted.

139 312
157 635

PEOPLE, *for Use of* COOK, *v.* COLE.

1. APPEAL AND ERROR—REVIEW—QUESTIONS CONSIDERED.
   Only such points as counsel make and rely upon for reversal in their original brief will be considered by this court in disposing of a case.

2. NOTARIES — BONDS — LIABILITY — NEGLIGENCE — TAKING ACKNOWLEDGMENT OF IMPOSTOR.
   In an action on a notarial bond for damages resulting from the notary's taking the acknowledgment of an impostor to a real-estate mortgage, evidence examined, and *held*, that the direction of a verdict for plaintiff was properly refused.

Error to Sanilac; Beach, J. Submitted January 5, 1905. (Docket No. 12.) Decided March 14, 1905.

Debt by the People of the State of Michigan, for the use and benefit of William W. Cook, against Sidney S. Cole, principal, and John H. Farley, surety, upon a notary's bond. There was judgment for defendants, and plaintiff brings error. Affirmed.

C. F. Gates (*Wilford Macklem* and *S. L. Kilbourne*, of counsel), for appellant.

William H. Aitkin, for appellees.

MOORE, C. J. This is an action brought by the plaintiff upon the notarial bond given by defendant Sidney S. Cole, as principal, and the defendant John H. Farley, as surety.

The condition of the bond is "that if the said Sidney S. Cole shall duly and faithfully discharge the duties of his said office, without fraud, then this obligation to be void, otherwise to be and remain in full force and virtue."

The breach charged is for taking the acknowledgment

of a mortgage signed by one Paul Davis under the name of Peter M. Carroll, which reads:

"STATE OF MICHIGAN, } ss.
County of Sanilac. }

"Before me, the subscriber, Sidney S. Cole, a notary public in and for said county, this 15th day of May, A. D. 1897, personally appeared Peter M. Carroll, to me known to be the same person described in and who executed the above mortgage and who acknowledged the same to be his free act and deed.

"SIDNEY S. COLE,
"Notary Public."

Mr. Cook is a farmer living a few miles out from Croswell, who sometimes loaned money through Mr. Cole, who was a lawyer and notary public living in 1897 at Croswell. The acquaintance between Mr. Cook and Mr. Cole ran through a series of years. It is the claim of Mr. Cook that on the evening of May 14th a man who was a stranger to him presented to him a note in the handwriting of Mr. Cole. He testified the note was lost, and he and his wife were permitted to give oral testimony of its contents, and claimed it read as follows:

"Will, this is Peter M. Carroll, of Detroit, is up wishing to make a loan on his farm northwest of Peck. If you have the money come up in the morning as Mr. Carroll wants to go away on the morning train. I have examined the abstract and find it O. K. See Thomas Dumphey as to value of the farm.

"S. S. COLE."

Mr. Cook testified that, supposing the man was Mr. Carroll, he agreed to make him a loan if the title was all right; that the next morning he went to the office of Mr. Cook, and found the man he supposed to be Mr. Carroll there; that a mortgage was made out and acknowledged before Mr. Cole; and that, relying upon the truth of the statement in the acknowledgment, he let the mortgagor have the money. Later it turned out that the man was not Mr. Carroll, but one Davis, who was later convicted of forgery and sent to State prison.

Upon the trial of this case it was claimed that Mr. Cole did not, on the morning when the mortgage was drawn, introduce Mr. Dumphey, who was in the office, to the man who claimed to be Carroll, for the reason that Dumphey knew Carroll. It was also claimed that Cole sent Dumphey out of the office to see Cook, so that Cole, Cook, Dumphey, and the man claiming to be Carroll, should not all be together. Mrs. Malaney was also sworn on the part of the plaintiff to show that Cole had known Davis for years at the time this mortgage was drawn.

A further claim of plaintiff may be drawn from the first request to charge, which reads as follows:

"The undisputed evidence in this case and the admission of the defendant shows that Sidney S. Cole was guilty of gross negligence in the taking of the acknowledgment of Paul Davis to the mortgage in question, and your verdict must be for the plaintiff."

The claim of defendant is stated in the brief, as follows:

"Cook was a farmer and dealer in mortgage loans. Cole was a country lawyer and notary public. Davis was an impostor. Davis, representing himself to be Carroll, called upon Cole; talked about loans; represented that he had an abstract of his farm at the bank, sent there by the abstractors to collect a balance due. Davis left the balance due on abstract with Cole to enable him to obtain and examine same. As a lawyer, Mr Cole examined abstracts and made out papers for parties who loaned money in that vicinity, and gave Davis the names of some of these parties, and among them Cook, whom Davis claimed to know, and showed a general acquaintance in the neighborhood. Cole did not introduce Davis to Cook, nor to any of the money loaners he mentioned. This question was submitted to the jury by the court in his instructions, as follows:

"'One principal question litigated in the testimony was as to whether Mr. Cole sent Mr. Davis to Mr. Cook with the letter. That is an important matter in this case. On the part of Mr. Cook and his wife, they claim that the letter was sent, and give what they claim to be the substance of the contents. On the part of Mr. Cole, he denies knowledge of sending such letter, and that he did not directly

send Davis to Mr. Cook. You will determine that question for yourselves.'

"Cook bargained with Davis at his home, and in the absence of Cole, and agreed to loan the money when he was satisfied that the security was ample, and that the abstract showed title in Carroll. This appears also by Mr. Cook's testimony:

"'*Q.* Then the only thing that occurred to your mind at that time was this: That, if you were satisfied as to the valuation of the land, you would make the loan. Is that correct?

"'*A.* Yes.

"'*Q.* And when you went to Croswell you satisfied yourself as to that, did you not—as to the value of the land?

"'*A.* Yes.

"'*Q.* Which was the only thing left undetermined?

"'*A.* Yes.

"'*Q.* And when you did, you concluded to make the loan, didn't you?

"'*A.* I accepted the loan when it was made.

"'*Q.* After you satisfied yourself as to the valuation? That is true, isn't it?

"'*A.* Yes; I accepted it.

"'*Q.* And the individual, or his identity, or whether he was impersonating some one else, never occurred to your mind, at any stage of the game, did it?

"'*A.* No, sir.

"'*Q.* That is correct, now, is it?

"'*A.* No; I never wanted to investigate; never had a doubt.

"'*Q.* Do you know how Mr. Cole came to draw the mortgage exactly as you wanted it?

"'*A.* Mr. Cole knew that if he loaned any money for me it was eight per cent., and not less than five years, generally.

"'*Q.* How did he know about this particular transaction?

"'*A.* I can't say.

"'*Q.* You don't know?

"'*A.* Unless it was that it was the Mr. Davis told him.

"'*Q.* The only way that you know is that Davis came back and told him what you had agreed on?

"'*A.* Yes.

"'*Q.* And the mortgage was drawn according to your agreement at the house?

"'*A.* That is right.'

"Cole did not know until the morning that the mortgage was executed that Cook would make the loan, and did not complete the execution of the mortgage until told to do so by Mr. Cook. Cook relied upon Mr. Cole's judgment as an attorney as to whether the title shown by the abstract was in Carroll. And he relied upon his own judgment as to all other matters connected with the loan. This is true as to all other loans made by Cook, as clearly shown by Cole's and Cook's testimony."

It is their claim that:

"The situation is no different than if Mr. Cook and Mr. Carroll together had called at the office of Mr. Cole for the first time, and Mr. Cook saying:

"'Mr. Cole, Mr. Carroll and I have agreed upon a loan, and I am going to let him have $550 for two years if you find the abstract comes down to Peter M. Carroll.'

"Would Mr. Cole under such circumstances be liable, should it turn out that this man was an impostor? If so, the practical result of everyday life will be that a notary public and his sureties will be guarantors of loans, in addition to the security agreed upon between the parties themselves. Mr. Cook did not rely on the certificate, but relied upon himself in everything except the question of abstract. Indeed, the bargain was made long before he saw Mr. Cole, or ever the certificate was executed."

The plaintiff preferred eight requests to charge, six of which were requests for a directed verdict. The trial judge declined to direct a verdict, and the jury found in favor of defendant.

In the original brief of plaintiff it is said:

"As the testimony in the case shows that the defendant Cole used no caution whatever, made no inquiries, and was guilty of gross negligence, we contend that the first and third requests to charge should have been given; and, as this court has the exact figures of the amount of judgment that plaintiff is entitled to, that the case should be reversed, and a judgment entered here for the plaintiff for $779.01, and the additional interest running to the time of judgment here, with cost of both courts."

Each of requests 1 and 3 directed a verdict in favor of plaintiff. In the supplemental brief of counsel some other

questions are discussed. Supreme Court Rule 40 provides that the original brief shall contain a statement of the errors upon which counsel rely. It has been held that only such points as counsel make and rely upon for reversal in their original brief will be considered by the court in disposing of the case. *Black* v. *Dawson*, 82 Mich. 485; *Shippy* v. *Village of Au Sable*, 85 Mich. 280; *Ashman* v. *Railroad Co.*, 90 Mich. 567; *Lacas* v. *Railway Co.*, 92 Mich. 412; *Hewitt* v. *Morley*, 111 Mich. 187.

In *Aldine Press* v. *Estes*, 75 Mich. 100, it was held that, before a court should direct a verdict for a plaintiff, he must make a case that has no matter of fact left open. See, also, *Hagan* v. *Railroad Co.*, 86 Mich. 615; *McDonald* v. *Ortman*, 88 Mich. 645. Under the testimony in this case, we do not think it would have been proper for the trial court to have directed a verdict in favor of plaintiff.

Judgment is affirmed.

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

CASS FARM CO. *v.* CITY OF DETROIT.

1. ADVERSE POSSESSION—TAX TITLE—CLAIM OF MUNICIPALITY.
   Adverse possession may be invoked to cut off a tax title held by a city.

2. SAME—KNOWLEDGE OF OUTSTANDING TITLE.
   A subsequent purchaser may invoke title by possession adverse to an outstanding tax title without alleging knowledge, or want of knowledge, of such title at the time of purchase.

Appeal from Wayne; Hosmer, J. Submitted February 8, 1905. (Docket No. 103.) Decided March 14, 1905.

Bill by the Cass Farm Company, Limited, against the city of Detroit and another to quiet title. From an order overruling a demurrer to the bill, defendants appeal. Affirmed.

Russel & Campbell, for complainant.

Timothy E. Tarsney and *John W. McGrath*, for defendants.

MCALVAY, J. Complainant, a partnership association of Detroit, and owner in fee of certain real estate in said city, filed its bill of complaint against defendants to quiet title to said premises, alleging that it acquired title by warranty deed March 22, 1893, and that for more than 15 years prior to the filing of the bill of complaint, complainant and its grantor have been in open, notorious, adverse, and exclusive possession of said premises, and claimed title in fee simple to the same; that during all that time the city regularly levied its taxes and assessments upon said premises, which were paid; that on August 2, 1869, said premises, being lot 11 of block 65 of the subdivision of the Woodbridge farm, were sold to the city of Detroit for alleged default in payment of a special assessment for

paving for the year 1868, and that defendant city treasurer has threatened to issue a tax title on the said property to some person to complainant unknown. The prayer of the bill is that complainant's title be quieted, and the defendant city treasurer be restrained from issuing the tax title, as threatened.

To this bill defendants demurred upon the grounds:

1. That the assessment made and referred to in the bill was made for an improvement of the property, and that the sale of the property was because of the failure of the owner to pay the assessment, as was his duty; that the said assessment was a continuing lien upon said property, and complainant purchased the same subject to such lien and subject to the sale thereof for the nonpayment of the said assessment, and it became and was the duty of the successive owners of the said property to pay and discharge such lien.

2. That the bill of complaint contained no allegation that the fact of the nonpayment of the assessment and the sale of the land by reason thereof was not actually known to the complainant at the time of its purchase of said property.

From an order overruling the demurrer, defendants have appealed.

It is claimed that this case is distinguished from *Schneider* v. *City of Detroit*, 135 Mich. 570, for the reason that it appeared in that case that complainant had no knowledge of defendant's lien or title, and in the present case the bill of complaint contains no averment that such was the fact. Whether the claim of defendant was known to complainant or not can make no difference. Adverse possession, in order to be invoked as a basis of title, must necessarily be exclusive, and hostile as to all claimants, whether known or unknown. The cases are not distinguishable.

The order overruling the demurrer is affirmed, with costs.

MOORE, C. J., and CARPENTER, GRANT, and BLAIR, JJ., concurred.

KENNEY *v.* APLEY.

LANDLORD AND TENANT—TENANCY OF CROPPER—TERMINATION OF RELATION.

Defendant worked complainant's land for the year 1900 for a share of the crop, and during that year complainant seeded it to grass with the grain at his own expense. In 1901 defendant's son, at his father's request, made a new arrangement with complainant to harvest the hay. *Held*, that defendant was not a tenant at will; that his rights terminated when the 1901 crop was harvested, and that he was a trespasser in interfering with the harvesting of the crop of 1902.

Appeal from St. Clair; Tappan and Law, JJ. Submitted February 9, 1905. (Docket No. 115.) Decided March 14, 1905.

Bill by Bernard Kenney against Thomas Apley to restrain a trespass upon certain land. From a decree for complainant, defendant appeals. Affirmed.

John B. McIlwain, for complainant..

Thomas Wellman, for defendant.

MCALVAY, J. Complainant filed an injunction bill in St. Clair county against defendant "to restrain and enjoin him from trespassing upon the premises described, and from going on the premises and cutting hay thereon, and from interfering with complainant and those claiming under him in the use and enjoyment of said property."

Complainant owned 40 acres of land in Riley township, St. Clair county, with a crop of hay on it, about ready to cut, at the time the bill was filed. Defendant had for the year 1900, under a certain agreement, made late in 1899, worked the place on shares for two-thirds of the crops. It was seeded to grass that year by complainant under

their arrangement. For the year 1901 complainant claims that under a new agreement defendant harvested the hay on shares for one-half the crop. For the work of 1902 complainant made arrangements for the season with one Blinn, when defendant interfered, ordered Blinn off, and insisted he would harvest the hay. Defendant, by his answer, claims that he is a tenant at will; that his tenancy has not been terminated; that, being in possession, he will cut the hay, and get his share, if permitted by the court. The allegations and admissions of the pleadings made it necessary to take but little testimony, the only question to determine being whether defendant was a tenant or a trespasser. Upon motion to dissolve the preliminary injunction the court ordered a hearing upon the pleadings and proofs. The case was heard before both judges of the circuit, and a decree granted according to the prayer of the bill of complaint.

We find that the action of the court was clearly justified by the proofs. Defendant never was a tenant at will of the premises. He worked the land for the first year on shares, furnishing two-thirds of the fertilizer and receiving two-thirds of the grain. The whole 40 acres, except barnyard, was seeded to grass with this crop of grain, by complainant, at his own expense, and defendant was to feed the straw on the premises. For the season of 1901 defendant's son, at his father's consent and request, went to complainant to make an agreement to cut the hay. This was an entirely new agreement. There was no other or further agreement or relation between these parties relative to this land after the hay crop for 1901 was harvested and sold. Complainant made some arrangement for 1902 with Blinn, when defendant interfered. The admissions of the answer and proofs clearly sustain the allegations of the bill.

The decree is affirmed, with costs of both courts.

MOORE, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

SWEET *v.* WESTERN UNION TELEGRAPH CO.

1. TRIAL—INSTRUCTIONS—REFUSAL—HARMLESS ERROR.
   The refusal of a proper request is not reversible error where its substance was given in others.

2. TELEGRAPH COMPANIES—DELIVERY OF MESSAGES.
   Where a telegram is sent to one person in care of another, delivery to the latter is sufficient.

3. DAMAGES—REMOTENESS—CONTINGENT INTEREST.
   Damages to an attorney for nondelivery of a telegram instructing him to attend a hearing on claims against an estate are too remote and speculative for recovery, where it appears that the hearing was adjourned and in the interim the claim was compromised, and that plaintiff's interest in prosecuting it was contingent on success.

Error to Cass; Carr, J. Submitted February 9, 1905. (Docket No. 124.) Decided March 14, 1905.

Assumpsit by Charles E. Sweet and Clyde W. Ketcham, copartners as Sweet & Ketcham, against the Western Union Telegraph Company for an alleged failure to deliver a message. There was judgment for defendant, and plaintiffs bring error. Affirmed.

Charles E. Sweet (*James H. Kinnane*, of counsel), for appellants.

Gore & Harvey (*C. A. Kent*, of counsel), for appellee.

MOORE, C. J. This case was brought in justice's court to recover damages for the nondelivery of a telegram. The case was appealed to the circuit court, where it was tried by a jury, which returned a verdict in favor of the defendant. The case is brought here by writ of error.

There are upwards of 20 assignments of error, many of which it will not be necessary to discuss.

The record discloses that plaintiffs, who live at Dowagiac, are attorneys who were acting for Lucy Jarvis in a claim she had against the estate of Burton Jarvis. It was expected this claim and others would be heard before the commissioners on claims at Buchanan, and on the 24th of September, 1902, Mr. Ketcham went to Buchanan to look after it. He obtained information early in the day which led him to believe that because of the hearing of other claims the hearing of this claim would not be heard that day, and, after arranging with his client what to do in case the claim was reached, he went on before noon to Benton Harbor. It became evident to Miss Jarvis later that the case would be reached on the 25th, and she communicated that fact by telephone to Mr. Sweet, who sent the following:

"DOWAGIAC, September 24, 1902.
"To CLYDE W. KETCHAM,
"Care John Doelle,
"Benton Harbor, Mich.,
"Principal of High School.
"Attend Buchanan case tomorrow without fail; I can't.
"C. E. SWEET."

Mr. Sweet heard nothing further from the telegram that day, and at 6 o'clock went to Grand Rapids. The telegram was forwarded to Benton Harbor, given to the messenger, and taken to Mr. Doelle. What then occurred is the subject of conflicting testimony. Mr. Doelle's version is as follows:

"After dinner we [Mr. Ketcham and Mr. Doelle] went direct to the schoolhouse. He remained until the last bell began to ring; that was about 1:30. I knew where he was going when he left. He was going to Grand Rapids on the next train. I knew from what depot that train would go. The messenger of the Western Union came to me at the high school. I know I looked at my watch when he came, to see whether he had time to go to the train and get Mr. Ketcham before the train

should leave. It was either 2 o'clock or ten minutes to 2. It was between those two. I told the messenger boy that Mr. Ketcham was going to Grand Rapids on the next train, and that I thought he would have time to reach him at the depot before the train should leave. There is but one depot at Benton Harbor from which you can go, by direct route, to Grand Rapids. The boy came back between 3 o'clock and 10 minutes to 4. Said he had not found Mr. Ketcham, and I told him to forward the message to Grand Rapids, care of the State convention. I paid him 25 cents to forward the message. I ascertained from the Western Union office that the telegram had arrived at 12.53."

On cross-examination he testified:

"*Q.* So the message was delivered to you at the schoolhouse?

"*A.* Yes, sir.

"*Q.* And I believe you receipted for it?

"*A.* I did not receipt for it.

"*Q.* You are positive of that?

"*A.* Yes, I am as positive as I can be.

"*Q.* But it was delivered to you?

"*A.* It was delivered to me; yes, sir.

"*Q.* About 2 o'clock or ten minutes to 2?

"*A.* About ten minutes to 2 or 2 o'clock; yes, sir.

"*Q.* I wish you would look at this delivery sheet, and answer me if this is your signature, 'J. Doelle?'

"*A.* Why, that looks something like it. I don't write like that very often.

"*Q.* That is the way you would write in pencil, isn't it?

"*A.* Perhaps it would be; yes, sir.

"*Q.* Is that your signature?

"*A.* It looks like it.

"*Q.* Would you say that it is not?

"*A.* I won't say that it is not.

"*Q.* What do you say whether or not that is your signature or not?

"*A.* I may have receipted for it the second time when he came back and I paid him the quarter to forward it. As to that I am not clear.

"*Mr. Gore:* We offer the delivery sheet in evidence. (Paper referred to marked 'Exhibit B')."

Redirect examination by Mr. Kinnane:

"When I say 'delivered it' I mean that they brought that message to the schoolhouse thinking I was the man who knew where Mr. Ketcham was. I believe I didn't have it in my hands. I may have taken it in my hands and looked at the address. I don't know whether I did or not. I didn't open it, nor see it opened in my presence, and did not retain it. I told the delivery boy that Mr. Ketcham was going to Grand Rapids on the next train, and I thought he would have time to get there. That was the first time."

The messenger testified:

"I went to dinner that day at 12:30; returned at 1:30. There were three messages waiting for me. I left the office with them about 1:35.

"*Q.* I hand you delivery sheet marked 'Exhibit B,' dated September 24, 1902, and ask you if you had that sheet in your possession that day?

"*A.* Yes, sir. I delivered the message to Squier at 1:40. I delivered a message to Mr. Squier and one to Mr. Walton before delivering the one to Mr. Doelle. I went straight to the schoolhouse, and found Mr. Doelle, and presented the message. I think he had it in his hands, but I think I took it back to the office. I am pretty sure he had it in his hands. I saw Mr. Doelle write his signature there, 'J. Doelle,' under message No. 22. I am sure. I think he made the figures '2:06.' I think I remember his taking out his watch and putting down the time. He said Mr. Ketcham had left for Grand Rapids; to forward the message there. Mr. Doelle did not say anything to me about Mr. Ketcham being at any railway station. When I reported at the office they wanted an address at Grand Rapids. I went back to the high school for an address. I went back immediately. I saw Mr. Doelle on this second occasion, and asked him for an address. And he said he didn't know where Mr. Ketcham would be that day, but the next day he would be at the State convention there; a republican convention. I went back to the office, and told them what he said, and they wanted a guaranty before they could forward the message. They told me to go back to the high school for the guaranty. I did that. That was the third time. He said he would guarantee it, and I went back to the office, and they wanted a deposit. I went back, and he said he had no money, but to come up

to his house at 5 o'clock, but to forward the message as soon I got back. I went to Mr. Doelle's that evening, and got the money at 5 o'clock at his house. I returned the money to Mr. Doelle some time within the next three days. Nothing was said during any of my interviews with Mr. Doelle about going to the railway station.

"*Q.* Do I understand you to say that when you first went to Mr. Doelle with this message he told you that Mr. Ketcham had left for Grand Rapids?

"*A.* Yes.

"*Q.* Was that the reason you didn't go to the station?

"*A.* Yes, sir."

On cross-examination:

"*Q.* You are quite positive, are you, that Mr. Doelle took out his watch and looked at it, and then wrote these figures?

"*A.* Yes, sir.

"*Q.* '2:06' down there?

"*A.* Yes, sir; I remember. * * * When I delivered this message to Mr. Doelle, he was at the schoolhouse, in the assembly hall. He looked at his watch. I think he said it was 2:06.

"*Q.* And then he said to you that Mr. Ketcham had gone to Grand Rapids?

"*A.* Yes.

"*Q.* Had gone on the train?

"*A.* He said he had left for Grand Rapids. I kept the message. I didn't go to the depot. It would have been two blocks down there to the depot and two blocks back."

The message was not forwarded to Grand Rapids, but was returned to Dowagiac after Mr. Sweet had taken a train to Grand Rapids. It was not until the morning of the 25th, when Mr. Sweet and Mr. Ketcham met in Grand Rapids, that the latter learned a telegram had been sent, and the former that Mr. Ketcham had not received it.

What occurred at Buchanan is shown by the testimony of Miss Jarvis, which will throw light upon several important features of the case. It is as follows:

"I live in Dowagiac, and have lived there all my life. Am one of the legatees of Burton Jarvis estate. I had a claim against this estate for $391. I placed it with Sweet

& Ketcham for adjustment. On September 24, 1902, I went before the commissioners on a hearing on that claim. Mr. Ketcham went with me. He went to Buchanan, and found that my case would not be heard that day. Mr. Ketcham said he would go to Benton Harbor, as he had business there, and that, in case my case would be heard the next day, he would return. He told me for any information I wished to telephone Mr. Sweet. I telephoned Mr. Sweet, and told him that my case would not be heard that day, but perhaps it would be the next day. I heard, after Mr. Ketcham had left, that I was to have my witness there the next day, and I telephoned Mr. Sweet to see this witness, and have her come, which he did. I told him Mr. Ketcham had gone to Benton Harbor, and Mr. Sweet said he would recall him, and that he would be there the next day. Afterward I talked with Mr. Sweet again over the phone. He informed me that my attorney would be on hand the next day. My attorney was not there the next day. My witness came, and I asked Mr. Roe to represent me that day; to hear Miss Allen, my witness. The hearing was not finished, and it was adjourned until the 7th of October for hearing the witness that was to appear on the other side against me. It was adjourned on motion of the other side. I left, thinking that I would come back the 7th. Then I heard that my cousin had settled, and I was nervous. Well, I settled it also.

"*Q.* If your attorneys had been there, I will ask you if you had entertained any such proposition?

"*A.* No.

"*Mr. Gore:* We object to it, your honor, as speculating. She cannot tell. (Objection sustained; to which ruling plaintiffs, by their counsel, duly excepted.)"

On cross-examination:

"I settled for $68. I paid Sweet & Ketcham $8. This made a total of $132 that I received—$64 of Mr. Jarvis in his lifetime and $68 from his estate. I had an arrangement with Sweet & Ketcham. Was to pay them one-half of the claim if it was allowed. If it went to circuit court, they were to have whatever the fees were.

"*Q.* So that their interest in this matter was dependent upon their success?

"*A.* Yes, sir. I made my settlement with Mr. Worthington, the executor of the estate, and went before the commissioners and they O. K.'d the settlement."

On redirect examination:

"If the claim was appealed, the pay of my attorneys would not depend upon whether they won the case or not. They were then to be paid for whatever they did."

There was other testimony offered, some of which was received and some rejected, relating to other branches, to which we deem it unnecessary to refer.

The trial judge charged the jury, among other things, as follows:

"This is an action by plaintiffs for damages they claim they suffered by the nondelivery of a telegram by the defendant. Coming right to the points in issue, it is the duty of the telegraph company to promptly deliver any message which is given to them for transmission and delivery, and a failure to deliver promptly makes them liable in damages, and it is a question for you to find, from the facts in this case, whether there was prompt delivery of the message in question. People send messages by telegram instead of by mail because they are in need of haste, and when a message is so sent and received it must be delivered with reasonable dispatch in all cases, and, if not, the company must pay damages for failure to so deliver. And it is for you to say whether, under all the circumstances of this case, there was such prompt delivery of the message as will relieve the defendant company from liability. The telegram in question demonstrated upon its face that it was an urgent message, and must be delivered with haste, and in such case a greater degree of diligence must be exercised than if no such urgency was expressed, and you will take this into consideration in considering the facts and making up your verdict. The telegraph is resorted to by the public to secure the speediest mode of communication, and the prompt delivery is of the very essence of the undertaking by the company. Hence a failure to make such prompt delivery, if shown in this case, requires a verdict at your hands for the plaintiffs, as hereafter indicated. If you find from the evidence that the defendant sent the message in question with reasonable promptness, and delivered the same to Mr. Doelle with reasonable diligence, your verdict must be for the defendant. On the question of prompt delivery, you are to take into account the distance of the place of delivery from the defendant's office, the distance from the office to

the schoolhouse, and the necessary time it would take to get there. The burden is on the plaintiffs to show by the preponderance of the evidence that the allegations in the declaration are true, and, if the evidence on behalf of the plaintiffs fails to do this, or such evidence is fully met by evidence on behalf of the defendant, then I instruct you that the plaintiffs cannot recover. The plaintiffs cannot recover unless by the neglect of some duty the company owed them; and, if the message was delivered to Mr. Doelle with reasonable diligence, your verdict must be for the defendant. * * *

"If you find that the company did not deliver this telegram, as I have indicated, with such promptness as was required under the circumstances, and are liable for a failure to so deliver, then you will find for the plaintiffs such an amount as will be reasonable under all the facts in the case. In other words, if you find for plaintiffs, your verdict will be for what the services of Mr. Ketcham would reasonably be worth before the commissioners, on trying the client's case, at the rate per day as shown by the evidence in this case."

The plaintiffs preferred the following request, which was refused:

"I charge you that if you find that the messenger boy did not give the message to Doelle the first time he (the messenger boy) came to the schoolhouse; that the messenger boy kept the message in his hand, and that Doelle did not sign the delivery sheet the first time the messenger boy came, and that Doelle only directed the messenger boy to go on to the Pere Marquette station—then I charge you that there was no delivery of the message at this time."

Complaint is made of the failure to give this request. It might have been well to give it, but, when taken in connection with what was given, a failure to give it was not, we think, reversible error. There was no claim there was any delivery of the message, unless the proofs disclosed there was a delivery to Mr. Doelle. In relation to that there was a conflict of testimony. The jury were told if the defendant did not deliver the message with such promptness as was required under the circumstances, they

should find for the plaintiff. This was stated in several ways, so that we do not think the jury misunderstood.

The conflicting testimony presented a question of fact as to whether there had been a delivery to Mr. Doelle, which was decided by the jury in favor of the contention of defendant.

In section 414, Croswell on Electricity, it is said:

"Although the duty of the telegraph company is to deliver to a certain person, it may not always be bound to deliver to the person for whom the telegram is intended, for, if the telegram is addressed to X., 'in care of' Y., the telegraph company may deliver the telegram to Y. without being guilty of any negligence even if it fails to reach X."

In section 748, Joyce on Electric Law, it is said:

"The same rule of diligence, the same requirement of prompt delivery, and the same obligation to find the person in whose care a message is addressed, undoubtedly applies as that which governs in the delivery of messages to the addressee himself."

Section 750 reads:

"If a person in whose care a message is sent refuses to receive or accept it, the telegraph company has fulfilled its duty in tendering it to such person."

Section 751 reads:

"Where a telegram is sent to one person in care of another, delivery to the latter is, as a rule, sufficient."

In *Western Union Tel. Co.* v. *Young*, 77 Tex. 245, the message was directed to "Mrs. N. Young, care W. R. Henry & Co., Fort Scott, Kansas." The court say:

"There was evidence to show that on the morning of the day it was received for transmission, it was delivered to W. R. Henry of the firm of W. R. Henry & Co. and that he declined to forward it and handed it back to the messenger. The court instructed the jury, in effect, that if the defendant's agent at Fort Scott tendered the message to W. R. Henry, and he declined to receive it, and

gave the messenger such directions as would have enabled him to find plaintiff's wife by the exercise of reasonable diligence, then it was the duty of the agent to use such diligence to find and deliver the message to her. We think the court erred in giving this instruction. The liability of the company must be determined by the terms of its contract. Its obligation was not to deliver to W. R. Henry & Co. and to Mrs. Young, but to deliver to them as her agents, properly addressed to her, to be dealt with by them as they deemed best. The direction to 'Mrs. N. Young, care of W. R. Henry & Co.,' has the same meaning and legal effect as it would have had if the direction had been to 'W. R. Henry & Co., for Mrs. Young.' The company contracted to deliver to W. R. Henry & Co. for the benefit of the plaintiff's wife; and when they delivered to a member of that firm their liability was at an end. The court should have so charged the jury."

In *Western Union Tel. Co.* v. *Elliott*, 7 Tex. Civ. App. 482, the court said:

"It is equally well settled that a delivery of the message to the person in whose care the same is addressed is a full performance of the contract by the company, so far as delivery is concerned."

In *Lefler* v. *Telegraph Co.*, 131 N. C. 355 (59 L. R. A. 477), the court say:

"The message was delivered to Johnson [the agent of the party in whose care the message was sent] in proper time, and eliminates the discussion of any negligence there may have been in sending the message, as no negligence can avail the plaintiffs that did not cause the injury."

The court further say:

"The court properly instructed the jury that Johnson was a proper agent of the Southern Railway Company, to whom a delivery of the message might be made, and a delivery to him was a delivery to the Southern Railway Company, and, as the message was directed to Price Lefler in care of the Southern Railway Company, the said company was made his agent, and a delivery to the agent discharged the defendant from further liability on account of the message. *Western Union Tel. Co.* v. *Houghton*, 82 Tex. 561 (15 L. R. A. 129); *Western Union*

Tel. Co. v. *Young*, 77 Tex. 245. These cases were cited by the plaintiffs for the purpose of showing that, although the telegram was sent in care of the Southern Railway Company, it was still the duty of the defendant to make diligent inquiry for Price Lefler, which the plaintiffs allege was not done. But upon examination of the cases it will be seen that this is only necessary when the party in whose care the message is sent cannot be found. When he is found, and delivery made to him, the defendant has nothing further to do with the telegram."

See, also, *Western Union Tel. Co.* v. *Barefoot*, 97 Tex. 159 (64 L. R. A. 491); *Western Union Tel. Co.* v. *Mitchell*, 91 Tex. 454 (40 L. R. A. 209).

We have not overlooked the cases cited on this point by plaintiffs. In *Western Union Tel. Co.* v. *Cooper*, 71 Tex. 507 (1 L. R. A. 728), the distinction from the case at bar may be noted. In that case the message was not sent in care of a third person, and was not delivered. The messenger went twice to the office of the physician, and, failing to find him, did not look further. The messenger personally knew the physician well, and it is held in this case that diligence required that the messenger should look for the physician upon the streets. In the case at bar the message, according to the finding of the jury, was delivered to the person in whose care it was sent. An examination of the other cases cited will show they are easily distinguishable.

There is another reason why the case should be affirmed. There is no dispute as to what the contract was between Miss Jarvis and the plaintiffs. Their compensation was to depend upon a contingency. No one can say she had a claim which could certainly be enforced. It is purely conjecture whether plaintiffs, had the litigation proceeded, would have been in a position to assert a claim against her. The damages claimed are too remote, uncertain, and speculative to entitle them to recover in this action. The plaintiffs, by their declaration, seek to recover in this action only for damages to business and reputation. No evidence of loss growing out of injury to repu-

tation was given. The loss in the way of business which they seek to recover was their interest in the claim of Miss Jarvis against the estate of Burton Jarvis. What was that interest? At this point we enter the realm of speculation. Miss Jarvis, though her case was adjourned at the request of the estate to October 7th, which would have given her ample opportunity to consult plaintiffs, deemed it wise to settle the claim for $68. Suppose it had been litigated, instead of settled, who can say what the result would have been? Upon this branch of the case we think the judge might very properly have directed a verdict in favor of defendant. 25 Am. & Eng. Enc. Law (1st Ed.), pp. 836–839, cases cited; *Bodkin* v. *Telegraph Co.*, 31 Fed. 134; *Baldwin* v. *Telegraph Co.*, 45 N. Y. 744; *Chapman* v. *Telegraph Co.*, 90 Ky. 265; *First National Bank of Barnesville* v. *Telegraph Co.*, 30 Ohio St. 555; *Western Union Tel. Co.* v. *Graham*, 1 Colo. 230; *Hibbard* v. *Telegraph Co.*, 33 Wis. 558; *Cahn* v. *Telegraph Co.*, 46 Fed. 40.

Judgment is affirmed.

CARPENTER, MCALVAY, GRANT, and HOOKER, JJ., concurred.

SLOMAN *v.* WILLIAM D. C. MOEBS CO.

1. INTOXICATING LIQUORS—LICENSE—INTERSTATE COMMERCE.
   Sales of liquor in original packages by a dealer whose place of business is in another State, from which the liquors are shipped, are interstate commerce and beyond local regulation, though both parties to the sale live in this State and the sale is made here.
2. SAME—STATUTES—CONSTITUTIONALITY.
   Section 4018, 1 Comp. Laws, attempting to regulate wholesale sales of intoxicating liquors in this State by nonresidents, is unconstitutional.

Error to Wayne; Brooke, J. Submitted February 9, 1905. (Docket No. 129.) Decided March 14, 1905.

Assumpsit by Morris H. Sloman against William D. C. Moebs Company for breach of a contract to purchase certain intoxicating liquors. There was judgment for plaintiff, and defendant brings error. Affirmed.

This case was heard by the court without a jury, and the facts and law found as follows:

"FACTS.

"1. That on the 15th day of January, 1902, the said plaintiff and the said defendant entered into a certain contract, in words and figures as follows:

"'DETROIT, MICHIGAN, January 15, 1902.

"'For and in consideration of the discharge of a certain mortgage made and executed the 17th day of June, 1901, by John Rivard, of the city of Detroit, to the Crown Distilling Company, and recorded in the office of the city clerk of the city of Detroit, on the 17th day of June, 1901, and known as file number 5475, we hereby agree to purchase from the Crown Distilling Company, four barrels of "400 Baltimore Rye" whisky within nine months from date, the same to be billed at the lowest market price, and to be paid for within four months from the date of shipment.

"'WILLIAM D. C. MOEBS COMPANY.'

"2. That during the year 1902 the said plaintiff was a resident of the city of Detroit, and had been such for a number of years.

"3. That during that time the said plaintiff was engaged in the wholesale liquor business, doing business under the name of the Crown Distilling Company, with his place of business in the city of Cincinnati, Ohio, and that he shipped liquors from the city of Cincinnati, Ohio, into the State of Michigan and other States, direct to his customers in the original packages, and not otherwise, and has no place of business in the State of Michigan, and did not have at the time of the execution of this contract, except an office in which he kept a few samples.

"4. That the said plaintiff personally sold whiskies throughout Michigan, Wisconsin, Ohio, and other States, and during the year 1902 sold in the State of Michigan about 100 barrels of whisky.

"5. That the said defendant company is a corporation operating in the State of Michigan, with its principal place of business in the city of Detroit, and made the contract for the purchase of said four barrels of whisky for use in a saloon on Woodward avenue, in said city of Detroit, to be shipped from Cincinnati in original packages.

"6. That on the 8th day of July, 1902, the said defendant company notified the said plaintiff of their refusal to accept or pay for the four barrels of whisky mentioned in said contract.

"7. That the said plaintiff paid no wholesale liquor tax in the State of Michigan for the year 1902, and did not have any wholesale license issued by the said State at the time the contract for the sale of the four barrels of whisky was made, or at the time when the defendant company refused to accept the same.

"8. That the loss of profits to the plaintiff on the sale of the four barrels of whisky amounted to $216.

"LAW.

"1. That the said plaintiff is not a wholesale dealer in spirituous and intoxicating liquors under the laws of the State of Michigan, and therefore is not required to pay a wholesale liquor tax.

"2. That the plaintiff was, at the time of the execution of this contract, engaged in interstate commerce within the meaning of the interstate commerce clause of the Constitution of the United States.

"3. That the plaintiff, being so engaged in interstate commerce, was not required to comply with the laws of the State of Michigan in regard to the sale of intoxicating liquors at wholesale within the State of Michigan.

"4. That the contract sued on was and is a valid contract, and plaintiff is entitled to recover damages in the sum of $216, with interest thereon from July 8, 1903."

John E. Moloney, for appellant.

Clark, Jones & Bryant, for appellee.

GRANT, J. (*after stating the facts*). The sole objection to the defendant's liability is that the contract is not a legal one, because the plaintiff had not complied either with section 5379, 2 Comp. Laws, or with section 4018, 1 Comp. Laws. Section 5379 provides for a tax of $500 upon the business of selling spirituous or intoxicating liquors at wholesale, as a condition precedent to the right to engage in the business. Similar cases have been in this court before, and also in the Supreme Court of the United States.

Under the contract the goods were to be shipped in the original package from the State of Ohio into the State of Michigan. They were so shipped and delivered to the defendant. The transaction was interstate commerce, under *Lyng* v. *Michigan*, 135 U. S. 161; *Leisy* v. *Hardin*, 135 U. S. 100; *Scott* v. *Donald*, 165 U. S. 58; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438. These and other cases are cited and discussed in the recent case of *American Express Co.* v. *Iowa*, 196 U. S. 133.

The fact that the plaintiff is a resident of Michigan, and that the contract was executed here, does not take the transaction out of interstate commerce and make it a State transaction. Plaintiff's place of business is in another State. His products are there manufactured, and shipped to other States in the original packages. The Constitution of the United States gives him this right, regardless of his residence. He is not engaged in selling the original packages after their arrival in the State,

within the decision in *Vance* v. *W. A. Vandercook Co.*, supra.

Act No. 217 of the Public Acts of 1885, being section 4018, 1 Comp. Laws, has been declared unconstitutional and void by the Supreme Court of the United States. *Walling* v. *Michigan*, 116 U. S. 446. That decision is binding upon us.

Judgment affirmed.

MOORE, C. J., and CARPENTER, MCALVAY, and HOOKER, JJ., concurred.

CLUTE *v.* IONIA CIRCUIT JUDGE.

1. CRIMINAL EXAMINATION—SUFFICIENCY.
   An examination on a complaint and warrant charging the larceny of a stick pin only is not a sufficient basis for an information charging the larceny of a stick pin and a sum of money.
2. MANDAMUS—DISCRETION—QUASHING INFORMATION.
   Where an information for larceny is quashed after trial and disagreement of the jury, mandamus to compel the judge to set aside the order of quashal will not be granted unless there is a showing that a different result would be reached on retrial.

Mandamus by William K. Clute, acting prosecuting attorney of Ionia county, to compel Frank D. M. Davis, circuit judge of Ionia county, to vacate an order quashing an information. Submitted February 27, 1905. (Calendar No. 20,972.) Writ denied March 14, 1905.

William K. Clute, in pro. per.

James Scully, for respondent.

MOORE, C. J. In May, 1904, a complaint was made before a justice of the peace, charging one Malone with larceny from the person of one McElroy of one gold stick

pin, of the value of $75. A warrant was issued, in which the offense charged followed the statement made in the complaint. Malone was arrested and taken before the justice of the peace, and an examination was held, the result of which was that the justice of the peace held Malone for trial to the circuit court for the offense alleged in the complaint and warrant. In September an information was filed against Malone in the circuit court, in which the offense was stated as follows:

"That he did take, May 25, 1904, at the city of Ionia, one gold stick pin of the value of $75 and $6 in money of the United States of America, of the goods, chattels, and money of one James C. McElroy, from the person of said James C. McElroy, and then and there did feloniously steal, take, and carry away."

When arraigned, and before having counsel, Malone pleaded not guilty. After he procured counsel, leave was given him to withdraw his plea of not guilty and file a motion to quash the information, for the reason that the respondent was not charged in the complaint and warrant and was not held to trial by the examining magistrate for stealing $6, but was charged with the offense of stealing a stick pin of the value of $75. This motion was overruled, and, Malone standing mute, the court entered a plea of not guilty. Thereupon a trial was had, and in his return to the motion made in this case the trial judge states that no evidence was produced on said trial that Malone had stolen a stick pin or $6 in money as charged, and the court directed a verdict of not guilty on the charge of stealing the stick pin, and submitted the charge to the jury of whether he had attempted to steal from the person of James C. McElroy $6, and that the jury disagreed.

At the February term it was conceded by the prosecuting attorney that Malone could not again be put on trial for the larceny of the stick pin, but claimed he might be tried for the attempt to steal $6 in money from McElroy, and that this trial might proceed under the original information. A motion was made that the circuit judge quash

the information, for the reason that the charge of stealing $6 is a separate and distinct offense from the charge of stealing a stick pin, and because the examining magistrate did not find there was probable cause to find Malone guilty of the crime of stealing $6. This motion to quash was granted, and the prosecuting attorney asks here for the writ of mandamus to compel the circuit judge to set aside this order, and to proceed with the trial of Malone for the offense of attempting to steal $6 from the person of McElroy.

In his return to the writ, the trial judge, in addition to what we have already stated, returned that he quashed the information for the reason that the charge of stealing $6, as set forth in said information, is a separate and distinct offense from the charge of stealing a stick pin as set forth in the complaint and warrant and the return of the examining magistrate, and that the said magistrate did not find or return that there was probable cause to believe said accused person to have been guilty of the crime of stealing $6, and that said Bert Malone cannot be put on trial in the circuit court for a separate and distinct offense from that set forth in the complaint and warrant and return made by the examining magistrate.

Upon the examination of the complaining witness in the court below, he gave testimony tending to show that in the morning, when he dressed himself, he put the stick pin into his necktie, and when he returned to the hotel the latter part of the afternoon it was gone. His testimony also showed that he spent a good share of the afternoon in saloons, drinking, and that Malone was with him, and showed circumstances which, taken in connection with his testimony, might tend to show Malone took the stick pin.

In addition to that, he gave testimony tending to show that Malone stole from him $6, and it is insisted by the prosecuting attorney that, though he was not charged with the offense of stealing the $6, inasmuch as there is testimony given upon the examination tending to show he had done so, he might be charged with that of-

fense in the information; citing *Annis* v. *People*, 13 Mich. 511, and quite a number of other cases. An examination of these cases convinces us that none of them go so far as is contended here. Mr. Malone was not charged with the larceny of $6, but was charged with the larceny of a stick pin of the value of $75, and it is with reference to that offense that the examination was conducted.

The respondent was not called upon in the court below to meet any other charge. The examining magistrate did not undertake to inquire into any other charge. He did not find that any other offense had been committed, nor that there was probable cause to believe that Malone was guilty of the offense of stealing $6 from the person of Mr. McElroy, but did find there was probable cause to believe he stole from his person the stick pin. If any defense had been interposed as to the larceny of $6 in the justice's court, it is quite possible that the examining magistrate might have found the offense was not proven; but no offense of that sort was charged, and it was not the subject of inquiry, except incidentally. We think the court was right in saying, as he did, that respondent could not be convicted of an offense with which he was not charged in the court below, and in relation to which no inquiry was entered upon by the examining magistrate. See *People* v. *Jones*, 24 Mich. 215; *Yaner* v. *People*, 34 Mich. 286; *People* v. *Evans*, 72 Mich. 387.

There is another reason why we should not set aside the order of the circuit judge. The writ of mandamus is a discretionary writ. The return of the circuit judge shows that the evidence produced on said trial did not show that Malone had stolen $6 in money, as charged in the information, and, as to whether he had attempted to steal it or not, the jury were unable to agree. It is not made to appear in the petition that any different result would be reached if the order to quash the information was set aside, and another trial had.

The application for the writ of mandamus is denied.

CARPENTER, MCALVAY, GRANT, and BLAIR, JJ., concurred.

BUXTON *v.* EMERY.

1. WILLS—CONTEST—UNDUE INFLUENCE.
   Evidence on a will contest examined, and *held*, sufficient to require submission of the question of undue influence to the jury.
2. SAME—MENTAL CAPACITY—BURDEN OF PROOF.
   The burden of proving mental capacity to make a will is on the proponent, and it is error not to so charge.
3. SAME—INSTRUCTIONS.
   Instructions as to mental capacity examined, and *held*, erroneous as placing the burden of proving its lack on contestant.
4. SAME—EXPERT EVIDENCE.
   Where, in a will contest, it is claimed that testatrix was a victim of the morphine habit, evidence that she exhibited symptoms indicating such habit is admissible to enable physicians to give expert evidence on the subject.
5. SAME—INSTRUCTIONS.
   Instructions on the use of expert testimony examined, and *held*, argumentative and open to criticism as containing a protest against established rules of evidence.

Error to Wayne; Frazer, J. Submitted October 5, 1904. (Docket No. 4.) Decided March 21, 1905.

Benjamin W. Buxton presented for probate the last will and testament of Jennie E. Buxton, deceased. The will was allowed in the probate court, and Ralph Emery, guardian of Robert T. Emery, appealed to the circuit court. There was judgment at the circuit for proponent, and contestant brings error. Reversed.

McDonald & Fowler, for contestant.

Miller, Smith, Alexander & Paddock, for proponent.

MONTGOMERY, J. This is a contest over the will of Jennie E. Buxton, deceased. From a verdict and judgment admitting the will to probate, the contestant, Emery, brings error.

The record is of great length, and contains 90 assignments of error. Many of these assignments must be passed upon without discussion, unless we start out to publish a volume for the report of this case. We are not possessed of this purpose, and will therefore confine our discussion to what we consider the salient features of the case.

The grounds of contest were the usual ones of mental incompetency and undue influence. The testator was a woman of refinement, but had in the later years of her life become a victim of the drinking habit. Without setting out at length the testimony, differing somewhat as to the extent of her drinking, it is enough to say that there is abundant proof from which the jury might have found that she drank whisky habitually, and often to excess, and that there was testimony from experts tending to show that this habit had so affected her mentality as to render her incompetent. These deductions of the experts were, however, sharply controverted.

Mrs. Buxton's immediate relatives were her son, the proponent, Benjamin W. Buxton, and the contestant's ward, Robert T. Emery, a grandson of Mrs. Buxton, 10 years of age. Both were members of Mrs. Buxton's household. The son was married, and, with his wife, boarded with the mother. Robert's mother had died shortly after his birth, and he had lived with his grandmother from his birth until after the will in question was made. She was very fond of him, as all the testimony shows.

Benjamin W. Buxton had an estate from his father, although it was claimed on the trial that some portion thereof had not been paid over to him by his mother. Robert's mother had a like estate, and at her death left an estate of something like $30,000, about $22,000 of which was by Ralph Emery allowed to pass into the hands of Robert's guardian, as constituting Robert's estate. There were no others who had a special claim upon the bounty of deceased.

The relations between Ralph Emery and deceased

were not cordial. At the time of Mrs. Emery's death, quite a large number of articles of jewelry, toilet articles, dresses, ornaments, etc., were left in Mrs. Buxton's possession, and not inventoried by Robert's guardian. In October, 1900, Mr. Pendleton, who had up to that date acted as Robert's guardian, resigned, and Mr. Ralph Emery was appointed in his place. At this time, and for some time prior thereto, Mr. Alexander represented Mrs. Buxton as her attorney. Mr. Ralph Emery approached Mr. Alexander, presented a list of the articles belonging to the estate of his wife which had not been turned over to Robert's guardian, and asked to have the list verified and the property accounted for. This demand came to Mrs. Buxton as a surprise, as we judge from the record. Mrs. Buxton is shown to have claimed that the property of right belonged to her. It is also shown that some of the property had been disposed of, and that she declined to account for it.

Mr. Ralph Emery testified that, after this claim had been made to him, Mrs. Buxton had an interview with him as follows:

"She said she wanted to talk with me. After passing some general remarks, she said: 'We have had our difficulties, and we have not been the best of friends, but I hope from now on we can be. You know I am getting old and feeble, and Robbie is about all I have in this world for comfort; and,' she said, 'for God's sake, don't take him away from me. He is everything to me, and when I die he shall have one-half of my property.'

"*Q.* What did you reply to that statement?

"*A.* I told her I didn't have any intention at that time of taking him away."

Mrs. Buxton died March 16, 1902, leaving an estate of about $50,000. The will in question was made on January 23, 1902, and, by its terms, bequeathes the entire estate to her son, Benjamin, entirely excluding Robert Emery from any participation. Mrs. Buxton was about 70 years of age at the time of her death. At the conclusion of the testimony the circuit judge withdrew the question of undue influence from the jury. The question of mental

competency was submitted to the jury under instructions to which reference will be made hereafter.

1. It is contended that the court was in error in withdrawing the question of undue influence from the jury. It is conceded that there is no direct evidence of any influence exerted by or on behalf of Benjamin, but the contention is that the circumstances tend to show that undue influence was exerted by Mr. Alexander. In counsel's brief it is asserted that Mr. Alexander testified that he told Mrs. Buxton that Mr. Emery had threatened to drag her into court and to show that she was a drunkard; and, as Emery testified that he did not make this threat, it became a question for the jury as to whether this alleged untruthful statement to Mrs. Buxton was not made to cause or increase a prejudice against Ralph Emery, and thus indirectly prejudice her against the idea of leaving any sum to Robert. An examination of the record leaves some doubt as to whether the witness Alexander intended to be understood that the fact of this threat was communicated to Mrs. Buxton; but we are of the opinion that his testimony was susceptible to that construction by the jury, and that, if the fact should be so found, it would have some tendency to prove undue influence, when considered in connection with the fact that Mrs. Buxton assigned as one of her reasons for making the will in the terms which she adopted a want of confidence in Ralph Emery, and the further fact that no suggestion was made to her that the interests of Robert in any bequest might be protected against the imprudence or dishonesty of his father by the appointment of a trustee.

2. There was error in refusing contestant's request to charge that the burden of proof on the question of mental capacity was with the proponent. Contestant was clearly entitled to such a charge, or its equivalent. *Prentis* v. *Bates*, 93 Mich. 234 (17 L. R. A. 494). It is contended by proponent's counsel that the main charge of the court did, in effect, cast the burden of proof on the proponent, and that the jury must have so understood it. We do

not so read the record. The court put the case to the jury as turning upon the question whether the testator was or was not of sufficient mental capacity to execute the will, and also charged as follows:

"Bear in mind all the time, gentlemen of the jury, if the evidence in the case is satisfactory to you—to show you that there was lack of mental capacity to execute the paper at the time—then, whether the reasons are good or bad to you, the paper must fall for lack of this mental power. So you see, gentlemen of the jury, reason as you will, pursue whatever path you may see fit to follow, they all lead you back to this one, main, central proposition involved in this controversy—whether or not this testatrix, at the time this will was executed, had sufficient mind, under the rules that I have laid down to you, or, rather, sufficient mental capacity, to execute the paper presented here as her last will and testament."

This instruction implies that the burden rests upon the contestant rather than upon proponent. It certainly does not effect the purpose aimed at by the request, and nowhere in the charge is the rule given to the jury.

3. The contestant sought to show that the testator was a victim of the morphine habit. No direct evidence was adduced to show the fact, but it was sought to show the main fact, as we gather from the record, by showing that the symptoms exhibited by Mrs. Buxton indicated this habit; and complaint is made of a remark or ruling of the court that "you cannot prove that the woman took morphine by somebody else's opinion." Without reviewing the specific rulings upon offers of testimony, we content ourselves with holding, in view of the necessity for a new trial, that it may become a matter for expert medical opinion as to whether the symptoms exhibited by one addicted to this habit are such as to enable a physician to judge of the fact. If they are, it follows that, as this habit is usually a secret one, such testimony might furnish the only means of proving the fact.

4. The circuit judge charged the jury upon the subject of expert testimony, and, after cautioning them as to the

necessity of an opinion resting upon the foundation of fact, and illustrating his point by appropriate illustrations, added:

"I make these illustrations only for the purpose of showing the difficulties that surround people who are undertaking to give opinions upon what other people say, based upon a hypothetical question supposed to contain all the facts that are germane to the issue. It is upon that uncertain foundation that all the experts in this case have been allowed to express their opinion. I permitted it in here. I permitted these people to give this testimony, and I want to say here, and say it frankly, not because I think I ought to have done it, but because the law compels me to do it— You can give it, on both sides of this case, just exactly such weight as you see fit to give it, and no more. At best, the testimony of all these experts is but an opinion based upon supposed facts stated by witnesses, first filtered through the witness, then through the lawyer, then through the expert, and then through the jury; and that is the kind of evidence upon which decisions are based upon such kind of testimony. Now, what the chances are of the conclusions drawn from that kind of testimony being correct, you can determine just as well as I can; but I submit this testimony to you, of these experts, telling you just exactly what it is, and how it is obtained, and what its strength is, and, without expressing any opinion as to whether they have formed correct opinions or not, I submit it to you, as the judges of the weight of this testimony, with these instructions, for your determination."

This charge is argumentative, and is open to just criticism in so far as it contains a protest against established rules of evidence. We need not determine whether the later portion of the charge was calculated to correct the impressions given to the jury by the earlier, as on a new trial the question is unlikely to arise in this form.

No other questions seem to call for special mention.

The judgment is reversed, and a new trial ordered.

MOORE, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

VILLAGE OF PLYMOUTH *v.* PERE MARQUETTE RAILROAD CO.

1. EMINENT DOMAIN—RAILROADS—HIGHWAYS—CONDEMNATION OF CROSSING—DAMAGES.
   On condemnation of a highway across its tracks a railroad company is entitled to compensation for structural changes made necessary, and also for any direct expense made necessary by the fact of the street opening, as in maintaining a flagman, or gates, or cattle guards, but not for the observance of public regulations, such as cutting trains to avoid obstruction of the crossing.
2. DAMAGES—INSTRUCTIONS—HARMLESS ERROR.
   Error in the form of an instruction authorizing consideration of an element of damages that should have been eliminated is not prejudicial to the party in whose favor it was given.

Appeal from Wayne; Hosmer, J. Submitted October 7, 1904. (Docket No. 35.) Decided March 21, 1905.

Proceedings by the village of Plymouth against the Pere Marquette Railroad Company to condemn a right of way for a street crossing. From an order confirming the award of the jury, respondent appeals. Affirmed.

Frederick W. Stevens (*Charles McPherson*, of counsel), for appellant.

Paul W. Voorhies (*Harry Helfman*, of counsel), for appellee.

MONTGOMERY, J. This is a review of a proceeding taken by the petitioner to condemn a right of way for a street across the defendant's track. The jury determined that the opening of the street was a necessary public improvement, and awarded the respondent damages to the amount of $382.64. The respondent brings the case here for review, contending that the circuit judge erred in his instructions to the jury as to the proper items to be considered in awarding damages.

It appears that at the point where the proposed street crosses the respondent's tracks there are three tracks. The center track is the main track for trains between Toledo and Saginaw. The east track curves to the right, and connects the main track to Toledo with the main track to Detroit. The west track is known as the "south lead track," and extends to the yard and the engine house. The testimony tended to show that the south lead track and the Detroit "Y" are used for storing through trains while the locomotives are being supplied with coal and water and while the trainmen are waiting orders to proceed, and that upon the opening of this street, if the present method of operating trains continues, it will be necessary to open certain of defendant's trains in order to avoid an obstruction of the new street for more than five minutes at a time, and that this will cause some delay and some additional expense in the operation of the road.

It is contended by the respondent:

First, that the damages caused by this delay and expense in opening trains is a proper item to be awarded to it in these proceedings; and, *second*, that, while the circuit judge was of this opinion, his charge was given in such form as to impress upon the jury his individual view that no tangible damages were shown, and that in this there was error.

The petitioner's counsel take issue with the appellant on both propositions, and contend, *first*, that such damages as the respondent may sustain in the operation of its road by being required, in pursuance of police regulations, to open its trains to admit of teams passing across its tracks in the proposed street, are damnum absque injuria, and insist, *second*, that the circuit judge not only gave the rule contended for by respondent's counsel, but that his charge is not subject to the criticism made.

Manifestly, the question of first importance is whether the railroad company is entitled to compensation for the inconvenience to which it will be put in operating its trains so as to admit of the use of the new street as a highway. This precise question has never been determined by this

court. It is undoubted that in case of a condemnation of a right of way across a railroad the company is entitled to compensation for structural changes made necessary, and also for any direct expense made necessary by the fact of the street opening, as in maintaining a flagman, or gates, or cattle guards. *City of Grand Rapids* v. *Railroad Co.*, 58 Mich. 641; *Commissioners of Parks & Boulevards of Detroit* v. *Chicago, etc., R. Co.*, 91 Mich. 291; *Same* v. *Michigan Central R. Co.*, 90 Mich. 385; *City of Grand Rapids* v. *Bennett*, 106 Mich. 528; *Chicago, etc., R. Co.* v. *Hough*, 61 Mich. 507.

On the other hand, it is well settled that compensation for the observance of public regulations cannot be demanded. 3 Elliott on Railroads, § 1103; *Kansas City Suburban Belt R. Co.* v. *Kansas City, St. Louis & Chicago R. Co.*, 118 Mo. 599; *Lake Shore, etc., R. Co.* v. *Cincinnati, etc., R. Co.*, 30 Ohio St. 604; *Chicago, etc., R. Co.* v. *Joliet, etc., R. Co.*, 105 Ill. 388; *Peoria & Pekin Union R. Co.* v. *Peoria & Farmington R. Co.*, 105 Ill. 110; *Flint, etc., R. Co.* v. *Detroit, etc., R. Co.*, 64 Mich. 350.

The question is whether the inconvenience occasioned the respondent by opening the street in question falls within the first class or the latter. It is conceded by counsel for the respondent that, if the damage caused by cutting the trains arises out of a necessity to observe a mere police regulation, such damages are damnum absque injuria, but it is contended that the cutting of trains at this point is not only enjoined by a police regulation, but that any use of the street by the company which would unreasonably obstruct the same could, in the absence of any statute, be prevented, or the injury resulting therefrom could be redressed. It is true that any unreasonable obstruction of a street may constitute a nuisance, but we think it does not follow that statutory regulations of the joint use of streets by a railroad company and the public may not, in a sense, be treated as a police regulation.

In the present case the damages were sought to be measured by the loss of time and the increase of expense

because the company would be precluded from occupying the street more than the time fixed by statute. The measure assumed was not what might, under any circumstances, be reasonable. We think the case ought not, in this respect, to be distinguished from *Flint, etc., R. Co.* v. *Detroit, etc., R. Co.*, 64 Mich. 350. In that case it was sought to recover damages which would result from being compelled to stop the trains of the respondent's road before crossing the track of the petitioning road. The question was ably discussed in an elaborate opinion by Mr. Justice CHAMPLIN, and the conclusion was reached that such damages could not be recovered. It was held that the company was not entitled to compensation for obeying a police regulation, and it was said:

"These are police regulations, enacted by the legislature, designed to promote the public safety, and are as binding upon an existing road as one newly organized. They stand upon an equality before the law, and neither can levy tribute upon the other as a compensation for obedience to its requirements. It is subject to amendment or repeal at any time the legislature may see fit, and for this reason, as well as for the absolute impossibility of determining in advance the number of trains which in the future operation of the road would be required to stop at such crossing, the damage arising therefrom is uncertain and conjectural. But, aside from this, any incovenience or annoyance or loss suffered in obeying the police regulations of the sovereign authority is damnum absque injuria."

Much of this reasoning applies with peculiar force to the case before us. The legislature may repeal the statute fixing the five-minute rule at will, or may change that limit so as to remove any inconvenience to respondent, and to this extent that regulation is a police regulation.

We think this element of damages should have been eliminated from the case, and it follows that there was no error to the prejudice of respondent.

The order is affirmed, with costs.

MOORE, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

EMPLOYERS' LIABILITY ASSURANCE CORP. *v.* GRAND RAPIDS BRIDGE CO.

1. SAVING QUESTIONS FOR REVIEW—CASE TRIED TO COURT—REQUEST FOR FINDINGS—EXCEPTIONS.

   Where, in a case tried to the court without a jury, defendant requests no finding of fact or law, and notes no exception to the decision of the judge on the main question in the case, that question is not open to review by defendant.

2. SAME.

   Where an insurance company claims that insured's acceptance of the policy estops him from claiming that the application is a part of the contract, an exception to the introduction of the application in evidence fairly raises the question for review.

3. INSURANCE—APPLICATION AS PART OF CONTRACT—ACCEPTANCE OF POLICY—WAIVER.

   The receipt by the insured of a policy, and filing it away without reading it, does not waive the right of the insured to insist that the application is a part of the contract, where the solicitor assured him, when taking it, that a copy of the application would be attached to the policy, and that it would not be necessary for him to preserve a copy.

4. COSTS ON ERROR.

   Where both parties bring error, and the judgment remains undisturbed, no costs are awarded.

Error to Kent; Perkins, J. Submitted October 20, 1904. (Docket No. 61.) Decided March 21, 1905.

Assumpsit by the Employers' Liability Assurance Corporation, Limited, against the Grand Rapids Bridge Company for a premium upon a policy of insurance. There was judgment for plaintiff for less than the amount claimed, and both parties bring error. Affirmed.

John E. More, for plaintiff.

Hatch & Wilson, for defendant.

MONTGOMERY, J. On the 24th day of April, 1901, the plaintiff was engaged in the business of insuring employers against liability for damages on account of injuries suffered by an employé while engaged in the work of the employer. The different kinds of employment are classified, and insurance is written at different rates. In employers' liability insurance the premium is determined by the gross amount of the pay roll and the rate. For the reason that the amount of the pay roll cannot be determined with certainty for the future period covered by the insurance, it is necessary to estimate the pay roll, and determine the premium by multiplying the amount of the estimated pay roll by the rate appropriate to the particular occupation. This estimated amount of pay roll may, at the end of the period covered by the policy, be found to be too great or too small, and it is customary to insert a provision in the policies of insurance of this sort that, if the actual amount paid exceeds the estimated amount mentioned in the policy, the assured shall pay the additional premium earned, and, if the amount actually paid is less than the estimated amount mentioned in the policy, the insurance company will return to the assured the unearned premium, *pro rata*, specifying a minimum premium which is to be retained by the insurance company in any event.

The plaintiff had established an agency in Grand Rapids, under the management of Mr. Charles L. Grinnell. The defendant was engaged in the business of bridge building and structural work. Wilmer H. Heath was an insurance solicitor and agent for a bond company in the office of Mr. Grinnell. About the 21st of April, 1901, he went to the office of the defendant for the purpose of arranging with them for a bond to be given to the city on the East Bridge street culvert bridge. In the application for the bond, inquiry is made if the applicant carries liability insurance. Mr. Gaines, the manager of the defendant, said that they carried none, but were going to take out some. Heath told him that he wrote that kind

of insurance, and would bring him up an application. He returned to Grinnell's office, and told Grinnell that the bridge company wanted some employers' liability insurance. He told Grinnell what the estimated pay roll was, and Grinnell entered upon a blank the particulars, viz., the period of the policy, the estimated amount of the pay roll, the rate, the amount of the premium, and the amount of the minimum premium. The estimated amount of the pay roll and the rate appeared in two places upon the application—in the upper right-hand corner, where appeared also the amount of the premium, and in paragraph 12, where appeared the estimated amount of the pay roll, the rate, and the minimum premium. This was the first application for employers' liability insurance that Heath had ever taken. Heath then took the application back to the bridge company, and showed it to Mr. Gaines, and filled out the remainder of the application from data furnished by Mr. Gaines. Heath explained to Gaines the method of arriving at the premium.

Before Gaines signed the application, he read it over very carefully, and figured out just what everything meant, and as to the pay roll they talked that, if there was anything over the $4,000, which had been fixed upon as the estimated pay roll, the bridge company was to pay 42 cents per hundred, and the minimum premium was to be $168. Heath made a copy of the application and gave it to Gaines. When Grinnell received this application, he sent it on to the insurance company, where it remained until the dispute arose which culminated in this suit.

The insurance company had issued a manual giving the classification of the different employments, and the rate appropriate to each. Mr. Grinnell had a copy of the manual, and upon examining it found the rate for bridge building to be $4.20 upon each $100 of the estimated pay roll. Upon filling the blanks in the application he computed the amount of the premium correctly at that rate, but in entering the rate of insurance he made the clerical error of writing 42 cents instead of $4.20. He made the same

mistake in paragraph 12, where the rate is also entered, and in that paragraph he also made the mistake of fixing the minimum premium at $168, which was the whole premium upon the estimated amount of the pay roll.

In due course the policy was delivered to the bridge company inclosed in an envelope, and was not examined by any of the officers of the company until the question arose which is to be determined in this suit. In the policy the rate is correctly stated to be $4.20 upon each $100 of wages, and the minimum premium is stated to be $25. The bridge company paid the premium of $168 shortly after the policy was delivered.

After the expiration of the policy Mr. Grinnell sent up to the office of the bridge company to ascertain the amount of the pay roll, so that settlement could be made, and, if the pay roll had exceeded the estimated amount of $4,000, he could collect the additional premium earned; if less than $4,000 had actually been paid for wages, he could return the unearned premium, pro rata, down to the minimum premium of $25. The amount actually paid for wages exceeded the sum of $4,000, and the insurance company demanded the premium upon the excess at the rate of $4.20 upon the $100. Mr. Gaines, the manager of the bridge company, produced his copy of the application, and claimed that the rate was 42 cents on the $100. The bridge company refused to pay, and this suit was commenced by summons in the justice's court December 23, 1902.

On the return day—January 2, 1903—the plaintiff filed its declaration in writing. The defendant pleaded orally the general issue. The case was tried before the court without a jury, and on February 10, 1903, judgment was rendered in favor of the insurance company, plaintiff, against the bridge company, for $203.99 damages, with costs of suit, taxed at $4.50. Defendant appealed the case to the circuit court, where the case was again tried before the court without a jury, and the court decided that the plaintiff was entitled to recover the premium upon the ex-

cess of wages paid beyond the estimated sum of $4,000, but only at the rate of 42 cents on the $100, which was computed at the sum of $21.71, and judgment was entered for plaintiff at that amount. Costs, however, were awarded to defendant bridge company, which were afterwards taxed at the sum of $32.40, and, setting off the judgment against the costs, it leaves a judgment in favor of defendant for $10.69. Neither party is satisfied with this result, and both ask this court to correct the errors made at the circuit.

There was no finding of facts or law called for, and no exception noted to the decision of the circuit judge on the main question by the defendant. The question is not, therefore, open to review by defendant under the repeated decisions of the court. *Wertin* v. *Crocker*, 47 Mich. 642; *Irwin* v. *Schlief*, 48 Mich. 237; *Haines* v. *Saviers*, 93 Mich. 440; *Gemberling* v. *Lazarus*, 100 Mich. 324; *Township of Cumming* v. *Shick*, 94 Mich. 222. The plaintiff would be similarly handicapped were it not for its exception to the admission of the original proposal for insurance in evidence. This exception fairly raises the question in the case, which is this: Did the acceptance of this policy, under the circumstances shown, estop the defendant from asserting that the entire contract was embodied accurately in the policy?

It is unquestioned law that the acceptance of a unilateral contract usually implies an assent to its terms. The question remains, however, as to whether the contract may be shown to have come into possession of the second party to it under circumstances showing that its terms were not assented to. It is to be noted in this case that there is no question of varying the terms of the contract by parol. The defendant's proposal was in writing. Not only was this so, but the solicitor assured defendant that it was unnecessary to retain a copy of the proposal, as a copy would be attached to the policy. Had a copy of the proposal, as made, been attached, it is clear that this would have constituted a part of the contract. Plaintiff's

agents attached something different, and delivered it to the defendant. Defendant did not read it. Has plaintiff, by this means, foisted upon the defendant a contract differing essentially from that which it engaged to deliver? There was no assent to this change. The question is ruled by *Gristock* v. *Insurance Co.*, 87 Mich. 428; *Hartford Steam Boiler Inspection & Ins. Co.* v. *Cartier*, 89 Mich. 41; *Dailey* v. *Accident Ass'n*, 102 Mich. 289 (26 L. R. A. 171).

The language of the supreme court of Connecticut in *Palmer* v. *Insurance Co.*, 54 Conn. 488, is so much in point, and so consonant with our view, that we quote:

"If the underwriter solicits a person to purchase of him indemnity against loss by fire, and if they unite in making a written draft of all the terms, conditions, and stipulations which are to become a part of or in any way affect the contract, and if the underwriter promises to make and sign a copy thereof, and deliver it as the evidence of the terms of his undertaking, and if a material and variant condition is by mistake inserted, and the variant contract is delivered, and the stipulated premium is received and retained, the court will not hear the claim that he is entitled to the benefit of the variant condition, where the other party had either actual or imputed knowledge of the change. In his promise to make and deliver an accurate copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not for his pecuniary advantage to impute it to another as gross negligence that the other trusted to his fidelity to a promise of that character."

The judgment is affirmed, but, as both parties appeal, and the judgment remains undisturbed, no costs will be awarded.

MOORE, C. J., CARPENTER, GRANT, and HOOKER, JJ., concurred.

SACHS v. NORN.

1. CHATTEL MORTGAGES—RECORD—VALIDITY—GOOD-FAITH CREDITORS.

A bill of sale, intended to operate as a chattel mortgage, not followed by a change of possession, and unrecorded, is void as to persons in good faith extending credit to the mortgagor without knowledge of its existence. Section 9523, 3 Comp. Laws.

2. GARNISHMENT—AFFIDAVIT—DEFECTS—WAIVER.

After counsel has appeared in garnishment proceedings representing the defendant, the garnishee, and an intervening claimant, and raised various objections to the proceedings, and at the beginning of the trial on the merits states that it is agreed that the intervenor shall be regarded as defendant in the case, and that whatever judgment is rendered shall be binding on him, it is too late to claim that a defect in the affidavit for garnishment, apparent on its face, requires the direction of a verdict for the intervenor.

Error to Bay; Shepard, J. Submitted January 4, 1905. (Docket No. 7.) Decided March 21, 1905.

Garnishment proceedings by Henry W. Sachs and Louis E. Wenzel, copartners as Sachs & Wenzel, against James Norn as garnishee defendant of the Rifle River Lumber Company. The Lumberman's State Bank was permitted to intervene as claimant. There was judgment for defendant bank on verdict directed by the court, and plaintiffs bring error. Reversed.

De Vere Hall (*Gilbert W. Hand*, of counsel), for appellants.

Lee E. Joslyn, for appellees.

MOORE, C. J. The plaintiffs are a firm doing business at West Branch. The principal defendant was a partnership association, limited, engaged in lumber business near

that place. The company purchased of plaintiffs between February 1 and June 6, 1902, supplies for use in its camps. Plaintiffs, failing to obtain payment, on December 6, 1902, commenced suit against the principal defendant, which resulted in a judgment against it on November 16, 1903. For the purpose of procuring a writ of garnishment against Mr. Norn in favor of the plaintiffs, Mr. Brockway, at the same time the original suit was brought, as agent and attorney for the plaintiffs, made an affidavit which reads in part as follows:

"And this deponent further says that he has good reason to believe, and does believe, that James Norn, of Standish, Michigan, has property, money, goods, chattels, credits, and effects in his hands and under his custody and control, belonging to said Rifle River Lumber Company, limited, etc., the above-named defendant, and that the said James Norn is indebted to the said Rifle River Lumber Company, limited, etc., the above-named defendant, whether such indebtedness is now due or not. And this deponent further says that he, the said affiant, is justly apprehensive of the loss of said sum of $431.98, so due to the plaintiffs from the said Rifle River Lumber Company, limited, etc., the above-named defendant, unless a writ of garnishment issue to the said Henry W. Sachs and Louis E. Wenzel, a firm and copartnership," etc.

A writ of garnishment was issued and served upon Mr. Norn, who, on December 23, 1902, made a sworn written disclosure showing he was indebted to some one in the sum of $659.82 for lumber; "that on the 3d day of July, 1902, I bought from the Rifle River Lumber Co., per John Walsh, administrator, a quantity of hemlock lumber, and said deal was sanctioned by H. H. Norrington." He further stated therein, "I do not know who I owe; would like the court to say."

A demand for an examination of the garnishee defendant under the statute was made January 2, 1903. An examination was had January 14, 1903, when the following occurred:

"Mr. Joslyn, appearing for the principal defendant, and especially as attorney for the Lumberman's State Bank.

"*Mr. Joslyn:* Let it appear that I appear specially as attorney for the Lumberman's State Bank, and object to the garnishee being sworn, for the reason that the disclosure filed shows that the Lumberman's State Bank, or Henry H. Norrington, representing the bank, is interested in the indebtedness, and the bank has had no notice of the garnishee proceedings or of this examination."

The objection was overruled. No objection was made that the affidavit was defective, and the examination proceeded, Mr. Joslyn taking part therein.

In January, 1904, a trial was had before a jury. At that time the record discloses that De Vere Hall appeared for plaintiff—

"For the defendant, the Rifle River Lumber Company, and for the garnishee defendant, James Norn, and for the Lumberman's State Bank, intervening, L. E. Joslyn.

"*Mr. Joslyn:* In this case it is agreed between the attorney for James Norn, the garnishee defendant, and Hall & Brockway, attorneys for the plaintiffs, that the Lumberman's State Bank may intervene, and that from this time the Lumberman's State Bank will be considered as a defendant in the case, and that whatever determination may be made in the suit as between the plaintiffs and the garnishee defendant shall be binding upon the Lumberman's State Bank.

"*Mr. Hall:* Whom do you represent?

"*Mr. Joslyn:* I represent the Lumberman's State Bank and also the principal defendant.

"*Mr. Hall:* That is right with respect to any intervention that the bank could take, or any rights it might have or might take by filing the ordinary petition for intervention. There is no objection, and we will treat it as intervening.

"*Mr. Joslyn:* I desire to raise the point of law that the affidavit for the writ of garnishment in this case is not sufficient upon which to warrant the issuing of the writ of garnishment or to found any subsequent proceedings. The statute provides that the plaintiff, or some one on his behalf, shall file an affidavit which requires, among other things, that it shall be stated that the affiant is justly ap-

prehensive of the loss of his claim or the claim of the plaintiff unless a writ of garnishment issue to the party whom he claims is indebted to the principal defendant. * * *

"*Mr. Hall:* The facts which the plaintiffs expect to be able to prove are that a judgment was secured in this court for goods and supplies furnished the principal defendant, which, with the cost taxed, now amount to about $470; that this writ of attachment was duly issued on the affidavit in question; that Mr. Norn has filed two disclosures, in which no question has been raised such as is now raised; that a notice under the statute for the taking of Mr. Norn's testimony has been given, and his testimony has been taken here, at which time Mr. Joslyn appeared on behalf of the Lumberman's State Bank, and raised a question as to the right of the court to proceed. He did not raise this question, or any question similar to it. Mr. Norn was examined by the counsel for the plaintiffs, he was cross-examined by counsel for the bank now raising this question. That testimony has been transcribed, and stands as testimony in this case. The case has been on the docket for two terms, at least, and stands continued to this term by special order of the court, and now for the first time this question is raised. We submit, if it is to be disposed of, it ought to be disposed of on a trial after the proofs are in, so that, if the Supreme Court acts upon this matter, it may act finally, and that there will be no going up there and coming back and a long delay in the matter.

"*The Court:* I won't make any change in the ruling I made before the recess. From the affidavit I don't think that there is anything misleading about it, and I will overrule the motion, and, if it is deemed necessary to make any formal amendment, it may be made as a curative one."

Mr. Joslyn made no suggestion that the statement of Mr. Hall was not true. The court permitted the amendment, and the trial proceeded upon the merits, Mr. Joslyn taking part therein.

Upon the trial a paper was introduced in evidence, the material portions of which read as follows:

"Know all men by these presents, that the Rifle River Lumber Company, limited, a partnership association organized and doing business under the laws of the State of Michigan, for and in consideration of the sum of one

dollar, and other good and sufficient consideration, to it paid by Henry H. Norrington, treasurer of said Rifle River Lumber Co., Ltd., of West Bay City, Bay county, Michigan, for the uses and purposes hereinafter referred to, have granted, bargained, and sold, and does hereby grant, bargain, and sell to the said Henry H. Norrington, treasurer, all of the following personal property and chattels, to wit: All of the timber, logs, and lumber now standing, growing, or being on the following-described lands in Ogemaw county. * * *

"Also all the West Branch Mill property, so called, including furniture, fixtures, and supplies in the office and bed rooms, sleeping camps, cook camps, West Branch yards, camp equipments, blacksmith shops, together with all of the other goods, chattels, and personal property described and referred to in a certain bill of sale. * * * Provided always, and this agreement is subject to the following covenants and agreements, to wit:

"(*a*) Said Rifle River Lumber Co., Ltd. (hereinafter called first party), is to have possession of all the foregoing goods, chattels, and property, with the full right to use the same for the purpose of manufacturing the timber and logs referred to into lath, lumber, shingles, ties, posts, and other suitable marketable material, and to sell and dispose of such material in the usual course of trade. But said first party shall not dispose of or sell any of the within and foregoing goods, chattels, or property, except in the usual course of trade, without the written consent of said Norrington (hereinafter designated as second party). * * *

"(*c*) It is understood and agreed that this bill of sale is given for the express purpose of securing the just and full payment of the sum of fifteen thousand dollars ($15,000.00), owing and due, or to be advanced and to become due, to the Lumberman's State Bank of West Bay City, Bay County, Michigan, from said first party. * * *

"(*e*) If said first party shall at any time neglect, refuse, or fail to pay the aforesaid sum or sums of money whenever and as often as the same shall become due and payable; or if said first party shall sell, assign, transfer, mortgage, or incumber said property or any part or parcel thereof, or shall permit any lien whatsoever to be placed thereon and shall not promptly discharge the same, and if in the opinion of said second party the security herein provided for is or shall become impaired, then and in that case, said second party may take possession of all of the

within and foregoing property (and which shall also include any and all sums of money due or owing to said first party, all bills receivable, accounts and bills of account, all books, and all of the property of every kind, name or nature owned by said first party whether the same is or shall be herein described or referred to or not), and to use the same in such manner as he shall deem for the best interests of the said bank. And said second party in such event may continue the business herein contemplated, or he may sell and dispose of said goods, chattels, and property, in bulk or in parcels, at public or private sale, giving such notice of the sale thereof, if any, as he may deem for the best interests of said bank. * * *

"Dated March 14, 1902."

Upon the trial it was conceded by Mr. Joslyn, representing all the interest not represented by the plaintiffs, that Sachs and Wenzel knew nothing of the claims of the Lumberman's State Bank at the time they sold the goods to the defendant for which they secured a judgment in this court, and that the business was then conducted by the Rifle River Lumber Company, at West Branch, and that there was no chattel mortgage or conveyance of any kind from the Rifle River Lumber Company to the bank, or any one representing the bank, filed in the city recorder's office of West Bay City, where the office of the principal defendant is, or in the township clerk's office at West Branch, where this property in Ogemaw county was located, or the register of deeds' office at West Branch being in the said Ogemaw county.

At the conclusion of the testimony on the part of the plaintiffs, the circuit judge directed a verdict in favor of defendant. The case is brought here by writ of error.

The plaintiffs claim a verdict should have been directed in their favor. It was their claim that Mr. Norn bought the lumber of the principal defendant, and was indebted to it. It was the contention of the intervening claimant that the lumber was bought from the Lumberman's State Bank, and that the direction of the verdict was right. The position of plaintiffs is discussed by counsel under eight heads, the last one of which is "that under section

9523 of the Compiled Laws of 1897 the bill of sale was entirely void as to plaintiffs as a matter of law, and, in any event, under section 9520 of the Compiled Laws, plaintiffs were entitled to go to the jury, because there was no actual or continued change of possession of the property covered by the bill of sale."

If it had been entirely clear that Mr. Norn purchased the property of the principal defendant, as claimed by plaintiffs, we have no doubt that, inasmuch as the paper called a bill of sale was not recorded, the case would come within section 9523, 3 Comp. Laws. As the lien given to the Lumberman's State Bank was not properly filed, and the plaintiffs had no knowledge of it, when they extended the credit, it would be void as to them. We think it equally clear that the bank could not, by making a sale to Mr. Norn, put him in any better position than it occupied. Taking either horn of the dilemma, we think plaintiffs were entitled to priority, and a verdict should have been directed in their favor. Section 9523, 3 Comp. Laws, and the many cases cited thereunder. See, also, *Lingle* v. *Owosso Sugar Co.*, ante, 203.

Defendants contend that the reasons given by the circuit judge in directing a verdict were based upon an undisputed legal basis; but, whether they were or not, it is contended that the verdict is a proper one, for the reason that plaintiffs and appellants had no standing whatever in court by reason of the defective affidavit filed in the garnishment proceedings; citing *Maynards* v. *Cornwell*, 3 Mich. 311, and other cases, all of which we have examined, as well as the case of *Hebel* v. *Insurance Co.*, 33 Mich. 400. A reference to these cases will show they are distinguishable from the one at bar. In this case, after personal service upon him, the garnishee defendant, without questioning the jurisdiction of the court, made a disclosure. Later, when the garnishee defendant was examined under the statute, Mr. Joslyn appeared generally for the principal defendant and specially for the intervening claimant, and objected to the garnishee defendant being sworn, be-

cause the disclosure which had been made showed the bank was interested, and had not received notice of the garnishee proceedings. When the objection was overruled, the examination proceeded, and Mr. Joslyn took part therein. It will be observed the jurisdiction of the court was not questioned, because of a defective affidavit, by any of the parties who were then before it, and they were all there. Again, upon the trial Mr. Joslyn appeared for the principal defendant and for the garnishee defendant, and agreed with the attorney for the plaintiffs in open court that the bank might intervene, and "that from this time the Lumberman's State Bank will be considered as a defendant in the case, and that whatever determination may be made in the suit as between the plaintiffs and the garnishee defendant shall be binding upon the bank." After this occurred, objection was made to the sufficiency of the affidavit, as we have already stated. It was amended, over the objection of counsel, so as to cure a defect which appeared upon the face of the affidavit, and the trial upon the merits proceeded, counsel who had appeared as we have stated, taking part therein. Under these circumstances we do not think it can be said the judge should have directed a verdict because of the defects in the affidavit. See *Millard* v. *Lenawee Circuit Judge*, 107 Mich. 134; *Wattles* v. *Wayne Circuit Judge*, 117 Mich. 662; *Union Nat. Bank of Chicago* v. *Muskegon Circuit Judge*, 117 Mich. 678; Tiffany's Justice Guide (5th Ed.), pp. 136, 137, and cases cited in note 1.

Judgment is reversed, and new trial ordered.

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

WILCOX *v.* WILCOX.

1. WITNESSES — EXAMINATION — FORM OF QUESTION — HARMLESS ERROR.

   It is not reversible error to overrule an interrogatory to a witness containing two questions where everything material and competent might have been obtained from the witness by other questions.

2. SAME — COMPETENCY — MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

   A claimant against the estate of a decedent for money expended in his behalf may testify as to expenditures about which deceased had no knowledge, but not as to those which he knew about.

3. LIMITATION OF ACTIONS — CLAIM AGAINST ESTATE — HUSBAND AND WIFE — QUESTION FOR JURY.

   A widow, in support of a claim against the estate of her husband, who died in 1902, showed that when they were married in 1892 she had ready money, that he had none, that his farm was mortgaged and the buildings in need of repairs, that he earned no money after marriage, and that their living expenses, the mortgage, repairs to the house, and the expenses of his last sickness and burial were paid by her. He frequently recognized his obligation to her, and recently before his death stated that she should be paid. *Held*, that it was error to direct a verdict for the estate on the ground that limitations had run against items of her claim dated in 1893 and 1894.

Error to Mason; McAlvay, J. Submitted January 7, 1905. (Docket No. 77.) Decided March 21, 1905.

Mary D. Wilcox presented a claim against the estate of Levi Wilcox, deceased, for money loaned during his lifetime. The claim was allowed in part in the probate court, and Frank Wilcox, an heir at law, appealed to the circuit court. There was judgment for contestant on verdict directed by the court, and claimant brings error. Reversed.

Fitch & Reek (*James H. Pound*, of counsel), for appellant.

David Stockdale & Son (*Wilkes & Stone*, of counsel), for appellee.

MOORE, C. J. Levi Wilcox died in 1902. Mary D. Wilcox presented a claim against the estate of her deceased husband, the following items of which were allowed in probate court:

First. 1893, to Levi Wilcox, cash, $250.
Second. By cash expended, lathing, plastering, papering, chimney built, bedding, linen, silver, and china, etc., paid mortgage and interest, bought farming tools, implements, etc., built barn and double granary, 1894, $875.
Third. Expenses connected with final sickness, $132.
Fourth. The other item is widow's mourning, $97.

From the allowance of these items an appeal was taken by the son of Mr. Wilcox to the circuit court. A trial was had before a jury, which returned a verdict, by direction of the trial judge, in favor of the estate. The claimant brings the case here by writ of error.

The record shows that the claimant, who was then a comparatively young woman, in 1892 married Mr. Wilcox, who was then more than twice as old as she, and not in good health. She then had upwards of $1,500 in the bank. He had 80 acres of new land in Mason county, incumbered by a mortgage, with an unfinished house upon the land, and some other small buildings. Her money was used to make the house habitable, to pay off the mortgage, and for the living expenses of the family. Mrs. Wilcox claims her money was used with the expectation upon her part it would be repaid to her, and upon Mr. Wilcox's part that he would repay it. For the purpose of making claimant's case, her sister, Mrs. Hunter, was sworn. After testifying to the marriage of the parties in 1892, and to the fact that she visited them at their home in 1895, and to some other things, she said:

"*Q.* What did he say as to his condition in regard to money?

"*A.* He was very sorry he didn't have more. She had so much and he had so little. He said he would pay it back; that he had been so sick; that now he was feeling fine, as fresh as a colt; that he had got a new horse, and was going to begin to work like a young fellow, and pay that back.

"*Q.* How much had he used at that time, if he stated?

"*A.* About a thousand dollars. He said he was very sorry that it should be so.

"*Q.* He told you he had been sick, and used the money?

"*A.* Yes, sir; they had no home.

"*Q.* State whether or not he told you anything at that time about what kind of a home he had for your sister when he married her.

"*A.* He told me he had none; a deplorable hole—that is, the condition of his home; no lath, no plaster, no nothing, but that he had begun to build a shell. He said she furnished the money to lath and plaster the house and fix it; get the furniture of every description—everything that was in it. * * *

"*Q.* Did he say anything what was to be done with the property? Did he say anything about his family? (Objected to as immaterial. Sustained. Exception taken.)"

On the cross-examination she said:

"*Q.* You stated that Mr. Wilcox stated to you that he had about $1,000?

"*A.* Yes, sir. This conversation was in the afternoon the time I was there.

"*Q.* How long had he had that money, did he say?

"*A.* They were expending it as they went along. They had never earned a cent.

"*Q.* Did not say so, did he?

"*A.* He did, but he was going to begin; but he never began yet.

"*Q.* And the $1,000 was entirely used up at the time you made the visit there?

"*A.* Yes, sir.

"*Q.* Can you tell us where, and for what, it had been used?

"*A.* Everything that had been done, and their living

for three years, came out of that, and their living still. * * *

"*Q.* What was furnished there that did not come from the farm—everything?

"*A.* Sugar, lemons, bananas, and lots of everything they should eat.

"*Q.* What else?

"*A.* They should buy of the grocery in the neighborhood.

"*Q.* Whose money did he use?

"*A.* Her own.

"*Q.* Are you sure of that?

"*A.* Yes, sir.

"*Q.* You were there when she was using her own money?

"*A.* Yes, sir; there was no other to be used.

"*Q.* You know that to be a fact of your own knowledge?

"*A.* He told me. I never had any conversation with Wilcox after my visit there about money in the summer of 1895."

The condition of the house before the marriage, and statements of Mr. Wilcox that he did not have money at that time to pay his taxes, and the fact that after his marriage the house was put in order and well furnished, was shown by other witnesses. Mr. Shefflers, who rented the farm, testified, among other things:

"I had a talk with him about two weeks before he died. It was when they commenced talking I had the farm from him, and I made a bargain to rent the farm; and when the bargain was made they tell me not to work on Saturday. He tell me she would not like that. He said she paid so much money in the farm, and he like to pay her back so long as he live, and when he died the farm belong to the woman. He did not tell me how much money she had put in farm, but he would like to pay her back what she put in."

On cross-examination:

"*Q.* You say he did not state how much money he had of his wife?

"*A.* No; he said she put so much out there he wants to pay her back sometime. He said the farm belonged to her when he died. He complained he was sickly."

Mr. Conners testified:

"*Q.* State whether or not you ever had any conversation with Mr. Wilcox relative to any money he intended to pay his wife.

"*A.* Well, we were once working together, and I guess I made the remark that his wife must have had quite a bit of money when he married her, and he made the remark, he said, 'Yes, but I will make it all right with her before I die.' He said he knew that he was a little hard up at the time he married her. That was about two years ago this fall."

Mrs. Wilcox was sworn as a witness. She testified that when she married Mr. Wilcox she had between $1,500 and $1,600. The following then occurred:

"*Mr. Fitch:* I wish to ask now whether it is the intention of counsel to object to proof by this witness as to expenditures during the last sickness.

"*Mr. Stockdale:* Yes, sir.

"*Mr. Fitch:* I make the offer to prove by this witness the amount paid by this witness for medical attendance, nursing, washing, and other incidental expenses connected therewith during the last sickness of the deceased.

"*Mr. Stockdale:* I object on the same grounds. If anything was paid, it was equally within the knowledge of the deceased, and can't be proved by this witness, but is open to proof by any other witnesses who had rendered their services, I should think, but not by any other witness."

The objection was sustained. No witnesses were sworn on the part of the defense. Counsel for defendant claimed there was no proof of items 3 and 4, and that as to items 1 and 2 the statute of limitations had run, and asked the court to direct a verdict in favor of the estate, which was done by the trial judge. The questions will be discussed in the order presented by counsel for claimant.

First. Should Mrs. Hunter have been allowed to answer the question: "Did he say anything about what was to be done with the property? Did he say anything about his family?" It will be observed there are two questions in the interrogatory. It would have been easy for

counsel by other questions to obtain from the witness any information she had which was material and competent. We do not think the ruling was reversible error.

Second. Did the court err in excluding the testimony of Mrs. Wilcox when counsel offered to prove by her the amount paid by this witness for medical attendance, nursing, washing, and other incidental expenses connected therewith during the last sickness of deceased? If any item of what was proposed to be proved by this witness was within the knowledge of the deceased, she could not testify in relation thereto, because of the statute. If, as to some of the items it was proposed to show by her, the deceased had no knowledge, then she would be a competent witness.

Third. The important question in the case is, Was the court right in holding as a matter of law that the statute of limitations had run, and in directing a verdict? This question is discussed by claimants under two heads: *First.* It is asserted the statute does not run against the wife in favor of the husband; *second*, that the statute does not begin to run until a right of action accrues, and whether it had run or not presented a question for the jury—citing *Sword* v. *Keith*, 31 Mich. 247; also note 1 to above case and authorities therein cited; also note 2 in *Mundy* v. *Foster*, 31 Mich. 313; *Winters* v. *De Turk*, 7 L. R. A. 658, and notes (133 Pa. St. 359); *Opp* v. *Wack*, 52 Ark. 288 (5 L. R. A. 743); *Evans* v. *Johnson*, 39 W. Va. 299 (23 L. R. A. 737). An examination of the authorities shows a want of uniformity as to the first of these propositions. In our view of the case, however, it is not necessary to pass upon this question. It must be remembered that the mouths of the parties who know just what the transaction was are closed, Mr. Wilcox's by death, and the claimant's by the statute; so it is difficult to show clearly just what the arrangement was. It does appear, however, by the testimony, that in 1895 the husband, who was poor, had at that date used about $1,000 of his wife's money, and that

the remaining portion of what she had was being daily used to pay the living expenses of the family. It also appears that two years before the trial Mr. Wilcox realized his obligation to repay his wife. It is also shown that he recognized this duty as late as within two weeks of his death. We do not think it would be a fair inference to say that it was expected by this man and his wife that he would at once repay the money he had borrowed from her. On the contrary, such an inference would be unfair, because they both recognized he had nothing with which to make an immediate payment. It is not denied that he had this money. It is equally clear that when he got it he expected to repay it at some future time, and that his wife expected he would. The inference would not be far-fetched from the testimony that he expected to repay it during his lifetime if he could earn it, and, if not, that it would be paid from his estate. In any event, we think that presented a question for the jury to pass upon.

Judgment is reversed, and a new trial ordered.

CARPENTER, GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

139 372
140 s165
139 372
150 1277
150 c331
139 372
f156 1 18

BROWN *v.* HARRIS.

1. HARMLESS ERROR—ERRORS CURED BY VERDICT.

   Where the jury found for plaintiff in an action for goods sold, and in order to do so must have found either that the goods actually conformed to the contract of sale, or that defendant accepted them as conforming to the contract, error in rejecting evidence of defendant's damages claimed for defects in the quality of the goods is immaterial.

2. SALES—PAYMENT OF PRICE—CONTRACT.

   Where a buyer accepts goods supplied on a contract he is bound to pay the contract price for them, and cannot limit the seller's recovery to their actual value.

3. SAVING QUESTIONS FOR REVIEW—UNRESPONSIVE ANSWER.

   A mere objection and exception to an unresponsive answer is ineffective to preserve a party's rights. He should move to strike it out and object and except if his motion is denied.

4. WITNESSES—CROSS-EXAMINATION—RESTRICTION.

   It is not error to restrict cross-examination where no reason for continuing it is apparent and counsel discloses none.

5. EVIDENCE—OBJECTIONS—STRIKING OUT TESTIMONY—HARMLESS ERROR.

   Errors in rejecting and striking out testimony become harmless when the same witness is elsewhere permitted to testify to the same effect.

6. EVIDENCE—BEST AND SECONDARY EVIDENCE.

   In an action on a contract for the sale of goods it is not error to limit examination of witnesses with respect to a variance between the order for the goods and the invoice, both of which are in evidence.

7. SAME—PRESUMPTIONS—RECEIPT OF LETTER MAILED.

   A request to charge on the presumption arising from proof of the deposit of a properly addressed and stamped letter in the mail is properly refused, where it is open to the construction of placing upon the addressee the burden of proving that it was not properly mailed.

8. PRINCIPAL AND AGENT — NOTICE TO AGENT — CONFLICT OF INTERESTS.

   Where, at the time an alleged notice that goods sued for

did not conform to the contract was given to plaintiff's agent, defendants knew that the agent was acting in antagonism to plaintiff, that he would disregard it, and not communicate it to plaintiff, such notice was not notice to plaintiff.

Error to Wayne; Frazer, J. Submitted February 7, 1905. (Docket No. 99.) Decided March 21, 1905.

Assumpsit by Louis Brown against Saul Harris, Benjamin Harris, Joseph A. Zechman, and George D. Clark, copartners as Harris Bros. & Co., for goods sold and delivered. There was judgment for plaintiff, and defendants bring error. Affirmed.

Adolph Sloman (*Edmund M. Sloman*, of counsel), for appellants.

Bowen, Douglas, Whiting & Murfin, for appellee.

CARPENTER, J. Plaintiff brought this suit in assumpsit to recover the contract price of certain cotton worsteds alleged to have been sold to defendants. These worsteds were delivered in pursuance of an executory contract. It was contended by the plaintiff that they did in fact conform to the description in the contract; that defendants received them, and never notified plaintiff of any claim that they did not conform to the contract. On the other hand, defendants insist that the goods did not conform to the contract description; that they refused to accept them, and promptly notified plaintiff of this fact. This issue was submitted to a jury, who rendered a verdict in plaintiff's favor. Defendants ask this court to reverse the judgment rendered on said verdict.

The jury must have found either that the goods actually conformed to the contract, or that defendants accepted them as conforming to the contract. If no error of law was committed in reaching that conclusion (a subject which will receive attention later in this opinion), defendants were not, as they insist, injured by the exclusion of testimony offered by them tending to prove the amount of

their damages. Had the excluded testimony been admitted, it could not have affected the result, since it bore upon an issue which the jury did not consider. The error in excluding such testimony, if error it was, was not prejudicial. See *Sterling* v. *City of Detroit*, 134 Mich. 22; *Scheel* v. *City of Detroit*, 130 Mich. 51.

Nor was it error, as contended by defendants, for the trial court to refuse to charge that plaintiff's recovery should be limited to the actual value of the goods delivered. Defendants, having accepted the goods, were bound to pay the contract price for them. See *Talbot Paving Co.* v. *Gorman*, 103 Mich. 403 (27 L. R. A. 96); *Williams* v. *Robb*, 104 Mich. 242. It is true, in *Wolverton* v. *McCabe*, 81 Mich. 265, we declined to reverse a judgment where the trial court had charged the jury that in a case like that before us the seller "would be entitled to recover what the goods were actually worth." That case was brought to this court by the purchaser, and it is an authority for the proposition that as to him the charge did not constitute reversible error. Indeed, it is clear from the reasoning of that opinion, and the cases upon which it is founded, that the charge was altogether too favorable to him; for in that case, as in this, the goods were worth less than the contract price. Whether the seller had a right to insist on the contract price—and that is a question determined in the later cases and in this case—was not involved, and was not considered in that case.

We are asked to reverse the judgment because plaintiff on cross-examination made an irresponsive answer to a question asked by defendants' counsel. It appears from an examination of the record that defendants' counsel, instead of asking the court to direct the witness to make his answer responsive, chose to assume that the court was responsible in the first instance because the answer was not responsive. The exception under consideration is based upon that assumption. It is hardly necessary to say that that assumption is erroneous. Counsel should apply to

the trial judge if they desire him to direct a witness to make responsive answers. If this is not done, the law imposes no duty upon the judge to interfere.

It is claimed that the trial court "erred in restricting defendants' counsel in the cross-examination of plaintiff relative to the detaching and removing of a portion of the original order sent in." On the cross-examination of plaintiff it appeared that his bookkeeper had detached and sent over to his lawyer a portion of the original order. This detached portion contained the terms of payment and of shipment. After defendants' attorney had, on cross-examination of plaintiff, drawn out the foregoing facts, and the further fact that he did not remember when the detachment occurred, plaintiff's counsel conceded the correctness of the duplicate in defendants' possession, and objected to further cross-examination. Defendants' counsel contented himself with saying, "I have a right to examine about the way he did send it and the way he filled that order." The court thereupon made a ruling, which it is contended by defendants prevented further cross-examination on the subject. If there was any reason for continuing this cross-examination, it is not apparent, and it did not occur to the trial judge. Under these circumstances he had a right to act on the reasons stated by defendants' counsel. If the latter knew of any such reason, he did not state it. He merely insisted upon his "right to examine about the way he did send it and the way he filled the order." This right he unquestionably had, and it was not affected by the ruling complained of.

One of the defendants testified that it was impossible for them to utilize certain small pieces of the worsted. The trial court struck out this testimony. This action was not prejudicial because later the same witness was permitted to testify "these goods that were shipped were absolutely worthless to us."

One of plaintiff's witnesses testified that in a garnishment suit an agent of defendants made a disclosure of indebtedness. He testified that he could not remember the

exact amount of the disclosure. On cross-examination the court sustained an objection to this question: "Didn't you, during the trial there [the former trial in justice's court], make some remark that you were not clear and definite as to what had been disclosed?" Defendants were not prejudiced by this ruling, for it already sufficiently appeared that the witness was not clear and definite as to what had been disclosed.

On cross-examination of one of plaintiff's witnesses the following occurred:

"*Q.* The bill that was sent here two off ten days? (referring to the bill that plaintiff sent defendants for the goods in question).

"*A.* They were bought on sixty days, if I am not mistaken. A copy of the order will show.

"*Plaintiff's Counsel:* That is admitted two or three times. I object to the endless repetition of propositions that are admitted.

"*The Court:* There is no necessity for it, if you knew that order was admitted and conceded to be the order.

"*Mr. Sloman:* But as bearing upon the fact that in all things in this entire order it was absolutely disregarded, and a failure to comply with it.

"*The Court:* That is an argument. You need not argue with the witness. I am going to give you time to argue with the jury."

This was not erroneous. There was no occasion to inquire what was shown on the face of an order already in evidence. If the discrepancy between the order and the bill had any tendency to show that the goods furnished did not conform to the contract, that was, as the trial court said, a matter of argument.

The trial court refused to give the following requests preferred by defendants:

"Defendants gave testimony tending to show that on or about the day of the receipt of the goods they notified the plaintiff by letter that the goods shipped were not the kind they ordered, and that this letter was enclosed in an envelope addressed to the plaintiff, postage prepaid, with a return stamp on the envelope, and was deposited by one of the defendants in the United States mail box for mail-

ing. The presumption of law is that the letter was received by the plaintiff, and the burden is upon him to show that he did not receive the letter."

This request was properly refused. Its vice is this: It does not give the jury to understand, as it should, that the presumption that the letter was received depends upon defendants establishing by a preponderance of proof that they sent the letter. If this request had been given, the jury might easily have inferred that the burden rested upon the plaintiff to prove that he never received a letter which he had a right under this record to claim was never mailed. In other words, this request might, if given, have improperly transferred from defendants to plaintiff the burden of proving that the letter was mailed.

Defendants complain because the trial court did not charge:

"Whether he [plaintiff] received the letter or not, if you find from the evidence that the defendants notified plaintiff's agent Goldstick, within the reasonable time I have spoken of, of the goods *not* being what was ordered, as the testimony tends to show on the part of the defendants, such notice has the same effect in law as if it were given to the plaintiff."

According to the defendants' testimony, at the time the notice was given to the agent Goldstick the latter was acting in antagonism to the plaintiff. Goldstick desired to have the goods left with defendants to enable him to collect from plaintiff his commissions, while—if the facts were as defendants testified—it was plaintiff's duty to take them away. In other words, at the time this alleged notice was given, defendants knew that the agent would himself disregard it, and that he would not communicate it to his principal. It is scarcely necessary to say that such a notice was not a notice to the principal.

The record discloses no error. No other complaint demands discussion.

The judgment is affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and BLAIR, JJ., concurred.

COFFEE *v.* PERE MARQUETTE RAILROAD CO.

1. RAILROADS—INJURIES AT CROSSINGS—OBSTRUCTION OF VIEW—CONTRIBUTORY NEGLIGENCE.

   Where, in an action for injuries at a railroad crossing, plaintiff heard the puffing of an engine before he started across the track, but, his view being obscured, he was advised by another, whose experience in railroading was, but whose opportunity for observation was not, superior to his own, that the puffing he heard proceeded from an engine on another track, whereupon plaintiff started to cross, he was not guilty of contributory negligence, as a matter of law, in not waiting until certain that the puffing was not from an engine approaching on defendant's track.

2. SAME—DUTY TO STOP.

   Where plaintiff, approaching a railroad crossing where his view was entirely obstructed, stopped, when only 30 feet from the track, until satisfied that it was safe to proceed, he was not guilty of contributory negligence, as a matter of law, in not stopping again, in addition to continuously listening, before driving on the track.

3. SAME—INQUIRIES OF OTHERS.

   Where plaintiff's view of a railroad crossing was entirely obstructed by a building and a freight car, and, as he was about to cross the track, other men were standing in front of him, who were in a position to have seen the approaching engine by which plaintiff was struck, but they said nothing to warn plaintiff of his danger, he was not guilty of contributory negligence, as a matter of law, in failing to ask such persons whether it was safe to cross the track.

Error to Kent; Wolcott, J. Submitted February 9, 1905. (Docket No. 114.) Decided March 21, 1905.

Case by John Coffee against the Pere Marquette Railroad Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Frederick W. Stevens (*Charles McPherson*, of counsel), for appellant.

Ward & Brown, for appellee.

CARPENTER, J. Plaintiff received serious injuries as the result of a collision between his wagon and defendant's locomotive. He brought this suit and recovered a judgment in the court below. Defendant asks us to reverse that judgment on this single ground, viz., that the trial court erred in not directing a verdict on the ground of plaintiff's contributory negligence.

The facts are these: September 18, 1901, plaintiff delivered a load of freight at Metzger's cold storage building, in the city of Grand Rapids, situated just west of Winter street. In driving from that building to Winter street, plaintiff had to cross two tracks of defendant, viz., a siding and a main track. The main track was situated within the limits of Winter street. While crossing the latter track, the collision which occasioned his injury occurred. In approaching said main track, plaintiff had to pass between two freight cars on said siding, situated about 10 feet apart. The cold storage building and the freight car on his north entirely obstructed plaintiff's vision, and prevented his seeing the approaching locomotive, which was coming from the north, until he reached the main track. When plaintiff was about 30 feet from defendant's track, he thought he heard the puffing of an engine. He stopped opposite the door of the cold storage warehouse to investigate. The noise ceased, and he was assured by Mr. Lemstra, an employé of the cold storage company, whose experience about railroads was, but whose opportunity for observation was not, superior to his own, that the engine was on another track, and that there was no danger. He started on, listening as he proceeded, and met an acquaintance—a Mr. O'Leary—who had just walked across defendant's track without seeing the approaching engine. Plaintiff merely said, "Good morning," and passed on, confirmed in his belief that the passage was safe. When

nearer defendant's track, plaintiff saw some persons standing in front of him on Winter street. These men were in such a position that they could have seen the approaching engine. They said nothing to plaintiff, and he made no inquiries of them, but their silence confirmed his belief that it was safe to cross. Passing on, he did not observe the locomotive which injured him until his horses were on the main track.

Defendant contends that plaintiff was, as a matter of law, guilty of contributory negligence, for three reasons:

"*First.* After hearing the engine puffing, he should have waited long enough to make sure that it was not approaching on defendant's track.

"*Second.* He should have stopped, as well as listened, in moving from this point to the place where the collision occurred.

"*Third.* Plaintiff should have inquired of the persons he saw in Winter street, whose view of the approaching engine was unobstructed, to learn if he might safely drive across the track."

We will consider each of these reasons.

1. Defendant's contention that plaintiff, after hearing the engine puffing, should have waited until certain that it was not approaching on defendant's track, assumes that the puffing heard by plaintiff proceeded from the engine which occasioned his injury. The record, which the trial judge certifies "contains all the testimony given upon said trial which in any manner affects the exceptions therein noted," contains no positive testimony tending to prove that assumption. While the jury might have inferred that the puffing heard by plaintiff proceeded from the engine which collided with him, that inference was by no means a necessary one. They might have believed, as Lemstra induced plaintiff to believe, that this puffing proceeded from an engine on another road. Since, for the purposes of this question, we must adopt that view of the facts most favorable to plaintiff, we cannot assume that this puffing proceeded from the engine which later collided

with his wagon. This disposes of defendant's claim under present consideration, for surely no one will claim that plaintiff was negligent in crossing defendant's track because an engine was moving on an altogether different track.

2. When plaintiff was only 30 feet away from defendant's track, he stopped until satisfied that it was safe to proceed. Defendant's contention that, as he approached the track, plaintiff was bound to stop again, as well as to listen, finds support in no decision of this court. We cannot say, as a matter of law, that a reasonably prudent man, with nothing to excite his apprehension, would not have relied, as plaintiff did, on his sense of hearing. Whether or not he should have stopped again was a question properly submitted to the jury. See *Guggenheim* v. *Railway Co.*, 66 Mich. 150.

3. Neither do we think that plaintiff was negligent because he did not ask the men standing on the opposite side of the track whether it was safe to cross. An ordinarily prudent person might assume, as it is to be inferred from his testimony plaintiff did assume, that, if those men knew he was putting himself directly in the path of a rapidly moving locomotive, the instinct common to humanity would lead them to warn him of his danger. We conclude, therefore, that the court did not err in leaving the question of plaintiff's contributory negligence to the jury.

Judgment is affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and BLAIR, JJ., concurred.

HARRIS *v.* BRANDENBURG.

SPECIFIC PERFORMANCE—LAND CONTRACT—SUFFICIENCY OF EVIDENCE.

On a bill for specific performance of a contract for the sale of land, defended on the ground of fraud in obtaining defendant's signature to the contract, evidence examined and *held*, sufficient to support the decree for complainant.

Appeal from Wayne; Frazer, J. Submitted February 9, 1905. (Docket No. 119.) Decided March 21, 1905.

Bill by Albert M. Harris against Christina Brandenburg for the specific performance of a land contract. From a decree for complainant, defendant appeals. Affirmed.

Charles Flowers, for complainant.

Haug & Yerkes, for defendant.

CARPENTER, J. This suit was commenced in chancery to enforce the specific performance of a written contract, signed by the above parties, by which defendant agreed to convey certain lands to complainant. The single issue in this case is whether defendant's signature to the contract was obtained by fraud. The learned trial judge determined this issue in favor of complainant on conflicting testimony taken in open court. Defendant appeals to this court.

The sole controversy is one of fact, and its correct determination depends upon the credibility of witnesses. It is sufficient to say that we think it was correctly decided.

The decree appealed from is affirmed, with costs.

MOORE, C. J., and MCALVAY, GRANT, and HOOKER, JJ., concurred.

139 383
143 334

GEORGE D. SISSON LUMBER & SHINGLE CO. *v.* HAAK.

SALES—ACCEPTANCE OF GOODS—EVIDENCE—SUFFICIENCY.

Circumstances attending a sale and delivery of shingles examined, and *held*, that by receiving and unloading them into his yard and selling from them and making no claim for defects until nearly a month after their receipt, the buyer accepted them and could not thereafter claim that they were not of the quality ordered.

Error to Calhoun; Hopkins, J. Submitted February 9, 1905. (Docket No. 121.) Decided March 21, 1905.

Assumpsit by the George D. Sisson Lumber & Shingle Company against Harry K. Haak for goods sold and delivered. There was judgment for plaintiff on verdict directed by the court, and defendant brings error. Affirmed.

J. M. & J. L. Powers, for appellant.

O. S. Clark, for appellee.

MCALVAY, J. Plaintiff, an Indiana corporation, brought suit against defendant, a dealer in lumber and shingles at Battle Creek, Calhoun county, for the price and value of a car load of shingles sold by plaintiff to defendant under the following circumstances: A letter was sent by defendant to plaintiff on July 13, 1903:

"*Gentlemen:* Will you please quote me prices on extra red cedar shingles 5/2. An early reply will be greatly appreciated. In case you get the order, how soon can you have the car here?

"H. K. HAAK."

July 18th plaintiff replied by telegram:

"To H. K. HAAK,
"Battle Creek, Mich.:
"Clears $3.25 transit car wire acceptance immediately."

To this telegram plaintiff replied:

"Send one car shingles."

The car in transit from the Pacific Coast was reconsigned to defendant by plaintiff, who surrendered the bill of lading to the railroad company, and sent invoice to defendant. Plaintiff ordered these shingles through the Bolcom Lumber Company of Winona, Minn. The transfer was made at Minneapolis. The shingles were sold f. o. b. at Battle Creek. The invoice amounted to $724.75. The shingles arrived at Battle Creek September 9th, and defendant paid $274.77 freight, and soon after they were delivered at his yard and unloaded by his employés.

There is no dispute as to the facts up to this point. The parties do not agree as to what occurred later. Plaintiff claims that defendant never notified it of the receipt of the shingles; that several letters were written to defendant, to which he made no reply; that a draft for the invoice was made upon him, and the letter of November 25th was the first heard from him after the shingles arrived:

"BATTLE CREEK, MICH., Nov. 25, 1903.

"GEORGE D. SISSON L. & S. CO.

"*Gentlemen:* I have just received notice through the National Bank of this city that they have your sight draft for $734.40. Do not understand why you draw for this amount. Your invoice is $724.75; the freight on this is $274.77. Will you kindly explain why you made draft for $734.40. If there is any reason why I should pay this amount, I will do so, but at present do not understand it.

"Yours truly,

"HARRY K. HAAK."

Defendant gave notice under his plea that the shingles were ordered July 18, under an express agreement to be delivered within 30 days; that they were not delivered until September 9th, and were not clear shingles, but were rotten, defective, and poorly manufactured. Defendant, upon trial, offered to show that he wrote plaintiff two letters, dated October 3 and October 31, 1903, claiming that the shingles were poor, and asking for a reduction.

He also offered to show the poor quality of the shingles received by him. The trial court finally excluded the proof offered by the defendant, and instructed the jury to find for the plaintiff the amount of the invoice, less freight paid.

Upon the undisputed facts in this case, we do not find that there was any error. The shingles were received by defendant September 9th, and unloaded into his yard. He had ample opportunity to inspect them. He began at once to sell them out of the yard, and, according to his own testimony, no claim was made as to the shingles until October 3d, and, according to plaintiff's claim, not until November 25th. The law is well settled that in sales of this nature the consignee must act promptly after opportunity is given to inspect the goods, and reject them within a reasonable time. The two letters claimed to have been written by defendant, about which there was a serious dispute, do not reject the shingles, but claim they are not up to grade, and ask for a reduction. The letter of November 25th, about which there is no dispute, refers in no way to the quality of the shingles, but simply to the fact that the draft on defendant was not correct in amount. The conduct of defendant after receipt of the shingles amounted to an acceptance. The judge properly instructed a verdict for plaintiff.

Judgment is affirmed.

MOORE, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

139 386
140 210
f140 462
139 386
f141 500
141 680

McDONELL *v.* UNION TRUST CO.

SAVING QUESTIONS FOR REVIEW — CASE TRIED TO COURT — REQUEST FOR FINDINGS.

Where, in a case tried to the court, without a jury, there are no findings of fact or law, the sufficiency of the evidence to support the judgment cannot be reviewed.

Error to Kent; Perkins, J. Submitted February 9, 1905. (Docket No. 127.) Decided March 21, 1905.

Garnishment proceedings by Archibald McDonell and Patrick W. O'Connor, copartners as McDonell Bros. & Company, against the Union Trust Company as garnishee defendant of the Traverse City, Leelanau & Manistique Railroad Company. There was judgment for plaintiffs, and the garnishee defendant brings error. Affirmed.

Russel & Campbell, for appellant.

J. Byron Judkins, for appellees.

William F. McKnight, for principal defendant.

HOOKER, J. An insuperable objection to the review of the questions discussed in this cause is the want of findings of fact or law. We have often held that in such cases we cannot examine the testimony to see whether it supports the judgment. *Van Middlesworth* v. *Van Middlesworth*, 32 Mich. 183; *Plumer* v. *Abbey*, 39 Mich. 167; *Hedges* v. *Hibbard*, 46 Mich. 551; *Green* v. *Gill*, 47 Mich. 86; *Wertin* v. *Crocker*, 47 Mich. 642; *Irwin* v. *Schlief*, 48 Mich. 237; *Morgan* v. *Botsford*, 82 Mich. 153; *Haines* v. *Saviers*, 93 Mich. 440; *Child* v. *City of Jackson*, 93 Mich. 503; *Merrill* v. *Newton*, 99 Mich. 229; *Gemberling* v. *Lazarus*, 100 Mich. 324; *In re Buchan's Estate*, 100 Mich. 219; *Barnum* v. *Andrews*,

106 Mich. 81; *Robson* v. *Dayton*, 111 Mich. 440; *Laird* v. *Coach*, 112 Mich. 628; *Hubbard* v. *Garner*, 115 Mich. 406; *Goulet* v. *Perry*, 123 Mich. 264; *Wickes* v. *Pulfrey*, 131 Mich. 407.

The case of *O'Brien* v. *Evans*, 107 Mich. 625, appears to be a relaxation of this rule. In that case there was no finding of facts. A motion for judgment upon specific grounds was made, however, and an exception follows the charge which disregarded the motion, and was, in effect, a denial of the motion. It may be doubtful if this should have been treated as a ruling made upon the introduction of evidence, or as a denial of a request for specific findings, as it apparently was; but the question was not raised by counsel, and was not considered.

We have no alternative but to affirm the judgment, and it is so ordered.

MOORE, C. J., and MCALVAY, GRANT, and MONTGOMERY, JJ., concurred.

REYNOLDS *v.* CAVANAGH.

1. ASSIGNMENTS—JUDGMENT—CONVERSION—ACTION ON THE CASE.
   Where the proceeds of a judgment were not converted by defendants until after the judgment had been assigned by the judgment creditor to plaintiff, an objection by defendants that the action on the case for its conversion is not assignable is without merit.

2. WRONGFUL CONVERSION — LAW PARTNERS — DISSOLUTION OF PARTNERSHIP—TIME.
   Where attorneys, who had been law partners, were sued for the wrongful conversion of a judgment recovered by them during their partnership, and they defend on the ground that they held a lien on the judgment for their services and that all over their lien has been tendered, the date of the dissolution of the partnership with reference to the time of collecting the judgment and disposing of its proceeds is immaterial.

3. VERDICT—ENTRY—CLERICAL ERROR—CORRECTION.

The entry of the verdict in form as in assumpsit in an action on the case, being a clerical error, may be corrected at the next term.

Error to Calhoun; Winsor, J. Submitted February 10, 1905. (Docket No. 138.) Decided March 21, 1905.

Case by Eliza Reynolds against Howard W. Cavanagh and Charles R. Mains for wrongfully converting a judgment. There was judgment for plaintiff, and defendant Cavanagh brings error. Affirmed.

Howard W. Cavanagh (*John Patterson*, of counsel), for appellant.

L. B. Tompkins and *W. S. Powers*, for appellee.

MCALVAY, J. Defendants were attorneys at law, and as such were employed by plaintiff's assignor, Alice Mason, to prosecute a certain claim against one Wakelee. Suit was brought by these attorneys, and a judgment recovered against George Howes, trustee of said Wakelee, for $500 damages and costs of suit. That case was appealed to this court by defendant, and judgment affirmed. *Mason* v. *Howes*, 122 Mich. 329. It is admitted that this judgment and costs, amounting to $651.52, was afterwards paid in full; $147.74 being paid on the order of this plaintiff, and the balance, $503.78, was paid to defendant Cavanagh, who turned it over to defendant Mains.

Plaintiff is the sister of said Alice Mason, and had loaned her $500, taking as security therefor an assignment of the said judgment against George E. Howes, trustee of Clement Wakelee. After demand in writing for the amount claimed, she brought this suit against both Mains and Cavanagh. Plaintiff claimed that she was present when Mrs. Mason made an agreement with defendant Mains to take the case for $50. Defendants claim that they took the case on an agreement that they were to re-

ceive 50 per cent. of the judgment. This is the principal dispute as far as the facts are concerned.

The action is trespass on the case and the declaration is in four counts. At the close of plaintiff's case defendant Cavanagh moved for judgment for defendants, for the reason that the declaration is in trover, and under the proofs no recovery could be had. This motion was denied, but renewed again at the close of the case. The court held the motion good as to three counts, and submitted the case to the jury; the fourth count being held good as a declaration in an action of trespass on the case. Defendant Cavanagh further moved for a judgment on the ground that the fourth count in the declaration is in trespass on the case, and such action is not assignable. This motion was denied. Three counts of the declaration were in trover, the fourth in trespass on the case.

This plaintiff was the bona fide assignee for value of this judgment obtained against Howes, trustee of Wakelee. The first assignment was made September 29, 1898, the day after the judgment was obtained; and the other February 23, 1900. The first assignment was drawn by the defendants with full knowledge of the transaction, and is in the handwriting of one of them. This judgment belonged by assignment to the plaintiff in this suit at the time it was paid to defendants, and they received plaintiff's money. If it has been wrongfully withheld, the injury has been done to plaintiff. No assignment of any right of action in tort has ever been made, and no right of action has been assigned since the right of action accrued in this case. Plaintiff's assignor never had any right of action against these defendants. No money came into their hands until after she had sold the judgment to the plaintiff, who took subject to the equities between the parties. There was no error in refusing these motions. The fourth count of the declaration sufficiently stated a case, and the question of assignment of a right of action in tort was not in the case.

The jury found a verdict generally against both defend-

ants, and specially, in answer to a question by defendant Cavanagh, that the assignment of the judgment to plaintiff occurred after January 9, 1900. It is claimed that this special verdict is inconsistent with the general verdict, which should, for that reason, have been set aside by the trial court.

The law partnership between defendants expired about January 1, 1900. This date was not material to this issue. Both defendants claimed a lien upon this fund by reason of services rendered as attorneys, and there was no dispute in the case but that they were entitled to receive something, the amount depending upon what was found to be the agreement for services; and this plaintiff, having bought the judgment subject to defendants' charges for services, must allow whatever is found to be due them. The testimony without dispute shows that defendant Cavanagh, as attorney for plaintiff, collected and receipted for this judgment January 9, 1900, that this was in a case where Mains and Cavanagh had been attorneys of record, and had performed the services for which they claim a lien should be given in this suit; that Cavanagh turned this money over to Mains; and both these defendants, by their pleas, claim that the money is simply held subject to said lien.

These defendants appeared separately, and each gave a notice with his plea of the general issue; Cavanagh claiming that he paid over this money to Mains at the request of plaintiff and Mrs. Mason, which was considered a full release as to him, and, further, that they did so claiming they could settle with Mains, as Cavanagh did not understand the arrangement; also that the partnership was dissolved before that date; also that he claimed an attorney's lien on this fund, and that all balance has been tendered to plaintiff. Defendant Mains, in his notice, denied that plaintiff had any right to the proceeds of the judgment, as the assignment to her was for the purpose of defrauding creditors of Alice Mason; that the suit was to blackmail defendant, and defeat his just dues as attorney; that the

money is held by him for both defendants by reason of a lien for their services and advances. Upon this trial Mains did not appear. Defendant Cavanagh defended for himself alone. Under the issue as framed by the defendants, the date of the dissolution of the partnership was immaterial. All of the questions properly raised by these notices were considered by the court in submitting the case to the jury, as favorably to the defendants as the testimony would warrant. The jury found for plaintiff upon evidence warranting such finding.

The verdict was entered in form as in assumpsit. On motion of plaintiff this was at the next term of court corrected, and a judgment was then entered in due form upon the corrected verdict. Error is assigned as to this correction. The court was not in error. This was a clerical error, and it was properly corrected, on motion duly noticed, to accord with the facts.

The motion for a new trial was based upon the claimed errors already considered. The court did not err in denying said motion.

The judgment is affirmed.

CARPENTER, GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

GARRISON *v.* UNION TRUST CO.

1. BANKS AND BANKING — COLLECTIONS — GENERAL BALANCE — LIEN.

   A bank has a lien on the proceeds of a draft sent to it by a correspondent for collection for the general balance of its account with the correspondent unless it has notice that the draft is not the property of the correspondent.

2. SAME—LIEN—ASSERTION AGAINST OWNER.

   A general indorsement on a draft sent for collection conveys an apparent title to the bank to which it is sent, and on that bank's sending it to another, which actually makes the collection, entitles the last-named bank to a lien on the proceeds for its general balance with the intermediate bank, though the first-named bank is in fact the owner.

3. SAME—NOTICE.

   Where a draft bears a general indorsement apparently transferring title to a bank, the fact that the bank indorses a collection number upon it does not put a correspondent bank upon notice that it is held for collection merely.

4. SAME—DISOBEDIENCE OF INSTRUCTIONS.

   Where a sight draft drawn against a car of grain in transit is accompanied by instructions to "return at once if not paid," and the bank to which it is sent, following an established custom, holds it until the car arrives, when it is paid in full, the bank does not, by so doing, forfeit its right to a lien on the proceeds for its general balance with the forwarding bank.

Appeal from Wayne; Donovan, J. Submitted January 17, 1905. (Docket No. 58.) Decided March 21, 1905.

Petition by William D. Garrison and Arthur Garrison, doing business under the name of Exchange Bank, against the Union Trust Company, receiver of the City Savings Bank of Detroit, for the return of a deposit made after the insolvency of defendant bank. The State Bank of

Carson City also filed a petition praying for the return of a draft sent for collection. The petitions were heard as one, and from the order entered the Garrisons appeal. Reversed.

Angell, Boynton, McMillan & Bodman, for petitioners Garrison.

Thomas A. E. Weadock, for petitioner Carson City Bank.

Bowen, Douglas, Whiting & Murfin, for defendant.

BLAIR, J. On January 30, 1902, the State Bank of Carson City sent to the City Savings Bank a sight draft drawn by the Rockafellow Grain Company, Limited, upon the Vernon Milling Company, at Vernon, Mich. The form of the draft was as follows:

"$467.50. CARSON CITY, Mich., Jany 29, 1902.
"For car No. 20714, at sight, pay to the order of E. C. Cummings, Cash'r, four hundred sixty-seven and 50/100 Dollars.
"Value received, and charge the same to account of
"THE ROCKAFELLOW GRAIN CO., LTD.
"Per F. A. ROCKAFELLOW, Mgr.
"To VERNON MILLING CO.
"No. 123 Vernon, Mich.
"Rockafellow Grain Co., Ltd."

On a perforated stub, the following:

"No protest. Take this off before presenting. If not paid, return without delay and state reasons given."

When this draft was received by the City Savings Bank, it bore the following indorsement:

"Pay City Savings Bank, Detroit, or order.
"STATE SAVINGS BANK OF CARSON CITY,
"Carson City, Mich. E. C. CUMMINGS, Cashier."

With the draft came a letter from the Carson City bank, of which the following only is important:

"CARSON CITY, Mich., Jan. 30, 1902.
"CITY SAVINGS BANK,
"Detroit, Mich.
"*Gentlemen:* I enclose for credit,
[here follow several items.]
"For col., credit and advice,
"No. 123, Rockafellow Gr. Co. on Vernon Milling Co. $467 50
"No Protest.
"Yours truly,
[Signed] "IRA CUMMINGS, Ass't Cash."

The difference between the manner in which items were treated when sent "for credit," and when sent "for col. [collection] credit and advice," was as follows: Items sent "for credit" were items drawn on other banks, and were credited by the City Savings Bank as soon as received. If they were not paid, the Carson City bank would be charged back with the amount. Items sent for "collection, credit and advice" were forwarded to some bank where the collection was to be made, and they were not passed to the credit of the Carson City bank until the collection had actually been made, at which time the Carson City bank would be credited and advised thereof.

On receiving this draft, the City Savings Bank marked upon its back: "Pay to the order of any State or National bank. City Savings Bank, Detroit, Mich. H. R. Andrews, Cashier"—and on its face, with a rubber stamp: "City Savings Bank. Collection, No. 4627, Detroit, Mich."

The City Savings Bank then sent the draft to Wm. D. & Arthur Garrison, at Vernon, with the following letter:

"CITY SAVINGS BANK.
"DETROIT, MICH., 1/31, 190
"W. D. & A. GARRISON, Esq., Cashier.
"Vernon.
"*Dear Sir:*
"I enclose for collection, and Cr.

Please Report by Number. Kindly follow instructions below.

4627 No Pro. $467 50
C. C. No. 2123.

Protest all items unless otherwise instructed.
Advise payment promptly and return at once if not paid.
When unpaid, give reason.

"Respectfully yours,
"H. R. ANDREWS,
"Cashier."

The draft was paid February 8th. The reason why it was held was because the car of grain against which the paper was drawn had not arrived. On the same day, February 8th, the Garrisons credited on their books the account of the City Savings Bank with the amount of the collection, and sent to the City Savings Bank notice of this credit as follows:

"VERNON, MICH., Feby. 8/02.
"We credit your acc't with No. 4627, $467.50.
"W. D. & A. GARRISON, C. S."

This notice was written upon the letter of the City Savings Bank of January 31st, which was returned to the City Savings Bank; reaching Detroit at the opening of the bank, Monday, February 10th, at which time the bank had ceased to do business, and was in the hands of the banking commissioner. Under authority of the banking commissioner, the Garrisons were charged with the amount of the collection, and "State Special Account" was credited with the same amount for the account of the State Bank of Carson City. After this credit was made, the Carson City bank was notified as follows:

"CITY SAVINGS BANK,
"DETROIT, Mich.
"Detroit, 2/10.

"Your favor of the ——— instant received with stated enclosures.

Your No. or date	We credit	For collection."
123	$467 50	

On February 8th, at the close of business, the account of the Garrison bank with the City Savings Bank showed a credit balance of $1,378.13. This includes a deposit of $707.05 made on that day. The Garrisons had for a num-

ber of years carried a balance at the City Savings Bank, and for 12 or 15 years had been making collections for the City Savings Bank in the same manner as done in this case; crediting the proceeds of such collections to the City Savings Bank against such balance on a running account existing between them. The Garrisons had no knowledge of the relation which the City Savings Bank bore to the draft in question, except so far as was disclosed by the indorsement on the back thereof, by the rubber stamp on the face thereof, and the letter of instructions sent to them by said bank, and did not know, if such was the fact, that the paper was the property of the Carson City bank, and had only been turned over to the bank for collection.

The City Savings Bank was the correspondent of the Carson City bank, and they had been doing business with each other for some time. There was a running account between the two banks, and there were no remittances of cash, but the course of their dealings was entirely a matter of debit and credit. This was also the case with the bank of the Garrisons.

On the 12th day of February, 1902, the Union Trust Company was appointed by the court receiver of the City Savings Bank, and on March 4th following an order was made directing said receiver to return to depositors all deposits made on the 8th day of February, 1902. Upon demand being made by the Garrisons for the repayment of their deposit of $707.05, the receiver refused to comply therewith, except after deducting the amount of the collection of $467.50. Thereupon the Garrisons filed their petition, praying for an order directing the receiver to refund the amount of their said deposit. The Carson City bank also filed a petition, alleging that the City Savings Bank received the proceeds of its draft above set forth on February 10, 1902, while insolvent, and praying for an order directing the payment to it of the sum of $467.50, with interest. The respondent, the Union Trust Company, receiver, answered the petitions, seeking the in-

struction of the court, and asking that the petitions be consolidated and heard as one, and they were so heard. After hearing the proofs the court entered an order directing the payment of $467.50 to the Carson City bank, and the payment to the Garrisons of $239.55, being the amount of their deposit of $707.05, less the amount of said collection of $467.50. From this order the Garrisons appeal.

After the order on these petitions had been entered, notice of appeal given, bond on appeal filed, and the proposed case on appeal prepared and served and presented for signature, counsel for the Carson City bank sought to have the order set aside, and to introduce proof of the insolvency of the City Savings Bank for a period of six months prior to the 8th day of February, 1902. This application was denied.

Counsel for the Garrison bank contend that, under the circumstances of this case, that bank had a lien upon the proceeds of the draft of $467.50 to secure the payment of its balance against the City Savings Bank; that the Carson City bank was merely a general creditor of the City Savings Bank as to the proceeds of the draft, and, as such, not entitled to a specific return of the amount collected; and that in any event the acceptance of the Garrison bank's deposit on February 8th of $707.05 was a fraud, from which no rights could accrue to the City Savings Bank.

The briefs filed on the part of the Carson City bank and of the Union Trust Company, receiver of the City Savings Bank, take the position, *first*, that the words appearing upon the face of the draft, viz., "City Savings Bank. Collection No. 4627, Detroit, Mich.," were notice to the Garrison bank that the City Savings Bank was acting as agent for collection, and not as owner of the draft; *second*, that the Garrison bank disobeyed the positive instructions that, if the draft was not paid promptly, it should be returned at once to the City Savings Bank.

In *Gibbons* v. *Hecox*, 105 Mich. 509, 513, Mr. Justice LONG, speaking for the court, said:

"The general rule derived from the cases is that the bank has a lien on all moneys, notes, and funds of a customer in its possession, for any indebtedness of the customer to the bank which is due and unpaid. The reason given for allowing the lien is that any credit which a bank gives by discounting notes or allowing an overdraft to be made is given on the faith that money or securities sufficient to pay the debt will come into the possession of the bank in the due course of future transactions. In *Re Farnsworth*, 5 Biss. (U. S.) 223, Judge Blodgett, of the United States circuit court of Illinois, held that a bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note, though collected after the filing of petition in bankruptcy, and can apply such proceeds upon the note. In *Muench* v. *Valley Nat. Bank*, 11 Mo. App. 144, the court say:

"'The general lien of bankers is part of the law merchant. That bankers have a lien on all money and funds of a depositor in their possession for the balance of the general account is undisputed. A banker's lien does not arise on securities deposited with him for a special purpose; otherwise we have no doubt that when a discount has been made by the bank, and the note has matured, so as to create an indebtedness from the depositor to the bank, all funds of the depositor which the bank has at the date of the maturity of the discounted note, or which it afterward acquires in the course of business with him, may be applied to the discharge of his indebtedness to the bank; and this is true not only of the general deposit of the customer, but the rule applies to any commercial paper belonging to the depositor in his own right, and placed by him with the bank for collection.'"

See, also, 1 Morse on Banks and Banking (4th Ed.), §§ 324, 338; *Cockrill* v. *Joyce*, 62 Ark. 216. In the case last cited the paper was deposited for collection and credit. The court say:

"The law on this subject is well settled, and is thus stated by a recent writer:

"'A banker has a lien on all securities of his debtor in his hands for the general balance of his account, unless such a lien is inconsistent with the actual or presumed intention of the parties. The lien attaches to notes and bills and other business paper which the customer has intrusted to the bank for collection, as well as to his general deposit account, * * * And so, if the securities be de-

posited after the credit was given, the banker has a lien for his general balance of account, unless there be an express contract or circumstances that show an implied contract inconsistent with such lien.' 1 Jones, Liens (2d Ed.), § 244."

We find no circumstances here to take the case out of the general rule, but, on the contrary, the circumstances clearly entitled the Garrison bank to a lien upon the proceeds of the draft, as against the City Savings Bank, unless it had notice that the latter bank was merely an agent for collection or had disobeyed its instructions, as contended by the receiver, which we shall discuss later on.

The important question, however, remains—whether the Garrison bank was entitled to a lien on the proceeds of the draft as against the Carson City bank, the owner of the draft. We think that, under the circumstances disclosed by this record, it was. The State Bank of Carson City indorsed the draft over generally—"Pay City Savings Bank, Detroit, or order"—which constituted prima facie evidence of ownership of the draft by the City Savings Bank. The instructions sent by the latter bank to the Garrison, that the draft was inclosed "for collection and credit" did not, in view of the unbroken course of dealing between the banks, impugn their apparent title. *Cody* v. *City Nat. Bank*, 55 Mich. 379.

Although the proceeds of the draft were not to be credited to the Carson City bank until collected, it never was contemplated that the money, when collected, should be remitted to the Carson City bank. The instructions were explicit that, when collected, the proceeds should be credited to the transmitting bank. The Carson City bank had no thought of the proceeds of the collection forming a special fund to be held for it, but intended to rely in this instance, as it had in all its past transactions, upon the credit of the City Savings Bank, and its financial responsibility. As testified by Mr. Fuehrer, who was with the City Savings Bank at the time of the transactions in question:

"The State Bank of Carson City and the City Savings

Bank had been doing business for some time. The City Savings Bank was the correspondent of the Carson City bank. The manner in which this draft came to the City Savings Bank was not unusual in any way. It came in the customary way. * * * There was a running account, as it were, between the State Bank of Carson City and the City Savings Bank. That is true, also, as between the City Savings Bank and the bank of W. D. & A. Garrison, at Vernon. There were debits and credits on the books of each of them—I mean the City Savings Bank books and the Carson City bank books.

"*Q.* I suppose there would also be actual remittances of cash or was it all a matter of debit and credit?

"*A.* All a matter of debit and credit. That was true, also, as between the City Savings Bank and the Garrison bank."

Under such circumstances, if the collection had been credited and reported to the City Savings Bank by the Garrison bank, and to the Carson City bank by the City Savings Bank, while solvent, the right of the Garrison bank to retain the proceeds of the collection would be unquestionable, under the arrangement between the respective banks. Must the Garrison bank lose its lien because the City Savings Bank had closed its doors when notice of the collection reached it?

Although the rule is well established that, when a bank acts as agent for the collection of paper, the property does not pass from the depositor, it is equally well settled that, when the money has been collected and credited, the title passes. *Wallace* v. *Stone*, 107 Mich. 190.

In *Commercial Bank* v. *Armstrong*, 148 U. S. 50, Mr. Justice Brewer, speaking for the court, said:

"We also agree with the circuit court in its conclusions as to those moneys collected by subagents to whom the Fidelity was indebted, and which collections had been credited by the subagents upon the debts of the Fidelity to them, before its insolvency was disclosed, for there the moneys had practically passed into the hands of the Fidelity—the collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents. It was the same as though the money had act-

ually reached the vaults of the Fidelity. It was a completed transaction between it and its subagents, and nothing was left but the settlement between the Fidelity and the principal—the plaintiff. The conclusions of the circuit court were based upon the idea that these collections could not be traced, because they had passed into the general fund of the bank. We think, however, a more satisfactory reason is found in the fact that, by the terms of the arrangement between the plaintiff and the Fidelity, the relation of debtor and creditor was created when the collections were fully made."

Under this high authority, the Garrison bank, having collected the draft without knowledge of the insolvency of the City Savings Bank, and having given that bank credit for the amount thereof, stood in precisely the same position as though it had actually transmitted the money to the bank.

Mr. Morse, in his work upon Banks & Banking (4th Ed.), §§ 591, 592, discussing the question "when a correspondent bank can hold paper sent to it for collection, or the proceeds of it, against the real owner," says:

"SEC. 591. When the last bank has successfully effected the collection, it is directly liable to the owner to pay the amount over to him only until such time as it has actually remitted the amount to its predecessor. But some nice questions have arisen where such predecessor, intervening between the real owner of the paper and the bank actually receiving the money, becomes insolvent before the receiving bank has actually paid over the amount to this predecessor. The general rule of law is that, if a person employs an agent to collect money under such circumstances that the agent naturally employs a subagent to accomplish the actual collection, then the principal will be entitled to sue the subagent, and collect the money directly from him, without regard to the relationship or condition of accounts existing between such agent and subagent, and although the subagent had no knowledge that his employer was an agent, and not a principal. But if the owner has delivered the paper to the agent, with no indicia whatsoever to show that such agent is not the owner, and the subagent receives it from the agent, supposing him to be the owner, and gives him credit upon the strength

thereof, then the principal cannot recover from the sub-agent. * * *

"SEC. 592. The leading case illustrative of this principle is that of *The Bank of the Metropolis* v. *New England Bank* (1 How. [U. S.] 234, 6 How. [U. S.] 212). The latter gave to the Bank of the Commonwealth for collection a piece of negotiable paper indorsed generally, so that, for all that appeared upon it, the Bank of the Commonwealth might be the sole and real owner. The Bank of the Commonwealth forwarded it to its correspondent, the Bank of the Metropolis, with which it had a running account. That bank collected it, and gave the Bank of the Commonwealth credit for it upon the running account. The Bank of the Commonwealth failed, being indebted to the Bank of the Metropolis, and soon afterward the Bank of the Metropolis was notified of the true ownership of this piece of paper. The latter refused, however, to account to the New England Bank, which accordingly brought suit. The case is first reported in 1 How. (U. S.) 234; but at a second trial at nisi prius in the lower court the rulings of the Supreme Court appeared to have been so misunderstood that the court reiterated them with much clearness and succinctness, in the following shape:

"1. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection, merely, as an agent, then the Bank of the Metropolis was not entitled to retain the money, as against the New England Bank, for the general balance of the account with the Commonwealth Bank.

"2. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks.

"3. But if the jury find that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had

no notice to the contrary, and, upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error (the Bank of the Metropolis) is entitled to retain against the defendant in error (the New England Bank) for the balance of account due from the Commonwealth Bank.

"Chief Justice Taney, in the first opinion in *Bank of the Metropolis* v. *New England Bank*, expressly denied that the former was put upon its inquiry as to the true ownership of the paper; the indorsement by the true owner being general, and not 'for collection.' The cited cases also establish that the collecting bank, the subagent, may retain the money, if, without making an actual payment, it has merely given credit to the agent, or suffered balances to its own credit to remain undrawn with the agent upon the strength of these receipts. But unless it has made some payment, or suffered a balance to remain undrawn, or otherwise substantially relied on the agent's ownership, so that it would be unjustly prejudiced by the denial of that ownership, then it cannot retain the money. The true owner, by indorsing, 'For collection,' could save all question; but if he chooses to neglect this precaution, to indorse generally, and thereby to permit his agent to appear as the owner, then, if a subagent or any other person be misled, and a loss occurs, it is proper that the owner whose carelessness has given opportunity for the subagent to be deceived should, as between these two, bear the loss.

"Where a negotiable instrument indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank 'for collection and credit' before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks."

The doctrine of *Bank of the Metropolis* v. *New England Bank* has been adopted and applied in *Vickrey* v. *State Savings Ass'n*, 21 Fed. 773; *Wood* v. *Boylston*

Nat. Bank, 129 Mass. 358; *Wyman* v. *Colorado Nat. Bank*, 5 Colo. 30; *Rathbone* v. *Sanders*, 9 Ind. 217; *Millikin* v. *Shapleigh*, 36 Mo. 596; *Carroll* v. *Bank*, 30 W. Va. 518. It has been repudiated in New York and some other States. We incline to the view of Mr. Morse (4th Ed., § 600) that the doctrine of the Supreme Court of the United States is the better one, both upon reason and authority.

Did the words, "City Savings Bank. Collection, No. 4627, Detroit, Mich.," stamped upon the face of the draft, notify the Garrison bank that the City Savings Bank was not the owner of the draft, but a mere agent for collection? This draft was sent to the Garrison bank for "collection and credit," in accordance with the uniform practice of 12 or 15 years. The instruction to credit the proceeds of the draft to the City Savings Bank was inconsistent with the idea that that bank was a mere agent for collection, and was in harmony with the indorsement showing ownership. In the absence of any evidence in the record to invalidate the assumption, we think the Garrison bank might reasonably assume that the words were stamped upon the draft as a part of the bank's system of keeping track of its own collection items by number. We do not think these words, under the evidence in the case, tended to show that the City Savings Bank was acting as an agent for collection. As said by Mr. Justice CAMPBELL in *Cody* v. *City Nat. Bank*, 55 Mich. 379:

"When the paper came into the defendant's hands, it had an unqualified blank indorsement of plaintiff's, which presumptively transferred title to any one who might become the holder. The fact that Rice and Messmore indorsed it for collection had no tendency to show that they held it themselves merely as agents for plaintiffs," etc.

Should the amount of the draft be deducted from the deposit of $707.05 because the Garrison bank disobeyed instructions? This certainly presents a very unusual question. Ordinarily failure to follow instructions is complained of because such failure results in the partial or

total loss of the collection. But in this case the failure to follow instructions, if there was such failure, resulted in securing the entire collection of the draft. The draft in this case was drawn against a car of grain to arrive. It was presented at once, and the drawee did not refuse payment or acceptance, but stated that he was willing to pay it as soon as the car of grain arrived. He was a customer of, and had money on deposit with, the Garrison bank, and actually did pay the draft when the car arrived. As shown by the record:

"*Q.* Now, have you frequently had paper of this kind, drawn by the same party and on the same parties, frequently come to your bank for collection, drawn on the City Savings Bank?

"*A.* Yes, sir.

"*Q.* Was it customary for instructions of the kind that appear upon the stub attached to this draft to be upon ordinary paper that came from them—'If not paid, return without delay and state reasons given?'

"*A.* Yes, sir; they always put that upon the draft.

"*Q.* Now, what was your practice in collecting paper of this kind drawn by the same parties in the way I have described—getting there before the goods arrived?

"*A.* Held the draft until the goods arrived."

The natural construction of the language used was that the draft should be returned at once if payment was refused or if not paid promptly. The parties, by their course of dealing, had placed a practical construction upon the meaning of the adverb "promptly," which justified the course taken by the Garrison bank in this instance.

It results that, in our opinion, the Garrison bank was entitled to credit the amount of their collection upon their balance with the City Savings Bank, and to have repaid to them the amount of their deposit of $707.05.

A decree will be entered in conformity with this opinion.

MCALVAY, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

139 406
s155 1 99
139 406
t156 1 87

NATIONAL CASH REGISTER CO. *v.* DEHN.

1. SALES—ORDER—ACCEPTANCE—DELIVERY OF GOODS.
   A written order for goods, though not formally accepted, becomes a binding contract on delivery and receipt of the goods described.
2. SAME — CONDITIONAL SALE — RIGHT TO SUE BEFORE TITLE PASSES.
   Where cash registers were sold under a contract providing that they should remain the property of the seller until all the installments of the purchase price should be paid, and that, if the buyer should fail to make the first payment, or execute notes for the deferred payments as agreed, the entire price should become due, the seller was entitled, on refusal of the buyer to accept the machines, to recover the entire price, and was not restricted to an action for damages for breach of contract.[1]

Error to Bay; Shepard, J. Submitted January 18, 1905. (Docket No. 71.) Decided March 21, 1905.

Assumpsit by the National Cash Register Company against August E. Dehn and Carl O. Dehn, copartners as Dehn Bros., for goods sold and delivered. There was judgment for defendants, and plaintiff brings error. Reversed.

This is an action in assumpsit to recover the entire purchase price for two cash registers sold and delivered by plaintiff to defendants on August 10, 1903. The cash registers were purchased under the following order:

"CITY BAY, COUNTY BAY, STATE MICH.,
"Date 8–10, 1903.
"NATIONAL CASH REGISTER CO.,
"Dayton, Ohio:
"Please ship to us at our place of business, No. 101–103

[1] As to rights and liabilities of vendor and purchaser by conditional sale on default of payment, see note to *Cole* v. *Hines*, (Md.) 32 L. R. A. 455.

Midland street, West Bay City, as soon as possible, two of your No. 35¼ total-adding registers, case to be A–B 74704. Denominations of keys to be standard stne. In consideration of the above, we agree to pay you Four hundred and fifty dollars ($450.00), in U. S. gold coin or its equivalent, being price of register f. o. b. Dayton, Ohio, viz. $——— cash with order; $45.00 upon delivery; balance $30.00 per month. This register is to be used on the front and back counter grocery and meat business. Upon delivery of machine, you to send notes for signature for monthly payments as per above terms.

"No discount to be allowed on price of autographic or other registers the price of which is $30 or less, or on any amount allowed on registers taken in trade.

"On presentation, should there be any failure to pay such draft, or to execute notes for deferred payments, it is agreed that the full amount of the purchase price shall at once become due and payable. Should there be any default in the payment of any note, it is agreed that all the remaining notes shall at once become due and payable, anything in the notes to the contrary notwithstanding. In default of any payment, you or your agent may take possession of and remove said cash register without legal process; and, in such case, all payments theretofore made by me under this order shall be deemed and considered as having been made for the use of said register during the time the same remained in my possession, and shall be retained and kept by said register company as such payment. In the event of refusal to accept said cash register when tendered, it is agreed that the sum first above mentioned, less any previous actual cash payments, shall at once become due and payable as liquidated damages and not as penalty.

"Should the register get out of order from ordinary use, any time within two years from date of shipment, you to quickly repair the same, gratis, the undersigned paying transportation charges to and from your factory or nearest agency capable of making the necessary repairs, or if repairs are desired made where the register is located, the undersigned to pay the traveling expense of repairman from and back to your factory or nearest agency capable of making the necessary repairs.

"It is agreed that the title to the said cash register shall not pass until the purchase price or any judgment for the same is paid in full, and shall remain your proper-

ty until that time. It is expressly agreed that this order shall not be countermanded.

"This contract covers all agreements between the parties hereto. Nameplates to read Dehn Bros. A on back, B on front; private till; draw through People's Savings Bank of West Bay City; ship by freight.

"Yours truly,

[Sign here] "DEHN BROS.

"By C. O. DEHN."

In compliance with this order, which was sent in to plaintiff's home office at Dayton, Ohio, the machines were shipped to defendants from Dayton by freight, as provided in the order. When the rigisters arrived in Bay City, the railroad company notified defendants to that effect, and they sent down and got them, and brought them over to their store from the freight office. Defendants did not countermand or cancel the order, or assume to do so in any way, prior to the actual receipt of the registers at their store. After uncovering the registers and examining them, defendants objected to receiving them on the ground that the registers were not the kind which they had ordered, they insisting that they had selected and supposed they had ordered initial key machines, which would enable them to keep track of the particular clerk who registered particular payments, and that plaintiff's agent undertook and agreed to describe such machines in the order, and they gave evidence tending to substantiate this claim. On the other hand, the plaintiff gave evidence tending to show that the two registers delivered were the exact machines selected and intended to be described in the order. The defendants claim that they were induced by plaintiff's agent to retain the machines for the purpose of trying them to see if they would not be satisfied to retain them; that they never accepted the machines, but, on the contrary, refused to accept them; and, after using them for some six or seven weeks, at the request of plaintiff's agent, they took the registers to the Michigan Central depot, and shipped them to the National Cash Register Company at Dayton, Ohio. This suit was begun October

12, 1903, while the cash registers were still in the possession of the defendants, prior to their shipping them to Dayton. When the registers arrived in Dayton the cash register company refused to receive them, and directed its attorneys to notify the debtors or their attorneys that the machines were subject to their order, and at their risk of loss, damage, etc. The trial judge, however, refused to permit plaintiff to introduce proof of this fact.

Plaintiff's declaration, after setting forth the contract, alleges, among other things:

"That said defendant refused and failed to pay the draft for $45, provided for in said order and contract, on presentation of the same, and did fail and refuse to execute notes for deferred payments, as in said contract provided, and still refuses so to do, and that by reason thereof the full amount of said contract, to wit, the sum of $450, thereby and under the terms of said contract became due and payable, and the same is now due and payable to said plaintiff."

Pierce & Kinnane, for appellant.

Lee E. Joslyn, for appellees.

BLAIR, J. (*after stating the facts*). The principal question in this case arises upon assignments of error challenging the correctness of the court's instructions to the jury that the order signed by the defendants never became a binding contract, because not accepted by the plaintiff in writing, and that plaintiff could not recover unless they should find that the defendants had accepted the registers. We do not consider it necessary to discuss the authorities cited with much learning by counsel in this case relative to the legal status of the order prior to performance on the part of plaintiff, since the order clearly became a binding contract between the parties when the cash registers were actually delivered to and received by the defendants, provided they were the kind of machines selected and which the order properly described. *National Cash Register Co.* v. *Blumenthal,* 85 Mich.

464; *Hallwood Cash Register Co.* v. *Millard*, 127 Mich. 316. This proposition is not disputed.

Counsel for defendants says in his brief:

"Plaintiff's third contention, that the delivery of the registers in question by plaintiff to defendant is a sufficient acceptance by plaintiff, is conceded to be the law, and there can be no doubt of that proposition as far as it goes; but we contend that this is not the question—the real question—at issue. * * * It was not disputed in the court below, it will not be disputed here, but that the plaintiff made out such a case in the lower court as might have warranted a verdict for breach of contract in refusing to accept the registers; but that is not the claim in the declaration, nor was that feature of the case in any way before the court, the action being for the entire purchase price of the registers sold, there being no count for breach of contract."

In *National Cash Register Co.* v. *Blumenthal*, supra, this court said, speaking of a similar order:

"It contains all the material stipulations of a contract, and when accepted and acted upon by the National Cash Register Company was binding and conclusive upon both parties."

Whether title passed or not is of no consequence in determining plaintiff's right to sue for the entire amount to be paid. It was provided in the contract itself that title should not pass until the machines were paid for, and the title would not have vested in the defendants if they had accepted the machines under the contract. The right of the plaintiff to sue for the entire amount does not depend upon the vesting of title in defendants, but upon the promises of defendants contained in the contract. Defendants agreed to pay, upon the delivery of the machines, $45, and the balance of the purchase price to be paid $30 a month, for which notes were to be given. They further agreed that, should they fail to so pay or execute the notes, "that the full amount of the purchase price shall at once become due and payable." The plaintiff delivered the machines, and, if they were the ones ordered, it at once became the duty of defendants to pay and give the notes

as they had agreed. They refused to pay or to give the notes, and thereupon the entire purchase price became due and demandable. The plaintiff has properly declared upon this clause of the contract providing that the full amount of the purchase price shall become due and payable upon default, and it is entitled to recover, provided it has furnished the machines which were ordered.

In 2 Mechem on Sales, appears the following:

"SEC. 1415. By Contract Payment May be Due Before Title Passes. There is, moreover, no reason why the parties may not stipulate that payment shall be made even before the title passes. As is said in a recent case: 'If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum.'"

As authority for this doctrine, the author cites *White* v. *Solomon*, 164 Mass. 516 (30 L. R. A. 537). In this case the opinion was written by Justice Holmes, now of the Supreme Court of the United States. The action was based upon the following contract:

"*Gentlemen:* Please deliver according to shipping directions given below, one White's Physiological Manikin, Medical Edition, price $35. In consideration of its delivery for me, freight prepaid, at the express office specified below, I promise to pay the sum of $35, as follows: $10 upon delivery at the express office, and the balance in monthly payments of $5.00, each payable on the first of each and every month thereafter until the whole amount is paid, for which the publishers are authorized to draw when due. It is expressly hereby agreed that in case of the failure to pay any one of the said installments after maturity thereof, all of said installments remaining unpaid shall immediately become due and payable, and the said Jas. T. White & Co. may take or cause to be taken the said manikin from the possession of the said——or their representatives, to whom he may have delivered the same, without recourse against said Jas. T. White & Co. for any money paid on account thereof. It being expressly agreed that the money paid on account shall be for the use and wear of said manikin."

Justice Holmes, speaking for the court, said:

"The main question is whether the judge who tried the case ought to have ruled that 'the plaintiffs are not entitled to recover the price of the article in question, but must offer evidence to the court upon the question of damages for the alleged breach of said contract.' A majority of the court are of opinion that this ruling properly was refused. We assume in favor of the defendant, but without deciding, that the title to the manikin did not pass by delivery at the express office, but that assumption does not dispose of the case. In an ordinary contract of sale the payment and the transfer of the goods are to be concurrent acts, and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damages for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods. But in the case at bar the buyer has said in terms that, although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly solvendum in futuro) of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words 'in consideration of its delivery' are not accidental or insignificant. The contract is carefully drawn, so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. We are not to construe equities into the contract, but to carry it out as the parties were content to make it. If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum."

In *Marvin Safe Co.* v. *Emanuel* (New York Court of Common Pleas), reported in 21 Abb. N. C. 181, the memorandum of order was as follows:

"320 Broadway, N. Y., Dec. 15, 1886.

"Marvin Safe Co.: Please send as per mark given

below one No. 206 safe, for which the undersigned agrees to pay the sum of $127.50-100, payable $10. cash and $10. per month till paid for, dollars.

"Terms cash, delivered on board in New York, unless otherwise stated in writing.

"It is agreed that Marvin Safe Co. shall not relinquish its title to said safe, but shall remain the sole owners thereof until above sum is fully paid in money; and if notes are given, until all such notes are actually paid in cash.

"In event of failure to pay any of said installments or notes when same shall become due, then all of said installments or notes remaining unpaid shall immediately become due, and Marvin Safe Co. may, at their option, remove said safe without legal process.

"It is expressly understood that there are no conditions whatever not stated in this memorandum, and the undersigned agrees to accept and pay for safe in accordance therewith.

"Sign here. EMANUEL & TAYLOR.
"Salesman. R. F.
"Approved.
"Money must not be paid to salesmen for our account.
"Mark on door, Emanuel & Taylor.
"Route, 320 Broadway, 3d floor.
"Not accountable for damage after shipment."

Daly, J., speaking for the court, said:

"The defendants in their written agreement expressly agreed to pay $127.50 for the safe which they ordered to be sent to them, and, as the safe was sent, and defendants refused to receive and pay for it, I cannot see any objection to the recovery of the price. The fact that it was also stipulated in the same written agreement that the title to the safe should not pass until the whole price was paid cannot affect plaintiff's right to recover upon the express agreement to pay, because the latter is an independent stipulation. The fact that the price was to be paid in installments, $10 down and $10 per month, does not affect the right of recovery. The same written agreement provides that all the installments shall become due upon default in paying one; and the option given thereupon to the plaintiff to remove the safe does not cancel the obligation to pay them when they so become due. It hardly seems necessary to cite authorities in support of the claim made by the plaintiff. The agreement to pay is enforceable in the

same way that a promissory note would be if the promise to pay for the safe had been contained in such an instrument instead of in this contract. It would be no defense to the note to say that the vendors and vendees had expressly stipulated that the title to the safe should not pass until the same was paid. Parties have the right to make any agreement they please, so long as they do nothing in violation of the law. They might have agreed that the possession as well as the title of the safe should be in plaintiff until the price was paid, and, if there was an express agreement to pay the price, it would be recoverable, because that would be the contract."

In support of his contention, defendants' counsel cites several Michigan cases, in which the contract was entirely verbal, where the court held that an acceptance must be shown of a part of the goods to bind the defendant, delivery alone not being sufficient, on the principle that the vendor cannot, by his own act alone, take the case out of the statute. Counsel also cites *McCormick Harvesting Machine Co.* v. *Cusack*, 116 Mich. 647, contending that that case rules the case at bar. Counsel says: "An examination of the order in this case shows that it is much like the McCormick order in several ways." We think the orders are strikingly dissimilar in most respects. In particular the clause, "On presentation, should there be any failure to pay such draft or to execute notes for deferred payments, it is agreed that the full amount of the purchase price shall at once become due and payable," is not found in the *Cusack Case*. In the latter case, also, the proofs showed conclusively that there never had been any delivery to the defendant prior to the countermanding of the order, and the order only required settlement by notes on delivery. Moreover, the order in the *Cusack Case* was never sent in to the principal, but was retained by the agent, and there were no acts of performance on the part of the principal sufficient to constitute an acceptance of the order on its part. In the case at bar there was a complete delivery by the plaintiff and a voluntary taking of possession by defendants for inspection. The defend-

ants made a written proposal containing all of the terms of a mutually binding contract, and when this proposal was accepted by full performance on the part of plaintiff the contract became a complete written contract. Delivery in compliance with a written order constitutes an acceptance of the order, and a mutually binding contract results. Delivery under an oral order does not constitute an acceptance, because there is nothing to accept, the oral order being void, and only acceptance by the defendants can raise contract relations. The language of Mr. Justice MOORE in the *Cusack Case* must be limited to the facts of that case, where, in the opinion of the learned justice, "there was no acceptance of this order," and therefore the contract was unilateral and void, as much as though it had been an oral contract; it was merely an unaccepted proposal. In such case undoubtedly it would be essential to show an acceptance of part of the goods by the defendant.

We think that the only question which should have been submitted to the jury was whether the machines delivered were of the same description as the ones actually ordered, and the jury should have been instructed to find a verdict for the plaintiff in case they found that the cash registers delivered were the same kind of registers as those ordered.

We also think that the court erred in refusing to permit plaintiff's counsel to cross-examine the defendants as to their previous testimony, and in excluding the plaintiff's letter, Exhibit B.

For the errors indicated, the judgment is reversed, and a new trial granted.

MCALVAY, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

CRESSWELL *v.* ROBERTSON.

BUILDING CONTRACTS — CONSTRUCTION — INJURIES TO WORK — REPLACEMENT — EXTRAS.

A subcontractors' contract provided that they should cover, protect, and secure the work from injury; that any damage thereto should be repaired at their expense, and that the inspection of any work by the architects, or the issuance of certificate thereon by them, or payments under the contract, should not release the subcontractors from any obligation to perform the work in a good and workmanlike manner, and any default or defect in the same, with all damages thereto, should be repaired and replaced or made good by the subcontractors at their own cost and expense. *Held*, that where water-conductor pipes were placed within four inches of the outside face of the wall, as provided by the plans and specifications, and were accepted after being tested, but they were subsequently damaged by frost because of the failure of other contractors to supply steam with which to warm them as contemplated, whereupon the architects ordered new pipes inserted in another location, the subcontractors were not required to insert such pipes under the contract, but were entitled to charge therefor as extras.

Error to Wayne; Frazer, J. Submitted January 18, 1905. (Docket No. 63.) Decided March 21, 1905.

Assumpsit by James L. Cresswell and Frank A. Hesse, copartners as the Detroit Cornice & Slate Company, against Robert Robertson for work and labor done. There was judgment for plaintiffs on a verdict directed by the court, and defendant brings error. Affirmed.

Angell, Boynton, McMillan & Bodman, for appellant.

Lodge, Trevor & Brown, for appellees.

BLAIR, J. This is an action brought by the appellees against the appellant to recover the final payment claimed to be due under a contract between them. The defendant

was the principal contractor for the erection of the Wayne county building at Detroit. He entered into an elaborate written contract with the county, which contained various clauses bearing upon the questions involved in this case. The plaintiffs were subcontractors under the defendant for a portion of the work covered by his contract with the county, viz., the portion covering roofing and metal work. The plaintiffs entered into a written contract with the defendant, covering this work, the clauses of which, so far as they affect the questions involved in this case, are identical in language with the clauses contained in the contract between the defendant, Robertson, and the county.

The plans called for the placing of iron water-conductor pipes in the outer walls, and four inches from the outside face thereof, of that portion of the building which surrounds the interior courts. The Detroit Cornice & Slate Company (plaintiffs) was the subcontractor in whose department this work fell. The plans required that the work of installing the pipes should go on as the outer brick walls went up, and this course was pursued, with the result that when the wall was finished the pipes were completely incased in brickwork. The work of installing the pipes, including making of connections near the roof, was completed about the month of October, 1899, when the work was subjected to a rigid test by allowing water to pass down into the pipes from the roof, and no defect was found, and none existed. The work was completely finished in accordance with the specifications. The plans and specifications contemplated that an opening should be left in the conductor pipe near the ceiling of the basement, into which a steam pipe should be introduced so as to allow steam to be discharged into the pipe for the purpose of warming the conductors in freezing weather. The proper opening was left for this purpose in each conductor pipe. As these conductor pipes were placed, according to the plans, within about four inches of the outside face of the wall, the heating of them as proposed was an essential safeguard in cold weather. For some reason, not disclosed

by the record, for which none of the parties to the suit was responsible, the apparatus to supply steam to the building was not in working order or put into operation until late in March or early in April, 1900. In the meantime, and probably during a period of heavy snows in January and February of 1900, the conductor pipes became filled with ice, and many of them were bursted and broken. After the bursting of the pipes, and some time in the spring of 1900, the architects directed defendant, Robertson, to cut from the inside of the building through some 20 inches of brickwork to reach each pipe in its then location, and to cut another slot on the inside of the wall, and to put new pipe in this new location, where some 20 inches of brickwork would be between the pipe and the outside air. Some of these pipes were, however, removed to the elevator shafts of the building, instead of being set in the brickwork, as last stated. After Robertson had been instructed to replace the pipes, he, in his turn, ordered the plaintiffs to replace them, which order plaintiffs refused to obey unless they were paid for so doing, whereupon Robertson caused the work to be done by others at his own expense. The plaintiffs did, however, make the roof connections to the pipes in the new location, putting in what are called in the record "goose necks;" and for this work they made a charge against Robertson, as for an extra, of $150.50. It appeared that to replace the pipes in their original location would have cost $1,408.56, and that the change in the plans made an additional expense of about $800.

The facts were undisputed, and at the close of the testimony the circuit judge directed a verdict in favor of the plaintiffs for the full amount of their claim. Defendant assigns as error the directing of the verdict, and the refusal of the court to give defendant's single request to charge—that, under the testimony in the case, the defendant was entitled to a set-off, as against the claim of the plaintiffs, in the amount of $1,408.56, with interest from the time of the completion of the building. Defendant's counsel contend that, as between the county and Mr. Rob-

ertson, the county had the legal right to insist that any damage happening to the work after its completion, and before the final acceptance of the work, should be replaced at his expense, no matter what the cause of the damage was, and that, although the cause might be bad plans made by the architect, this did not alter his responsibility. They also contend that the subcontractors under these same clauses were similarly liable to Mr. Robertson for the expense to which he was put in making good the damages to the county.

In the course of his instructions to the jury, directing a verdict for the plaintiff, the trial judge said:

"Now, when application was made to the plaintiff by the defendant to alter this pipe—to put it in a different place, as directed by the architect—he refused to do it; claiming that he had completed his contract according to the terms of the contract, and according to the plans and specifications. It is my opinion that, having complied with his contract, there was no law that could require him to make this alteration, without he was paid for it. If it had been any neglect on his part—any failure to comply with the original plans and specifications—it would have been different; but it is conceded that there is nothing of that kind, but that the architect came along and ordered this changed; and it is claimed he had a right to make it, under the original contract between the county and the defendant in this suit, the general contractor. I do not so interpret that contract at all. I do not think that the architect had a right, under that contract, to arbitrarily change the plans, and expect to make the workmen—the persons who had taken these contracts—pay for it out of their own pockets. If they saw fit to change the plans—and having found there was a defect in them—and to put this pipe further away from the outside wall, to prevent freezing, it was to be done at the expense of the owners of the building, and not at the expense of the contractors. The work having been performed, this general contractor was under no liability, and there was no authority to make Mr. Robertson make it in this way; but they went on and made it, and it has been paid for."

We fully agree with the trial judge in his interpretation of the contract. All of these contractors had executed

their contracts in exact compliance with the plans and specifications; their work had been finished, tested, and found satisfactory; and they were in no wise responsible for the neglect of others in not installing the steam heating apparatus, nor for the placing of the pipes four inches from the outside, where they were likely to freeze.

The construction of the contract by the appellant, whereby the contractors could be required by the arbitrary action of the architect to do their work over again without compensation, is so harsh and unjust that it should only be adopted in case the provisions of the contract are so clear and certain in their meaning as to admit of no other rational conclusion. The clauses of the contract upon which counsel for appellant rely in their brief are the following:

"3rd. Should any alterations be required in the work shown or described by the drawings or specifications, the quantities for such alterations either as additions to or deductions from the work, shall be made by the architects, and the prices for same shall be in accordance with the prices named in the proposal submitted by these contractors. Said proposal is attached to this contract.

"4th. The contractors shall, within twenty-four (24) hours after receiving written notice from the architects to that effect, proceed to remove from the grounds all materials condemned by them, whether worked or unworked, or take down all portions of the work which the architects shall condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and to the conditions of this contract. The contractors shall permit the owners and architects to visit and inspect the said work or any part thereof, at all times and places during the progress of the same, and shall provide sufficient, safe and proper facilities for such inspection. * * *

"6th. Should the contractors be obstructed or delayed in the prosecution of the work by the neglect, delay, or default of any other contractors, or by an alteration that may be required in the said work, or by any damage which may happen thereto by fire, or by the unusual action of the elements, or by the abandonment of the work by the employés through no fault of the contractors, then

there shall be an allowance of additional time beyond date set for the completion of said work; but no such allowance shall be made unless the claim is presented in writing at the time of such obstruction or delay. The architects shall award and certify the amount of additional time to be allowed, in which case the contractors shall be released from the payment of the stipulated damages for the additional time so certified and no more. * * *

"8th. The contractors shall make no claim for additional work, unless the same shall be done in pursuance of an order from the parties of the second part, and notice of all claims shall be made to the parties of the second part, in writing, within ten (10) days of the beginning of such work. * * *

"10th. The contractors shall cover, protect, and secure the work from injury, any damage happening thereto shall be repaired, replaced, or made good by said contractors. The contractors shall be responsible for any harm or injury which may happen to any person or persons on or about the building by reason of any act or default of said contractors, their subcontractors, employés, or agents. The contractors shall pay to the parties of the second part all costs which the said parties of the second part may incur by reason of said harm or injury. * * *

"14th. It is mutually further agreed by the parties hereto, that the inspection of any work by the architects or the issuance of certificate thereon by them, or payments made by the parties of the second part, under this contract, shall not release the contractors from any obligation to perform the work in a good and workmanlike manner, and in case of any default or defects being found at any time, either in workmanship or materials, the same, with all damages due thereto, shall be repaired, replaced, or made good by the contractors at their own cost and expense."

The tenth clause seems to be the one upon which appellant principally relies as supporting his construction of the contract, and is the only clause, in our opinion, which affords a plausible basis for such construction. It is his view that that clause required the contractors to protect the work against injury, and to repair, replace, or make good any damage from any cause occurring before the ac-

ceptance of the work by the county. We do not think this view should prevail as to the plaintiff's contract, whatever may be the construction of the clause in defendant's contract with the county. So far as plaintiff's contract is concerned, we think this clause meant that he should cover, protect, and secure the work from injury, and should repair, replace, and make good any damage happening during the progress of the work, and before its final completion in accordance with his contract, while he was still in charge of and responsible for the particular work. To hold that the subcontractor should be held responsible for the negligence of others causing damage months after he had completed his work, which had been tested and accepted by the principal contractor as satisfactory, and which, as a matter of fact, complied in every detail and circumstance with the plans and specifications, would, in our opinion, be unreasonable and unwarranted by the clause in question.

The fourteenth clause manifestly has no application, since the plaintiff performed his work in a good and workmanlike manner, and there were no defaults or defects found at any time either in workmanship or materials.

We think that the trial court adopted the correct view of the contract between the parties, and the judgment is affirmed, with costs.

McALVAY, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

139 423
d151 1 40

WILSON *v.* ROYAL NEIGHBORS OF AMERICA.

1. TRIAL—DIRECTION OF VERDICT—UNDISPUTED EVIDENCE.
   A verdict may be directed for a party having the burden of proof only when the testimony to establish his claim is undisputed; and in this respect testimony cannot be considered as undisputed because no witness directly denies it, since cross-examination may cast doubt upon it, or other testimony may dispute it by indirection.

2. APPEAL AND ERROR—QUESTIONS CONSIDERED—EXCEPTION AND ASSIGNMENT.
   Consideration will not be given a complaint regarding a colloquy between court and counsel to which no exception was saved and on which no error is assigned.

3. SAME—INSTRUCTIONS—REVIEW.
   The charge will be reviewed as a whole without reference to the punctuation of the stenographer or attorneys.

4. LIFE INSURANCE—ACTIONS—FALSE WARRANTY—INSTRUCTIONS.
   In an action on a life-insurance policy in which the defense was false warranty, in that insured stated in her application that she had not consulted a physician within seven years, and had never had heart disease, instructions examined and *held*, that, taken as a whole, the charge was not subject to the objection of telling the jury that they could consider insured's statement in the application as evidence of its own truthfulness.

Error to Muskegon; Russell, J. Submitted January 19, 1905. (Docket No. 74.) Decided March 21, 1905.

Assumpsit by John W. Wilson against the Royal Neighbors of America on a policy of insurance. There was judgment for plaintiff, and defendant brings error. Affirmed.

James A. Lombard (*George Lovelace*, of counsel), for appellant.

Nims, Hoyt, Erwin, Sessions & Vanderwerp, for appellee.

McALVAY, J. Plaintiff brings suit against defendant upon a certain benefit insurance certificate issued April 3, 1901, to Harriet B. Wilson, plaintiff's wife, for $2,000. Defendant is an Illinois fraternal insurance corporation, authorized to do business in the State of Michigan. Plaintiff is the beneficiary named in said insurance certificate. Mrs. Wilson made application for membership, in writing, March 4, 1901. She was duly examined by the local medical examiner of the society. The application was accepted, the examination approved, and the insurance certificate issued.

The application and certificate provided that the by-laws in force or thereafter enacted, the written examination, and the benefit certificate should each form a part of and constitute the contract of insurance. The truth of all the statements in the application and medical examination were made strict warranties, to form the only basis of liability on the part of the society. Mrs. Wilson died April 16, 1903, being then in good and regular standing as a member of the order. The necessary proofs of death were duly made and filed with the defendant, but payment of the claim was refused.

Upon trial in the circuit court a prima facie case in favor of the plaintiff was admitted. The defense relied upon a breach of warranty, and claimed that Mrs. Wilson, in stating in her application that she had not within seven years consulted a physician concerning any personal ailment, and that she never had heart disease, did not state the truth. Plaintiff recovered judgment for the amount claimed.

In this court two errors are relied upon: *First*, that the court erred in not directing a verdict for defendant; *second*, the court erred in instructing the jury that they might consider the statement of the applicant in her application for insurance as evidence of its truthfulness, when the truthfulness of such statement was in issue.

The first error is based upon the claim of defendant that, from the testimony of the doctor, it appeared that the ap-

plicant, Mrs. Wilson, had consulted him in regard to a personal ailment within seven years prior to making the application; that he diagnosed such ailment as valvular disease of the heart; that such testimony was undisputed, and established the falsity of her representations in her application to defendant company, and avoided liability under the benefit certificate upon which suit was brought.

To determine whether this contention is true, the court must weigh and examine all of the testimony of this witness, and decide, as a matter of law, that the testimony was undisputed, and that the trial court should have directed a verdict for defendant. We do not find that it was so clear and certain that we can say the court was in error in submitting the case to the jury. The record discloses that the doctor relied upon his memory, unaided by any record; that there was uncertainty as to dates; and that his recollection as to the age of the child was at fault. This had a bearing upon the time Mrs. Wilson was married, and consequently upon the question whether the consultations occurred within the seven years prior to the application for insurance. That she had consulted him at some time was undisputed. From the testimony, we cannot say the time when the consultations were had was not disputed. There was also other testimony in the case, bearing upon this fact, to be taken into consideration.

Testimony cannot be considered as undisputed because no witness directly denies it. Cross-examination may cast doubt upon it, or other testimony may dispute it by indirection. In the case of *Ferris* v. *Assurance Co.*, 118 Mich. 485, cited by defendant, the application for insurance stated that applicant had never made application for insurance upon a policy which did not issue, nor had he been given an unfavorable opinion by a physician with reference thereto. It was proved that he had made application to another company, and that the medical examiner had given applicant an unfavorable opinion concerning his health, and there was no other evidence in the case touching the question. This court said:

"There is no testimony in the case which tends to discredit the testimony on the part of the defendant that Mr. Ferris did apply to the Ancient Order of United Workmen for insurance, and that their medical examiner advised him he was not a proper subject for insurance. The judge should have directed a verdict in favor of defendant."

To the same effect in *Lange* v. *Perley*, 47 Mich. 355, it was said:

"When there is no contest concerning a point of fact, and it stands virtually conceded, it is a clear impropriety to ask or lead the jury to view it otherwise."

These cases are not in point, for the reason that in the case at bar, as we have already indicated, the testimony of the doctor was not undisputed.

The other error assigned refers to the claimed instruction to the jury that they might consider the statement of the applicant in her application for insurance as evidence of its truthfulness, when the truthfulness of such statement was in issue. The portion of the charge in which the instruction occurs reads as follows:

"The defendant attacks the claim made here on the part of the plaintiff and says that at the time this application was made by Mrs. Wilson, certain statements were made in that application which were in conflict with the truth, and that by reason of that being so, this policy is void. It is conceded on both sides that if the claim of the defendant is true, that those statements were in conflict with the truth, that the plaintiff cannot recover in this case. One of those questions in substance is that Mrs. Wilson had not for seven years prior to the 4th day of March, 1901, consulted a physician upon any question with reference to an ailment to herself. Now, it is necessary, gentlemen, in viewing this controversy, to examine this contract, and these questions form part of the contract, fairly and honestly, and interpret them reasonably, and in this particular case it is conceded on the part of the defendant that when they say that she had not consulted—when she says that she had not consulted a physician, that it does not apply and was not intended to apply to slight temporary ailments but it was something that was of importance,

and in this particular case the claim is that it applies to the question of heart difficulty. They claim that she stated, and she did state in that contract that she had not during the seven years prior to the 4th day of March, 1901, consulted a physician with reference to a heart difficulty that they claim she had for that time and longer. You have heard the testimony of Dr. Marvin on that point. You have heard the testimony of Mr. Wilson. You have heard the testimony of the other physician. You know all of the attendant circumstances, and it is for you gentlemen to say what the real facts were with reference to that matter. You have heard her statement as given in the application. If you find that she had consulted a physician within the seven years with reference to this ailment, the difficulty of the heart, that will dispose of this case, and it won't be necessary to investigate the matter farther."

The words complained of are, "You have heard her statement as given in the application." There is no fault found with the charge as given immediately following:

"If you find that she had consulted a physician within the seven years with reference to this ailment, the difficulty of the heart, that will dispose of this case."

In both reply briefs, considerable stress is laid upon the punctuation. On the part of the appellant it is claimed that the part of the charge complained of and the last above quotation were given in two distinct sentences, and that the fair construction of this part of the charge is that the court submitted the application to be considered by the jury as evidence of its truthfulness. The other side claims that the punctuation should be simply a comma, and that the first part of the sentence simply called the attention of the jury to the fact that the truthfulness of her statement was attacked.

Appellant further claims that the statement of the judge when the motion was made to instruct the jury to find for the defendant indicates that the court held this application could be considered as evidence of its truthfulness. After this motion was argued at length, the following colloquy took place:

"*The Court:* I don't believe that will hardly do. I will have to overrule the application, with the evidence of Dr. Marvin as it appears, taking into consideration Mr. Wilson's testimony, and the affidavit made by this party at the time of application. I don't hardly believe it will do.

"*Mr. Lombard:* I don't know as I understand the affidavit you refer to.

"*The Court:* Well, the application of the party, I mean."

The exception taken at this time would indicate that it was to the refusal to grant the motion. There is a dispute between counsel as to whether this occurred in the presence of the jury. This is not so important as the fact that no exception was taken to what was said, and no error is assigned upon it. This court has always held that consideration will not be given to matters not included within the assignments of error. The error assigned was predicated solely upon the language of the general charge. The charge must be taken as a whole, without reference to the punctuation of the stenographer or the attorneys. The clause in dispute must be taken in connection with what preceded it and what immediately follows. From the whole charge, we do not find that the instruction complained of will bear the construction claimed for it by defendant. The court had fairly submitted the case to the jury, carefully calling attention to the evidence upon matters in dispute, and then referred to the application, not as evidence, but as the thing attacked. We find no error in this charge.

The judgment is affirmed, with costs.

GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

MANEY v. LAMPHERE.

LANDLORD AND TENANT—TRESPASS BY LANDLORD—ACTION—RECOVERY BY TENANT.

A landlord is liable in trespass to his tenant, where, during the tenant's absence from the premises, he enters without the tenant's consent, moves the house, and erects another in its place.

Error to Wayne; Donovan, J. Submitted January 19, 1905. (Docket No. 87.) Decided March 21, 1905.

Trespass quare clausum fregit by Lillie Maney against Leman B. Lamphere and Helen Lamphere. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

F. C. Moriarty and *Lehman & Riggs*, for appellant.

Bowen, Douglas, Whiting & Murfin, for appellee.

MCALVAY, J. The record in this case does not give this court a very clear idea of the bearing of all that transpired in the circuit court upon the issue before that court. From the testimony, which is all returned, the following facts appear: Plaintiff, on the 12th day of July, 1902, at the township of Redford, in Wayne county, was, with her family, consisting of her father and her two children, in the lawful and peaceable possession and occupancy of a little house, used by her as a dwelling house. This house was situated on the Waterford road, in said township, on certain land over which defendant Leman B. Lamphere exercised control either as owner or agent for the owner, and who had rented the premises to plaintiff for $5 per month, agreeing to make necessary repairs, raising the monthly rent from $2.50, the price formerly paid him. The agreement to rent also included land around

the house for a garden. It did not appear who owned the premises, but the proofs indicated that they belonged to the estate of defendant Helen Lamphere's father, and that she claimed some interest in them. There is no dispute in the case, but that the relation of landlord and tenant existed between plaintiff and defendant Leman B. Lamphere.

On July 12, 1902, defendant Leman B. Lamphere, without authority of law or consent of plaintiff, as far as this record discloses, and while plaintiff was away from home, by his men and team entered upon these premises, put the dwelling house upon rollers, and with rope and capstan moved the same off for a distance of about 10 rods, and afterwards dug a cellar and built a house for himself and the other defendant, his wife, on the place where the old house stood. While the house was being moved, plaintiff returned home to her family, and occupied the house from that time to October, 1902. Plaintiff brought this action of trespass against defendants for damages claimed to have been sustained by her by reason of moving her house, trampling down and destroying her garden, tearing down her henhouse, and for damage to her household furniture and wearing apparel, caused by rain coming in through openings made in moving the building, and other injuries complained of. An issue was joined upon proper pleadings. Upon the trial before a jury sufficient proof was offered by plaintiff and admitted in evidence to entitle her to have the same submitted to the jury for its consideration and determination. This was accordingly done under the charge of the court. The jury retired in custody of an officer at about 10:30 o'clock a. m. to deliberate upon their virdict. The bill of exceptions shows that afterwards, and while the jury were out, the following occurred:

"At about 1 o'clock p. m. the court instructed Charles Benoit, deputy clerk of said court, that, if the jury did not agree by 3 o'clock p. m., to direct a verdict for defendant, and discharge the jury. This was done at 3 p. m., as directed, to which plaintiff duly excepted."

From a judgment entered upon this verdict in favor of defendants against plaintiff, the plaintiff appeals to this court.

Several errors are assigned upon exceptions taken during the course of the trial and to the charge of the court to the jury. As this judgment must be reversed upon other grounds, and as in all probability upon a new trial the record will more clearly disclose the questions raised, we do not deem it necessary to consider them.

Error is alleged, founded upon the action of the trial judge in instructing the deputy clerk that, if the jury did not agree by 3 o'clock, to direct a verdict for defendants, and discharge the jury. Without discussing at this time the propriety of delegating to the clerk the authority to direct a verdict of a jury if it did not agree by a certain time, we hold that in this case it would have been error had the judge himself directed such a verdict. Upon this record the plaintiff was entitled to a verdict, and the only question for the jury to determine was the amount of damages.

The judgment is reversed, with costs to plaintiff, and a new trial ordered.

GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

139 432
p145 559

WOLVERINE LUMBER CO. *v.* PALATINE INSURANCE CO.

FIRE INSURANCE—PROPERTY COVERED—CONSTRUCTION OF POLICY.

An insurance policy covered lumber "piled in mill building, on cars, under mill sheds and in sheds adjoining to said mill building." There were sheds called "mill sheds" where lumber was piled situated some distance from the mill. The roof of the mill itself extended out 10 or 12 feet over the tracks on either side of the mill to protect the lumber and men loading or unloading cars. It was undisputed that these projections or sheds were erected simply to cover the tracks, were open at the ends and sides, and were not intended to be used as lumber sheds. *Held,* that the words "mill sheds" in the policy should be construed as indicating the sheds located some distance from the mill, and not those projecting from the building, and the quoted clause of the policy should be construed as though it read, "On lumber in mill building; on lumber on cars; on lumber under mill sheds and on lumber in sheds adjoining to said mill building."

Error to Bay; Shepard, J. Submitted January 19, 1905. (Docket No. 84.) Decided March 21, 1905.

Assumpsit by the Wolverine Lumber Company, Limited, against the Palatine Insurance Company, of London, England, on a policy of insurance. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

T. A. E. & J. C. Weadock, for appellant.

Lewis P. Coumans (*Pierce & Kinnane,* of counsel), for appellee.

BLAIR, J. The plaintiff brought suit against defendant upon a policy of insurance of $1,000 issued by it, and recovered for the full amount by direction of the court. The fire occurred on May 30, 1903, and destroyed two sheds of lumber and two cars of lumber on plaintiff's premises in Bay City. The total loss was $11,936.29, and the total insurance, including the policy of $1,000 in suit, was $5,214.08. The defendant claimed that the lumber burned

was not covered by the policy, and requested the court to direct a verdict in its favor for that reason. This raised the principal question, and, so far as the record discloses, the only question, called to the attention of the trial judge, and is therefore the only question proper for our consideration.

The clause in the policy upon which plaintiff claimed the right to recover is as follows:

"On rough and dressed lumber (lath and shingles, if any) owned by them or held in trust or on commission or sold, but not delivered, *piled in mill building, on cars, under mill sheds and in sheds adjoining to said mill building* situate on their premises 4th Ward, West Bay City, Michigan."

The court construed this clause as though it read:

"On lumber in mill building; on lumber on cars; on lumber under mill sheds and on lumber in sheds adjoining to said mill building."

The defendant insisted that the clause in question should be read, as follows: "On lumber in mill building; on cars under mill sheds; and in sheds adjoining to said mill building"—insisting that the projecting roofs or awning of the mill constituted the mill sheds referred to in the policy. The roof of the mill extended out 10 or 12 feet over the tracks on either side of the mill to protect the lumber and the men when loading or unloading the cars in stormy weather. There were five sheds where lumber was piled, numbered 1, 2, 3, 4, and 5. The mill building was about 150 feet long north and south by 50 feet wide east and west. On the east and west sides were spur tracks, which were covered by the projecting mill roof. Shed No. 1 was about 200 feet west of the mill; shed No. 2 about 20 feet south of No. 1; shed No. 3 was very close to the mill on the west side, the mill roof overlapping the roof of No. 3; No. 4 was on the west side of the west spur track, about 80 feet south of the mill; No. 5 was on the east side of the west spur track, about 75 feet south of the mill. The lumber burned was in sheds 4 and 5 and in two cars standing on the east spur track opposite No. 5. The

only witnesses who testified in the case were Frank D. Glover, plaintiff's secretary, and Joseph Catherwood, the treasurer and general superintendent. Mr. Glover was asked:

"*Q.* What are those sheds, Nos. 1, 2, 3, 4, and 5? State what they are known as, and in what way, by the people in connection with the plant.

"*A.* Why, the sheds are known as mill sheds. They were built in 1885. I have been familiar with the sheds and their location since I started to work there in 1888. At that time and since they have been known as mill sheds. There are no sheds of any kind attached to or connected with the mill. The side tracks that are on the premises of the Wolverine Lumber Company do not run under any sheds. The roof of the mill extends over a little to cover the cars or the men while they are loading or unloading in stormy weather.

"*Q.* Is that intended or used as a lumber shed or mill shed to store anything in?

"*A.* No, sir. The width of the roof of these sheds is about ten or eleven feet. The sides are composed of posts holding it up. It is all open, ends and sides. The railroad tracks enter at the end, and the sides and ends are both open. It is just simply to cover the tracks. The roof covering the track is a continuation of the roof of the mill, simply the rafters run out over to cover it. In unloading lumber from the cars that stand under there, it is put in at the side of the mill."

Mr. Catherwood testified:

"The two sheds that burned and shed No. 3, the other two sheds, 1 and 2, are known as our mill sheds, and have been known as that ever since they were built, about 18 years."

This evidence was wholly undisputed, and, in the absence of any evidence to qualify it, we must presume that the words "mill sheds" in the policy referred to these sheds 1, 2, 3, 4, and 5.

We think that, in view of the testimony of Mr. Glover and Mr. Catherwood, the court placed the proper construction upon this policy, and rightly directed a verdict in favor of the plaintiff, and the judgment is affirmed.

MCALVAY, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

WOLVERINE LUMBER CO. *v.* LIVERPOOL & LONDON & GLOBE INSURANCE CO.

139 435
p145 559

FIRE INSURANCE—PROPERTY COVERED—CONSTRUCTION OF POLICY. This case, involving the construction of a fire-insurance policy as to the property covered, is ruled by the case of *Wolverine Lumber Co.* v. *Palatine Insurance Co.*, ante, 432.

Error to Bay; Shepard, J. Submitted January 19, 1905. (Docket No. 83.) Decided March 21, 1905.

Assumpsit by the Wolverine Lumber Company, Limited, against the Liverpool & London & Globe Insurance Company, of Liverpool, England, on a policy of insurance. There was judgment for plaintiff on verdict directed by the court, and defendant brings error. Affirmed.

T. A. E. & J. C. Weadock, for appellant.

Lewis P. Coumans (*Pierce & Kinnane*, of counsel), for appellee.

BLAIR, J. The facts in this case are identical with those in the case of *Wolverine Lumber Co.* v. *Insurance Co.*, ante, 432, and the case is ruled by the decision in that case. The judgment is accordingly affirmed.

MCALVAY, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

PERE MARQUETTE RAILROAD CO. *v.* KALKASKA CIRCUIT JUDGE.

INJUNCTION—DECREE—VALIDITY—MERITS—VACATION OF PART OF DECREE—MANDAMUS.

A railroad filed a bill to restrain defendant from obstructing a side track; the answer set up title to the land in defendant, and prayed for affirmative relief, and the court announced that the bill would be dismissed, but, without notice to complainant, made a decree restraining complainant from using the track. *Held*, that the decree not being void, nor embracing matter not within the issues, the Supreme Court would not by mandamus vacate the portion of the decree restraining complainant.

Mandamus by the Pere Marquette Railroad Company to compel Clyde C. Chittenden, circuit judge of Kalkaska county, to vacate a restraining order in a decree. Submitted February 14, 1905. (Calendar No. 20,938.) Writ denied March 21, 1905.

Pratt & Davis, for relator.

Wayne Simmons, for respondent.

OSTRANDER, J. The relator, in June, 1904, filed its bill of complaint in the circuit court for the county of Kalkaska, in chancery, claiming to be owner and in possession of a certain right of way, upon which it had built and was then operating a side track connecting with a spur of a branch line of its road, and complaining that a person named as defendant in the bill interfered with the operation of the road on the said right of way by piling logs on the track and felling trees across it, and by threats of personal violence to employés of relator. The bill prayed for both a temporary and a permanent injunction. The bill was answered, and in the answer the defendant claimed that he had title to the land in question, and that com-

plainant had none, and was upon the land without right, and asked for affirmative relief. The answer does not specifically pray for any order restraining the complainant from operating its road, but does contain a prayer for general relief. The court issued a temporary injunction, but, after hearing, made a decree dismissing the bill, dissolving the injunction, and restraining the complainant (relator) from going upon or operating trains across the said land. This decree is dated on the 7th of October. It was preceded by an opinion in which the court indicated a purpose to grant to defendant the following relief, and no other:

"At this time the court will dismiss this bill of complaint, dissolving the injunction, with full costs to the defendant, and an attorney fee of $25."

Relator knew the terms of the opinion, but seems to have had no notice of the settlement of decree. A copy of it was served upon solicitors for complainant (relator) about November 24th. Relator ceased, after the opinion was filed, to operate its road, until after the 13th of October, when it claims to have made arrangement with the owner of the legal title (not the defendant in the chancery suit, nor the one from whom, in the bill of complaint, it claimed to have acquired its rights) which resulted in obtaining from such owner, on November 5, 1904, by deed, a right of way, and it at once began operating its trains over the road. On the 3d of January the defendant in the chancery suit tore up the railroad track, so that trains could not be operated upon the said right of way. On the 17th of January the relator filed its petition in said court and cause, in which it set out that it had no notice of the settlement of the decree; that it did have notice of the decision which the court announced; that, upon receiving a copy of the decree, certain conditions in it not mentioned in the opinion of the court were overlooked—among others, the restraining order; and that relator and its solicitors were not aware that a restraining order had been entered in the cause until after January 1, 1905. The petition

further sets out that the alleged title of the defendant is founded on void tax deeds; sets up its own title, acquired after determination of the cause, the tearing up of the track, and the interruption of business; and prays for the following relief:

"(*a*) That the decree entered in said cause be so changed and modified as to strike all that part of said decree that restrains your petitioner from operating its trains over said Mahan Branch, and the land in controversy in said case.

"(*b*) To expunge from said decree so much thereof as requires your petitioner to restore the land in dispute to its former condition.

"(*c*) That said decree be so corrected and modified as to exclude from its terms everything not covered by the decision of the court as rendered on October 7th.

"(*d*) That said decree be so modified as to place said defendant and your petitioner in the same position they were left by the finding and decision of the court on October 7, 1904.

"(*e*) That said decree be so modified as to permit your petitioner to protect its rights under the facts as they now exist.

"(*f*) That said decree be so modified as to leave your petitioner the right to pursue such remedy as, in law, your petitioner is entitled to, without prejudice from said former suit."

Upon filing the petition to modify the decree, the respondent made an order expunging the principal matters complained about, unless defendant should show cause on January 20th why the order should not be made. The defendant answered the petition. A hearing was had, and, while it does not appear that an order was formally entered, the court announced on January 21, 1905, in a letter to the solicitors for the relator, (1) that execution would be withdrawn; (2) time fixed to settle a case for appeal; (3) that the petition to amend or modify the decree is denied. What showing, if any, was made on the hearing of the petition, does not appear; but the answer of the respondent, which we must assume states the facts, contains the following:

"The respondent, further answering, says that if the relator has acquired legal title to the land in question, and by virtue of the same is entitled to the use of said right of way, that, upon proper and legal proof of the same, this respondent would be glad to modify his decree and dissolve the restraining order heretofore made; but that the respondent would not feel warranted in changing a decree simply on ex parte affidavits and petitions, in view of the fact that the court felt that he had been misled as to the real facts by the petition for a restraining order, as set forth in complainant's bill of complaint, and upon which the respondent restrained defendant."

It appears that relator proposes to appeal from the decree, and has taken proceedings to that end. It is claimed that the decree was entered without any jurisdiction to do so, because no notice of the settlement of the decree was given, as required by the practice, and that, whether this is so or not, there is no prayer in defendant's cross-bill asking for an injunction, and therefore none should have been granted against relator, the complainant. We are asked to vacate, by mandamus, so much of the decree as restrains relator from the use of the land in question for its right of way. We must assume that the decree complained of is the decree which the court desired to enter, and the one which, if no irregularities had occurred, would have been entered. The decree is not void, nor does it embrace matters not fairly in issue upon the bill and answer. We must assume that if relator has, since the entry of the decree, acquired title to its right of way, it did not have such title when it filed its bill. We must assume, too, that, upon a proper presentation to the circuit court of convincing evidence that relator now has the title to the land upon which its side track is laid, the court will deal properly with the matter.

We cannot, by mandamus, vacate a part or the whole of a decree upon the merits.

MOORE, C. J., and CARPENTER, MCALVAY, and HOOKER, JJ., concurred.

GARR *v.* ALDEN.

VENDOR AND PURCHASER—SALE OF STANDING TIMBER—FRAUD—RESCISSION.

Where, in purchasing standing timber, the purchaser used artifice to prevent an investigation by the vendors, and by positive assurances of fair dealing induced them to accept his statements both as to quantity and value, and to sell him the timber at about one-third its actual value, such statements were not mere expressions of opinion, but constituted such fraud as entitled the vendors to rescission.

Appeal from Berrien; Coolidge, J. Submitted February 15, 1905. (Decided March 21, 1905.)

Bill by Martha A. Garr and Harriet Garr against Horace G. Alden and Frank B. Smith to cancel a contract for the sale of certain timber. From a decree for complainants, defendants appeal. Affirmed.

James O'Hara, for complainants.

Colgrove & Potter and *Dudley M. Shively*, for defendants.

MONTGOMERY, J. Complainants filed the bill in this case to cancel and set aside a contract by which they had agreed to sell the timber on 80 acres of land in Berrien county. Complainants are mother and daughter; the former being 83 years old and infirm, the latter being 45. The bill charged that complainants were the owners of the timber on the land in question, but that they were neither of them acquainted with the quality or value of the same; that the defendants came to their farm, made an estimate of the timber, and then offered $1,650 for the same; that complainants told defendants that they did not know how much timber there was, or its value, and suggested having an estimate made by some one in their interest; that

defendants assured them, in effect, that this was not necessary; that they were honest men, and had made a fair estimate; that they would not take advantage of complainants, and would deal fairly with them.

The answer admits that complainant Martha Garr at one time said she would like to have an estimate made of the timber. They allege the truth to be, however, that after this happened, after they had been through the timber and made their estimate of the same, and that in reply to her expression of desire to have some one estimate the timber for her, they said they would treat her fairly; that they showed her several contracts which they had made with other parties in that vicinity.

The testimony fairly supports the allegations of the bill. The bill also alleges that the timber included in the contract was in fact worth $6,000. Upon the question of value there was a sharp conflict in the testimony. The circuit judge found for complainants, and decreed a rescission of the contract. Defendants appeal.

It is contended that the statements made by defendants were mere expressions of opinions, and that fraud cannot be predicated upon them, inasmuch as the complainants had the means in their own hands of ascertaining the facts. This contention states a general rule. But we are satisfied that in this case defendants used artifice to prevent an investigation by complainants, and by the most positive assurances of fair dealing induced them to accept their statements, both as to quantity and value, expecting to induce, and in fact inducing, complainants to rely upon their statements, and act upon them, assuming their substantial accuracy and truth.

We think the case falls within the principle that where one is overreached by means of artifice employed to prevent an investigation as to value, and by this means is compelled to pay for or part with property upon a valuation fixed by the one employing such artifice, that fraud may be predicated thereon. 14 Am. & Eng. Enc. Law

(2d Ed.), p. 38; *Maxted* v. *Fowler*, 94 Mich. 106, and cases cited.

Upon the question of the value and quantity of the timber, we are satisfied that the circuit judge reached a very fair estimate, based upon the best evidence in the case, when he fixed the value at $4,000. The statements made by the defendants were therefore essentially and grossly false. The complainants were deceived by them.

The decree is affirmed, with costs.

CARPENTER, BLAIR, OSTRANDER, and HOOKER, JJ., concurred.

PEOPLE *v.* SANDERS.

1. EMBEZZLEMENT—DEPUTY TREASURER—AUTHORITY TO APPOINT.
   Where a township treasurer's deputy is prosecuted for embezzlement of township funds, under section 11612, 3 Comp. Laws, it is immaterial whether the treasurer could lawfully appoint a deputy or permit respondent to act as his representative.

2. SAME—TRIAL—INSTRUCTIONS.
   In a prosecution of a deputy township treasurer for embezzlement, an instruction that defendant cannot be convicted if he paid out for township orders or deposited in the bank all money received by him for taxes, ignores the claim that he drew from the bank and embezzled the money, and was therefore properly refused.

3. CRIMINAL TRIALS—POWER OF JURY.
   The jury is not the judge of the law in criminal cases.

4. SAME—EVIDENCE—OTHER OFFENSES.
   In a prosecution of a deputy township treasurer for embezzlement it was proper to show that defendant, by reason of his default as village treasurer, found it necessary to replenish that account, which he did with funds drawn from the township treasury.

5. SAME—ARGUMENT OF PROSECUTOR.

In the prosecution of a deputy township treasurer for embezzlement, the prosecuting attorney in his argument stated that the treasurer committed a gross indiscretion when he put his trust in defendant, because defendant did not deserve that trust; that defendant was a thief, and the treasurer did not know it, and put his trust "in this young thief, who stole the money from the township," etc. *Held*, that the argument was a legitimate one.

Exceptions before judgment from Wayne; Hosmer, J. Submitted February 16, 1905. (Docket No. 266.) Decided March 21, 1905.

Walter F. Sanders was convicted of embezzlement. Affirmed.

John E. Moloney, for appellant.

Ormond F. Hunt, Prosecuting Attorney, and *Louis C. Wurzer*, Assistant Prosecuting Attorney, for the people.

HOOKER, J. Frank A. Parent was elected treasurer of the township of Monguagon, Wayne county, at the spring election in the year 1902, and qualified, giving the required bond. About April 1st he appointed Sanders, the defendant, his deputy, without, however, obtaining the consent of his bondsmen, as required by 1 Comp. Laws, § 3934. Sanders took the oath of office, and acted in an official capacity, under the authority and instruction of Parent, until his arrest for embezzlement on May 23, 1903. He collected all of the money due the township, deposited a portion of it in the bank in the name of Parent, treasurer, and kept a portion in his possession, paid township orders partly by money not deposited and partly by checks on the bank, signed by him in the manner authorized by Parent. It is said that after his arrest he admitted that he had used township funds for his own purposes to the amount of more than $3,000. The prosecutor claims that the proof shows the amount to be over $5,300. The defendant was convicted, and has appealed.

Counsel for the respondent contend that the treasurer was not authorized to appoint a deputy, or to permit him to draw from the bank funds credited to him in his official capacity; and that, even if he had such authority, he has not exercised it in a lawful way, and such appointment is therefore void, and affords no protection to the officer and none to the bank. The theory of the prosecution is that the respondent was given authority to collect and disburse this fund for the treasurer and in his name, and the testimony shows that the treasurer informed the bank that he had given the respondent such authority. Accordingly the respondent's checks were honored and payed to the payees, who in some instances was the respondent. The prosecution is made under 3 Comp. Laws, § 11612, which reads as follows:

"(11612). SECTION 1. *The People of the State of Michigan enact*, That if any person holding any public office in this State, or if the agent or servant of such person knowingly and unlawfully appropriates to his own use, or to the use of any other person, the money or property received by him in his official capacity or employment, of the value of fifty dollars or upwards, the person so offending shall be deemed guilty of a felony, and shall, upon conviction, be punished by imprisonment in the State prison, at hard labor, not to exceed ten years, or by fine not exceeding five thousand dollars, or both said fine and imprisonment."

Whether the treasurer might or did lawfully appoint a deputy, and whether he had a lawful right to permit respondent to act as his representative, it is undeniable that he authorized his acts, and respondent acted for him in his name. That, as between them, he acted as the treasurer's agent, cannot be denied, and as between them the relation of principal and agent existed. He has consented to act as such agent, has so acted, and in fact was such agent; and he has fraudulently converted the money to his own use, even if it could be said that the law did not provide for a deputy or agent, and contemplated neither. His liability under this statute is not affected by

the treasurer's responsibility to the township, nor by the bank's want of justification for cashing his checks. The money belonged to the municipality when deposited. It was paid out by the bank as such money, and was such when it was converted by the respondent, and he is in no position to question either proposition upon the facts stated. The claim that one who consents to be agent, and thus acts to obtain money, which he embezzles, can avoid responsibility upon the ground that the principal could not lawfully appoint, or he accept an appointment as such, and that, therefore, he is at liberty to fraudulently appropriate the funds without liability as a criminal, was considered in the case of *People* v. *Hawkins*, 106 Mich. 484, where it was held that a de facto agent or servant was liable under the statute applicable to that case, whether the relation involved a lawful contract or not. This case is within the principle there stated.

The court properly refused to charge that the defendant could not be found guilty if he paid out for township orders, or had deposited in the bank, all of the moneys received by him in cash for the collection of taxes. It excludes the prosecutor's claim that he drew from the bank and embezzled the money. He did not err in refusing to say to the jury that "they alone were the sole judges of the law." Such is not the law.

Question is made over the suggestion by the prosecutor that he would show the defendant's dealing with village money. It was proper to claim and show that by reason of his default as village treasurer the respondent found it necessary to replenish that account, which he did by funds drawn from the township account.

An exception was taken to the following argument by the prosecutor:

"We admit, gentlemen of the jury, that Mr. Parent perhaps committed a gross indiscretion—perhaps the greatest indiscretion in his life—when he put one single bit of trust in Mr. Sanders, because Mr. Sanders did not deserve that trust. He was a thief, and Mr. Parent did not know it.

That has been the statement Mr. Parent has made in this case. Mr. Parent thought Mr. Sanders was honest. He knew Mr. Sanders' father for a long time before, and he knew Mr. Sanders' father was an honest man, and he had known Mr. Sanders from boyhood up, as he said on the stand. He knew he had been interested in many enterprises, and had traveled over all parts of this country; that he had an experience in business that Mr. Parent had not; and, honest, simple old man that he was, he put his trust in this young man here—in this young thief, who stole the money from the township of Monguagon, and betrayed the trust that Mr. Parent reposed in him; made him his associate in business."

The argument was a legitimate one. It was unnecessary to speak of respondent as a "young thief," but he was on trial for an offense equivalent to larceny. The prosecutor was insisting that he was an embezzler, and the language implied nothing more than such contention.

The allusion to the forgery of Parent's name could not be misunderstood, and we think should be classed with the other statement, as unnecessary, but harmless to the respondent, though probably not to the prosecution. The average juror ordinarily resents vituperation of a defendant, and it generally reacts upon him who indulges in it.

There are several assignments which we do not discuss because they involve no important question. As to some of them, there is no reference either in the record or brief to the page where they appear in the record. This is a hazardous omission, for the court cannot be expected to supply the omission through a search of the record.

We find no error, and the judgment is affirmed.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

MERCER *v.* LEIHY.

1. AUCTIONEERS—LIABILITY—DISCLOSURE OF PRINCIPAL.
   Where an auctioneer discloses the fact of agency and his principal, the law presumes that he does not contract upon his own behalf, but for the principal.

2. SAME—SALE OF STOLEN PROPERTY—IDENTITY OF PRINCIPAL.
   Where, in an action to recover money paid to an auctioneer for stolen horses sold by him, the evidence indisputably showed that the auctioneer's principal was present at the sale, and identified himself in plaintiff's presence by stepping out from the crowd on being called on to do so by the auctioneer, the sufficiency of such identification to relieve the auctioneer from personal liability was a question of fact, though he failed to disclose the principal's name.

Case made from Wayne; Brooke, J. Submitted February 17, 1905. (Docket No. 178.) Decided March 21, 1905.

Assumpsit by George Mercer against George W. Leihy and another for an alleged breach of warranty on the sale of certain horses. There was judgment for defendants, and plaintiff appeals. Affirmed.

Louis E. Howlett, for appellant.

Seward L. Merriam, for appellees.

HOOKER, J. Coombs stole some horses, and brought them to defendants' auction rooms, where they were sold at auction to the plaintiff, who afterward sued the auctioneers to recover the money paid, and a judgment of no cause of action was rendered by the circuit judge before whom the case was tried without a jury. Plaintiff appealed, and alleges error upon the finding of fact that the auctioneers sufficiently disclosed their principal to relieve

themselves from liability. The testimony upon this subject is as follows:

George Leihy said:

"I believed that the property brought there by Coombs belonged to him. I had no knowledge that the title to them was in any manner defective. I made no representation whatever as to the title of these horses. When I was selling them Mercer and Lane were bidding on them, and the bidding got dull. I didn't know but the audience might think that Mercer and Lane were bidding on their own horses. I called the attention of the people in the audience that they were not Mercer and Lane's horses, and I told the public: 'These are not Mr. Mercer and Lane's horses. They belong to another party,' and I looked around and I didn't see the man in the audience, and I said, 'Where is the man who owns these horses?' The man stepped out. He was talking with Mr. Lane, and said, 'Here I am.' Lane was the plaintiff's partner. I saw Mr. Lane talking with Coombs both before and during the sale. I did not hold myself out in any way as a principal, and I did not sign my name to any receipt for money or any bill of sale. I received the money—$111.50—from Mr. Mercer, and held it until 3 o'clock of the next day after banking hours. Then I gave Mr. Coombs my check for the amount, less my commission of 5 per cent."

On cross-examination he said:

"'Here are a pair of horses which came in from Ann Arbor this morning; consigned horses.' Nothing more was said until the bidding became slow, when I said that: 'These are not Mercer's horses. They belong to another man.' I had every reason to think they belonged to Coombs. Mercer made several bids. I did not point Coombs out. When I called for the owner, Coombs said, 'I am the man,' or 'I am the one.'"

Redirect examination:

"Before the horses were sold, I stated that the buggy came with them."

George W. Leihy, Jr., said:

"I did not know Coombs, but had seen him once or twice before. Didn't know anything about him at all. I knew that Mercer and Lane were in partnership. Father

said: 'Here is a pair of horses from Ann Arbor. Came in this morning between 6 and 7 o'clock. They are to be sold at auction for the high bid.' Mercer and Lane were there, as well as Coombs. Mercer made a bid. The horses were sold separately. Father spoke up, and said: 'Gentlemen, I don't want you to think these horses are Mercer's and Lane's horses, because they are bidding on them. They are not. Where is the man that owns these horses?' Mr. Coombs stood right at the end of the auction stand. He stepped out, and said, 'Here I am.' There was from 50 to 100 people present in the arena of the building. I saw Mercer and Lane talking with Coombs before any of this property was sold. I saw Lane. I wouldn't be positive about Mercer. I didn't hear the talk between them. Mercer made two or three bids afterwards. When the next horse was brought in, father said, 'Here is one of the pair—mate to the horse just sold—one of the Ann Arbor team.' Later, he said, 'Here is the buggy that goes with the horses.' They were sold one after the other. Mercer bid them all in. I had no reason to know or to believe that anything was wrong about the title to these horses. I didn't know it until three or four days afterwards, when Mercer called our attention to it. This was after Coombs got the money."

It was then conceded by counsel for both parties that a man by the name of Cole, who was absent, would, if present, testify substantially in accordance with the above.

The plaintiff testified:

"There had been a number of bids made, and I made a bid. Mr. Leihy tried to get the bid raised. He seemed to think that the crowd thought the horse might be mine, and that I was booming my own horse, and he said: 'Gentlemen, this is not Mercer's horse. He isn't bidding on his own horse.' He still asked for bids, and no one bid. He looked over the crowd as if looking for somebody, and said, 'Where is the man that brought in this horse, or brought in this team?' Nobody spoke, and then somebody said, 'Here he is.' Then Leihy says: 'There is the man that brought in these horses. He is the man that owns that team.' I didn't hear the man that was pointed out say anything."

Cross-examination:

"I understood that the man who was represented or claimed to be the owner of the horses was in the crowd.

"*Q.* You had a chance to go over and talk with him if you wanted to, didn't you?

"*A.* Certainly I had a chance to talk with him. Lane was my partner in the purchase and in the bidding. I bought the horses and Lane bought the buggy. I had some horses there before and at that sale, and knew of the custom of holding the money until 12 o'clock the next day. I did not go over and talk with Coombs. I would not be positive whether Mr. Leihy said, 'Where is the man that owns the team?' or, 'Where is the man who brought in this team?' I am not sure which expression he used. There were several bids made on each horse. The talk in reference to 'Where is the man who owns or brought in the horses?' was before the first horse was sold, and the buggy was sold after the horses."

Lane testified:

"Mr. Leihy said: 'These horses were fetched in this morning, through the rain. This man came from Ypsilanti with these horses. He had been in three or four different days to have him send up to his farm in Ypsilanti to have this team sent in.' This man stood there in the crowd. I was talking with him, and I said, 'Do you know Mr. Yost, of Ypsilanti?' He says, 'I do.' Later there was a lull in the bidding, and Leihy said: 'These are not Mr. Mercer's horses. Where is the man that owns these horses?' His son was driving, and pointed over in the crowd, and says, 'Here is the man.' The man pointed out didn't say a word. Leihy, Jr., pointed him out with his whip."

Cross-examination:

"I was Mercer's partner, and with him in this deal. I talked with the man supposed to be Coombs. I asked him if he knew Yost, of Ypsilanti. He said he did. Yost is a horseman there. After he was pointed out as the owner of the horses, I talked with him the same as I would with anybody in the crowd that would be talking.

"*Q.* Was it after that that you talked with Mr. Coombs?

"*A.* Certainly, I was talking right along with him. I

couldn't tell you what other talk I had with him. I couldn't tell how long I talked. I couldn't tell whether it was five, ten, or fifteen minutes. I think it was before the horse was struck off to Mercer. The horses were sold before the buggy. I didn't have to walk over where he was. I was standing right by him. * * * I did not ask him (Coombs) how old the horses were, or how long he had owned them, where he got them, nor whether they were trained to go single or double, nor any other question, that I now recall.

"*Q.* You knew your partner, Mercer, was bidding on these horses?

"*A.* I did not.

"*Q.* Didn't you know he was bidding on them?

"*A.* I did not.

"*Q.* Didn't you notice his bid?

"*A.* No, sir; not until Mr. Leihy said what he did.

"*Q.* Didn't you hear Leihy say so?

"*A.* No, sir; not until Mr. Mercer made the bid that bought the first horse, $52.50.

"*Q.* Didn't you ask a question of Coombs?

"*A.* No, sir.

"*Q.* You had the chance, didn't you?

"*A.* That might all have been.

"*Q.* Didn't you have the chance to find out all about those horses, so far as you knew?

"*A.* Certainly I did not.

"*Q.* But you knew who the man was that was pointed out?

"*A.* I did not, only what they said. I took their word.

"*Q.* You knew the identity of the individual so that you went over and talked with him?

"*A.* I certainly stood right by this man.

"*Q.* You knew him when Leihy pointed him out?

"*A.* Sure I did. I thought my partner was capable of bidding a fifty-dollar concern without my having to look after it. That is the reason I didn't ask this gentleman. I am quite positive that I had the talk with Coombs right away after Leihy told the crowd that Mercer was bidding on the horses. I think so because I did not know the man before.

"*Q.* Do you want the court to understand that you didn't know, while you were talking with Coombs, and asking him if he knew a man from Ypsilanti, that your partner, Mercer, was bidding on this horse?

"*A.* Not until after Leihy said it.
"*Q.* This was after Leihy said it?
"*A.* Well, that was about the time I was talking with him."

Wynne testified:

"All I heard Mr. Leihy say is, 'Where is the man that brought those horses in? Where is the man that owns these horses?' I think that is what he said. Then either the man or somebody else said, 'Here he is.' I do not know who said 'Here he is.' It was somebody in the crowd. I couldn't say whether it was Mr. Leihy's son or not. The man who said 'Here he is' was on the opposite side of the team to me. I couldn't see him from where I stood. I stood right to the front on the High street side of the auctioneer's block. Mercer stood right by me. The horses were faced toward High street."

Cross-examination:

"Whoever the man was that said 'Here he is' was standing on the opposite side of the wagon to me. I don't know whether the man said 'Here I am,' or 'Here he is.' The point I want to make is that somebody made that man known by saying 'Here I am,' or 'Here he is.'"

There was testimony that Lane, plaintiff's copartner, talked with Coombs before the sale. This is the substance of the proof upon that subject. Plaintiff claims that it did not warrant a judgment for defendant.

The rule is well established that an auctioneer who does not disclose his principal is presumed to contract upon his own behalf, except where he expressly contracts upon the understanding that he will not do so. On the other hand, if he discloses the fact of agency and his principal, the law presumes that he does not contract upon his own behalf, but for the principal. The question here seems to be whether anything less than a disclosure of the name of the principal is sufficient, and a number of authorities are cited which use language to the effect that a disclosure of the name of the principal is essential. Many of these are cases where there is nothing to indicate that there was an agency; others that the principal was not present,

and no clue to his identity could be found in the facts stated; while there are others which show that there was an absent principal, yet the language used makes such indefinite reference to him as not to afford an opportunity to immediately ascertain who he is. Such is the case of *Neely* v. *State*, 60 Ark. 66 (27 L. R. A. 503), where a minor bought intoxicating liquor, which he said was for two teachers at a neighboring college, without naming or otherwise identifying them. *Raymond* v. *Proprietors of Crown & Eagle Mills*, 2 Metc. (Mass.) 319, is another case where the court held that it was not error to submit the question of the sufficiency of the disclosure to the jury, where an agent stated that goods which he was buying were for the C. & E. Mills, the language being ambiguous. So in *Cobb* v. *Knapp*, 71 N. Y. 350, the statement that the property was for the Blissville Distillery was held not conclusive. In each of these cases except the first there is an implication that the facts shown might be found sufficient, otherwise they should not have gone to the jury. They were not so strong in favor of the agent as the case before us, because the opportunity to ascertain was not immediately present; and in the case last mentioned there was testimony not only that the plaintiff did not know who were the proprietors of the distillery, but that the defendant directed the property to be charged to him.

In *Hanson* v. *Roberdeau*, Peake, N. P. 120, it is indicated, as it is in many later authorities, that, where the auctioneer fully discloses the fact of his agency and his principal, the presumption arises that he is not contracting upon his own behalf, and that the law recognizes the transaction as one on behalf of the principal.

In 2 Kent, Com. 630, 631, it is said:

"If a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal (not the name of his principal) at the time of making the contract, and that he acted on his behalf."

Other authorities quoted from text-writers and other

sources are found in *Neely* v. *State*, 60 Ark. 66 (27 L. R. A. 503). See, also, Reinhard on Agency, § 303.

We are of the opinion that the statement, frequently found, that the agent, to avoid personal liability, must disclose the *name* of his principal, is due to the fact that such is, in the nature of things, the natural and ordinary, and many times the only convenient and practicable, way of identifying him. The important information to be given to the purchaser is that the auctioneer is an agent, acting for a principal whom he *discloses*, and it would seem that the accurate giving of his principal's name is not indispensable where other means of clearly pointing out and identifying him are adopted.

The testimony in this case indisputably shows that the principal was present, and in the presence of the plaintiff identified himself to a degree sufficient to carry that question to a jury, or to the court, where, as in this case, a jury has been waived. It is equally certain that the auctioneer disclosed the fact of agency, and it is inferable that he designed to and did inform those present that he was not selling the property as his own, but for and on behalf of a man who came from Ypsilanti, was present, and upon whom he called to appear and make himself known. We are of the opinion that the court did not err in treating the question as one of fact, subject to decision by him. Of course, we cannot review his finding upon the merits.

The judgment is affirmed.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

McCALL CO. v. JACOBSON.

139 455
148 560

1. SALES — CONTRACTS — ENFORCEMENT — ACTIONS — BURDEN OF PROOF.

In an action by the seller to enforce a contract for the sale of goods the burden is on plaintiff to show that the goods tendered complied with the contract.

2. APPEAL AND ERROR—QUESTIONS REVIEWABLE—DISCRETIONARY QUESTIONS.

Where there are no circumstances better known to the trial court than to this court, it is the duty of this court to review a decision that a notice to take depositions was insufficient.

3. DEPOSITIONS—NOTICE TO TAKE—SUFFICIENCY.

Four full secular days' notice at Reed City to take depositions at Cleveland, Ohio, is sufficient.

4. SAME—FILING—TIME.

The statute (§ 10139, 3 Comp. Laws) requiring certain objections to depositions to be made within three days after they are filed in the case does not require that they be on file three days before being used.

Error to Osceola; McAlvay, J. Submitted February 17, 1905. (Docket No. 182.) Decided March 21, 1905.

Assumpsit by the McCall Company against Moses I. Jacobson and others for goods sold and delivered. There was judgment for plaintiff, and defendants bring error. Reversed.

Charles A. Withey (*C. H. Rose* and *J. E. Richardson*, of counsel), for appellants.

B. N. Savidge, for appellee.

CARPENTER, J. Plaintiff and defendants entered into a contract whereby the former agreed to sell, and the lat-

ter to buy, certain paper patterns, fashion sheets, and fashion magazines. Defendants refused to accept the goods tendered by plaintiff. Plaintiff thereupon brought this suit. The controversy turned upon the question whether the goods tendered and refused complied with the contract. The issue was left to a jury, who found for the plaintiff. Defendants ask us to reverse the judgment entered on said verdict, on grounds which will appear in this opinion.

The trial court, acting under the mistaken belief that this case was governed by the principle of law applicable when one asserts a failure of consideration (see *Bulen* v. *Granger*, 58 Mich. 274), charged the jury that the burden rested upon defendants to prove that the goods tendered did not comply with the contract. This was clearly erroneous. It was an essential part of plaintiff's case to prove that the goods tendered complied with the contract. See *Simons* v. *Paper Co.*, 77 Mich. 185; *Stahelin* v. *Sowle*, 87 Mich. 134.

It is claimed that the trial court erred in refusing to permit defendants to read on the trial a deposition of Alice Lusk. In support of the ruling of the trial judge, it is urged that the deposition was inadmissible on two grounds: *First*, that the notice under which it was taken was insufficient, being unreasonably short; *second*, that the deposition was not on file for three days before the commencement of the trial.

First. As to the sufficiency of the notice: The deposition was taken in Cleveland, Ohio, March 18, 1904. Proper notice that it would be so taken was served on plaintiff's counsel, in Reed City, in this State, March 14th. The days between March 14th and March 18th were all secular. To excuse taking this deposition on the eve of the trial—the trial commenced March 21st—defendants' counsel offered to show that the whereabouts of the witness was not ascertained until just before the notice was given. It is to be assumed from the record that, at the time this notice was given, plaintiff's counsel made no objection to its sufficiency, and did nothing at that time to apprise de-

fendants' counsel that he would thereafter claim that it was insufficient. The sufficiency of this notice depends upon the proper construction of the following portion of section 10136, 3 Comp. Laws:

"Reasonable notice must first be given in writing by the party * * * proposing to take such deposition, to the opposite party or his attorney of record."

This is a comparatively new statute in this State, having been adopted in 1895 (see *Drosdowski* v. *Order of Chosen Friends*, 114 Mich. 180); but before we adopted it it was an old statute in other States, and had been judicially construed.

As it is idle to consider what constitutes reasonable notice, under this statute, unless we have a right to review the decision of the trial court, we must first determine whether or not we have that right. While in these cases "something may properly be left to the wise legal discretion of the trial court" (see *Sing Cheong Co.* v. *Yung Wing*, 59 Conn. 535; *Harris' Appeal*, 58 Conn. 492)—that is, as I understand it, this court will not review decisions of the trial court as to the sufficiency of the notice, in so far as they rest upon facts and circumstances known to the trial judge and not known to the appellate tribunal—(see *Drosdowski* v. *Order of Chosen Friends*, supra), it is settled that, as a general proposition, the decisions of a trial court as to what constitutes a sufficient notice are reviewable by an appellate court (see *Sing Cheong Co.* v. *Yung Wing*, supra; *McGinnis* v. *Washington Hall Ass'n*, 12 Grat. [Va.] 602; *Trevelyan's Adm'r* v. *Lofft*, 83 Va. 146; *American Exchange Nat. Bank* v. *First Nat. Bank*, 27 C. C. A. 277; *Carlisle* v. *Tuttle*, 30 Ala. 613; *Hipes* v. *Cochran*, 13 Ind. 175; *Manning* v. *Gasharie*, 27 Ind. 399). This accords with sound reason. Otherwise a statute of the State which it must be presumed was intended to establish a uniform practice has possibly established a different practice in each of our many courts, if not in each case tried in those courts. As there were

not in this case, as in *Drosdowski* v. *Order of Chosen Friends*, supra, any circumstances better known to the trial judge than to this court, it is our duty to review the decision holding that the notice under consideration was insufficient.

"What is reasonable notice is nowhere defined in the law, and cannot well be defined, but must depend on the circumstances of each case." *McGinnis* v. *Washington Hall Ass'n*, supra. See, also, *Sing Cheong Co.* v. *Yung Wing*, and *Drosdowski* v. *Order of Chosen Friends*, supra. In determining whether notice is reasonable, courts give weight to the exigency which requires a short notice, viz., that the witness is about to leave the State. See *McGinnis* v. *Washington Hall Ass'n; Harris' Appeal*, supra. In the latter case it was intimated that the objection that the notice was insufficient was more likely to be upheld if brought to the attention of opposing counsel when the notice is served. See, also, *American Exchange Nat. Bank* v. *First Nat. Bank*, supra.

"What is reasonable notice is a question dependent upon the peculiar circumstances of each case, the principal of which are the distance, traveling conveniences, condition of the roads, and other such matters as affect the ability of the party to attend personally or by counsel, and to return in time for trial." *Trevelyan's Adm'r* v. *Lofft*, supra.

"When depositions are to be taken in this State or in any of the United States, the length of time that notice should be given before the taking, in order to be a reasonable notice, can be fairly determined by the length of time required to reach the place of the taking by the ordinary modes of travel, because all the things necessary to be done by way of preparation are pretty certainly known, and a proper allowance of time can be made for them." *Sing Cheong Co.* v. *Yung Wing*, supra.

"The chief features to be considered in determining whether a certain notice is or is not reasonable are distance, number of witnesses, and facility of communication and to obtain proper representation." *American Exchange Nat. Bank* v. *First Nat. Bank*, supra.

See, also, *Carlisle* v. *Tuttle*, *Hipes* v. *Cochran*, and *Manning* v. *Gasharie*, supra.

It results from these cases, and it accords with our judgment, that, as a general rule (it is possible that exceptional cases may not be within this rule), the notice of taking depositions, under our statute, is sufficiently long if it gives time to counsel to prepare for the taking, and by the ordinary means of travel to reach the place where they are to be taken. In the case at bar the notice gave counsel in Reed City four days to attend the taking of the deposition in Cleveland, Ohio. As we may take judicial notice that it takes less than 24 hours, by the ordinary means of travel, to go from Reed City to Cleveland (see *Hipes* v. *Cochran*, supra), the remaining question is whether three days was a sufficient time to prepare for the taking of the deposition. We are bound to say that it was. See *Harris' Appeal*, supra. *American Exchange Nat. Bank* v. *First Nat. Bank*, supra. We feel constrained therefore to say that the notice was reasonable.

Second. Was the deposition inadmissible because it had not been on file three days before it was offered in evidence? This depends upon the construction to be given the following portion of section 10139, 3 Comp Laws:

> "Objections to notices of, or objections to the manner of taking the testimony, or of certifying or returning the deposition, shall be regarded as waived unless made in writing within three days after knowledge or notice of the return thereof."

This language does not require the deposition to be on file three days before it is offered in evidence. It only limits the time for taking certain objections. As this time had not elapsed, plaintiff had the right to make these objections when the deposition was offered in evidence. The construction urged by plaintiff's counsel would prevent a party litigant from availing himself of the right of taking

depositions on the eve of or during trial. This right is sometimes essential (see *Deming* v. *Foster*, 42 N. H. 165), and we cannot believe that the legislature intended to take it away. We are therefore compelled to say that the learned trial judge erred in refusing to permit defendants to read the deposition under consideration.

Defendants' brief complains of remarks of plaintiff's counsel made during his closing argument to the jury. These remarks were not justified by the testimony, but we are not sure that they were not excused by remarks of a similar character made by defendants' counsel. As the judgment is reversed for other reasons, and as it is not to be presumed that these remarks will be repeated on another trial, we do not consider it necessary to determine whether or not they constitute ground for reversal.

We find no other error in the record, and no other complaint which merits discussion.

The judgment is reversed, with costs, and a new trial ordered.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

FRYSZKA *v.* PRYBESKI.

LANDLORD AND TENANT—LIABILITY FOR RENT—SUBSTITUTION OF LESSEES.

Where plaintiff leased from defendant property which was afterward, without any arrangement releasing plaintiff from liability, occupied by a firm composed of plaintiff and another, plaintiff continued to be responsible for the rent, and the fact that defendant purchased goods from the partnership from time to time, and did not pay for them, did not, in the absence of any finding that the indebtedness was to apply on the rent, make the partnership directly responsible, and show that plaintiff had ceased to be so responsible.

Error to Bay; Shepard, J. Submitted February 17, 1905. (Docket No. 188.) Decided March 21, 1905.

Assumpsit by Stanley Fryszka against William V. Prybeski for goods sold and delivered. There was judgment for plaintiff, and defendant brings error. Reversed.

Lee E. Joslyn, for appellant.

Isaac A. Gilbert (*James Van Kleeck*, of counsel), for appellee.

CARPENTER, J. This case was tried by a referee, who reported his findings of facts and conclusions of law. It appears from those findings that defendant owed plaintiff a balance on an account between them which, together with interest, amounted to $744.62; that there was due defendant for rent of a building occupied by a partnership composed of plaintiff and one Richard Champagne $648. This, with interest thereon at the date of the referee's report, amounted to $792.18. Defendant claimed in the court below, and claims in this court, that plaintiff was

responsible for this rent, and that he was entitled to have it applied to set off plaintiff's claim, and to have judgment entered in his favor for the balance. This claim was denied by the court below, and judgment rendered for plaintiff for the full amount of his claim. It appears from the finding of facts that plaintiff alone originally leased defendant's property, and that no arrangement was made by which he was released from his obligation to pay the rent. Under these circumstances, plaintiff continued to be responsible for the payment of the rent, and defendant is therefore entitled to set off the same in this suit. See *Brooks* v. *Allen*, 146 Mass. 201; *Doty* v. *Gillett*, 43 Mich. 203; *Williams* v. *Railroad Co.*, 133 Mich. 448.

We were urged by plaintiff, in deciding this case, to give weight to the circumstance that defendant has not paid for goods purchased from the partnership from time to time during their occupancy of his premises. There is no finding of fact from which we may infer that this indebtedness was to apply on the rent, or that the partnership had been substituted for plaintiff as defendant's tenant. According to the principles of the foregoing authorities, the circumstance under consideration would not make the partnership directly responsible to defendant for his rent. That circumstance is not, therefore, a finding of fact which we can regard. It merely proves that defendant continues to be a debtor of the partnership to the extent of his purchases.

It results from this opinion that the judgment of the lower court should be reversed, and a judgment entered in this court in favor of defendant and against plaintiff for $47.56, with interest from March 24, 1904. Defendant should have costs of both courts.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

SMITH v. KENT CIRCUIT JUDGE.

1. CLERKS OF COURTS—DUTIES.
   Since the duties of the clerk of the circuit court are defined neither in the statutes nor the Constitution, he is subject to all the legitimate orders of the court.

2. COSTS—SECURITY—FORM.
   The form of the security for costs which may be required of the plaintiff in a civil action under section 9992, 3 Comp. Laws, rests in the sound discretion of the court.

3. SAME—CERTIFICATE OF DEPOSIT.
   The clerk of the circuit court cannot refuse to obey an order for the filing with him of a certificate of deposit as security for costs in a pending case.

Mandamus by Connor H. Smith, county clerk of Kent county, to compel Willis B. Perkins, circuit judge of Kent county, to vacate an order receiving a bank certificate of deposit as security for costs. Submitted March 7, 1905. (Calendar No. 20,987.) Writ denied March 21, 1905.

In a suit pending in the circuit court for the county of Kent, the respondent, on motion of the defendant, made an order requiring the plaintiff to give security for costs by filing a bond in the sum of $150. Plaintiff, failing to obtain a bond, stipulated in writing with the defendant to deposit $150 in the Grand Rapids National Bank, obtain a certificate of such deposit, and file the same with the clerk of the court in lieu of the bond; the certificate to be indorsed payable to the clerk of the court upon the order of the court; the clerk to keep such certificate until the further order of the court. This stipulation was presented to the court, and an order made in compliance therewith. The relator moved to set the order aside, which motion being denied, he applied to this court for the writ of mandamus to compel the vacation of such order.

Ward & Brown, for relator.

Jesse F. Orton, for respondent.

GRANT, J. (*after stating the facts*). The relator insists that he cannot be compelled to receive property of any kind or description, and hold it as a bailee, in lieu of a bond. In other words, he insists that a bond is the only security for costs contemplated by the statute.

The county clerk is a constitutional officer (Const. § 12, art. 6), and is by that section made the clerk of the circuit court of such county. Section 221, 1 Comp. Laws, requires him to attend every term of court; gives him the care of all the records, seals, books, and papers pertaining to the office of the clerk of such court, and filed or deposited therein. Neither the Constitution nor the statute prescribes his duties. He is therefore subject to all the legitimate orders of the court of which he is clerk. There are several provisions of the statute in regard to security for costs in suits—sections 713, 9990–9993, 10353, 10958, 11282, 11285, 11287, 11288. Some of these require the writs and declarations in certain cases to be indorsed by some one as security for costs; others require a bond; while still others simply require security for costs without specifying in what manner it shall be given.

The section here involved is 9992, reading as follows:

"The court in which any civil action shall be pending, may, in all cases, when it shall appear reasonable and proper, require the plaintiff to give sufficient security for all such costs as may be awarded against him therein."

The statute in question does not provide that the security shall be a bond. The form of the security therefore rests in the sound discretion of the court. *Skinner* v. *Lucas*, 68 Mich. 424, 434; *Gifford* v. *Roberts*, 125 Mich. 408. Under a similar provision in New York it was held that "the nature of the security is not designated, and there can be no good reason why the deposit of money should not be deemed competent security." *Wheelock* v.

Brinckerhoff, 13 Johns. (N. Y.) 481. See 11 Cyc. 183. Other citations are not necessary.

The statute in many cases provides for the deposit of money with the clerk of the court, who is also register in chancery. 1 Comp. Laws, §§ 425, 504. The deposit of money or a certificate of deposit imposes no hardship upon the clerk, and gives him no more trouble than does the care and keeping of a bond. The relator in this case is put to no liability as bailee. Compliance with the order of the court would be a complete defense to any claim made against him. If the legislature had intended that a bond should be the only security, it would evidently have so provided, as it has in other provisions of the law. In civil cases the sole object of the security is to indemnify the defendant against costs. A stranger or one without property might be unable to give a bond, but could make a deposit of money, or, as in this case, deposit a certificate as security. We think it manifest that the purpose of the law was to leave the matter entirely in the discretion of the court. It by no means follows, as counsel for the relator suggest, that a clerk could be compelled to accept diamonds or horses or other chattels as security, and be compelled to act as bailee.

Where the plaintiff was ordered to give security for costs, he deposited with the clerk $50, and it was held to be a compliance with the order. *Fenet* v. *Wilson*, 3 Hill (S. C.), 340. There are good reasons why the deposit of money, or, as in this case, a certificate, is better than a bond. It saves the trouble of a suit, and places under the control of the court the money with which to order the costs to be paid.

The writ is denied.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

BOARD OF SUPERVISORS OF BAY COUNTY *v.* EDMUNDS.

COUNTIES — REDUCTION OF TERRITORY — CONSTITUTIONAL PROVISIONS.

Section 2 of article 10 of the Constitution prohibits the reduction of the territory of a county below 16 townships without a vote of the people as well by attaching the territory to an existing county as by using it to form an entirely new one.

Certiorari to Bay; Shepard, J. Submitted November 3, 1903. (Calendar No. 20,216.) Decided March 28, 1905.

Mandamus by the board of supervisors of Bay county to compel Peter Edmunds, supervisor of the township of Gibson, to appear with his assessment roll and act as a member of said board. There was an order granting the writ, and respondent brings certiorari. Affirmed.

T. E. Webster (*James Van Kleeck* and *Chester L. Collins*, of counsel), for relator.

John J. McCarthy (*E. A. Cooley*, *J. C. Hewitt*, and *Ashley Pond*, of counsel), for respondent.

HOOKER, J. In 1883 the legislature organized the county of Arenac from territory theretofore included in the county of Bay, leaving the latter county reduced to 16 townships. See *County of Bay* v. *Bullock*, 51 Mich. 544. At its last session the legislature passed an act providing that the township of Gibson be taken from Bay county and attached to the county of Arenac. This act was approved May 27, 1903 (Act No. 496, Local Acts 1903). On October 15, 1903, a petition was filed in the circuit court for the county of Bay, asking a writ of mandamus to compel the supervisor of Gibson township to appear with his assessment roll and act as a supervisor, with the board of supervisors of the county of Bay, in the

equalization of the rolls of said county. Upon a hearing a peremptory writ was issued, and the respondent has brought the proceeding to this court.

Section 2 of article 10 of the Constitution provides:

"No organized county shall ever be reduced by the organization of new counties to less than sixteen townships as surveyed by the United States, unless in pursuance of law a majority of electors residing in each county to be affected thereby shall so decide. The legislature may organize any city into a separate county, when it has attained a population of twenty thousand inhabitants, without reference to geographical extent, when a majority of the electors of a county in which such city may be situated, voting thereon, shall be in favor of a separate organization."

It is contended by the relator that this provision forbids such action as was taken in this instance, and that the act is void, for the reason that its effect is to reduce Bay county to 15 townships, without a vote of its electors authorizing it. Upon the part of the respondent it is said that the act does not infringe the section cited, for the reason, that although said section forbids such a reduction by the organization of a new county, it does not prohibit any change that the legislature may see fit to make, where the change adds the territory taken to a county already established, and, as Arenac was organized in 1883, it was competent for the legislature to increase it 20 years later by taking territory from Bay county, although the effect be to reduce Bay county to less than 16 townships.

In our opinion, this construction does violence to the spirit of the Constitution. At the time that the Constitution was made and adopted, the State was young, and several of the counties, especially of the Upper Peninsula, comprised large areas, and new counties have since been organized from such. By reference to the earlier histories and maps, and the acts of the governor and judges to be found in the Territorial Laws, this will be seen, *e. g.*, in a map published in 1839, and found in Lanman's History of Michigan, "Civil and Topographical," Sanilac county comprised the territory south and east of Saginaw

Bay, lying north of Lapeer, as it then existed, and a county lying to the east of Lapeer called Desmond, while all north of Oceana (which then appears to have embraced Muskegon and Newaygo), Montcalm, Isabella, Gladwin, and Arenac was called the township and county of Michillimackinac. The entire Upper Peninsula was included in Chippewa county. The territory afterwards constituting Bay county was divided between Midland and Arenac counties. It was an early practice to include 16 townships in the establishment of a county, and the Territorial Laws contain many such instances where the governor and judges took such action. This practice was generally followed after the State was admitted to the Union, since which time many new counties have been organized from the large counties referred to. It is reasonable to suppose that, previous to the time when the Constitution of 1850 was formulated, changes in counties had consisted for the most part in reduction of the area of large counties, for the purpose of erecting new counties, rather than to add to counties already established, and it is probable that the language used was suggested by existing conditions and practices.

In ascertaining the intent of this constitutional provision, we may consider the object to be accomplished, and the consequences that will follow a given construction. It is conceded that, had Gibson township been included in Arenac by the act of 1883, the act would have been void; yet, if the act of 1903 is valid, the legislature can do by indirection a thing which it cannot do directly, and accomplish by two bills what it could not by one. It is suggested that the bona fides of the legislature may be made a test of the validity of such an act, but this cannot be so. The good faith of the legislature must be presumed, and it is unseemly for one branch of the government to exercise the power of trying the good faith of another, and nullifying its acts on such a ground, if it is not more than doubtful if any such power exists. We must therefore hold, either that the legislature can never

reduce any county below 16 townships without the consent of its inhabitants, or that it may make changes between existing counties at will; and that the territory of the State having now been fully divided into counties approximating 16 townships, so that changes are hereafter to be limited to additions and subtractions to and from existing counties, there is little or no further chance for an application of the constitutional provision in question, and that under respondent's contention it has already become, or must soon become, practically obsolete.

If respondent's contention is right, the provision of the Constitution was never an impediment to the reduction of an existing county to less than 16 townships, so long as it was not done for the purpose of using it in the erection of an entirely new county, either by itself, or together with land taken from another county. To illustrate, while Lapeer county, which consisted of but 16 townships, could not be reduced by using it, with other territory to be taken from the adjoining large county of Sanilac, to erect a new and distinct county without a vote of its inhabitants, it would not have been an infringment of this provision for the legislature to attach any portion of Lapeer to the already existing county of Sanilac without such vote. The object that the constitutional convention must have had in view seems apparent. It was to protect existing counties, and such as should be thereafter created, from reduction below 16 townships without the consent of the inhabitants thereof. There is nothing to indicate an intention merely to place an obstacle in the way of creating altogether new counties, and leave the way open to the reduction of existing counties by giving their territory to other existing counties. The proceedings of the convention indicate a practically unanimous sentiment against the reduction of counties to less than 16 townships, and the provision in question in terms, says, "No county shall ever be reduced," etc.

Keeping in view the evident design to protect the inhabitants of counties from undesirable changes in county

lines, and the absence of any reason for discriminating between instances where an altogether new county is to be erected from territory taken from an existing county, and instances where it is to benefit an existing county territorially at the expense of another, and the improbability of an intention to make a rule by which the legislature was to be at liberty to reduce Bay county below 16 townships by attaching some of its territory to Midland, a pre-existing county, but not to do a similar thing by attaching the same territory to Arenac, a county organized after the Constitution was adopted, we are justified in looking for a more reasonable construction than that contended for by the relator. Bearing in mind the rule upon which this contention mainly rests, i. e., that all of the language of the provision must be given effect, if possible, and the further principle that the Constitution is to receive a strict construction in its limitations upon legislative power, we must still find a reasonable construction, if possible. This is done, without violence, either to the rules stated, by finding that the term "new counties" should not be limited to such as had previously in no part formed a complete county by itself, but was intended to include all counties resulting from changes in pre-existing county lines. When a county is changed in its territory by the addition of territory, it becomes a "new county," although the name be unchanged, and although it be accomplished by a law which in terms attaches the territory to the old county. By this construction we find no difficulty in carrying out the manifest intent of the convention, and adhering to the opinion heretofore announced by this court, through Mr. Justice COOLEY [*County of Bay* v. *Bullock*, supra], that "the object [of this provision] was to prevent the unreasonable reduction of counties in size," and that the act is invalid.

The order is affirmed.

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

PALMER v. CITY OF PORT HURON.

MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — NOTICE OF ASSESSMENT.

Under that section of the charter of Port Huron which provides that the city engineer shall give notice when assessments for street improvements are completed, the notice need not be addressed to individuals by name, but it is enough that it is addressed "To all owners and other persons interested in" the lots abutting a certain avenue between certain streets.

Appeal from St. Clair; Tappan, J. Submitted October 6, 1904. (Docket No. 31.) Decided March 28, 1905.

Bill by Thomas W. Palmer against the city of Port Huron and others to set aside a paving assessment. From a decree for complainant, defendants appeal. Reversed, and bill dismissed.

A. E. Chadwick (*Chamberlain & Guise*, of counsel), for complainant.

Joseph Walsh and *C. A. Wagner*, for defendants.

MONTGOMERY, J. Complainant owns certain vacant land, which has been subdivided into lots, in the city of Port Huron. On the west this land abuts a highway known as "Gratiot Avenue." The city has paved said Gratiot avenue, and has assessed against complainant's property a portion of the expenses of said pavement. This suit is instituted for the purpose of setting aside said assessment. The case was heard in the court below on pleadings and proofs, and a decree granted to complainant on the ground that legal notice was not given of said assessment. The material question raised by this appeal relates to the correctness of this decision.

Complainant had no personal notice of the assessment,

and did not, in fact, know that the improvements were made or contemplated. The notice of assessment was given by publication. The material part of the notice published was as follows:

"To all owners and other persons interested in the several lots, blocks, and parcels of land described as follows, to wit: All those lots, blocks, and parcels of land lying on, and fronting, touching, or abutting that portion of Gratiot avenue lying between the south curb line of Garfield street and north line of Holland avenue in the city of Port Huron.

"Take notice: * * * You are hereby notified that an assessment has been made on all the lots, blocks, and parcels of land lying within said assessment district and liable to be assessed for said improvement under the provisions of the charter and ordinances of said city, and that a roll of said assessment is now complete, and will remain in the office of the city engineer from the date hereof until the twenty-sixth of July, 1900, for the inspection of any person or persons concerned therein, and during such time any person or persons considering him, her, or themselves aggrieved by such assessment may file in writing in said city engineer's office his, her, or their objection to said assessment roll."

The charter provision for this notice reads:

"The city engineer shall give notice that such assessment has been completed and will remain in the city engineer's office for ten days from the first publication of said notice for the inspection of all concerned."

Manifestly the notice contemplated by this provision was a notice by publication. It would appear, also, that a specific notice to named individuals was not contemplated, as it is notice that the assessment will be open to inspection by "all concerned." The notice conformed to the charter, unless we are to read into the latter a provision that the notice shall be addressed to the respective owners of the property subject to assessment by name. We do not think this charter subject to that construction. Similar charter and statutory provisions for a general notice of a review of assessments have been in force and

have been acted upon for many years. See 1 Comp. Laws, § 3195. In other States similar provisions have been construed, and notices quite as general in terms as the one before us sustained. *Williams* v. *Viselich*, 121 Cal. 314; *Kansas City* v. *Ward*, 134 Mo. 172; 1 Cooley on Taxation (3d Ed.), 630, and note.

The notice in this case was sufficient, if it came under the eye of the owner, to challenge his attention to the fact that his property was being subjected to assessment. That the assessment based upon the frontage of lots was authorized, see *City of Kalamazoo* v. *Francoise*, 115 Mich. 554. The contention that the street-railway company should have been assessed for a portion of the benefit is answered by *Boehme* v. *City of Monroe*, 106 Mich. 401. The question raised as to the sufficiency of the certificate attached to the roll is sufficiently answered by *Walker* v. *City of Detroit*, 136 Mich. 6, and *Auditor General* v. *Calkins*, 136 Mich. 1.

The decree will be reversed and the bill dismissed, with costs of both courts to defendants.

MOORE, C. J., and CARPENTER, GRANT, and HOOKER, JJ., concurred.

NOWACK *v.* LEHMANN.

BILLS AND NOTES—CONSIDERATION.

Where a trustee, on paying money to another as a gift from his beneficiary, takes a promissory note to keep as a voucher, the note is without consideration and unenforceable.

Error to Menominee; Stone, J. Submitted January 5, 1905. (Docket No. 15.) Decided March 28, 1905.

Assumpsit by Ferdinand C. Nowack against William Lehmann upon a promissory note. There was judgment for defendant, and plaintiff brings error. Affirmed.

This suit is brought to recover upon a promissory note dated December 4, 1893, executed by the defendant, payable on or before two years from date, to plaintiff, trustee, with interest at 6 per cent. per annum. With the plea of the general issue defendant gave notice of want of consideration, and that the note was executed for a special purpose, set forth in the notice, to the effect that plaintiff and Robert Nowack are sons of Gottlieb Nowack, deceased; that plaintiff had full charge of and transacted his father's business; that the father had $6,000 in cash, which plaintiff had loaned to the Menominee River Brewing Company; that Robert Nowack is the son-in-law of the defendant; that in 1893 Robert and his wife desired to purchase a home, so that Gottlieb might live with them; that Gottlieb agreed to give his son Robert $1,000 for the purchase of said home, and would pay the same in October, 1893, when the money was due from the brewing company; that Robert informed the defendant of this agreement; that it was then agreed between Robert and defendant that defendant should purchase the home, take the deed in his own name, convey the same to Robert,

and that as soon as Robert obtained his money from his father he would pay it to defendant; that said brewing company paid the money to the plaintiff, as trustee for his father; that on December 4, 1893, plaintiff delivered to the defendant said $1,000, saying: "Here is the money for Robert. I want a note for this, so that I can show my father in settlement with him what I have done with the money;" that Robert was then away from home, working in the woods; that it was agreed that defendant should sign the note, and that Robert's wife should indorse it, which she did; that the note so indorsed was delivered to the plaintiff, to be used by him for the specific purpose of showing his said father what he had done with the money, and that it was not executed and delivered as a promissory note.

This suit was brought in April, 1901. The father died January 9, 1897. The defendant gave evidence to sustain his claim. Plaintiff gave evidence in denial. The court instructed the jury that the defendant could not show that this was not a promissory note, but could show what, as between the original parties, the understanding at the time was as to the consideration, and whether it was given for the specific purpose mentioned. The evidence on behalf of defendant shows that the father intended to give to each of his sons $1,500 and to each of his daughters $1,000; that he had given $500 to Robert before the execution of the note, and that the money paid the defendant by plaintiff was the money of the father.

B. J. Brown, for appellant.

W. H. Phillips, for appellee.

GRANT, J. (*after stating the facts*). If the instruction of the learned circuit judge could be fairly construed as holding that it was competent for the jury to find that a promissory note delivered and received as a promissory note was in fact intended as a receipt, we should doubt the soundness of the instruction. *Billings* v. *Billings*, 10

Cush. (Mass.) 178; *Dickson* v. *Harris*, 60 Iowa, 727; *Phelps* v. *Abbott*, 114 Mich. 88. But the instruction, which is necessarily somewhat lengthy, read as a whole, informed the jury that it was competent to show a want of consideration, and that they must find that there was no consideration in order to find for the defendant. Under the instruction the jury could not have reached the conclusion they did upon any other basis than that the plaintiff delivered the money to the defendant not as his own money nor as a loan for his father, for whom he was trustee, but under the instructions from the father to pay it over to the defendant as a gift to his son Robert. This was the sole claim of the defendant. There was ample evidence to sustain it. If this was the true state of affairs —and the jury must have found that it was—it follows that there was no consideration for the note. The case falls within the principle laid down in *Lovell* v. *Willard*, 28 Mich. 346; *Macomb* v. *Wilkinson*, 83 Mich. 486; *Kelley* v. *Guy*, 116 Mich. 43; *Graham* v. *Alexander*, 123 Mich. 168.

Judgment affirmed.

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

RANDALL v. DETROIT & NORTHWESTERN RAILWAY.

DISMISSAL AND NONSUIT—PAPERS—ORDER TO PRODUCE—ENFORCEMENT.

It is error to direct a verdict for defendant because plaintiff, suing for services, refuses to produce papers in his possession belonging to defendant, and not shown to be relevant to the case on trial.

Error to Wayne; Donovan, J. Submitted January 10, 1905. (Docket No. 36.) Decided March 28, 1905.

Assumpsit by James A. Randall against the Detroit & Northwestern Railway for services rendered. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

James A. Randall, in pro. per.

Thomas A. E. Weadock, for appellee.

MONTGOMERY, J. This action was brought to recover attorney's fees for services claimed to have been rendered for defendant. It appeared by the cross-examination of plaintiff that he had in his hands some papers, consisting of agreements to convey rights of way, deeds, etc., which belonged to the defendant. Defendant's counsel thereupon served oral notice on him to produce these papers in court. The court so ordered, and thereupon the plaintiff declined to produce the papers, for the reason that they had no reference to the case being tried.

The position taken by the court is best stated in his own language, as follows:

"These papers called for are clearly the property of the company. Whatever value they have is not an issue at present. Whatever use they may be put to in evidence here is not at present the issue. The owner of any paper, in a court trial, is entitled to be the controller of it, and the question is now up to this: Shall the court control

this matter, or allow the parties who have been in dispute, and that continue to dispute and wrangle over these papers? The ruling is that the court controls these papers; that they shall be brought into court before we take another step or give any judgment at all. We cannot play with them. Bring them in, Mr. Randall, before you go to this jury. Will you need some little time? Unless they are brought in, I shall direct a verdict. I shall have the order of the court obeyed. Unless they are brought in, I shall direct a verdict."

Plaintiff persisted in his refusal to produce the papers, and thereupon the court directed a verdict for defendant.

It is clear to us from an examination of the record that the papers did not relate to any question involved in the issue. It is doubtless true that the papers belonged to the defendant, and, so far as the record indicates plaintiff's relation to them, his refusal to turn them over to the defendant, either in or out of court, was wholly without justification. The question remains whether the duty to deliver these papers to the company could be enforced in the manner adopted.

The defendant's counsel cites us to *Hunton* v. *Hertz & Hosbach Co.*, 118 Mich. 475, as sustaining this action of the trial judge. The case is not in point. In that case certain papers in court in possession of the party were demanded, and the court refused to order their production. This was held error. The papers were desired as evidence, and were presumably pertinent to the case. In the present case the papers could not have been required as evidence, and we are cited to no case which justifies the ruling made.

It is contended that by plaintiff's own testimony he made no case. We have examined the record with care, and find that there was some testimony to sustain plaintiff's claim. We are not therefore able to say that it conclusively appears that the error pointed out was without prejudice.

The judgment is reversed, and new trial granted.

MOORE, C. J., and CARPENTER, OSTRANDER, and HOOKER, JJ., concurred.

VAN HAAFTEN *v.* VAN HAAFTEN.

MARRIAGE — ANNULMENT — INSANITY — EVIDENCE — SUFFICIENCY — RELIGIOUS BELIEFS.

On a bill to annul a marriage on the ground of insanity of the wife at the time of the marriage, it appeared that the parties were aged, when married, that the wife was a religious enthusiast, that they lived together for three years before separating, and after the first separation cohabitation was resumed at the husband's request. The bill was not filed until after she had been adjudged insane and her guardian had sought to compel him to support her. *Held*, that a case for annulment was not shown.

Appeal from Kalamazoo; Adams, J. Submitted January 11, 1905. (Docket No. 26.) Decided March 28, 1905.

Bill by Ive Van Haaften against Antonia Van Haaften and Walter Hoek, as guardian of defendant Van Haaften, to annul a marriage. From a decree for complainant, defendants appeal. Reversed, and bill dismissed.

Hollender & Notley and *Dallas Boudeman*, for complainant.

Osborn & Mills and *A. M. & C. H. Stearns*, for defendants.

HOOKER, J. The parties to this cause were respectively 75 and 60 years old when married. They lived together nearly three years, after which they separated without apparent reason. This was followed by a resumption of cohabitation at the solicitation of the complainant, and some time later by another separation. The wife lived with her son for a time, when she was adjudged insane, and has been in the Kalamazoo asylum since. Her expenses were paid from her estate, and her guardian after-

wards brought suit to recover them from the husband. Subsequently the husband brought this action to have the marriage declared null upon the ground that the woman was insane at the time of the marriage. A decree for the complainant was rendered at circuit, and the case has been appealed.

The proofs show that the parties were married on August 27, 1894. They separated within three years. About three years later, and on April 12, 1900, the woman was adjudged insane, and sent to the asylum. On April 27, 1903, Walter Hoek was appointed her guardian.

We have endeavored to examine the testimony in the case critically. Our impressions derived therefrom are that the woman was for some years a religious person, who perhaps took the teachings of her faith more literally than is usual; that she was much concerned about her spiritual welfare; and that on some occasions she obtruded these things upon others, more than is commonly done. Her husband testified to some instances of talking to herself, more frequently after she went to bed. He was unable to understand her. Sometimes during the day he noticed peculiar actions, and that she walked up and down the room four or five times, with her hands clasped, but saying nothing. He never spoke to her about it, and did not know why she did these things. He stated that on one occasion she said she saw something, something he did not like to see. When asked what it was, he replied:

"I don't know nothing, because I stopped her. She started, but I stopped her. She said these, and she saw that. Some angels, and sometimes Christ, and so on.

"*Q.* How frequently did you talk about ghosts with her, or spirits?

"*A.* Not very much. I shut her up when she began to talk about it. I told her to stop talking.

"*Q.* How often did that occur?

"*A.* Well, maybe two or three times. That is all—to me.

"*Q.* How soon after you were married to her did that begin?

"*A.* Maybe four or five or six weeks.

"*Q.* Now, when you had this talk about the angels and Christ, did she say that she had seen them?

"*Mr. Stearns:* I object to that as leading.

"*A.* Yes, she saw them.

"*Q.* Just tell us what she said.

"*A.* I could not say much, because I stopped her right away as soon as she commenced. I didn't like to listen to that thing.

"*Q.* I want you to tell as near as you can—tell about what she has seen, and what she said to you she had seen, at those times.

"*A.* Just what I say. I could not say no other way. She came in to talk, and I stopped her right away, because I did not believe in such things.

"*Q.* How much would she say when she commenced?

"*A.* Oh, maybe a good deal. I don't know.

"*Q.* What was it she said?

"*A.* She was talking about the angels and Christ, and then I quieted her right away. I stopped her right away.

"*Q.* Did you leave her, and tell her to stop?

"*A.* At first I stopped her, and then I go out of the house and go in the barn.

"*Q.* And this occurred how frequently—how often?

"*A.* Oh, frequently—more—maybe three times; that is all. I got to make excuses, and go to the barn."

He never called her insane, or called a physician to consult regarding her condition.

It is unnecessary to quote the testimony of other witnesses, and it is sufficient to say that the evidence indicates that she was exceptionally religious, perhaps abnormally so; that she believed in the visitation of spirits—not, perhaps, of her own particular friends, but spirits generally; that she believed in a personal devil, and that he had personal designs regarding her, which were thwarted only through the intervention of Christ, to whom she looked for protection; that she communed with Christ, and saw spirits and angels.

The evidence indicates that she was a model housewife, and that the relation of the parties toward each other was satisfactory to the complainant up to the time that she finally left him. He gave no reason for the separa-

tion, apparently did not know why she left. He opposed her going upon the second occasion, and told her that if she did she must not come back. There is nothing to indicate that he thought her deranged during these years, though it is improbable that he was ignorant of her religious tendencies. The manifestations of religious opinion, zeal, and fervor are too various and common to justify an assumption of derangement lightly. It certainly would not do for courts of justice to set up their own views upon such subjects as a standard of what is natural, or in conformity to general opinion. Upon these subjects it would be difficult to determine what religious opinions could safely be called "insane delusions consisting in the belief of facts which no rational person would believe." Nevertheless, we do know that religious interest sometimes begets insanity, and it is plainly shown in this case that the defendant became insane, and there is abundant evidence that it was in a measure due to her religious belief, though there is no certainty that it is the principal cause. The fact of her ultimate derangement is the only thing that gives plausibility to the complainant's claim. If she had continued to this day to evince no further symptoms of insanity than those preceding the separation of these parties, we could not safely infer insanity. Insanity is not to be lightly inferred. Many cases protest against it.

In *Cole* v. *Cole*, 5 Sneed (Miss.), 59, it was said:

"Every consideration of policy and humanity admonishes us that a contract so essentially connected with the peace and happiness of individuals and families and the well-being of society should not be annulled on this or any other ground not clearly made out."

This view has support in *Powell* v. *Powell*, 27 Miss. 783, where it is said that "'the law favors marriage, and, when once solemnized according to forms of law, will not declare its nullity upon anything less than clear and certain testimony."

Hayden, J., in *Slais* v. *Slais*, 9 Mo. App. 97, expresses the sentiment thus:

"A contract of marriage is not likely to be pronounced void, on the ground that one of the parties was insane, and incapable of contracting. The testimony by which such cases are often supported is open to suspicion, and nowhere ought the discernment of the chancellor to be more employed than in weighing witnesses who testify as to insanity."

This is pertinent language to the testimony before us.

In *Kern* v. *Kern*, 51 N. J. Eq. 582, the language from *Cole* v. *Cole*, supra, given above, is quoted more at length and with approval. The New Jersey court said, "A result so important * * * should not be reached except upon the most convincing proofs," etc.

When we consider the uncertainty of the conclusion that should be drawn from the facts stated, coupled with the failure of the complainant to discover insanity so long as he could induce the defendant to live with him, the coincidence of the attempt to compel him to support her, and his assertion of this claim, we are not able to say that the claim of insanity is proven, or that we would be justified in saying that she was ever insane previous to the marriage. It is true that she is said to be insane now, but when her reason was dethroned is not satisfactorily shown.

We have not found it necessary to discuss the questions arising in relation to our statute and the interpretation that it should receive, as, under any view presented by counsel, the complainant's case fails upon our understanding of the proofs.

The decree is reversed, and complainant's bill will be dismissed, with costs of both courts.

MOORE, C. J., and CARPENTER, MONTGOMERY, and OSTRANDER, JJ., concurred.

LINE *v.* SPIES.

139 484
148 334

1. SLANDER—ACTIONABLE WORDS.
To say of another, "He is a thief," is prima facie actionable.

2. SAME—EVIDENCE—SURROUNDING CIRCUMSTANCES.
In an action for slander the surrounding circumstances and connection in which the words were used may be shown for the purpose of proving that the words could not have been understood as imputing a crime.

3. SAME—CIRCUMSTANCES.
Language used toward another is actionable if, in the circumstances under which it was used, the hearer would reasonably understand that it was intended to impute a crime.

4. SAME—DAMAGES.
In an action by an attorney for slander, where there is no evidence of injury to plaintiff in his profession, it is error to leave that question to the jury.

Error to Menominee; Stone, J. Submitted January 12, 1905. (Docket No. 4.) Decided March 28, 1905.

Case by Charles Line against Augustus Spies for slander. There was judgment for plaintiff, and defendant brings error. Affirmed conditionally.

L. D. Eastman (*George H. Peaks*, of counsel), for appellant.

Charles Line, in pro. per.

MONTGOMERY, J. This is an action on the case for slander. The words charged in the declaration are, "He (meaning plaintiff) is a thief." On the trial the defendant denied having uttered the words. Plaintiff's case was made in the main by the testimony of John Stiles. Mr. Stiles was at the time sheriff of Menominee county, and in

his official capacity had received from plaintiff, who was city attorney of Menominee, some papers to serve on the defendant. The witness Stiles testified that the defendant made use of the language imputed to him by the declaration. He further testified that a controversy had arisen between the city of Menominee and the defendant over the assessment of certain lots owned by the defendant for the construction of a sidewalk, and that defendant claimed the assessment was illegal, and was angry about it.

On cross-examination the witness testified as follows:

"*Q.* And you understood that what he said had reference to the action of the city council with regard to the construction of that sidewalk, did you?

"*A.* What do you mean—by calling Mr. Line that name?

"*Q.* No, repeat the question to him. (Question repeated.)

"*A.* The conversation we had led from that I served the papers from the city suing him.

"*Q.* You understood in a general way that is what the trouble was about?

"*A.* Oh, yes; there wouldn't have been any trouble if I hadn't served the papers. * * *

"*Q.* Did you understand by what Mr. Spies said about Mr. Line that Mr. Spies intended to accuse Mr. Line of having stolen anything, and, if so, what?

"*A.* He didn't say that he stole anything. * * *

"*Q.* You didn't understand that he meant to impute the crime of larceny to Mr. Line, or that he didn't mean that Mr. Line had committed the crime of larceny; is that true?

"*A.* Yes; I didn't consider that Mr. Spies meant it, because he was excited, and I didn't pay any attention to it; that is, it didn't make any impression upon my mind that Mr. Line was a thief.

"*Q.* You didn't believe it?

"*A.* No, sir.

"*Q.* You understood that it was simply the vituperation of an angry man, who thought he was being unjustly dealt with by the city council of the city of Menominee; is that true?

"*A.* Yes.

"*Q.* You didn't understand that Mr. Spies meant to say that Mr. Line had stolen anything, did you?

"*A.* Well, I didn't know whether he knew that he stole anything."

On redirect he testified:

"*Mr. Power:* You say you didn't understand him to mean that he had stolen anything. Wasn't he serious when he said that Line was a thief?

"*A.* Yes, he was very angry, angry and serious, loud and boisterous."

It was contended at the circuit, and is strenuously insisted in this court, that the testimony of this witness conclusively shows that it was not the intention of defendant to impute a crime to plaintiff by employing the language charged, and that the witness Stiles did not so understand the language, and that, therefore, the court should have directed a verdict for defendant as requested. There can be no doubt that the language counted on is prima facie actionable. It is also settled by our adjudications that the surrounding circumstances may be shown, and the connection in which the words are used put before the jury for the purpose of showing that the words could not have been understood as imputing a crime. *Ritchie* v. *Stenius*, 73 Mich. 563; *Ellis* v. *Whitehead*, 95 Mich. 105; *Youngs* v. *Adams*, 113 Mich. 199.

It is also unquestionably true, as contended by appellant's counsel, that if, upon the showing made by the plaintiff's witnesses, taken as a whole, it appears that the language used was employed in a connection which of necessity precludes the idea that a crime was charged, or if the language taken as a whole could not have been understood as imputing a crime, the words are not actionable per se.

We do not, however, find that the circumstances of this case conclusively show that that charge is not to be given its ordinary meaning. In reaching this conclusion we discard the test of the impression actually made upon the mind of the witness Stiles as to the fact of plaintiff's guilt

of the crime charged. It will not do to say that slanderous words are any the less actionable because uttered in the presence of those only who have such confidence in the plaintiff that belief in the truth of the charge made is withheld. The law presumes some damage from such a slander, and will not enter into nice calculations to learn whether the impression made upon the mind of the hearer leads to present belief in the truth of the charge or remains dormant to be fanned into a belief, more or less strong, by some future circumstance.

We think a fair construction of the testimony of the witness Stiles by no means leads to the conclusion that it is conclusively shown that the language imputed was used in a sense, or would by reasonable men be understood as having been employed in a sense, which restricted the meaning to something else than a charge of larceny.

It is to be noticed that the controversy between the city and defendant did not relate to any matter with reference to which any act of plaintiff could be characterized by the use of the word "thief," that word having for the time and occasion a different meaning. The controversy, it is true, furnished the *occasion* for the use of this term, but does not *explain* it, or give a conclusively different color to its meaning.

The circuit judge, in charging the jury, made use of the following language:

"Now, gentlemen, what were the circumstances? Were the circumstances such that a reasonable man would have understood on that occasion that the defendant was imputing a crime to the plaintiff; or has the explanation been sufficient to show you that this language, even if applied to the plaintiff, was not intended to impute to him the crime of larceny? This is the turning point, in my judgment, in the case, gentlemen."

Later in the charge he said:

"Now, gentlemen, you will take this case, and look it over carefully, bearing in mind that the plaintiff has the burden of proof here to establish the use of these words in the first place; that they were used; that they were used

in a sense intended to impute a crime, or at least so that bystanders would understand that they were intended to impute a crime, to the plaintiff."

It is contended that by the first instruction above quoted the court placed the burden on the defendant of showing that the words were used in a peculiar sense, and that the use of the words "sufficient to show you," etc., implied a necessity for something more than a preponderance of evidence. In view of the instruction last above quoted, it is altogether clear that no such construction could have been given to this language by the jury.

We understand defendant's counsel to contend that the first quoted instruction is faulty in another respect. The contention is made that the true test in determining whether the words were actionable is how they were in fact understood by the bystanders, rather than how they would have been understood by a reasonable auditor. The authorities are not agreed upon this question. There are cases holding that the understanding of the words by the bystander cannot be given in evidence. It is clear such testimony cannot be used to aid an innuendo or enlarge the meaning of the language actually employed. There are, however, cases which hold such testimony competent in cases like the present, and some which go the length of making the actual understanding of the bystander the test of liability. We think, however, the better rule is that the language is actionable if, in the circumstances under which it is used, the hearer would reasonably understand that it was intended to impute a crime. See Newell on Slander and Libel (2d Ed.), p. 308 et seq.

In *Ellis* v. *Whitehead*, 95 Mich. 105, the trial judge appears to have made the question turn upon the understanding of the bystanders; i. e., what that understanding was in fact. The defendant brought error. It is manifest that the charge was sufficiently favorable to the defendant, and it was stated by the court that the charge was a fair presentation of the case. The precise question here involved was not presented.

In *Youngs* v. *Adams*, 113 Mich. 199, the charge stated:

"Explanatory circumstances, known to all of the parties, speakers and hearers, are to be taken into account, then, as a part of the words. * * * The test in such case is the knowledge possessed by those to whom the language is published. The question now is not what the defendant meant by the words he spoke, but what reasonable men, hearing the words, would understand them to mean."

This court, speaking through Mr. Justice HOOKER, said:

"The foregoing instruction was elaborated and applied to the question in the case, and, in our opinion, made it plain that the defendant should not be found guilty if the circumstances showed that the words ought not to have been understood in their ordinary sense. This charge follows the rule laid down in *Ellis* v. *Whitehead*, 95 Mich. 105, where a similar question was considered."

It will be seen that these cases recognize the test to be what the language employed would import to a reasonable man. The charge was not erroneous upon the ground stated.

The charge upon the subject of damages was as follows:

"He claims injury in his declaration, and I use the word, meaning to use it; that the declaration, fairly construed, would mean that he has been prejudiced and injured in his good name, fame, credit, reputation, and profession, and has been thereby and is greatly injured and hurt in his feelings. Wherefore the said plaintiff alleges that he is injured, and has sustained damages. I think the declaration sufficient for you to consider those matters. But, gentlemen, there being no evidence of any specific damages, it would be simply such damages as, in your judgment, under all the circumstances of the case, the plaintiff is entitled to recover by reason of the use of these words maliciously. If you shall say that they were used, I say intentionally, intending to impute a crime to the plaintiff, then the law will imply malice. * * * Remembering that there is no evidence here of injury at all to his property, and no claim in his declaration of injury to property."

The jury were also instructed to award separately dam-

ages on account of injury to feelings and all other damages, under 3 Comp. Laws, § 10424. The verdict was $500, $350 of which was for injury to feelings and the balance for other damages.

There was no evidence of injury to plaintiff in his profession. We feel constrained to hold that the instruction was erroneous in leaving this question to the jury. *Smedley* v. *Soule*, 125 Mich. 192; *Derham* v. *Derham*, 123 Mich. 451.

The judgment will be reversed, with costs, unless the plaintiff shall elect to remit the sum of $150 from the judgment as of its date, in which event the judgment will be affirmed, but with costs of this court to the plaintiff in error.

MOORE, C. J., and CARPENTER, OSTRANDER, and HOOKER, JJ., concurred.

---

139 490
146 214

WHITEHEAD *v.* BOARD OF EDUCATION OF DETROIT.

MUNICIPAL CORPORATIONS — GOVERNMENTAL AGENCY — BOARD OF EDUCATION—NEGLIGENCE OF EMPLOYÉS—LIABILITY.

The board of education of Detroit is a governmental agency and is not liable for the negligence of its agents in providing unsafe appliances with which a servant is directed to work.

Error to Wayne; Hosmer, J. Submitted January 19, 1905. (Docket No. 89.) Decided March 28, 1905.

Case by Harry Whitehead against the board of education of the city of Detroit for personal injuries. There was judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

Abbott & Abbott (*M. J. Lehman*, of counsel), for appellant.

P. J. M. Hally (*T. E. Tarsney*, of counsel), for appellee.

BLAIR, J. Plaintiff seeks to recover damages from defendant corporation for certain personal injuries sustained by him while employed by the said defendant in the painting of one of its school buildings. The declaration is framed upon the theory that the defendant was undertaking and performing the work in question in its corporate capacity, and under the direct supervision and control of its private agents employed by the defendant for the special work of painting and repairing all of defendant's school buildings; that the said special agents employed by the said defendant were intrusted, not only with the duty of overseeing and superintending the work, but were also authorized and relied upon to properly discharge and perform all of such duties as usually devolve upon the owner, the principal, or the master, with respect to all persons who might in any way be affected by the acts, doings, and undertakings on the part of the said defendant while engaged in the repairing and painting of said school buildings.

The duty counted upon was one which, the declaration avers, the defendant, by and through said private and special agents, owed directly to the plaintiff as an individual, and under which it became and was the duty of the defendant to furnish to plaintiff a safe place in or on which to perform his work, and to also furnish to him such tools, implements, and accommodations as would be reasonably safe for the use expected of them, and which the plaintiff would be required to make of them. In assigning the breach of said duty the declaration avers that the defendant furnished to plaintiff certain appliances and accommodations, viz., a certain "guy hook," which the said defendant, through its said agents, knew was defective, and not of sufficient strength and quality and reasonably safe

and fit for the use which plaintiff was required to make of it; that as a result of said negligence on the part of said defendant the scaffold upon which plaintiff was working gave way, precipitating plaintiff to the ground, and causing him to fall a distance of some 35 feet, whereby plaintiff sustained severe and permanent injuries.

A demurrer was interposed to the declaration, alleging that "under the facts set forth in said declaration plaintiff is not entitled to recover," assigning as the reason therefor that "there is no statute in the State of Michigan making the board of education of the city of Detroit liable for the negligence of its servants or agents," and that "in the State of Michigan municipal corporations are not liable for the negligence of their servants when in the exercise of duties in connection with the governmental capacity of the corporation, unless made so by statute."

The circuit judge sustained the demurrer, filing the following opinion:

"The board of education was engaged in purely governmental work. It was decided as long ago as *Belles* v. *Burr*, 76 Mich. 1, that the Constitution had turned all matters of education over to the legislature, and, that being so, the affairs of the board of education are as purely a State function as those of the board of health. I therefore cannot distinguish the case from the case of *Nicholson* v. *City of Detroit*, and hence feel compelled to sustain the demurrer."

From the judgment of the court sustaining the demurrer, plaintiff appeals to this court.

In the case of *Nicholson* v. *City of Detroit*, 129 Mich. 246 (56 L. R. A. 601), the plaintiff, as administratrix of one Alfred Cope, brought action against the city of Detroit to recover for the negligent causing of his death, alleging, in substance, that the city was possessed of a parcel of land upon which was an old building that had been used by defendant as a hospital for contagious diseases, particularly smallpox; that defendant began the erection of a new building designed for a similar use, and

employed the plaintiff's intestate, who was a carpenter, to work upon the same; that the new building was located in close proximity to the old one, and that said old building and the surrounding grounds were infected with smallpox germs; that plaintiff's intestate was attacked by smallpox and died from that disease. It was alleged that defendant was negligent in not using reasonable care to furnish plaintiff's intestate a safe place to work, and in not warning him against said dangers, and in not constructing the new building at a greater distance from the old one, and in not causing the old building and the grounds to be disinfected. A second count of the declaration alleged that the deceased was employed to tear down the old building, and that while so engaged he was exposed to smallpox, and by reason thereof was seized with said disease, and died, and that defendant had assured the deceased that it was safe for him to work upon and about said building. A demurrer was interposed, which, upon the hearing, was sustained. It was held by this court upon appeal that the demurrer was rightly sustained, since the city was not liable for the negligence of its officers, because it was acting in a governmental capacity.

Section 5 of an act relative to free schools of the city of Detroit (compiler's section 596, 1904 compilation of the charter of the city of Detroit) provides:

"The school inspectors * * * shall be a body corporate, to be known and distinguished by the name and style of the 'Board of Education of the City of Detroit,' and in that name may be capable of suing and being sued, and of holding and selling and conveying real and personal property as the interest of said free schools may require."

In *Attorney General, ex rel. Kies*, v. *Lowrey*, 131 Mich. 639, this court, speaking of this class of corporations, says:

"The quasi corporations are radically different. They consist of counties, townships, school districts, highway districts, etc. They are governmental agencies, and it is,

to say the least, doubtful if they are in any respect anything else, or have any rights that can be called private. They perform many functions, but these are for and about the business and policies of the State, which has imposed upon them the responsibility and expense of maintaining highways, schools, drains, bridges, etc. * * *

"The school district is a State agency. Moreover, it is of legislative creation. * * * The property of the district is in no sense private property, but it is public property devoted to the purposes of the State, for the general good, just as almshouses and court-houses are, although confided to local management, and applied to uses which are in a sense local, though in another sense general."

Applying this decision to the facts of the present case, we think the learned trial judge was correct in saying that "the affairs of the board of education are as purely a State function as those of the board of health," and that this case could not be distinguished in principle from the case of *Nicholson* v. *City of Detroit*, 129 Mich. 246 (56 L. R. A. 601), upon which he relied.

The case of *Ferris* v. *Board of Education of Detroit*, 122 Mich. 315, cited by plaintiff's counsel as requiring a different determination of the case, involved the liability of the defendant for injuries occasioned not by the negligence of its agents, but by direct act or trespass of the municipality itself. Mr. Justice LONG, speaking for the court, said:

"The trial court was of the opinion that the defendant, being a municipal corporation, could not be held liable for negligent injuries under the common law, and, there being no liability created by statute, the plaintiff could not recover. It is conceded by counsel for plaintiff that municipal corporations are not generally held liable, under the common law, for negligent injuries to individuals arising from defective plans of construction of public works or failure to keep the same in repair; but it is contended that, where the injury is the result of the direct act or trespass of the municipality, it is liable, no matter whether acting in a public or private capacity. We are satisfied that counsel for plaintiff are right in this contention. The plaintiff had the right to the exclusive use and enjoyment of his property, and the defendant had no more right to

erect a building in such a manner that the ice and snow would inevitably slide from the roof and be precipitated upon the plaintiff's premises than it would have to accumulate water upon its own premises, and then permit it to flow in a body upon his premises. It has been many times held in this court that a city has no more right to invade or cause the invasion of private property than an individual."

The case is clearly distinguishable from the case at bar, and is not at war with the conclusion reached by the trial court. We do not deem it necessary to consider the numerous authorities cited in plaintiff's brief, since we regard the question as settled by our own decisions.

The judgment is affirmed, with costs.

MCALVAY, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

---

139 495
149 398
149 399

BIALY *v.* BAY CITY.

1. TAXATION — STATE TAX COMMISSION — REVIEW OF ASSESSMENTS — CITY CHARTER.

   Act No. 154, Pub. Acts 1899, giving the board of State tax commissioners authority to make a general and also a special review of assessment rolls, is not in conflict with the provisions of the charter of Bay City.

2. SAME — POWERS OF BOARD.

   The board of State tax commissioners has the power, at any time prior to the equalization of State and county taxes, to review the assessments, and add to the rolls assessments against persons omitted therefrom, or property omitted, provided the same is done according to the provisions of the statute. Act No. 154, Pub. Acts 1899.

3. SAME — POWERS OF ASSESSING OFFICERS.

   After tax rolls have been passed upon by local boards of review, and are properly certified by the members thereof, no change can be made by the board or any assessing officer.

4. SAME — REVIEW BY STATE TAX COMMISSION — NOTICE—SUFFICIENCY.

A notice of a general and special review of the assessment rolls of certain cities and townships by the board of State tax commissioners examined, and *held*, in form and substance a compliance with the statute.

5. SAME—GENERAL AND SPECIAL REVIEW—TIME.

The fact that a hearing on a general and special review was set for the same date was not objectionable.

6. SAME—NOTICE TO TAXPAYER—NECESSITY.

A change in the amount of the personal property assessment of a taxpayer who was not named in the order was invalid.

7. SAME—CERTIFICATE OF REVIEW—SUFFICIENCY.

Where it appears from the record made by the board of State tax commissioners that a notice of a general and special review was given for the 19th of September, and the reviews were certified by the board to have occurred on September 19th and October 6th, the certification is insufficient, for uncertainty, and the changes made by the board in assessments are invalid.

Case made from Bay; Shepard, J. Submitted January, 19, 1905. (Docket No. 81.) Decided March 28, 1905.

Assumpsit by Robert C. Bialy against Bay City to recover taxes paid under protest. There was judgment for defendant, and plaintiff appeals. Reversed, and judgment entered for plaintiff.

John L. Stoddard (*E. A. Cooley* and *J. C. Hewitt*, of counsel), for appellant.

Brakie J. Orr, for appellee.

MCALVAY, J. Plaintiff sued defendant in assumpsit to recover the amount of certain personal property and real estate taxes for the year 1902 paid by him under protest, and also for real-estate taxes paid under protest by the Fraser House Company, Stoddard, and Grant for the same year, the claims for which were duly assigned to

him, amounting altogether to $3,307.62 and interest. The case was tried before the court without a jury. The facts found by the court, or so much thereof as may be necessary to print for the purposes of this case, are as follows:

The State and county tax rolls for the year 1902, for each of the 11 wards of Bay City, were introduced in evidence. Said rolls, except as changed by the State tax commissioner, as hereafter shown, are copies of the city assessment rolls for the several wards of Bay City for the year 1902, and are severally certified in accordance with the charter of Bay City, by the comptroller of said city, to be copies of the city assessment rolls of the different wards of said city for said year 1902, and show that the several assessment rolls of said city were approved and certified by the comptroller and the board of review, in accordance with the charter of Bay City, on July 29, 1902. Upon said State and county tax rolls so offered and received in evidence, the real estate of the several parties, Bialy, Stoddard, Fraser House Company, and Grant, mentioned in the bill of particulars, was assessed to them, respectively. The several rolls show, by figures found in the columns headed, "Cash Value as Fixed by the Board of State Tax Commissioners," "Real Estate," "Personal," that the value of each and every parcel of real estate assessed was increased by the board of State tax commissioners 10 per cent. over the valuations on the city rolls for that year as fixed by the board of review. The State and county tax roll for the Second ward shows that a personal assessment was made against the plaintiff of $35,000, as fixed by the board of review, which amount was increased by the State tax commissioners to $70,000. The taxes against the real estate referred to, as well as the personal taxes against the plaintiff, were computed and carried out upon the basis of the valuations and amounts of assessments as so increased by the State tax commissioners, and the amount of the taxes so personally assessed against the plaintiff, and so assessed against the several parties, the plaintiff, Stoddard, Fraser House Company, and Grant, on account of the real estate

owned by them, is correctly shown in the bill of particulars.

In the back part of said State and county tax roll for the Second ward a certificate appears, of which the following is a copy:

"CERTIFICATE OF REVIEW AND CHANGES MADE BY THE BOARD OF STATE TAX COMMISSIONERS.

"STATE OF MICHIGAN, } ss.
County of Bay. }

"This is to certify that J. C. McLaughlin and Wm. T. Dust, members of the board of State tax commissioners of the State of Michigan, acting under and by virtue of authority in them vested by sections 152 and 153, of Act No. 154, of the session laws of the State of Michigan, for the year 1899, an order having been made and notice of hearing published and given as in said section provided, did in pursuance thereof, on the 19th day of September and the 6th day of October, A. D. 1902, review the assessments made by the assessors of the city of Bay City, county of Bay, and State of Michigan, of the following persons, firms, and corporations, and of their property subject to taxation in the Second ward, in said city, and upon such review have changed the said assessments of personal property upon the roll to which this certificate is attached, and spread the same as follows, viz.:

Names of persons, firms and corporations—assessments reviewed.	Amount appearing upon the roll before review by Board of State Tax Commissioners. Personal.	Amount fixed and determined by Board of State Tax Commissioners. Personal.
Jennison Hardware Co.	$50,000	$100,000
F. W. Bradfield, Agt.	37,500	75,000
R. C. Bialy	35,000	70,000
Gustin, Cook & Buckley	25,000	30,000
Bay City Gas Co.	115,000	226,000
	$262,500	$501,000

"Signed this 10th day of October, A. D. 1902.

"J. C. MCLAUGHLIN,
"WM. T. DUST,
"Members of the Board of State Tax Commissioners."

There also appears, following the above certificate, a certificate of which the following is a copy:

"CERTIFICATE OF GENERAL REVIEW MADE BY THE BOARD OF STATE TAX COMMISSIONERS.

"STATE OF MICHIGAN, } ss.:
County of Bay. }

"This is to certify that J. C. McLaughlin and Wm. T. Dust, members of the board of State tax commissioners of the State of Michigan, acting under and by virtue of the authority vested in them, by sections 152 and 153, of Act No. 154, of the Public Acts of the State of Michigan, for the year 1899, an order having been made and notice of hearing having been published and given as in said sections provided, did in pursuance thereof on the 19th day of September and the 6th day of October, A. D. 1902, review the assessments heretofore made by the board of assessors of the city of Bay City, in the county of Bay, and the State of Michigan, of all the property upon the roll, to which this certificate is attached, and did then and there determine in accordance with law the amount at which said assessments should be made, and did then and there change the assessment made by the said board of assessors upon said roll to make it comply with law, and did then and there place upon said roll property omitted therefrom by said board of assessors, all of which changes made, and all additions made thereto by said board of tax commissioners appear upon said roll, and are spread thereon as shown by the amount and figures in the columns of said roll marked 'True and lawful assessments as determined by the board of State tax commissioners,' and opposite the respective names of persons, firms, and corporations appearing on said roll and so assessed for said amount (reference being hereby made to said roll to which this certificate is attached) and as also shown by the recapitulations of said roll on page 40 thereof, and that the aggregate value of the real estate of the Second ward of said Bay City as found by them is $1,746,800, and that the aggregate value of the personal property of the Second ward of said city of Bay City as assessed is, $1,375,271, and that the total aggregate value of the assessable real estate of the whole of said city of Bay City as found by them is, $9,186,570, and that the total aggregate value of the assessable personal property of the whole of said city of Bay City as assessed is, $3,531,149, and that the total aggre-

gate value of the assessable property of the whole of said city of Bay City as shown by above is $12,717,719.

"Dated this 10th day of October, A. D. 1902.

"J. C. MCLAUGHLIN,
"WM. T. DUST,
"Members of the Board of State Tax Commissioners."

A certificate similar in form to the one above mentioned appears in the latter part of the rolls for each of the other wards of said city.

Said findings of fact further show: That plaintiff and his assignors, Fraser House Company, Stoddard, and Grant, paid the taxes in dispute at the times and in the amounts stated in the bill of particulars, and the written protests were filed with the treasurer when payment was made; also the assignments of the said claims to plaintiff. That applications for allowance of these claims were made in due form to the common council of Bay City, and payment refused. That plaintiff resides in Bay City, lives six blocks from court-house, and knows all officers of Bay City. He received no notice in 1902 (unless chargeable with constructive notice by reason of notice published) that State board of tax commissioners would review his assessment, and had no knowledge that such review was contemplated. First learned of their action last of November or first of December, 1902. That he furnished statement as required, in full of all his taxable property, showing assets and liabilities. The total of all personal property other than that not in dispute here did not exceed $30,000. Stoddard, McEwan, for Fraser House Company, and Hewitt, for Grant, testified practically same as plaintiff as to notice, knowledge of board meeting and review, and none of these parties had any notice, unless chargeable with constructive notice of the published notice. Bay City Tribune is a daily paper published in Bay City, and on Friday, September 12, 1902, the notice hereinafter mentioned was published. This was the only notice ever published, and no other notice than this was ever given to any of the parties interested in this suit. The following is a copy of the notice so published:

"MICHIGAN BOARD OF STATE TAX COMMISSIONERS—ORDER FOR GENERAL AND SPECIAL REVIEW.

" *Whereas*, the assessment rolls for the cities of Bay City and West Bay City, and for the townships [naming them] in the county of Bay and the State of Michigan, for the year 1902, have heretofore been made by the several assessing officers of said cities and townships and reviewed by the regularly constituted boards of review of said cities and townships, and

" *Whereas*, said assessment rolls are now subject to inspection and review by the board of State tax commissioners, or by any member thereof, and

" *Whereas*, it has been made to appear and does appear to said board that the assessment rolls of the said cities of Bay City and West Bay City and of the townships [naming them] are so grossly irregular, and that property is so unlawfully assessed thereon that adequate compliance with law cannot be secured except by a general review of said assessment rolls, and that property subject to assessment and taxation in the city of Bay City and belonging to [naming certain individuals and corporations] and divers other properties, individual and general, of said city of Bay City, have been omitted from said assessment rolls or not assessed in compliance with law. Also

"That property subject to assessment and taxation in the city of West Bay City and belonging to [naming certain persons] and divers other properties, individual and general, of said city of West Bay City, have been omitted from said assessment roll or not assessed in compliance with law. Also

* * * [A similar paragraph as to each township being included in said notice, naming individuals in four of them.]

" *Therefore ordered*, That the assessment rolls of said cities of Bay City, West Bay City and of the townships [naming them] shall be subject to general and special review and that [naming them] the respective assessing officers of said cities and townships, whose assessment or failure to assess are complained of, be required to appear at the office of the board of supervisors in the city of Bay City on Friday the 19th day of September, A. D. 1902, at two o'clock in the afternoon, and have with them at the said time and place the assessment rolls of their respective cities and townships for the year 1902: At which time and place said assessment rolls shall be subject to general

and special review, and that all persons interested in said assessments may be heard, and that the assessments and omitted assessments of the persons and property above mentioned be then and there examined and considered by the board of State tax commissioners, or by some members thereof, and such action taken as will correct the irregularities complained of, if found to exist; this order and notice being published and given in compliance with law.

"Witness our hands and seals this 30th day of July, A. D. 1902.

"A. F. FREEMAN,
"WM. T. DUST,
"MANVILLE JENKS,
"J. C. MCLAUGHLIN,
"IRA T. SAYRE,
"Board of State Tax Commissioners."

For some time prior to and after the publication of said notice, said plaintiff, Stoddard, McEwan, and Hewitt were subscribers to, and daily readers of, said Bay City Tribune, but neither of them saw said notice.

The amount of the several taxes for State and county purposes hereinbefore referred to, had the same been computed, based, and carried out upon the valuations and assessments as fixed and determined by the board of review, and before the action of the State tax commission, and the amount of such taxes as computed and based upon valuations established by the State tax commissioners, and paid by the several parties, are shown by the following statement (the first column being the amount based upon the assessment as established by the board of review, and the second column the amount upon the valuations as increased and established by the board of State tax commissioners and paid by the parties):

Bialy, personal tax	$241 43	$482 87
Bialy, real estate	285 72	314 30
Stoddard, real estate tax	127 76	140 43
Fraser House Co., real estate tax	258 64	284 50
Grant, real estate tax	1,895 93	2,085 52

CONCLUSIONS OF LAW.

Thereupon the facts so found and established upon said trial were duly considered by the court, and, as conclusions of law, the court did then find and determine:

1. That the action of the State Tax Commissioners in increasing the personal assessment of the plaintiff, Bialy, was legal and valid.
2. That the action of the State Tax Commissioners in increasing the valuation of real estate 10 per cent. was legal and valid.
3. That the personal taxes ($482.87) assessed against the plaintiff, Bialy, upon an assessment of $70,000, is legal and valid.
4. That the real estate taxes assessed upon the real estate mentioned in the foregoing statement of facts, and paid by the several parties, Bialy, Stoddard, Fraser House Company, and Grant, were legally assessed.
5. That the plaintiff is not entitled to recover either the whole or any portion of the taxes, personal or real, assessed and paid as shown in said statement of facts.
6. That the defendant is entitled to judgment.

And counsel for plaintiff did then and there duly except severally to each of the said conclusions of law. Thereupon the court, notwithstanding the objections and exceptions taken by counsel for plaintiff, on, to wit, the 2d day of June, A. D. 1904, rendered and entered judgment in said cause against the plaintiff and in favor of the defendant for its (the defendant's) costs in the case to be taxed.

Error is assigned to each of the six foregoing conclusions of law, and also:

"*Seventh.* The court erred, in that it did not render and enter judgment upon the facts found in favor of the plaintiff and against the defendant for the full amount of the personal taxes paid by Bialy, and the real-estate taxes paid by Bialy, Stoddard, Fraser House Company, and Grant, with interest from the dates of payment, * * * or for the excess of the personal and real-estate taxes paid by them by reason of the increase in the assessments and valuations by the State tax commissioners, with interest thereon from the dates of payment."

The plaintiff contends that the facts found do not warrant the conclusions of law. He insists that the board of State tax commissioners had no authority to review the rolls in question and increase the individual assessments. This contention is based upon the claim that the provisions of the tax law (Act No. 154, Pub. Acts 1899) are inconsistent with the charter of Bay City, and consequently, under section 107 (Act No. 206, Pub. Acts 1893) of the law, not applicable.

In the case of *Board of State Tax Com'rs* v. *Board of Assessors of Grand Rapids*, 124 Mich. 498, where practically the same charter provisions were under consideration, this court held that "the provisions of the amendatory act are not so far inconsistent with the city charter as to render them wholly inapplicable," and that, "although apportionment of taxes among the wards could not be affected by a change in the assessment, the rolls may be corrected as to individual taxpayers, and no injustice be done to them thereby."

In Grand Rapids, where this case arose, there was a charter provision as to two tax rolls—one for the city and the other for the State and county taxes: The latter a copy of the former, as is the case in Bay City. That case disposes of this question against plaintiff's contention, and decides that the board of State tax commissioners has the power, under this law, at any time prior to the equalization and apportionment of State and county taxes, to review the assessments and add to the rolls assessments against persons omitted therefrom, or property omitted, provided the same is done according to the provisions of the statute.

Plaintiff contends that the board cannot confiscate a taxpayer's property without notice and without a hearing. It is well settled that after tax rolls have been passed upon by local boards of review, and are properly certified by the members thereof, no change can be made by said board or any assessing officer. In the amendatory act under consideration, by sections 152 and 153 authority is given

to the State board of tax commissioners to review and examine tax rolls after the final review of the local board. These sections provide for two kinds of review—special and general. In this case the State board of tax commissioners on July 30, 1902, made the order heretofore referred to in the finding of facts, entitled, "Michigan Board of State Tax Commissioners—Order for General and Special Review." This order was intended to cover the requirements of sections 152 and 153 as to a special review of the assessments of the persons therein specially mentioned, in certain townships and wards, and as to a general review of all the assessments of all the townships and wards in Bay county; the date fixed for said review being September 19, 1902. In our opinion, this notice, in substance and form, complied with the requirements of these sections of the law, and the fact that the hearing of both reviews was set for this date is not objectionable. These sections also require a notice of the time and place of hearing upon such orders to be given by publication in some newspaper published at the county seat. Such required publication was duly made by one publication in the Bay City Tribune, published at the county seat of Bay county. This is admitted to be the only notice given to any of the parties whose taxes are in dispute in this case. Neither the plaintiff nor any of his assignors were named in the order as persons whose assessments were to be specially reviewed. Plaintiff was already assessed in the Second ward of Bay City $35,000 upon personal property; having furnished to the assessing officer the required statement, under oath, showing his personal property, bank stock, etc., upon which taxes were paid, about which there was no dispute, and which does not enter into consideration in this suit. On October 10, 1902, the commissioners, as required by sections 152 and 153, after the hearings, made and attached to the tax roll of the Second ward of Bay City two certificates, which appear in the finding of facts. The first entitled, "Certificate of Review and Changes made by the Board of State Tax Com-

missioners," in which it is certified that, in pursuance to notice, they did on September 19 and October 6, 1902, review the assessments made by the assessors "of the following persons, firms, and corporations, and of their property subject to taxation in the Second ward" of Bay City, "and upon such review have changed the assessments of personal property upon the roll to which the certificate is attached, and spread the same as follows." Among those in this list is the name of the plaintiff, changed from $35,000 to $70,000, as appears from said certificate hereinbefore set forth. The assessment of the plaintiff in this certificate is treated in the same manner as the assessments of those who were given notice by the publication. The second certificate referred to is entitled "Certificate of General Review Made by the Board of State Tax Commissioners," and is, in terms, a general review of the property upon the roll. It is therefore clear that the tax commissioners did make a special and general review of this roll in question, as appears from the published notice and the certificates they attached to the roll.

In *Board of State Tax Com'rs* v. *Quinn*, 125 Mich., at page 130, this court, in construing sections 152 and 153, says:

"It seems to have been contemplated that the board should review the assessments of individuals. Hence section 152 provides for notice to persons whose assessments are questioned, and an opportunity for them to be heard. The board establishes the valuation, and its action is made final. * * * It is done by the board, and is called a 'change' and a 'correction' of the roll. Not only may the board deal with individual assessments, but, when a general review is required, it may be made. This is especially provided for, and indicates that what precedes it with reference to individual assessments was not supposed to cover a general review."

The notice above referred to by the court, provided by section 152, as already stated, was not given to plaintiff in this case, and consequently the "change" in his per-

sonal property assessment from $35,000 to $70,000 was irregular and void.

Plaintiff owned real estate assessed upon the roll, the valuation of which, together with the valuation of the real estate of his assignors and all real estate in Bay City, was raised 10 per cent. by the State board upon the general review of the rolls. It is contended that the record shows that this review was had on the 19th day of September and the 6th day of October, 1902, and that the notice provided for a hearing September 19, 1902. This raises the question whether, from the notice and certificates, there is a presumption that the meeting and action of the board on October 6th was regular. Section 153 provides for a notice by publication of a hearing for a general review of a tax roll, specifying what the board may do, and that "said board or member * * * shall proceed in all respects as provided in the last preceding section." This refers to section 152, which provides:

"In case of review under the provisions of this section the said board or the member thereof acting in said review shall certify under his hand officially and spread upon said roll a certificate of the day and date at which said assessment roll was reviewed by him."

This is the only statutory provision for the official certification of the reviews of said board. It is admitted that the notice published and hereinbefore referred to is the only notice ever given of this review. This notice was for the meeting of September 19th. We cannot presume that the review certified to have occurred on October 6th was under the notice for September 19th. The record made by the board does not warrant such presumption. A general or special review held without the required statutory notice is irregular and void. The reviews are certified to have occurred on September 19 and October 6, 1902. There appears from the record made by the board to have been a notice given of the review of September 19th, but no notice of that of October 6th. The certificates do not disclose which assessments were reviewed on the first date, when,

as shown by the record, a lawful review could have been made. The certification is not sufficient, by reason of uncertainty. The review was not made according to the provisions of the statute. We therefore hold that the conclusions of the circuit court were erroneous, in holding that the increased personal property assessment of plaintiff was valid, and that the increased valuation of the real estate was valid. These taxes are invalid only as to the amount of the excess of the real and personal taxes by reason of the increase in the assessments and valuations by the State tax commissioners over the original assessments. There is no question raised as to the legality of the assessments on these rolls before the action of the State board. The amount of taxes wrongfully assessed against plaintiff and his assignors is determined without difficulty.

The judgment of the court below is reversed, and a judgment entered in this court in favor of the plaintiff for the amount of the increase under the assessments fixed by the board of State tax commissioners, paid by plaintiff under protest, with interest from date of payment, being the sum of $577.01.

GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

PLACE *v.* PLACE.

139 509
156 561

1. LIMITATION OF ACTIONS — INTERRUPTION — SUFFICIENCY — ADVERSE POSSESSION.
   Under section 9721, 3 Comp. Laws, mere disturbance of the possession of one claiming land is not sufficient to interrupt the running of limitations once begun.

2. ESTOPPEL—PLEADINGS.
   The fact that defendant filed a petition for alimony, in which she stated that plaintiff owned the land in controversy, does not estop her from asserting title to such property, where the alimony was not granted.

3. TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.
   An instruction on the credibility of a party as a witness which improperly assumes that he was guilty of perjury in a prior suit is reversible error.

4. SAME—HARMLESS ERROR.
   A judgment will not be reversed for error which would have been corrected at the time but for appellant's failure to call the court's attention to it.

Error to Oceana; Russell, J. Submitted February 8, 1905. (Docket No. 108.) Decided March 28, 1905.

Ejectment by Hiram B. Place against Elizabeth Moe Place. There was judgment for defendant, and plaintiff brings error. Reversed.

Hartwick & Skeels, for appellant.

W. D. Fuller, for appellee.

CARPENTER, J. The parties to this suit were formerly husband and wife. September 26, 1887, plaintiff obtained a divorce from defendant on the ground of desertion. Prior to 1885 the property in controversy was occupied by these parties as their homestead. Since that time defendant has resided thereon, and plaintiff has resided else-

where. The legal title is in plaintiff, and on the 21st day of July, 1903, he commenced this suit in ejectment to recover possession. Defendant claims to have acquired title by adverse possession. Whether she had so acquired title constitutes the sole issue in this case.

Plaintiff contends that there was no testimony warranting the finding of an adverse holding. He insists that according to the testimony the adverse holding did not commence to run until October, 1888 (less than 15 years before the commencement of suit), and that thereafter defendant acquiesced in plaintiff's claim of the right to control the property. Defendant's testimony warranted the jury in finding that the adverse holding commenced more than 15 years before the commencement of suit, viz., in October, 1887. She testifies that at that time plaintiff gave her the property, and that thereafter she has claimed the place as her own, and exercised full control over it. While it appears that during these 15 years plaintiff exercised rights of ownership over portions of the property, it is none the less true that, if defendant's testimony is credited, she never acquiesced in any of these acts. If she did not, these disturbances of her possession would not interrupt the running of the statute of limitations. See section 9721, 3 Comp. Laws, which reads:

"No person shall be deemed to have been in possession of any lands, within the meaning of this chapter, merely by reason of having made an entry thereon, unless he shall have continued in open and peaceable possession of the premises for at least one year * * * or unless an action shall be commenced upon such entry and seizin, within one year after he shall be ousted or dispossessed of the premises."

See *Donovan* v. *Bissell*, 53 Mich. 464. This section not only answers the complaint under present consideration, but it affords a complete answer to many other assignments of error discussed in plaintiff's brief. We conclude, therefore, that there was evidence which justified the finding of an adverse possession.

In 1896 defendant filed a petition for alimony in the divorce proceedings, in which she stated that plaintiff owned the property in controversy. No alimony was granted on this petition, and therefore the trial court very properly refused to charge the jury, as requested by plaintiff, that this statement estopped defendant from asserting title.

In charging the jury, the court said:

"In order to obtain a divorce on the grounds of desertion, complainant must show that defendant left him and refused to live with him for fully two years," and that he gave this instruction as bearing upon the question "as to whether this plaintiff at the time of that suit was guilty of the crime of perjury;" that "* * * you might take that fact into consideration as bearing upon the credit that might be given or should be given by you to his testimony in this case."

In giving this charge the trial court assumed that the plaintiff testified in his divorce case that defendant *left* him. There is nothing to show that he so testified, and this assumption is unfounded unless plaintiff could not get his divorce without so testifying. I think he could get his divorce without so testifying. Defendant could desert plaintiff without leaving the matrimonial home. See *Warner* v. *Warner*, 54 Mich. 494. If plaintiff testified, as he swore he did, that defendant had not lived or cohabited with him for two years and six months, and if it also appeared, as consistently with this record it might, that defendant wrongfully refused to live with plaintiff as his wife, and insisted on his leaving her, a decree of divorce on the ground of desertion might have been granted. See 1 Bishop's Mar. Div. & Sep. § 1711; *Daeters* v. *Daeters* (N. J. Ch.), 38 Atl. 950; *Harding* v. *Harding*, 22 Md. 337; *Kinsey* v. *Kinsey*, 37 Ala. 393; *Shrock* v. *Shrock*, 67 Ky. 682; *Warner* v. *Warner*, supra. There is therefore no testimony in the record tending to prove that plaintiff committed perjury in the divorce suit. The charge in question was prejudicial, for much depended

upon the credibility which the jury might attach to defendant's testimony.

The trial court, in narrating defendant's testimony to the jury, misstated it, to plaintiff's prejudice. We do not refer to this as reversible error, for, according to proper practice, plaintiff should have corrected it at the time. See *Smith* v. *McDonald*, ante, 225. It is merely mentioned to guard against a similar mistake on a new trial.

We do not think that for the purposes of a new trial any other complaint demands discussion.

Judgment reversed, and a new trial granted.

MOORE, C. J., and MCALVAY, GRANT, and BLAIR, JJ., concurred.

STRONG *v.* WEBER.

APPEAL AND ERROR—QUESTIONS CONSIDERED—WAIVER OF ERROR.

Where, on error by defendant in an action for negligence, the only error assigned is refusal to direct a verdict for defendant for failure of proof as to his negligence, and defendant states that a new trial is not desired, and if reversal accompanied by denial of another trial could not be had, the error would be waived, and the evidence does not affirmatively and conclusively show absence of negligence, and plaintiff might produce, if attainable, other evidence of negligence without bad faith, the error will be treated as waived and the judgment affirmed.

Error to Bay; Shepard, J. Submitted February 9, 1905. (Docket No. 117.) Decided March 28, 1905.

Case by Arthur Strong against Henry Weber for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Simonson, Gillett & Clark, for appellant.

Pierce & Kinnane (*De Vere Hall*, of counsel), for appellee.

HOOKER, J. The defendant has appealed from a verdict and judgment for $610 for injuries received from the fall of a truss that had been raised and was being secured in position upon the walls of a building in process of erection. The plaintiff was a carpenter in the defendant's employ. The only error alleged is that the court refused to direct a verdict for the defendant. Upon the oral argument we understood counsel for the defendant to say that a new trial was not desired, and that, if a reversal of the judgment could not be accompanied by the denial of another trial, he would waive the claim of error. We see no impropriety in this suggestion, and have examined the case with it in mind. We think that there is much force in the claim that no actionable negligence is shown upon this record. While this is true, the evidence does not affirmatively and conclusively show that this fall of the truss was not the result of negligence. Upon this record, if the merits were to be left to us, we should say that it is probable that no blame should attach to any one. The reason for our saying it is the absence of a satisfactory explanation of the cause of the fall of the truss. The parties and all witnesses seem unable to tell the cause. The plaintiff's testimony is not so inconsistent with the negligent cause to make bad faith necessary upon his part to show additional facts proving such negligence, as has usually been the case where we have denied new trials upon reversal. If there is evidence of such attainable, he should not be denied the benefit of it. If we should conclude that there was error in the course taken upon the trial, we should feel it a right of the plaintiff to have a retrial of the cause.

We therefore treat the alleged error as waived, and the judgment is affirmed.

MOORE, C. J., and CARPENTER, MCALVAY, and GRANT, JJ., concurred.

CITY OF BATTLE CREEK *v.* HAAK.

1. ASSUMPSIT—WAIVER OF TORT—STATUTE—VALIDITY.

   Section 10421, 3 Comp. Laws, providing that, where an injury is occasioned by fraudulent representations or conduct for which an action on the case for fraud may be brought, an action of assumpsit may be brought to recover the damages, is not unconstitutional.

2. TRIAL—INSTRUCTIONS—STATING ISSUES.

   Where there was no occasion for reference to the several counts of the declaration in the charge, and the issues were fairly presented without such reference, there was no error in overruling a request to charge that no recovery could be had on a particular count to which a demurrer had been sustained.

3. PLEADING—DEMURRER—WAIVER.

   Pleading issuably to a count of a declaration after the sustaining of a demurrer thereto waives the question raised by the demurrer.

4. BILLS OF PARTICULARS—AMENDMENT.

   The allowance of an amendment of a bill of particulars is discretionary.

5. FRAUD—OVERCHARGES—INSTRUCTIONS.

   Where, in an action for fraud, it appeared that defendant had been furnishing lumber for the repair of plaintiff's bridges and systematically raising the bills therefor, and an estimate of the overcharges could be arrived at only by subtracting from the aggregate of payments the aggregate of new lumber visible in the various structures, defendant was not entitled to an instruction that plaintiff was entitled to recover only the overpayment shown on each separate bill.

6. SAME—INSTRUCTIONS—WEIGHT OF EVIDENCE.

   On an issue as to whether certain frauds had been perpetrated on plaintiff by defendant, an instruction that, if the jury believed the testimony of a certain witness, and believed the frauds to have been perpetrated, plaintiff was entitled to recover, was not erroneous as permitting a recovery on the testimony of such witness alone.

7. MISCONDUCT OF JURY—AFFIDAVITS OF JURORS.
Affidavits of jurors will not be received to prove misconduct of the jury.

8. DELIBERATIONS OF JURY—GENERAL AVERAGE.
That the jury ascertained the average of their views as to the amount of damages will not invalidate their verdict where there was no previous agreement to abide the result.

9. VERDICT—AMOUNT—COMPUTATION—DEFINITENESS.
Where the verdict rendered was not in excess of the aggregate of the items of the bill of particulars, it was not objectionable on the ground that there was no tangible evidence as to any definite amount having been overcharged, and that it could not have been reached by any proper method of computation.

Error to Calhoun; Winsor, J. Submitted February 14, 1905. (Docket No. 150.) Decided March 28, 1904.

Assumpsit by the city of Battle Creek against Harry K. Haak to recover money obtained by fraud and deceit. There was judgment for plaintiff, and defendant brings error. Affirmed.

J. M. & J. L. Powers, *L. B. Tompkins*, and *Frank W. Clapp*, for appellant.

O. Scott Clark (*Arthur B. Williams*, of counsel), for appellee:

Where the jury reach their verdict by adding together the amount of damages that each juror is willing to award, and dividing the sum by 12, such conduct is not ground for new trial, in the absence of a showing that the jury acted corruptly, or that they previously agreed to adhere to the result. *Chandler* v. *Barker*, 2 Har. (Del.) 387; *Heath* v. *Conway*, 1 Bibb. (Ky.) 398; *Grinnell* v. *Phillips*, 1 Mass. 530; *Dorr* v. *Fenno*, 12 Pick. (Mass.) 521; *Village of Ponca* v. *Crawford*, 23 Neb. 662; *Cowperthwaite* v. *Jones*, 2 Dall. (U. S.) 55; *Harvey* v. *Jones*, 3 Humph. (Tenn.) 157; *Tinkle* v. *Dunivant*, 84 Tenn. 503; *Fowler* v. *Colton*, 1 Pin. (Wis.) 331; *Stanley* v. *Stanley*, 32 Wash. 489; *Watson* v. *Reed*, 15 Wash. 440; *Illinois Cent. R. Co.* v. *Able*, 59 Ill. 131; *City of Pekin* v. *Winkel*, 77 Ill. 56; *Barton* v. *Holmes*, 16 Iowa, 252;

Dana v. *Tucker*, 4 Johns. (N. Y.) 487; *Dunn* v. *Hall*, 8 Blackf. (Ind.) 32; *Wilson* v. *Berryman*, 5 Cal. 44; *Schoolfield* v. *Brunton*, 20 Colo. 139; *Hoover* v. *Town of Mapleton*, 110 Iowa, 571; *Empson Packing Co.* v. *Vaughn*, 27 Colo. 66; *City of Colorado Springs* v. *Duff*, 15 Colo. App. 437; *Jobe's Adm'r* v. *Weaver*, 77 Mo. App. 665; *Johnson* v. *Perry*, 2 Humph. (Tenn.) 569; *McDonnell* v. *Stage Co.*, 120 Cal. 476; *Cleland* v. *Borough of Carlisle*, 186 Pa. St. 110; *Moore* v. *Railway Co.*, 100 Mo. App. 665; *Owen* v. *Christensen*, 106 Iowa, 394; *Consolidated Ice Machine Co.* v. *Trenton Hygeian Ice Co.*, 57 Fed. 898; *Turner* v. *Water Co.*, 25 Cal. 397; *Guard* v. *Risk*, 11 Ind. 156; *Hamilton* v. *Railroad Co.*, 36 Iowa, 31; *Deppe* v. *Railroad Co.*, 38 Iowa, 592; *Sullens* v. *Railway Co.*, 74 Iowa, 659; *Bailey* v. *Beck*, 21 Kan. 462; *St. Martin* v. *Desnoyer*, 1 Minn. 156; *Cortelyou* v. *McCarthy*, 37 Neb. 742; *Dodge* v. *Carroll*, 59 N. H. 237; *Conklin* v. *Hill*, 2 How. Prac. (N. Y.) 6; *Moses* v. *Railroad Co.*, 23 N. Y. Supp. 23; *Forbes* v. *Howard*, 4 R. I. 364; *Luft* v. *Lingane*, 17 R. I. 420; *Handley* v. *Leigh*, 8 Tex. 129; *Lee* v. *Clute*, 10 Nev. 149; *Johnson* v. *Railway Co.*, 46 Fed. 347; *Orange Belt R. Co.* v. *Craver*, 32 Fla. 28; *City of Kinsley* v. *Morse*, 40 Kan. 588; *Birchard* v. *Booth*, 4 Wis. 67.

The verdict should not be set aside even if there may be some evidence of improper practice upon the part of the jury, as long as the preponderance of evidence before the court is to the effect that no improper methods were employed. *Parshall* v. *Railway Co.*, 35 Fed. 649; *McNamara* v. *Dratt*, 40 Iowa, 413; *Fulliam* v. *City of Muscatine*, 70 Iowa, 436.

Affidavits or evidence of the jurors cannot be used to impeach their verdict or to show misconduct in the jury-room or improper methods used in arriving at their verdict. *Wixom* v. *Bixby*, 127 Mich. 479–486; *In re Merriman's Appeal*, 108 Mich. 454–462; *Murphy* v. *Murphy*, 1 S. Dak. 316 (9 L. R. A. 820, and note); also note to *Houk* v. *Allen*, 11 L. R. A. 706 (126 Ind. 568); 14 Enc. Pl. & Prac. 905; *Stull* v. *Stull*, 197 Pa. St. 243; *Hannum* v. *Inhabitants of Belchertown*, 19 Pick. (Mass.) 311–313; *Ladd* v. *Wilson*, 1 Cranch (U. S.), 305; *State* v. *Freeman*, 5 Conn. 348; *Haight* v. *Turner*, 21 Conn. 593; *Martin* v. *Ehrenfels*, 24 Ill. 187; *Allison* v. *People*, 45 Ill. 37; *Palmer* v. *People*, 138 Ill. 356; *Sanitary Dist. of Chicago* v. *Cullerton*, 147 Ill. 385;

Taylor v. *Giger*, Hardin (Ky.), 595; *Steele's Heirs* v. *Logan*, 3 A. K. Marsh. (Ky.) 394; *Campbell* v. *Miller*, 6 Mart. (La.) 623; *Cire* v. *Rightor*, 11 La. 140; *State* v. *Millican*, 15 La. Ann. 557; *Duhon* v. *Landry*, Id. 591; *Godfrey* v. *Soniat*, 33 La. Ann. 915; *Shepherd* v. *Inhabitants of Camden*, 82 Me. 535; *Cook* v. *Castner*, 9 Cush. (Mass.) 266; *Boston, etc., R. Corp.* v. *Dana*, 1 Gray (Mass.), 83; *Chadbourn* v. *Franklin*, 5 Gray (Mass.), 312; *Rowe* v. *Canney*, 139 Mass. 41; *Pratte* v. *Coffman*, 33 Mo. 71; *Sawyer* v. *Railroad Co.*, 37 Mo. 240; *Brewster* v. *Thompson*, 1 N. J. Law, 32; *Randall* v. *Grover*, Id. 151; *Dana* v. *Tucker*, 4 Johns. (N. Y.) 487; *Clum* v. *Smith*, 5 Hill (N. Y.), 560; *Taylor* v. *Everett*, 2 How. Prac. (N. Y.) 23; *Hulet* v. *Barnett*, 10 Ohio, 459; *Willing* v. *Swasey*, 1 Browne (Pa.), 123; *Cluggage's Lessee* v. *Swan*, 4 Bin. (Pa.) 150; *White* v. *White*, 5 Rawle (Pa.), 61; *Smith* v. *Culbertson*, 9 Rich. Law (S. C.), 106; *Mason* v. *Russell's Heirs*, 1 Tex. 721; *Burns* v. *Paine*, 8 Tex. 159; *Cheney* v. *Holgate*, Brayt. (Vt.) 171; *Cochran* v. *Street*, 1 Wash. (Va.) 79; *Amsby* v. *Dickhouse*, 4 Cal. 102; *Castro* v. *Gill*, 5 Cal. 40; *Rutland* v. *Hathorn*, 36 Ga. 380; *O'Barr* v. *Alexander*, 37 Ga. 195; *City Council of Augusta* v. *Hudson*, 94 Ga. 135; *Jacobs* v. *Dooley*, 1 Idaho, 41; *Reed* v. *Thompson*, 88 Ill. 245; *Cummins* v. *Crawford*, Id. 312; *Niccolls* v. *Foster*, 89 Ill. 386; *Lechleiter* v. *Broehl*, 17 Bradw. (Ill. App.) 490; *Barlow* v. *State*, 2 Blackf. (Ind.) 114; *Dunn* v. *Hall*, 8 Blackf. (Ind.) 32; *Bennett* v. *State*, 3 Ind. 167; *Conner* v. *Winton*, 8 Ind. 315; *McCray* v. *Stewart*, 16 Ind. 377; *Haun* v. *Wilson*, 28 Ind. 296; *Stanley* v. *Sutherland*, 54 Ind. 339; *Abel* v. *Kennedy*, 3 G. Greene (Iowa), 47; *Butt* v. *Tuthill*, 10 Iowa, 585; *Bradt* v. *Rommel*, 26 Minn. 505; *McCormick* v. *City of Monroe*, 64 Mo. App. 197; *Dodge* v. *Carroll*, 59 N. H. 237; *Lindauer* v. *Teeter*, 41 N. J. Law, 255; *Messenger* v. *Fourth Nat. Bank*, 48 How. Prac. (N. Y.) 542; *Williams* v. *Montgomery*, 60 N. Y. 648; *Gale* v. *Railroad Co.*, 53 How. Prac. (N. Y.) 385; *Moore* v. *Railroad Co.*, 24 Abb. New Cas. (N. Y.) 77; *Lafoon* v. *Shearin*, 95 N. C. 391; *In re Snyder's Estate*, Wilcox (Pa. Lack. Co.), 190; *Gurley* v. *Clarkson*, 30 S. W. (Tex. Civ. App.) 360; *Haley* v. *Cusenbary*, 30 S. W. (Tex. Civ. App.) 587; *Downer* v. *Baxter*, 30 Vt. 467; *Bull* v. *Commonwealth*, 14 Grat. (Va.) 613; *Howard* v. *McCall*, 21 Grat. (Va.) 205; *Moses* v. *Cromwell*, 78 Va.

671; *Elam* v. *Commercial Bank*, 86 Va. 92; *Phillips* v. *Town of Scales Mound*, 195 Ill. 353; *Schwamb Lumber Co.* v. *Schaar*, 94 Ill. App. 544; *Illinois Cent. R. Co.* v. *Souders*, 79 Ill. App. 41; *Clay* v. *City Council of Montgomery*, 102 Ala. 297; *Leighton* v. *Sargent*, 31 N. H. 119; *Walker* v. *Kennison*, 34 N. H. 257; *Tucker* v. *Town Council of South Kingstown*, 5 R. I. 558; *Luft* v. *Lingane*, 17 R. I. 420; *Robbins* v. *Windover*, 2 Tyler (Vt.), 11; *Studley* v. *Hall*, 22 Me. 198; *Pleasants* v. *Heard*, 15 Ark. 403; *Croasdale* v. *Tantum*, 6 Houst. (Del.) 218; *St. Clair* v. *Railway Co.*, 29 Mo. App. 76; *Clark* v. *Manchester*, 64 N. H. 471; *Moses* v. *Railroad Co.*, 23 N. Y. Supp. 23; *International, etc., R. Co.* v. *Gordon*, 72 Tex. 44; *Chesapeake, etc., R. Co.* v. *Patton*, 9 W. Va. 648; *Rumford Chemical Works* v. *Finnie*, 2 Flip. (U. S.) 459; *Janes* v. *Hoehn*, 3 Ohio C. C. 433; *Montgomery St. Ry.* v. *Mason*, 133 Ala. 508; *Ward* v. *Blackwood*, 48 Ark. 396; *Philips* v. *Stewart*, 69 Mo. 149; *Carpenter* v. *Willey*, 65 Vt. 168; *Marvin* v. *Yates*, 26 Wash. 50; *Kunkel* v. *Hughes*, 6 Pa. Dist. R. 356; *St. Martin* v. *Desnoyer*, 1 Minn. 156.

HOOKER, J. The defendant was an alderman of the city of Battle Creek, and as chairman of the bridge committee had charge of the repairing of some of its walks, bridges, etc., for which he furnished the materials, bills being filed, and allowed by the council from time to time, and afterwards paid. Suspicions of the honesty of the defendant having arisen, some members of the council made investigation of the items for which bills had been rendered by the defendant, and this led to the bringing of this action to recover from him a large sum, claimed to have been paid for fraudulent items. A trial resulted in a verdict for $1,750 in favor of the city. The defendant has brought the cause to this court by writ of error.

There are nearly 200 assignments of error, but counsel have grouped them for the purpose of discussion, and marginal notes of exceptions in the record (a practice to be commended) have made reference to them easy. Many of these exceptions can properly be omitted from the discussion, as they raise no substantial points or questions of

interest to the profession. A statement of the facts essential to an understanding of the respective questions can best be made in connection with their discussion. The testimony tended to show that one Toole, who was bookkeeper for the defendant from March, 1900, to August, 1901, made most, if not all, of the bills in question; that a bill for the lumber for a bridge called the "Angell Street Bridge" was for one wagon load more lumber than was furnished; that it occurred by mistake, and that Haak's attention was called to it, and he said he intended to make it right at the next meeting of the council. On the occasion of a subsequent talk about this he said that he had intended to make it right, but the members did not notice it, so he let it go. This was in August, 1900. He stated further that all bills were made out from the defendant's books by him (Toole), and that sometimes an excessive amount was entered in the books, and at other times the bills were made for more than the books showed; that this was done systematically, and in different ways—sometimes by increasing the number of pieces of lumber, and sometimes by mistakes in computation. He stated that these things were done by defendant's instructions, and included all bills made after the Angell street bill was paid. The witness was unable to state the amounts. He testified further that after defendant's fraud was discovered he produced a new set of books, which he told Toole to open, and copy some items from the old ones; that Haak stated to him in that connection that his counsel had advised this, so that the discrepancy between the books and the bills could not be shown. Toole did not finish this work. He testified that he concluded that he could not "copy the books and do as he [Haak] wanted him to," so left his employment, and disclosed the situation to his uncle, one Patrick Hart, "including what he had done to assist in swindling the city," and afterwards went to the law office of Hulbert & Mechem, where he met the mayor and other officials, and made affidavits in relation to the subject. This action followed, and was commenced by

attachment. The declaration was in assumpsit, and comprised two special counts, and the common counts.

Of the special counts, the first made reference to 3 Comp. Laws, § 10421, which was an act passed in 1897, and is as follows:

"An act to provide for bringing actions of assumpsit in certain cases, and to provide that in such cases the cause of action shall survive.

"(10421). SECTION 1. *The People of the State of Michigan enact*, That in all cases where, by the fraudulent representations or conduct of any person, an injury has been or shall be produced, either to the person, property, or rights of another, for which an action on the case for fraud or deceit may by law be brought, an action of assumpsit may be brought to recover damages for such injury, and in all such cases a promise shall be implied by law to pay all just damages arising from such fraud or deceit, and may be so declared upon."

The reference to this act in the count was as follows:

"Whereby said plaintiff has sustained great damage, of, to wit, two thousand dollars ($2,000); whereby a right of action has accrued to said plaintiff, and said plaintiff does hereby claim all right and benefit which it may possess to bring and maintain this action under and by virtue of section 10421 of the Compiled Laws of 1897 of the State of Michigan, by virtue of which statute a promise has been and is implied by law on the part of said defendant to pay to said plaintiff its just damages arising from such fraud and deceit, whereby said defendant, upon, to wit, the said 7th day of August, A. D. 1901, became indebted to said plaintiff in the sum of, to wit, two thousand dollars ($2,000)."

The second count was substantially like the first, except that it concluded with the following language in place of that hereinbefore last quoted:

"Whereby said defendant overcharged said plaintiff in the several bills and charges above mentioned, and said defendant was overpaid by said plaintiff, and said defendant received of the money and funds of said plaintiff, without having given any consideration therefor, in the aggregate a large sum of money, to wit, the sum of two

thousand dollars ($2,000), whereby said plaintiff has sustained great damage of, to wit, two thousand dollars ($2,000), whereby said defendant upon, to wit, the said 7th day of August, A. D. 1901, became indebted to said plaintiff in the sum of, to wit, two thousand dollars ($2,000)."

To these were added the common counts.

This declaration was demurred to, and the demurrer was sustained as to the second count, and overruled as to the other counts. Thereupon a plea of the general issue was filed. One of the grounds of demurrer was that the statute section 10421 was unconstitutional. Its constitutionality appears to have been considered and upheld in the case of *First Nat. Bank of Ovid* v. *Steel*, 136 Mich. 588.

Counsel requested the court to charge the jury that—

"No recovery can be had upon the second count of the declaration, for the reason that a demurrer to said second count has been sustained by the court, and the plaintiff has not amended the said second count."

There is nothing in the record to which our attention has been called to indicate that the cause was submitted to the jury upon the second count, or, for that matter, that their verdict was made to depend upon what they might think of any of the counts. There was no occasion for reference to the respective counts, and the learned circuit judge who tried the cause properly omitted allusion to the declaration, and clearly stated the issue to be whether the defendant had, through fraud and deceit, charged and received payment from the city for more lumber than he had furnished between the dates April 1 and August 8, 1901, and said that the theory upon which the case was submitted by the plaintiff was to charge him with all money paid for lumber furnished between said dates, and to credit him with all lumber so furnished. The declaration in the case (omitting the second count, which was not considered as a part of it) justified the trial of the case upon this theory, unless the bill of partic-

ulars precluded it, and there was no occasion for saying to the jury that they should or should not render a verdict upon one or another count. Such instruction would have been more likely to confuse than to subserve a useful purpose.

What has been said applies to several similar requests to charge, which we need not state at length. As to the questions involving the joinder of counts, and the sufficiency of the several counts, the disposition of the demurrer settled them.

The bill of particulars is lengthy, covering 37 pages of the record. It states that plaintiff's demand consists of overcharges for lumber, which have been paid to the defendant. It states in a general way the purposes for which lumber was furnished. It then attempts to give tabulated statements of lumber charged for, i. e., defendant's bills, which it claims to have been allowed and paid, each accompanied by a statement of lumber admitted to have been furnished, the remainder resulting from a subtraction of the latter from the former, constituting the overcharge claimed in each instance. Two items were added to this bill by way of amendment, against defendant's objection. In passing, we may dispose of the assignment of error covering this amendment by saying that it was a discretionary ruling, and, moreover, it would be entitled to our approval, were we called upon to review it.

Counsel for the defendant urge that, under the bill of particulars, it was improper to permit the jury to dispose of the case upon the theory of the plaintiff, as stated by the trial judge, claiming that they should have been directed to find the specific amount of overcharge on each bill. They requested the court to charge that:

"There have been a large number of these bills introduced in evidence, and, in order to determine whether the plaintiff is entitled to recover for overpayments made to the defendant, you should consider each of these bills separately, and determine from the evidence in the case, if you can do so, whether there has been an overpayment

made on any of these bills, and, if so, how much such overpayment was in each bill; and, if you cannot so determine, your verdict must be for the defendant—no cause of action."

This was accompanied by a request that "no recovery can be had by the plaintiff in this case, for the reason that there is no evidence in the case from which it can be determined with a sufficient degree of certainty or accuracy how much lumber was delivered to the plaintiff by the defendant, on any one or all of the bills paid by the plaintiff;" and error was assigned for a failure to give each of them.

The record shows that evidence tending to show shortage consisted in part of statements of witnesses who had examined the structures for which the several bills were rendered, and their computation of the amount of new lumber visible therein. An examination of the testimony shows that the money paid could only be arrived at by taking the aggregate of the bills, or such of them as the jury should find to have been paid. On the other hand, the proof of shortage was by testimony tending to show that the amounts stated in the bills were larger than the respective amounts furnished. The aggregate of the payments and the aggregate value of the lumber found to have been delivered, upon the respective bills, furnished the only method by which the total overcharge could be accurately determined. While the request tendered was not given, the jury were given to understand that it was only by finding overcharges upon some or all of these bills that a verdict could be rendered.

The court said:

"In this case, if you believe the testimony of the witness James Toole in regard to the alleged frauds on the part of the defendant to be true, and that fraud was actually perpetrated against the city by the defendant Haak, in the furnishing of the lumber and receiving the same, then it is your duty to render a verdict in favor of the city and against the defendant for such an amount as you find

the overcharges against the city in the various bills may amount to."

Again he said:

"If you find that in any of the bills there has been a clerical mistake made, or any overcharge made and paid, that fact alone will not authorize you to find that there have been mistakes or overcharges made in other bills. And if you find that the defendant had conceived and was carrying out a scheme or plan to obtain more money from the city than the value of the lumber delivered, and he obtained the approval of the officers and agents of the city to the bills presented by him, falsely representing them to be true, or by undue or improper means he obtained the approval of the city officers to the bills, he (the defendant) knowing them to be false and untrue, and in pursuance of his plan or scheme, then it is your duty to find a verdict for the plaintiff for the amount which you shall find that he (the defendant) so obtained."

And again:

"I instruct you that in order to entitle the plaintiff, the city of Battle Creek, to a verdict in this case, the city must show by a preponderance of evidence (and you will remember what I have said about that) not only that the city has paid for more lumber than has been delivered by defendant, but the amount of such overpayment must also be shown, together with the fraud of defendant. The burden of showing such overpayment and fraud also rests upon the plaintiff in this case. I instruct you that if the plaintiff has shown by a fair preponderance of the evidence that, through the fraud or false representations of the defendant, Harry K. Haak, it has paid him for more lumber than he actually delivered to the plaintiff during the time named, then it is your duty to determine the amount of such excess so overpaid by the city to the defendant, and to render your verdict for the plaintiff for whatever amount you may find such overcharge to be. And this you must determine from the proofs and bills which have been submitted to you in evidence. I charge you that, in order to determine whether the plaintiff is entitled to recover for overpayment made to the defendant, you have a right to consider each and all of the bills offered in evidence in the case, and from such evidence and bills determine whether there has been an overpayment made or not. And by your verdict, if any overpay-

ment you find, you should find the sum, and so declare. And if you are unable to find any overpayment from the evidence and the bills in the case, and in such case you cannot so determine, then your verdict must be for the defendant—no cause of action."

He endeavored to guard the rights of the defendant by saying:

"In this case, if you believe the testimony of the witness James Toole in regard to the alleged frauds on the part of the defendant to be true, and that fraud was actually perpetrated against the city by the defendant, Haak, in the furnishing of the lumber and receiving the same, then it is your duty to render a verdict in favor of the city and against the defendant for such an amount as you find the overcharges against the city in the various bills may amount to."

In our opinion, the defendant did not suffer from the omission to give these requests, for they were sufficiently covered by the charge.

It appears to be assumed that the jury did not consider the items of the bill of particulars separately, but there was no other feasible method of arriving at a result, under the charge given, and we think the jury must have understood this.

A number of assignments relating to the instructions given may be passed with little comment: In Nos. 1 and 2, the court alluded to the overcharges as being between April 1st and August 8th. It is said that two bills were O. K.'d on July 22d, but not paid. There is nothing in the charge that warrants the inference that all bills between those dates contained overcharges for which recovery might be had. In No. 3, exception is taken to the instruction regarding the testimony of Mr. James Toole. It is hereinbefore quoted, and need not be repeated in this connection. Counsel say, "The criticism is that it permitted the jury to find a verdict in favor of the plaintiff and against the defendant upon the testimony of witness Toole alone." The quotation itself contains a refutation of this claim. We omit further reference to No. 4 than

the statement that, in our opinion, it was impossible for the jury to misapprehend the charge so far as to suppose that recovery could be based on bills anterior to April 1st or after August 8th. In No. 5 the instructions relating to the preponderance of proof, given on the occasion of the return of the jury for further instructions, contain no error.

There are about 156 assignments of error, based upon rulings relating to the admission of testimony. We have examined each of them, and not only find no error in them, but feel justified in saying that they raise no legal questions that require discussion. We have much hesitation in appearing to criticise the judgment of counsel in such matters, especially in view of the circumstances under which it must be exercised, yet we must refuse to burden our opinions with discussions of such objections.

The remaining question relates to motion for new trial. The brief tabulates the errors relied on in that connection, as follows:

"*First.* Errors of the court in charging the jury, and in refusing to charge as requested by defendant.

"*Second.* Want of sufficient evidence to sustain the verdict.

"*Third.* That the verdict was contrary to law.

"*Fourth.* That the jury disregarded the evidence and the instructions of the court.

"*Fifth.* That the jury arrived at the amount of their verdict by an illegal method.

"*Sixth.* That the verdict was contrary to and against the evidence in the case."

The first is sufficiently covered by what has been said. The others may be discussed together, as they all relate to the alleged adoption by the jury of the principle of "general average" in determining the amount of damage.

In support of this motion the defendant has not hesitated to unqualifiedly swear, in an affidavit, that the jury made no attempt at a computation, but agreed to determine the amount of the verdict to be given by taking one-twelfth of the aggregate sum of the opinions of the several jurors,

which agreement was carried out. He failed to state how he knew what occurred in the jury-room. Another affidavit of similar character was made by three of the jurors, and this was not considered by the court, being rejected under the familiar rule that affidavits of jurors will not be received to prove the misconduct of the jury, and thereby impeach their verdict. Counter affidavits were made by several of the jurors, and one or two of those first mentioned subsequently filed affidavits, qualifying their first statements. From all the evidence furnished, the court found, and states, in substance: That there was much discussion and computation of the amount that plaintiff should recover. That there was a proposal at one stage of the deliberations that each juror mark the amount that he thought plaintiff should recover, and that this was done, and the amounts were read. Some jurors wrote down these amounts, after which it was suggested that the general average be ascertained, and this was done. That up to this time no agreement or understanding had been made or had as to what the verdict should be, or how it should be reached. Afterwards, there was further discussion, and by mutual agreement the amount was settled at $1,750, which was less than the amount of the general average.

The court did not err in refusing to receive the affidavits of the jurors filed in support of the motion. It is a rule well established that this cannot be permitted. It is settled for this State by the case of *Merriman's Appeal*, 108 Mich. 462, where an opinion written by Mr. Justice MONTGOMERY reviews the authorities. This case was followed in the case of *Wixom* v. *Bixby*, 127 Mich. 479, in an opinion written by the present Chief Justice. A long list of authorities will be found in the brief of plaintiff's counsel in the present case. The affidavits filed by the plaintiffs indicate that during their deliberation the jurors ascertained the general average of their views relating to the subject of damages. This is a disquieting fact, for it suggests the suspicion of an unlawful verdict, but the suspicion is not necessarily a just one. Many cases hold

that the averaging of views, where there is no agreement to abide the result, should not invalidate the verdict. It is only when the record overcomes the presumption of proper methods that the verdict should be set aside. There is affirmative proof that this verdict was not a "quotient verdict," notwithstanding the fact (which is proved if the affidavits of any of the jurors should be looked into upon the subject) that for one purpose or another the general average of views was ascertained. Under the authorities cited, we think that the learned circuit judge did not err in refusing to set aside the verdict on this ground.

Counsel for the defendant strenuously urge that this record and verdict show that the verdict could not possibly have been reached by proper methods. His argument on this proposition, briefly stated, is that, while there was clear proof of the amount paid him, there was no tangible and certain evidence that any definite amount was overcharged upon any bill or bills, and therefore there could have been no lawful verdict reached by computation, and that is also shown by the amount of the verdict rendered, which, it is stated, could not be reached by any proper method of computation, and therefore must have been reached in some other way, involving guessing or compromise. If it be conceded that the jury must find the amount of overcharge upon each particular item of the bill of particulars, it does not follow that such amount must accord with the amount stated in the bill. If it might not exceed, it certainly might be less, than the amount claimed, and thus the verdict cannot be said to be an impossible one, legally, under the proof, unless it exceed the aggregate of the items of the bill. There was proof in the case tending to show, with a greater or less degree of accuracy, the lumber furnished on each bill, and thus indirectly to furnish a means of ascertaining (counsel say computing) the overcharge. In any or every instance the jury might find an overcharge less in amount than the item as stated in the bill. Furthermore, there

was testimony by Toole that nearly every bill was raised, but he could not tell definitely how much in any case, but in some cases doubled, and in some it was less; that he thought in one bill each item was raised from four to fourteen pieces. It cannot be said that the proof is so uncertain that it fails to justify a verdict, without suggesting that if a man can get a sufficient degree of rascality into his methods, so as to make it difficult to say just how much he has defrauded in a particular instance or item, a jury cannot determine how much he has wronged his adversary, and he is to be relieved from accountability. The office of a bill of particulars is to reasonably apprise the defendant of the nature of the plaintiff's claim. This one gave defendant to understand that he was charged with padding the bills itemized therein, and any proof that showed this was to be considered, and justified the jury in determining the respective amounts, when it established a probability of such amount. Upon the whole, the record discloses a patient and painstaking trial upon the part of the trial court, in every way fair and free from error. While his review of the case upon the motion for new trial discloses disapproval of the method pursued by the jury, it appears to rest upon the lawyer's appreciation of the danger to be apprehended from a departure from proper methods, rather than upon evidence that the same should overcome the presumption that the verdict was not affected thereby. In following the law in this matter, and determining that the invalidity alleged was not proved, we find no error.

The judgment is affirmed.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

PARKINSON *v.* PARKINSON.

PROBATE COURTS—DECREE IN PARTITION—EFFECT—TITLE UNDER DECREE—RES JUDICATA.

A decree of the probate court making partition among devisees, and deciding that one of them holds a life estate in the part allotted to her, acquiesced in by her, precludes her from thereafter asserting a different tenure.

Appeal from Wayne; Frazer, J. Submitted February 15, 1905. (Docket No. 158.) Decided March 28, 1905.

Bill by Jane E. Parkinson against Charles A. Parkinson, Ida J. Parkinson, Norman Parkinson, and Edward A. Parkinson to construe the last will and testament of Alva Ewers, deceased, and to quiet title. From a decree for complainant, defendants Norman and Edward A. Parkinson appeal. Reversed, and bill dismissed.

Miller, Smith, Alexander & Paddock, for complainant.

Wilkinson, Post & Oxtoby, for appellants.

HOOKER, J. Jane E. Parkinson filed the bill in this cause to settle the title to two city lots of which she is in possession and claims in fee, but which some of the defendants' counsel insist that she holds as tenant for life with remainder in fee to all of the defendants. The land belonged to her father, who undertook to dispose of it by will. The complainant claims that this will was void, for the reason that its provisions unlawfully suspended the power of alienation, and that in consequence the lands descended in accordance with the statute, whereby she took an aliquot part in fee instead of an estate for life, according to the terms of the will.

The will was dated February 6, 1851, and it provided

that most of the testator's real estate, including that in controversy here, should be held by his widow in trust until October 17, 1864, and that upon that date a final division of the property should be made as follows, viz., one-third to the widow, Jane G. Ewers, for her natural life, and the other two-thirds to the testator's three children, his two sons to receive their portions in fee simple, and the daughter, Jane E. Parkinson, the complainant, to take her share for life, with remainder to her heirs at law in fee simple. There was a further provision that the share of the widow should at her death be divided among the testator's children, each of the sons taking one-third in fee, and the daughter one-third for life, with remainder to her heirs at law in fee simple.

It is inferable that the will was probated, and after October 17, 1864, the widow's final account was allowed, and on December 10, 1864, the probate court made a decree (see 3 Comp. Laws, §§ 9443, 9444) directing a distribution of the estate according to the terms of the will, and appointing commissioners to make partition, as follows:

"Now, therefore, it is ordered, adjudged, and decreed by this court, the parties in open court assenting thereto, that partition and division of certain real estate hereinafter described, and of which the said Alvah Ewers died seised and possessed, be made among the parties entitled thereto, and that William B. Wesson, Levi Cook, and Winslow W. Wilcox, of the city of Detroit, be, and they are hereby, appointed commissioners to divide and make partition of all and several the real estate and premises of which the said Alvah Ewers died seised or was at his decease entitled, and that said commissioners in making division do set off and apart by a proper description to the said Jane G. Ewers, widow of said Alvah Ewers, the one-third part of all and several said real estate, to have and to hold the same during the term of her natural life; that said commissioners do divide and set off to said William C. Duncan, the grantee of said William Ewers, the one-third part of the balance of said real estate, less the sum of $1,513.42, so advanced to said William Ewers; and that said commissioners do proceed and set off to said Jane Parkinson, late Jane Ewers, and to Charles Ewers, the

balance of said real estate not so set off to said Jane G. Ewers and William C. Duncan, grantee; and that said commissioners in making partition and division of said real estate do set off to said William C. Duncan and to said Jane Parkinson and Charles Ewers each their share and part of said real estate by metes and bounds, or such other description by which the same may be known and described, and that, as to such part of said real estate as shall be set off to said Jane G. Ewers, the parties entitled thereto have leave to apply on the death of said Jane G. Ewers for a partition thereof."

The commissioners proceeded to partition the land, and certified and reported to the probate judge as follows:

"That they had allotted and assigned to Jane Parkinson (formerly Jane Ewers), wife of William Parkinson, of Detroit, Michigan, and daughter of said Alvah Ewers, deceased, to hold to her as provided for under said last will and testament, for and during the term of her natural life, and after her death to her heirs at law, their heirs and assigns, forever, in severalty in fee, as and for her and their right and portion of the said lands and premises as the same was adjudged to her and them by said court under said last will and testament of said Alvah Ewers, deceased, being all the following described pieces or parcels of land situated in Detroit, Wayne county, Michigan, described as lot three, block ten, Governor & Judge's plan."

They certified further:

"That they had allotted and assigned to Jane G. Ewers, of Detroit, Michigan, widow of said Alvah Ewers, deceased, one of the devisees under the last will and testament of said Alvah Ewers, deceased, to hold to her for and during the term of her natural life in severalty as and for her right and portion of the said lands and premises as the same was adjudged to her by said court under said last will and testament of said Alvah Ewers, deceased, certain other real estate, among which was lot No. three (3) of the Military Reserve on the north side of Larned street."

This report was filed, and on June 16, 1865, was confirmed upon the filing of the following consent:

"In the Matter of the Estate of Alvah Ewers, Deceased. In the Court of Probate for the County of Wayne.

"The undersigned, Jane G. Ewers, widow, Jane Parkinson, late Jane Ewers, Charles Ewers, and William C. Duncan, grantee of William Ewers, distributees or devisees of said Alvah Ewers, hereby consent that the report of the partition of said estate made by Levi Cook, William B. Wesson, and Winslow W. Wilcox, commissioners, be ratified and confirmed as against us and that an order be made by the Court of Probate to that effect.

"Signed this 16 June, 1865.

"JANE G. EWERS.
"CHARLES EWERS.
"JANE PARKINSON.
"WILLIAM C. DUNCAN,
"By D. C. HOLBROOK, His Attorney."

Two of the defendants in the case are children of the complainant, and the other two are children of her deceased son. All but one were of age when the suit was begun. He was 16 years of age, and appears by guardian ad litem. The bill was taken as confessed by complainant's children Charles and Ida. The other defendants answered. A decree was granted complainant, and they have appealed.

Counsel agree that the will was void, and the principal, if not only, question of importance in the case, is whether the order of partition and complainant's acquiescence preclude her from making claim to an estate in fee. The questions before us are not numerous. They are: *First*, Was the assignment and partition by probate court more than an adjudication of the right of the complainant to possession of a share of this land and a setting off of her share to her in severalty? and, *second*, If it would not otherwise be more than that, did complainant's consent to confirmation affect the question?

At common law a writ of partition lay to separate the interests of copartners, and did not extend to voluntary cotenants who were not entitled to partition. During the reign of Henry VIII. the right to partition was extended, and made to apply to all tenancies in common. This

statute is said to have recognized or provided for equitable jurisdiction in some cases, if it did not already exist. In the time of William IV. the writ of partition was abolished by statute, and chancery had exclusive jurisdiction thereafter. [21 Am. & Eng. Enc. Law (2d Ed.), 1143.] This allusion to the history of partition is only for the purpose of showing that we received with the common law the chancery jurisdiction in partition. If we received any other concurrent jurisdiction, it is practically obsolete in this State.

There can be no question but that, had a court of equity made the decree that we have before us, such decree would have settled, not only complainant's right to possession, but also the extent of her title, and the character of her estate. Aside from any general power of this kind, our statute confers the power to do so. See 3 Comp. Laws, §§ 11013–11102. We may confidently say that the general understanding and practice contemplates something more than a mere dividing up of possessory rights, and it is not reasonable to suppose, as counsel contend, that the legislature had only that in view when it provided for partition by probate courts. Under the statute there must be an assignment of the property to be partitioned before there can be a partition. *Campau* v. *Campau*, 19 Mich. 116. The court could not leave it to commissioners to determine who should participate in the partition, or the aliquot parts which each should have. The court must determine who shall share, and what their respective shares are in the land, and the commissioners must recognize this finding, and make partition according to it. We cannot think that it was the intention that, after all this is done, the matter should be left in a state of uncertainty as to the estate each had taken under the will, so that, to ascertain, some other court would be obliged to intervene. It is more reasonable to think that it was intended to furnish to heirs, devisees, etc., a ready means of ascertaining definitely their interests in the ancestors' land, and have a determination of what particular parcels should be set off to them. That

the legislature has authority to do this cannot be doubted. See *Robinson* v. *Fair*, 128 U. S. 53. We cannot suppose that this jurisdiction was conferred merely as a convenient method of dividing premises held in common generally for the mere purpose of settling possessory rights, for it is not made to apply to all cases of cotenants. It is only where the subject is land belonging to an estate of which the court has jurisdiction that it can act. Authority to partition is ancillary to its jurisdiction to administer and distribute. When the proper case arises, it must determine who are the tenants in common in the property, and, if there is to be anything final about its decree, it must determine the rights and interests of such tenants as between themselves. When it does so, its decrees are as conclusive upon such parties as those of any other court. Thus, in the present case, the court must of necessity have ascertained from the will who were the devisees, and it is as apparent that it must also have ascertained their respective shares.

The case of *Robinson* v. *Fair*, 128 U. S. 76, deals with some of these questions. It arose over a decree of a probate court in California. As in all such cases, the jurisdiction was statutory. The court distinguished between "distribution" and "partition," as follows:

"We lay aside, as not open to dispute, the proposition that there is a difference between distribution and partition. And we are satisfied that that difference was in the mind of the legislature when it passed the original probate act, as well as when the Code of Civil Procedure was adopted. As correctly observed by counsel, distribution neither gives a new title to property, nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession, and the extent of their respective interests; while partition, in most, if not in all, of its aspects, is an adversary proceeding, in which a remedial right to the transfer of property is asserted, and resulting in a decree which, either ex proprio vigore or as executed, accomplishes such transfer. * * *

"In a large number of the States, as the citations by counsel of statutes and decisions show, probate courts were and are invested with power to make partition, among heirs or devisees, of estates coming within their cognizance for settlement and distribution. * * * Such legislation, we suppose, has its origin in the belief that it is convenient, if not desirable, for all concerned in the estate of a decedent, that the same court which supervises the final settlement of the accounts of a personal representative, and ascertains and declares the interests of heirs in such estate as may remain after the demands of creditors are satisfied, should have the power to make partition. We are not prepared to say that this belief is not well grounded. The connection between the administration, settlement, distribution, and partition of an estate is such that the power to make partition may be justly regarded as ancillary to the power to distribute such estate, and therefore not alien to the probate system as it has long existed and now exists in many States."

This work would be but half done were not the decree of the probate court to determine the estate which the heirs or devisees should take. Counsel do not point out any substantial differences between our present statute, and that in force when the partition was made. Section 2, chap. 226, 3 How. Stat. (3 Comp. Laws, § 9443), requires the assignment (by the court) of the "residue of the estate to such persons as are by law entitled to it." While perhaps this might be said to apply to personalty only if it stood alone, section 5 provides:

"When the estate, real or personal, assigned to two or more heirs, devisees, or legatees, shall be in common and undivided, and the respective shares shall not be separated and distinguished, * * * partition and distribution may be made by three discreet and disinterested persons to be appointed commissioners for that purpose by the probate court," etc.

And section 18 provides:

"The partition, when finally confirmed and established, shall be conclusive on all the heirs and devisees and all persons claiming under them, and upon all persons interested."

If the assignment provided by section 2, above quoted, may be said to be not conclusive of rights, but is merely declaratory, as suggested in *Robinson* v. *Fair* (which we do not decide), nevertheless it cannot be doubted that parties to *proceedings for partition in equity* would be bound by a decision confirmatory of such assignment, and partitioning the land accordingly. The respective estates would be conclusively determined thereby. Instead of proceeding in chancery, the parties may ask partition by the probate court in such cases, and in our opinion its determination of the estate taken is as final as though a court of equity had been asked to intervene. The probate court may construe wills for certain purposes. It is necessary for it to do so in distributing estates. *Glover* v. *Reid*, 80 Mich. 232; *Knapp* v. *Knapp*, 95 Mich. 478; *Patterson* v. *Stewart*, 38 Mich. 402; *Kelly* v. *Reynolds*, 39 Mich. 464; *Langrick* v. *Gospel*, 48 Mich. 185; *Byrne* v. *Hume*, 84 Mich. 185; *Dean* v. *Mumford*, 102 Mich. 510.

Counsel for the defendants cite the case of *Haddon* v. *Hemingway*, 39 Mich. 617, as an authority sustaining the claim that partition does not settle the title. Under the will of the ancestor of Axford, the land was partitioned, and the premises in controversy were set off to him. Although thus partitioned, it was claimed that the will gave the executors and trustees the authority to sell them, and they did so, to Haddon, who took possession. Axford's wife secured a decree for alimony, and levied execution on the land, and sold it at execution sale to Hemingway, whereupon Haddon filed a bill to restrain the completion of the sale and to quiet his title. Defendants claimed the land to have belonged to Axford in fee. Complainant claimed that the executors held it from the ancestor under an active trust, and had authority to sell it. The question did not arise between Axford and his coheirs, but between him and his trustees. The assignment was of certain land, but the title which the court was dealing with was limited by the will, and nothing indicates that any at-

tempt was made to decide between the executors and Axford. The land was partitioned while the title, such as it was, remained unquestioned. On the other hand, the case of *Persinger* v. *Jubb*, 52 Mich. 304, is not in point. In that case partition was made between children of the deceased. Afterwards one contested the validity of the partition in an ejectment case upon the ground that one of the supposed heirs was illegitimate, and therefore not entitled to a share of the property. The court held that the question was set at rest in the partition proceedings. This falls short of the question that the complainant's counsel raise here.

We have been cited to no Michigan case that reaches this question, but after availing ourselves of the light shed by the briefs of counsel, and such authorities as we have been able to find, we are of the opinion that the decree in the case, which clearly decides the tenure of the complainant, is final, and her contention cannot prevail, although had she raised the question on the proceedings for partition, and appealed from the decree of the probate court, as she might have done under the statute (3 Comp. Laws, § 9458), it is probable that she would have prevailed. We are constrained to reverse the decree of the circuit court in chancery. A decree will be entered in this court dismissing complainant's bill, with costs of both courts.

CARPENTER, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

HAYWARD *v.* SCHOOL DISTRICT NO. 9 OF THE TOWNSHIP OF HOPE.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE.
   A contention not raised below canot be relied upon as a ground of reversal.

2. TRESPASS—RIGHT TO MAINTAIN—PARTY OUT OF POSSESSION.
   One not in possession of the property cannot maintain trespass quare clausum fregit.

3. LANDLORD AND TENANT—POSSESSION—OUSTER OF TENANT.
   The act of a landlord, in placing a lock on the door of a building in lawful possession of his tenant, is a mere invasion of the tenant's rights, and does not place the landlord in possession.

4. SAME — RIGHT TO REMOVE BUILDINGS — TERMINATION OF TENANCY.
   The tenant owns buildings erected by him on leased land in furtherance of the purpose for which the premises were leased, and may remove them during the tenancy, or, if the tenancy terminate on a contingency, within a reasonable time after it terminates.

5. SCHOOL DISTRICTS — LEASED PREMISES — REMOVAL OF SCHOOLHOUSE.
   Where a school district asserted its right to remove a schoolhouse on leased premises within five days after closing school in such house, and before it had ceased exercising a right of possession over the same, the subsequent removal of the building within a reasonable time thereafter was within its rights, and the circumstances did not warrant any inference of abandonment by the school district of its right to the schoolhouse.

6. SAME—STATUTE—OWNERSHIP OF SCHOOLHOUSE—RESERVATION.
   Under section 4673, 2 Comp. Laws, providing that no district shall build a frame schoolhouse on any site for which it has not a title in fee, or a lease for 50 years, without securing the privilege of removing the schoolhouse, the owner of premises, leased for 50 years for school purposes, is not entitled to the schoolhouse, after the termination of the lease, merely because of the absence of an express reservation of title in the school district.

Error to Barry; Smith, J. Submitted February 16, 1905. (Docket No. 159.) Decided March 28, 1905.

Trespass quare clausum fregit by Thomas Hayward against school district No. 9 of the township of Hope. There was judgment for plaintiff, and defendant brings error. Reversed.

Colgrove & Potter, for appellant.

Fred W. Walker (*Thomas Sullivan*, of counsel), for appellee.

CARPENTER, J. Plaintiff brings this suit, which is an action of trespass quare clausum fregit, to recover the value of a schoolhouse which he alleges defendant removed from his land. The schoolhouse was erected on the land in question in 1868. The land, which was subsequently transferred to plaintiff, then belonged to plaintiff's father. During the construction of the building, defendant and plaintiff's father orally assented that their rights should be determined by certain writing. By this writing defendant, for a consideration therein named, leased the land for 50 years, provided "that at any time that the parties of the second part [defendant] shall discontinue the district school on said land, the same shall fall in full possession of the parties of the first part" (plaintiff's ancestor and grantor). In the summer of 1902 defendant built a new schoolhouse on a different site. It ceased holding school in the schoolhouse in question December 24th. December 29th its directors gave notice of a special meeting of the voters to be held in this old schoolhouse "on Monday evening, January 5th, at 7 o'clock p. m., for the purpose of disposing of the schoolhouse on the old site." At this meeting plaintiff appeared, and insisted that he owned the schoolhouse. This claim was denied by the others present, and the district then sold the building to the highest bidder for $40 (the sale to be null and void if there was no right to sell), with the proviso "that the district hold the

schoolhouse for twenty days from the date of sale." Within this 20 days defendant moved the building. Later this suit was brought. The issue was submitted to a jury, who rendered a verdict of $300 in plaintiff's favor.

Defendant insists that a verdict should have been directed in its favor on various grounds, of which we notice these two: (1) Plaintiff was not in possession of the property at the time the alleged trespass was committed. (2) Defendant had a right to remove the building.

Plaintiff insists that defendant in the court below did not contend that it had a right to remove the building. If so, that contention cannot now be relied upon as a ground of reversal. We are bound, however—and this will more clearly appear in our opinion—to consider defendant's right of removal in determining whether plaintiff was or was not in possession.

Was plaintiff in possession of the property at the time the schoolhouse was removed? If he was not, he cannot maintain this action. See *Carpenter* v. *Smith*, 40 Mich. 639. Defendant never formally yielded possession to plaintiff. It never notified plaintiff that he might have possession. The only possession which plaintiff ever took was to put a lock on the schoolhouse door. It is obvious that this did not put the building in plaintiff's possession if defendant's possessory rights continued. If defendant's possessory rights continued, plaintiff's action was only an invasion of those rights. Those possessory rights did continue if defendant had a right to remove the building. Defendant's right to remove the building at the time of the alleged trespass affords, therefore, a complete answer to plaintiff's claim that he was in possession.

Plaintiff insists that the rights of the parties shall be determined by the writing to which they verbally assented. No unfairness results to plaintiff therefore if we so determine them. This writing does not in express terms give defendant the right to remove the schoolhouse. Neither does it provide that the schoolhouse shall be the property of the owner of the land. If the rights of the parties are

determined by common-law principles, the schoolhouse was defendant's property, for it is settled in this State that the tenant owns buildings erected by him on leased land, "and in furtherance of the purpose for which the premises were leased." See *Kerr* v. *Kingsbury*, 39 Mich. 150. See, also, *Osborn* v. *Potter*, 101 Mich. 300; *Van Ness* v. *Pacard*, 2 Pet. (U. S.) 137. Accordingly, the tenant may remove such buildings during his tenancy, or, if his tenancy terminate on a contingency, within a reasonable time after it terminates. See *Martin* v. *Roe*, 7 El. & Bl. 237; *Northern Cent. R. Co.* v. *Canton Co.*, 30 Md. 347; 2 Taylor on Landlord & Tenant (9th Ed.), § 552. If, therefore, as contended by plaintiff, the lease terminated when school closed on the 24th of December, defendant had a reasonable time thereafter to remove the schoolhouse. Defendant's right of removal was asserted within five days. It was asserted before it had ceased to exercise the right of possession over the property, and the building was itself removed within a reasonable time thereafter. Under these circumstances, defendant acted within its rights. See *Antoni* v. *Belknap*, 102 Mass. 193. Neither do these circumstances warrant, as plaintiff contends, any inference of abandonment. It follows, therefore, that, if the rights of the parties are governed by the common law, defendant had a right to remove the building, plaintiff was not in possession at the time of the alleged trespass, and a verdict should have been directed in defendant's favor.

Plaintiff insists, however, that the common-law principles are rendered inapplicable to this case by reason of the following portion of section 4673, 2 Comp. Laws, viz.:

"Nor shall any district build a frame schoolhouse on any site for which they have not a title in fee or a lease for fifty years without securing the privilege of removing the said schoolhouse when lawfully directed so to do by the qualified voters of the district at any annual or special meeting when lawfully convened."

It is obvious that the purpose of this statute was to se-

cure to the school district the right of removing at any time a frame schoolhouse erected on a site leased for less than 50 years. This statute has no application to the lease under consideration (which, from the standpoint of plaintiff, adopted by us, is a lease for 50 years) unless it indicates a legislative intent that, in the absence of an express reservation of title, schoolhouses on leased land shall belong to the landowner. No such intent is expressed. We cannot infer that intent without deciding that the legislature, by enacting a statute to enlarge the rights of the public in a schoolhouse erected on leased land, intended to diminish those rights and enlarge the opposing rights of the landowner. We cannot so decide. We conclude, therefore, that the statute has no application, and that the rights of the parties are to be determined by the principles of the common law. So determined, as heretofore indicated, defendant had a right to have the jury instructed to render a verdict in its favor.

It follows that the judgment of the lower court should be reversed, with costs of both courts. As plaintiff cannot recover, no new trial will be granted.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

139 544
141 60

WELLS *v.* MONTCALM CIRCUIT JUDGE.

1. MANDAMUS—GROUNDS—ABSENCE OF OTHER REMEDY.
   The writ of mandamus will not be allowed to take the place of an appeal or writ of prohibition, or any other writ to review the action of the lower court.

2. SAME—REMEDY BY APPEAL.
   Mandamus to a circuit judge will not be granted to determine which of two circuits has jurisdiction of a suit for divorce where relator has pleaded the pendency of the other suit in abatement of the one pending before respondent.

Mandamus by Maude M. Wells to compel Frank D. M. Davis, circuit judge of Montcalm county, to set aside an order denying a motion to dissolve an injunction and dismiss a bill of complaint. Submitted March 7, 1905. (Calendar No. 20,954.) Writ denied March 28, 1905.

E. O. Grosvenor and *Willis Baldwin* (*Griswold & Tennant*, of counsel), for relator.

E. J. Bowman and *C. L. & C. B. Barden*, for respondent.

PER CURIAM. Relator, on January 9, 1905, filed her bill for divorce in the circuit court for Wayne county against Percy D. Wells, and a subpœna and injunction issued immediately. Said subpœna was at once placed in the hands of the sheriff of Wayne county for immediate service. Defendant could not be found in Wayne county, and, upon showing made, the court authorized alias subpœnas to be issued, one of which was sent to Montcalm county, and the other to Kent county. The sheriff of Montcalm county found defendant, and duly served said subpœna, January 14, 1905. After filing the bill of complaint and issuing subpœna and injunction, complainant went to Greenville after the child, who was with defend-

ant Wells' parents, taking with her the injunction to show her authority to have custody and control of said child.

On January 10, 1905, defendant, Percy D. Wells, filed his bill of complaint for divorce against this relator, as defendant, in the circuit court for Montcalm county, a subpœna and injunction issued, and were served at once on Maude M. Wells at Greenville on said last-mentioned date. After such service the parents of Wells refused to give her the child.

On January 12, 1905, relator moved said circuit court for Montcalm county to dissolve the injunction and dismiss the bill of complaint, for the reason that before and at the time of the commencement of said suit there was a suit for divorce pending in the circuit court for Wayne county between the same parties praying for the custody of this child, and said Wayne county circuit court was possessed of jurisdiction over the subject-matter and the parties before the bill was filed in Montcalm county. This motion was denied, with costs against relator.

Relator filed this petition, and, afterwards appearing specially in the Montcalm circuit court, pleaded in abatement to said bill of complaint the same facts set up in her motion to quash, and as set up in her petition in this matter. Issue was joined upon said plea, and is now pending in said Montcalm circuit court.

The question sought to be raised here is whether the Wayne circuit court or the Montcalm circuit court has jurisdiction to hear and determine the subject-matter of the controversy between relator and her husband, Percy D. Wells. It is first necessary to determine whether the remedy sought is the proper one. Where there is any other adequate remedy, a writ of mandamus will not be granted. Relator has made an issue, now pending in the case in Montcalm circuit, by plea in abatement, since her petition filed in this matter. That forum is of competent jurisdiction to determine that issue.

The writ of mandamus will not be allowed to take the place of an appeal or a writ of prohibition, or any other

writ to review the action of a lower court. The only argument in favor of this writ that can be made is because of the peculiar situation, where two courts of co-ordinate jurisdiction are assuming control of the same parties and subject-matter, and an unseemly squabble might arise in attempts to enforce conflicting orders. It would seem, however, that by making proper application during these proceedings, especially reserving all rights, the court would make only such orders as would conserve relator's interests, and she could come here on appeal from that court and have the question sought to be raised in this proceeding regularly determined.

For the reasons stated, the writ of mandamus is denied.

HANSELMAN *v.* ADRION.

APPEAL AND ERROR — ASSIGNMENTS OF ERROR — FAILURE TO SERVE — DISMISSAL.

Where plaintiff in error failed to serve any assignments of error, and no satisfactory excuse was given for the failure to do so, his motion to extend the time to make return to the writ of error was denied, and the writ dismissed.

Case by Frederick Hanselman against Charles Adrion for slander. There was judgment for plaintiff for less than the amount claimed, and he brings error. On motion to dismiss. Submitted February 28, 1905. (Calendar No. 20,791.) Granted March 28, 1905.

A. J. Waters, for the motion.

William Look, contra.

PER CURIAM. Motion to dismiss writ of error. This is an action for slander, and was tried in Washtenaw cir-

cuit, and judgment entered for plaintiff November 1, 1903, for six cents damages and six cents costs of suit. A motion for a new trial was denied December 3, 1903, and 90 days granted by consent to settle a bill of exceptions. The writ of error issued October 17, 1904, returnable November 28, 1904.

It is admitted that on or about April 30, 1904, counsel for plaintiff handed the attorney who assisted defendant on the trial as counsel a proposed bill of exceptions and a copy of the testimony on the case, that no assignments of error were made or served, that in a few days the papers counsel for defendant received were delivered to defendant's attorney of record, and that no other papers were ever served on anybody. There is a dispute between the attorneys as to what occurred at the time these papers were served. It is not necessary for us to settle this controversy.

This motion is determined by the undisputed facts. Defendant's attorney of record was by rule entitled to be served with all papers. No attempt has been made at all to show that he has been recognized in any manner since the case was tried. Nor is any claim made that he or counsel for defendant made any agreement about the bill of exceptions, or that either was afterwards in any way approached about the matter. The rule is that assignments of error must be served with the bill of exceptions. No claim is made that this requirement was ever complied with in this case.

If it is claimed that by practice in that circuit service on counsel should be recognized, that would not supply the omitted assignments of error. Defendant's attorney of record was entitled to the assignments of error, in order to know what plaintiff relied upon as error in the case; but no attempt has ever been made to furnish assignments of error either to the attorney of record or counsel who assisted on the trial. Plaintiff has not followed the practice, and has been very dilatory in this matter.

At any time plaintiff's attorney might have proceeded

under the rules and practice in this court if he had so desired, by assigning errors, settling a bill of exceptions, and having the record certified to this court. No satisfactory reason or excuse is given why this has not been done. The motion to dismiss the writ is granted, with costs.

It follows that the motion made by plaintiff to extend the time to make return to the writ of error, and which was considered at the same time with the above motion to dismiss the writ, is denied.

---

139 548
140 536
139 548
149 392

CITY OF DETROIT *v.* BOARD OF INSPECTORS OF ELECTION FOR THE FOURTH ELECTION DISTRICT OF THE SECOND WARD OF THE CITY OF DETROIT.

ELECTIONS—USE OF VOTING MACHINE—CONSTITUTIONALITY.

Section 2 of article 7 of the Constitution, requiring all votes, except for township officers, to be given by ballot, merely declares the policy of the State to assure to the elector a secret, as distinguished from an open, or announced, vote, and does not permanently establish a particular mode of voting, and is not infringed by Act No. 234, Pub. Acts 1903, amending sections 3750-3758, 1 Comp. Laws, authorizing the use of voting machines, and requiring all voting by machine to be by a secret vote.

Certiorari to Wayne; Mandell, J. Submitted March 28, 1905. (Calendar No. 21,035.) Decided March 30, 1905.

Mandamus by the city of Detroit to compel the board of inspectors of election for the Fourth election district of the Second ward of the city of Detroit to use certain voting machines. There was an order denying the writ, and relator brings certiorari. Reversed.

Timothy E. Tarsney, Corporation Counsel (*Lewis A. Stoneman* and *Frank Keiper*, of counsel), for relator.

Sherman D. Callender, for respondents.

OSTRANDER, J. The relator, the city of Detroit, filed its petition in the circuit court for the county of Wayne, setting out, in substance, the following facts: That at a meeting of the common council of the city of Detroit held March 7, 1905, the city clerk was directed by resolution to have voting machines placed in divers election districts in said city (amongst others, in the Fourth district of the Second ward), to be used at the election to be held Monday, April 3, 1905; that the resolution specified a particular kind of voting machine; that the board of inspectors of the named district, and each of them, have refused to obey the order of the common council, and assert that they will not obey it, giving as reason for their refusal that such method of voting is not a constitutional method. It is further set out that the particular voting machine is a complete and perfect piece of mechanism, thoroughly tested and reliable, constructed and operated in such a way as to permit an elector to vote secretly for a candidate or candidates of his choice upon any and all tickets, and that the same opportunity for discrimination is provided for the elector as if a paper ticket were used. The petition prays for a writ of mandamus, directed to the board of inspectors of said election district, commanding them to obey the resolution of the council. An order to show cause was issued, and the inspectors of said election district filed an answer, in which they admit the facts stated and set forth in the petition of relator, and they aver that they have refused and will refuse to obey the said order and direction of the common council to use the voting machine named, or any other voting machine, because they are advised that, under and by virtue of the provisions of section 2 of article 7 of the Constitution of this State, all votes given at any election must be by bal-

lot, except as stated in said Constitution, "and that the word 'ballot,' as contained in said provision of the Constitution, does not permit the use of said voting machines, or any other voting machine, at elections, but means only a ticket upon which shall be written or printed the names of the candidates to be voted for at said election, and that the use of any other device is without warrant or authority of law." The cause coming on to be heard upon the petition and answer, the court denied the writ. The proceeding is brought into this court by certiorari, has been argued orally, and very full briefs have been submitted in behalf of both the relator and the respondents.

The act of the legislature which is brought into question is Act No. 61, Pub. Acts 1897, 1 Comp. Laws, §§ 3750–3758, as amended by Act No. 234 of the Public Acts of 1903. The title of the act is, "An act to authorize the use of any thoroughly tested and reliable voting machine at any election held in this State." The act provides that any city council or village council may at any regular meeting authorize the use of such voting machines at any election to be held within their respective cities or incorporated villages during the ensuing year, but that "all voting by machines shall be a secret vote as hereinafter provided," and that all election laws not incompatible with the act are continued in full force and effect.

The pleadings before us, read in connection with the legislation referred to, not only assume but afford assurance of the fact, that the voting machines in question will, if used, insure to the elector proper instruction in the use of the machines, absolute secrecy in voting, opportunity to vote for any person or candidate of his choice for any office to be filled at a particular election, a knowledge that he has voted, a correct record of the vote or votes, and a public and correct declaration of the total result of the election, and the recording and preservation of such result by officers chosen and sworn for that purpose.

It is with reference to this statement of facts, and upon the assumption of the verity of each of them, that we pro-

ceed to discuss the only question before us, which is, Does the legislation in question contravene the provisions of section 2 of article 7 of the Constitution? That section reads:

"All votes shall be given by ballot, except for such township officers as may be authorized by law to be otherwise chosen."

The same language was used in the Constitution of 1835, art. 2, § 2.

There is but one other provision of the Constitution relating to the method of voting at elections, and that is section 11 of article 4, which is:

"In all elections by either house or in joint convention, the vote shall be given viva voce."

The question may be stated in simpler form in this way: Is a vote given or cast by the use of the machine—secrecy, free choice of candidates, a correct record of the vote, and a correct record and announcement of the total vote given for each candidate being assured—a vote "given by ballot?"

All reasonable presumptions are to be indulged to support the questioned legislation. The Constitution of Michigan is not a Code, nor is the particular provision in any way self-executing. The language is imperative, and requires that whatever system of conducting elections shall receive legislative sanction must have, as an integral, mandatory part of it, voting by ballot. In our opinion, the question is not to be determined as one of mere philology; nor should we apply, as we are asked to do, the rule of construction, often of great assistance, which limits the meaning of the words "given by ballot" to the vehicle used in voting or the method of depositing the vote which was probably in the contemplation of the framers of the Constitution. Neither do we regard as controlling the fact that previous legislative enactments have, with few exceptions, and those like the one now before us, uniformly provided for written or printed tickets for use in elections.

We may assume that they have adopted the best known and most convenient way of voting by ballot—of obeying the constitutional mandate. And a ticket so provided was not a ballot, but, when properly deposited, or properly marked and deposited, by the elector, was a vote given by ballot. *State, ex rel. Runge*, v. *Anderson*, 100 Wis. 523, 531 (42 L. R. A. 239).

We regard the provision of the Constitution as a declaration of State policy, assuring to the elector a secret, as distinguished from an open or announced, vote. And in reaching this conclusion, we apply those rules of construction which observe the apparent purpose of the provision questioned; its generality; whether the language used is broader in meaning than the individual conceptions at the time of its adoption, and broad enough to sustain the legislation now considered.

The necessity for an early opinion in this case prevents any considerable references to the history of voting by ballot. The uses of the white and black balls in the club and in the lodge are familiar. Some of the early laws of the colonies provided that freemen might vote in the affirmative by the use of an Indian corn; in the negative, by putting in a bean. Lexicographers seem not agreed upon the derivation of the word "ballot." It has been said that it was adopted from the French language, without change of meaning (*State* v. *Shaw*, 9 S. C. 94, 138); that it comes from the Greek word meaning "to throw" (2 Am. Cyc. 540). In common speech, the word "ballot" is used to mean the ball or ticket used in voting; the act of voting; the result of voting. It seems clear, however, that from the earliest times voting by ballot has been a term used to contradistinguish open, viva voce, or public voting, and secret voting.

"Voting by ballots is by a ticket or ball, and secrecy is an essential part of this manner of voting." 1 Bouvier Law Dict. (Rawle's Rev.) tit. "Election," subd. "Ballots."

"The material guaranty of the provision of the constitution (section 6, art. 6), that 'all elections by the people

shall be by ballot' is inviolable secrecy as to the person for whom an elector shall vote; and this guaranty is binding upon municipal governments in their regulation of elections." *State, ex rel. Smith*, v. *Anderson*, 26 Fla. 240, syllabus.

"The expression 'election by ballots' had been expounded and construed by the various courts of last resort, and, with entire unanimity, they had declared it meant a *secret* ballot, and that the essential principle of this manner of voting was that the elector might conceal from every person the name of the candidate for whom he voted." *Ex parte Arnold*, 128 Mo. 261 (33 L. R. A. 386).

See, also, *Williams* v. *Stein*, 38 Ind. 89; *Ritchie* v. *Richards*, 14 Utah, 345; *Brisbin* v. *Cleary*, 26 Minn. 107. References to the principal lexicographers will discover the same concept and definitions of ballot voting.

In *Opinion of the Judges*, 7 Me. 495, one of the questions answered was whether printed ballots came within the meaning of a constitutional provision which required that all elections shall be by written ballots. The answer was, in part:

"It may be observed that those who framed the constitution undoubtedly intended to guard against many inconveniences in the before-named elections, by excluding all those other modes by which questions are often decided in popular assemblies. This was the general object. The word 'ballot' may be considered as opposed to a vote by word or by signs—as, for instance, a vote by yeas and nays, or the common mode of voting, by holding up the hand, or by rising and standing till counted. It may well be supposed that the mode prescribed was preferred * * * because it secures a greater degree of independence than any other in the exercise of the elective franchise."

And the printed ballot was held good.

Henshaw v. *Foster*, 9 Pick. (Mass.) 312, 320, is as to the question presented, like the case last cited, and to that question the same answer was returned. But the opinion is of further interest here. It was urged "that the uniform and constant use of manuscript ballots in elections amounts to a construction of the terms of the constitution which ought

now to be received as the only true one." Of this the court, speaking by Chief Justice Parker, said:

"This practice of a mode of voting which is undoubtedly constitutional, founded in existing convenience, and never brought into competition with the use of printed votes, scarcely furnishes an argument against the latter. * * * It merely shows a preference of one over the other, or that one during the time of the practice is more convenient than the other."

To the same effect is *Temple* v. *Mead*, 4 Vt. 535.

In the opinions and briefs in *State* v. *Shaw*, 9 S. C. 94, will be found an exhaustive discussion of the meaning of the word "ballot," its derivation and definitions, some history of its employment, and its meaning, as used in the constitution of that State. That constitution provided that "in all elections by the general assembly, or either house thereof, the members shall vote viva voce and their votes thus given shall be entered upon the journal of the house to which they respectively belong." Another section of the same instrument required the State to be divided into convenient circuits, and that for each the assembly should elect a judge by "joint ballot." In the election of certain judges, the vote was given viva voce; and upon application of the attorney general, who invoked the original jurisdiction of the supreme court of the State, and who contended that a secret ballot was by the constitution made imperative in such elections, there was a judgment of ouster.

The case, *In re Voting Machine*, 19 R. I. 729 (36 L. R. A. 547), is not precisely in point here, because of differences in the constitutional provisions of the two States. The opinion is of interest, however, because the court considered the argument that the framers of the constitution, as individuals, never had in mind such a method of voting. Of this it is said:

"The question, however, is not what limitations they may have had in mind, by reason of the methods to which they were accustomed, but what the language of the con-

stitution means, or may reasonably mean, with reference to the matter before us. * * *"

In *Opinion of the Justices to the House of Representatives*, 178 Mass. 605 (54 L. R. A. 430), the question presented was:

"Has the general court the right to authorize the use of voting and counting machines at elections by the people of national, State, district, county, city, or town officers?"

The constitution, as has been noticed, provided that representatives shall be chosen by written vote. It was held by three of the justices that the requirement might be complied with in voting by a machine which registers each vote cast without the use of separate ballots. One justice concurred, provided the results of the action of the machine in registering each vote were visible to the voter, and the work of the machine in adding up votes was done under the supervision of some person or persons charged with the duty of counting the votes cast. Three justices dissented upon the ground that "the turn of a wheel or dial punching a hole in an unseen roll of paper on which are the names of candidates, by a voter who pulls a lever or turns a key, is not a written vote, within the meaning of the constitution." The majority opinion, which seems to have been prepared by Chief Justice Holmes, referring to the opinion in *Henshaw* v. *Foster*, 9 Pick. (Mass.) 312, in which it was said that the word "ballot" is ambiguous, which was the reason for the constitutional requirement of a written vote, contains this language:

"No doubt, the picture in the minds of those who used the words was that of a piece of paper with the names of the candidates voted for written upon it in manuscript; but the thing which they meant to stop was oral or hand voting, and the benefits which they meant to secure were the greater certainty and permanence of a material record of each voter's act, and the relative privacy incident to doing that act in silence * * * It seems to us that the object and even the words of the constitution, in requiring 'written votes,' are satisfied when the voter makes a

change in a material object—for instance, by causing a wheel to revolve a fixed distance—if the material object changed is so connected with or related to a written or printed name purporting to be the name of a candidate for office that, by the understanding of all, the making of the change expresses a vote for the candidate whose name is thus connected with the device."

Our attention has been called to no decisions precisely in point. We have referred to those mentioned as supporting substantially our reasoning and the result arrived at. We do not regard the decision in *State, ex rel. Runge*, v. *Anderson*, 100 Wis. 523 (42 L. R. A. 239), as opposed in principle to either our reasoning or conclusions.

The purpose of the framers of our Constitution in requiring that in all elections in either house of the legislature the votes shall be given viva voce is obvious. Equally obvious, in our opinion, is the purpose of the provision under consideration. It is undoubted, as is claimed by counsel for respondents, that as early as 1835 the method of voting by the use of tickets was known. It was nevertheless important that the policy of the new State with reference to the subject of voting at elections should be declared in the Constitution. Agitation for the vote by ballot had only then begun in England, nor was it ended and the ballot assured until 1872. In 1835, and after, voting other than by ballot was practiced in the United States. To say that the purpose of the framers of our Constitution was not to secure a particular mode of voting secretly, but was to make manifest in the organic and continuing law a policy to be perpetuated, is to give to the words of the instrument no forced or unnatural meaning.

As was said by Mr. Justice CAMPBELL in *People* v. *Cicott*, 16 Mich. 283, 297.

"Our whole ballot system is based upon the idea that, unless inviolable secrecy is preserved concerning every voter's action, there can be no safety against those personal or political influences which destroy individual freedom of choice."

If we could imagine our Constitution adopted today, and the legislation in question enacted, with reference to all the facts stated, tomorrow, would it be contended that the legislation was unconstitutional because not providing that "votes shall be given by ballot?"

We are of opinion that we should not hold the legislation to be invalid for any of the reasons urged. The circuit court for the county of Wayne was in error in denying the writ of mandamus, which should issue as prayed.

The proceeding being one of public interest and importance, no costs will be awarded.

MOORE, C. J., and CARPENTER, MCALVAY, GRANT, BLAIR, MONTGOMERY, and HOOKER, JJ., concurred.

BUHLER *v.* TROMBLY.

1. STATUTE OF FRAUDS — PART PERFORMANCE — PAROL CONTRACT TO CONVEY LAND.

   Mere occupancy of a dwelling and the making of ordinary repairs and changes to suit the premises to the needs of the occupant, paid for out of partnership funds belonging to the promisor and promisee, are not sufficient part performance to take a parol promise to convey out of the statute of frauds. CARPENTER, C. J., and MCALVAY, and MONTGOMERY, JJ., dissenting on rehearing.

2. GUARDIAN AND WARD — PROMISE OF WARD — REVOCATION BY GUARDIAN.

   A promise which may at any time be recalled by the promisor may, on his becoming non compos mentis, be recalled and revoked by his guardian.

3. GIFTS—REAL ESTATE—PAROL—PART PERFORMANCE.

   A promise, as a mere act of bounty by a foster father, to permit his foster son to occupy certain premises rent free during the father's life, and that they shall become the property of the son on the father's death, is not a contract, in the absence of

any showing that the son agreed to do anything, or ever did or refrained from doing anything, or in any way changed his condition or circumstances, or was induced to forego any benefit or assume any liability because of or relying on the promise, though he entered on the premises, and for several years occupied them without paying rent. CARPENTER, C. J., and MCALVAY and MONTGOMERY, JJ., dissenting on rehearing, on the ground that the promise by the son, fully performed, to live in the house that he might be near the partnership business of himself and foster father, constituted a sufficient consideration.

Appeal from Wayne; Frazer, J. Submitted January 11, 1905. (Docket No. 45.) Decided February 27, 1905. Motion for rehearing granted December 30, 1905. Reargued April 3, 1906. (Docket No. 1.) Former opinion affirmed July 3, 1906.

Bill by Christian F. Buhler against Robert Trombly, guardian of Joseph Buhler, an incompetent, to enforce a parol agreement for the occupancy of certain real estate, and to restrain summary proceedings for the possession of the same. From a decree for complainant, defendant appeals. Reversed, and decree entered for defendant.

Maybury, Lucking, Emmons & Helfman, for complainant.

De Forest Paine, for defendant.

OSTRANDER, J. The contention of complainant is that, by the mutual parol agreement of himself and Joseph Buhler, complainant was to occupy, rent free, certain premises on Macomb street, in Detroit, belonging to Joseph Buhler, during the life of said Joseph, and that, at his death, the premises were to be the sole property of complainant. The bill is filed to give effect to this agreement so far as the rent of the premises is concerned, to restrain certain proceedings at law brought to recover possession of said premises, and that the court "determine that your orator is entitled to continue in the use, occupation, and

possession of said premises under and by virtue of the said contract and agreement between your orator and said Joseph Buhler." The bill was verified on November 3, 1903. Prior to that time, and on the 10th of January, 1903, Joseph Buhler had been, upon the application of complainant, adjudged by the probate court for the county of Wayne to be mentally incompetent to transact his business, and the defendant in this suit, Robert Trombly, had been on or about that date appointed guardian of the person and estate of said Joseph Buhler. The guardian so appointed, before the filing of the bill, demanded of complainant rent for the property in question, payment of which was refused, served upon complainant notice to quit the premises, and later began before a circuit court commissioner summary proceedings to obtain possession of the premises, which were pending when the bill was filed. The guardian filed an answer, in which he denies that any such agreement as that relied upon in the bill was ever made, and in the answer claims the benefit of a cross-bill, and asks for an accounting as to the amount due to defendant for rent, for restitution of the premises, and for other relief. Proofs were taken in open court.

The vital questions in the case are whether any such agreement as is claimed was made, and, if made, whether there has been such performance on the part of complainant as to warrant a court of equity to enforce specific performance of the agreement to the extent prayed for in the bill.

It is at the beginning important to learn the terms of the agreement asserted, and for these we look to the bill of complaint. The bill, after stating the adoption of complainant by Joseph Buhler, his rearing and education as Buhler's own son, and the fact that at the age of 24 Joseph Buhler took him into partnership in business, avers that on July 26, 1887, complainant was married, and that at that time and prior to that time Joseph Buhler had been carrying on a meat business at 210 Randolph street, in

Detroit, under the firm name of Joseph Buhler & Son, and—

"That said Joseph Buhler desired your orator to remain and continue in said business after he should be married, and desired your orator to live close by the place where the said business was being conducted; that said Joseph Buhler, a short time prior to your orator's marriage, proposed to your orator and promised and agreed with him that, if your orator would continue after his said marriage to remain in said business with said Joseph Buhler, and would live close to the place or store where the same was being conducted, said Joseph Buhler would purchase for your orator a home in the vicinity wherein your orator and his family should live without paying rent therefor, and upon the death of said Joseph Buhler the same should be and become the sole property of your orator; that your orator then and there accepted the proposal of said Joseph Buhler as hereinbefore set forth, and promised and agreed to conform to and abide by the terms and conditions thereof."

These are the terms, and all of them, of the agreement alleged. The marriage of complainant is not asserted to have been any consideration for the agreement, nor an act in part performance thereof. The bill sets out that thereafter Joseph Buhler purchased the premises in question, turned them over to complainant for a home, and that from a period shortly after his marriage complainant and his family have occupied the premises continuously under and by virtue of the terms of the said agreement, and that Joseph Buhler has never demanded or collected any rent from complainant for the premises, but has, on the contrary, at all times said that the property belonged to complainant. The bill further alleges the expenditure of large sums of money by complainant, to the knowledge of Joseph Buhler, in repairing, improving, and beautifying the property, all in reliance upon the said contract; that complainant has at all times lived up to and carried out the duties and obligations resting on him under said contract; and that Joseph Buhler has never expressed a desire nor made an attempt to change or alter or revoke said con-

tract, and that the contract has at all times continued to be, and is now, in full force and effect.

The decree appealed from by defendant finds and recites an agreement considerably broader in terms than the one set out in the bill of complaint, adjudges that complainant is entitled exclusively to "the use, possession, and enjoyment and ownership of the aforesaid premises during the lifetime of said Joseph Buhler," and restrains permanently the attempt to collect rent, and any disturbance or interference with the quiet and peaceable possession of the premises by complainant.

Joseph Buhler was not sworn as a witness. At the hearing in the court below, the files and records in the case of Robert Trombly, guardian, etc., complainant, against Andrew Klersy and Helen Klersy, defendants, were offered in evidence. The bill in that case was filed on August 5, 1903, and the decree therein on April 11, 1904, and an appeal from that decree has been taken to this court. The offer made is broad enough to include the testimony taken in that case, from which testimony it appears (and it has been examined for no other facts) that Joseph Buhler was at the hearing in the circuit court sworn as a witness, and attempted to give testimony, and that he appeared to be unable to understand the questions asked him, or the character of the business being transacted for him.

In the case at bar the only witness sworn on behalf of defendant was the defendant himself, and there is nothing in his testimony to indicate that he has any knowledge of the alleged agreement.

The testimony shows that some time prior to 1866 Joseph Buhler and his wife, a childless couple, then residents of Detroit, took complainant, an infant, into their home, and that Joseph, and his wife, while she lived, thereafter always treated him and spoke of him as their son. In 1866, when he was about 8 years old, he was baptized in St. Mary's Church, Detroit, the baptismal record describing him as Christian, adopted son of Joseph Buhler and his

wife. From the age of 7 until he was past 12 he attended St. Mary's School, and later, for a period of six months, a classical school. He then went to work for Joseph, who kept a butcher shop at 210 Randolph street, the family living over the shop. The boy was not paid wages until he was about 22 or 23 years of age, but was clothed and furnished some money. When he was about 23 years of age, he for 6 months worked by agreement for $8 a week, and then Joseph made him a partner in the business. Complainant did not contribute to the capital of the partnership. There were no written articles of partnership.

Complainant testified that Joseph said:

"I will tell you, I will take you right into business with me, and we will be right in together, and whatever you will use you will use, and whatever I use I will use, and we will all be at home, one, partners."

On cross-examination he testified:

"And after while he said he would take me in business, and then I could use what I wanted. * * * I went into that business with Joseph Buhler, and drew out what money I needed. I am not guessing about the amount of money I drew out of that business, but I should judge it would be about three or four hundred dollars a year—what it cost me to live—and probably $500."

They did considerable business. Complainant worked early and late, and was apparently in all respects a dutiful foster son and a valuable aid in affairs of business. No division of profits was made, and complainant says that over and above the sums which he took Joseph had the proceeds of the business. In 1887 complainant was married. Five or six months before his marriage, complainant being then 28 years old, he had, he says, a talk with Joseph, then a man 59 or 60 years of age, in which he spoke of getting married, and it was at or about this time that the alleged agreement was made. In substance, complainant testified that Joseph Buhler said that, if he would settle down and get married, he wanted him to be near the business.

"He told me: 'I will buy a home for you, because I want you right near the business, because I am not as young as I used to be, and it is hard to work, and you will have to be here early and late, and you cannot live far away; and I will buy a home for you, and this house is yours free of rent until I die, and after that the house is yours.'"

On cross-examination he testified:

"I spoke of getting married. So he says, 'Yes, that would be very good.' We would settle down. He didn't want me to live far from the house, so he says: 'I will buy a house for you in the neighborhood here, and I want you to be right here near the business, and we had the use of the barn as well and everything handy, because you have to be here early in the morning and late at night, and you know you can't live far away;' and he bought the house, three or four months before I was married, for me. * * *

"*Q.* Do I understand you to say that you would not have got married at all if this proposal had not been made to you?

"*A.* That is something I cannot say. I would very likely have got married as well.

"*Q.* You would have been willing to go right on as you were before, whether he made this proposal or not, would you not?

"*A.* How do you mean? Proposal for what?

"*Q.* Proposal to buy you this homestead.

"*A.* I have not made any proposal to him. He proposed it to me.

"*Q.* You expected to get married anyway?

"*A.* Oh, certainly; naturally I would.

"*Q.* And you were willing to continue in the business?

"*A.* Certainly.

"*Q.* Whether he bought that house for you or whether he didn't, you were willing to continue in the business?

"*A.* Certainly.

"*Q.* You didn't have any other business to go to but that?

"*A.* No, sir. I was always home, and from a child up never knew anything else."

Frances Knopp, a witness sworn for complainant, who had known Mr. and Mrs. Buhler since she was a little

girl, entered their family to work and as a companion in February, 1887. At that time the sign on the butcher shop, she says, was "Joseph Buhler & Son," and the family lived over the shop. She ate at the same table and sat at the same fireside with the family. She heard a conversation between Joseph Buhler and Christian before his marriage about a house; that they agreed, and wanted to buy Chris a house, so that he would be near the shop; that, if they could have had Mr. Chris Buhler upstairs in the same building with them, it would have suited them better to have him near the shop; that they wanted Chris to live as close as that because he was the main hand in the shop.

"It was Mr. Joseph Buhler who made the advances and induced Chris that he wanted him, to have him near the shop, and that he would buy him a home close by; and it was his wish and inducement that he did that. Mr. Joseph Buhler made the advances. He said he wanted Chris to live there so that he would be early and late right near the shop, and be right with it always. Chris agreed to that. Chris was satisfied. * * * Chris was present when it was spoken about and decided to buy the home on Macomb street. Mr. and Mrs. Buhler and Christian were present at that time. I think it was at the breakfast table they spoke of it. Joseph Buhler said, 'We will buy the house on Macomb street, and give it to you for a home.' Chris said, 'All right.' Chris was satisfied, and he says, 'All right, if it suits you, it suits me.' That is about all they said. So the house was bought. There might have been a lot more said, but I could not give just every word about it. That is all I remember. Chris was not present at any other time when this subject was mentioned by Joseph Buhler. I don't remember any other time when he was present. It was mostly spoken of at the butcher shop. * * * He says that to have the house nearer the shop the better, the nearer he lived the better he would like it. He wanted Christian to live near the shop. If he could have taken him upstairs, and arranged with him to live above the shop, it would have been better. That could not be done. There was something said at the time Joseph Buhler spoke to Chris about buying this house about living upstairs and being

close to the business. That was the time it was said. It was all at one time, and Chris agreed to anything his father asked him to do; if it was satisfactory to his father it was satisfactory to him."

There is some other testimony to the same effect. There is testimony that when the premises in question were purchased by Joseph Buhler he said, and it was otherwise talked in the family, that the deed would have been taken in complainant's name but for the fact that there was a barn upon the premises which the old gentleman desired to use and did use more or less; that the desire to control the barn and the use of it was more or less determinative of the question of who should be named as grantee in the deed.

We think this testimony and all of the testimony in the record lacks something of proving the agreement set out in the bill, or any agreement. At the time of the talk or talks upon the subject between complainant and his father, complainant was already a partner in business with his father. He had been told, as he testified, by his father, that eventually the business would all be his. Both the interest and duty of complainant were served by continuing his relations with his father and with the business. Complainant did not assume any obligation nor forego any advantage because of what his father proposed to do and did do for him. He worked no more hours after the house was bought than he had previously worked. It was rather the promise of a gift than a bargain or agreement in the proper meaning of that word. Complainant says that he has performed faithfully the contract and agreement. As has already been said, there was nothing to perform. He has done nothing that he would not have done if the home had not been furnished to him by his father, unless it may be said that some money expended upon the property entitles him to consideration. As to that, it appears that he was married in 1887; that some time after that Joseph Buhler bought the property in question; that when he bought it, it was leased, and that for a year, or until the

lease expired, Christian lived on Columbia street, sleeping at home, but for the most part taking his meals, as he had always done, over the shop; that after the tenant left the property in question some $300 was spent upon the house in tearing out partitions, painting, papering, and other changes. This money was drawn out of the firm, and so was the money paid for taxes so long as the partnership continued. Some of the windows have been replaced, the house has been occasionally painted, some other repairs have been made to it and also to the barn upon the premises. Apparently, complainant has kept the premises at all times in good repair. Joseph Buhler has all the time since dissolution of the partnership paid the taxes, and upon at least one occasion assisted in a small way to pay for painting. Complainant has never paid any rent, and has occupied the premises upwards of 16 years, during a part of which time he himself says the rental value was $30 a month, and the remainder of the time $20 a month. If we were to say that all of these expenditures were made in reliance upon the promise of Joseph, it would not be part performance of a parol contract to convey land. There is ground for finding that the changes in the building were for convenience of complainant, as have been the repairs made during his occupancy of the premises. The most that can be said of the matter is that there was a promise on the part of Joseph to give a life estate, and finally a fee, carried out, so far as he was concerned, by placing complainant in possession of the premises; a promise which might at any time be recalled without doing violence to legal rules or creating any right of action on the part of complainant. If Joseph Buhler had the right to recall his promise, his guardian, who has control of his person and estate, may likewise recall and revoke the promise.

There is more or less persuasive testimony in the record, not specifically referred to, tending to show that Joseph Buhler intended that the property in question should be occupied by complainant without payment of rent, and

should, upon his death, belong to complainant, and that he, upon different occasions and to different people, spoke of the property as Chris' property or Chris' home. The fact that complainant was left in possession after the dissolution of the partnership is some evidence that the original intention continued. But it also appears that in 1891 the partnership was dissolved, the place of business moved, Joseph Buhler retired from the firm, and Christian continued the business; that on May 1, 1891, complainant gave to Joseph Buhler his note, due one year after date, containing no provision for interest, for $2,464, and that this sum represented the assets of Joseph Buhler & Son on February 4, 1891, as Christian testified, or represented the stock that was left and the fixtures and the horses and wagons and the money that was in the bank; and that his father told him he never would have to pay the note, as it simply represented the value of the property which he had turned over to his son. Complainant never has paid the note nor paid interest upon it, and it is apparently, because of the statute of limitations, not a valid obligation. September 1, 1897, he borrowed from Joseph Buhler $1,291, giving his note therefor, due one year after date, no provision being made in the note for interest. Upon this note he has paid neither principal nor interest, and it is apparently, because of the statute of limitations, no longer a valid obligation. September 11, 1900, he borrowed of his father $1,000, giving his note therefor, due five years after date, and this note contains no provision for interest, and no interest has been paid. It is in evidence that the defendant, before being appointed guardian for Joseph Buhler, acted as his agent, beginning in 1896 or 1897; that in June, 1900, which was prior to the giving of the last note to Joseph Buhler by complainant, he was sent by Mr. Buhler to see if he could not make arrangements with Christian to pay a certain amount of rent for the house; that he did go, asked Christian to pay rent, and was told by him that he could not pay any rent; that the taxes upon the property have averaged since 1887

$40 to $45 a year. Complainant testified that the first demand for rent of the premises was made after defendant was appointed guardian, but he does not specifically deny the fact sworn to by the defendant. His testimony is, "While Robert Trombly was the agent of Joseph Buhler, I don't think he has asked me to pay rent for the premises; not to my knowledge."

It is said on the part of complainant that the case is on all fours with that of *Wright* v. *Wright*, 99 Mich. 170 (23 L. R. A. 196). That case has been cited as authority for the proposition that an oral contract to give property at death in consideration of care or labor will be enforced in equity if the consideration has been paid or performed. See *Owens* v. *McNally*, 113 Cal. 444 (33 L. R. A. 369).

In *Wright* v. *Wright* two justices agreed that a parol contract to convey land could rest in implication, and that there could be such part performance of the implied contract as to warrant a decree for specific performance. A third justice agreed to the decree entered, but in a separate opinion, and upon a different ground, and two justices strongly dissented.

In *Albring* v. *Ward*, 137 Mich. 352, the opinion in *Wright* v. *Wright* was relied upon by complainant to sustain devolution of property by virtue of the adoption of a child under the provisions of a void statute, and its authority for any such proposition was denied. But *Wright* v. *Wright* is otherwise easily distinguished from the present case. In none of the other cases cited and relied upon by complainant do we find authority for the decree in the present case. It is unnecessary to review them. In each case an agreement was proven, and satisfactory proof furnished of substantial performance of the agreement on the part of the party seeking relief. Here we do not find any agreement—any contract—to have been made. Considered in the light of complainant's own testimony, there was an act of bounty, merely, on the part of his father, which complainant naturally, and to his profit, was willing to accept; and, as has been already stated, it

does not appear that he agreed to do anything, or ever did or refrained from doing anything, ever in any way changed his condition or circumstances, was induced to forego any benefit or assume any liability, because of or relying upon the promise of the father.

There is much in the case inclining one to look kindly upon the claims of the complainant, and to wish that the bounty of the foster father might equal the expectations of the son. It is to be considered, however, apart from the very clear effect of the testimony referred to, that Joseph Buhler is living, that he is shown to have been a rather careful business man, that he is owner of the premises in question, and that to sustain the decree below will amount to first making and then enforcing an agreement based upon no legal consideration, to divest him of the use and of the fee of the premises in question.

The decree of the court below is reversed, with costs, and a decree will be entered in this court awarding to defendant restitution of the premises, unless complainant shall, within 30 days after notice of said decree, pay to defendant, at the rate of $20 per month, rent from July 1, 1903, to the time of said payment; occupancy thereafter of the said premises to depend upon the agreement of the parties.

MOORE, C. J., and CARPENTER, MONTGOMERY, and HOOKER, JJ., concurred.

ON REHEARING.

OSTRANDER, J. I have found no reason for changing the opinion expressed when the case was first before this court.

GRANT, BLAIR, and HOOKER, JJ., concurred with OSTRANDER, J.

CARPENTER, C. J. (*dissenting*). The object of this suit is to enforce a certain oral agreement described in complainant's bill as follows:

"Said Joseph Buhler (defendant's ward), a short time prior to your orator's marriage, proposed to your orator and promised and agreed with him that, if your orator would continue after his said marriage to remain in said business with said Joseph Buhler (this was a meat business in which said Buhler and complainant were partners), and would live close to the place or store where the same was being conducted, said Joseph Buhler would purchase for your orator a home in the vicinity wherein your orator and his family should live without paying rent therefor, and that upon the death of said Joseph Buhler the same should be and become the sole property of your orator; that your orator then and there accepted the proposal of said Joseph Buhler as hereinbefore set forth, and promised and agreed to conform to and abide by the terms and conditions thereof."

The bill also sets out that thereafter Joseph Buhler purchased the premises in question, turned them over to complainant for a home, and that from a period shortly after his marriage complainant and his family have occupied the premises continuously under and by virtue of the terms of said agreement.

The trial court rendered a decree in favor of complainant. This court (see ante, 557) reversed that decree upon the ground that the testimony of complainant and his witnesses—and this testimony was uncontradicted—did not warrant the conclusion that any agreement was made by him and defendant's ward. The facts are fully stated in our former opinion. A rehearing was granted. The case has been reargued and we are called upon to again determine whether or not such an agreement was made, and, if so, whether it can be enforced. I think that the agreement was made and that it was also enforceable. I proceed to state such of the testimony as, in my judgment, establishes the agreement.

Complainant testified that defendant's ward "told me, 'I will buy a home for you because I want you right near the business. * * * I will buy a home for you and this house is yours free of rent until I die, and after that the house is yours. * * * I will buy a house for you

in the neighborhood here and I want you to be right near the business;'" that he shortly thereafter—in 1888—moved into this house and has lived there ever since. Frances Knopp testified:

"It was Mr. Joseph Buhler who made the advances and induced Chris that he wanted him to have him near the shop, and that he would buy a home close by. * * * He said he wanted Chris to live there so that he would be early and late right near the shop and be right with it always. Chris agreed to that; Chris was satisfied."

There is other testimony corroborating what I have quoted, and to which I need not refer. It is obvious—and this was recognized in our former opinion—"that there was a promise on the part of Joseph to give a life estate and finally a fee," but we held that promise "might at any time be recalled without doing violence to legal rules or creating any right of action," because "it does not appear that he (complainant) agreed to do anything, or ever did or refrained from doing anything, ever in any way changed his condition or circumstances, was induced to forego any benefit or assume any liability, because of or relying upon the promise of the father."

In making this statement, we overlooked this, viz. (at least I overlooked it in assenting to said statement), that complainant agreed to live in the house in order that he might be near the joint business conducted by his foster father and himself, and that he faithfully carried out this agreement. By making this agreement, and by performing it, complainant was induced to forego a benefit, and did thereby furnish a consideration which entitles him to enforce the promise of Joseph Buhler. Had not complainant made this agreement, he might have lived wherever he chose. By making it and by performing it, he deprived himself of this right which was otherwise his.

In determining whether or not this is a consideration for the promise of defendant's ward we resort to elementary principles.

"If the promisee, at the instance of the promisor and moved by his promise, do any act which occasions him even the slightest trouble or inconvenience, or in doing which he incurs a risk, the act so performed constitutes a valuable consideration for the promise." 6 Am. & Eng. Enc. Law (2d Ed.), p. 722.

"Indeed there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not." 9 Cyc. pp. 312, 313.

In accordance with these principles it has been held:

The abandonment of one's plan to accept employment in a distant town and making his home upon a farm is a consideration for a promise to deed the farm. *Welch* v. *Whelpley*, 62 Mich. 15.

The giving up of one's home and employment and moving to a farm is a consideration for a promise to deed the farm. *Bigelow* v. *Bigelow*, 95 Me. 17. (These cases are in my judgment legally indistinguishable from the case at bar.)

Attending, or promising to attend, the promisor's funeral is a consideration for a promise to pay money. *Earle* v. *Angell*, 157 Mass. 294.

Granting to the promisor at his request the privilege of naming the promisee's child is a consideration for a promise to "provide for it generously and give it a good education." *Wolford* v. *Powers*, 85 Ind. 294.

Changing the name of a female child at the request of the promisor is a consideration for his promise to leave her by his will $500. *Babcock* v. *Chase*, 92 Hun (N. Y.), 264.

The disclosure of certain information is a consideration for a promise. *Green* v. *Brooks*, 81 Cal. 328.

Abstinence from smoking, chewing, drinking, swearing, and playing billiards for six years, or until plaintiff's assignor was 21 years old, is consideration for a promise to pay $5,000. *Hamer* v. *Sidway*, 124 N. Y. 538.

Abstinence from use of tobacco until after promisor's death is consideration for a promise to pay $500. *Talbott* v. *Stemmons' Ex'r*, 89 Ky. 232.

Abstinence from use of intoxicating liquors is consideration for promissory note. *Lindell* v. *Rokes*, 60 Mo. 249.

The incurring of expenses of a trip to Europe is consideration for the promise to reimburse such expenditures. *Devecmon* v. *Shaw*, 69 Md. 199.

The promise by a divorced wife that she will "conduct herself with sobriety, and in a respectable, orderly, and virtuous manner," is consideration for a promise to pay an annuity; the court saying: "She was legally at liberty * * * to conduct herself in these respects as she might think fit, and her promise to surrender her liberty * * * constituted a good consideration for his promise." *Dunton* v. *Dunton*, 18 Vict. 114.

I submit that the foregoing authorities correctly state and apply the law, and that if we follow that law, we must hold that there was a consideration for the promise of defendant's ward. I conclude, therefore, that there was an agreement between these parties. By the terms of that agreement defendant's ward agreed that complainant should have during the life the house rent free and on his death the fee, and complainant agreed to reside in the house, and performed his agreement.

Was this agreement enforceable? It was an oral agreement. It related to the transfer of land and was therefore within the prohibition of the statute of frauds. The fact, however, that complainant, in conformity with his contract, took possession of the land and held it for many years is such a part performance as to entitle him to relief in equity. *Lamb* v. *Hinman*, 46 Mich. 112; *Welch* v. *Whelpley*, supra; *Bigelow* v. *Bigelow*, supra.

As stated in our former opinion, after making the foregoing contract, complainant became indebted to defendant's ward. This indebtedness has never been paid, and the larger part of it is no longer a valid debt because of the operation of the statute of limitations. In considering

complainant's moral culpability in not paying this indebtedness, it should be remembered that complainant testifies—and this testimony is undisputed—that he was often assured by defendant's ward that he need not pay it. Said indebtedness has, however, no relation whatever to this controversy. Complainant's failure to pay it—whether morally justified or not—did not release defendant's ward from the obligations of his contract. Indeed, our consideration of this indebtedness will only tend, in my judgment, to obscure our view of the real controversy.

The decree of the circuit court should be affirmed.

MCALVAY and MONTGOMERY, JJ., concurred with CARPENTER, C. J.

MOORE, J., did not sit.

APRIL TERM, 1905.

LOVE *v.* HALLADAY.

1. FALSE IMPRISONMENT—EVIDENCE—QUESTION FOR JURY.
   In an action against two defendants for false imprisonment, evidence examined, and *held*, not to conclusively show that one of defendants participated in the arrest, but to sustain the finding of the jury that he was not responsible therefor.

2. SAME—INSTRUCTIONS—HARMLESS ERROR.
   In an action for false imprisonment against two defendants, error, if any, in charging that exemplary damages were limited to such a sum as would constitute a just verdict against the defendant least culpable, was harmless, where the jury found in favor of one defendant.

3. DAMAGES—INADEQUACY—REMEDY.
   The remedy for inadequacy in the amount of the verdict is a motion for a new trial.

Error to Eaton; Smith, J. Submitted January 10, 1905. (Docket No. 28.) Decided April 4, 1905.

Case by Sarah A. Love against Oliver A. Halladay and Burton P. Love for false imprisonment. There was judgment for plaintiff against defendant Halladay, and she brings error. Affirmed.

Lyman H. McCall and *Horace S. Maynard*, for appellant.

Garry C. Fox and *J. M. C. Smith*, for defendant Halladay.

MONTGOMERY, J. This is an action for false imprisonment. On the trial a verdict was rendered acquitting the

defendant Love, and against the defendant Halladay for $5. A judgment according with this verdict was entered, and plaintiff brings error. The assignments of error are numerous, but the questions calling for discussion are few.

The question of first importance is whether the court should have directed a verdict against the defendant Love as well as against defendant Halladay. This question is of prime importance, in our judgment, for the reason that, if the court was right in submitting this question to the jury, the fact that the jury has found that he ought not to have been joined in the action eliminates some of the questions discussed. The facts, briefly stated, are as follows (adopting, for the purposes of this statement, the view most favorable to defendant Love, as we are bound to do, the jury having found the facts with him): The defendant Love, his wife, and little daughter, lived with plaintiff on her farm; all the parties occupying the same house. On the day that the trouble originated, the plaintiff committed an assault upon the wife of defendant Love, and when defendant Love afterwards learned of the fact, and charged plaintiff with it, also assaulted him. Defendant Love drove to the city of Charlotte for the purpose of causing plaintiff's arrest. His wife accompanied him. They visited the prosecuting attorney, and laid all the facts before him; and, from certain statements made by defendant Love and his wife, the prosecuting attorney was evidently of the opinion that plaintiff's sanity should be inquired into, and referred defendant Love to the judge of probate. The defendant Love then visited the judge of probate. The facts were fully stated to the latter, and a petition was signed by defendant Love, asking for an inquiry as to plaintiff's sanity. Defendant Love was asked if some one could be secured to remain with plaintiff over Sunday, and he replied that he knew of no one. The judge of probate then directed the defendant Halladay, who was sheriff of the county, to go out to the farm and take plaintiff into custody. Defendant Love did not urge plaintiff's arrest, and stated to the judge of probate that all he

wanted was protection. It was arranged between the defendant Love and the sheriff that the former was to be present at his home when the sheriff acted. The sheriff went to the farm, arrested plaintiff, took her to Charlotte, and kept her in jail from Saturday evening until Monday, when she was released.

It is urged that these facts conclusively show the participation of defendant Love in the arrest. We are of the opinion, however, that the testimony is open to inference which the jury drew, viz., that defendant Love confined himself to stating all he knew, and no more, to the public officials charged with the duty of taking action in the matter, and left them free to take such action as they thought best. The fact that the defendant Love was present when the arrest was made is of less significance than would otherwise attach to it, when it is considered that the place of his arrest was his own home.

It is next urged that the court was in error in charging that the jury would be limited in its award of added or exemplary damages, in a case where two defendants are jointly responsible for the injury to plaintiff, to such a sum as would constitute a just verdict against the least culpable. The plaintiff contends that the correct rule is the reverse of that given, and that the damages to be awarded in such a case is such a sum as would be just as against the most culpable. We find it unnecessary to discuss the authorities bearing upon this question, as it is evident that the finding of the jury that only defendant Halladay was liable eliminates this question. It could not be maintained that the bad faith of one not legally responsible for an imprisonment could be made the basis for an added award against the only one who is legally responsible but who acts in good faith.

Numerous assignments of error are directed to the rulings of the court in refusing requests, and to the charge as given upon the subject of damages. All have been considered, and no error is discovered. The charge fairly submitted the question of defendant Love's responsibility

for the arrest. The abstract instructions on the question of immunity from arrest could not have served any useful purpose, in view of the direct charge that the arrest was unlawful. The instructions as to added damages growing out of the wantonness or recklessness of defendant were sufficiently full.

The verdict does impress us as being very small, considering the circumstances of the arrest, but the remedy for any inadequacy in this respect was a motion for a new trial.

No error is found.

Judgment affirmed.

MOORE, C. J., and CARPENTER, OSTRANDER, and HOOKER, JJ., concurred.

JEWELL *v.* JEWELL'S ESTATE.

139 578
143 9

1. PRINCIPAL AND AGENT—RELATIONS—EVIDENCE—MEMORANDA.
   A memorandum book kept by an agent in his own handwriting, in which are entries relating to his principal's business, and covering a period of many years before and after the date of a settlement between them, the entries before the settlement being crossed out and those made thereafter not being so crossed, is competent evidence, after the death of the agent, of the nature and extent of the business relations between him and the principal; but its completeness is a question for the jury, and, as evidencing liability, only those entries after the settlement are to be considered.

2. SAME—LIMITATIONS.
   A right of action in favor of a principal to recover money collected by his agent, whose duty to remit is fixed without an accounting, accrues as soon as the money is paid to the agent.

3. LIMITATIONS—PRINCIPAL AND AGENT—TRUST RELATION.
   The relation between a principal and an agent who has ceased doing new business for his principal, and whose duty it is

merely to collect and remit the money due his principal on outstanding mortgages, is not such a trust relation as suspends the running of limitations.

4. SAME—NEW PROMISE—SUFFICIENCY OF WRITING.
A letter written by an agent to his principal, stating, "I have used the money and I want to turn out my property to make you all right," constitutes a sufficient acknowledgment by the agent of the existence of a debt in favor of the principal to satisfy the statute (§ 9740, 3 Comp. Laws) requiring acknowledgments of debts to be in writing in order to postpone the running of limitations.

5. APPEAL AND ERROR—QUESTIONS CONSIDERED—THEORY BELOW.
Where defendant requested a directed verdict on the ground that the claim was barred by limitations, and did not, either in his requests to charge or assignments of error, raise the question of the effect of testimony offered in proof of a writing which, if as represented, postponed the running of limitations, the judgment will not be reversed because the truth of the testimony as to such writing was not submitted to the jury, and the trial court charged that limitations had no application to the case, though the charge was based on the erroneous theory that the relations of the parties were such as to preclude the running of limitations.

Error to Newaygo; Palmer, J. Submitted January 19, 1905. (Docket No. 80.) Decided April 4, 1905.

James M. Jewell presented a claim against the estate of Joseph B. Jewell, deceased, for money loaned by decedent as claimant's agent. The claim was disallowed in the probate court, and claimant appealed to the circuit court. There was judgment for claimant at the circuit, and defendant brings error. Affirmed.

Martin Rozema and *Nims, Hoyt, Erwin, Sessions & Vanderwerp*, for appellant.

W. D. Fuller, for appellee.

OSTRANDER, J. Joseph B. Jewell, a resident of Newaygo county, Mich., died testate June 29, 1897, and on August 16, 1897, letters testamentary were issued. James M.

Jewell, his brother, filed September 19, 1902, a claim against the estate, which is here set out, from the record, in full:

"STATE OF NEW YORK, County of Erie, Town of Evans. } ss.

"James M. Jewell being duly sworn, deposes and says:

"1. That on or about the 15th day of May, 1877, he deposited with Joseph B. Jewell, late of the town of Sheridan, county of Newaygo, State of Michigan, the sum of $1,000, lawful money; the same to be loaned on unincumbered real estate, with first mortgage security.

"2. That he appointed the said Joseph B. Jewell, late of the town, county, and State aforesaid, his agent for the purpose of loaning said money, and, to that end, granted him a power of attorney, and that he afterwards at divers times transmitted certain other sums of money to be loaned in like manner.

"3. That said moneys were loaned as set forth in the bill of items annexed hereto, a copy of the same being furnished by the administratrix of the estate of the late Joseph B. Jewell, and purported to have been transcribed from the deceased's books.

"4. That no part of said moneys was ever, to his knowledge or with his consent, loaned to the said Joseph B. Jewell, now deceased; that said agency has never been surrendered or revoked; and that no settlement has ever been made, nor any moneys paid over to him, by either the said agent, Joseph B. Jewell, now deceased, or by his heirs or administrators.

"JAMES M. JEWELL.

"Subscribed and sworn to before me this 15th day of September, 1902.

"HORATION P. MUFFITT,
[Notary Seal.] "Notary Public.

"EVANS, N. Y., September 17th, 1902.

"Estate of Joseph B. Jewell, as Agent, Fremont, Mich.

"To James M. Jewell, Dr.:

1890, Sept. 23d.	Interest on Peter Omler mortgage	$60 00
	Interest on $60.00 two yrs. and six mos.	9 00
1891, Feb. 16th.	Received on Frank Westgate mortgage	300 00
	Interest on same to March 17th, 1893	37 50

1891, Mar. 8th. Received on Frank Westgate mortgage		$57 00
Interest on same to Mar. 17th, 1893		6 84
" Mar. 28th. Received on Charlotte Briggs mortgage		297 47
Interest on same to Mar. 17th, 1893		17 88
1892, Jan. 22d. Received on Frank Westgate mortgage		308 00
Interest on same to Mar. 17th, 1893		21 00
" Mar. 15th. Received on Peter Omler mortgage		50 00
Interest on same to Mar. 17th, 1893		3 00
" Mar. 8th. Received on Frank Westgate mortgage		31 40
Interest on same to Mar. 17th, 1893		1 86
1893, Feb. 1st. Received on Peter Omler mortgage		600 00
Interest on same to March 17th, 1893		4 50
" Mar. 17th. Received on Peter Omler mortgage		427 48
	$727 48	
Less N. Y. draft,	300 00	
	$427 48	
" " Received on Frank Westgate mortgage		137 00
		$2,361 93
Interest 9 years and 6 mos.		1,256 15
		$3,618 08"

This claim was on December 20, 1902, disallowed. Appeal was taken to the circuit court for Newaygo county, and, as the result of a trial in that court, a verdict and judgment for $2,254.02 in favor of claimant was entered. No testimony was offered on the part of the estate, and the substance of all the testimony given is in the record. At the conclusion of the case made by claimant, the court was requested to direct a verdict for the estate, for the reason, among others, "that under the undisputed evidence in this case the claim, if any ever existed, is barred by the statute of limitations of this State." The motion was denied, and a single question of fact was submitted to the jury. They were required to find whether the

money collected by decedent after September 5, 1890, had been paid to claimant.

A somewhat extended examination of the testimony is necessary to a correct understanding of the case. Meager and unsatisfactory as in many respects it is, the testimony shows that claimant is a man upwards of 85 years of age, a retired farmer, living in the State of New York. In 1877, he began to lend money in Newaygo county, securing payment by real-estate mortgages running to himself; his brother, Joseph B. Jewell, acting for him in securing loans, taking and recording mortgages, and collecting interest and principal. The record of mortgages for Newaygo county shows a number of such mortgages to have been recorded, and during the period from 1883 to 1893 a number to have been discharged by decedent, who from November, 1881, had from claimant a written power of attorney to discharge and satisfy any and all mortgages "belonging to me, the said James M. Jewell, and which may now be or hereafter come into the custody and care of the said Joseph B. Jewell as the said mortgages shall become paid." Various remittances are shown to have been made to claimant, and various sums deposited to his credit in a local bank; and on September 5, 1890, on a visit made by decedent to claimant, a settlement was made, and evidence of it put in writing, and signed by both parties. In June, 1902, a representative of claimant came to Michigan, and had an interview with the widow of decedent and with the executor of his estate; and he and the executor visited the judge of probate, and secured an order opening the estate for presentation of claims. Evidence of the nature of the relations of the parties was afforded principally by the records in the office of the register of deeds, by the written power of attorney, by certain letters, and by a memorandum book. Eight of these letters, written by decedent to claimant from May 28, 1878, to February 14, 1887, with their envelopes; two, dated respectively March 16, 1887, and March 25, 1893, written by claimant to decedent; and one other letter,

with its envelope, dated November 30, 1881, written by decedent to Mrs. J. M. Jewell (Linda)—were, with the memorandum book, received in evidence, subject to objection. The memorandum book was found, after his death, among the papers of decedent. The entries in it were in the handwriting of decedent. The dates of the various entries are from August 25, 1881, to February 25, 1894. They relate, with the exception of the Linda Jewell loans, to the business of claimant, and are records of the receipt and disbursement of claimant's money. This book contains the memorandum, signed by both parties, of the settlement of September 5, 1890, and after that eleven entries concerning the business of claimant, and one of the business of Linda Jewell. The following are examples of the entries contained in it:

Aug. 25, 1881. J. M. Jewell, Cr., by interest on the Wm. Martin note that was due on the 1st day of June, '81	$25 00
Aug. 25th. J. M. Jewell, Dr., to cash paid to Bal.	25 00
Sept. 30. J. M. Jewell, Cr., by cash received on Martin mortgage	350 00
June 30th, 1882. J. M. Jewell, Dr., to draft on 9th National Bank by registered letter	454 00
Oct. 18, 1882. Forwarded to J. M. Jewell certificate of deposit on Weber, Hewitt & Co. bank, Fremont, $392.40, the same being interest on the Bill Beattie mortgage.	

When this book was found, all entries down to the memorandum of settlement of September 5, 1890, were crossed in ink, as if of no further moment. Those entries made after September 5, 1890, are none of them so crossed. The letters and the memorandum book were competent evidence, as showing the nature, and, in some degree, the extent, of the business relations of these parties. The jury were instructed that it was for their consideration—that it was for them to say whether it was complete or incomplete. So far as evidencing any liability, they were told to consider none of the entries in the book prior to the settlement of September 5, 1890. No error was commit-

ted in receiving this evidence, nor in the charge relating to it. There was testimony from persons who paid decedent money for claimant after September 5, 1890, and receipts for money so paid, signed by decedent, were in evidence. A daughter of claimant testified to the contents of a destroyed letter which she saw and read at her home, in Wisconsin, about April 1, 1897, upon an occasion when claimant and his wife visited her. It was a letter from decedent to claimant, and contained the statement, in substance, that decedent had used claimant's money, and wished to turn out his property to make him all right. The last entry in the book showing receipt of money belonging to claimant is dated March 17, 1893. The last remittance of money to claimant, proved, was acknowledged by claimant in a letter dated March 25, 1893, and corresponds with the remittance of March 17, 1893, charged by decedent in the book.

The nature and legal effect of the relations existing between claimant and decedent is a question, and the principal question, debated by counsel. For appellant it is claimed that no such trust relations are shown as to take the case out of the operation of the statute of limitations; that, in any event, the agency of decedent was of such character that demand by the principal and accounting by the agent must be presumed to have occurred within a reasonable time after receipt of money by the agent.

When the settlement was made between these parties in 1890, the matters left in decedent's hands were investments already made, upon certain terms, to persons known. No other funds thereafter came to decedent from claimant for investment. The duties of decedent thereafter were confined to the receipt and remittance of moneys to become due. The claim presented specifies the Peter Omler, the Frank Westgate, and the Charlotte Briggs mortgages only, as to each of which the principal sum, the rate of interest, and the dates of payment must be presumed to have been known to claimant. The Westgate mortgage, given in 1887, matured March 8, 1892. The other two

mortgages were long past due in 1890. The Westgate mortgage was discharged by decedent March 7, 1893, as appears by the record. The others are paid, and the money was paid to decedent. The interest on the Westgate mortgage was payable annually; on the other two, semi-annually. The memorandum book shows that the decedent collected the following sums at the times stated, viz.:

September 23, 1890	$60 00
February 16, 1891	300 00
March 8, 1891	57 00
March 28, 1891	297 47
January 22, 1892	300 00
March 15, 1892	50 00
March 8, 1892	31 40
February 1, 1893	600 00
March 17, 1893	728 20
March 17, 1893	137 00

— a total of $2,561.07; and all of these sums were collected upon the securities named. The only sum shown to have been remitted was $300, in March, 1893, already mentioned.

Counsel for appellee claims, and we agree with him, that the testimony raises the presumption that the moneys collected by decedent had not been loaned again, and that the jury were justified in finding that decedent used all of the money collected after the settlement, excepting the amount of the single remittance. We think that, under the proofs, the charge of the court correctly stated the issue, and is in no respect open to criticism.

It was more than four years after the date of the last remittance shown before decedent died, and more than five years after his death that this claim was presented. Our statute of limitations, so far as applicable to cases like this, bars action "six years next after the cause of action shall accrue." 3 Comp. Laws, § 9728. Where a cause of action is fraudulently concealed, the statute limitation is not effective until two years after discovery of the fraud. 3 Comp. Laws, § 9739.

Conceding that the relation of principal and agent ex-

isted, claimant had a right of action at law against decedent for each of the several sums of money paid to him. No accounting was required. No equitable or other defenses could have been made to such actions. It seems to be the better rule, and better supported—although there is some conflict as to when a right of action accrues to a principal against his agent who collects his money—that, if the duty of the agent to remit is fixed, he is liable to an action for the money, and that a statute of limitations, worded as is ours, begins to run when action might be brought. *P. P. Mast & Co.* v. *Easton*, 33 Minn. 161. This in no way conflicts with the holding in *Kimball* v. *Kimball*, 16 Mich. 211, 219.

There is no occasion to consider in this case any question of what would be a reasonable time to make remittance or to discover the agent's dereliction. The proofs show that decedent collected claimant's money at periods running from 9 to 11 years before action brought.

Nor is the relation shown by the evidence such a trust relation as suspended the operation of the statute of limitations. In 2 Perry on Trusts, § 863, it is said—and numerous cases are cited—that, "as between trustee and cestui que trust, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar." Manifestly, the author had in mind some definition of an "express trust," which definition must be discovered in order to apply the rule he gives. He cites, for example, *Kane* v. *Bloodgood*, 7 Johns. Ch. (N. Y.) 90, a leading case, which arose in 1823, in which Chancellor Kent uses this language:

"I cannot assent to the proposition that all cases of direct and express trust, and arising between trustee and cestui que trust, are to be withdrawn from the operation of the statute of limitations, notwithstanding a clear and certain remedy exists at law. The word 'trust' is often used in a very broad and comprehensive sense. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may

be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust. * * *

"The reciprocal rights and duties founded upon the various species of bailment, and growing out of those relations, as between 'hirer and letter to hire, borrower and lender, depositary and person depositing, a commissioner and an employer, a receiver and a giver in pledge,' are all cases of express and direct trust. * * *

"Are all such cases to be taken out of the statute of limitations, under the notion of a trust, when one of the parties selects his remedy in this court [court of equity]? A review of the decisions will enable us, as I apprehend, to deduce from them a safer and sounder doctrine, and to establish, upon the solid foundations of authority and policy, this rule: That the trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court."

There follows an exhaustive review of the English and earlier New York cases. As supporting the rule above stated, Angell on Limitations, § 166; *Farnam* v. *Brooks*, 9 Pick. (Mass.) 242; *Robinson* v. *Hook*, 4 Mason (U. S.), 152; *McClane's Adm'x* v. *Shepherd's Exec.*, 21 N. J. Eq. 76; *Hayward* v. *Gunn*, 82 Ill. 385; *Cook* v. *Woodley*, 2 N. J. Eq. 209; *Cone* v. *Dunham*, 59 Conn. 145 (8 L. R. A. 647, and note); *Boyd* v. *Fire Ass'n*, 116 Wis. 155 (61 L. R. A. 918); *Merton* v. *O'Brien*, 117 Wis. 437; *Buttles* v. *De Baun*, 116 Wis. 326. The opinions filed in these cases cite—each of them—a large number of other decisions, and a number of these have been examined. The variations, so far as facts are concerned, are infinite, and the rule is often loosely stated.

In *Merton* v. *O'Brien*, supra, it is said:

"It is frequently said in the authorities that in case of an express trust, as between trustee and cestui que trust, the statute of limitations does not apply. This language is not accurate, and may be very misleading."

The case of *Shepherd* v. *Shepherd's Estate*, 108 Mich. 82, is the only case determined by this court in which the

question was raised as it is here raised. In that case it appeared that decedent was, until his death, the general agent of claimant, and had control and management of his business at Charlotte, Mich.; signing his principal's name to notes, making settlements for him, having entire charge of his books, and generally exercising authority without limitation. The court found that this business was in the hands of decedent, a trust estate, and the continuance of the trust was interrupted only by the death of the agent. No accounting had ever been had. It is true that the principal presented his claim to the commissioners on claims in probate court, and on appeal the matter was referred by the circuit court, on stipulation, to referees, who seem to have occupied 46½ days, each, in making and stating an account. It was apparently a matter which, if settled in the lifetime of decedent other than amicably, would have required the interposition of a court of equity. The case is not an authority for claimant here.

We should agree with counsel for appellant that the statute of limitations had barred this demand if it were not for the effect to be given the letter about which the witness Ina Brodie gave testimony. She says that from about April 1, 1897, until some time in October, 1897, her father, the claimant, and his wife, visited her at her home in Wisconsin; that while there her father received a letter from his brother, decedent, written a few weeks before his death, in regard to these matters; that she saw and read the letter; that, after the departure of her father and mother, she found this letter in the room they had occupied, and destroyed it. She testified that she saw the envelope in which the letter came; that the letter was from Fremont, the home of decedent; that she knew decedent's handwriting; and that the letter was in his handwriting. Asked to state the contents of the letter, objection was made by counsel for the estate, and this objection is the ground for the fourth assignment of error. This assignment is abandoned in this court, and we treat the testimony called for as properly admitted. The letter con-

tained the statement: "I have used the money and I want to turn out my property to make you all right." This witness also testified that many letters passed between claimant and decedent while claimant was at her house. We are of opinion that if this letter, containing the matter stated, was written and received as testified to by this witness, there was a sufficient acknowledgment of the demand to which consideration was limited, within the meaning of 3 Comp. Laws, § 9740; *Rumsey* v. *Settle's Estate*, 120 Mich. 372.

The ruling of the trial court to the effect that the statute of limitations was no bar was not put upon the ground that the running of the statute had been interrupted, but upon the ground that the relations of the parties was such as to preclude the running of the statute. Upon this point, namely, the reason for the ruling, we do not agree with the learned trial judge, and do agree with counsel for appellant. We are therefore obliged to consider whether, because the matter of the truth of this testimony was not submitted to the jury, we should reverse the finding of the jury and order a new trial. Counsel for appellant do not ask for a reversal upon this ground. Indeed, this letter and the effect of it are not at all discussed in their brief. The contention on the part of the estate is that there was no question for the jury. The requests to charge do not raise the point, nor do the assignments of error. We conclude, therefore, that we must hold that no error was committed in instructing the jury that the statute of limitations had no application.

The claim was properly allowed. Claimant will recover costs of this court.

McALVAY, GRANT, BLAIR, and MONTGOMERY, JJ., concurred.

139 590
f151 ³264

WEAVER *v.* ANN ARBOR RAILROAD CO.

1. CARRIERS—LIVE STOCK—PERSONS IN CHARGE.
   A person designated by the shipper, and accepted by the carrier, to take charge of a shipment of live stock, is a "bona fide employé" of the shipper, within the meaning of those words as used in the contract of carriage, though he has not theretofore been in the shipper's employ and receives no other compensation than his passage to the destination of the shipment.
2. SAME—EVIDENCE—SUFFICIENCY.
   On the issue of whether decedent, killed while riding on a drover's pass, was in charge of a shipment of cattle, evidence examined and *held*, sufficient to justify a finding that he was actually placed in charge of the cattle by the shipper with the understanding that he should do whatever was necessary in caring for them.
3. SAME—PASSENGER—PERSON RIDING ON DROVER'S PASS—NEGLIGENCE—LIMITATION OF LIABILITY—CONTRACT.
   A person rightfully riding on a drover's pass is a passenger for hire, and his release of liability for damages on account of the negligence of the carrier is invalid.

Error to Gratiot; Stone, J. Submitted January 20, 1905. (Docket No. 96.) Decided April 4, 1905.

Case by Lizzie Weaver, administratrix of the estate of John H. Weaver, deceased, against the Ann Arbor Railroad Company for the negligent killing of plaintiff's intestate. There was judgment for plaintiff, and defendant brings error. Affirmed.

Alexander L. Smith, for appellant.

Julius B. Kirby, for appellee.

BLAIR, J. This writ of error is prosecuted to reverse a judgment of the circuit court of Gratiot county in favor of the plaintiff, as administratrix of the estate of John H.

Weaver, deceased, in an action brought against the defendant railway company for injuries received by said decedent, caused by the negligence of the defendant, and from which he subsequently died. The action was brought under the survival act. At the close of the plaintiff's evidence defendant made a motion for a verdict on the pleadings and proofs, which the court overruled, and defendant excepted. The defendant offered no testimony. The case was thereupon submitted to a jury, which returned a verdict for plaintiff, on which judgment was entered. There is no dispute about the facts in the case. The errors assigned are the action of the court in overruling the motion above mentioned, in refusing to give in the charge to the jury two requests of the defendant, and error in the charge as given.

Plaintiff's decedent, John H. Weaver, was, at the time of the accident causing his death, being transported on a freight train of defendant, which was at said time standing within what are known as "yard limits" of the station at Ashley, a village on the line of the defendant railroad. He was in the caboose at the rear of said train, which was a south-bound train, known as "No. 33." The accident occurred shortly before midnight on the 29th of January, 1904. The accident was caused by another south-bound freight train of defendant, known as "No. 41," coming into the yard or station limits at Ashley, and running into the caboose in which plaintiff was, wrecking that car, and causing a hay car in front of it to be derailed and upset upon plaintiff's body, injuring him so severely that he died within a short time thereafter. The accident was due to the negligence of the engineer of train No. 41 in failing to keep his train under control when coming into yard or station limits, as required by a rule of the company.

The declaration avers that plaintiff's intestate was being transported as a passenger for hire. In proof of this allegation there was offered in evidence of the right of said Weaver as a passenger on defendant's train a paper

found upon his body after his death. This document is designated a "limited liability live stock contract." It was a written contract entered into by the railroad company and certain shippers of live stock, Messrs. Altenburg & Van Buskirk, providing for the transportation of 28 head of cattle from Ithaca, Mich., to Black Rock (near Buffalo), N. Y. Ithaca is a station on the defendant's railroad a short distance north of Ashley. Under the contract the shippers had the right to accompany, or have an employé accompany, the stock, to take care of the same. The transportation of the man in charge was without other money consideration than the sum paid for the transportation of the stock.

The contract contained, among others, the following provisions:

"That the said shipper is, at his own sole risk and expense, to load and take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same. * * *

"That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of said stock from said car or cars. * * *

"That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, etc. * * *

"And it is further agreed by said shipper that, in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid or to be paid for the transportation of the live stock in charge of which he is, the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims, liabilities, and de-

mands of every kind, nature, and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employés, or otherwise. * * *

"And Altenburg & Van Buskirk does hereby acknowledge that he had the option of shipping the above described live stock at a higher rate of freight according to the official tariffs, classifications, and rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad, and transportation companies as common carriers of the said live stock upon their respective roads and lines, but has voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

"ANN ARBOR RAILROAD COMPANY,
"By E. W. ANGELL, Station Agent.

"Witness my hand,
"ALTENBURG & VAN BUSKIRK, Shipper.
"By————, Shipper's Agent.

"E. W. ANGELL, Witness.

"(See back for release for man in charge.)"

Upon the back of the contract appeared the following:

"Form 258. Live stock contract:

"From Ithaca, Mich., to Black Rock, N. Y., via M. C. R. R.

"Date Jany 29th, '04. Shipper, Altenburg & Van B.; consignee, do., ac Bun. W. B. Nos. M. C. 31 and M. C. 32; car Nos. M. C. 7991, T. C. S. D. 20836.

"Parties actually in charge of and accompanying within named stock are required to write their own names in ink here.

"JOHN WEAVER.

"Men in charge have written their own names above.
"E. W. ANGELL, Forwarding Agent.

"Ithaca, Mich., Station.

"Note—Agents will permit only the signature of owners or bona fide employés, who accompany the stock, to be entered on back of contract, without regard to passes allowed by number of cars, and run a pen through the remaining lines.

"JOHN WEAVER.

"I hereby sign my name as a means of identifying myself as original signer of this contract.

"JOHN WEAVER.

"Agents will fill in the blank spaces in face of contract in accordance with rates, weights, and conditions, as provided in tariffs and classifications, or such instructions as may be issued from time to time.

"The names of persons who are actually entitled to pass free with stock must be entered on the waybill, and which, when certified to by the agent, is the authority for the conductor to pass them.

"No return passes will be given.

"Agents will permit only the names of owners, or bona fide employés who accompany the stock, to be entered on waybill, without regard to passage allowed by number of cars.

"Agents are expected to adhere strictly to the rules in regard to the loading of mixed cars of stock, checking of shipments, examination of cars and doors, and the affording of proper facilities for the care of stock to parties in charge of same.

"This contract must be signed in duplicate in all cases; the shipper to

"Release for man or men in charge.

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock I am in charge, the undersigned do hereby voluntarily assume all risk of accidents or damage to his person or property, and do hereby release and discharge the said carrier or carriers from every and all claims, liabilities, and demands of every kind, nature, and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers, or any of its or their employés, or otherwise.

"JOHN H. WEAVER,
"Signature of man in charge.
"E. W. ANGELL, Witness."

Defendant contends that:

"John Weaver was not a passenger for hire, as claimed by plaintiff. In fact and law he was really a trespasser, to whom defendant owed no duty except to abstain from injuring him by wanton or willful acts. * * *

"The contract offered by plaintiff as the evidence of his right to be carried as a passenger contained, in the very paragraph signed by Weaver, a provision that it was intended only for bona fide employés. And in this paragraph, as well as in the release signed by him, the validity of which we shall discuss further on, he, in effect, represents and certifies that he is a bona fide employé of the shippers, in charge of their stock. That such was not the fact was well known to him and the shippers. It was not known to the railway company's agent. And, if it had been, the contract, on its face, shows that the agent was authorized to issue the pass only to bona fide employés of the shippers. In fact, the whole transaction was a fraud on the company. The privilege of sending a 'man in charge' was abused by sending instead a man who was not in charge of the stock, and had no connection with it or the shippers. Weaver was, for the purpose of getting a ride for nothing, pretending (with the connivance of the shippers) to be what he was not—a bona fide employé of the shippers, in charge of their stock. Under these circumstances he had no right to the transportation. He was therefore wrongfully on the train. In other words, he was a trespasser. And, irrespective of the release signed by him, the company is not liable."

We do not think the trial judge erred in refusing to direct a verdict for defendant on the ground that Weaver was a trespasser. The contract relied upon was between Altenburg & Van Buskirk as shippers, and the railroad company as carrier, and intended to be signed by both parties. It was signed by the carrier, and by its station agent, and purported to have been signed by the shippers, although Mr. Altenburg testified that he never signed it, and had never read it, and there was no evidence, so far as the record shows, who did sign the shippers' names. The contract between the shippers and the carrier was all set forth upon the face of the paper, appears to be complete, and contains no reference to anything upon the back thereof. There is no provision in this contract, as signed, requiring that the person accompanying the stock shall be a "bona fide employé" of the shippers. It gave them the right to select whomsoever they chose, and send

him in charge of the stock, in consideration of their indemnifying the carrier against liability for injuries received by the person so placed in charge. It was manifestly the shipper who assumed all of the risk of an improper selection, and not the carrier. *Heller* v. *Railway Co.*, 109 Mich. 53.

The provisions with reference to "bona fide employés" are all upon the back of the agreement, not included in the agreement signed by the shippers, either explicitly or by reference, and are, in form, directions or instructions to the carrier's agent. Although one of these clauses was apparently signed by John Weaver, an inspection of the original in the return to the writ shows that it was not contemplated that it should be signed by him. Evidently the only clauses which it was intended that Weaver should sign were the two clauses reading as follows:

"Parties actually in charge of and accompanying within-named stock are required to write their own names in ink here. * * *

"I hereby sign my name as a means of identifying myself as original signer of this contract."

These instructions to the carrier's agent seem to be designed for the protection of the company by insuring that the person who received a pass should be the person actually in charge of and accompanying the stock. The words "bona fide employés," as used in the instructions to the agent, mean the same thing as the expression, "Parties actually in charge of and accompanying within-named stock." The word "employé" has a variety of meanings, according to the context, subject-matter, and circumstances in which it is used. According to Webster, an employé is "one who is employed." According to the text of the 11 Am. & Eng. Enc. Law (2d Ed.), p. 1:

"To employ means to engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs; when used passively, it sometimes has a reflexive meaning, signifying only to be engaged in. To select; to designate."

In *Reg.* v. *Reason*, 23 L. J. Rep. (N. S.) part 3, p. 11, it was held that if a person, while engaged in gratuitously assisting a postmaster, at his request, in sorting the letters, steal one of them, he is liable to the severer penalties imposed by the statute as a person employed under the post office.

In the case of *Reg.* v. *Foulkes*, L. R. 2 C. C. R. 150, the prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence, the prisoner acted for him at the meetings of the board, and when present he assisted him. The prisoner was not appointed or paid by the board, and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use. Held, that there was evidence that the prisoner was a clerk or servant, or employed as a clerk or servant, and was guilty of embezzlement.

It was not necessary in this case that Weaver should have been employed before the occasion in question; nor was it necessary that there should have been any compensation in money provided for. It was sufficient if he was actually put in charge of the stock with the understanding that he should render such services as should become necessary in consideration of the transportation furnished to him. If this was substantially the transaction between Weaver and the shippers, then he was a bona fide employé in the sense in which those words are used on the back of the contract.

Defendant's counsel regarded this inquiry as foreclosed by the testimony of Altenburg, who was called as a witness by plaintiff, and testified that Weaver was not in his employ or the employ of Altenburg & Van Buskirk at any time during his lifetime; that Weaver came to him a perfect stranger, and told him he wanted to get a pass to Buffalo; that on learning he was the son of Dan Weaver,

a friend of Altenburg's, he gave him the pass simply as a favor to his father; that they had not been in the habit of sending a caretaker with their cattle, because it was unnecessary; that he told one of the defendant's agents at the depot to give Weaver a pass; that he expected that, if anything happened to the stock, Weaver would take hold and help, if called upon, but didn't think he would be called upon because of the light load. It appeared also from the testimony of Altenburg and others that Weaver put on two suits of clothes when he left home, and his overalls over them; that he got to the stockyards about 10 o'clock in the forenoon, and worked from then until 3 o'clock in the afternoon, at which time the loading of the stock was finished; that he told the conductor that he was in charge of the stock, and he signed the statement that he was in charge of the stock, and the agent authenticated it; that he had his overalls on when he was killed. Altenburg testified that Weaver was not asked to help load the stock; but he did help load it, and thereby plainly showed his understanding that he was to earn his pass by doing whatever needed to be done about the stock. Altenburg had been notified by defendant's attorney that the railroad company would look to Altenburg & Van Buskirk to indemnify them against any damages on account of the death of Weaver, and the jury were entitled to view his testimony in the light of his manifest interest, and to reject some parts of it and accept others. We think there was evidence from which the jury might have found that Weaver was actually placed in charge of the stock by Altenburg, with the understanding that he should do whatever was necessary to be done in caring for them; and the trial judge would not have been warranted in taking this question from the jury.

But, in any event, defendant's counsel contend: That the company is not liable because the release signed by plaintiff's intestate was a valid and binding contract, and absolved the company from liability. That, whatever the law may be in other States, it is the settled law in Michi-

gan that railway companies are not common carriers of live stock. They are not bound to perform the service of carrying live stock. Nor does the fact that they do in fact carry such stock under special contracts, such as the one in this case, make them common carriers. That if the railway company, in making the contract in question here, was not acting in the capacity of a common carrier, the whole argument against the validity of the release necessarily falls to the ground; for if it was contracting to do a service which it was not bound by law to do in any event, clearly it had the right to impose such conditions as it saw fit upon the performance of the service, and the agreement of the shippers to indemnify it against, and of Weaver to release it from, liability for injuries to the latter caused by the negligence of the company's employés, is entirely valid—citing *Michigan Southern, etc., R. Co.* v. *McDonough*, 21 Mich. 165, 193; *Lake Shore, etc., R. Co.* v. *Perkins*, 25 Mich. 329; *Heller* v. *Railway Co.*, 109 Mich. 53; *McKenzie* v. *Railroad Co.*, 137 Mich. 112; *Coup* v. *Railway Co.*, 56 Mich. 111, 115; *Mann* v. *Railroad Co.*, 135 Mich. 210; *Wilson* v. *Railroad Co.*, 129 Fed. 774, 783; *Baltimore, etc., R. Co.* v. *Voigt*, 176 U. S. 498, 514; *Russell* v. *Railway Co.*, 157 Ind. 305, 316 (55 L. R. A. 253).

Plaintiff's counsel does not claim, in support of the judgment in this case, that the defendant was a common carrier of live stock, but contends that, as to the plaintiff's intestate, defendant was a common carrier of passengers, and therefore, upon grounds of public policy, it could not lawfully stipulate for exemption from responsibility for its own negligence.

In our opinion, the contention of plaintiff's counsel must be sustained. This precise question was exhaustively considered and discussed by Mr. Justice Bradley in the case of *Railroad Co.* v. *Lockwood*, 17 Wall. (U. S.) 357. In an opinion of great force and clearness of reasoning, concurred in by the entire court, it was held that the plaintiff, riding upon a stock drover's pass, as in the pres-

ent case, was a passenger for hire, and the release of liability for damages on account of negligence of the carrier was invalid. The same rule is adopted in Illinois (*Illinois Cent. R. Co.* v. *Beebe*, 174 Ill. 13 [43 L. R. A. 210]):

"It is said, however, that in Illinois a carrier may by contract limit its liability for all negligence except gross negligence. This rule has been laid down in some cases in reference to the shipment and carriage of property, but does not apply when a carrier intends to limit its liability for personal injury to a passenger paying fare. Where a passenger was traveling in the cars of a railroad company upon a free pass given him by the company, and received injuries to his person, it has been held that a contract exempting it from liability for any other species or degree of negligence than gross negligence was valid. *Illinois Cent. R. Co.* v. *Read*, 37 Ill. 484; *Toledo, etc., R. Co.* v. *Beggs*, 85 Ill. 80. But in the present case it cannot be said that the deceased intestate was riding upon a free pass.

"'A person who is traveling, with the consent of the railroad company, upon a freight train, in charge of stock or goods carried by the company for him, is a passenger. *Indianapolis, etc., R. Co.* v. *Beaver*, 41 Ind. 493; *Lawson* v. *Railway Co.*, 64 Wis. 447. Even where such a person is traveling in charge of cattle on a drover's pass, he is a passenger for hire. The consideration of his passage is the service he renders in taking care of the cattle, or the charge made against him or his employer for shipping the cattle. *Railroad Co.* v. *Lockwood*, 17 Wall. (U. S.) 357; *Indianapolis, etc., R. Co.* v. *Horst*, 93 U. S. 291; *Cleveland, etc., R. Co.* v. *Curran*, 19 Ohio St. 1; 3 Am. & Eng. Enc. Law, p. 16, and cases cited in notes; *Lake Shore, etc., R. Co.* v. *Brown*, 123 Ill. 162; *New York, etc., R. Co.* v. *Blumenthal*, 160 Ill. 40.'"

Many authorities are cited in support of the doctrine in plaintiff's briefs, and we are satisfied that it has in its support the great weight of reason and authority.

The cases of *Baltimore, etc., R. Co.* v. *Voigt*, 176 U. S. 498, and *Russell* v. *Railway Co.*, 157 Ind. 305 (55 L. R. A. 253), upon which defendant's counsel strongly rely, are, in our opinion, fatal to his contention. The case of *Baltimore, etc., R. Co.* v. *Voigt* distinctly recognizes and approves of the *Lockwood Case*, and distinguishes

the case under consideration from that case, and therefore from the case before us. It was held that Voigt was not a passenger, while Lockwood was. So in the case of *Russell* v. *Railway Co.* the court fully recognize the validity of the rule adopted in the *Lockwood Case* and approved in Indiana in numerous cases. Among other cases the court quotes from its own decision in *Louisville, etc., R. Co.* v. *Faylor*, 126 Ind. 126, in which the plaintiff "was a passenger at the time he suffered the injury complained of, and was occupying a seat in a caboose attached to a freight train in which he was transporting a car load of cattle. While the train on which he was being carried was ascending a steep grade, a number of the cars, including the caboose in which the plaintiff and others were seated, became detached from the engine and the forward part of the train," collided with a following engine, and plaintiff was severely injured. The railroad company set up, among other things, "that at the time of the injury complained of the plaintiff was in charge of a car load of cattle, and was riding under a contract, in which it was stipulated that, in consideration of a free pass and other valuable considerations, the company was to be exempt from any liability for any injury which the plaintiff might sustain while in charge of the cattle." The court held that:

"A stipulation that the carrier shall not be bound to the exercise of care and diligence is, in effect, an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with a passenger that the latter should take the risk of the negligence of the carrier or of his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void."

But the principal case under consideration now distin-

guishes this case and the *Lockwood Case* and others, and holds that the Pullman car porter "did not occupy the position of an ordinary passenger upon appellee's train." The *Voigt Case* and the *Russell Case* sustain the rule contended for by plaintiff's counsel that Weaver was a passenger for hire, as to whom defendant occupied the position of a common carrier of passengers, but as to express messengers and Pullman car porters the rule is different.

We find no errors in the rulings of the trial judge, and the judgment is affirmed.

MCALVAY, GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

LASLEY *v.* DELANO.

1. STATUTE OF FRAUDS — PROMISE TO ANSWER FOR DEBT OF ANOTHER—EXECUTED AGREEMENT.

   A parol contract by which a part owner of land was authorized by other part owners to sell the same, and apply a part of the proceeds to the payment of a debt owed by himself and another party to the contract, is not, after it has been performed, and the money applied in accordance with its terms, within section 9515, subd. 2, 3 Comp. Laws, requiring a special promise to answer for the debt of another to be in writing.

2. USES AND TRUSTS—EXECUTED AGREEMENT.

   Nor is such contract, after performance, within the statute of uses and trusts. Sections 8829, 8833, 9509, 3 Comp. Laws.

3. BILL FOR ACCOUNTING—NECESSARY PARTIES.

   Complainant's husband and defendant purchased certain lands, the deed to her husband's interest in which was subsequently made to complainant in order to assist her husband in financial troubles. Complainant's husband and defendant were jointly indebted on a note to defendant's wife, and, in order to liquidate the same, deeds were executed by complainant and

her husband, with the name of the grantee in blank, and delivered to defendant, to enable him to sell the lands. It was agreed that defendant should pay the note to his wife out of the proceeds. On a bill by complainant against defendant and his wife for an accounting, defendant claimed the benefit of the payments to his wife, *held*, that complainant's husband was not a necessary party to the suit.

Appeal from Muskegon; Russell, J. Submitted February 9, 1905. (Docket No. 116.) Decided April 4, 1905.

Bill by Isabel A. Lasley against Horace L. Delano and Cora A. Delano for an accounting. From a decree for complainant, defendants appeal. Reversed, and bill dismissed.

Complainant, in her bill, alleges that in September, 1902, she and the defendant Cora A. Delano were the owners of the lands described in the bill, situated in the State of Louisiana; that prior to that time she had authorized and empowered defendant Horace L. Delano, the husband of said Cora, to find a purchaser for said lands; that he did find a purchaser; that he sold them for $9,715—part in cash and part in notes; that her share of the cash was paid to her husband, and by him paid to her; that Mr. Delano took a mortgage for $4,346.90, accompanied by eight promissory notes, for the balance of the purchase price; that the mortgage and notes were made payable to Mr. Delano, trustee; that she never authorized him to take said mortgage and notes in his name as trustee, but that, if any securities were taken, they were to be taken in her name, in so far as her interest was concerned; that money has been received upon two of said notes, and accounted for to her husband; that said Mr. Delano had never accounted to her for the balance of said money; and she prays for an accounting, and payment to her of the money found to be due her.

The joint answer of defendants admits the legal ownership of an undivided one-half of said lands to have been

in complainant, and that defendant Horace L. Delano was authorized to sell them, and did sell them, and avers that he has properly accounted for the proceeds—both the cash payment and the notes. That the lands were originally purchased by Mr. Lasley, complainant's husband, and the defendant Horace L. Delano, the title being taken in Mr. Delano's name. Subsequently he conveyed to Mr. Lasley an undivided half interest. That the deed was not recorded for several years. That in 1898 Mr. Lasley conveyed to complainant, at her request, and at the suggestion of the defendants, Mr. Lasley's undivided one-half interest. That the conveyance was without consideration, and was made for the purpose of protecting and preserving said lands in the interest of Mr. Lasley, and to provide the means of payment to defendant Cora of an indebtedness owing to her by Mr. Lasley and Mr. Delano, and evidenced by a promissory note. That Mr. Lasley has in fact been the owner of the undivided one-half of said lands, and has transacted all the business relating thereto, and that she has held the legal naked title in trust for him and the defendant Cora.

The answer avers: That the mortgage and notes were given to Mr. Delano, as trustee, with the full knowledge and assent of the complainant and her husband. That on October 14, 1893, Mr. Lasley and Mr. Delano were jointly indebted to Cora A. Delano in the sum of $3,256.21, for which they executed to her a promissory note. That at the time of the conveyance by Mr. Lasley to his wife, in 1898, the note was still unpaid, and Mr. Lasley was financially embarrassed, without any means to pay his share of the note, and that, in order to secure to Mrs. Delano the payment of his share of said indebtedness, it was agreed that he (Mr. Lasley) should convey his interest in the lands to said complainant, that a sale of said lands should be made as speedily as possible by Mr. Delano, and that from the proceeds a sufficient sum should be retained by Mr. Delano to pay one-half of the amount of said note. That, upon receipt of the cash payment

from such sale, Mr. Lasley persuaded Mr. Delano to pay over to him one-half thereof, and to retain the notes—the proceeds thereof, when collected, to be used in payment of their joint note—and out of the receipts of said notes the one-half of the indebtedness to Mrs. Delano has been paid. Proofs were taken in open court, and decree entered for the complainant.

M. Brown and *William Carpenter*, for complainant.

Nims, Hoyt, Erwin, Sessions & Vanderwerp, for defendants.

GRANT, J. (*after stating the facts*). 1. The testimony on the question of fact, namely, Was there an agreement that, out of the moneys received from the sale of the lands, Mr. Delano's obligation on this note should be paid? is in sharp conflict.

The circuit judge, in disposing of the case, said:

"I have made an examination of the evidence, and I will state that it is impossible for the court to determine what the facts are as to what the truth is with reference to the arrangement they claim to have made. The evidence is very conflicting and very unsatisfactory, but I am inclined to the opinion that the theory of the defendants may be correct. * * * I have examined the evidence two or three times with a view to determining, but I am unable to satisfy myself, as to what the facts are. I have examined the authorities. * * * I think the law is against him [the defendant Mr. Delano]. It may be conceded, for the disposition of the case, that the facts are with him, and I am inclined to think that they may be."

We are convinced that the following facts are established by the testimony: Mr. Lasley and Mr. Delano purchased these lands. Mrs. Lasley paid nothing. The deed was made to her to assist her husband in his financial troubles, and was without any consideration. He was obligated on the note with Mr. Delano for one-half the amount thereof. Deeds were executed by Mrs. Lasley and Mr. Lasley, with the name of the grantee in blank,

and delivered to Mr. Delano, to enable him to sell the lands. It was then agreed that, out of the proceeds received therefrom, the note of Mrs. Delano should be paid by Mr. Delano. Mr. Lasley acted for himself and for his wife. The funds received were treated as his own, and were used by him as his own. Both complainant and her husband knew that Mr. Delano sold the lands, received half in cash, and took a mortgage and notes to himself as trustee for the balance. Mr. Lasley's obligation upon the note to Mrs. Delano is fully canceled. Mr. Delano carried out his instruction and executed his trust.

The legal questions raised are:

(1) Is the parol agreement void under the statute of frauds (3 Comp. Laws, § 9515, subd. 2)?

(2) Is the agreement void as against the statute of uses and trusts, under 3 Comp. Laws, §§ 8829, 8833, 9509?

(3) Was Mr. Lasley a necessary party to the suit?

If these questions are answered in the negative, the decree must be reversed.

2. Neither the statute of frauds, nor that of uses and trusts, applies to this case. The parol contract between complainant and Mr. Delano has been performed, and the parol trust imposed upon him fully executed. No contract for the sale of lands is involved. The relation of vendor and vendee did not exist between them. Complainant concedes his right to sell and receive the money, and that he did sell and receive the money. The relation, then, between them, was not other or different than it would have been if she had sold the lands herself, and intrusted the money to him, to be disposed of as directed and agreed by her. *Petrie* v. *Torrent*, 88 Mich. 43; *Carr* v. *Leavitt*, 54 Mich. 540; *Edinger* v. *Heiser*, 62 Mich. 598. If, however, the trust rested in parol, and while so resting could not be enforced as an executory contract, yet, when the parol agreement has been executed, neither party can invoke the statute. The courts have repeatedly held that a party may perform a promise which he could not legally be compelled to perform, and

that, when so performed, it is binding upon him and the other party to it. *Moore* v. *Crawford*, 130 U. S. 122; *Desmond* v. *Myers*, 113 Mich. 437; *Collar* v. *Collar*, 86 Mich. 507 (13 L. R. A. 621); *Bork* v. *Martin*, 132 N. Y. 280; *Gwaltney* v. *Wheeler*, 26 Ind. 415.

3. Mr. Lasley was not a necessary party to the suit. The issue presented by the pleadings upon this branch of the case is whether Mr. Delano disposed of this money as it was agreed he should do. The condition of accounts between Mr. Delano and Mr. Lasley is not in issue here, except in so far as it might throw light upon the question whether Mr. Delano had disposed of this fund as agreed. All three agreed that out of this fund, received from the sale of the lands, Mr. Delano should pay Mr. Lasley's share of this note. He has done this. If Mr. Delano owes Mr. Lasley on accounts which have run between them, that is a question in which complainant has no concern. She very properly did not make her husband a defendant in the suit; neither did defendants make any objection that he was not a party.

Decree reversed and bill dismissed, with the costs of both courts.

MOORE, C. J., and CARPENTER, MCALVAY, and HOOKER, JJ., concurred.

RHOADES *v.* SEIDEL.

1. LANDLORD AND TENANT—DEFECTIVE PREMISES—INJURY TO TENANT—LIABILITY OF LANDLORD.
   Where defendants leased to plaintiff a house containing an open sewer, which after some two weeks began to emit noxious gases, causing sickness, defendants were not liable on the ground that they rented the premises in a defective condition, inasmuch as they did not know and were not chargeable with knowledge of the defect at the time the premises were rented.[1]
2. SAME—REPAIRS—DUTY TO MAKE.
   Where a landlord does not agree to make repairs, he is under no obligation to make them.
3. SAME—AGREEMENT TO REPAIR—CONSIDERATION.
   Where, after the execution of a lease not obligating the landlord to make repairs, he agrees so to do, the agreement is without consideration and unenforceable.
4. SAME—FAILURE TO PERFORM—NEGLIGENCE.
   Where, after premises were leased, an open sewer thereon began to emit sewer gas, and the landlord promised to remedy the defect, but failed in an attempt to do so, and the tenant became sick in consequence of the gas, the landlord was not liable on the ground that the agreement to repair was negligently executed.

Error to Wayne; Donovan, J. Submitted February 10, 1905. (Docket No. 126.) Decided April 4, 1905.

Case by Joseph A. Rhoades against August F. Seidel and Victoria Seidel for damages caused by the defective condition of a house rented from defendants. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Affirmed.

Lodge, Trevor & Brown, for appellant.

Louis C. Wurzer (*May, Denby & O'Brien*, of counsel), for appellees.

[1] As to liability of landlord for injury to tenant from defect in premises, see note to *Hines* v. *Willcox* (Tenn.), 34 L. R. A. 824.

CARPENTER, J. Plaintiff leased a house from defendants. While occupying this house he was taken ill with typhoid fever. He alleges that this disease was caused by a noxious gas and discharge emanating from an open sewer in the rented house. He brings this suit to recover damages. His testimony tends to prove that he entered into the occupancy of the house under defendants' assurances that it was all right. No arrangement was made about repairs. He was a tenant from month to month. In the cellar was an open drain, which defendants intended should later be used to make connections for a closet or bath tub. About two weeks after the tenancy commenced, there came from this drain an odorous gas, which plaintiff says was a sewer gas. Later there came from it a nasty liquid discharge. About two weeks after he noticed this gas, plaintiff notified defendants. Defendant August promised to fix it, and came on the premises and made an attempt to do so. This was ineffectual, as plaintiff knew. He left, giving plaintiff directions to stop the discharge by a stream of running water. This plaintiff tried, but it also proved ineffectual. A week later plaintiff notified defendants that the trouble was getting worse. Defendant August came again, and made another ineffectual attempt to remedy the difficulty, and he left after repeating his directions to use a stream of running water. This plaintiff tried the second time, and a second time it proved ineffectual. About two weeks later—on the day before plaintiff was taken ill—defendants were again notified, and made another ineffectual attempt to remedy the difficulty. On this evidence the trial court directed a verdict in defendants' favor. The question raised on this appeal relates to the correctness of this direction.

Defendants' liability must rest either upon the ground that they rented the premises in a defective condition, or that after notice they wrongfully neglected to remedy the defect. The liability of a landlord to a tenant for injuries resulting from defects existing at the time premises

are leased extends only to defects which he knows or which he should know, and which are not open to the observation of the tenant. See 1 Taylor on Landlord & Tenant, § 175*b*, and cases cited. *Willcox* v. *Hines*, 100 Tenn. 538 (41 L. R. A. 278), relied upon by plaintiff, does not extend this rule beyond the above statement. This open sewer was as well known to the plaintiff as to the defendants. It is true that the plaintiff did not know that a noxious gas or discharge would come from it. It is equally true that the defendants did not know that.

It is contended, however, that as the sewer was built under instructions given by them, defendants should have known that it would emit this noxious gas and discharge. This contention assumes that the instructions given by defendants contemplated that no precautions whatever should be taken to prevent the escape of gas. This assumption is unwarranted. Indeed, there was no evidence that the sewer was originally constructed without precautions being taken to prevent the escape of gas. The fact that gas did not escape for two weeks warrants the belief that such precautions were taken, and that through defective workmanship they proved entirely inadequate. We cannot hold defendants responsible upon the ground that a defect existed at the time of the letting without declaring that a landlord is a guarantor to a tenant of the competence and skill of plumbers and other workmen employed in constructing the building. It is clear he is not such a guarantor. See *Willcox* v. *Hines*, supra.

Are defendants liable because they did not, after notice, remedy the defect? They had not agreed to make repairs, and therefore they were under no obligation to make them. See *Gregor* v. *Cady*, 82 Me. 135; *Gill* v. *Middleton*, 105 Mass. 477. Their agreement to make repairs, testified to by plaintiff, made after the premises were leased, was without consideration, and therefore unenforceable. See *Libbey* v. *Tolford*, 48 Me. 316.

Plaintiff relies upon authorities (see *Gregor* v. *Cady*,

82 Me. 131; *Gill* v. *Middleton*, 105 Mass. 477; *Wertheimer* v. *Saunders*, 95 Wis. 573 [37 L. R. A. 146]; *Little* v. *Macadaras*, 29 Mo. App. 332) which hold that, if a landlord voluntarily undertakes to repair, he is responsible for injuries resulting from the negligent performance of his undertaking. The principle of these cases is inapplicable to the case at bar. Here plaintiff was injured not by reason of negligence in the performance of the voluntary undertaking, but because that undertaking was not, as he knew, carried out. It may be said in this case that the landlord, to the tenant's knowledge, neglected to perform his undertaking to remedy the defect. Plaintiff's complaint, then, must rest upon the proposition that a landlord has no right to refuse to perform a voluntary undertaking to remedy a defect. To assert that proposition is to deny the elementary principle that a promise based on no consideration is not enforceable.

We conclude that there was no ground upon which defendants could be held liable, and the verdict in their favor was properly directed.

Judgment affirmed.

McALVAY, GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

KELLOGG *v.* FROHLICH.

1. SALES—PASSING OF TITLE—PROPERTY NOT IDENTIFIED.
   Plaintiff, who manufactured oils of various kinds, which were stored in tanks and drawn therefrom for shipment to customers, sold oil to defendant by a contract calling for a certain number of barrels, four different kinds of oil being specified, but no amount of each kind being called for, and delivery was to be made from month to month, the contract calling for a minimum and maximum number of car loads each month. *Held*, that, no oil having been identified and set apart as defendant's, no title to any oil passed to him.

2. SAME — CONTRACT — BREACH BY BUYER — NOTICE OF RESALE — DAMAGES.
   Where the purchaser under such a contract refused to accept the goods, and the seller sued for the damages, alleged to be the difference between the contract price and the price at which the seller was forced to resell, no notice of resale was necessary, the measure of damages being the difference between the contract and market price at the time of breach.

3. SAME—REMEDY OF SELLER—MODIFICATION OF CONTRACT.
   A contract for the sale of a number of barrels of oil required shipment to be made of from one to three car loads each month between specified dates, as ordered by the buyer. The seller, after urging the buyer to comply with his contract by giving orders for shipment, wrote that he would prefer to have shipping directions, but that unless he received them it would be necessary for him to ship the oil without notice. Thereafter the seller shipped one car load, which was paid for, but the buyer made no reply to the letter. *Held*, in an action for the buyer's breach of contract, that plaintiff had not assumed to deliver all the oil, plaintiff's letter having varied the terms of the contract, on which variation defendant could not rely in the absence of acquiescence.

4. SAME—BREACH BY BUYER—SUBSEQUENT OFFER TO RECEIVE GOODS.
   Where plaintiff sold defendant a number of barrels of oil, the contract calling for payment 30 days from date of invoice, and defendant refused to take the oil within the time provided for by the contract, his subsequent offer to take all the

oil on the terms provided for in the contract was not an offer that plaintiff was under any obligation to accept.

Error to Wayne; Frazer, J. Submitted February 10, 1905. (Docket No. 132.) Decided April 4, 1905.

Assumpsit by Spencer Kellogg against Edward Frohlich for breach of a contract to purchase certain oil. There was judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff, a resident of Buffalo, N. Y., made a contract with the defendant, residing in Detroit, and doing business under the name of Edward Frohlich Glass Company. The contract, dated July 17, 1902, was in two parts, one signed by the plaintiff, and the other by the defendant. The part signed by the plaintiff reads as follows:

"I have this day sold and agreed to deliver to Edward Frohlich Glass Company, of Detroit, Michigan, fire and strike excepted, 900 barrels pure linseed oil, delivered in barrels at Detroit, Michigan, as follows: 900 barrels in car loads of 60 barrels each, all to be taken between October 15th, 1902, and July 1st, 1903, not less than one car nor to exceed three cars in any one month. Raw oil, 6c. per lb.; boiled oil or aged raw oil, 2/15c. per lb.; Kellogg varnish or refined oil, 4/15c. per lb.; heavy bodied boiled or superior oil, 10/15c. per lb., over raw oil price. Terms of payment, 30 days or less 1 per cent., if paid in 10 days from invoice date. Shipments to be made according to this agreement in car load lots and within ten days of specified dates. It is understood that there are no conditions or representations relating to this sale other than stated hereon."

The part signed by the defendant reads as follows:

"We, the undersigned, have this day bought and agreed to receive of Spencer Kellogg, Buffalo, N. Y., fire and strike excepted, 900 bbls. pure linseed oil, delivered in barrels at Detroit, Mich., as follows: 900 bbls. in car loads of 60 barrels each, all to be taken between October 15th, 1902, and July 1, 1903, not less than one car nor to exceed three cars in any one month. Raw oil, 6c. per lb.;

boiled oil or aged raw oil, 2/15c. per lb.; Kellogg varnish or refined oil, 4/15c. per lb.; heavy bodied boiled or superior oil, 10/15c. per lb., over raw oil price. Terms of payment, 30 days or less 1 per cent., if paid in ten days from invoice date. Shipments to be made according to this agreement in car load lots and within ten days of specified dates. It is understood that there are no conditions or representations relating to this sale other than stated hereon."

Defendant ordered one car load shipped in November, and one in February. These cars were shipped, and at the same time defendant requested plaintiff not to send any more oil, as he was crowded for room. Plaintiff continually urged the defendant to take the oil as the contract provided, and on February 14, 1903, wrote him as follows:

"If the oil had been taken as it was contracted for, possibly you might have disposed of it. However, you are so much behind now, it may be difficult for you to do so. In any event our former letter stands good, and we are obliged to ask you for shipping instructions for all oil due as per the amount already mentioned. I should much prefer having your shipping instructions for the oil than to ship it out without notice, which it will be absolutely necessary to do unless I hear from you with shipping orders. According to the contract, I understand from our attorney, that it is sufficient to give notice if shipment as per these letters for all undelivered oil. This is not aimed at any one in particular, but is absolutely imperative on our part, as we cannot hold the oil any longer. Kindly let me hear from you by return mail."

After this one car load of oil was shipped without any order, and accepted and paid for. Defendant gave no other orders. Plaintiff shipped no more oil. At the expiration of the time, July 1, 1903, plaintiff placed the case in the hands of his attorneys. One of them saw the defendant, and had a conversation with him about the claim. Thereupon, and on July 10, 1903, defendant wrote the following letter in duplicate, sending one to plaintiff at Buffalo, and the other to his attorneys at Detroit:

"We have written your attorneys, Messrs. Bowen, Douglas & Whiting, as follows:

"'Your Mr. Murfin called on me relative to the balance of oil you claim to be due under our contract of July 17, 1902, with Spencer Kellogg, and as I stated to him, I am now ready to carry out the contract and take the oil you claim due me under the contract. Therefore please ship 500 bbls. of the total amount in raw, and the remainder in boiled. Please see to it that the cooperage is first class.'

"This offer is made without prejudice to any of the rights we may have in this matter."

Plaintiff refused to then deliver the oil, and brought suit to recover for breach of contract.

The declaration sets forth the contract in full, alleges a breach by the defendant, alleges that the market price had fallen, and that in consequence of his failure to perform the contract plaintiff had suffered great loss, "being the difference between the price indicated by the contract, and the price at which the plaintiff was forced to resell, and did resell, his said oil."

Three defenses are made:

(1) That the contract is an executed contract; that under it the title to the oil vested absolutely in the defendant; and that, in order to recover under the declaration, plaintiff must have given notice to defendant of his intention to sell the oil, and must actually have sold it.

(2) That it was plaintiff's duty to deliver the oil at Detroit, and that, having failed to deliver or tender the oil there, he cannot recover.

(3) That it was plaintiff's duty to accept defendant's offer to take the oil as contained in defendant's letter of July 10th.

The case was submitted to the jury, and verdict rendered for plaintiff.

Wilkinson & Younglove, for appellant.

Bowen, Douglas, Whiting & Murfin, for appellee.

GRANT, J. (*after stating the facts*). 1. Plaintiff was a manufacturer of oils of various kinds or types. As it

was manufactured it was stored in large tanks, from which it was drawn to ship to plaintiff's customers as orders were received or contracts made. Manifestly, the oil which was covered by this contract was not in existence at the time the contract was made. It was not, therefore, contemplated that the oil covered by the contract was a part of a distinct mass then in existence and stored in plaintiff's tanks. The contract called for four different kinds, but not for a specific amount of each kind. The defendant could have ordered the whole 900 barrels of one kind, or of two or of all kinds. There was to be no delivery if delivery was prevented by fire or strikes. There was no identification, and no selection out of a common mass. The minds of the parties could only meet as to the identical goods to be furnished when the defendant, in compliance with his contract, had ordered the number of barrels of such oil as he wished shipped to him. Under these conditions, nothing short of language which can leave no doubt of the intention of the parties to pass title will justify the finding that the title had passed. 1 Mechem on Sales, §§ 695, 717; *Lingham* v. *Eggleston*, 27 Mich. 324; *First Nat. Bank of Marquette* v. *Crowley*, 24 Mich. 492; *Hahn* v. *Fredericks*, 30 Mich. 223. We find no such language in this contract. The expressions "have sold," in the one part, and "have bought" in the other, are to be construed with reference to all the provisions of the contract and the surrounding circumstances. They are not of themselves conclusive of the intent.

In this connection it is urged that the plaintiff's declaration is framed upon the theory of a resale, "and that said resale cannot be without notice of an intention to resell; and, no such notice having been given, the plaintiff cannot recover." As already stated, title had not passed; there was no oil identified and set apart as the defendant's; there was no identical oil to put up for sale. The oil specified in the contract had a market value, and, presumably, the price at which it would sell would not be above that value. It is probable that the oil which would have been

furnished to the defendant, had he complied with his contract, had been sold, as the tanks were constantly being emptied and filled. Counsel cite no authorities that notice of a sale was necessary. Evidently the notice would have been an idle ceremony, as the real damage sustained would be the difference between the contract and the market or selling price at the time of the breach. We think notice of an intention to sell was unnecessary. The request, therefore, was properly refused.

2. Plaintiff was under no obligation to deliver the goods except as instructed by the defendant. The delivery was to be of one to three car loads each month, of such kinds as defendant should direct plaintiff to deliver, within 10 days of the dates specified. Defendant could not wait until after the expiration of the time and then order a delivery of the whole amount. After repeatedly urging the defendant to comply with his contract in giving orders for shipment, the plaintiff, on February 14th, wrote to him for shipping instructions, and in the letter said:

"I should much prefer having your shipping instructions for the oil than to ship it out without notice, which it will be absolutely necessary to do unless I hear from you with shipping orders."

It is urged that the plaintiff by this letter assumed the delivery, and, by shipping one car load thereafter, assumed the burden of delivering all the oil at Detroit. To this letter defendant made no reply. It was not a waiver of the obligation on the part of the defendant to comply with the contract. It varied the terms of the contract, and the defendant is not in position to assert such change, unless he acquiesced in it.

3. Plaintiff was under no obligation to accept defendant's offer contained in his letter of July 10th. Defendant had violated his contract. He had not ordered the goods as required. His offer was to "take the oil you claim due me under the contract." The times of delivery had expired. It was, of course, the duty of the plaintiff to make all reasonable effort to reduce the damages. The

contract was at an end, and he was under no obligation to sell upon credit. The contract provided for payment 30 days from date of the invoice, or less 1 per cent. if paid within 10 days from such date. Defendant's offer in the letter was not to pay cash, but to take the goods upon the credit provided in the contract. If defendant had offered to take the goods, and tendered in cash the price fixed by the contract, undoubtedly the plaintiff would have been required to accept it, or, failing to accept it, would have been held to waive any claim for damages. But defendant was seeking to revive a dead and broken contract.

Judgment affirmed.

CARPENTER, MCALVAY, MONTGOMERY, and HOOKER, JJ., concurred.

CADY *v.* ST. CLAIR CIRCUIT JUDGE.

BASTARDY—NATURE OF PROCEEDING — PRIVILEGE FROM ARREST.

Bastardy proceedings are so far of a criminal nature that a person who is within the State only for the purpose of putting in special bail in an action in which he was arrested on a capias is not privileged from arrest on a charge of bastardy.

Mandamus by Burt D. Cady, prosecuting attorney, to compel Eugene F. Law, circuit judge, of St. Clair county, to vacate an order discharging a prisoner from arrest. Submitted February 14, 1905. (Calendar No. 20,909.) Writ granted April 4, 1905.

Burt D. Cady, in pro. per.

Moore & Brown, for respondent.

OSTRANDER, J. On the application of the petitioner, the prosecuting attorney of St. Clair county, for a manda-

mus, an order to show cause was granted, the return of respondent has been filed, and the matter stands upon the petition and answer.

The facts, briefly stated, are as follows: Norris C. Peterson is a resident of Sarnia, in the province of Ontario. He was arrested on November 15, 1904, at Port Huron, by the sheriff of St. Clair county, upon a writ of capias ad respondendum sued out of the circuit court for that county. The writ was indorsed with an order, made by the circuit judge, that the defendant be held to bail by the sheriff in the sum of $1,500. By some special arrangement he deposited $1,500 in currency on the evening of the day of his arrest with the sheriff as a guaranty for his appearance, and that he would furnish special bail on the following day which would be acceptable to the court, and thereupon the sheriff released him from custody, and he returned home. On the succeeding day, November 16th, he returned to Port Huron for the purpose, it is claimed, and the only purpose, of putting in special bail. He was arrested upon a warrant issued by a justice of the peace of Port Huron in bastardy proceedings instituted by the daughter of the plaintiff in the action first mentioned. He gave special bail in the first case, was arraigned before the magistrate in the bastardy proceedings, made no defense before the justice, and was required to and did enter into a recognizance to the satisfaction of the justice in the sum of $500 to appear at the next term of the circuit court for the county of St. Clair to abide the order of the said court, and was thereupon discharged from custody. His counsel made and entered a motion in the circuit court, based upon the affidavit of said Peterson and upon the records and files in the bastardy proceedings and in the capias suit, for an order discharging said Peterson and dismissing the bastardy proceedings, for the reason that at the time of his arrest he was in Port Huron solely for the purpose of securing his release by furnishing bail in the suit begun by capias. It is not claimed that before the justice any privilege from arrest was suggested. The respondent, the cir-

cuit judge, upon the hearing of said motion, made an order, the form of which is not before us, discharging the respondent from arrest, but refusing to dismiss the proceedings. Thereupon, on the same day, the prosecuting attorney (relator) moved the court to vacate, reverse, and set aside the order discharging Peterson from arrest, for the reason that said Peterson was not privileged from arrest at the time and under the circumstances of his arrest. The circuit judge denied this motion, and the prosecuting attorney asks that he be compelled to enter the order asked for.

We are of opinion that bastardy proceedings are so far criminal proceedings that respondent was not privileged from the arrest. It is true that such proceedings are special and statutory, and are strictly neither civil nor criminal in nature. But it is contemplated, and is essential, that control be had of the person of the respondent. A recognizance is taken as in criminal cases, and is forfeited, as in criminal cases, for nonappearance. For a failure to recognize he may be committed.

The writ will issue as prayed.

CARPENTER, BLAIR, MONTGOMERY, and HOOKER, JJ., concurred.

139 621
140 118

139 621
e150 253

WILKINSON v. DUNKLEY-WILLIAMS CO.

1. INJUNCTION—INJURY TO LAND—WATERCOURSES.
   Injunction will issue to restrain injury to lots and a street adjoining a river by cutting through them to make a channel and basin in which to turn a steamboat too large for the river.

2. SAME—INJURY TO STREET—PRIVATE PERSON—PECULIAR INTEREST.
   The owner of the lots, to which access is possible only along such street, has the peculiar interest in the street necessary to enable him to maintain injunction to restrain interference with it.

3. SAME—EQUITABLE OWNER—RIGHT TO SUE.
   That complainant's deed of land was only intended as a mortgage is immaterial to a stranger against whom injunction is sought to restrain his interference with the property.

Appeal from Van Buren; Carr, J. Submitted January 11, 1905. (Docket No. 42.) Decided April 21, 1905.

Bill by Thomas L. Wilkinson against the Dunkley-Williams Company to restrain an encroachment upon land. From a decree for complainant, defendant appeals. Affirmed.

Sam H. Kelley and *M. L. Howell*, for complainant.

H. T. Cook and *A. J. Mills*, for defendant.

MONTGOMERY, J. The bill alleges that complainant is the owner of a number of lots lying between Black River and Black River street in the city of South Haven; that Black River street can be reached from the other parts of the town only by way of Dyckman street, and that the lots can only be reached from Black River street; that in May, 1903, the defendant unlawfully and without authority or permission cut a channel or basin from the then

water's edge on lots 4, 5, 6, and 7, in block 7, in Dyckman & Woodman's Addition to South Haven, through those lots, and into and part way across Black River street, so that the lots invaded were not only destroyed, but access to the other property of complainant lying below this excavation was interfered with and destroyed. This was done to enable defendants to turn a steamer which was so large that it could not turn in the river. The answer denied complainant's title, alleging that his deed was in fact a mortgage. It alleged that a basin for turning boats existed on the premises before its entry, and that it deepened and dredged out this basin, and excavated into Black River street, and that consent was given by the city authorities. The evidence was taken in open court, and showed that the defendant removed a large amount of earth from said lots, and a considerable distance into Black River street. The court visited and examined the premises and adjacent property, and found the allegations of the bill to be true.

There is little room for questioning the conclusion of the circuit judge on the facts. We are satisfied that the bank of the river, as fixed by the platting and as recognized by the authorities, was substantially as claimed by complainant; that Black River street was platted as a means of furnishing access to the lots now owned by complainant; and that the defendant has cut into both the lots and the street. That a remedy by injunction exists in such a case is clear. *Davis* v. *Township of Frankenlust*, 118 Mich. 494, and cases cited; *Stock* v. *Township of Jefferson*, 114 Mich. 357 (38 L. R. A. 355).

We think, also, that complainant has such a peculiar interest in this street as to entitle him to protection against invasion by the defendant. *Grand Rapids, etc., R. Co.* v. *Heisel*, 47 Mich. 393.

The defendant insists that, as complainant holds the legal title as security only, he is not entitled to maintain this action. No question arises between the complainant and the equitable owner of the land. The question here

is whether the owner of the legal title, whose interest is in equity that of a mortgagee, may maintain a bill for an injunction to preserve the property. We think he may. 20 Am. & Eng. Enc. Law (2d Ed.), p. 1017, and cases cited in note 3. The cases of *Taylor* v. *McConnell*, 53 Mich. 587, and *Collins* v. *Rea*, 127 Mich. 273, cited by defendant's counsel, do not make for a contrary rule. The most that can be said of either case is that it was not found necessary to declare the doctrine above stated, and that it was not declared.

The decree is affirmed.

MOORE, C. J., and CARPENTER, OSTRANDER, and HOOKER, JJ., concurred.

FINN v. SOWDERS' ESTATE.[1]

139 623
f146 1235

1. WITNESSES — COMPETENCY — MATTERS WITHIN KNOWLEDGE OF DECEASED.

   A husband cannot testify to conversations between himself and decedent which are relied upon as forming the contract between his wife and decedent on which the wife bases a claim against decedent's estate. Act No. 30, Pub. Acts 1903.

2. WORK AND LABOR—SERVICES RENDERED TO DECEASED— CLAIM UNDER WILL.

   One who accepts the terms of a will, and retains the property granted thereby as compensation for services rendered testator, cannot make a further claim against the estate for compensation.

Error to Bay; Shepard, J. Submitted January 19, 1905. (Docket No. 85.) Decided April 21, 1905.

Christie Finn presented a claim against the estate of Minerva Sowders, deceased, for services rendered. The

[1] Rehearing denied May 12, 1905.

claim was allowed in part by the commissioners, and defendant appealed to the circuit court. There was judgment for claimant at the circuit, and defendant brings error. Reversed.

T. A. E. & J. C. Weadock, for appellant.

Lee E. Joslyn, for appellee.

MONTGOMERY, J. In the year 1898 Minerva Sowders was the owner of two houses in West Bay City, in one of which she lived, had an income of about $7 a month from a land contract on lands recently theretofore sold by her, and an additional income of $8 a month from a government pension. She was of advanced age, and was suffering from cancer. During the year 1898 her granddaughter, Christie Finn, claimant in this case, came to her on a visit. A short time afterwards her husband, William Finn, also came to West Bay City, and the two thereafter lived rent free with Mrs. Sowders in one of the latter's houses, and this arrangement continued until the time of Mrs. Sowders' death, September 17, 1902. During that time Mrs. Sowders submitted twice to surgical operations for cancer. During all of this time Mrs. Finn resided with her. Mrs. Sowders was an invalid, confined to her bed a great portion of the time, and in need of constant care and attention. It is not disputed that Mrs. Finn gave her such attendance and care during that time as one member of a family would and should give another under such circumstances, and that this attendance involved considerable extra work on Mrs. Finn's part in addition to her work as housekeeper.

On June 17, 1902, Mrs. Sowders made a will, that portion of which pertinent to this case was as follows:

"I give, devise, and bequeath my estate and property, real and personal, as follows, that is to say, I give, devise, and bequeath to my three sons and granddaughter, Christie Finn, Charles Orrin Sowders, Samuel Sowders, George Washington Sowders, and Christie Finn, all of my real es-

tate, consisting of lot eight in block four, Mulholland & Shearer's addition to West Bay City, Michigan, with dwellings thereon, to be divided between them equally, share and share alike, provided all of my legal debts, my funeral expenses, and the expenses of my last sickness shall be paid first.

"My household furniture and personal effects I bequeath to my granddaughter, Christie Finn, provided that she remains in my house and boards me for the rent of the two houses until my death, but should said Christie Finn leave my house and fail to do as she agreed, I bequeath to her one dollar only, and the personal and real estate property to be divided equally among my three sons above mentioned."

After Mrs. Sowders' death, and after the opening of the will, Mrs. Finn accepted the devises and bequests made her therein, and then filed a claim against Mrs. Sowders' estate, which claim is as follows:

"Estate of Minerva Sowders, deceased, In account with Christie Finn, Dr. 1902, June 17, To board, lodging, nursing and care, from September 15, 1898, to June 17, 1902, 45 months at $12.00 per month, * * * $540.00."

This claim was duly presented to the probate court, and by it allowed at the sum of $304, from which allowance an appeal was taken by the administrator to the circuit court, and where, after a jury trial, the claim was allowed at the sum of $403.

Upon the trial, plaintiff's husband, under the defendant's objection, was allowed to testify that, when his wife and he first came to West Bay City, Mrs. Sowders asked them to stay there and take care of her as long as she lived, and in return that she would leave Mrs. Finn her property when she died. He also testified to a like agreement made about 10 months before Mrs. Sowders' death. Both of these conversations which he testified to were between himself and Mrs. Sowders, and evidently constitute the express agreement upon which the claimant relies. Mr. Finn also testified that he himself furnished the house and supplied the table from September, 1898, to the date of

Mrs. Sowders' death. Other witnesses produced by the claimant testified as to statements made by Mrs. Sowders during her lifetime as to her intentions to leave her property to the claimant at her death, but none of these witnesses testified that Mrs. Sowders ever admitted the existence of any contract or agreement whatsoever between herself and Mr. or Mrs. Finn, or the existence of any obligation whatsoever on her part to leave her property to Mrs. Finn.

The testimony of these witnesses may be said to be consistent with a purpose on the part of Mrs. Sowders to provide for the claimant by testamentary bequest according to her own notions of right; but assuming that the testimony was open to the construction contended for by claimant, i. e., that Mrs. Sowders had agreed to pay for these services, there is, in our view, manifest error which makes a reversal imperative. Under the circumstances of this case, the testimony of claimant's husband to facts equally within the knowledge of the deceased should have been excluded, under section 10212, 3 Comp. Laws, as amended by Act No. 30, Pub. Acts 1903. This case is not distinguishable from *Stackable* v. *Stackable's Estate*, 65 Mich. 515.

The court submitted to the jury the question whether there was an acceptance of the terms of the will by the claimant. Her testimony shows that, with full knowledge of the provisions of the will, she accepted the personal property and continued to live in the house, and testified in answer to the question, "You are claiming all the household goods and the interest in the real estate?" "Yes, sir." On this record a verdict should have been directed for the estate.

Judgment reversed, and a new trial ordered.

MCALVAY, GRANT, BLAIR, and OSTRANDER, JJ., concurred.

WETMORE v. DEAN.

139 627
f155 560

CERTIORARI—RETURN—CONCLUSIVENESS.

The return of a justice of the peace to a writ of certiorari is conclusive.

Error to Mason; McAlvay, J. Submitted February 8, 1905. (Docket No. 107.) Decided April 21, 1905.

Assumpsit by Frank E. Wetmore against Charles M. Dean for the amount of a judgment. Plaintiff had judgment in the justice's court, and defendant appealed to the circuit court by writ of certiorari. There was judgment for defendant, and plaintiff brings error. Reversed.

Wallace Foote, for appellant.

Virgil A. Fitch, for appellee.

MOORE, C. J. The plaintiff obtained judgment in justice's court against defendant. The case was removed to the circuit court by certiorari, where the judgment was reversed. The case is brought here by writ of error. There were a good many reasons assigned in the affidavit for the writ why the judgment should be set aside. An inspection of the record shows that each of these reasons was fully answered by the return of the justice. This return must be regarded as conclusive. *Young* v. *Kelsey*, 46 Mich. 414; *Rawson* v. *McElvaine*, 49 Mich. 194; *Mann* v. *Tyler*, 56 Mich. 564; *People* v. *Hux*, 68 Mich. 477. We think, instead of reversing the judgment of the justice, it should have been affirmed.

Judgment is reversed, and the judgment rendered in justice's court is affirmed, with costs of both courts.

CARPENTER, GRANT, BLAIR, and HOOKER, JJ., concurred.

COOPER *v.* LAWSON.

1. LANDLORD AND TENANT — UNSAFE PREMISES — LIABILITY OF LANDLORD—ACTIONS—EVIDENCE.

In an action against a landlord for injuries to a tenant's property arising from an unswept chimney flue, evidence of a conversation between the landlord's agent and another tenant relative to sweeping the flue in another apartment was properly rejected.

2. SAME.

Evidence as to the control assumed by another tenant over the means of access to the roof of the building was also properly rejected.

3. SAME—LANDLORD'S DUTY TO REPAIR—SEVERAL LESSEES.

When a landlord leaves separate portions of the same building to different tenants, and reserves control of those parts of the building or premises used in common by all the tenants, he must use reasonable diligence to keep in a safe condition the parts over which he retains control.

4. SAME—DUTY TO SWEEP CHIMNEY.

Where the chimneys to the several apartments of a building are separate, and the tenant of a single apartment might sweep its chimney without trespassing or interfering with the others, there is no duty resting upon the landlord to sweep it.

5. SAME—CITY ORDINANCE.

A city ordinance making it the duty of the owner, agent, or occupant of any building to have the chimney thereof swept once in each year imposes no duty in that respect upon the landlord in favor of the tenant.

Error to Wayne; Rohnert, J. Submitted February 10, 1905. (Docket No. 120.) Decided April 21, 1905.

Case by George W. Cooper against George E. Lawson and Thomas J. Kennedy, administrators of the estate of Thomas Kennedy, deceased, for damages caused by fire in premises rented from defendants. There was judg-

ment for defendants on a verdict directed by the court, and plaintiff brings error. Affirmed.

Walter Barlow (*Edward A. Stricker*, of counsel), for appellant.

May & O'Brien (*Clarence A. Lightner*, of counsel), for appellees.

MONTGOMERY, J. The estate of Thomas Kennedy, deceased, owns the building known as Nos. 247, 249, and 251 Michigan avenue, in the city of Detroit. It is a three-story brick building, with stores underneath, and flats above the stores. It has stairways running up from Michigan avenue for entrances to the two upper stories of the building. There are three stairways in this building from the ground floor—one at No. 247, one at No. 249, and one at No. 251 Michigan avenue. The building thus contains three stores on the ground floor, and two flats above each store, or six flats in all, for dwelling purposes. The tenants dwelling in the several flats or apartments go up to their flats from the street by a hallway from Michigan avenue. Those dwelling in the third-story flats use the same stairways and hallways as the tenants of the second-story flats. All the stairways are in common hallways used by the tenants. At the rear of the building there are stairways leading up from the yard to the back porches or landings to the several flats. The rear stairways do not continue up to the roof of the building. There is a platform or small porch above the stairway in rear of the third floor. The means of going from this platform to the roof is an iron fire-escape ladder. The stairway ends at the third floor. There are back kitchen doors at the stairway landings of each floor. This iron fire-escape ladder is fastened to the roof on the inside of the back porch, with a trapdoor above it. The trapdoor was kept down and closed, but unfastened. The ladder works on hinges or joints, so as to fasten it up to the roof, and is kept up most of the time. The ladder is lowered

by pulling it down with a rope. By means of this ladder is the only way to get on to the roof of the building. There is a chimney built on the east side of the building, in the east wall of the building. This chimney and the fireplace are on the east side of the front parlor, about midway, four or five feet back from the front of the building. The fire grate is an open grate—a grate for the purpose of burning soft coal. The fireplace is about the regulation size. The opening is about two feet wide and two feet high. This chimney is one chimney with three flues, and built to accommodate several apartments.

The plaintiff, with his family, resided in the flat on the second floor of this apartment building, over No. 247 Michigan avenue, from June, 1900, until December 26, 1902. He moved into this apartment before the death of Mr. Thomas Kennedy, as his tenant. Mr. Kennedy died September 13, 1900. Defendants are administrators of his estate, and, as such, in charge of the building. On December 26, 1902, fire occurred in the apartment or flat occupied by the plaintiff and his family, and burned and destroyed all of his household furniture, pictures, and household goods in his two parlors, and two bedrooms and dining room. He had no insurance on his household goods and effects at the time of the fire. This fire resulted from an explosion of coal gas generated from burning soft-coal soot in the inside of the chimney leading from the fire grate in the front parlor of the apartment or flat occupied by plaintiff. This chimney had not been cleaned during the plaintiff's occupancy of this apartment or flat.

The plaintiff commenced suit in the court below to recover his damages for the loss of his household furniture, etc., resulting from this explosion and fire incident thereto; and the court, at the conclusion of all the testimony offered on the trial of the case, on motion of counsel for defendants, directed the jury to return a verdict in favor of the defendants of no cause for action, and judgment was ac-

cordingly entered on such verdict. The case is brought to this court by the plaintiff on writ of error for review.

It does not appear that there was any covenant or agreement on the part of the landlord to keep the premises in repair. Mrs. Gay, who, with her husband, occupied the flat above that of plaintiff, was called as a witness, and was asked as to a conversation with a Mr. Sevald, who collected rents for Mr. Kennedy, relative to cleaning the chimney. The question was ruled out. No error was committed in this. A new duty to plaintiff could not have arisen out of any conversation with Mrs. Gay relative to the condition of the flue connecting with her apartments.

The Botsfords had at one time occupied the flat above plaintiff, and plaintiff was asked:

"Now, do you know what the Botsfords did as to this folding ladder that you speak of—whether or not they allowed anybody to use it?"

This was ruled out for the reason that the witness had testified that he never had any occasion to go up there. It is to be noted that Botsford was not a tenant of defendants at the time of the accident, and had not been later than the fall of 1900. And their assumption of authority over this ladder, which was the only means of access to the roof, would not have fixed their rights even while they were occupying the flat. Much less would it have fixed the rights of the Coopers, who succeeded in the occupancy of the tenement. Moreover, it is undoubted that other tenants would be excluded from the use of this upper platform except as they had occasion to go upon the roof for a proper purpose.

This leaves for consideration the question of whether the circuit judge was right in directing a verdict. No case is cited to us, nor have we in our research found a case, which rules this. Recourse must be had to general principles in determining whether, at the common law, and in the absence of any obligation imposed by ordinance (such as will

be referred to later), the landlord was, under the circumstances of this case, bound to keep the chimney clean. The general rule that, in the absence of any agreement between the parties, the landlord is under no obligations to his tenant to keep the premises in repair, is well settled, and is not questioned in this case. See 18 Am. & Eng. Enc. Law (2d Ed.), p. 215. It is also generally held that, where only a part of the buiding is demised to a particular tenant, the landlord is not responsible to such tenant for conditions created by an occupant of another portion of the building which prove detrimental to the first-named tenant. Id. 218.

The plaintiff, while recognizing these settled rules, rests his case upon the rule which appears to have received the sanction of most courts which have dealt with the question, and which appears to us sound in principle: That when the landlord leases separate portions of the same building to different tenants, and reserves control of those parts of the building or premises used in common by all the tenants, he is under an implied obligation to use reasonable diligence to keep in a safe condition the parts over which he reserves control. The cases in which this rule has been laid down and applied are numerous: *Dollard* v. *Roberts*, 130 N. Y. 269 (14 L. R. A. 238); *McGinley* v. *Trust Co.*, 168 Mo. 257 (56 L. R. A. 334); *Lindsey* v. *Leighton*, 150 Mass. 285—being illustrative cases. In these cases, as well as in all to which our attention has been directed, injury resulted from a defective condition of a common stairway or landing, or defective appliances, of which the landlord had control. In each case it appeared that the tenant could not, without becoming a trespasser, make the repairs himself. If we apply this rule to the present case, does it aid plaintiff's contention? The use of hallways and stairways was undoubtedly appurtenant to plaintiff's landed interest. He had the right to use these passageways for ingress and egress. In reason, why might he not have used them also for the purpose of reaching the roof to have the flue to his chimney swept?

We think it clear that he had this right. Control over the flue of plaintiff's chimney was not reserved to the landlord either expressly or by implication. The plaintiff's access to, and right to care for, this flue, as a part of his premises, can be no less because there were other flues to the same chimney in use by other tenants. Plaintiff's flue could be cleaned without molesting the other flues. We think that, independent of the ordinance, the defendant was not liable for the consequences of the casualty.

The ordinance referred to reads as follows:

"It shall be the duty of every owner, agent, or occupant of any building within the limits of the city of Detroit to have the chimneys of such building swept at least once in each year, providing that the same has been used for carrying off of smoke for the consumption of wood or soft coal."

Without determining whether the ordinance could be invoked by any other than the public, or whether, on the other hand, it is to be construed as a purely penal statute, it is enough for the purposes of this case to say that the very terms of the ordinance indicate that there was no *purpose* of fixing the duty of keeping the chimneys cleaned, as between the owner and occupant.

No error is found.

Judgment affirmed.

CARPENTER, MCALVAY, GRANT, and HOOKER, JJ., concurred.

WOODRUFF *v.* COFFMAN.

MORTGAGES — FORECLOSURE — INSUFFICIENT ADVERTISEMENT — EFFECT.

An attempted foreclosure by advertisement which is wholly void for failure of the notice to describe the land, and other defects, is no bar to a subsequent foreclosure in chancery, though the mortgagee purchased at the sale had pursuant to advertisement, and has been in possession thereunder ever since.

Appeal from Mason; McAlvay, J. Submitted February 10, 1905. (Docket No. 131.) Decided April 21, 1905.

Bill by John S. Woodruff against Ira R. Coffman for the foreclosure of a mortgage. From a decree for complainant, defendant appeals. Affirmed.

Henry C. Hutton (*M. B. Danaher*, of counsel), for complainant.

Fitch & Reek, for defendant.

OSTRANDER, J. Defendant, July 22, 1886, borrowed $500 from complainant, giving a note therefor, due five years after date, drawing interest at 10 per cent. per annum. To secure payment he executed to complainant a mortgage on the north half of the north half of the southeast quarter, and the northeast quarter of the southwest quarter, of section 25, town 18 north, range 16 west. This mortgage seems to have been recorded July 24, 1886.

In 1891 an attempt was made to foreclose this mortgage by advertisement. The notice of sale is dated January 15, 1891, which, it will be noticed, is more than six months before the note fell due. The notice recites that the mortgage, after being given, was assigned to one C. H. Woodruff, without stating anything further about the assignment, and describes the premises to be sold as the north half of the north half of the southeast quarter, and the

northeast quarter of the southeast quarter, of section 35, township 18 north, range 16 west. Sale was fixed for the 18th of April, 1891, on which day, as appears from the sheriff's deed, a sale was made to complainant of property described as it is described in the notice of sale just referred to. This deed also recites that the mortgage was assigned to C. H. Woodruff. The bid made at the sale seems to have been large enough to satisfy the mortgage debt. After the period for redemption had expired, complainant entered into possession of the property described in the mortgage, and has since by himself or his tenants possessed and used the same, paid taxes, and exercised usual acts of ownership. The bill in this cause was filed to foreclose this mortgage. An abstract only of the bill and answer appears in the record. The cause coming on to be heard in open court, testimony was introduced, and a decree as in chancery foreclosures was entered. This decree recites the circumstances of the prior attempted foreclosure, sets those proceedings aside, and expressly finds that complainant is owner of the note and mortgage. We find no testimony which warrants a different finding. From this decree, defendant has appealed to this court.

The brief of counsel for appellant contends that the only ground urged for relief is that complainant's agent, who foreclosed the mortgage, made a mistake in omitting one description contained in the mortgage from the notice of sale, and that this calls for the application of the elementary rule that a court of chancery will assist only the vigilant. He also urges that the mortgagee being purchaser at such a sale takes title with notice of the defects in the foreclosure proceedings, and cannot be heard to say that the sale is illegal or irregular when the mortgagor makes no objection. It is claimed that the sum bid at the first sale must be presumed to have been paid to the assignee of the mortgage, C. H. Woodruff, resulting in payment of the mortgage indebtedness. We see no reason for indulging a presumption of fact opposed to the real fact found by the court. It will be noticed, and has been al-

ready stated, that the attempted statutory foreclosure did not have a proper notice of sale under our statute, if there was an assignee of the mortgage. It will be noticed that it describes none of the land which is described in the mortgage. Both the notice of sale and the sheriff's deed described the land as on section 35, when as a matter of fact it was on section 25, and also misdescribed the second 40 acres. There does not appear to have been any foreclosure of this mortgage. If at any time defendant had filed a bill to redeem, the decree must have provided for a redemption from the mortgage as an unforeclosed security. *Grover* v. *Fox*, 36 Mich. 461, 472.

Counsel for appellant say in their brief:

"In any case, the amount declared to be due by the decree, as well as the method of computation, is so culpably erroneous as to call for but little comment.

"As an instance, the credits to the defendant are placed at the paltry sum of $272.98, which included interest on credits at 10 per cent., and is put forward as full compensation for the use of the whole premises for 11 years and over, in face of the testimony of complainant's own witness Parker that the value of the use was at least $60 per year, which, with the average interest computed at 10 per cent., amounts to $993."

Complainant, after stating the years for which he had paid taxes and the amounts paid for taxes, computed that there was due him on the 1st of January, 1903, $1,685.18; that, "putting in everything I had received, and crediting interest on everything I had received at the same rate," the total of credits was $272.98. This left a balance of $1,412.20. He was not cross-examined upon this subject at all, nor did counsel point out in what respect, if any, the computation was erroneous. As matter of fact, it is substantially what the note would have amounted to at simple interest at 10 per cent. if we treat the principal sum as $750 after the maturity of the note. Another witness testified that the fair rental value of the place from the time he went there until he went away was $60 a year. When he went there and when he went away the record

does not disclose. The only proof upon this subject is given by complainant, and it is that "about that time [after redemption had expired] I let Russell H. Parker go onto the place; have been in possession ever since; by Parker a good share of the time, and Mr. Arnold for one year." The lease to Parker was offered in evidence, but it does not appear in the record. The fact that Parker had an agreement with defendant in 1895, about the land, was testified to by Parker, and that the agreement was in writing. The writing was introduced in evidence. It does not appear in the record. It is apparent, therefore, that the certificate attached to the record, which bears no date, but which states that it contains all the testimony presented and all the exhibits, is not true in fact. Presumably, counsel for appellant prepared the record for this court. The decree being for the sum of $1,024.02, it is apparent that the circuit judge made an allowance to the defendant of more than $272.98, and more than $600. We do not know how this sum of six hundred and odd dollars was made up. Counsel for complainant say in their brief that the circuit judge computed the amount due upon the mortgage from its date to the day of hearing and deducted therefrom the rental value of the premises at the rate of $60 a year. If any contention arose over the method of computing the amount due, the record does not disclose it. The borrowed money has not been paid. No rights except those of the mortgagor and the mortgagee are involved. The only question presented, in our opinion, is whether the bill can be sustained as a sufficient pleading to warrant foreclosure of the mortgage now. We think it can be. We are furnished by counsel no reason why the mortgage is not a present, valid, subsisting lien upon the premises described in it, nor why the bill filed cannot be and should not be sustained as containing the averments necessary for a foreclosure of the mortgage.

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

CARPENTER, GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

139 638
d145 651

HOWE *v.* CHICAGO, KALAMAZOO & SAGINAW RAILROAD CO.

1. NEGLIGENCE—DANGEROUS PREMISES—RAILROADS—PUBLIC CONVENIENCES—INSPECTION—QUESTION FOR JURY.
   In an action for injuries occasioned by plaintiffs being precipitated into the vault of a public convenience at a railroad station on its floor giving way, evidence examined, and *held*, that whether defendant railroad company was negligent in failing to properly inspect it was for the jury.

2. SAME—DAMAGES—INSTRUCTIONS.
   Instructions on the measure of damages in such a case examined, and *held*, not erroneous as permitting the jury to speculate upon the value of the injuries to the plaintiffs' feelings, no matter in what way they were occasioned.

3. SAME—DAMAGES—INJURY TO FEELINGS.
   The damages recoverable for such an injury may include injury to feelings occasioned by the fright and suspense which plaintiffs suffered while in the vault.

4. PERSONAL INJURIES—EXAMINATION OF WITNESS—OBJECTION.
   Where a witness in a personal injury case testifies that plaintiff "always complains" a motion to strike out the answer that "she always complained" is not sufficient to call attention to the objection that the statement of witness is a narrative of past suffering.

5. SAME—PRESENT OR PAST SUFFERING.
   A statement by a witness in a personal injury case that plaintiff "always complains of being sore through her lungs" fairly imports that the complaints made related to present, rather than past, suffering.

Error to Barry; Smith, J. Submitted February 15, 1905. (Docket No. 161.) Decided April 21, 1905.

Case by Eva Howe and Frances Roach against the Chicago, Kalamazoo & Saginaw Railroad Company for personal injuries. There was judgment for plaintiffs, and defendant brings error. Affirmed.

Colgrove & Potter, for appellant.

Thomas Sullivan, for appellees.

MONTGOMERY, J. These two actions were brought to recover damages for injuries sustained by the plaintiffs from being precipitated into the vault of a privy situated on defendant's station grounds at Hastings. The two cases were tried as one, and a verdict in favor of plaintiffs and judgments based thereon were entered.

The chief contention is that there was no evidence in the case supporting the averments in the declaration as to defendant's negligence. The declarations were not essentially different. In the second count of the Howe case defendant's duty and neglect thereof are set out as follows:

"It became and was the duty of the said defendant to keep the foundation thereof safe, and to keep the timbers supporting the floor and the seats therein in a secure and safe condition, and to make timely and reasonable inspection of said privy and the floor and timbers supporting the same, and supporting the seats thereof from time to time, and to see that they did not become decayed, weakened, or misplaced, so as to become unsafe or unfit to hold and maintain the weight of those who should have occasion to enter and use the same, and it became and was their duty to take all timely and reasonable precautions to keep and maintain said privy, and each and every part thereof, in such a condition that the same would not break and give way under the weight of those who might enter the same. * * * That the said defendant disregarded its said duty in the premises, wrongfully and negligently failed to keep and maintain said privy in a safe condition for the use of its employés, patrons, customers, and the general public, and failed to keep the foundation thereof safe, and failed to keep the timbers supporting the floor and seats in said privy in a secure and safe condition, and failed to make timely and reasonable inspection of said privy and the floor and timbers supporting the same and supporting the seats therein, and failed to keep the same in such condition as to hold and maintain the weight of those who should have occasion to enter and use the same, and did not take all timely and reasonable precautions to keep and maintain said privy, and each and every part thereof,

in such a condition that the same would not break or give way under the weight of those who might enter the same, but wrongfully and negligently permitted said privy to become unsafe, and the floors and timbers beneath the floor and seats to become rotten, decayed, and weakened, and to become unsafe, dangerous, and insufficient in strength and firmness to maintain the ordinary and reasonable weight which its use from time to time would place upon it."

At the close of the testimony the court withdrew from the jury all question of faulty construction of the privy as not within the declaration.

The defendant's counsel state in their brief their view of the scope of the declaration as follows:

"The declarations nowhere charge faulty construction. The suits were planted upon the theory that the defendant had negligently failed to maintain, and not upon the theory that the building was constructed in a faulty manner, and the negligence charged in the declarations against the defendant was:

"*First*, that the defendant was negligent in maintaining the privy in an unsafe condition; and,

"*Second*, that defendant was negligent in failing to make proper inspection of the same."

And it is strenuously contended that there was no evidence of negligence in making proper inspection.

The evidence showed that the privy was built before the road was built, some 15 years ago; that it had been moved twice—the last time not many weeks prior to the accident. The first time it was moved the privy was tipped over, and the timbers examined, and found to be sound. The privy was last moved under the supervision of Mr. Burke, an employé of defendant. A new vault was excavated, boarded up on three sides and partly on the fourth side. The privy was then placed upon the new foundation, and Mr. Burke went through the opening, and sounded the timbers, and inspected them as well as he could under these circumstances, and found them sound, as he states. He testified that he tapped the timbers with a hammer to see if they were all right; that he couldn't tell what kind

of timber it was; that he didn't see the nails, but saw it was all solid by hitting it. He also testified that the stringers were toe-nailed. It appeared by further testimony of defendant's witnesses that the nails were in fact rusted off when the floor gave way a few weeks later. We think it cannot be said as matter of law that this inspection was all that was required. Particularly in view of the peculiar construction of this building (which might be considered for this purpose) it was a question for the jury as to whether a proper inspection of this building required an examination of the nails sufficient to determine whether they were rusted off, as it was as apparent to the witness Burke as it was to the jury that, whether the construction be proper or improper, it was such as to leave this support dependent entirely upon the soundness and sufficiency of these nails. We think this was a question for the jury.

Complaint is made of the charge of the court on the subject of damages. The court said to the jury that plaintiffs were entitled to recover compensation for injuries to their feelings occasioned by the fright and suspense, if any existed, while in the vault, but distinctly excluded damages for humiliation, disgrace, and annoyance. It is contended that damages for injury to feelings are not recoverable in the absence of evidence of some voluntary act or gross neglect. The trial court evidently recognized fully the rule which excludes *added* damages for injury to feelings where the elements of gross carelessness or wantonness are lacking, but recognized that such inevitable injury to feelings as necessarily occurs from shock and fright are not dependent upon the malice of the defendant, but necessarily flow from the injury. The court, in this charge, followed the holding in *Styles* v. *Village of Decatur*, 131 Mich. 443. Counsel for defendant do not question that under the ruling in the case cited fright and suspense might be considered, but insist that the court had no right to go beyond this, and throw open the door for the jury to speculate upon the value of the injuries to

the plantiffs' feelings, no matter in what way they were occasioned. The court did not leave the question to the jury in any such broad way as this criticism implies; on the contrary, the charge distinctly limited the recovery for injury to feelings to injuries to feelings *occasioned* by the fright and suspense which plaintiffs suffered while in the vault.

On the examination of Ida Backus, a witness for plaintiff, the following occurred:

"*Q.* What other things have you noticed in reference?
"*A.* She always complains of being sore through her lungs.
"*Mr. Colgrove:* I move to strike out the answer that she always complained.
"*Mr. Sullivan:* I think it is a proper question.
"*The Court:* I am inclined to think that testimony is admissible.
"*Mr. Colgrove:* I am perfectly willing that the court should rule so. I want the record. Give me an exception."

It is now insisted that this testimony was not admissible, for the reason that the statements are not limited as to time, and, for aught that appears, they may have been narratives of past suffering. The attention of the court was not called to this specific objection. Moreover, the language fairly imports that the complaints made and testified to by this witness related to present suffering. *Strudgeon* v. *Village of Sand Beach*, 107 Mich. 500; *Elliott* v. *Van Buren*, 33 Mich. 52.

The charge fairly presented the issues to the jury.

Judgments affirmed.

CARPENTER, BLAIR, OSTRANDER, and HOOKER, JJ., concurred.

139 643
p149 1 37.

VILLAGE OF MORRICE *v.* SUTTON.

1. MUNICIPAL CORPORATIONS—CONTRACTS—LIGHTING—POWER OF COUNCIL.

   Under section 2908, 1 Comp. Laws, providing that the council of an incorporated village may contract for any period not exceeding 10 years for gas, electric, or other lights, the council has no power to enter into such a contract during the life of a valid contract previously entered into, covering the period of 10 years.

2. SAME—PRIVATE ADVENTURE—PUBLIC AID.

   A municipality has no power to aid, by contract or otherwise, a private adventure, and money paid by a village council as a bonus to secure the building of a grist mill and electric lighting plant may be recovered as money received.

Error to Shiawassee; Smith, J. Submitted February 16, 1905. (Docket No. 167.) Decided April 21, 1905.

Assumpsit by the village of Morrice against Edward Sutton and George Mackey, copartners as Sutton & Mackey, for money had and received. There was judgment for plaintiff, and defendants bring error. Affirmed.

Lyman B. Trumbull and *Thomas E. Barkworth*, for appellants.

John T. McCurdy, for appellee.

OSTRANDER, J. The village of Morrice sued defendants, declaring on the common counts in assumpsit, and furnishing a bill of particulars, which, in substance, states its demand to be $2,000 in money paid by plaintiff to defendants as a bonus. The plea was the general issue. A trial was had before the court without a jury. An opinion, which has by all parties been treated as a finding of

facts and law, was filed; and later, upon the application of defendants, an amended and extended finding was made and filed. Both the opinion and the amended findings are here set out at length:

"OPINION.

"This is an action of assumpsit, whereby the plaintiff seeks to recover of defendants the sum of $2,000, and interest thereon, which plaintiff claims was of the public moneys of said village, and which the defendants unlawfully and wrongfully received into their hands and to their use. It is an undisputed fact in this case that the defendants received such sum of $2,000 of the public money of the plaintiff with full knowledge that the same was the property of the plaintiff, and that the same was paid over to them as a bonus for building a mill and lighting plant. Such a perversion of public moneys can only be in violation of the law, and cannot be sustained by the courts.

"Defendants, by brief, argue that the contract between the plaintiff and E. Bennett & Sons 'was not assigned' to the defendants, etc. (Exhibit B); that such contract (Exhibit A) had been assigned to defendants; and that defendants were agreeing to furnish light under the terms and conditions of such last-named contract.

"It is further argued in behalf of the defendants that there was a consideration moving to plaintiff for such $2,000 by force of the agreements of the defendants to furnish certain electric lighting to plaintiff, etc. Such claim cannot be sustained in face of the statement in the contract (Ex. B) that 'said sum of three thousand dollars to be paid to them by said second parties [i. e., plaintiff] as a voluntary aid in the construction of an electric light plant and flouring mill.' As far as it appears in this case, any lighting furnished to plaintiff by defendants has been paid for by plaintiff according to the terms of the contract Exhibits A and B.

"My conclusions are that the plaintiff is entitled to recover of defendants such sum of $2,000, and interest thereon at the rate of five per cent. from September 15, 1900, to this time, amounting in all to the total sum of $2,325, with costs to be taxed.

"Let finding and judgment be entered accordingly.

"AMENDED FINDINGS.

"1. I find that said plaintiff is a village incorporated under the general laws for the incorporation of villages.

"2. That defendants, on or about the 7th day of June, 1900, purchased of Edmund Bennett a gristmill and an electric light plant situated within said village; being the only gristmill and lighting plant within said village.

"3. That said lighting plant, which was operated in connection with said gristmill, had been used to furnish light for said village under certain contract entered into between said village and Bennett & Sons on the 13th day of November, 1899, which contract is in words and figures as follows:

"'*This Indenture* made this 13th day of November, A. D. 1899, between the village council of the village of Morrice, county of Shiawassee, State of Michigan, for said village of Morrice of the first part and Edmund Bennett of the same place of the second part:

"'*Witnesseth*, That the said party of the first part together with their successors in office do bargain and contract with the said second party to buy all electric lighting of said party of the second part for a period of ten years from and after said second party has his electric light plant installed in said village of Morrice, which is to be installed within four months from the date hereof; and it is further agreed by said party of the second part to furnish said village eight arc lights, each of 1,600 candle power, schedule of standard make and to maintain and operate the same for said period of ten years after said plant is installed as aforesaid at a cost to said village of Morrice of $50 a year for each arc light aforementioned; the same to be paid monthly in advance by said village to said Bennett or his assigns during the continuance of this contract. The light to be furnished as aforesaid shall be kept clean by said second party or his assigns and shall burn from sundown, dark, each night until eleven o'clock p. m., except Saturday nights said lights shall burn until twelve o'clock and except also moonlight nights. And the same shall be maintained as aforesaid unavoidable accidents excepted. The said council and their successors do hereby grant to said second party and his assigns the right to the use of the streets, alleys, and public grounds in said village of Morrice as shall be necessary to enable the said Bennett or his assigns to construct and operate proper works for the supplying of said lights to said village under this contract, and supplying the inhabitants thereof with incandescent lights on any terms that may be agreed upon by said inhabitants and said Bennett or his assigns; such grant to continue

for the period of 25 years from the date hereof. It is also agreed that said eight arc lights are to be placed within the corporation limits of said village, and at such points as may be determined by said council; and should said council or their successors require any more lights for said village, the same shall be furnished by said second party or his assigns at the rate aforesaid in consideration of the privileges hereby granted.

" 'Witness the signature of the parties hereto on the day first above mentioned.

" 'ROBERT B. CRAIG,
" 'President, and
" 'CLAUD E. JONES,
" 'Clerk of the Village of Morrice, Shiawassee County, Michigan.
" 'E. BENNETT & SONS.'

"4. That said contract was afterwards assigned by said Bennett & Sons to said defendants. While I do not find that the defendants, or either thereof, ever contracted or agreed directly with said plaintiff to assume or carry out the terms and conditions of such last-mentioned contract, yet I do find that the defendants subsequently, by their contract of date, to wit, September 7, 1900, made with Benjamin F. Rann, William Case, and Abraham L. Beard, and hereinafter set forth, did contract and agree with said last-mentioned persons 'to furnish said village with lights under the terms and conditions of said last-mentioned contract between said village and said Bennett & Sons.'

"5. That said defendants afterwards purchased said mill and lighting plant and property, and that about 30 days after such purchase such property was struck by lightning and burned up.

"6. That during the course of the summer of the year 1900 certain representative citizens of said village of Morrice held out as an inducement to defendants to rebuild said mill and lighting plant that they would raise the sum of $3,000, to be paid to defendants on conditions embodied in the contract hereinafter next mentioned.

"7. That on, to wit, the 7th day of September, 1900, a written contract was made and entered into by and between defendants, as parties of the first part, and William Case, Benjamin F. Rann, and Abraham L. Beard, three citizens of said village of Morrice, as parties of the second part, which contract is in words and figures as follows, viz.:

" 'This Agreement made and entered into this 7th day of Septem-

ber, 1900, by and between Edward Sutton and George Mackey of Albion, Michigan, of the first part, and William Case, Benjamin F. Rann, and Abraham L. Beard, of Morrice, Shiawassee county, of the second part:

"'*Witnesseth*, That the said first parties, for and in consideration of the sum of $3,000 to be paid to them by said second parties, as a voluntary aid in the construction of an electric light plant and flouring mill, at the time and in the manner hereinafter stated, do agree to construct substantially after the plans and specifications of the Jackson Flour Mill and Machinery Company of Jackson, Michigan, a copy of which specifications is hereto attached and made a part of this agreement. Said first parties also agree to erect and maintain an electric light plant of sufficient power to furnish current to light the village of Morrice with at least ten arc lights of 1600 candle power, also of sufficient power to furnish current for at least 500 incandescent lights if so many be desired by private citizens of said village. Said first parties agree to furnish the village with light under the terms and conditions of a certain contract made on the 13th day of November, 1899, with Bennett & Sons, which contract has been duly assigned to said first parties. Said flouring mill and electric light plant shall be located on some suitable site within the said village of Morrice.

"'The payment of the sum herein stipulated shall be made as follows: When the foundation walls are all completed according to specifications, and the lumber and all other materials for said building are upon said ground the sum of $1,000; when the building is fully inclosed, the sum of $500, when the boiler and engine are upon the ground, the sum of $500, and at the completion of both the mill and electric light plant in the manner heretofore specified, the sum of $1,000, all of which the said second parties agree to pay to said first parties.

"'It is further agreed that said first parties shall keep said mill and electric plant insured in the sum of at least $2,000, and shall assign said insurance to the amount of $2,000 to said second parties as security for the specific performance by first parties of the following undertaking, to wit: In case said mill and electric plant shall be destroyed by fire in whole or in part and first parties shall not elect to rebuild said mill and electric light plant or to resume operations, then in that event said first parties shall pay back to said second parties the sum of $2,000, less the amount of premiums actually paid by said first parties in carrying said insurance. When said first parties have expended the sum of $2,000 in premiums in carrying the insurance to the amount above specified then this agreement to assign insurance and return any sum to said

second parties in case first parties should not elect to rebuild after a fire, shall become void.

" 'This agreement shall be binding upon and inure to the benefit of the heirs, representatives, and assigns of the respective parties.

" '*In Witness Whereof,* the respective parties have hereunto set their hands and seals the year and day first above written in duplicate.

" 'EDWARD SUTTON. [L. S.]
" 'GEORGE MACKEY. [L. S.]
" 'BENJAMIN F. RANN. [L. S.]
" 'WILLIAM CASE. [L. S.]
" 'ABRAHAM L. BEARD. [L. S.]

" 'In the presence of, as to Edward Sutton:
" 'JOHN A. BROWN.
" 'PALMER M. DEARING.
" 'Witnesses to George Mackey and parties of the second part:
" 'R. B. CRAIG.
" 'H. B. WATERMAN.'

"8. That defendants built and constructed a mill and electric light plant substantially according to the terms of said last-mentioned contract, and received the sum of $3,000, as therein provided, of which last-mentioned sum of money $1,000 was raised by said second parties by subscription, and $2,000 thereof was raised by the sale of the municipal bonds of plaintiff; that the issuing of such bonds was through the action of the village council of plaintiff after the question of the issuing of such bonds had by said village been submitted to, and voted upon by, the electors of said village at a special election called by such council for such purpose; that the $2,000 so received by said village was by its municipal officers turned over into the hands of the said parties of the second part to the last above mentioned contract, and by them afterwards paid to the said defendants; that said defendants, at and before the time they so received said sum of $2,000, were advised and had knowledge of the manner and means by which such moneys were procured, and that such last-mentioned sum was the property of the said plaintiff village.

"9. That said sum of $2,000 was delivered to defendants by said Rann, Case, and Beard as follows, viz.: $1,000 thereof on November 5, 1900; $500 thereof on November 17, 1900; and $500 thereof on January 22, 1901. That such sum of $2,000 was received by said Rann, Case, and Beard from said village for the purpose of delivery to defendants on or about September 15, 1900.

"10. That defendants substantially completed such mill and electric lighting plant on or about January 22, 1901, and have furnished light for said village of Morrice from that time until the present under the terms and conditions of the contract which said Bennett & Sons made with said village and assigned to defendants, and have received pay therefor from said village as stipulated in said contract with Bennett & Sons.

"11. That, in the making of said contract by Case, Rann, and Beard with defendants, at least some of the members of said village council had knowledge thereof, and impliedly consented thereto and approved of the same, but I do not find that the common council of said village, by action as a council, ever directly consented to or approved of the making of such contract further than by their subsequent action in calling a special election submitting to the electors of said village the question of issuing bonds, and the further action of said council in issuing bonds of said village and selling the same, and thereby raising the said sum of $2,000, and causing said last-mentioned sum to be delivered into the hands of Case, Rann, and Beard, and which sum of $2,000 subsequently came into the hands of defendants in the manner hereinbefore stated.

"12. That said defendants, for a time, at least, and without objection from said plaintiff, furnished lights and lighting in compliance with the terms of their said contract with Case, Rann, and Beard, and that said plaintiff village has paid defendants therefor according to the terms of said last-mentioned contract with Bennett & Sons.

"13. That said plaintiff has assumed to recognize such last-mentioned contract, and acted under it, to the extent that it made provision for the payment to defendants of the sum of $2,000 of the $3,000 in such contract mentioned, and which was so as aforesaid by Case, Rann, and Beard paid over to defendants, and has paid defendants for lighting as stated in the foregoing (12) paragraph of these amended findings of fact.

"14. I am not able to determine from the evidence whether the defendants would or would not have erected the electric lighting plant and furnished lights to plaintiff under their contract with Case, Rann, and Beard, but for the payment of said sum of $2,000, but it is but a fair presumption that defendants would not have done so without payment to them of said sum.

"15. In addition to the findings as to matters of the foregoing 14 proposed amendments of findings of facts, I further find and add thereto that there was a plan or scheme in which a portion at least of the members of said village council, a large number of the electors of said village, Rann, Case, and Beard, and the defendants in this case, were to some extent engaged, or had knowledge of, to get and use said sum of $2,000, and pay the same over to defendants as a bonus for building and erecting said mill and electric lighting plant, which sum was the $2,000 so as aforesaid paid over to defendants by Case, Rann, and Beard.

"As to defendants' requests for a finding of conclusions of law, they are all denied, except as they may be embodied in the following conclusions: The whole proceeding of the disposition of said sum of $2,000 was unlawful and void; and it does not matter whether there were or were not informalities or neglect of methods anywhere in such proceeding, or whether such proceedings were regular or irregular. The result is the same—that public moneys of a municipal corporation cannot be lawfully used for the particular benefit of private individuals, even though the general public may incidentally receive some benefits from such use in common with such private individuals."

But two assignments of error, viz., the eighth and the third, are argued. These are:

"8. The court erred in refusing to make the fourth finding of fact proposed by defendants."

"3. The court erred in making the finding as follows:

"'It is an undisputed fact in this case that the defendants received such sum of $2,000 of the public money of the plaintiff with full knowledge that the same was the property of the plaintiff, and that it was paid over to them as a bonus for building a mill and lighting plant.'"

The fourth finding of fact proposed by defendants reads:

"That said contract [the Bennett & Sons contract] was not at any time assigned to said defendants, or either of them; neither did they assume nor agree with Bennett & Sons to carry out its conditions."

It is true, as claimed by counsel, that defendant Sutton, who bought the Bennett property, testified, "I did not

assume in any manner the obligations of that contract." After purchasing the Bennett plant, defendants, for 30 days or more, continued to supply electric lighting as Bennett had done. In the contract of September 7, 1900 (seventh finding), to which defendants are parties, it is recited that the Bennett contract has been duly assigned to defendants, and defendants agree, in terms, to provide light under the terms and conditions of that contract. True, this contract is not one to which the village is a party, but the facts recited are some evidence supporting the finding of the circuit judge. It is at least debatable whether defendants are not estopped to assert against the plaintiff that they are not bound as assignees of the Bennett contract. They have furnished lights thereunder as his successors; they bought his property, knowing about his obligation to the village; and the instrument contains a grant of the use of the streets, alleys, and public places in the village for a term of 25 years for public and private lighting. By reasonable inference, it appears, that, under this contract and grant, private lighting is being done. Suppose, however, for the purposes of argument, we concede the position of counsel upon this point, and pass to their remaining contention. Summing up their position, counsel say:

"1. This money, or a part of it, at least, was paid out of the village treasury and went into the hands of Sutton and Mackey as payment, in part, for electric lighting for a term of nine years and more. Even though the court should think that the idea of bonus as well as of lawful consideration entered into payment of this money, it cannot now be recovered by plaintiff without depriving defendants of that lawful consideration without which they would not have furnished lighting for the village. In other words, the court would not do one wrong to right another.

"2. A contract for electric lighting which involved an advance payment could have been legally entered into by the corporate authorities.

"3. If the court holds that the village acted in an irregular manner in bringing about this arrangement, then, by

reason of the part performance of the contract, it cannot be allowed to complain at the present time.

"4. The idea of bonus, as far as electric lighting is concerned, is negated in the express terms of the contract with Case et al. under which the village paid this money. Would the village have paid the money if Sutton and Mackey had not agreed to furnish electric lighting? Would Sutton and Mackey have undertaken to furnish the lighting if the money had not been paid? These questions must be answered in the negative, and show that the idea of bonus did not control that part of the transaction."

And again, in their supplemental brief, counsel say:

"We contend that while the joining of the action of the village with that of its citizens through the mediumship of such a committee may be an irregularity which might seasonably have been prevented at the objection of citizens, nevertheless, the villiage having the unquestioned right to contract with regard to the subject-matter, and having so contracted, and the defendants having been clearly prejudiced thereby, and the village having received and appropriated the benefit which it sought to obtain by its action, that the decisions cited in our former brief apply, and that the inequity of now permitting the village to rescind the contract, after years of acquiescence, and when the parties can no longer be put in statu quo, should prevent recovery."

We do not think it necessary or profitable to discuss the law of ultra vires as applied to municipal corporations, or to pursue other of the interesting legal questions with which the briefs for appellants deal.

The act under which plaintiff is incorporated provides (1 Comp. Laws, § 2908) that the council may contract from year to year, or for any period of time not exceeding 10 years, for gas, electric, or other lights. This is the full measure of power in this behalf. This power was exhausted when the contract was made with Bennett, November 13, 1899, for lighting for 10 years. No one would assert that, this contract being in force and being performed, plaintiff would have power to make another covering the same subject and same period of time. If we could say that the effect of the sale by Bennett of his

plant, the destruction of the plant, and the attitude of defendants were together equivalent to an abrogation of the Bennett contract, and that the village was in position to make a new contract for lighting, it is still true that its power in this behalf is a power to contract. It has made no such contract. The village is not a party to the contract with defendants.

There is another proposition not to be overlooked. If we could say that the village is indirectly and beneficially a party to the contract with defendants, it would appear that the $2,000 of village money was paid to defendants as much to secure a flouring mill as an electric light plant. It does not appear that the village has the power to so aid, by contract or otherwise, private adventures.

Counsel for appellants say that the case falls directly within the rule laid down in *Coit* v. *City of Grand Rapids*, 115 Mich. 493. We think that the case is easily to be distinguished.

In our opinion, the errors discussed are not well assigned, and the judgment should be affirmed, with costs.

CARPENTER, BLAIR, MONTGOMERY, and HOOKER, JJ., concurred.

SHELDON *v.* CARR.

1. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENTS.
An heir suing to set aside a deed made by his grandmother, or to enforce a trust on the property granted by it, cannot testify to conversations with her concerning the deed and the consideration moving her to execute it. Section 10212, 3 Comp. Laws.

2. TRUSTS—ESTABLISHMENT—EVIDENCE—SUFFICIENCY.
On a bill to set aside a deed as obtained by fraud, or to impress a trust upon the land conveyed, evidence considered, and *held*, insufficient to support a finding that the grantee promised at the time of the conveyance to make a certain payment to the grantor's daughter.

3. APPEAL AND ERROR—CONCLUSIVENESS OF FINDINGS.
Where the court below presumably reached a conclusion based on all the testimony, including that of complainant, which was incompetent, the consideration, usually of force, that the court below saw and heard the witnesses, is eliminated.

4. TRUSTS—ESTABLISHMENT BY PAROL.
A parol agreement by the grantee of land to pay a certain sum of money to the grantor's daughter when the land should be again sold gives rise to no trust enforceable in equity by the heirs of the daughter.

Appeal from Barry; Smith, J. Submitted February 16, 1905. (Docket No. 162.) Decided April 21, 1905.

Bill by Harvey Sheldon and another against Allen G. Carr and others to establish an interest in certain land. From a decree for complainants, defendant Carr appeals. Reversed, and bill dismissed.

Thomas Sullivan, for complainants.

Colgrove & Potter and *C. S. Palmerton*, for appellant.

OSTRANDER, J. The substance of the averments of the bill of complaint is here set out: On May 3, 1883, there was conveyed by warranty deed to Sarah Carr and defendant Allen G. Carr certain premises. The deed was recorded, and a copy of the record is annexed to the bill. The entire consideration of $2,000 was paid by Sarah Carr, and the undivided one-half of the premises was given by Sarah Carr to Allen G. Carr as his share as an heir at law of her estate. On August 12, 1889, Allen G. Carr, who was son and one of two heirs at law of Sarah Carr, for the purpose of defrauding said Sarah and the heirs of her body other than himself, promised said Sarah that, if she would convey to him her undivided interest in the premises, he would, after her decease, sell the premises, and from the proceeds pay Etta Sheldon, his sister, the sum of $400; if Etta Sheldon was then dead, he would pay that sum to her heirs. Allen G. Carr never intended to perform his said promise, but made it with the deliberate and fraudulent intent of not performing, and of beating Etta Sheldon and her heirs out of their rightful share of the property of Sarah Carr. Sarah conveyed to Allen her undivided half interest in the premises without other consideration than the said promise, and relying upon the promise, and the deed was not recorded until December 17, 1900. From May, 1883, to the time of her death, June 4, 1890, Sarah Carr continued to occupy and control the said premises as though they were her own. The heirs of Sarah Carr living at the time of her death were defendant Allen and his sister, Etta Sheldon. Etta Sheldon died December 8, 1900, and complainant is her only surviving heir. Defendant frequently informed Etta Sheldon during her lifetime that as soon as he sold the premises she should receive $400, as agreed between himself and his mother. Defendant sold and conveyed the premises April 2, 1902, giving a warranty deed therefor, to the other persons made defendants, whose good faith as purchasers is not attacked; receiving in payment other real estate and a mortgage on the premises sold. Since the said sale by defendant, defendant has ap-

parently avoided meeting complainant, who has not been able to attempt to obtain a fulfillment of the said promise.

The answer of defendant Allen G. Carr puts in issue the payment by his mother of the entire consideration for the premises, the promise to pay any sum at any time to Etta Sheldon, and the procuring the deed from Sarah because of any such promise. It also asserts that another daughter of Sarah Carr (Emeline Hadley) is living; that no administrator of the estate of Etta Sheldon has ever been appointed.

Upon the filing of this answer, a paper appears to have been filed, of which the following is a copy:

"[Title of cause.] And now comes the said defendant [?] and amends the bill of complaint heretofore filed in this cause by making Emeline Hadley, who is a half sister of Etta Sheldon, mentioned in said bill of complaint, and a daughter of Sarah Carr, deceased, a party complainant. Said bill to be and remain in all other particulars the same as filed, with the exception of adding the name of Emeline Hadley as one of the complainants thereto. [Signed by counsel for complainant.]"

Authority to make this amendment does not seem to have been challenged in the court below. The fact is mentioned as explanatory of the theory upon which the bill was filed.

The prayer of the bill is that the court will decree complainants to be entitled to a one-half portion of the note, mortgage, and real estate received by defendant in exchange for his property, and to one-half the rents and profits of the land after the decease of Sarah Carr; also that defendant Allen be required to assign to complainants such portion of the proceeds of sale of the land as would have been theirs if the deed from Sarah to Allen had not been made. There is a prayer for general relief. The relief prayed could only be given by setting aside the deed from Sarah to Allen, and finding that Allen had no interest in one-half the proceeds of the land.

The court below found that Allen G. Carr received the

conveyance from his mother with an understanding and promise to pay his sister (mother of Harvey Sheldon) $400, and he determines that this sum defendant Carr shall pay within 60 days, and establishes a lien for its payment on the note, mortgage, and real estate which defendant received in the trade.

We might dispose of the case without further reference to the facts. The bill, however, charges the defendant with fraudulent conduct, and the court below has, in effect, found that charge sustained by the proofs. For that reason, and because it will lead to a better understanding of the case and of our conclusions, we make a brief reference to the testimony:

The entire consideration for the deed and land was not paid by Sarah Carr. She was from some time before 1865 until her death a widow. Defendant was her only son, and a cripple. He has never married, but lived with his mother until her death. When her husband died, Sarah Carr sold some land, paid some debts, and, according to the testimony of Allen, she distributed a part of the remainder; giving to her daughter Etta Sheldon her share, or one-third. Then she and Allen together bought 10 acres of land, the title being taken in the name of Allen. Later she received a back pension of some $1,900. With some of this money and with the proceeds of a sale of the 10 acres the land in question was purchased, the deed running to Sarah and Allen. Seventeen hundred dollars was paid down, and a mortgage for $300 given for the balance, and this mortgage was afterwards paid. There is no evidence tending to show that the joint deed had any reference to, or was in any way connected with, a distribution of property, or that it was a setting off of property to Allen as heir. There is no proof that the deed from Sarah to Allen, made in August, 1889, was in consideration of a promise of Allen that he would pay to Etta Sheldon or her heirs $400, or any other sum, at the decease of Sarah, or out of the proceeds of a sale of the premises, or at any other time, unless found in inferences

to be drawn from certain of the testimony. There was no valuable consideration paid by Allen to his mother for this deed, excepting his lifelong care of her. She lived to be 73 years old. The testimony referred to is that of complainant and of the witnesses Martin and Mary Cole, Charles Phillips, and Charles Roscoe. Of this, the testimony of complainant was and is challenged as incompetent, because facts stated by him were equally within the knowledge of Sarah Carr. The testimony of this witness is to be weighed, as to value, somewhat by the manner of its extraction. He was 30 years old when sworn (1902), and, after stating that he was present at a talk in harvest time, 1888, between his mother, Allen, and Sarah, the following occurred:

"*Q.* State to the court what that conversation was.

"*A.* Why, my grandmother was talking of deeding him a farm, and he was to pay my mother $400.

"*Q.* That was talked between your grandmother and Allen and your mother?

"*A.* Yes, sir.

"*Q.* What did Allen say with reference to that arrangement? Did he consent to it?

"*A.* He did.

"*Q.* Do you know whether or not at that time your mother had a deed— Your grandmother had deeded her interest. Did she deed her interest after that to Allen?

"*A.* Yes, sir.

"*Q.* After the deed was made, and various times until your mother's death, did you hear other conversations between Mrs. Carr and your mother about the matter—your grandmother and mother?

"*A.* I do not understand that question.

"*Q.* After the deed was made to Mr. Carr, here, did you hear other conversations between your mother and grandmother in reference to the $400?

"*A.* Yes, sir.

"*Q.* What were those conversations?

"*A.* My grandmother seemed to be worried about it—whether he was going to pay my mother or not—and she spoke about it.

"*Q.* Did you ever hear any conversation between your mother and Allen?

"*A.* Yes, sir.

"*Q.* In which reference was made to the $400?

"*A.* Yes, sir.

"*Q.* What was said by your mother, and what was said by Allen, in those conversations?

"*A.* She needed the money, and asked him for it, and he promised to pay it to her.

"*Q.* How many times have you heard such conversations?

"*A.* Probably a dozen times.

"*Q.* Did you ever on any occasion during your mother's lifetime ever hear Allen Carr repudiate the debt, or claim he had paid any portion of it or that he did not owe it?

"*A.* No, sir.

"*Q.* Have you had any talk with him in reference to the matter since your mother's death?

"*A.* I have not. * * *

"*Q.* During the time you worked this farm for Allen, was Allen promising that this money would be paid to your mother?

"*A.* Yes, sir.

"*Q.* Did he so continue to promise continually during all the years up until the time of your mother's death?

"*A.* Yes, sir.

"*Q.* I have forgotten your answer, but did you ever have any talk with Allen about this claim after your mother's death?

"*A.* No, sir. * * *

"*Q.* Do you know whether or not your grandmother would have made a deed of the premises, had it not been for his promise to pay?

"*A.* I don't think she would.

"*Q.* From the conversations you heard there between them, you think that promise was one of the inducements he held out to procure the deed?

"*A.* I do; yes, sir.

"*Q.* Is it your firm conviction, had the promise not been made, the deed would not have been executed?

"*A.* No, sir."

On cross-examination:

"*Q.* You say this talk you had there at your grandmother's house occurred in harvest time in 1889?

"*A.* Yes, sir.

"*Q.* Wheat harvest?
"*A.* Yes, sir.
"*Q.* That was some time after she deeded this land to Carr?
"*A.* No; that was before.
"*Q.* You didn't know she had made a deed to Allen in 1888?
"*A.* I did not. * * *
"*Q.* You knew when this other deed was made?
"*A.* Yes, sir.
"*Q.* When did you say that was made?
"*A.* August 12, 1889.
"*Q.* You are sure it was at harvest time—just before?
"*A.* Yes, sir.
"*Q.* Allen had a half interest in this farm anyway, didn't he?
"*A.* Not that I know of.
"*Q.* You have examined the records?
"*A.* Yes, sir.
"*Q.* You never learned that?
"*A.* No.
"*Q.* You knew he had a deed of half of it?
"*A.* No.
"*Q.* And always had a deed of half?
"*A.* I never knew it."

Witness further testified on cross-examination that after his grandmother's death he rented this farm for four or five years, and settled with Allen; that he never went to Allen about this matter.

The witness Martin Cole testified that he never heard Mrs. Carr say anything about the deeding to Allen, and never heard Allen Carr say anything in regard to the deed, but that at his (witness') house, at a time when Allen Carr, witness, his wife and children were present, he heard Allen Carr say—

"That he was to pay his sister some money, and after the deed was drawed—after the deed was made— I have just forgotten what time—whether it was at his mother's death it was drawn in that way.
"*Q.* How much did Mr. Carr say he was to pay his sister?
"*A.* I think, $400.

"Q. He was to take the farm?
"A. Yes, sir."

He says this conversation occurred about three years ago. Later on he says it was about four years ago.

"Q. In that conversation at that place did he state how this indebtedness—how this indebtedness to Etta Sheldon originated?
"A. Why, no; I don't think he said anything in regard to that—how it was originated—more than he was to pay Ettie. He owed her some money—$400—and she wanted the money. At times she wanted some money."

The witness Mary Cole testified that she heard Sarah Carr, in her lifetime, say that she was going to deed Allen the place. She said he had always lived with her, but Allen was to pay her a sum of money, "but she didn't tell me just how much, but he was to pay her some money;" that since Sarah Carr's death she had been up to the Sheldons, and found her worrying about money, and that, coming home, she told Allen Carr about it, and he said he owed it to her, and, if she really wanted it, he would get it.

The witness Roscoe served the papers in this case upon the defendant Allen Carr, and he testified that defendant said, "I don't think I will have any lawyer;" that he said he guessed Harvey had some kind of a claim; he had been looking for something of that kind.

The witness Charles Phillips testified to having had two conversations with Sarah Carr—the last one a year or a year and a half before her death, and the first one a year prior to that one—at which no one was present but himself and Sarah Carr. He testified that his hearing was pretty bad, and had been for a good many years; that Mrs. Carr said to him, in substance, that she thought Allen ought to have the place, but that they were going to pay Etta money, about—she thought about $500.

Sarah Carr had a deed made to Allen of her interest in this land in 1888, executed it, and tendered it to him. He declined to take it. The deed was destroyed. Allen was

not present at the drawing or execution of the deed made a year later—the deed in question. He took it when it was given him, and laid it away among other papers in the house. There is an abundance of testimony to show that Sarah Carr intended the land for Allen, and that their life together was such that her desire was a reasonable one.

Whether we treat the bill as filed to enforce a right which accrued to the ancestor, Sarah Carr (a right to treat the deed from Sarah to Allen as though it had never been made), or as one to enforce a parol trust in or concerning land, the testimony of Harvey Sheldon concerning the statements made by Sarah Carr is incompetent. He is a person within the terms of the statute (3 Comp. Laws, § 10212). If we eliminate the objectionable testimony given by this witness, there remains none which will warrant a finding that the deed from Sarah to Allen was procured by a fraudulent promise, or that the land, or any of it, was held by Allen in trust. With his testimony, the case is a very doubtful one upon the facts. The proof shows that Allen managed the farm while he and his mother lived together. That he owned an undivided half of it from the time of its purchase is undisputed. Etta Sheldon lived in the neighborhood of defendant until December 8, 1900, 10 years after the death of her mother. During this time her son (one of the complainants) rented the land for four or five years from defendant Allen, and settled with him. Inaction on her part is attempted to be explained by the allegation of frequent promises made by Allen to pay her. The testimony upon this subject has been already referred to. Its tendency to show any promise or acknowledgment based upon or growing out of any arrangement with his mother is equaled, at least, by the testimony offered on the part of defendant. There is no proof that defendant has since the death of Etta Sheldon avoided complainant. Complainant never applied to defendant nor conversed with him about the matter. Complainant did not know that Allen had from 1883 been

owner of one-half the land. The fact that presumably the court below reached a conclusion upon all the testimony, including that of complainant, eliminates the consideration, usually of force, that he saw and heard the witnesses.

Two distinct claims are set up by the complainants. As to both, we quote from the brief:

"It is certainly a well-established principle in equity practice that if Allen Carr procured this deed from his mother to her undivided one-half interest in the forty-four acres of land on the express promise and understanding that he was to pay to Etta Sheldon or her heirs the sum of $400, that in that case the court will enforce a parol trust in said land in favor of Etta Sheldon or her heirs.

"In the case at bar it is our contention that Allen Carr procured the deed upon his express promise to pay this $400 to Etta Sheldon; that Sarah Carr continued in possession of the land up until the time of her death; that Allen Carr always recognized this trust arrangement, and never repudiated it, until within a short time before the filing of the bill of complaint in this case, and not until after the death of Etta Sheldon. It is our contention that the rights of Sarah Carr in the premises descended to Etta Sheldon and her personal representatives."

It is to be noticed that none of the testimony is addressed to any agreement except the alleged agreement to pay to Etta Sheldon or her heirs $400; that, as averred in the bill, payment was to be made after death of Sarah Carr. We assume, upon the proofs, that this alleged agreement rested wholly in parol. No mention is made of it in the deed. No proof of any such agreement is made, excepting by the testimony of Harvey Sheldon; and the conversation he gives us, if occurring in 1888, occurred prior to the making of the deed. Besides, counsel for complainants speak of and treat it as a parol agreement or trust. The case of *Thompson* v. *Marley*, 102 Mich. 476, is authority for the proposition that there is no such trust averred or proven as can be declared or enforced in equity. The same case is said by counsel for complainants to be authority for the proposition that if Allen procured

the deed by fraud, with intent not to carry the agreement into effect, Sarah Carr might at any time have filed a bill to set the deed aside, and, having died without so doing, her rights devolved upon her heirs or personal representatives. Her personal representatives are not here. If *Thompson* v. *Marley* is authority for holding, under the facts of this case, that the heirs of Sarah Carr might set aside the deed to Allen—a proposition we do not discuss—still the court below found against complainants upon that theory, and they have not appealed.

The decree can only be sustained as a declaration and enforcement of a trust made void by our statutes. It is reversed, with costs of both courts, and a decree will be entered here dismissing the bill of complaint.

CARPENTER, BLAIR, MONTGOMERY, and HOOKER, JJ., concurred.

POWERS *v.* BRIGGS.

1. SALES—WARRANTY—BREACH—QUESTION FOR JURY.
   Plaintiff, in an effort to sell a hay loader to defendant, warranted that it would do certain work. Defendant declined to purchase the machine, but afterwards the matter was again taken up, and the machine was ordered. *Held*, that it was a question for the jury whether the original warranty entered into the contract of sale as finally made.

2. SAME—RETURN OF GOODS—DELAY—REASONABLENESS.
   In an action for the price of a hay loader, rejected on account of breach of warranty, circumstances examined, and *held*, that the delay in returning the machine was not, as a matter of law, unreasonable.

Error to Eaton; Smith, J. Submitted February 16, 1905. (Docket No. 166.) Decided April 21, 1905.

Assumpsit by Seroll E. Powers against Albert Briggs for goods sold and delivered. There was judgment for defendant, and plaintiff brings error. Affirmed.

Horace S. Maynard, for appellant.

Frank A. Dean, for appellee.

MONTGOMERY, J. This action was brought to recover the price of a hay loader sold and delivered to the defendant. The defense was that the loader was bought under an express warranty that it would do good work and would load hay from windrows, and that, if it failed to do so, defendant might return it; that it did not answer the terms of the warranty; and that defendant returned it. There was a sharp contest on the trial. The circuit judge submitted to the jury the three questions: (1) Whether there was such a warranty as claimed; (2) whether defendant gave the machine a fair test within a reasonable time, and found that the machine would not do good work; and (3) whether within a reasonable time thereafter he returned the machine to plaintiff.

If there was evidence which justified the submission of each of these questions to the jury, we think the concise, clear charge of the circuit judge covered all the points in the case, and that no elaboration was necessary. It is insisted, however, that the evidence shows that the sale, when made, was not accompanied by a warranty. Plaintiff's contention in this regard is best stated in his request to charge:

"The time when the warranty was made, if any were made, becomes important in this suit. If you find that some time prior to the delivery of the machine the plaintiff, either by phone or otherwise, tried to sell a hay loader to the defendant, and in the negotiations made warranties and representations of what such machine would do, and said that if said machine did not do good work the defendant would not have to keep it, and that it might be returned; and find that the offer and proposal of the plaintiff was not at the time accepted by the defendant, but

that the defendant said he would consider the matter, and let the plaintiff know whether he would take the machine or not; and find, further, that the plaintiff afterwards called the defendant by phone and asked him if he was going to take the machine, and whether the plaintiff should order a machine for him, and that the defendant then informed the plaintiff, in substance, that he (the defendant) had concluded not to buy a machine, and that the plaintiff need not order a machine for defendant—that would end the negotiations at that point, and all representations and warranties, if any, made by the plaintiff up to that time, would not bind the plaintiff in any after negotiations or proposals of sale, unless he expressly renewed them. If the status of affairs then was that the plaintiff had made a proposal of sale which the defendant rejected, a new warranty would have to be made by the plaintiff in order to bind him."

We do not think this request correctly states the law. The evidence shows that, after the conversation referred to in the request, the subject was again taken up, and the loader ordered. In the view most favorable to plaintiff, it was a question for the jury as to whether the subsequent order had reference to, and was understood to have reference to, the preceding conversation, and whether both parties understood that the loader was ordered under the warranty which was a part of the offer of the machine in the first instance. The case of *Childs* v. *O'Donnell*, 84 Mich. 533, is easily distinguished. It was there held that a warranty on a sale of one bill of goods did not attach to a sale of another bill at a later time. In the present case the negotiations all related to the identical machine delivered to the defendant, and the question is whether all that was said during the negotiations was understood to have reference to these machines, and whether, in the understanding of the parties, the proposed warranty attached when the sale was finally consummated.

It is contended that the machine was retained an unreasonable time before being returned. It is said that the machine was retained from July 20th to September 14th

before it was returned. The testimony tends to show that on July 20th it was understood that the machine was to be given a further trial. It was given a further trial on the 23d. On the 25th defendant sent his brother to inform plaintiff that the machine did not work. Again, about the middle of August, the defendant's brother told plaintiff that the machine did not work, and was informed that it would not be taken back. Finally, on September 14th, it was returned to the place where defendant got it. It was not used after July 23d. Under these circumstances, it cannot be said, as matter of law, that the delay was unreasonable, particularly when it is considered that, under the testimony, plaintiff had a duty to perform in making the machine do the work it was designed for, and when it is considered that the season for its use was about closed. *Felt* v. *Evaporator Co.*, 52 Mich. 602.

Error is assigned on the opening statement of defendant's counsel. We see no reason to question the good faith of defendant's counsel in stating what he expected to prove. The reasoning in *Prentis* v. *Bates*, 88 Mich. 567, applies with peculiar force to the present case.

No error appears.

Judgment affirmed.

CARPENTER, BLAIR, OSTRANDER, and HOOKER, JJ., concurred.

OLIVER CHILLED PLOW WORKS *v.* DOLAN.

SALES—CONTRACTS—CONSTRUCTION—CONDITIONS.

Where plaintiff, a manufacturer of plows, used the same blank form to create sales agencies and for sales to the trade, an indorsement on the blank that plaintiff retained title to the goods until paid for was not a part of a contract for the sale of goods to defendant's assignor, providing for absolute payment at specified dates, which both parties must have understood would be after the purchaser would have sold most of the goods in the due course of trade, and which did not qualify the buyer's right to make sales in any manner satisfactory to himself, though it also contained a provision that the buyer recognized as lawful and binding "all conditions and agreements on this sheet."

Error to Ingham; Wiest, J. Submitted February 16, 1905. (Docket No. 163.) Decided April 21, 1905.

Replevin by the Oliver Chilled Plow Works against Patrick H. Dolan. There was judgment for plaintiff, and defendant brings error. Reversed.

P. H. Dolan (*Black & Reasoner*, of counsel), in pro. per.

Charles F. Hammond, for appellee.

CARPENTER, J. In December, 1902, plaintiff and D. J. Mahoney (defendant's mortgagor), a retail dealer of agricultural implements in the city of Lansing, executed a written agreement, of which the following is a copy:

"LANSING, Dec. 24, 1902.

"ORDER.

"OLIVER CHILLED PLOW WORKS,

"South Bend, Ind.

"Please ship on or about the 15th day of February, 1903,

via L. S. R. R., sure, from South Bend, the goods below specified.

"This order is given at the discounts named below from current price lists of the Oliver Chilled Plow Works due and payable ¼ May 20, ½ Sept. 20, ¼ Nov. 20, 1903, with 10 per cent. additional discount for cash, if paid by that date. Payment to be made in New York or——exchange, or currency by express, charges prepaid. Remittances by check at customer's risk. Failure to realize from any cause will be at customer's loss. Subsequent orders during the season are subject to all the conditions of this contract and to changes in prices and discounts without notice, are due on the 20th day of the month following purchase, and are subject to 14 per cent. cash discount if paid at maturity. The terms to the trade and the conditions and agreements on this sheet are recognized as lawful and binding by all the parties hereto."

This was signed "D. J. Mahoney," and accepted subject to approval of the Oliver Chilled Plow Works by plaintiff's salesman. Then followed a statement of terms to the trade, and then a description of the goods ordered (which consisted of 50 plows and a large quantity of slips, points, molds, etc.). Above the order, which was given on a blank prepared by plaintiff, was printed this:

"The handling of bogus or imitation plows, extras, or repairs will work a forfeiture of this agency. Contract for agency of Oliver chilled and steel walking and riding plows for the season ending Nov. 1, 190–."

On the back of this contract appeared in large letters this indorsement: "Agency Contract for Oliver Chilled and Steel Plows, taken by ——." In another column, printed in smaller type, was: "Territory ——."

"Agents are not permitted to sell outside the territory assigned them. * * *

"In all cases the title to and ownership of goods manufactured by the Oliver Chilled Plow Works shall remain vested in said Oliver Chilled Plow Works until paid for."

This same column contained many other stipulations.

Some of them were clearly limited in their application to agents.

After the goods were delivered to Mahoney under this contract, and before they were paid for, he mortgaged the same to defendant for the purpose of securing his creditors. The plaintiff, claiming that by the indorsement on the contract it retained title until the goods were paid for, brought this action of replevin. Mahoney testified that he did not know that there was any indorsement whatever on the contract, while plaintiff's testimony indicated that this indorsement was brought to his attention at the time he signed the ordered. The trial court directed a verdict in plaintiff's favor. Defendant appeals.

The decisive question is this: Is the indorsement retaining title in plaintiff a part of the contract of sale? Cases have arisen where it was clear that one of the parties to a contract intended that indorsements thereon should be a part of the contract, and the issue in dispute was whether the other party assented to that intent. Jurists have not agreed upon the principle by which that issue should be determined. Compare *Seymour* v. *Farquhar*, 93 Ala. 292, with *Parker* v. *Railway Co.*, L. R. 2 C. P. D. 423, and *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. App. 470.

We are not called upon to consider that interesting question, because here, as we shall endeavor to show, it was not plaintiff's intention to make the indorsement reserving title a part of its contract with defendant's mortgagor. The contract under consideration was a contract of sale. It was made on a form prepared by plaintiff to be used when it made a contract for goods to be sold by an agent, as well as when it sold them to the trade. When the form was used to create an agency, certain blanks were filled, which, when it was used for the purpose of a sale to the trade, as in this case, were left vacant.

Thus certain provisions indorsed on the contract were operative when an agency was created which had no application in case of a sale. We think the indorsement retaining title until the goods were paid for is such a provision. It will be noticed that defendant's mortgagor had until November 20, 1903, to pay for goods which (it is fair to assume) both contracting parties intended would be sold before that date. No provision in the contract qualified the vendee's right to make such sales, and to make them in any manner satisfactory to himself. He had, therefore, a right to transfer to the purchasers an absolute title or anything less than an absolute title. A provision retaining title in plaintiff until the season closed would, as between the vendor and vendee, nullify this right. It would prevent the vendee from doing precisely what the contract intended he should do. We are bound, therefore, to decide that the indorsement which retained title in plaintiff had no application to the contract of sale under consideration.

In reaching this conclusion we have considered and rejected plaintiff's contention that the language recognizing "as lawful and binding" "all conditions and agreements on this sheet" makes the indorsement reserving title a part of the contract. It is proper that we should state why we reject that contention. This clause does not say that all indorsements thereon shall be a part of the contract. Neither can it be so construed, for it is clear that the indorsement restricting the sales of an agent to a specific territory is not a part of the contract. The utmost that plaintiff can claim, then, is that this clause makes *some*, but not *all*, of the indorsements a part of the contract. If so, the court must determine by considering the writing —that is, by construing it—whether a particular indorsement is a part of a particular contract. It is obvious that that question must be determined by the general principles applicable in the construction of contracts. Those princi-

ples have already been applied in construing the contract in suit. They will not permit us to read into the contract by implication any provision which (like that reserving title in the vendor) would defeat the purpose for which the contract was made. See *Walker* v. *Douglas*, 70 Ill. 448; *First Nat. Bank of Baltimore* v. *Gerke*, 68 Md. 456; *Hunter's Adm'rs* v. *Miller's Ex'rs*, 45 Ky. 619.

While the clause reserving title to plaintiff has no application to this case where the goods were sold to the trade, it is easy to see how it may have application when goods are consigned to an agent. It may then be regarded, as between principal and agent, as a limitation upon the agent's authority to sell. In case he makes a sale on credit, title is to remain in the vendor (the agent's principal) until the goods are paid for.

It follows from these views that the learned trial judge erred in directing a verdict for the plaintiff. He should have directed a verdict for the defendant.

Judgment reversed, with costs, and a new trial ordered.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

PEOPLE v. SCHNEIDER.

1. MUNICIPAL CORPORATIONS—ORDINANCES—REGULATION OF AUTOMOBILES.

   The city of Detroit has power under its charter (1904, § 170), to provide by ordinance for the registration and numbering of automobiles and other motor vehicles.

2. SAME—LICENSE—REVENUE.

   An ordinance regulating automobiles and requiring registration and numbering thereof at a cost to the owner of $1 to cover the value of figures furnished by the city to form the number, is not objectionable as a license, it being at most a mere means of regulation, and not a license for revenue.

3. SAME—CONSTITUTIONALITY.

   An ordinance requiring one operating an automobile on the street to display thereon a number furnished by the city, is not in conflict with the Constitution in that it is an unreasonable search, or compels the operator to furnish evidence against himself, or deprives him of rights without due process of law; but such an ordinance is a justifiable exercise of the police power, in the interest of the safety of the traveling public.

Certiorari to recorder's court of Detroit; Phelan, J. Submitted February 16, 1905. (Docket No. 268.) Decided April 21, 1905.

John P. Schneider was convicted of a violation of an ordinance regulating the use and speed of automobiles and other motor vehicles. Affirmed.

Henry F. Chipman and *Henry Look*, for appellant.

Timothy E. Tarsney and *J. Walter Dohany*, for the people.

CARPENTER, J. Certiorari to the recorder's court of the city of Detroit. Respondent was convicted in the lower court, and fined $25, for operating an automobile in

the streets of the city of Detroit without having first registered said automobile, and without placing thereon a number, as required by an ordinance of said city. We are asked to set aside said conviction upon the ground that said ordinance is invalid.

The provisions of said ordinance material to this decision are as follows:

"SECTION 1. No person or persons shall drive or propel any automobile or other motor vehicle within what is known as three-quarter mile circle at a rate of speed to exceed eight (8) miles per hour; nor shall any person or persons drive or propel any automobile or other motor vehicle outside of said three-quarter mile circle within the city limits at a rate of speed to exceed twelve (12) miles per hour; and at no time shall any person or persons drive or propel any automobile on any street, highway, or public place in a careless, reckless, or negligent manner. * * *

"SEC. 2. The owner or driver of any automobile or other motor vehicle shall, before operating the same, register with the license collector his name and residence, together with a description of the vehicle so owned or operated, and the license collector shall enter such name and residence and description in a record kept for that purpose and shall furnish the person so registered with one or more aluminum figures sufficient to compose a number corresponding with the number appearing upon the record so made. The figures shall be four (4) inches high, and three (3) inches in width, for which the person to whom delivered shall pay to said license collector the sum of one dollar ($1). The owner of such vehicle shall place, or cause to be placed, such figures on the rear of his vehicle in the center of the bed thereof, arranging the same in a horizontal line with the space of one and one-half (1½) inches, between the nearest adjacent points thereof, and on a dark background; but said figures may be rigidly attached to the axle or hung under the body of the vehicle; said figures shall at no time be concealed or covered, but shall be kept in plain sight. * * *

"SEC. 5. No person shall operate or cause to be operated an automobile or other motor vehicle upon any of the streets, alleys, boulevards, park driveways, or public grounds of the city of Detroit without complying with the provisions hereof.

"*Provided*, That the provisions of the ordinance relating to the registration and numbering of such vehicles and notification as to transfers thereof shall not apply to automobiles or other motor vehicles owned by nonresident visitors when said vehicle is kept in the city for not more than two (2) days.

"SEC. 6. Any person violating any of the provisions of this ordinance shall be punished by a fine not exceeding one hundred dollars ($100) for each offense; and, in the imposition of such fine, the court may make a further sentence that, in default of the payment of such fine, the offender may be imprisoned in the Detroit house of correction for such offense for any period of time not exceeding three (3) months."

Respondent concedes that part of the ordinance regulating the speed of automobiles is valid. He contends, however, that the provisions respecting registration and numbering are invalid. His objections to the validity of those provisions may be classified thus: (1) The legislature has never granted to the common council of Detroit authority to enact them. (2) They interfere with respondent's constitutional rights. We will consider each of these objections separately.

1. Has the legislature authorized the common council to enact the provision in question? This depends upon the proper construction of section 170 of the city charter (1904), which gives the common council authority "to control, prescribe, and regulate the manner in which the highways, streets, avenues, lanes, alleys, and public grounds and spaces within said city shall be used and enjoyed." It is scarcely necessary to say that this gives the common council ample authority to enact ordinances which will tend to make streets safe for the traveling public. We may take judicial notice that many of these automobiles may be driven at a speed of at least 40 miles an hour. Driven by indifferent, careless, or incompetent operators, these vehicles may be a menace to the safety of the traveling public. Under its authority to regulate the use of the streets, the city may enact ordinances which will diminish this danger. It is clear, and it is conceded, that it may

regulate the speed of automobiles and repress their careless management, but it is contended that it has no power to provide for their registration and numbering. It is not difficult to see that the registration and numbering of automobiles is intimately connected with their safe operation in the streets. In a city like Detroit many automobiles are precisely alike in external appearance. They are sometimes operated by persons whose faces are partially concealed and whose identity is uncertain. Those operators who are most reckless and indifferent—and those are the ones who endanger the safety of others—may violate this ordinance with impunity unless some method is adopted by which they or their automobiles may be identified. The provision in the ordinance for registration and numbering is such a method. It is reasonable to believe that, when he knows that the number displayed at the rear identifies his automobile, fear of discovery and punishment will lead the automobile's driver to observe the requirements of the ordinance. Indeed, we cannot say that the common council did not decide—and did not justly decide—that the provision for identification by registering and numbering was necessary to prevent injury to pedestrians and other travelers from the careless management of automobiles.

If authority be needed for the proposition that the city may enact this provision for the purpose of identifying automobiles which endanger the safety of travelers, *Frankford, etc., R. Co.* v. *City of Philadelphia*, 58 Pa. St. 119, is such an authority. The ordinance there in question provided "that each car run shall be numbered and have its number painted in a conspicuous place." The court sustained this ordinance, saying:

"It is obvious that its effect is that of police regulation. It clearly furnishes a means of identifying every car which may be run in violation of those rights and public interests which the city is authorized by its charter to maintain and secure."

See, also, *Laundry License Case*, 22 Fed. 703.

But it is said that the provision for registration and numbering is a license, and that the grant of authority to regulate gave the city no power to license. If the provision for registration and numbering—which involved no discrimination, and requires the payment of nothing more than is necessary to pay for the number which the municipality furnishes—can be regarded as a license (for conflicting definitions of "license," see 2 Cooley on Taxation [3d Ed.], p. 1137; *Adler* v. *Whitbeck*, 44 Ohio St. 539), it is not a license for the purpose of raising revenue. If it were, it might well be contended that it did not pass as an incident to the power to regulate. See 2 Cooley on Taxation (3d Ed.), p. 1141; *Laundry License Case*, 22 Fed. 703. It is a license (if a license at all) as a mere means of regulation; indeed, we might say, as already shown, as a necessary means of regulation. This proposition is self-evident, viz., that the grant of authority to accomplish a certain purpose carries with it authority to use any proper and lawful means without which that purpose cannot be accomplished. If, therefore, the speed of automobiles cannot be effectually regulated without licensing them, the grant of the power to regulate confers upon the city power to license, unless some other provision of law forbids the exercise of that power. I think this conclusion is supported by the following authorities: *Town of Russellville* v. *White*, 41 Ark. 485; *Fort Smith* v. *Ayers*, 43 Ark. 82; *Village of St. Johnsbury* v. *Thompson*, 59 Vt. 300; *Laundry License Case*, supra.

In the *Laundry License Case*, which involved the licensing of laundries in the city of Portland, Or., it was said:

"The words 'to control' and 'to regulate,' ex vi termini, imply to restrain, to check, to rule and direct. And, in my judgment, the power to do either of these implies the right to license, as a convenient and proper means to that end. * * * By this means the persons or occupations to be regulated are located and identified and brought within the observation of the municipal author-

ities, so that whatever regulations are made concerning them may be the more easily and certainly enforced."

There are cases holding that the grant of power to regulate does not confer upon the city power to license. See *City of Burlington* v. *Bumgardner*, 42 Iowa, 673. In that case (that was a grant of authority to regulate taverns and houses for public entertainment) it might be said that the power of regulation might be effectually exercised without licensing. That is by no means an authority for the proposition that, when regulation cannot otherwise be effectual, the grant of power to regulate does not carry with it power to license. We do not think that any of the cases cited by respondent are opposed to this conclusion. The cases most nearly in point are *City of Chicago* v. *Collins*, 175 Ill. 445 (49 L. R. A. 408), and *City of Chicago* v. *Banker*, 112 Ill. App. 94.

In *City of Chicago* v. *Collins*, the supreme court of Illinois held invalid an ordinance of Chicago which imposed a license fee on each vehicle using the streets of the city. The grounds of that decision were these: (*a*) The city had no authority to prohibit, and therefore no authority to license, "an ordinary method of locomotion, or even an extraordinary method, if it is not of itself calculated to prevent a reasonably safe use of the street by others." (*b*) The city had no authority to raise a revenue by taxing the use of vehicles which were already subject to taxation under the general laws of the State. That decision has no application to the case at bar. It does not hold nor indicate that municipal authorities may not (if in their judgment such a requirement is essential to safe travel) exclude from their streets automobiles not registered and numbered.

City of Chicago v. *Banker*, supra, is more nearly in point. In that case it was decided that an ordinance of the city of Chicago compelling one "who uses his automobile for his pleasure and business only to submit to an examination and to take out a license (if the examining board see fit to grant it) * * * is beyond the power

of the city council, and is therefore void." Without approving that decision, it is sufficient to point out that the ordinance in question in that case goes further than the ordinance in the case at bar.

We conclude, therefore, that the common council of the city of Detroit had authority to provide for the registration and numbering of automobiles under the grant of power to regulate the use of the streets, unless the exercise of that power is forbidden on some constitutional ground.

2. Is the ordinance constitutional? Respondent contends that the ordinance violates section 26, art. 6, of our Constitution, which forbids "unreasonable searches," and section 32 of article 6, which reads:

"No person shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

We deem it sufficient to say that the provision requiring one operating an automobile on the street to display thereon a number furnished by the municipality is not an unreasonable search. The statement in the opinion of this court in *Robison* v. *Haug*, 71 Mich. 38, relied upon by respondent, which denies the right of the public to look into one's private place of business or residence, manifestly has no application. We think it equally clear that the ordinance does not compel an automobile owner or operator to testify against himself, or deprive him of any property rights. It is merely a justifiable exercise of the police power in the interest of the safety of the traveling public. We think it unnecessary to discuss any other objection.

The conviction is affirmed.

MCALVAY, BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

139 680
156 375
139 680
157 113
157 635

PEOPLE *v.* PECK.

1. CRIMINAL APPEAL—BRIEF—COURT RULES.

   Where the brief of plaintiff in error contains no statement of the facts, nor of the errors on which he relies, nor of the questions involved, nor the manner in which they are raised, as required by Rule 40 of this court, the fact that the case is one involving personal liberty alone prevents affirmance of the verdict without an examination of the questions raised, and even then the action of the court is not to be regarded as a precedent.

2. JURORS—VOIR DIRE—USE OF PEREMPTORY CHALLENGES—PREJUDICIAL ERROR.

   In a criminal case it is reversible error, regardless of whether peremptory challenges have been used, to refuse to permit jurors to be asked on their voir dire examination "if, * * * the testimony is evenly balanced in your mind * * * which way would you be inclined to lean, for or against the defendant?"

3. CRIMINAL LAW — EVIDENCE — OTHER OFFENSES — CROSS-EXAMINATION.

   On a prosecution for embezzlement of the amount of a check, sent by prosecuting witness to defendant to buy tax titles, the parties were shown to have had a number of business transactions and some litigation, and the vital issue in the case on which the evidence was conflicting was whether a receipt introduced by defendant for the money alleged to have been embezzled was a forgery. *Held*, that it was error to require defendant on cross-examination to answer concerning receipts in other transactions, which, on an accounting between defendant and the prosecuting witness, had been disallowed as credits on the claim of the prosecuting witness that they were forgeries.

4. SAME—EVIDENCE OF PROSECUTING WITNESS.

   It was error also to permit the prosecuting witness to state that receipts in other transactions were forgeries, and that on an accounting between defendant and the prosecuting witness they had been disallowed as credits, on the claim of the prosecuting witness that they were forgeries.

5. EMBEZZLEMENT — CHECK — HISTORY—ADMISSIBILITY IN EVIDENCE.

   On a prosecution for embezzlement of the amount of a check

sent by prosecuting witness to defendant, proof of the history of the check was admissible, where the defense admitted the receipt of the check and of the money on the check, and insisted that it had been accounted for to the prosecuting witness.

Exceptions before judgment from Muskegon; Russell, J. Submitted February 16, 1905. (Docket No. 233.) Decided April 21, 1905.

William Peck was convicted of embezzlement. Reversed.

Turner & Turner, for appellant.

George S. Lovelace, Prosecuting Attorney, and *Charles B. Cross*, Assistant Prosecuting Attorney, for the people.

OSTRANDER, J. This case comes here on exceptions before sentence. Respondent was convicted of having, on December 17, 1898, embezzled and fraudulently converted to his own use $250 of the goods and chattels of another, contrary to the provisions of 3 Comp. Laws, § 11570. No attempt has been made by counsel for appellant to comply with Rule 40 of this court. His brief contains no statement of the facts, nor of the errors upon which he relies, of the questions involved, or the manner in which they are raised. The fact that it is a case involving personal liberty alone prevents affirmance of the verdict without examination of the questions raised. Nor must this action of the court be regarded as a precedent.

In November, 1897, respondent, who lived at Montague, Mich., wrote to the complaining witness, Nathan H. Webb, with whom he had had similar transactions, inviting him to invest $250 in purchasing certain tax titles from the State of Michigan. Mr. Webb lived at Austin, Ill. Pursuant to the correspondence had, Mr. Webb sent to respondent his check for $250, and later, on request of respondent, $25 additional. Respondent cashed the checks, purchased a sight draft at the Muskegon County Bank for $267 and

sent to a person in Lansing, Mich., to be used at the office of the auditor general to purchase the tax interest. This was in December, 1897. The land had been redeemed, and on December 9, 1897, the money was returned to respondent by way of a State treasurer's check, upon which respondent within a day or so obtained the money. It is claimed by Mr. Webb that he did not learn for several years that the check was not used for the purpose intended, and that his first knowledge came from respondent's testimony in litigation which arose between them. After some investigation, on July 10, 1903, a criminal complaint was made by Webb; respondent was arrested, examined, and held for trial. The complaint, as well as the information, charges in different counts the felonious appropriation of the check and its proceeds. Neither the complaint, the testimony before the magistrate, nor the information leaves room for doubt about the particular transaction involved.

In selecting the jury, counsel for respondent asked of one of the panel presented this question:

"If, in the proof introduced here, witnesses should take the stand on the part of the people and on the part of the defense, and at the end of the trial you retire to your jury-room to deliberate on your verdict, suppose that you then ascertain that the testimony is evenly balanced in your mind (that is, as much upon one side as the other, and entitled to the same weight and credence), which way would you be inclined to lean—for or against the defendant?"

This was objected to by the prosecuting attorney, the objection was sustained, and an exception for respondent was taken. Upon proceeding to ask other jurors the same question, the trial judge said:

"It isn't necessary for you to ask that question. I have ruled on it, as far as that is concerned. It isn't a proper question anyway."

Thereupon another exception was entered for respondent. So far as the record discloses, no objection was made to any juror, nor any other questions asked the jury by counsel for respondent. There was no argument, nor was

the court referred to any authority. In *Monaghan* v. *Insurance Co.*, 53 Mich. 238, 245, the following question was asked a juror:

"Suppose, in this case, after the evidence is all introduced, you should believe that it was evenly balanced, so that there was as much for the plaintiff as for the defendant, which way would you be inclined to lean—against or in favor of the company?"

To this counsel for the plaintiff objected for the reason that the juror would probably be guided by the court, and the court said:

"Of course, the party that has affirmation of an issue must produce a preponderance of evidence, and, if the evidence was evenly balanced, they would be obliged to find against the party that had the affirmative of the issue. I don't think the question is proper. I don't permit the juror to answer it."

This court held the question a proper one, and that the court erred in not permitting the juror to answer. That the question was a proper one is conceded. In *Township of Otsego Lake* v. *Kirsten*, 72 Mich. 1, 6, it was held proper to be answered. In *People* v. *Keefer*, 97 Mich. 15, 19, it was held error to exclude such a question. In *Towl* v. *Bradley*, 108 Mich. 409, a case from Muskegon circuit, it was held that the case came within the rule announced in *Monaghan* v. *Insurance Co.* We regard it as the settled law of the State that counsel have the right to interrogate jurors upon their voir dire to the precise point indicated by the question here asked, and that it is reversible error to exclude such questions and the answers to them. As is explained in *Monaghan* v. *Insurance Co.*, the fact that counsel have not or do not use peremptory challenges does not affect the question. Such questions are asked to enable counsel to judge of the propriety or the necessity of peremptory challenges.

Upon the trial respondent claimed that he had repaid to Mr. Webb the money he was accused of having converted, and he produced and offered in evidence a receipt for it, purporting to be signed by Webb. The fact and the

giving of the receipt were denied, and the signature to the receipt was declared by Webb to be forged. Upon this question of forgery or no forgery, an issue of fact, vital and controlling, was presented. Upon his cross-examination of respondent upon this issue the prosecuting attorney asked the following questions, which, over objection, were required to be answered:

"*Q.* You had some other receipts you did introduce or claim credit for that Mr. Webb claimed were forgeries, didn't you? * * *

"*Q.* You had some other receipts or papers or orders you introduced, or attempted to, upon the accounting of Mr. Webb's father's estate, which Mr. Webb claimed were forgeries? * * *

"*Q.* You were not allowed any credit for that, were you? * * *

"*Q.* Isn't it true that the court refused to allow you any credit for it in any respect?"

The parties were shown to have had a number of business transactions, and some litigation, and it was the claim on the part of the people that respondent had forged other papers besides the particular one involved upon this trial. The answers to these questions, while admitting that Mr. Webb claimed there were other forgeries, do not in any way admit that they were, in fact, forgeries, and explain why no credit was given respondent by the court in the matter to which his attention was called. This was not proper cross-examination. It was not material that Mr. Webb claimed that other papers were forged, nor that some court had disallowed a claim presented by respondent. Whether, in view of the answers of respondent, by which the people were bound, reversible error was committed, we do not determine. The prosecution did not rest upon respondent's answers to these questions. Upon rebuttal Mr. Webb not only testified—as was competent and proper—that the receipt in question was forged, but was permitted over objection to testify as follows:

"*Q.* Will you state whether or not Mr. Peck has ever used, or offered to use, upon the trial of any of these other

cases which have been pending between you and him, any other forged papers or documents?

"*A.* Yes, sir; he has.

"*Q.* Mr. Peck's attention was called the other day to an order claimed to have been given by you authorizing the applying of $563, or $567, I don't recollect which, as an advancement against your father's estate. Will you state whether that order was ever given or signed by you at all?

"*A.* Never.

"*Q.* Was any such order of any kind or character ever signed by you?

"*A.* Never.

"*Q.* That was a forgery?

"*A.* It was a forgery out and out.

"*Q.* Was there also a forged note, or a forged indorsement of one, or something of that kind?

"*A.* A forged note at the bank."

Upon motion made to strike out all of this testimony, which was denied, the court said:

"The jury cannot pay any attention so far as they refer to a conviction, and that would not warrant the jury in convicting the defendant of this crime; that is not the object of the admissibility of them at all; that is not what they are admitted for."

Counsel for the people do not refer us to any authority supporting this procedure. It is said in the brief that this testimony was admissible, not for the purpose of showing this particular receipt was a forgery, but to show respondent's felonious and guilty intent. The issue was, as we have stated, whether a particular receipt, produced by respondent, was genuine or was forged. Respondent contended that it was genuine, Webb that it was forged. Any competent evidence bearing upon this issue was proper to go to the jury. But Webb's statement that other papers were forged raised new issues. Respondent could not be expected to meet and to try these various issues. The cross-examination of respondent and the direct examination of Webb, taken together, was prejudicial to respondent, inasmuch as the jury were at liberty to infer that respondent's guilt or innocence of other claimed forgeries was a matter for them to determine.

In the charge to the jury the court said upon this subject:

"The evidence tends to show that there has been some controversy heretofore over other receipts that were claimed to be forged. You have a right to take that matter into consideration; but be careful. You are not warranted in convicting this defendant of this crime simply because he has been accused, or it is claimed that other receipts have been forgeries. It is a matter you have a right to take into consideration in connection with the case."

It will be seen that the jury were not told for what purpose they might consider this evidence—for what purpose it was before them. If respondent had been on trial for forging the particular receipt, the testimony would have been inadmissible. *People* v. *Henry*, 129 Mich. 100; *People* v. *Lonsdale*, 122 Mich. 388. It does not fall within the rule of *Helwig* v. *Lascowski*, 82 Mich. 619 (10 L. R. A. 378).

We pass the assignments of error based upon the testimony of Mr. Webb of the contents of letters written to respondent because the respondent afterwards produced the letters themselves.

The various assignments relating to proof of the history of the check are overruled. It was proper to lay the whole matter before the jury. The defense admitted the receipt of the check and of the money on the check, and insisted it had been accounted for to the owner. There was no error in refusing to rule that respondent and Webb were partners in the transaction involved.

We have examined such of the other assignments of error as are at all discussed in the brief for respondent. Some are not likely to arise upon a new trial. Others, in the view we have taken of the case, require no discussion.

For the reasons herein assigned, the conviction should be set aside, and a new trial granted.

CARPENTER, BLAIR, MONTGOMERY, and HOOKER, JJ., concurred.

PEOPLE v. MCPHEE.

LOTTERIES—SUIT CLUB.

A "tailor suit club," the members of which contribute $1 each per week and have weekly drawings, and through which a member may receive a suit of clothes for $1, is a lottery or gift enterprise, as defined and prohibited by section 11344, 3 Comp. Laws, though there is no chance for the members to sustain a loss.

Exceptions before judgment from Chippewa; Steere, J. Submitted February 17, 1905. (Docket No. 267.) Decided April 21, 1905.

Monroe J. McPhee was convicted of conducting a lottery. Affirmed.

Holden & Holden (*Clyde Hayden*, of counsel), for appellant.

John P. Conrick, Prosecuting Attorney, for the people.

OSTRANDER, J. At the conclusion of the testimony in this case, counsel on both sides asserted that there was no issue of fact to be determined, and requested the court to direct a verdict either of conviction or acquittal, according to his opinion of the law. The court instructed the jury that under the testimony they should render, and they did render, a verdict of guilty as charged, and the case comes here upon exceptions before sentence.

Respondent is charged in the information with setting up and promoting a lottery for merchandise, and that he did dispose of merchandise by way of lottery and gift enterprise, contrary to the form of the statute. He is a merchant tailor doing business at the city of Sault Ste. Marie, and, in connection with or as a part of his regular business, he conducted what is known as a "tailor suit club," or

"suit club." This suit club had 30 members, who each paid to respondent $1 a week. Respondent gave receipts for the money, dated, and in the following form:

"$1.00. Received of———one dollar, club dues.
"M. J. MCPHEE."

To each member a number was allotted by the members themselves. These were put in a cigar box, thoroughly mixed and shaken, and a drawing was made from this box by one of the members according to some plan agreed upon among themselves. The drawings took place each Saturday night, and some member, as a result of the drawing, received for whatever he had paid in a suit of clothes or an overcoat valued at and worth $20, made to order by respondent. If a member won, he drew out of the club, and a new member was taken in. It might occur that one who had paid in but $1 would get the suit of clothes or overcoat, and it might occur that a member would pay $20 and participate in 20 drawings without securing either as a result of the drawing. It was a part of the agreement, however, and was the practice, to permit a member of the club to withdraw at any time, and upon such withdrawal he was entitled to receive from respondent clothing of the value of the money he had contributed to the club, or let the sum of money he had paid in stand as a credit and as part payment for clothing purchased of respondent. That is to say, if a member had paid $1 a week for 20 weeks, he had a credit of $20. If he had paid but 6 weeks, he had a credit of $6, which he could use with the respondent in the purchase of garments.

Counsel for respondent say that the only question involved is whether, upon this state of facts, a verdict of guilty was properly directed, or, to put it in another way, whether respondent was conducting a lottery or gift enterprise, within the meaning of our statute.

The statute in question is section 11344 of the Compiled Laws of 1897, and is the first section of chapter 316, enti-

tled, "Of offenses Against the Public Policy." It provides that:

"Every person who shall set up or promote, within this State, any lottery or gift enterprise for money, or shall dispose of any property, real or personal, goods, chattels or merchandise or valuable thing, by the way of lottery or gift enterprise, and every person who shall aid, either by printing or writing, or shall in any way be concerned in the setting up, managing, or drawing of any such lottery or gift enterprise, or who shall in any house, shop, or building owned or occupied by him or under his control, knowingly permit the setting up, managing, or drawing of any such lottery or gift enterprise, or the sale of any lottery ticket or share of a ticket, or any other writing, certificate, bill, goods, chattels or merchandise, token or other device purporting or intended to entitle the holder or bearer or other person to any prize or gift, or to any share of or interest in any prize or gift to be drawn in any such lottery or gift enterprise, or who shall knowingly suffer money or other property to be raffled for in such house, shop, or building, or to be there won by throwing or using dice, or by any other game or course of chance, shall for every such offense be punished by a fine not exceeding two thousand dollars, or by imprisonment in the county jail not more than one year."

A subsequent section of the same chapter (§ 11346) provides that if any person shall, after being convicted of any offense mentioned in this section, commit the like offense, or any other of the offenses therein mentioned, he shall, in addition to the fine provided therefor, be further punished by imprisonment in the State prison not more than three years, or by imprisonment in the county jail not more than one year.

The single contention of counsel is that, inasmuch as there was no chance for a member of the club to sustain a loss, respondent was not conducting a lottery. We have been referred to many definitions of the word "lottery," some of them made by lexicographers, some by judges, and particularly to one given in the third edition of Bishop on Statutory Crimes, § 952, which counsel say supports their contention, and which is:

"A lottery may be defined to be any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine."

We do not understand how this definition aids respondent. It is well known that in most lottery schemes some of those who pay get nothing. It is difficult to see how a definition intended to be general, and to describe the results to participants in a lottery, could well omit language indicating that the result might be *nothing*. But the learned author does not mean that, to be classed as a lottery, the scheme must have blanks. This is evidenced by the context and by cases cited. In another place the same author says that the word has not yet been defined in a manner which is both inclusive and exclusive. Our statute does not define the word. Nor need we attempt a definition. Like similar statutes in other of the States, our own has a general purpose, and this purpose is not alone evidenced by the language of the statute. In a large majority of the States, including Michigan, there is a constitutional limitation upon the power of the legislature to authorize lotteries. Few definitions are directly or indirectly attempted. These various constitutional inhibitions in effect recognize and affirm the rule stated in *Stone* v. *Mississippi*, 101 U. S. 814, that lotteries are not in the legal acceptation of the term mala in se, but may properly be made mala prohibita. Such a provision has been held to be so far self-executing as to warrant and require the court, in the absence of penal or other statutes upon the subject, to declare the charter of a private corporation, whose scheme and plan of business was within the constitutional inhibition, to be forfeited. *State, ex rel. Kellogg*, v. *Mercantile Ass'n*, 45 Kan. 351 (11 L. R. A. 430). In the case mentioned it was said that the word "lottery" must be construed in the popular sense, with a view of remedying the mischief intended to be prevented, and to suppress all evasions for the continuance of the mischief. The word

"lottery" is generic. No sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed, but not quite within the letter of the definition given. This is made very apparent in the large number of cases which we have examined in which various methods of distributing money or goods by chance are examined and discussed. It is said by counsel for respondent in their brief that this court, in *People* v. *Elliott*, 74 Mich. 264 (3 L. R. A. 403), laid down a definition which did not include a possibility of loss. In that case, as in others, the language of the opinion is addressed to the facts before the court, and the contentions presented for decision. We approve the language used in the opinion in *Ballock* v. *State*, 73 Md. 1 (8 L. R. A. 671), where it is said:

"Our statute does not justify a court * * * in deciding a thing is not a lottery simply because there can be no loss, when there may be very large contingent gains or because it lacks some element of a lottery according to some particular dictionary's definition of one, when it has all the other elements, with all the pernicious tendencies which the State is seeking to prevent."

In that case it was contended that no blanks were drawn, and the scheme considered provided for the ultimate return of the entire investment, with interest; the time of such return to certain holders of the bonds depending upon chance, and the inducement for investment being the possibility of getting a bonus, also determined by chance. See, also, *State, ex rel. Attorney General*, v. *Investment Co.*, 64 Ohio St. 283 (52 L. R. A. 530); *Wooden* v. *Shotwell*, 23 N. J. Law, 465; *U. S.* v. *Olney*, Deady (U. S.), 461; *State* v. *Mumford*, 73 Mo. 647; *MacDonald* v. *U. S.*, 63 Fed. 426; *Reg.* v. *Harris*, 10 Cox, C. C. 352. For a considerable collection of cases and general discussion, see *Equitable Loan & Security Co.* v. *Waring*, 117 Ga. 599 (62 L. R. A. 93). The case of *State* v. *Moren*, 48 Minn. 555, is in its essential facts precisely like the case at bar. The only question considered by the court was whether the evidence was sufficient to

bring the case within the condemnation of the statute. The Minnesota statute defines a lottery to be a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a "lottery," "raffle," or "gift enterprise," or by any other name. The court held the term "lottery" to have no technical meaning, but under the statute it was to be construed in the popular sense, and with the view to remedy the mischief intended to be prevented.

"The statute is intended to reach all devices which are in the nature of lotteries, in whatever form presented, and the courts will tolerate no evasions for the continuance of the mischief."

Of the fact that the holder had the option to receive in goods the amount he had paid, it was said that it would probably operate only as an additional incentive to aid the lottery scheme.

"It does not take the scheme out of the statute. They were not bought in order to get their face value in goods. The vicious element still inheres in the transaction. * * * The sale of the ticket gave the purchaser the chance to obtain something more than he paid for, and that became an extra inducement for the purchase."

Counsel for respondent say that the Minnesota statute differs from ours, and that the court had before it what we have not—a statutory definition of the word "lottery." The definition, however, is very broad, and cannot be said to contain any language which would make the decision on that account inapplicable here. Upon the facts and the construction placed by the court upon the statute, the case is decisive.

It cannot be denied that the respondent sought to, and presumably did, increase his business by a device or scheme, the feature of which, so far as securing patrons and customers was concerned, was the chance to obtain $20 worth

of clothing for some sum of money less than $20. It was calculated to, and did, appeal to the gambling propensity of men, was within the mischief at which the legislation is aimed, was within the terms of the statute, and, in our opinion, a disposition of property by way of lottery. We are referred by counsel to no case which sustains their contention.

We have not lost sight of the fact that the charters of various cities permit ordinances forbidding lotteries and punishing promoters of them, treating them as minor offenders, nor that the statute before us warrants the imposition of a considerable penalty, and makes a second offense a felony. The statute is general, as it must be, and applies to big and to little lotteries. The extent of the mischief done by respondent is not a consideration which ought to affect our determination.

We are of opinion that the court below was right, and the conviction is therefore affirmed.

MOORE, C. J., and CARPENTER, MCALVAY, and HOOKER, JJ., concurred.

BLANCHARD *v.* DETROIT & MACKINAC RAILWAY CO.[1]

MASTER AND SERVANT—RAILROADS—INJURY TO BRAKEMAN—AUTOMATIC COUPLERS—STATUTES—CONSTRUCTION.

Section 5511, 2 Comp. Laws, requiring coupler devices that can be operated without requiring the operator to go between the cars to be placed "upon each end of every freight car," etc., and declaring (section 5512) that every railroad company refusing to comply therewith shall be liable to a penalty, does not require the placing of such couplers on the tenders of locomotives.

Error to Alpena; Emerick, J. Submitted February 17, 1905. (Docket No. 185.) Decided April 21, 1905.

Case by Louis Blanchard against the Detroit & Mackinac Railway Company for personal injuries. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Collins & D'Aigle, for appellant.

Charles R. Henry, for appellee.

OSTRANDER, J. Plaintiff was a brakeman, employed by defendant from 1897 to late in the winter of 1899, and again from February 15, 1900, to March 3d of the same year, when he was injured. On April 10, 1900, he again resumed work, and continued, at practically the same work as before, until March, 1902. When the injury occurred the locomotive was backing to make connection with a train of flat cars loaded with short logs. Plaintiff rode on the engine until it was within a few feet of the train. He then ran ahead of the backing locomotive, and in making the coupling his hand was injured. The negligence of defendant charged and relied upon is failure to

[1] Rehearing denied June 29, 1905.

comply with the provisions of section 5511, 2 Comp. Laws. That section and the one succeeding it read as follows:

"(5511) SECTION 1. *The People of the State of Michigan enact*, That on and after the first day of July, one thousand eight hundred and eighty-six, every railroad company owning or operating any portion of a railroad wholly or partly in this State shall cause to be placed upon each end of every freight car thereafter constructed, purchased, or leased, for use in this State, by such corporation, or which may be sent to the shops for general repair or for repair of the coupling fixtures thereof, some form of safety coupler or safety coupling device, by which the cars can be coupled and uncoupled from either side of the train without the necessity of going between the cars, and which will couple with other forms of safety coupler, and with the ordinary link and pin coupler: *Provided*, That no coupler or device for coupling of cars shall be adopted for use by any railroad company owning or operating any railroad wholly or partly within this State until approved by the commissioner of railroads: *Provided further*, That no freight car shall be run upon any of the railroads within this State after the first day of January, eighteen hundred and ninety-one, unless furnished with safety couplers as provided by this act.

"(5512) SEC. 2. The provisions of this act may be enforced by any circuit court of this State in a county through which the railroad of any company refusing to comply with such provisions may run, upon application of the commissioner of railroads, under such penalty as the said court may determine, of not less than one hundred dollars for each violation of the provisions of this act."

It is conceded that the flat car to which the coupling was made was equipped as the statute requires. The tender of the locomotive had a link and pin coupling. Plaintiff was perfectly acquainted with the equipment, and had at different times made the coupling, as he attempted to do at the time of his injury, by guiding, with his hand, the link into the opening or slot of the automatic coupler.

Plaintiff testified, "I do not know of any mismanagement on the part of the engineer, or any one else, that caused me to receive my injury."

At the conclusion of plaintiff's case, the court, on the motion of defendant's attorney, directed a verdict for defendant, upon the ground that to plaintiff the risk was visible, and was well known, and that he assumed that risk. In doing this the learned trial judge expressly declined to rule upon other propositions urged by counsel for defendant, which were that the statute does not require automatic couplers upon the tenders of locomotives, nor upon any but freight cars; that the statute relied upon is penal, and failure to obey it not ground for private action, since a right of private action is not expressly given. For this reason the fifth, sixth, and seventh assignments of error seem not well taken. There remain the assignments based upon the refusal to submit the case to the jury and the one that the "court erred in holding that plaintiff had assumed the risk of his employment, notwithstanding the provisions of section 5511 of the Compiled Laws of 1897."

The only negligence relied upon is the failure or neglect of defendant to equip cars as the statute requires. If, therefore, the statute is held to apply to freight cars only, the direction of a verdict for defendant was right, and the judgment should not be disturbed. The statute names freight cars only. It omits to name locomotives, tenders (which are in fact a necessary part of locomotives), passenger cars, or any other of the classes of cars usually designated by the use to which they are put. The fact that the statute is penal is noticed for the purpose only of saying that this fact is a reason for not enlarging the statute by construction, even if the meaning of the terms used in it were more doubtful than they are. We may concede that there is one, at least, general object or purpose of the legislation in question, and that the greater safety of employés. This does not excuse reading into the statute words which, while they might better effectuate the general purpose, are plainly excluded by the words found in the statute.

Counsel upon both sides have called attention to the Federal statute and to the case of *Johnson* v. *Southern Pa-*

cific Co., 196 U. S. 1. The Federal statute makes it unlawful for any common carrier to haul or permit to be hauled or used upon its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. The last section of the act gives a right of action to any employé of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of the act, and that such employé should not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after such unlawful use of locomotive, car, or train had been brought to his knowledge. The suit was brought by an injured employé, and it was held, overruling the decision of the circuit court and of the circuit court of appeals, that the word "car" was used in its generic sense, and that, tested by context, subject-matter, and object, "any car" meant all kinds of cars running on the rails, including locomotives.

We have not lost sight of the contention of counsel for appellant that the words of description found in our statute, namely, "by which the cars can be coupled and uncoupled from either side of the train, without the necessity of going between the cars," read in the light of the fact that locomotives are coupled to freight cars, and that unless locomotives are so equipped they can be neither coupled nor uncoupled without going between the cars, requires that his construction of the act be adopted. The words quoted describe an appliance. The statute requires that this appliance be placed at each end of every freight car. When that is done, the law is obeyed. See *Bryce* v. *Railway Co.*, 119 Iowa, 274.

The judgment is affirmed, with costs.

CARPENTER, BLAIR, MONTGOMERY, and HOOKER, JJ., concurred.

F. & F. LUMBER CO. *v.* TOWNSHIP OF THOMPSON

TAXATION—HIGHWAY FUND—POWER OF TOWNSHIP BOARD.

A township board has power to raise money for highway purposes only when the electors have failed to do so after the matter has been brought to their attention.

Error to Schoolcraft; Steere, J. Submitted April 5, 1905. (Docket No. 15.) Decided April 21, 1905.

Assumpsit by the F. & F. Lumber Company, Limited, against the township of Thompson for taxes paid under protest. There was judgment for plaintiff, and defendant brings error. Affirmed.

Virgil I. Hixson, for appellant.

C. W. Dunton, for appellee.

GRANT, J. Plaintiff paid certain taxes under protest, and brought suit to recover them back. The item for which the plaintiff recovered was for a highway tax spread by the order of the township board on the ground that the electors at their annual township meeting had neglected and failed to provide for the raising of a highway fund. The record of the township meeting was in evidence, and failed to show that the attention of the electors was called to the highway fund, and that they neglected or refused to act thereon. It is settled by several decisions of this court that the power of the township board to raise money in such cases depends upon the neglect or refusal of the electors to do so, and that the proposition must in some manner be submitted to the electors before it can be held that they either neglected or refused. *Tillotson* v. *Webber*, 96 Mich. 144, 154; *Auditor General* v. *Sparrow*, 116 Mich. 574, 593. The case was tried before the court without a jury, and its finding is sustained.

Judgment is affirmed.

CARPENTER, MCALVAY, MONTGOMERY, and HOOKER, JJ., concurred.

HAMMOND v. TUTTLE.

TRESPASS — DEFENSES — PARTITION FENCE — INSTRUCTION — AGREEMENTS.

Where the holder of a tax title on land subsequently conveyed to plaintiff agreed with defendant, an adjoining owner, that he would build his share of a partition fence "when his tax title was cleared up," but such title was subsequently declared void, the holder's failure to build any part of the fence was no defense to an action by plaintiff, the grantee of the owner, to recover for damages caused by the trespass of defendant's sheep.

Error to Ingham; Wiest, J. Submitted April 6, 1905. (Docket No. 34.) Decided April 21, 1905.

Trespass quare clausum fregit by Carmi Hammond against Andrew Tuttle. There was judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff and defendant are farmers owning adjoining farms. Defendant's sheep trespassed upon plaintiff's lands, injuring his corn, for which he brought suit and recovered a small judgment in the justice and circuit courts. The defense is that defendant and a former occupier of plaintiff's land, claiming under a tax title subsequently found to be void, made an agreement dividing the fence; that defendant had built his half; and that neither the former occupier nor plaintiff had built the other one-half. The court held that the former occupier of plaintiff's land had no authority to make a contract binding upon the plaintiff, and that no valid agreement was made for the partition of the division fence, and left to the jury the two questions: (1) Did the defendant's sheep commit the trespass? (2) If so, what was the damage?

W. T. Webb and *Jason E. Nichols*, for appellant.

W. F. Danes, *Q. A. Smith*, and *O. J. Hood*, for appellee.

GRANT, J. (*after stating the facts*). The sole question arises upon the ruling of the court below. Whether the alleged parol agreement is valid under 1 Comp. Laws, § 2431, which requires the division of a line fence between unimproved lands to be in writing, and whether one in possession of land under a tax title, the validity of which is in dispute before the auditor general, and which is afterwards held to be invalid, is in position to make a contract for the division of a line fence binding upon the then owner in fee, and subsequent grantees, we need not determine. The testimony of the plaintiff himself shows that the agreement relied upon was not absolute, but was conditional upon the tax title being held valid. Defendant testified that the tax-title owner said:

"When this thing was settled up [the validity of the tax title], he would go on and build his part of the fence. I suppose he meant when his tax-title claim was cleared up."

He further testified that the tax-title holder did not agree to build it at that time (the time of the alleged agreement), and that he did not positively agree to do it at any other time. The tax-title claimant testified that he did not recollect any positive agreement. Under this evidence, there was no agreement binding upon the plaintiff's grantors or upon himself.

The judgment is affirmed.

CARPENTER, MCALVAY, MONTGOMERY, and HOOKER, JJ., concurred.

GRAND LODGE, INDEPENDENT ORDER OF ODD FELLOWS, *v.* BARKER.

1. APPEAL AND ERROR — DECREE — RIGHT ON MERITS — REASONS IMMATERIAL.

   If, for any reason, a decree dismissing a bill is correct, the reason given by the court below is immaterial.

2. BENEFICIAL ASSOCIATIONS — SUPERIOR AND SUBORDINATE BODIES — PROPERTY RIGHTS — BONA FIDE PURCHASERS.

   A subordinate lodge of Oddfellows instructed B., one of its members, to purchase certain real estate in his own name for the benefit of the lodge, which he did, taking a warranty deed. The lodge paid the price through B., and, though it exercised all acts of ownership over the building, B. gave no deed to the lodge. At a subsequent meeting the lodge voted to sell the property to B. on certain terms, with which he complied. B. thereafter contracted to sell the property to M., who subsequently assigned to S., neither of whom at the time were members of the lodge. *Held*, that, B. having paid the lodge a fair price for the property, and M. and S. being bona fide purchasers from him, the grand lodge, on dissolution of the subordinate lodge, could not recover the property under provisions of its charter declaring that the property of subordinate lodges shall belong to such lodges so long as their charters are unreclaimed, and that on suspension or dissolution their property of all kinds shall revert to the grand lodge.

Appeal from Van Buren; Carr, J. Submitted April 7, 1905. (Docket No. 45.) Decided April 21, 1905.

Bill by the Grand Lodge, Independent Order of Oddfellows of the State of Michigan, against George H. Barker and others to set aside a certain conveyance, and for an accounting. From a decree dismissing the bill, complainant appeals. Affirmed.

The complainant was organized in 1847. It incorporated June 5, 1867, under Act No. 199, Laws of 1865 (2 Comp. Laws, §§ 7990–8000). It reincorporated in September, 1899. Those parts of its constitution and by-laws material

to this controversy are substantially as follows: The grand lodge has exclusive jurisdiction in Oddfellowship within the State, and is the supreme tribunal of the order. No lodge can be formed or continue to exist without its sanction. It may grant or suspend charters at its pleasure, for proper cause. It may receive appeals and redress grievances arising in subordinate lodges. It may originate and regulate the means of its own support, and may do all acts promotive of the interest of the order, or that appertain to it by ancient usage or custom, and are not in violation of the laws of the land or of the constitution and laws of the grand lodge of the United States. By section 2, art. 2, of its by-laws, it is provided that the funds, properties, etc., raised by subordinate lodges for the purpose of relieving sick and distressed brethren, and other charitable uses, are not liable to be divided in any manner among the members individually, but must remain for legitimate purposes the property of the lodge so long as its charter is unreclaimed and five members remain in good standing in the lodge. Section 3 reads as follows:

"In all cases where a lodge shall have been suspended or expelled, or its charter shall have been forfeited, the charter, funds, books, properties, and effects of all kinds shall revert to the grand lodge; and it shall be the duty of the last installed officers of such lodge to deliver immediately to the grand master or to the brother by him deputed to receive them, such funds and other effects as the lodge may have claim to, and any brother who shall be concerned in or give countenance to the divisions of the funds or other effects of a lodge under any circumstances, or who shall receive any part or share thereof, or be concerned in withholding any of the effects of a suspended, expelled, or defunct lodge from the grand lodge, shall be deemed unworthy of fellowship, and shall be debarred from all connection with the order until he shall have made full restitution and such reparation for the offense, as shall be pronounced satisfactory by a vote of the grand lodge."

In May, 1879, a subordinate lodge, known as "Covert Lodge, No. 328," was organized at Covert, Michigan,

and a charter duly granted. That charter provided that said subordinate lodge shall render due obedience to the laws and mandates of the grand lodge; in default thereof its rights, powers, and privileges may be suspended. The subordinate lodge rented a room for its meetings, and occupied it as tenant until July 1, 1885.

On June 16, 1885, at a regular meeting, the following proceedings were had, as appears by the record:

"Moved the lodge as a lodge buy the drug store building for the sum, as reported by the trustees, of $650. Motion seconded, and, after being thoroughly discussed, was carried. Moved that Brother Barker be instructed to purchase the property. Seconded and carried. Moved that Brother George Barker be instructed to buy the property in his own name, and then give the lodge a contract to deed the property to whom they desired when they paid Brother Barker the cost and subsequent expenses of building. Seconded and carried. Moved and seconded that an order be drawn on the treasurer for $325, payable to Brother Barker when he gives lodge contract for the property."

The reason for taking the title to the property in the name of Mr. Barker was that the grantor did not want to deal with the lodge. He was evidently not willing to take the obligation of the lodge for the unpaid purchase price. The lodge paid the $325 to Mr. Barker, who paid it to the grantor. Subsequently the lodge paid the balance of the purchase price through Mr. Barker, but Mr. Barker gave no deed to the lodge. The lodge meanwhile had entire charge of the building, paid the taxes, and received the rents until 1892.

At a regular meeting held February 9, 1892, the record shows the following proceedings:

"Moved and supported that the lodge sell lot No. 32 in the village of Covert as platted according to the village plat, and building thereon, subject to the lease, and reserve the second story of building for 20 years, and a way to get up to it, the lodge has the exclusive right to it for lodge purposes, to Brother G. H. Barker, for $450—$10.00 down, his note for one year of $290, his note in two years

for $50.00, his note in three years for $50.00, his note in four years for $50.00—each note to draw interest at 7 per cent. from date."

On October 11, 1898, Mr. Barker made a contract with one Morgan for the sale of the property. Mr. Morgan subsequently, on December 31, 1901, sold and assigned this contract to defendant Spivey and one Rumsey. Rumsey afterwards assigned to Spivey & Son. Covert lodge became defunct in 1896, returned its rituals, and on January 31, 1899, its charter was surrendered to the secretary of the grand lodge. Soon after an officer of the grand lodge took charge of what effects of the defunct lodge he was able to find. On March 7, 1904, this bill was filed against the defendants Barker and Spivey, praying that the conveyance to defendant George H. Barker should be held to have been taken for the use and benefit of the Covert lodge so long as it continued in existence; that said Barker be decreed to hold the premises in trust for the complainant; that the sale by the Covert lodge to Barker be set aside; that said Barker be decreed to convey the property to complainant; and that an accounting be had. The Spiveys entered no appearance, and an order pro confesso was rendered as to them. The defendant Barker answered, denying that complainant was entitled to relief. Proofs were taken in open court, and the bill dismissed.

Lincoln H. Titus, for complainant.

Benjamin F. Heckert, for defendants.

GRANT, J. (*after stating the facts*). The circuit judge dismissed the bill, holding that "the facts do not support a resulting trust, and none can be raised by parol in the case." We doubt if this conclusion is correct. We, however, find it unnecessary to determine the question. If for any reason the decree dismissing the bill is correct, the reason given by the court below is immaterial.

It is apparent that there was no bad faith or fraud on

the part of Mr. Barker, or any of the then members of the Covert lodge. All parties acted in good faith, and upon the belief that they were acting within their legal rights. The Covert lodge paid the consideration through Mr. Barker under a written resolution spread upon their minutes. After the full consideration was paid by the lodge, it still let the title rest in him. There is evidence tending to show that the lodge needed funds to pay sick benefits, and that the money paid by Barker was used by the lodge for legitimate purposes. There is also evidence tending to show that there was money on hand at the time the lodge disbanded, and that some had been divided among the members. Be this as it may, Mr. Barker paid a fair value for the land. The lodge received the money. If any of this or other money remained in the treasury at the time the lodge disbanded, it admittedly belonged to the complainant, and it could sue the parties who had the money. If it had been divided among the members, it could be recovered back from them. The lodge did not have the legal title. This was in Barker. The deed to Barker was a warranty deed. At the time of the sale to him it was deemed unnecessary to make out a deed, as the title already stood in him. He sold the property under a land contract to Mr. Morgan, agreeing to give a warranty deed. Mr. Morgan paid part of the purchase price, and then assigned his interest to defendants Spivey and Rumsey for $1,500, and Rumsey subsequently assigned his interest to defendant Spivey. Mr. Barker has been paid the purchase price, except $300. Neither Morgan nor the Spivoys were at the time members of the lodge, and there is no evidence showing or tending to show that either of them had any knowledge of any defect in the title, or of the relation that existed between Barker and the lodge. Both Morgan and the Spiveys must therefore be held to be bona fide purchasers. For this reason the decree must be affirmed, with costs.

CARPENTER, MCALVAY, MONTGOMERY, and HOOKER, JJ., concurred.

PAGE WOVEN WIRE FENCE CO. *v.* POOL.

APPEAL AND ERROR—VERDICT—CONCLUSIVENESS.

The verdict, on conflicting evidence, of a properly instructed jury, is conclusive.

Error to Montcalm; Davis, J. Submitted April 12, 1905. (Docket No. 61.) Decided April 21, 1905.

Assumpsit by the Page Woven Wire Fence Company against Phœbe M. Pool on a promissory note. There was judgment for defendant, and plaintiff brings error. Affirmed.

H. R. Clark and *L. C. Palmer*, for appellant.

V. H. & H. H. Smith, for appellee.

OSTRANDER, J. This case has twice before been in this court. *Page Woven Wire Fence Co.* v. *Pool*, 129 Mich. 57, 133 Mich. 323. Upon each occasion a judgment for the defendant was reversed and a new trial ordered. Defendant has again recovered judgment. Upon the last trial, for the first time, evidence was given of the circumstances under which the note sued upon was paid by defendant. Upon the record eight errors are assigned, one of which relates to the admission of testimony, one to the refusal of the court to direct a verdict for the plaintiff, the others to the refusal of the court to charge as requested by the plaintiff and to the charge as given by the court. No one of these assignments is mentioned or referred to in the brief for appellant. The statement is made:

"Defendant has made her showing as to the circumstances under which she made payment, and the question before this court now is as to whether or not her showing as a matter of law is sufficient. In other words, Did she make such investigation as the law requires, she having notice of the loss of the note?"

It appears that the circuit judge charged the jury that it was undisputed that the defendant was notified before the note became due that it was lost. But an examination of the record shows that, while plaintiff's witness testified that he told defendant the note was lost, she denies that fact, claiming that he told her no more than that the bank had not received the note, and that it had probably been miscarried, and would be received in a short time. Counsel for plaintiff requested the court to charge the jury:

"I charge you as a matter of law that Mrs. Pool, having had notice that the note was lost, was not justified in making payment to a stranger until she had made careful and thorough investigation, sufficient to satisfy her that the agent had the authority of the plaintiff company to collect the same."

This request the court gave. There was evidence from which the jury might have found that defendant did make careful and thorough investigation, sufficient to satisfy her that the person who presented the note had the authority of plaintiff company to collect it. Under the circumstances, we do not feel called upon to discuss, further than it has been discussed in the former opinions in this case, the question of the diligence required of the maker of a note, who pays it, after notice that it has been lost, to a stranger. The court, following the suggestion of counsel, assumed that defendant had notice that the note was lost, and in respect to that situation gave the jury the rule of law as to the investigation required proposed by counsel for the plaintiff.

The judgment is affirmed, with costs.

MOORE, C. J., and CARPENTER, MCALVAY, and HOOKER, JJ., concurred.

139 708
f141 366

139 708
147 466
148 2323
139 708
149 2130

HATHAWAY *v.* WASHINGTON MILLING CO.

1. APPEAL AND ERROR—BRIEFS—ERRORS NOT DISCUSSED.
   An assignment of error not discussed in the brief of plaintiff in error will not be considered.

2. MASTER AND SERVANT — INJURIES TO SERVANT — DANGEROUS EMPLOYMENT—WARNING.
   The oiling of a line shaft in a properly lighted room does not require any special instruction or cautionary suggestion from the master to a man of mature years in possession of all his faculties, though it involves reaching over gear wheels in motion, the danger, such as it is, being as apparent to man as to master.

3. SAME—SCOPE OF EMPLOYMENT—CHANGE OF DUTIES.
   A servant, who has worked in the packing department of a flouring mill and had charge of the machinery of such department and occasionally been called to assist in the mill proper, is not taken from his regular employment and set at a more hazardous employment by being called to help start the mill and oil its machinery.

4. LIMITATION OF ACTIONS—PERSONAL INJURY—STATUTE—APPLICATION.
   Act No. 155, Pub. Acts 1899, limiting in section 1 the time within which actions for personal injury shall "hereafter" be brought, affects only such causes of action as accrued after the law took effect.

Error to Lenawee; Chester, J. Submitted April 14, 1905. (Docket No. 79.) Decided April 21, 1905.

Case by Richard Hathaway against the Washington Milling Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Weaver, Morgan & Priddy and *H. C. Smith*, for appellant.

John E. Bird and *John L. O'Mealey*, for appellee.

OSTRANDER, J. The defendant, for several years prior to September 5, 1898, operated a flouring mill in the

city of Adrian. In the fall of 1892, plaintiff began to work for defendant, being employed in the packing department of the mill, the operation of which department was in a building 12 or 14 feet from the mill proper, connected with it by a covered passageway. There was machinery in the packing department, which during the six years of his employment the plaintiff had been acquainted with, had oiled, kept in order, and generally superintended. At various times and frequently he had been called into the mill proper to assist in cleaning up the mill, oiling and cleaning machinery, and he was familiar with the machinery contained in the mill, its purpose and operation. He had sometimes, when the engineer was not there in the morning, fired the boiler and started the engine. It does not appear that he had done very much work about the machinery in the mill proper when the machinery was in motion. On the day first above mentioned, one of the millers being ill, and not at the mill, the superintendent called plaintiff to come in and help start the mill. After obeying certain directions, which included oiling the rolls, he was instructed to go on the second floor and do some oiling and cleaning. This involved—and the superintendent made special mention of the fact—the digging out of the waste and grease in boxes on the line shaft and the putting in of new waste and grease and oil. To perform this duty, the line shaft being 9 or 10 feet above the floor, plaintiff was required to, and did in the usual way, and as he had seen others do, mount a certain machine by way of a ladder, and, standing upon this machine, he proceeded, at first with a piece of hoop, and, finding that ineffective, then with his jackknife, to dig out the old grease from the box. Directly in front of him was a gearing exposed, entirely visible, which consisted of a cogwheel on the line shaft, six inches in diameter and four inches wide, meshing with inch teeth into another wheel three feet or more in diameter upon another shaft. By or past these cogwheels plaintiff had to reach with his hand and arm in order to do the work required, and while so using his knife to remove the hardened grease his arm

or clothing became involved in the cogs, with the result that he was very seriously injured. He testifies:

"While I was endeavoring to get the grease out of the box, my arm was caught in this gear. I know that my arm got caught in the gear because I lost my arm. In reaching by the gear, I must have got too close to it and got my arm in."

He sued the defendant, and the theory of the declaration filed and of plaintiff's case is that he was taken from his regular employment, and from duties he was hired to perform, and set to work at more hazardous employment, without being informed of the dangers incident to such new employment; and that he was not furnished with proper and suitable tools, or a tool, with which to perform the work so assigned to him to do.

Defendant, against whom a judgment was recovered, assigns a number of errors, which are grouped and stated by its counsel as follows: (1) That the action of the plaintiff was barred by the provisions of Act No. 155, Pub. Acts 1899. (2) That the defendant corporation was dissolved before suit begun. We do not find this question discussed in the brief for appellant, and we therefore refrain from discussing it. (3) That it appeared from the evidence in the case that the danger accompanying the act to be performed by the plaintiff was as apparent to the plaintiff as to the superintendent of the mill, and that plaintiff could not recover, even though he attempted to perform such act at the request of the superintendent.

We discuss these propositions in the inverse order of the statement. Plaintiff was 28 years old, sound, and in possession of all his faculties. The room in which he was injured was properly lighted. There was no defect, hidden or other, in the machinery. The work he was doing was in itself neither difficult nor dangerous, and to perform it properly and safely required only ordinary care. Whatever danger there was was visible. The result likely to follow contact of clothing or person with the cogwheels was evident. We do not discover any testimony in the record warranting an inference that any instruction or

cautionary suggestion from the superintendent would have afforded plaintiff any better knowledge of the danger to be apprehended from the cogwheels than was afforded by merely looking at them. It does not appear that there was any tool or appliance furnished or used for cleaning the boxes. Plaintiff neither asked nor sought for any such tool. He had cleaned one box with a piece of barrel hoop, with which he began work upon the second box. The facts do not warrant the conclusion that plaintiff was wrongfully set to doing work outside the scope of his employment. The entire contention of the plaintiff is determined against him upon the authority of rules stated in *Schroeder* v. *Car Co.*, 56 Mich. 132; *Mackin* v. *Refrigerator Co.*, 100 Mich. 276; *Melzer* v. *Car Co.*, 76 Mich. 94. Upon the undisputed facts, a verdict for the defendant should have been directed.

As we are of opinion that a new trial should be granted, we notice the contention of defendant first stated. The statute of limitations invoked took effect June 23, 1899. The injury to plaintiff occurred September 5, 1898.

This suit was begun by summons, issued November 4, 1902. The act is entitled "An act limiting the time in which actions may be brought to recover damages for personal injuries," and provides that "no action shall hereafter be brought in any courts of this State to recover damages for personal injuries unless the same be brought within three years from the occurrence upon which the claim for liability is founded." Act No. 155, Pub. Acts 1899, § 1. We have no doubt that the statute must be held to affect only such causes of action as accrued after the law became operative. *Stambaugh* v. *Snoblin*, 32 Mich. 296; *Harrison* v. *Metz*, 17 Mich. 377. See, also, *Ludwig* v. *Stewart*, 32 Mich. 27; *McKisson* v. *Davenport*, 83 Mich. 211 (10 L. R. A. 507).

Judgment is reversed, with costs, and a new trial granted.

MOORE, C. J., and CARPENTER, MCALVAY, and HOOKER, JJ. concurred.

In re ALLEN.

1. CRIMINAL LAW — PUNISHMENT — PRISONS — LEWD AND LASCIVIOUS COHABITATION.

On conviction of lewd and lascivious cohabitation, an offense for which the punishment provided is "imprisonment in the county jail not more than one year, or fine not exceeding five hundred dollars" (§ 11693, 3 Comp. Laws), the offender may be sentenced either to the State house of correction at Ionia or to the branch prison at Marquette, but not to the State prison at Jackson. Section 2108, 1 Comp. Laws.

2. HABEAS CORPUS—VOID SENTENCE.

Habeas corpus is an appropriate remedy when a sentence to imprisonment is wholly void for lack of authority to sentence to the institution in question.

Habeas corpus proceedings by Edward H. Allen to procure his discharge from the State prison at Jackson. Submitted March 21, 1905. (Calendar No. 21,017.) Petitioner discharged April 28, 1905.

E. R. Boyles, for petitioner.

Elmer N. Peters, for respondent warden.

MONTGOMERY, J. This proceeding is by habeas corpus to determine the question of the validity of a sentence. Petitioner was convicted of the offense of lewd and lascivious cohabitation, and on March 1, 1905, was sentenced to be confined at the Michigan State prison at Jackson, at hard labor, for not less than six months. On the same day, by virtue of a warrant issued from the court in pursuance of this sentence, the petitioner was committed to the State prison at Jackson, where he is now confined. The contention of petitioner is that this sentence is unauthorized and void, and that therefore he should be released and discharged from custody.

The statute provides for the punishment of the above-named offense thus:

"If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, * * * every such person shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars." 3 Comp. Laws, § 11693.

The statute which provides in what cases persons may be sentenced to State prisons for an offense is as follows:

"Courts of criminal jurisdiction may sentence to the State house of correction and reformatory at Ionia all male persons over fifteen years of age and not known to have been previously sentenced to a prison for felony, who shall be convicted of any crime except treason or murder in the first degree; and all male persons over fifteen years of age who shall be convicted of any misdemeanor, where the sentence for such crime or misdemeanor shall not be less than six months; and may sentence to the State prison at Jackson any person over the age of fifteen years, duly convicted of any crime punishable by imprisonment in said State prison as the courts shall deem best; and may sentence to the State house of correction and branch of the State prison in the Upper Peninsula all persons convicted as is or may be provided by law for sentencing prisoners to any of the other prisons in this State as the court shall in its discretion deem best." 1 Comp. Laws, § 2108.

The provision therein relating to the State prison at Jackson—"and may sentence to the State prison at Jackson any person over the age of fifteen years duly convicted of any crime punishable by imprisonment in said State prison as the courts shall deem best"—does not authorize the sentence in this case, and there is no other authority therefor. This statute empowers the court to sentence to the branch of the State prison at Marquette a person convicted of such an offense as the one now before this court. *People* v. *Smith*, 107 Mich. 584. By this case it was decided that the provision in section 29, Act No. 118 of the Public Acts of 1893 (section 2108, above quoted), relating

to imprisonment at Marquette, amends by implication a provision of a previous statute providing for imprisonment only in a county jail. This because of the very plain inconsistency between the provisions in those two statutes. And this inconsistency was very apparent, as section 29 provides for a sentence to Marquette of "all persons convicted as is or may be provided by law for sentencing prisoners to any of the other prisons in this State." And if, under the first provision in this act, a person might be sentenced to Ionia, as in this case, he might, therefore, be sent to Marquette. But this would not authorize an imprisonment in Jackson for the same offense. That part of the above act providing for a sentence to the State prison at Jackson of all persons "duly convicted of any crime punishable by imprisonment in said State prison" is not inconsistent with any previous statute providing for punishment in county jail only. For this reason the provision in section 11693 providing for imprisonment in the county jail is not inconsistent with the provision in section 2108 providing imprisonment in Jackson.

The sentence being wholly void, habeas corpus is an appropriate remedy. *Hamilton's Case*, 51 Mich. 174; *In re Silverthorn*, 73 Mich. 644.

The petitioner is discharged.

MOORE, C. J., and CARPENTER, MCALVAY, and HOOKER, JJ., concurred.

INDEX.

ABANDONMENT—See ATTACHMENT.

ABATEMENT AND REVIVAL—See PARTIES (2).

ACCOUNT.

Complainant's husband and defendant purchased certain lands, the deed to her husband's interest in which was subsequently made to complainant in order to assist her husband in financial troubles. Complainant's husband and defendant were jointly indebted on a note to defendant's wife, and, in order to liquidate the same, deeds were executed by complainant and her husband, with the name of the grantee in blank, and delivered to defendant, to enable him to sell the lands. It was agreed that defendant should pay the note to his wife out of the proceeds. On a bill by complainant against defendant and his wife for an accounting, defendant claimed the benefit of the payments to his wife, *held*, that complainant's husband was not a necessary party to the suit. *Lasley* v. *Delano*, 602.

ACCOUNT STATED.

Where the debtor objected, when the account was rendered, that the account should be charged to a corporation of which he was manager, instead of to him individually, the creditor cannot claim an account stated on the ground that the debtor did not object to the amount. *Love* v. *Ramsey*, 48.

ACKNOWLEDGMENTS.

Where the caption of an acknowledgment showed that it was taken in the county of Calhoun, State of Michigan, and the notary's name was followed by the words, "Notary Public in and for Eaton Co.," it was not objectionable on the ground that it did not show that the notary was one for Eaton county, Mich. *Lamb* v. *Lamb*, 167.

See NOTARIES (1).

Liability on bond for taking acknowledgment of impostor, see NOTARIES (2).

ADVERSE POSSESSION.

1. In order to sustain a claim of riparian right by prescription, the claimant must show an exclusive enjoyment of the water, substantially in the way claimed, by claimant or his grantors, adverse to the right of defendant, and without interruption, for a period of at least 15 years. *Rickels* v. *Log-Owners' Booming Co.*, 111.

ADVERSE POSSESSION—Continued.

2. Entry under a deed conveying land described as a single tract gives possession coextensive with the deed. *Brigham* v. *Reau*, 256.

3. Evidence in a suit to quiet title examined, and *held*, to show title by adverse possession. *Id.*

4. When land is sold by one not in possession the purchaser is bound to ascertain the rights of the possessor. *Howatt* v. *Green*, 289.

5. The suggestion that the purchaser of land from one out of possession acquires all the latter's rights, includiug the right to be informed of the possessor's hostile holding cannot be entertained. *Id.*

6. The knowledge of the hostile character of the possession of land necessary to set the statute of limitations in motion in favor of an adverse possessor need not proceed from the possessor nor any other particular source, it being sufficient if it come to the owner of the record title from any source whatsoever. *Id.*

7. Where, when one purchased the legal title to land, another was in exclusive possession claiming ownership under a recorded warranty deed purporting to convey title in fee to him, such purchaser was charged with notice of the extent of the possessor's interest and the source of his title, and limitations then began to run in favor of the adverse possessor against the purchaser, although the latter did not actually know of the hostile possession, and although the hostile character of such possession was not known to his grantor, against whom it was originally merely permissive. *Id.*

8. Adverse possession may be invoked to cut off a tax title held by a city. *Cass Farm Co.* v. *City of Detroit*, 318.

9. A subsequent purchaser may invoke title by possession adverse to an outstanding tax title without alleging knowledge, or want of knowledge, of such title at the time of purchase. *Id.*

See LIMITATION OF ACTIONS (2).

AGENCY—See PRINCIPAL AND AGENT.

ALIMONY—See DIVORCE.

AMENDMENTS—See PARTIES (1).

Discretionary after reversal, see APPEAL AND ERROR (2).

Harmless error in denial, see APPEAL AND ERROR (3).

APPEAL AND ERROR.

1. The erroneous rejection of testimony is harmless where the fact is sufficiently shown by the same witness elsewhere. *Stowell* v. *Standard Oil Co.*, 18.

2. Permission to amend in the trial court after reversal and re-

APPEAL AND ERROR—Continued.

mand for new trial is discretionary with the trial court. *Central Savings Bank* v. *O'Connor*, 82.

3. The denial of an application to amend a plea was not prejudicial where defendants were permitted to make a full statement on the trial of all the defenses claimed, and a verdict was directed because the defenses were not available on the merits. *Id.*

4. Where no effort to appeal from an order of the probate court is made until nearly 11 months after it was entered, and 85 days after the Supreme Court has decided that appeal is the proper remedy, and no cause is shown for the delay, it is improper for the circuit court to grant an appeal out of time under section 674, 1 Comp. Laws. *Hopper* v. *Livingston Circuit Judge*, 100.

5. An appeal from an order reducing the amount of alimony previously granted by a decree of divorce does not bring up the original decree. *Smith* v. *Smith*, 133.

6. Findings by the trial judge, on conflicting evidence, in a case tried without a jury, are conclusive on error. *Fairfield* v. *Hart*, 136.

7. An appeal does not lie from a decree or order of the circuit court in chancery to procure a review of provisions contained in such order or decree which were assented to by the appealing party. *Weber* v. *Costigan*, 146.

8. An appeal without supersedeas bond does not deprive the circuit court in chancery of jurisdiction to enter an order nunc pro tunc modifying the order appealed from so as to show that it was entered by consent of the parties in open court. Act No. 243, Pub. Acts 1899. *Id.*

9. An order of the circuit judge in a chancery case, modifying the order appealed from so as to show that it was entered by consent of the parties, amounts to a certificate of the fact that the order appealed from was a consent order. *Id.*

10. Where the error assigned is the direction of a verdict, the bill of exceptions should contain the substance, at least, of all the testimony. *Goldsmith* v. *Lichtenberg*, 163.

11. A claim of appeal and filing bond prior to the settlement of a chancery case is irregular. *Sherman* v. *Sherman*, 180.

12. By taking no steps to procure dismissal of a premature appeal, until after appellant moves for further time for settlement of the case, appellee, who had full knowledge of the facts, waives the irregularity. *Id.*

13. Failure to file the record below within 40 days after filing a bond merely having effect to stay proceedings, does not require dismissal of the appeal. Supreme Court Rules 8 and 15. Act No. 243, Pub. Acts 1899. *Id.*

14. Where complainant is an old man and files his bill to set aside a deed given in consideration of life support, which he alleges he has not received, an extension of time to defendant to

APPEAL AND ERROR—Continued.

settle his case on appeal will be conditioned on payment of a reasonable sum per month for complainant's support. *Id.*

15. Where a party reads from the depositions of his adversary, his failure to read the direct examination of the witnesses cannot be held prejudicial on error, where the direct examination is not shown by the record. *McDonald* v. *Smith*, 213.

16. The court will not reverse a case because of error in the charge arising from a technical omission in a definition substantially correct. *Id.* 214.

17. In an action for fraud, a judgment for plaintiff, which, while otherwise correct, improperly included damages for a conveyance which was established by incompetent evidence, was affirmed on condition of a remittitur of the value of the property claimed to have been conveyed. *Id.*

18. Questions not raised in the lower court will not be considered on error. *Smith* v. *McDonald*, 225.

19. The payment, within 30 days, of the statutory register's fee by a chancery appellant is mandatory, and an appellee who has done nothing to waive the right is entitled to a dismissal of the appeal after the statutory period. Section 552, 1 Comp. Laws. *Trombly* v. *Klersy*, 311.

20. Only such points as counsel make and rely upon for reversal in their original brief will be considered by this court in disposing of a case. *People, for Use of Cook,* v. *Cole*, 312.

21. Consideration will not be given a complaint regarding a colloquy between court and counsel to which no exception was saved and on which no error is assigned. *Wilson* v. *Royal Neighbors of America*, 423.

22. The charge will be reviewed as a whole without reference to the punctuation of the stenographer or attorneys. *Id.*

23. Where there are no circumstances better known to the trial court than to this court, it is the duty of this court to review a decision that a notice to take depositions was insufficient. *McCall Co.* v. *Jacobson*, 455.

24. Where, on error by defendant in an action for negligence, the only error assigned is refusal to direct a verdict for defendant for failure of proof as to his negligence, and defendant states that a new trial is not desired, and if reversal accompanied by denial of another trial cannot be had, the error will be waived, and the evidence does not affirmatively and conclusively show absence of negligence, and plaintiff might produce, if attainable, other evidence of negligence without bad faith, the error will be treated as waived and the judgment affirmed. *Strong* v. *Weber*, 512.

25. A contention not raised below cannot be relied upon as a ground of reversal. *Hayward* v. *School District No. 9 of the Township of Hope*, 539.

26. Where plaintiff in error failed to serve any assignments of error, and no satisfactory excuse was given for the failure to do

APPEAL AND ERROR—Continued.

so, his motion to extend the time to make return to the writ of error was denied, and the writ dismissed. *Hanselman* v. *Adrion*, 546.

27. Where defendant requested a directed verdict on the ground that the claim was barred by limitations, and did not, either in his requests to charge or assignments of error, raise the question of the effect of testimony offered in proof of a writing which, if as represented, postponed the running of limitations, the judgment will not be reversed because the truth of the testimony as to such writing was not submitted to the jury, and the trial court charged that limitations had no application to the case, though the charge was based on the erroneous theory that the relations of the parties were such as to preclude the running of limitations. *Jewell* v. *Jewell's Estate*, 579.

28. Where the court below presumably reached a conclusion based on all the testimony, including that of complainant, which was incompetent, the consideration, usually of force, that the court below saw and heard the witnesses, is eliminated. *Sheldon* v. *Carr*, 654.

29. If, for any reason, a decree dismissing a bill is correct, the reason given by the court below is immaterial. *Grand Lodge, I. O. O. F.* v. *Barker*, 701.

30. The verdict, on conflicting evidence, of a properly instructed jury, is conclusive. *Page Woven Wire Fence Co.* v. *Pool*, 706.

31. An assignment of error not discussed in the brief of plaintiff in error will not be considered. *Hathaway* v. *Washington Milling Co.*, 708.

See COSTS (1).

Case made, see ATTORNEY AND CLIENT.

ARBITRATION AND AWARD—See EVIDENCE (2).

ARGUMENT OF COUNSEL—See TRIAL (1).

ARREST.

Privilege from arrest, see BASTARDY.

ASSIGNMENTS.

Where the proceeds of a judgment were not converted by defendants until after the judgment had been assigned by the judgment creditor to plaintiff, an objection by defendants that the action on the case for its conversion is not assignable is without merit. *Reynolds* v. *Cavanagh*, 387.

See TAXATION (3, 4).

ASSUMPSIT.

1. In assumpsit on the common counts for goods sold, where plaintiff's proofs show that the goods were sold to defendant

ASSUMPSIT—Continued.

individually, and defendant claims that he ordered the goods for a corporation, as its manager, the question for determination is whether the contract was with defendant individually or as representative of the corporation, and the question whether defendant is liable as a stockholder, because of informal organization of the corporation, is not involved. *Love* v. *Ramsey*, 47.

2. Where plaintiff made advances to defendant on a contract which was abandoned, it was proper for plaintiff to sue on the common counts in assumpsit for the recovery of the advances. *Murphy* v. *Dalton*, 79.

3. Where plaintiff sued on the common counts in assumpsit, furnishing a bill of particulars for "money lent," and the evidence showed that the money had been advanced to defendants to enable them to manufacture lumber on an understanding that it was to be sold by plaintiff on commission that plaintiff might get back his advances, there was no variance. *Id.*

4. Where plaintiff, after making advances to defendant under a contract, violated the same, but the contract was not abandoned, plaintiff could not recover the advances on the common counts in assumpsit. *Id.*

5. Section 10421, 3 Comp. Laws, providing that, where an injury is occasioned by fraudulent representations or conduct for which an action on the case for fraud may be brought, an action of assumpsit may be brought to recover the damages, is not unconstitutional. *City of Battle Creek* v. *Haak*, 514.

ATTACHMENT.

Pending a suit at law, in which defendant's land was attached, defendant died, and the suit was revived against his administrator. Judgment was entered for plaintiff. An execution was issued, and levy made on the land. Subsequently the property was released from the levy, the execution returned unsatisfied, and plaintiff proved his claim in the probate court against defendant's estate as an absolute claim, without anything to indicate an intention to retain his lien. Over a year afterwards, the estate proving insolvent, the probate court certified the judgment back to the circuit, and plaintiff filed a bill in aid of execution to reach the land originally attached. *Held*, that the release of the levy amounted to an abandonment of the attachment levy placing plaintiff in the list of general creditors. *Lafferty* v. *Lafferty*, 176.

ATTORNEY AND CLIENT.

That the attorney who appears in behalf of a garnishee and excepts to judgment being entered against the garnishee has hitherto acted as attorney for the principal defendant, and is not the regularly retained attorney for the garnishee, a bank, is no reason why the circuit judge should refuse to make a finding of facts and law at the request of such attorney, or refuse to settle and sign a case made on like request. *Cadillac State Bank* v. *Wexford Circuit Judge*, 126.

AUCTIONS AND AUCTIONEERS.

1. Where an auctioneer discloses the fact of agency and his principal, the law presumes that he does not contract upon his own behalf, but for the principal. *Mercer* v. *Leihy*, 447.

2. Where, in an action to recover money paid to an auctioneer for stolen horses sold by him, the evidence indisputably showed that the auctioneer's principal was present at the sale, and identified himself in plaintiff's presence by stepping out from the crowd on being called on to do so by the auctioneer, the sufficiency of such identification to relieve the auctioneer from personal liability was a question of fact, though he failed to disclose the principal's name. *Id.*

AUTOMOBILES.

Regulations, see MUNICIPAL CORPORATIONS (12, 13).

BAIL.

Where the circuit judge, in refusing bail to one accused of murder, apparently finds that the proof is evident and the presumption great that accused is guilty as charged, and the evidence taken before the examining magistrate supports such finding, this court will not interfere by habeas corpus proceedings. *In re Tubbs*, 102.

BANKS AND BANKING.

1. A bank has a lien on the proceeds of a draft sent to it by a correspondent for collection for the general balance of its account with the correspondent unless it has notice that the draft is not the property of the correspondent. *Garrison* v. *Union Trust Co.*, 392.

2. A general indorsement on a draft sent for collection conveys an apparent title to the bank to which it is sent, and on that bank's sending it to another, which actually makes the collection, entitles the last-named bank to a lien on the proceeds for its general balance with the intermediate bank, though the first-named bank is in fact the owner. *Id.*

3. Where a draft bears a general indorsement apparently transferring title to a bank, the fact that the bank indorses a collection number upon it does not put a correspondent bank upon notice that it is held for collection merely. *Id.*

4. Where a sight draft drawn against a car of grain in transit is accompanied by instructions to "return at once if not paid," and the bank to which it is sent, following an established custom, holds it until the car arrives, when it is paid in full, the bank does not, by so doing, forfeit its right to a lien on the proceeds for its general balance with the forwarding bank. *Id.*

BASTARDY.

Bastardy proceedings are so far of a criminal nature that a person who is within the State only for the purpose of putting in special bail in an action in which he was arrested on a capias is not privileged from arrest on a charge of bastardy. *Cady* v. *St. Clair Circuit Judge*, 618.

BENEFICIAL ASSOCIATIONS.

1. A local society of a mutual benefit association, by a majority of a quorum, voted to withdraw from the general association, and its officers assumed afterwards to audit and pay from its funds a death claim on a certificate issued by the general association, whereupon certain members of the society filed a bill to restrain such payment. *Held*, that the general association was not a necessary party. *Kern* v. *Arbeiter Unterstuetzungs Verein*, 233.

2. Allegations that it was the duty of the local officers to institute proceedings to collect the benefit from the general association, which they refused to do, but, on the contrary, assumed authority to pay it themselves from the funds of the local society, state sufficient reasons why it was necessary for complainants to sue, and sufficiently show that it would have been an idle ceremony to demand that defendant's officers act in the matter. *Id.*

3. A provision in the constitution of the local society authorizing it to aid the widows and orphans of deceased members entitled to benefits could not be invoked to authorize the payment of the benefit. *Id.* 234.

4. The constitutions of the general association and of the constituent local societies of a mutual benefit association, as well as the benefit certificates, form parts of the insurance contracts with the members. *Id.*

5. Both the State (art. 4, § 43) and Federal (art. 1, § 10, and Amend. 14) Constitutions are "laws," within 1 How. Stat. chap. 164, § 4, giving mutual benefit associations power to make regulations for their own government not contrary to the laws of the United States or this State. *Id.*

6. A local society of a mutual benefit association cannot, by resolution, withdraw from the association and assume the payment of the benefit certificates issued to the members of the local society by the association, where such action impairs the obligations of the contracts of the association and society with its members. *Id.*

7. A subordinate lodge of Oddfellows instructed B., one of its members, to purchase certain real estate in his own name for the benefit of the lodge, which he did, taking a warranty deed. The lodge paid the price through B., and, though it exercised all acts of ownership over the building, B. gave no deed to the lodge. At a subsequent meeting the lodge voted to sell the property to B. on certain terms, with which he complied. B. thereafter contracted to sell the property to M., who subsequently assigned to S., neither of whom at the time were members of the lodge. *Held*, that, B. having paid the lodge a fair price for the property, and M. and S. being bona fide purchasers from him, the grand lodge, on dissolution of the subordinate lodge, could not recover the property under provisions of its charter declaring that the property of subordinate lodges shall belong to such lodges so long as their charters are unreclaimed, and that on suspension or dissolution their property of all kinds shall revert to the grand lodge. *Grand Lodge, I. O. O. F.* v. *Barker*, 701.

BILLS AND NOTES.

Where a trustee, on paying money to another as a gift from his beneficiary, takes a promissory note to keep as a voucher, the note is without consideration and unenforceable. *Nowack* v. *Lehmann*, 474.

Parol evidence to vary, see EVIDENCE (1).

BOOKS AND PAPERS—See DISMISSAL AND NONSUIT.

BOUNDARIES.

1. On an issue as to the location of a boundary line, evidence examined and *held*, that it was a question for the jury whether plaintiff had agreed, before he had occupied up to the actual boundary for more than 15 years, to have the line fixed by a survey. *Lamb* v. *Lamb*, 166.

2. In ejectment, involving the location of a boundary line, the evidence was conflicting as to whether plaintiff had agreed with defendant, at a time before plaintiff had occupied up to the fence for more than 15 years, that the line should be fixed by a survey; and the court charged that unless the jury found that the land claimed by plaintiff was occupied up to the fence, as a line claimed by plaintiff's grantors and defendant, for more than 15 years, and that there was no agreement that the fence was maintained at any other place than the true line, the line would not be fixed by adverse possession. *Held*, that the instruction could not have been misunderstood, and was sufficiently favorable to defendant. *Id.*

CANCELLATION OF INSTRUMENTS.

1. On a bill to set aside a deed appearing to have been given by an aged woman, without advice of counsel, in settlement of a groundless claim of the grantee, evidence examined, and *held*, that a decree granting the relief prayed was proper. *Hubert* v. *Traeder*, 69.

2. A bill to cancel a deed alleged to have been made by complainant to defendant conveying property worth $2,500 to avoid a liability of $115 is properly dismissed, it appearing that complainant was accustomed to business affairs, and there being no fiduciary relation between the parties. *Massi* v. *Lavine*, 140.

CARRIERS.

1. Where plaintiff, a passenger on an open street car, arose as the car was approaching his destination, and stood with one foot on the platform and the other on the car step, with his hand on the rail, and, as the car stopped with a sudden jerk, he was thrown to the ground and injured, he was not entitled to recover, in the absence of evidence as to the cause of the jerk. *Conroy* v. *Detroit United Ry.*, 173.

2. In an action against a street-railway company for injuries to a passenger caused by the stopping of the car by a sudden jerk, testimony that the jerk was caused by the sudden application of the brake, from witnesses who failed to testify that they

CARRIERS—Continued.

saw the motorman apply the brake, but inferred the cause from what happened, was insufficient to show the cause of the jerk, or that the application of the brake was negligently made. *Id.*

3. The obligation of a carrier who holds goods after transit, awaiting delivery, continues until the consignee has been notified of their arrival and has had reasonable time, in the common course of business, to take them away after such notification, though the consignee knows the probable date of shipment and probable date of arrival. *Walters* v. *Detroit United Ry.*, 303.

4. A person designated by the shipper, and accepted by the carrier, to take charge of a shipment of live stock, is a "bona fide employé" of the shipper, within the meaning of those words as used in the contract of carriage, though he has not theretofore been in the shipper's employ and receives no other compensation than his passage to the destination of the shipment. *Weaver* v. *Ann Arbor R. Co.*, 590.

5. On the issue of whether decedent, killed while riding on a drover's pass, was in charge of a shipment of cattle, evidence examined and *held*, sufficient to justify a finding that he was actually placed in charge of the cattle by the shipper with the understanding that he should do whatever was necessary in caring for them. *Id.*

6. A person rightfully riding on a drover's pass is a passenger for hire, and his release of liability for damages on account of the negligence of the carrier is invalid. *Id.*

CASE MADE—See ATTORNEY AND CLIENT.

CERTIORARI.

1. On certiorari to review the action of the lower court this court can reverse only for objections presented by the record to the court below and assigned by the petition for the writ. *Lewis* v. *Detroit Board of Education*, 306.

2. The return of a justice of the peace to a writ of certiorari is conclusive. *Wetmore* v. *Dean*, 627.

CHATTEL MORTGAGES.

1. Under section 9523, 3 Comp. Laws, providing for the filing of chattel mortgages, an unfiled mortgage on a growing crop, taken in good faith and without knowledge of a previous one, has priority over a mortgage contained in a lease of the land which is not filed. *Lingle* v. *Owosso Sugar Co.*, 203.

2. A bill of sale, intended to operate as a chattel mortgage, not followed by a change of possession, and unrecorded, is void as to persons in good faith extending credit to the mortgagor without knowledge of its existence. Section 9523, 3 Comp. Laws. *Sachs* v. *Norn*, 557.

CIVIL-DAMAGE ACT—See INTOXICATING LIQUORS.

CLERKS OF COURTS.

Since the duties of the clerk of the circuit court are defined neither in the statutes nor the Constitution, he is subject to all the legitimate orders of the court. *Smith* v. *Kent Circuit Judge*, 463.

Duty in respect to costs, see COSTS (2, 3).

COMMERCE.

Intoxicating liquors as interstate commerce, see INTOXICATING LIQUORS (8, 9).

CONSPIRACY.

Persons who conspire to perpetrate a fraud are responsible for false representations made in furtherance of that scheme, although not expressly authorized by all the conspirators. *McDonald* v. *Smith*, 213.

CONSTITUTIONAL LAW.

An ordinance requiring one operating an automobile on the street to display thereon a number furnished by the city, is not in conflict with the Constitution in that it is an unreasonable search, or compels the operator to furnish evidence against himself, or deprives him of rights without due process of law; but such an ordinance is a justifiable exercise of the police power, in the interest of the safety of the traveling public. *People* v. *Schneider*, 673.

See INTOXICATING LIQUORS (9); LANDLORD AND TENANT (4).

Obligation of contracts, see BENEFICIAL ASSOCIATIONS (6).

Reduction of counties, see COUNTIES.

Uniformity in taxation, see TAXATION (2).

Waiver of tort and suit in assumpsit, see ASSUMPSIT (5).

CONTEMPT—See CORONERS (3-6).

CONTRACTS.

1. Where two persons, each desiring to purchase the same property, which is to be offered at public sale, agree that one shall purchase for the benefit of both, thereby preventing competitive bidding between themselves, the contract is contrary to public policy, and cannot be enforced in equity. *Fletcher* v. *Johnson*, 51.

2. Defendant was elected manager of a corporation, and given a mortgage on the corporate property to secure advances to be made by him under an agreement "that he will furnish money for the prosecution of the business of said company, and for paying up the outstanding accounts of said company, which are now due, less stockholders' notes, which are to run one year, and shall not exceed $15,000." *Held*, that defendant was not required to pay stockholders' notes from the amount advanced by him. *Fairbairn* v. *Houghten*, 72.

CONTRACTS—Continued.

3. A contract, by which it is agreed to change a heading mill into a stavemill, and carry on the business of manufacturing staves, is not void for indefiniteness in that it fails to specify the kind of machinery to be bought or the kind of staves to be manufactured. *Alderton* v. *Williams*, 296.

4. A contract, by which one party agrees to change his heading mill into a stavemill, and carry on the business of manufacturing and selling staves, and establish a general store in connection therewith, and buy his supplies as far as possible from the other party, the other agreeing to advance the necessary money to carry out the enterprise and take his pay from a share of the profits, does not lack mutuality. *Id.*

5. A contract to carry on the business of manufacturing and selling staves as long as sufficient timber is to be had in the locality for that purpose is not void for uncertainty. *Id.*

6. That one of several promises forming the consideration of a contract is unenforceable does not invalidate it. *Id.*

7. A subcontractors' contract provided that they should cover, protect, and secure the work from injury; that any damage thereto should be repaired at their expense, and that the inspection of any work by the architects, or the issuance of certificate thereon by them, or payments under the contract, should not release the subcontractors from any obligation to perform the work in a good and workmanlike manner, and any default or defect in the same, with all damages thereto, should be repaired and replaced or made good by the subcontractors at their own cost and expense. *Held*, that where water-conductor pipes were placed within four inches of the outside face of the wall, as provided by the plans and specifications, and were accepted after being tested, but they were subsequently damaged by frost because of the failure of other contractors to supply steam with which to warm them as contemplated, whereupon the architects ordered new pipes inserted in another location, the subcontractors were not required to insert such pipes under the contract, but were entitled to charge therefor as extras. *Cresswell* v. *Robertson*, 416.

See GIFTS; SALES (13).

Necessity of consideration, see MORTGAGES (2).

Parol evidence to vary, see EVIDENCE (1).

Rescission, see VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE—See RAILROADS; STREET RAILROADS.

CORONERS.

1. The presentation and allowance of a coroner's claim for an inquest on the body of an alleged deceased stranger, under section 11828, 3 Comp. Laws, not being subject to review by the auditor general, such claim, when filed, is a proceeding depending in the circuit court, within section 10891, 3 Comp.

CORONERS—Continued.

Laws, authorizing punishment of coroners for misbehavior in office, willful negligence, or violation of duty therein, as to any cause or matter depending in a court of record. *In re Toepel*, 85.

2. The determination and allowance of such claim involves the exercise of judicial discretion and judgment by the court, and is therefore a judicial act. *Id.* 86.

3. Affidavits charging the presentation by a coroner of fraudulent claims against the State to the circuit court for fees and expenses in holding an inquest on the body of an alleged stranger, under section 11829, 3 Comp. Laws, examined, and *held* to establish a prima facie case of misconduct on the part of the coroner, warranting the issuance of an order to answer why he should not be punished for contempt. *Id.*

4. It appearing from the affidavits that the claim found its way into the hands of the judge, and was supported by the coroner's certificate, which could only have been made for presentation to the court, and that the amount of the bill was receipted for by defendant, the affidavits were not objectionable for failure to affirmatively allege that the claim was ever presented to the court. *Id.*

5. Where a coroner presented a fraudulent claim against the State to the circuit judge for allowance, the contempt of court was complete on presentation of such claim; and it was not, therefore, material that the order allowing it was not entered of record. *Id.*

6. The judge who allowed a fraudulent coroner's claim is not disqualified from acting in proceedings to punish the coroner for contempt in presenting the fraudulent claim. *Id.*

CORPORATIONS.

One who deals with a corporation, charged with knowledge that it is not in fact a de jure corporation, is estopped to deny its legality, and cannot hold its manager liable individually or its stockholders liable as partners. *Love* v. *Ramsey*, 47.

Stockholders' bill, see EQUITY (2, 3).

COSTS.

1. Where both parties bring error, and the judgment remains undisturbed, no costs are awarded. *Employers' Liability Assurance Corp.* v. *Grand Rapids Bridge Co.*, 351.

2. The form of the security for costs which may be required of the plaintiff in a civil action under section 9992, 3 Comp. Laws, rests in the sound discretion of the court. *Smith* v. *Kent Circuit Judge*, 463.

3. The clerk of the circuit court cannot refuse to obey an order for the filing with him of a certificate of deposit as security for costs in a pending case. *Id.*

COUNTIES.

Section 2 of article 10 of the Constitution prohibits the reduction of the territory of a county below 16 townships without a vote of the people as well by attaching the territory to an existing county as by using it to form an entirely new one. *Board of Sup'rs of Bay County* v. *Edmunds*, 466.

COURTS—See CORONERS (1-6).

CRIMINAL LAW.

1. An examination on a complaint and warrant charging the larceny of a stick pin only is not a sufficient basis for an information charging the larceny of a stick pin and a sum of money. *Clute* v. *Ionia Circuit Judge*, 337.
2. The jury is not the judge of the law in criminal cases. *People* v. *Sanders*, 442.
3. In a prosecution of a deputy township treasurer for embezzlement it was proper to show that defendant, by reason of his default as village treasurer, found it necessary to replenish that account, which he did with funds drawn from the township treasury. *Id.*
4. In the prosecution of a deputy township treasurer for embezzlement, the prosecuting attorney in his argument stated that the treasurer committed a gross indiscretion when he put his trust in defendant, because defendant did not deserve that trust; that defendant was a thief, and the treasurer did not know it, and put his trust "in this young thief, who stole the money from the township," etc. *Held*, that the argument was a legitimate one. *Id.* 443.
5. Where the brief of plaintiff in error contains no statement of the facts, nor of the errors on which he relies, nor of the questions involved, nor the manner in which they are raised, as required by Rule 40 of this court, the fact that the case is one involving personal liberty alone prevents affirmance of the verdict without an examination of the questions raised, and even then the action of the court is not to be regarded as a precedent. *People* v. *Peck*, 680.
6. On a prosecution for embezzlement of the amount of a check, sent by prosecuting witness to defendant to buy tax titles, the parties were shown to have had a number of business transactions and some litigation, and the vital issue in the case on which the evidence was conflicting was whether a receipt introduced by defendant for the money alleged to have been embezzled was a forgery. *Held*, that it was error to require defendant on cross-examination to answer concerning receipts in other transactions, which, on an accounting between defendant and the prosecuting witness, had been disallowed as credits on the claim of the prosecuting witness that they were forgeries. *Id.*
7. It was error also to permit the prosecuting witness to state that receipts in other transactions were forgeries, and that on an accounting between defendant and the prosecuting witness they had been disallowed as credits, on the claim of the prosecuting witness that they were forgeries. *Id.*

CRIMINAL LAW—Continued.

8. On conviction of lewd and lascivious cohabitation, an offense for which the punishment provided is "imprisonment in the county jail not more than one year, or fine not exceeding five hundred dollars" (§ 11693, 3 Comp. Laws), the offender may be sentenced either to the State house of correction at Ionia or to the branch prison at Marquette, but not to the State prison at Jackson. Section 2108, 1 Comp. Laws. *In re Allen*, 712.

DAMAGES.

1. Where a joint adventure fails because one of the parties fails to advance funds as agreed, the other is not limited in his damages to the excess of interest he would have had to pay on borrowing the money elsewhere, but he may recover substantial damages, including expense for machinery and labor incurred in performing his part of the agreement. *Alderton* v. *Williams*, 296.

2. Where a joint adventure involving the remodeling of a mill fails because one of the parties refuses to advance funds as agreed, the measure of the other's damages is not affected by defects in his title to the machinery, where there is no privity between the first party and the alleged real owner of the machinery. *Id.* 297.

3. Damages to an attorney for nondelivery of a telegram instructing him to attend a hearing on claims against an estate are too remote and speculative for recovery, where it appears that the hearing was adjourned and in the interim the claim was compromised, and that plaintiff's interest in prosecuting it was contingent on success. *Sweet* v. *Western Union Telegraph Co.*, 322.

4. Error in the form of an instruction authorizing consideration of an element of damages that should have been eliminated is not prejudicial to the party in whose favor it was given. *Plymouth* v. *Pere Marquette R. Co.*, 347.

5. The remedy for inadequacy in the amount of the verdict is a motion for a new trial. *Love* v. *Halladay*, 575.

6. Where a witness in a personal injury case testifies that plaintiff "always complains" a motion to strike out the answer that "she always complained" is not sufficient to call attention to the objection that the statement of witness is a narrative of past suffering. *Howe* v. *Kalamazoo, etc., R. Co.*, 638.

7. A statement by a witness in a personal injury case that plaintiff "always complains of being sore through her lungs" fairly imports that the complaints made related to present, rather than past, suffering. *Id.*

See FALSE IMPRISONMENT (5); LANDLORD AND TENANT (5); LIBEL AND SLANDER (4); NEGLIGENCE (4, 5); SALES (8).

Avoidable consequences, see WATERS AND WATERCOURSES (3).

Computation of general average by jury, see TRIAL (17).

Under civil-damage act, see INTOXICATING LIQUORS.

DEDICATION.

Land was platted along a street of half width which had been dedicated by the owner of the adjoining plat, the dedicator reserving as a private right of way the strip necessary to complete the street of full width. The plat showed the strip marked "Private Way." The circumstances indicated an intention to reserve title to the strip in the dedicator in order that he might receive compensation when it should be condemned for widening the street. *Held*, that the fee to the strip was reserved to the maker of the plat and the lot owners were given access to the street over it. *Lever* v. *Grant*, 273.

DEEDS.

Where a deed was executed by certain of the grantors named therein and delivered to the common agent of the grantors and grantee on the understanding that it was not to be delivered to the grantee without the signature of the remaining grantor, and that the consideration was not to be paid until such signature was obtained, there was no delivery of the deed to the grantee. *Wisconsin, etc., R. Co.* v. *McKenna*, 43.

See TENANCY IN COMMON (1).

Cancellation, see CANCELLATION OF INSTRUMENTS.

DEPOSITIONS.

1. A party may use depositions taken by his adversary. Circuit Court Rule 41 *a*. *McDonald* v. *Smith*, 212.

2. Permitting a party to read depositions taken by his adversary, on the theory that they constitute his own cross-examination of the adversary's witness, instead of evidence offered by himself, is not ground for reversal, where there is nothing in the depositions which would not be admissible if the party offered them as his own evidence. *Id.*

3. Where a party reads the cross-examination of witnesses from depositions taken by his adversary, the latter, if he wishes their direct examination read, should read it himself. *Id.* 213.

4. Four full secular days' notice at Reed City to take depositions at Cleveland, Ohio, is sufficient. *McCall Co.* v. *Jacobson*, 455.

5. The statute (§ 10139, 3 Comp. Laws) requiring certain objections to depositions to be made within three days after they are filed in the case does not require that they be on file three days before being used. *Id.*

DISMISSAL AND NONSUIT.

It is error to direct a verdict for defendant because plaintiff, suing for services, refuses to produce papers in his possession belonging to defendant, and not shown to be relevant to the case on trial. *Randall* v. *Detroit & Northwestern Ry.*, 477.

DIVORCE.

Where a divorce was granted to a wife on her cross-bill, and she was awarded permanent alimony, not shown to be beyond her necessities, and 12 days thereafter complainant married a

DIVORCE—Continued.

woman with whom he had been keeping company for 2 years before the divorce, and it was this conduct that alienated the affections of complainant's daughter from him, after which defendant discouraged the daughter's association with complainant, neither complainant's subsequent marriage nor the alienation of the daughter's affections justified an order reducing the decree for permanent alimony. *Smith* v. *Smith*, 133.

DOWER—See MORTGAGES (1).

EASEMENTS.

An easement appurtenant to certain lots on a plat is terminated by a sale by the plat maker, before sale of the lots, of his interest in the servient estate. *Lever* v. *Grant*, 273.

EJECTMENT.

In ejectment, involving the location of a boundary line, the plea alleged an agreement to fix a boundary line, and that defendant, in reliance on the agreement, entered on the lands occupied by the owner of the lands described in the declaration, for the purpose of erecting a fence on the boundary line as located by the survey. *Held*, that plaintiff had a right to treat such entry under claim of right as an ouster and that an objection that the evidence failed to show an ouster was not available to defendant. *Lamb* v. *Lamb*, 167.

ELECTION OF REMEDIES—See LANDLORD AND TENANT (3).

ELECTIONS.

Section 2 of article 7 of the Constitution, requiring all votes, except for township officers, to be given by ballot, merely declares the policy of the State to assure to the elector a secret, as distinguished from an open, or announced, vote, and does not permanently establish a particular mode of voting, and is not infringed by Act No. 234, Pub. Acts 1903, amending sections 3750–3758, 1 Comp. Laws, authorizing the use of voting machines, and requiring all voting by machine to be by a secret vote. *City of Detroit* v. *Election Inspectors*, 548.

EMBEZZLEMENT.

1. Where a township treasurer's deputy is prosecuted for embezzlement of township funds, under section 11612, 3 Comp. Laws, it is immaterial whether the treasurer could lawfully appoint a deputy or permit respondent to act as his representative. *People* v. *Sanders*, 442.

2. In a prosecution of a deputy township treasurer for embezzlement, an instruction that defendant cannot be convicted if he paid out for township orders or deposited in the bank all money received by him for taxes, ignores the claim that he drew from the bank and embezzled the money, and was therefore properly refused. *Id.*

3. On a prosecution for embezzlement of the amount of a check sent by prosecuting witness to defendant, proof of the history

EMBEZZLEMENT—Continued.

of the check was admissible, where the defense admitted the receipt of the check and of the money on the check, and insisted that it had been accounted for to the prosecuting witness. *People* v. *Peck*, 680.

EMINENT DOMAIN.

1. The use of the streets of a city for a street railroad is not an additional servitude. *Mannel* v. *Detroit, etc., Ry.*, 106.

2. On condemnation of a highway across its tracks a railroad company is entitled to compensation for structural changes made necessary, and also for any direct expense made necessary by the fact of the street opening, as in maintaining a flagman, or gates, or cattle guards, but not for the observance of public regulations, such as cutting trains to avoid obstruction of the crossing. *Plymouth* v. *Pere Marquette R. Co.*, 347.

EQUITY.

1. Where a suit in chancery was at issue as to one defendant when complainant served notice of his intention to take testimony in open court, as authorized by Chancery Rule 15*a*, and such defendant made no application to have the case referred to a commissioner to take testimony, he was not entitled to object that the service of the notice to take testimony was premature because no order pro confesso had been entered against the other defendants. *Letts* v. *Trevallick*, 143.

2. Stockholders who are alleged to have participated in the wrongful acts complained of are proper parties to a stockholders' bill against the corporation and its officers and stockholders, though no specific relief against them is prayed. *Stone* v. *Pontiac, etc., Ry.*, 265.

3. A stockholders' bill, alleging violation of a contract with complainant S., and praying that one of the officers be required to account for official misconduct, that the officers refund certain unauthorized salaries, that certain unauthorized dividends be refunded, that certain acts of the directors be set aside, and that a receiver be appointed, is not multifarious because it joins with S. certain stockholders whose interests in the corporation were acquired after the making of such contract with S. *Id.*

4. Though the prayer of a bill is not controlling in determining the question of multifariousness, it is to be considered. *Id.*

5. That the violation of a contract with complainant is one of the wrongful acts complained of does not relegate complainants to their remedy at law. *Id.*

6. A bill is not rendered multifarious by introducing averments of fact and a prayer for relief based thereon to which complainant is not entitled. *Id.*

Public policy, see CONTRACTS (1).

ESTATES OF DECEDENTS—See WILLS.

ESTOPPEL.

1. Where defendant insisted that it had never bought property of plaintiff, and declined to recognize any claim on plaintiff's part against it, it was estopped, when sued for conversion of the property, to assert that plaintiff had sold the property to it, and could sue only in assumpsit for its value. *Great Western Smelting & Refining Co.* v. *Evening News Ass'n*, 55.

2. The fact that defendant filed a petition for alimony, in which she stated that plaintiff owned the land in controversy, does not estop her from asserting title to such property, where the alimony was not granted. *Place* v. *Place*, 509.

Necessity of notice on vacating decree, see JUDGMENT (1, 2).

EVIDENCE.

1. Promissory notes in common form cannot be defeated by parol evidence of a contemporaneous agreement not to enforce them in a certain contingency. *Central Savings Bank* v. *O'Connor*, 33.

2. The conclusion reached by an arbitrator, to whom the differences between plaintiff and defendant were submitted under an agreement that his decision should not be binding, is not admissible. *Truax* v. *Bliss*, 153.

3. Parol evidence is inadmissible to prove the transfer of an interest in land. *McDonald* v. *Smith*, 212.

4. Parol evidence of a transfer of land is not prejudicial, where the deed is subsequently put in evidence. *Id.*

5. The improper admission of a note in evidence is harmless where no recovery is allowed on it. *Id.* 213.

6. Parol evidence that defendants' ancestor deeded the premises in suit to defendants, and an unprobated will of such ancestor making no mention of the property, are not admissible to prove title in defendants. *Brigham* v. *Reau*, 256.

7. Where, in a will contest, it is claimed that testatrix was a victim of the morphine habit, evidence that she exhibited symptoms indicating such habit is admissible to enable physicians to give expert evidence on the subject. *Buxton* v. *Emery*, 341.

8. Where the jury found for plaintiff in an action for goods sold and in order to do so must have found either that the goods actually conformed to the contract of sale, or that defendant accepted them as conforming to the contract, error in rejecting evidence of defendant's damages claimed for defects in the quality of the goods is immaterial. *Brown* v. *Harris*, 372.

9. Errors in rejecting and striking out testimony become harmless when the same witness is elsewhere permitted to testify to the same effect. *Id.*

10. In an action on a contract for the sale of goods it is not error to limit examination of witnesses with respect to a variance

EVIDENCE—Continued.

between the order for the goods and the invoice, both of which are in evidence. *Id.*

11. A request to charge on the presumption arising from proof of the deposit of a properly addressed and stamped letter in the mail is properly refused, where it is open to the construction of placing upon the addressee the burden of proving that it was not properly mailed. *Id.*

Form of objection, see FRAUD (6).

EXECUTION.

Sale of exempt property, see EXEMPTIONS.

EXECUTORS AND ADMINISTRATORS.

Claim against estate, see WORK AND LABOR.

EXEMPTIONS.

In trover against a sheriff for selling exempt property on execution, evidence examined, and *held* that, on plaintiff's own showing, the property was not sold on execution, but on foreclosure of a chattel mortgage, and that a verdict was properly directed by defendant. *Lester* v. *Addison*, 232.

EXPLOSIVES.

1. On the trial of an action for damages resulting from an explosion caused by adulterated kerosene oil sold by defendant, it was proper to allow an expert witness to describe the process of producing kerosene oil from petroleum, with the purpose of showing that gasoline is the lighter product, since it tended to show what was the substance sold. *Stowell* v. *Standard Oil Co.*, 18.

2. For a like reason it was competent to show that gasoline would throw off a vapor at a lower temperature than kerosene oil of the legal test standard, and that oil of the legal test would not ignite under the conditions shown to exist, and that, if mixed with gasoline or other similar substance, it might do so. *Id.*

3. Under a declaration alleging that kerosene oil sold by defendant was "adulterated," it may be shown that the adulteration was the result of improper manufacture as well as by admixture after manufacture. *Id.* 19.

4. The manufacturer or wholesaler of kerosene oil, which is inferior to the test required by Act No. 26, Pub. Acts 1899, is liable for resulting damages to a consumer. *Id.*

FALSE IMPRISONMENT.

1. Municipal officers cannot justify their arrest of a street car motorman on the ground that the overhead system of the railway was so out of repair as to be a public nuisance, and had been so declared by the common council, and that operation of the cars increased the danger from it, where, at the time of the arrest, the controller of the car had been taken from

FALSE IMPRISONMENT—Continued.

the motorman and the car could not be started without it, and the whole system might have been stopped by detaching the feed wires. *Mumford* v. *Starmont*, 188.

2. Plaintiff in false imprisonment may state that he felt humiliated by the arrest. *Id.*

3. In false imprisonment by a street car motorman for arrest to prevent him from running his car, it is proper to exclude evidence that he was subsequently complimented by his employer for his effort to run the car. *Id.*

4. Defendant cannot show that it was the custom to search prisoners, and that plaintiff was not searched. *Id.*

5. An instruction basing plaintiff's recovery on what an average man would suffer from a similar injury, rather than on what plaintiff actually suffered, is not prejudicial where there is nothing to indicate that plaintiff suffered less than the average man. *Id.*

6. In an action against two defendants for false imprisonment, evidence examined, and *held*, not to conclusively show that one of defendants participated in the arrest, but to sustain the finding of the jury that he was not responsible therefor. *Love* v. *Halladay*, 575.

7. In an action for false imprisonment against two defendants, error, if any, in charging that exemplary damages were limited to such a sum as would constitute a just verdict against the defendant least culpable, was harmless, where the jury found in favor of one defendant. *Id.*

FIRE INSURANCE—See INSURANCE (3).

FRAUD.

1. Where defendant, to facilitate an exchange of property, induced complainant to lend money on the security of the land exchanged, to discharge a mortgage on the land received by defendant in exchange, his representations as to the value of the land on which the security was taken were statements of fact and not mere expressions of opinion. *Coulter* v. *Minion*, 200.

2. That a declaration for fraud does not expressly charge that the alleged false representations induced plaintiff to part with his property is not available after plea of the general issue, where there is a sufficient charge by inference. *McDonald* v. *Smith*, 211.

3. A representation that a worthless medicine, in the manufacture of which plaintiff was induced to invest, is a sure cure for a certain malady, is not a mere expression of opinion, but is a misrepresentation of fact, and is actionable. *Id.*

4. In an action for fraudulent conspiracy, whereby plaintiff was induced to invest in the manufacture of a worthless medicine, evidence examined and *held*, to justify a finding that plaintiff in error was a party to the conspiracy. *Id.*

FRAUD—Continued.

5. Where a corporation, in the worthless stock of which plaintiff was induced to invest, was only an instrument in the scheme of fraud by which defendants obtained plaintiff's property, the statute (§ 9518, 3 Comp. Laws) requiring representations "made concerning, etc., any other person * * * to be made in writing," has no application. *Id.*

6. An objection that certain acts of misconduct shown have no relation to the fraud complained of, must be made on the ground of relevancy, and not on the ground that they are not averred in the declaration. *Id.*

7. Specific acts of misconduct relevant to prove a charge of fraud may be shown, though not averred in the declaration. Plaintiff is not required to plead his evidence. *Id.*

8. Plaintiff may show that as a part of the fraudulent scheme complained of defendants made him certain promises and failed to perform them, though the promises were void as against public policy. *Id.*

9. A charge that the jury may consider a promise and its nonperformance as evidence in the case is not equivalent to charging that the breach of the promise, standing alone, is evidence of the fraud forming the basis of the action. *Id.* 212.

10. Where evidence of a promise and of its nonperformance is admitted on the issue of fraud, defendant, if he wishes a charge that the promise and nonperformance are not of themselves evidence of the fraud, should prefer an appropriate request. *Id.*

11. The admission of evidence of declarations respecting past transactions made by other parties to an alleged conspiracy is harmless to defendant, who shows the same matters by his own testimony. *Id.*

12. A party may recover damages for fraud inducing a conveyance of property, although the property conveyed stood in the name of, and was conveyed by, another, where such conveyance was made on behalf of the defrauded party. *Id.*

13. An objection that the property alleged to have been conveyed by plaintiff, as a result of an alleged fraudulent conspiracy, is not specifically described in the declaration, must be taken by special demurrer, it being described generally as a house and lot in a certain city. *Id.*

14. An offer to buy stock, accompanied by the statement that the party had investigated it enough to know that he wanted some of it, by which it was falsely implied that the party knew facts making the stock valuable, was more than a mere expression of opinion, and was actionable. *Id.* 213.

15. A fraudulent misrepresentation inducing plaintiff to invest in more stock of a corporation is actionable, though he had previously invested therein. *Id.*

16. A charge on the issue of fraud that a statement must be intended to deceive, calculated to deceive, and must actually deceive, sufficiently charges that it must be material. *Id.*

FRAUD—Continued.

17. A notice of special defense setting up in detail a representation of plaintiff, charging that it was false and fraudulent, and was intended to and did deceive defendant, sufficiently avers fraud. *Smith* v. *McDonald*, 225.

18. A further averment that plaintiff and certain named associates had procured the organization of a corporation for the pretended purpose of manufacturing medicine, and that the stock issued by the corporation was of no value, sufficiently averred organization of the corporation as a step in the scheme of fraud, although it did not, in precise language, charge fraud in such organization. *Id.*

19. A request that it would take "the same amount of proof" to establish plaintiff's complicity in the fraud alleged as it would to establish the fraud against plaintiff alone was properly refused, and a charge that defendant must establish plaintiff's complicity in the fraud by a preponderance of the testimony was properly given in lieu thereof. *Id.*

20. A request to charge that defendant waived fraud if he gave the note in suit after he "believed" he had been defrauded does not present the question of the entertainment of a settled conviction by defendant that he had been defrauded, but to raise such question the request should have used the word "knew" instead of "believed." *Id.* 226.

21. A request to charge, in effect, that defendant could not complain of a fraud, if, at the time he executed the note, he entertained a settled conviction that he had been defrauded, is satisfied by a charge to the effect that, if defendant knew, when he signed the note, that he had been defrauded, plaintiff could recover. *Id.*

22. The defense of fraud is not defeated by the fact that the party defrauded should, in the exercise of ordinary diligence, have known of the fraud when he entered into the fraudulent transaction complained of by him. *Id.*

23. Where, in an action for fraud, it appeared that defendant had been furnishing lumber for the repair of plaintiff's bridges and systematically raising the bills therefor, and an estimate of the overcharges could be arrived at only by subtracting from the aggregate of payments the aggregate of new lumber visible in the various structures, defendant was not entitled to an instruction that plaintiff was entitled to recover only the overpayment shown on each separate bill. *City of Battle Creek* v. *Haak*, 514.

24. On an issue as to whether certain frauds had been perpetrated on plaintiff by defendant, an instruction that, if the jury believed the testimony of a certain witness, and believed the frauds to have been perpetrated, plaintiff was entitled to recover, was not erroneous as permitting a recovery on the testimony of such witness alone. *Id.*

See CORONERS (1); TAXATION (3, 4); VENDOR AND PURCHASER.

Liability of conspirators, see CONSPIRACY.

Suit in assumpsit, see ASSUMPSIT (5).

FRAUDS, STATUTE OF.

1. The execution of a deed by a part of the vendors in an oral executory contract for the sale of an interest in land, and its delivery to a common agent of the vendors and purchaser, on the agreement that he is to procure its execution by the remaining vendor, and deliver it when complete to the purchaser, and the deposit at the same time by the purchaser of the purchase price in the hands of the agent, does not, the remaining vendor having refused to execute, constitute such a part performance as to take the executory contract out of the statute of frauds, though the purchaser, by consent of the vendors, took possession in expectation of performance, and expended a small sum of money on the land. *Wisconsin, etc., R. Co.* v. *McKenna*, 43.

2. Where one occupied up to a certain boundary line under a claim of ownership for more than 15 years, an oral agreement to have the line surveyed could not affect his title up to the line to which occupation was had. *Lamb* v. *Lamb*, 166.

3. Mere occupancy of a dwelling and the making of ordinary repairs and changes to suit the premises to the needs of the occupant, paid for out of partnership funds belonging to the promisor and promisee, are not sufficient part performance to take a parol promise to convey out of the statute of frauds. *Buhler* v. *Trombly*, 557.

4. A parol contract by which a part owner of land was authorized by other part owners to sell the same, and apply a part of the proceeds to the payment of a debt owed by himself and another party to the contract, is not, after it has been performed, and the money applied in accordance with its terms, within section 9515, subd. 2, 3 Comp. Laws, requiring a special promise to answer for the debt of another to be in writing. *Lasley* v. *Delano*, 602.

Application to fraudulent scheme, see FRAUD (5).

FRAUDULENT CONVEYANCES—See CHATTEL MORTGAGES (2).

GARNISHMENT.

After counsel has appeared in garnishment proceedings representing the defendant, the garnishee, and an intervening claimant, and raised various objections to the proceedings, and at the beginning of the trial on the merits states that it is agreed that the intervenor shall be regarded as defendant in the case, and that whatever judgment is rendered shall be binding on him, it is too late to claim that a defect in the affidavit for garnishment, apparent on its face, requires the direction of a verdict for the intervenor. *Sachs* v. *Norn*, 357.

See MANDAMUS (1).

GASOLINE—See EXPLOSIVES.

GIFTS.

A promise, as a mere act of bounty by a foster father, to permit his foster son to occupy certain premises rent free during the

GIFTS—Continued.

father's life, and that they shall become the property of the son on the father's death, is not a contract, in the absence of any showing that the son agreed to do anything, or ever did or refrained from doing anything, or in any way changed his condition or circumstances, or was induced to forego any benefit or assume any liability because of or relying on the promise, though he entered on the premises, and for several years occupied them without paying rent. *Buhler* v. *Trombly*, 557.

GUARDIAN AND WARD.

A promise which may at any time be recalled by the promisor may, on his becoming non compos mentis, be recalled and revoked by his guardian. *Buhler* v. *Trombly*, 557.

HABEAS CORPUS.

Habeas corpus is an appropriate remedy when a sentence to imprisonment is wholly void for lack of authority to sentence to the institution in question. *In re Allen*, 712.

See BAIL.

HIGHWAYS AND STREETS.

1. For a city to leave unused railway tracks in a street, lightly covered so as to be invisible, but a dangerous obstruction in wet weather, is negligence as a matter of law. *Cutcher* v. *City of Detroit*, 186.

2. Where railroad side tracks were left in a street 2½ years after being disconnected from the main track, and were a dangerous obstruction, the city must be presumed to have had notice of the defect. *Id.*

See LICENSES; NUISANCES.

Condemnation of highway across railroad tracks, see EMINENT DOMAIN (2).

Damages for change of grade, see MUNICIPAL CORPORATIONS (5, 6).

Duty of traveler using highway containing street-railway track, see STREET RAILROADS (4–6).

Rights in highway, see STREET RAILROADS (3).

Use by street railroad as additional servitude, see EMINENT DOMAIN (1).

HOMESTEAD.

Where the wife of a mortgagor, who was secretly married, and did not join in the mortgage, had not lived on the mortgaged property prior to the execution of the mortgage, she was not entitled to homestead therein as against the mortgagee, who was ignorant of her marriage. *Hall* v. *Marshall*, 123.

HUSBAND AND WIFE.

Neither the contract nor the will of a husband can affect the title to lands owned by himself and wife as joint tenants. *Hubert* v. *Traeder*, 69.

INDICTMENT AND INFORMATION.

An information for forgery was quashed, and defendant remanded to the sheriff for 24 hours in which to allow the prosecuting attorney to file new information, or take such other steps as he might deem proper. The prosecuting attorney then swore to a complaint charging defendant with obtaining money by false pretenses on the alleged forged check, and such proceedings were had that defendant was bound over for trial. Subsequently the prosecuting attorney made an informal ex parte motion to vacate the order quashing the information, and, on its denial, brought mandamus. *Held*, that the prosecuting attorney, by causing the accused to be bound over for trial for obtaining money by false pretenses, acquiesced in the quashal of the prior information, and the motion to vacate the order to quash being oral and without notice to the accused, the application for mandamus would be denied, without considering the legal sufficiency of the information for forgery. *Louisell* v. *Benzie Circuit Judge*, 40.

See CRIMINAL LAW (1); MANDAMUS (6).

INJUNCTION.

1. A railroad filed a bill to restrain defendant from obstructing a side track; the answer set up title to the land in defendant, and prayed for affirmative relief, and the court announced that the bill would be dismissed, but, without notice to complainant, made a decree restraining complainant from using the track. *Held*, that the decree not being void, nor embracing matter not within the issues, the Supreme Court would not by mandamus vacate the portion of the decree restraining complainant. *Pere Marquette R. Co.* v. *Kalkaska Circuit Judge*, 436.

2. Injunction will issue to restrain injury to lots and a street adjoining a river by cutting through them to make a channel and basin in which to turn a steamboat too large for the river. *Wilkinson* v. *Dunkley-Williams Co.*, 621.

3. The owner of the lots, to which access is possible only along such street, has the peculiar interest in the street necessary to enable him to maintain injunction to restrain interference with it. *Id.*

4. That complainant's deed of land was only intended as a mortgage is immaterial to a stranger against whom injunction is sought to restrain his interference with the property. *Id.*

See TRADE UNIONS.

INSTRUCTIONS TO JURIES—See TRIAL

INSURANCE.

1. The receipt by the insured of a policy, and filing it away without reading it, does not waive the right of the insured to insist that the application is a part of the contract, where the solicitor assured him, when taking it, that a copy of the application would be attached to the policy, and that it would

INSURANCE—Continued.

not be necessary for him to preserve a copy. *Employers' Liability Assurance Corp.* v. *Grand Rapids Bridge Co.*, 351.

2. In an action on a life-insurance policy in which the defense was false warranty, in that insured stated in her application that she had not consulted a physician within seven years, and had never had heart disease, instructions examined and *held*, that, taken as a whole, the charge was not subject to the objection of telling the jury that they could consider insured's statement in the application as evidence of its own truthfulness. *Wilson* v. *Royal Neighbors of America*, 423.

3. An insurance policy covered lumber "piled in mill building, on cars, under mill sheds and in sheds adjoining to said mill building." There were sheds called "mill sheds" where lumber was piled situated some distance from the mill. The roof of the mill itself extended out 10 or 12 feet over the tracks on either side of the mill to protect the lumber and men loading or unloading cars. It was undisputed that these projections or sheds were erected simply to cover the tracks, were open at the ends and sides, and were not intended to be used as lumber sheds. *Held*, that the words "mill sheds" in the policy should be construed as indicating the sheds located some distance from the mill, and not those projecting from the building, and the quoted clause of the policy should be construed as though it read, "On lumber in mill building; on lumber on cars; on lumber under mill sheds and on lumber in sheds adjoining to said mill building." *Wolverine Lumber Co.* v. *Palatine Ins. Co.*, 432; *Wolverine Lumber Co.* v. *Liverpool & London & Globe Ins. Co.*, 435.

INTOXICATING LIQUORS.

1. In an action under the civil-damage act, error in the admission of testimony as to the amount spent by plaintiff's husband in defendant's saloon is cured by subsequently charging the jury that no recovery can be had for such money. *Manzer* v. *Phillips*, 61.

2. Cross-examination of plaintiff as to her husband's earnings and business does not entitle plaintiff to show that she has children who contribute to the earnings of the family. *Id.*

3. It is not competent to show an aggravation of injuries to plaintiff's feelings by showing the presence of her children when she was informed of her husband's debauch. *Id.*

4. The admission, though indirectly, of testimony that plaintiff had children, was reversible error. *Id.*

5. Evidence of the property and financial condition of plaintiff's husband is admissible as showing plaintiff's means of support. *Id.*

6. Where plaintiff's testimony showed that her husband provided for her as well after the debauch complained of as formerly, and that the only real difference that the loss of the money spent on the debauch made was that plaintiff would have that much less money if her husband should die before her, the court should have charged that plaintiff had failed to

INTOXICATING LIQUORS—Continued.

show any injury to her person, property, or means of support, and could not recover for those items. *Id.*

7. Where liquor was sold to a person known to be intoxicated, the jury may find that such sale was wanton, and may award exemplary damages, although the saloon keeper did not know the person had a wife and could not anticipate the particular injury suffered by reason of the sale complained of. *Id.* 62.

8. Sales of liquor in original packages by a dealer whose place of business is in another State, from which the liquors are shipped, are interstate commerce and beyond local regulation, though both parties to the sale live in this State and the sale is made here. *Sloman* v. *William D. C. Moebs Co.*, 334.

9. Section 4018, 1 Comp. Laws, attempting to regulate wholesale sales of intoxicating liquors in this State by nonresidents, is unconstitutional. *Id.*

JOINT ADVENTURES.

Where one party agreed to establish and conduct a business the other agreed to furnish a certain amount of money to assist it and take a stipulated portion of the net profits until paid, the business is properly described as a joint enterprise, though the parties are not partners and the title to the mill and business remained with the first party. *Alderton* v. *Williams*, 296.

See DAMAGES (1, 2).

JOINT TENANCY—See HUSBAND AND WIFE.

JUDGES.

Disqualification in contempt case, see CORONERS (6).

Judicial act, see CORONERS (2).

JUDGMENT.

1. A purchaser of land, the title to which was quieted prior to his purchase, is entitled to a mandamus directing the judge to set aside an order, granted without notice to the purchaser and without his knowledge, vacating the decree quieting title. *Vincent* v. *Benzie Circuit Judge*, 90.

2. The fact that a decree quieting title was irregular does not entitle the party against whom it was rendered to have the same set aside without serving proper notice on parties interested in sustaining the same. *Id.* 91.

3. The validity of a tax deed is established by the decree in the tax sale proceedings, and the contesting owner cannot retry that issue by a subsequent action of ejectment against the tax sale purchaser on a ground since discovered. *Napper* v. *Fitzpatrick*, 139.

4. A decree of the probate court making partition among devisees, and deciding that one of them holds a life estate in the part allotted to her, acquiesced in by her, precludes her from

JUDGMENT—Continued.

thereafter asserting a different tenure. *Parkinson* v. *Parkinson*, 530.

Conversion, see ASSIGNMENTS; TROVER AND CONVERSION (2).

Setting aside default, see MANDAMUS (2, 3).

JURY.

1. On the trial of an action for damages resulting from an explosion caused by adulterated kerosene oil sold by defendant, it is within the discretion of the court to allow counsel for plaintiff to ask jurors on the voir dire whether they would consider it negligent to extinguish a lighted lamp by blowing across and down the chimney. *Stowell* v. *Standard Oil Co.*, 18.

2. The overruling of a challenge of a juror for cause, if error, is harmless, where the party challenging had exercised but one peremptory challenge when the panel was completed. *Id.*

3. In an action against a mutual fire-insurance company, members thereof, liable to be assessed to pay the loss if the company should be defeated, are interested, and incompetent as jurors. *Martin* v. *Farmers' Mut. Fire-Ins. Co. of Calhoun County*, 148.

4. Plaintiff challenged a disqualified juror for cause, and, on the overruling of the challenge, exercised a peremptory challenge. Thereafter, and while plaintiff still had two peremptory challenges, four other jurors, disqualified for the same reason, were called, and plaintiff neither challenged for cause nor exercised his peremptory challenges. *Held*, that he did not thereby waive his objections to the disqualified jurors. *Id.*

5. Affidavits of jurors will not be received to prove misconduct of the jury. *City of Battle Creek* v. *Haak*, 515.

6. In a criminal case it is reversible error, regardless of whether peremptory challenges have been used, to refuse to permit jurors to be asked on their voir dire examination "if, * * * the testimony is evenly balanced in your mind * * * which way would you be inclined to lean, for or against the defendant?" *People* v. *Peck*, 680.

Duties, see TRIAL (7).

KEROSENE OIL—See EXPLOSIVES.

LABOR UNIONS—See TRADE UNIONS.

LANDLORD AND TENANT.

1. Before expiration of an annual lease the lessee stated to the lessor's supposed agent, who called, under the lessor's direction, to inspect the heating plant, that he would remain if provision was made for heating, and on assurances supposed by him to be made with authority, he continued to occupy the premises beyond the term. *Held*, that the lessor, by subsequently reiterating the assurances, ratified the agreement of the agent, and, having failed to supply the furnace agreed on as a condition to the continuance of the lease, he relieved

LANDLORD AND TENANT—Continued.

the lessee from the payment of further rent on vacating the premises. *Rogers* v. *Babcock*, 94.

2. Where a tenant, before leaving the premises, told a relative of the landlord, who had been authorized to make certain repairs, that he intended to vacate, and requested him to take care of the house, which he promised to do, there was a surrender, so far as giving up the premises were concerned, since the tenant was justified in intrusting them to the care of such person as agent. *Id.*

3. By bringing suit on the appeal bond given by defendant in summary proceedings for the possession of leased premises, complainant elects his remedy and cannot afterwards maintain suit in trespass for treble damages under section 24, chap. 308, 3 Comp. Laws, though certain items of damages recoverable under the statute are not recoverable in suit on the bond. *Schellenberg* v. *Frank*, 183.

4. Section 25, chap. 308, 3 Comp. Laws, providing for an election of remedies, is constitutional, since it merely prescribes the conditions under which a landlord may pursue the statutory remedy. *Id.*

5. Where plaintiff has sued on the bond pursuant to section 25, he can recover neither single nor treble damages under section 24. *Id.*

6. Defendant worked complainant's land for the year 1900 for a share of the crop, and during that year complainant seeded it to grass with the grain at his own expense. In 1901 defendant's son, at his father's request, made a new arrangement with complainant to harvest the hay. *Held*, that defendant was not a tenant at will; that his rights terminated when the 1901 crop was harvested, and that he was a trespasser in interfering with the harvesting of the crop of 1902. *Kenney* v. *Apley*, 320.

7. A landlord is liable in trespass to his tenant, where, during the tenant's absence from the premises, he enters without the tenant's consent, moves the house, and erects another in its place. *Maney* v. *Lamphere*, 429.

8. Where plaintiff leased from defendant property which was afterward, without any arrangement releasing plaintiff from liability, occupied by a firm composed of plaintiff and another, plaintiff continued to be responsible for the rent, and the fact that defendant purchased goods from the partnership from time to time, and did not pay for them, did not, in the absence of any finding that the indebtedness was to apply on the rent, make the partnership directly responsible, and show that plaintiff had ceased to be so responsible. *Fryszka* v. *Prybeski*, 461.

9. The act of a landlord, in placing a lock on the door of a building in lawful possession of his tenant, is a mere invasion of the tenant's rights, and does not place the landlord in possession. *Hayward* v. *School District No. 9 of the Township of Hope*, 539.

LANDLORD AND TENANT—Continued.

10. The tenant owns buildings erected by him on leased land in furtherance of the purpose for which the premises were leased, and may remove them during the tenancy, or, if the tenancy terminate on a contingency, within a reasonable time after it terminates. *Id.*

11. Where defendants leased to plaintiff a house containing an open sewer, which after some two weeks began to emit noxious gases, causing sickness, defendants were not liable on the ground that they rented the premises in a defective condition, inasmuch as they did not know and were not chargeable with knowledge of the defect at the time the premises were rented. *Rhoades* v. *Seidel*, 608.

12. Where a landlord does not agree to make repairs, he is under no obligation to make them. *Id.*

13. Where, after the execution of a lease not obligating the landlord to make repairs, he agrees so to do, the agreement is without consideration and unenforceable. *Id.*

14. Where, after premises were leased, an open sewer thereon began to emit sewer gas, and the landlord promised to remedy the defect, but failed in an attempt to do so, and the tenant became sick in consequence of the gas, the landlord was not liable on the ground that the agreement to repair was negligently executed. *Id.*

15. In an action against a landlord for injuries to a tenant's property arising from an unswept chimney flue, evidence of a conversation between the landlord's agent and another tenant relative to sweeping the flue in another apartment was properly rejected. *Cooper* v. *Lawson*, 628.

16. Evidence as to the control assumed by another tenant over the means of access to the roof of the building was also properly rejected. *Id.*

17. When a landlord leaves separate portions of the same building to different tenants, and reserves control of those parts of the building or premises used in common by all the tenants, he must use reasonable diligence to keep in a safe condition the parts over which he retains control. *Id.*

18. Where the chimneys to the several apartments of a building are separate, and the tenant of a single apartment might sweep its chimney without trespassing or interfering with the others, there is no duty resting upon the landlord to sweep it. *Id.*

19. A city ordinance making it the duty of the owner, agent, or occupant of any building to have the chimney thereof swept once in each year imposes no duty in that respect upon the landlord in favor of the tenant. *Id.*

LEWDNESS—See CRIMINAL LAW (8).

LIBEL AND SLANDER.

1. To say of another, "He is a thief," is prima facie actionable. *Line* v. *Spies*, 484.

LIBEL AND SLANDER—Continued.

2. In an action for slander the surrounding circumstances and connection in which the words were used may be shown for the purpose of proving that the words could not have been understood as imputing a crime. *Id.*

3. Language used toward another is actionable if, in the circumstances under which it was used, the hearer would reasonably understand that it was intended to impute a crime. *Id.*

4. In an action by an attorney for slander, where there is no evidence of injury to plaintiff in his profession, it is error to leave that question to the jury. *Id.*

LICENSES.

Where a city council gives an abutting owner permission to occupy a portion of the street by show cases and bays, expressly reserving the right to remove them at any time, the revocation of the license will not be enjoined though the owner will sustain considerable loss thereby without fault on his part. *Forbes* v. *City of Detroit*, 280.

Automobiles, see MUNICIPAL CORPORATIONS (12, 13).

LIENS—See WAREHOUSEMEN.

LIMITATION OF ACTIONS.

1. A widow, in support of a claim against the estate of her husband, who died in 1902, showed that when they were married in 1892 she had ready money, that he had none, that his farm was mortgaged and the buildings in need of repairs, that he earned no money after marriage, and that their living expenses, the mortgage, repairs to the house, and the expenses of his last sickness and burial were paid by her. He frequently recognized his obligation to her, and recently before his death stated that she should be paid. *Held*, that it was error to direct a verdict for the estate on the ground that limitations had run against items of her claim dated in 1893 and 1894. *Wilcox* v. *Wilcox*, 365.

2. Under section 9721, 3 Comp. Laws, mere disturbance of the possession of one claiming land is not sufficient to interrupt the running of limitations once begun. *Place* v. *Place*, 509.

3. The relation between a principal and an agent who has ceased doing new business for his principal, and whose duty it is merely to collect and remit the money due his principal on outstanding mortgages, is not such a trust relation as suspends the running of limitations. *Jewell* v. *Jewell's Estate*, 578.

4. A letter written by an agent to his principal, stating, "I have used the money and I want to turn out my property to make you all right," constitutes a sufficient acknowledgment by the agent of the existence of a debt in favor of the principal to satisfy the statute (§ 9740, 3 Comp. Laws) requiring acknowledgments of debts to be in writing in order to postpone the running of limitations. *Id.* 579.

LIMITATION OF ACTIONS—Continued.

5. Act No. 155, Pub. Acts 1899, limiting in section 1 the time within which actions for personal injury shall "hereafter" be brought, affects only such causes of action as accrued after the law took effect. *Hathaway* v. *Washington Milling Co.*, 708.

See ADVERSE POSSESSION (6, 7); APPEAL AND ERROR (27); PRINCIPAL AND AGENT (3).

LOTTERIES.

A "tailor suit club," the members of which contribute $1 each per week and have weekly drawings, and through which a member may receive a suit of clothes for $1, is a lottery or gift enterprise, as defined and prohibited by section 11344, 3 Comp. Laws, though there is no chance for the members to sustain a loss. *People* v. *McPhee*, 687.

MANDAMUS.

1. Under section 10642, 3 Comp. Laws, an order quashing a writ of garnishment, and releasing the garnishee from further liability, with costs to defendant, is in effect a final judgment against plaintiff in the garnishment proceeding, reviewable on error, and hence mandamus does not lie to review such order and to compel the circuit judge to vacate the same. *Recor* v. *St. Clair Circuit Judge*, 156.

2. The action of the circuit judge in refusing to set aside a default and judgment on the ground that under the facts shown the court had no jurisdiction will not be controlled by mandamus, the question being determinable on error. *Valley City Desk Co.* v. *Kent Circuit Judge*, 194.

3. Where the circuit judge has acted on a motion to set aside a default and permit the filing of an amended plea, by granting the motion on condition that defendant appear and plead to the merits, mandamus will not lie to compel him to vacate the conditions, as the court's exercise of discretion will not be interfered with, and any error in the decision may be reviewed by allowing the case to go to judgment and raising the question by writ of error or case made. *Hallwood Cash Register Co.* v. *Wayne Circuit Judge*, 198.

4. The only pleadings contemplated by our mandamus practice are the petition and answer, replication and rejoinder being unauthorized. *Lewis* v. *Detroit Board of Education*, 306.

5. Where no issues are framed, mandamus proceedings are disposed of on the issue raised by the petition and answer, it being assumed that all averments of fact in the answer and all material allegations in the petition, not specifically answered by the respondent, are true as alleged. Circuit Court Rule 46 *c*. *Id.*

6. Where an information for larceny is quashed after trial and disagreement of the jury, mandamus to compel the judge to set aside the order of quashal will not be granted unless there

MANDAMUS—Continued.

is a showing that a different result would be reached on retrial. *Clute* v. *Ionia Circuit Judge*, 337.

7. The writ of mandamus will not be allowed to take the place of an appeal or writ of prohibition, or any other writ to review the action of the lower court. *Wells* v. *Montcalm Circuit Judge*, 544.

8. Mandamus to a circuit judge will not be granted to determine which of two circuits has jurisdiction of a suit for divorce where relator has pleaded the pendency of the other suit in abatement of the one pending before respondent. *Id.*

See INDICTMENT AND INFORMATION; INJUNCTION (1); JUDGMENT (1).

MARRIAGE.

On a bill to annul a marriage on the ground of insanity of the wife at the time of the marriage, it appeared that the parties were aged, when married, that the wife was a religious enthusiast, that they lived together for three years before separating, and after the first separation cohabitation was resumed at the husband's request. The bill was not filed until after she had been adjudged insane and her guardian had sought to compel him to support her. *Held*, that a case for annulment was not shown. *Van Haaften* v. *Van Haaften*, 479.

MARRIED WOMEN—See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. Section 5511, 2 Comp. Laws, requiring coupler devices that can be operated without requiring the operator to go between the cars to be placed "upon each end of every freight car," etc., and declaring (section 5512) that every railroad company refusing to comply therewith shall be liable to a penalty, does not require the placing of such couplers on the tenders of locomotives. *Blanchard* v. *Detroit & Mackinac Railway Co.*, 694.

2. The oiling of a line shaft in a properly lighted room does not require any special instruction or cautionary suggestion from the master to a man of mature years in possession of all his faculties, though it involves reaching over gear wheels in motion, the danger, such as it is, being as apparent to man as to master. *Hathaway* v. *Washington Milling Co.*, 708.

3. A servant, who has worked in the packing department of a flouring mill and had charge of the machinery of such department and occasionally been called to assist in the mill proper, is not taken from his regular employment and set at a more hazardous employment by being called to help start the mill and oil its machinery. *Id.*

Liability of municipality as master, see MUNICIPAL CORPORATIONS (9).

MECHANICS' LIENS.

A lienor who fails to furnish the owner with the statement of his claim, provided by section 10717, 3 Comp. Laws, within five days after demand, forfeits his lien, though the owner is not prejudiced. *Frohlich* v. *Beecher*, 278.

MONEY LENT—See ASSUMPSIT (3).

MONEY PAID.

Money paid by mistake in excess of the amount due may be recovered. *Truax* v. *Bliss*, 153.

MONEY RECEIVED—See MUNICIPAL CORPORATIONS (11).

MORTGAGES.

1. Where a mortgagor's marriage to defendant was concealed without fraudulent purpose, and defendant did not join in the mortgage, such concealment was not a fraud on the mortgagee, so as to deprive defendant of her dower in the mortgaged premises. *Hall* v. *Marshall*, 123.

2. Where, at the time of the making of a loan secured by a mortgage, there was no arrangement that the mortgage should not be paid according to its terms, evidence of subsequent statements by the mortgagee that he did not expect the mortgagor to pay the principal, and that he would have the money after the mortgagee's death, did not establish a binding promise on the mortgagee's part to forbear collection of the debt, there being no consideration to support it. *Trombly* v. *Klersy*, 209.

3. An attempted foreclosure by advertisement which is wholly void for failure of the notice to describe the land, and other defects, is no bar to a subsequent foreclosure in chancery, though the mortgagee purchased at the sale had pursuant to advertisement, and has been in possession thereunder ever since. *Woodruff* v. *Coffman*, 634.

See SUBROGATION.

MUNICIPAL CORPORATIONS.

1. On a bill to set aside an assessment of benefits made in proceedings to open a street, evidence examined and *held*, that the establishment of an assessment district 300 feet in width on each side of the street, the whole length thereof, as newly opened, and assessing the whole expense to the property benefited, instead of a portion to the city at large, was not an abuse of discretion. *Power* v. *City of Detroit*, 30.

2. Where a building on land taken for a street is sold, but the assessment of benefits is made without deducting the money so received from the expense, as required by Act No. 236, Pub. Acts 1889, the assessment is not wholly void, but the court may direct the making of the proportionate reduction and allow the assessment as amended to stand. *Id.*

3. Assessments of benefits for opening streets in the city of Detroit are properly made payable all at one time, notwithstanding section 3406, 1 Comp. Laws, directs that such assess-

MUNICIPAL CORPORATIONS—Continued.

ments shall be levied and collected as near as may be in the same manner that is provided in the charter of the municipality for levying and collecting the expense of grading streets, and the charter of Detroit provides (Act No. 489, Local Acts 1887, § 44) that grading assessment rolls shall be made in four parts, the charter provision not being applicable. *Id.*

4. Where a lot owner refuses to pay any portion of his assessment for a street improvement, and litigates the whole of it, he is liable for such penalties and interest as are fixed by law on such portion of the assessment as is held valid on final determination, though the original assessment was reduced. *Id.*

5. In the absence of a statute giving a right to recover therefor, damages suffered by an adjacent property owner because of a change in the grade of a street cannot be recovered. *Cummings* v. *Dixon*, 269.

6. Under the general village law (§§ 2783, 2784, 1 Comp. Laws), a property owner is entitled to damages for the change in a street grade only when the prior grade in conformity to which his improvements were made was established by competent municipal authority in the prescribed manner. *Id.*

7. The board of education of the city of Detroit has no power to require contractors constructing public buildings to employ union labor exclusively. *Lewis* v. *Detroit Board of Education*, 307.

8. Under that section of the charter of Port Huron which provides that the city engineer shall give notice when assessments for street improvements are completed, the notice need not be addressed to individuals by name, but it is enough that it is addressed "To all owners and other persons interested in" the lots abutting a certain avenue between certain streets. *Palmer* v. *City of Port Huron*, 471.

9. The board of education of Detroit is a governmental agency and is not liable for the negligence of its agents in providing unsafe appliances with which a servant is directed to work. *Whitehead* v. *Board of Education of Detroit*, 490.

10. Under section 2908, 1 Comp. Laws, providing that the council of an incorporated village may contract for any period not exceeding 10 years for gas, electric, or other lights, the council has no power to enter into such a contract during the life of a valid contract previously entered into, covering the period of 10 years. *Village of Morrice* v. *Sutton*, 643.

11. A municipality has no power to aid, by contract or otherwise, a private adventure, and money paid by a village council as a bonus to secure the building of a grist mill and electric lighting plant may be recovered as money received. *Id.*

12. The city of Detroit has power under its charter (1904, § 170), to provide by ordinance for the registration and numbering of automobiles and other motor vehicles. *People* v. *Schneider*, 673.

13. An ordinance regulating automobiles and requiring registra-

MUNICIPAL CORPORATIONS—Continued.

tion and numbering thereof at a cost to the owner of $1 to cover the value of figures furnished by the city to form the number, is not objectionable as a license, it being at most a mere means of regulation, and not a license for revenue. *Id.*

See HIGHWAYS AND STREETS (1); STREET RAILROADS (1).

Revocation of license, see LICENSES.

MUTUAL BENEFIT SOCIETIES—See BENEFICIAL ASSOCIATIONS.

NEGLIGENCE.

1. In an action for damages arising from negligence, the fact that plaintiff's case rests largely upon inferences to be drawn from facts proved is not fatal to it, where it does not rest upon mere conjecture. *Stowell* v. *Standard Oil Co.*, 19.

2. The seller of an article of commerce, not in itself dangerous, is not responsible for consequences to a purchaser from his vendee resulting from defects unknown to the original seller. *Id.*

3. In an action for injuries occasioned by plaintiffs being precipitated into the vault of a public convenience at a railroad station on its floor giving way, evidence examined, and *held*, that whether defendant railroad company was negligent in failing to properly inspect it was for the jury. *Howe* v. *Kalamazoo, etc., R. Co.*, 638.

4. Instructions on the measure of damages in such a case examined, and *held*, not erroneous as permitting the jury to speculate upon the value of the injuries to the plaintiffs' feelings, no matter in what way they were occasioned. *Id.*

5. The damages recoverable for such an injury may include injury to feelings occasioned by the fright and suspense which plaintiffs suffered while in the vault. *Id.*

See APPEAL AND ERROR (24); CARRIERS; HIGHWAYS AND STREETS; LANDLORD AND TENANT (11–15); MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS; STREET RAILROADS.

Duty of traveler using highway containing street-railway track, see STREET RAILROADS (4, 5, 6).

Injury from explosion of kerosene oil, see EXPLOSIVES.

Liability of municipality as master, see MUNICIPAL CORPORATIONS (9).

NEW TRIAL—See DAMAGES (5).

NOTARIES.

1. Under the statute, a notary public of one county may take acknowledgments in another. *Lamb* v. *Lamb*, 167.

2. In an action on a notarial bond for damages resulting from the notary's taking the acknowledgment of an impostor to a real-estate mortgage, evidence examined, and *held*, that the

NOTARIES—Continued.

direction of a verdict for plaintiff was properly refused. *People, for Use of Cook,* v. *Cole,* 312.

See ACKNOWLEDGMENTS.

NUISANCE.

Show cases and bays, extending along the whole front of a building and upwards of two feet into the street, constitute a nuisance which an adjoining owner specially injured may maintain suit to abate. *Forbes* v. *City of Detroit,* 280.

Peculiar interest of private person, see INJUNCTION (3).

PARTIES.

1. Where an action is begun in a name that imports a limited partnership, an amendment is not allowable which introduces an individual trading under that name. *Voigt Brewery Co.* v. *Pacifico,* 284.

2. Naming a limited partnership, which in fact has no existence, instead of the individual trading under that name, is not a misnomer, but a failure to name the true plaintiff, which is fatal upon trial, though not pleaded in abatement *Id.*

See ACCOUNT.

PARTNERSHIP—See PARTIES (1, 2); TROVER AND CONVERSION (2).

PAYMENT.

1. Though a debtor may designate to which of several accounts a payment shall apply, in the absence of such designation the creditor may make the application at any time before suit. *People, for Use of C. H. Little Co.,* v. *Grant,* 26.

2. Where credit for a payment is entered on a general account, and a statement thereof rendered to the debtor, this is an election to apply the payment to the extinguishment of items antecedently due in the order of time in which they stand in the account, and the creditor cannot thereafter make another application. *Id.*

3. The retention and use of a check accompanied by a letter stating that it is in full of a certain account does not preclude action for a balance in fact due. *Goldsmith* v. *Lichtenberg,* 163.

PLEADING.

1. Where defendant pleads issuably after his demurrer is overruled he cannot thereafter again raise the questions settled by the ruling, on the demurrer. *Kern* v. *Arbeiter Unterstuetzungs Verein,* 233.

2. A variance between the pleadings and proofs will be deemed waived when brought to the attention of the court for the first time by a request to charge after the close of the evidence. *Alderton* v. *Williams,* 297.

PLEADING—Continued.

3. Pleading issuably to a count of a declaration after the overruling of a demurrer thereto waives the question raised by the demurrer. *City of Battle Creek* v. *Haak*, 514.

4. The allowance of an amendment of a bill of particulars is discretionary. *Id.*

See ASSUMPSIT (1); ESTOPPEL (2); FRAUD (2); MANDAMUS (4, 5).

Necessity of special demurrer, see FRAUD (13).

Notice of defense, see WATERS AND WATERCOURSES (1).

Pleading adulteration of kerosene oil, see EXPLOSIVES (3).

Special defense, see FRAUD (17, 18).

That evidence need not be pleaded, see FRAUD (7).

PRINCIPAL AND AGENT.

1. Where, at the time an alleged notice that goods sued for did not conform to the contract was given to plaintiff's agent, defendants knew that the agent was acting in antagonism to plaintiff, that he would disregard it, and not communicate it to plaintiff, such notice was not notice to plaintiff. *Brown* v. *Harris*, 372.

2. A memorandum book kept by an agent in his own handwriting, in which are entries relating to his principal's business, and covering a period of many years before and after the date of a settlement between them, the entries before the settlement being crossed out and those made thereafter not being so crossed, is competent evidence, after the death of the agent, of the nature and extent of the business relations between him and the principal; but its completeness is a question for the jury, and, as evidencing liability, only those entries after the settlement are to be considered. *Jewell* v. *Jewell's Estate*, 578.

3. A right of action in favor of a principal to recover money collected by his agent, whose duty to remit is fixed without an accounting, accrues as soon as the money is paid to the agent. *Id.*

See LIMITATION OF ACTIONS (3).

Ratification, see LANDLORD AND TENANT (1).

PRISONS—See CRIMINAL LAW (8).

PUBLIC POLICY—See CONTRACTS (1); FRAUD (8).

QUIETING TITLE.

Necessity of notice on vacating decree, see JUDGMENT (1, 2).

RAILROADS.

1. A cattle guard, so narrow that it does not fill the space necessary to be left between the "glance fences" to allow passage

RAILROADS—Continued.

of the trains, does not comply with the statute though it is of a pattern approved by the railroad commissioner. *Johnson* v. *Detroit, etc., R. Co.*, 287.

2. Where, in an action for injuries at a railroad crossing, plaintiff heard the puffing of an engine before he started across the track, but, his view being obscured, he was advised by another, whose experience in railroading was, but whose opportunity for observation was not, superior to his own, that the puffing he heard proceeded from an engine on another track, whereupon plaintiff started to cross, he was not guilty of contributory negligence, as a matter of law, in not waiting until certain that the puffing was not from an engine approaching on defendant's track. *Coffee* v. *Pere Marquette R. Co.*, 378.

3. Where plaintiff, approaching a railroad crossing where his view was entirely obstructed, stopped, when only 30 feet from the track, until satisfied that it was safe to proceed, he was not guilty of contributory negligence, as a matter of law, in not stopping again, in addition to continuously listening, before driving on the track. *Id.*

4. Where plaintiff's view of a railroad crossing was entirely obstructed by a building and a freight car, and, as he was about to cross the track, other men were standing in front of him, who were in a position to have seen the approaching engine by which plaintiff was struck, but they said nothing to warn plaintiff of his danger, he was not guilty of contributory negligence, as a matter of law, in failing to ask such persons whether it was safe to cross the track. *Id.*

See MASTER AND SERVANT (1); NEGLIGENCE (3).

Condemnation of highway across tracks, see EMINENT DOMAIN (2).

RESCISSION OF CONTRACT—See VENDOR AND PURCHASER.

SALES.

1. In an action for the price of goods sold, where defendant claimed they were sold to a corporation of which he was manager, plaintiff's books of account, showing that the goods were charged to the defendant individually, with evidence that defendant knew they were so charged and made no objection, are admissible. *Love* v. *Ramsey*, 48.

2. Where a buyer accepts goods supplied on a contract he is bound to pay the contract price for them, and cannot limit the seller's recovery to their actual value. *Brown* v. *Harris*, 372.

3. Circumstances attending a sale and delivery of shingles examined, and *held*, that by receiving and unloading them into his yard and selling from them and making no claim for defects until nearly a month after their receipt, the buyer accepted them and could not thereafter claim that they were not of the quality ordered. *Geo. D. Sisson Lumber, etc., Co.* v. *Haak*, 383.

SALES—Continued.

4. A written order for goods, though not formally accepted, becomes a binding contract on delivery and receipt of the goods described. *National Cash Register Co.* v. *Dehn*, 406.

5. Where cash registers were sold under a contract providing that they should remain the property of the seller until all the installments of the purchase price should be paid, and that, if the buyer should fail to make the first payment, or execute notes for the deferred payments as agreed, the entire price should become due, the seller was entitled, on refusal of the buyer to accept the machines, to recover the entire price, and was not restricted to an action for damages for breach of contract. *Id.*

6. In an action by the seller to enforce a contract for the sale of goods the burden is on plaintiff to show that the goods tendered complied with the contract. *McCall Co.* v. *Jacobson*, 455.

7. Plaintiff, who manufactured oils of various kinds, which were stored in tanks and drawn therefrom for shipment to customers, sold oil to defendant by a contract calling for a certain number of barrels, four different kinds of oil being specified, but no amount of each kind being called for, and delivery was to be made from month to month, the contract calling for a minimum and maximum number of car loads each month. *Held*, that, no oil having been identified and set apart as defendant's, no title to any oil passed to him. *Kellogg* v. *Frohlich*, 612.

8. Where the purchaser under such a contract refused to accept the goods, and the seller sued for the damages, alleged to be the difference between the contract price and the price at which the seller was forced to resell, no notice of resale was necessary, the measure of damages being the difference between the contract and market price at the time of breach. *Id.*

9. A contract for the sale of a number of barrels of oil required shipment to be made of from one to three car loads each month between specified dates, as ordered by the buyer. The seller, after urging the buyer to comply with his contract by giving orders for shipment, wrote that he would prefer to have shipping directions, but that unless he received them it would be necessary for him to ship the oil without notice. Thereafter the seller shipped one car load, which was paid for, but the buyer made no reply to the letter. *Held*, in an action for the buyer's breach of contract, that plaintiff had not assumed to deliver all the oil, plaintiff's letter having varied the terms of the contract, on which variation defendant could not rely in the absence of acquiescence. *Id.*

10. Where plaintiff sold defendant a number of barrels of oil, the contract calling for payment 30 days from date of invoice, and defendant refused to take the oil within the time provided for by the contract, his subsequent offer to take all the oil on the terms provided for in the contract was not an offer that plaintiff was under any obligation to accept. *Id.*

SALES—Continued.

11. Plaintiff, in an effort to sell a hay loader to defendant, warranted that it would do certain work. Defendant declined to purchase the machine, but afterwards the matter was again taken up, and the machine was ordered. *Held*, that it was a question for the jury whether the original warranty entered into the contract of sale as finally made. *Powers* v. *Briggs*, 664.

12. In an action for the price of a hay loader, rejected on account of breach of warranty, circumstances examined, and *held*, that the delay in returning the machine was not, as a matter of law, unreasonable. *Id.*

13. Where plaintiff, a manufacturer of plows, used the same blank form to create sales agencies and for sales to the trade, an indorsement on the blank that plaintiff retained title to the goods until paid for was not a part of a contract for the sale of goods to defendant's assignor, providing for absolute payment at specified dates, which both parties must have understood would be after the purchaser would have sold most of the goods in the due course of trade, and which did not qualify the buyer's right to make sales in any manner satisfactory to himself, though it also contained a provision that the buyer recognized as lawful and binding "all conditions and agreements on this sheet." *Oliver Chilled Plow Works* v. *Dolan*, 668.

SAVING QUESTIONS FOR REVIEW.

1. Error in respect to nonessential matters in stating plaintiff's claims is not available to defendant on error, where he did not direct the court's attention to the misstatement at the time, and before the case was submitted to the jury. *McDonald* v. *Smith*, 213.

2. By failing to object to the introduction of testimony, its incompetency, under section 10212, 3 Comp. Laws, because relating to a transaction with a deceased person, is waived. *Howatt* v. *Green*, 289.

3. The objection that evidence admitted on behalf of defendant denied allegations in the declaration which they had by their pleadings admitted to be true cannot be raised for the first time on error. *Alderton* v. *Williams*, 296.

4. Where, in a case tried to the court without a jury, defendant requests no finding of fact or law, and notes no exception to the decision of the judge on the main question in the case, that question is not open to review by defendant. *Employers' Liability Assurance Corp.* v. *Grand Rapids Bridge Co.*, 351.

5. Where an insurance company claims that insured's acceptance of the policy estops him from claiming that the application is a part of the contract, an exception to the introduction of the application in evidence fairly raises the question for review. *Id.*

6. A mere objection and exception to an unresponsive answer is ineffective to preserve a party's rights. He should move to

SAVING QUESTIONS FOR REVIEW—Continued.

strike it out and object and except if his motion is denied. *Brown* v. *Harris*, 372.

7. Where, in a case tried to the court, without a jury, there are no findings of fact or law, the sufficiency of the evidence to support the judgment cannot be reviewed. *McDonell* v. *Union Trust Co.*, 386.

SCHOOLS AND SCHOOL DISTRICTS.

1. Where a school district asserted its right to remove a schoolhouse on leased premises within five days after closing school in such house, and before it had ceased exercising a right of possession over the same, the subsequent removal of the building within a reasonable time thereafter was within its rights, and the circumstances did not warrant any inference of abandonment by the school district of its right to the schoolhouse. *Hayward* v. *School District No. 9 of the Township of Hope*, 539.

2. Under section 4673, 2 Comp. Laws, providing that no district shall build a frame schoolhouse on any site for which it has not a title in fee, or a lease for 50 years, without securing the privilege of removing the schoolhouse, the owner of premises, leased for 50 years for school purposes, is not entitled to the schoolhouse, after the termination of the lease, merely because of the absence of an express reservation of title in the school district. *Id.*

SPECIFIC PERFORMANCE.

1. A deed was executed by some of the vendors in an oral executory contract to convey the land, and delivered to the common agent of the parties, on the understanding that he should procure the signature of the remaining vendor, who was to receive no consideration, and the consideration then on deposit in the agent's hands was to be paid to the others. The remaining vendor refused to execute the deed, whereupon the purchaser tendered the consideration to the others, waiving the signature of the vendor who refused to execute. *Held*, that the tender did not take the executory contract out of the statute of frauds, so as to support a bill for specific performance by the purchaser. *Wisconsin, etc., R. Co.* v. *McKenna*, 43.

2. Where a contract between a railroad company and a landowner for a conveyance of a right of way over land was executory and within the statute of frauds, the mere entry on the land by the company with the consent of the owner, and the excavation of a small quantity of earth, was not a sufficient part performance to warrant specific performance at the suit of the company, condemnation being available. *Id.*

3. On a bill for specific performance of a contract for the sale of land, defended on the ground of fraud in obtaining defendant's signature to the contract, evidence examined and *held*, sufficient to support the decree for complainant. *Harris* v. *Brandenburg*, 382.

STATE OIL INSPECTOR—See TRIAL (1).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

The construction placed upon a statute by the courts of the State from which it is copied will be followed by this court. *Kaufman* v. *Leonard*, 104.

STREET RAILROADS.

1. An ordinance regularly passed and accepted is necessary, under section 6446, 2 Comp. Laws, to grant the right to build and operate a street railway in the streets of a city, but after a city has thus granted the right to operate a car line, subject to a provision that the location of poles, side tracks, spurs, and switches shall be under the control of the council, it may, by a mere motion adopted by the council, authorize the company to change the location of a curve in the track connecting a street with a cross street, since the duty of the council in this respect is ministerial and might be delegated to a committee or a city officer. *Mannel* v. *Detroit, etc., Ry.*, 106.

2. A motorman who runs his car on a dark, stormy night twice as fast as, under his own testimony, he should, to enable him to control it and prevent accidents, and depends on his gong to warn travelers, is negligent. *Ablard* v. *Detroit United Railway*, 248.

3. Street railway companies do not possess an exclusive right to that portion of the highway covered by their tracks, but the ordinary traveler has a right to use every portion of the highway, including the space between the rails, until it becomes necessary for him to yield the track to the cars. *Id.*

4. In using the track of a street railway, it is the duty of the traveler to maintain such a reasonable watchfulness for the approach of a car as, under the circumstances of the particular case, an ordinarily prudent man would. He is not required to be constantly looking back, but has a right to rely to some extent upon the exercise of proper caution on the part of the motorman in controlling his car in accordance with his legal duty and giving notice of its approach. *Id.*

5. It is not negligent per se for a traveler to drive his team along the track of a street railway in the night-time, though there is room in the street for him to drive off the track out of danger from cars. *Id.* 249.

6. Whether plaintiff, injured by a street car approaching from the rear and colliding with his moving van while driving astride the track, was negligent, *held*, properly submitted to the jury. *Id.*

See CARRIERS (1, 2).

Use of street as additional servitude, see EMINENT DOMAIN (1).

STREETS—See HIGHWAYS AND STREETS.

SUBROGATION.

1. Where at the time a mortgage was executed by deceased he had contracted a secret marriage with defendant, who did not join in the mortgage, but the proceeds of the loan were used in part to take up two existing valid mortgages, the mortgagee therein was subrogated to the liens of the former mortgages, defendant was entitled to dower in the surplus arising after payment of the amount covered by such prior mortgages and the remainder of the fund belonged to the mortgagee. *Hall* v. *Marshall*, 123.

2. Complainant, having been fraudulently induced to advance money on worthless security, which was used to discharge a mortgage on defendant's land, is entitled to be subrogated to the rights of the mortgagee in the discharged mortgage. *Coulter* v. *Minion*, 200.

TAXATION.

1. Under section 3834, 1 Comp. Laws, where the only business a corporation transacts at the place named as its office in its articles of incorporation is the annual meeting of stockholders, its residence for the purpose of taxation is the place where its principal business is conducted, such as receiving and disbursing its funds. *Teagan Transp. Co.* v. *Detroit Board of Assessors*, 1.

2. The proviso of section 3834, 1 Comp. Laws, that "the personal property of all corporations of the State for the purpose of maritime commerce and navigation shall be assessed only in the city, village, or township which is stated in their articles of association to be the location of their general office for business," attempts to confer on such corporations the special privilege of fixing the situs of their property for the purpose of taxation, in violation of section 11, of article 14, of the State Constitution, requiring a uniform rule of taxation. *Id.*

3. The right to recover illegal taxes paid under protest given by Act No. 130, Pub. Acts 1901, may be assigned and the assignee may recover though he is a stranger to the tax roll. *Laing* v. *Township of Forest*, 159.

4. That the illegality which justifies recovery consists of fraudulent alterations in the tax roll by the supervisor, does not make the action one for fraud and deceit so as to render it unassignable. *Id.*

5. A notice of the sale of land for taxes, personally served upon the owner, is good though addressed to him as mortgagee instead of owner. *Bradley* v. *Williams*, 230.

6. The statute does not require a tax sale purchaser to exhibit to the owner with his notice a certified copy of his deed and a certificate that the report of sale has become absolute. *Id.*

7. Where, pending certiorari to review a mandamus directing a supervisor to spread certain taxes upon his assessment roll for a certain year, the time when the tax could be spread on the roll for that year elapsed, the Supreme Court, on sustaining the legality of the tax, will direct that the assessment be

TAXATION—Continued.

spread on the roll for the ensuing year. *Canal Construction Co.* v. *Schlickum*, 246.

8. The fee of a strip of land which the maker of a plat reserves as a private way is properly assessable to him, though the lot owners have a right of way over it as an appurtenance to their lots which is assessed to them as a part of the value of their lots. *Lever* v. *Grant*, 273.

9. Under section 173 of the charter of Detroit (1893), a tax deed is prima facie evidence of the regularity of all the tax proceedings. *Id.*

10. Act No. 154, Pub. Acts 1899, giving the board of State tax commissioners authority to make a general and also a special review of assessment rolls, is not in conflict with the provisions of the charter of Bay City. *Bialy* v. *Bay City*, 495.

11. The board of State tax commissioners has the power, at any time prior to the equalization of State and county taxes, to review the assessments, and add to the rolls assessments against persons omitted therefrom, or property omitted, provided the same is done according to the provisions of the statute. Act No. 154, Pub. Acts 1899. *Id.*

12. After tax rolls have been passed upon by local boards of review, and are properly certified by the members thereof, no change can be made by the board or any assessing officer. *Id.*

13. A notice of a general and special review of the assessment rolls of certain cities and townships by the board of State tax commissioners examined, and *held*, in form and substance a compliance with the statute. *Id.* 496.

14. The fact that a hearing on a general and special review was set for the same date was not objectionable. *Id.*

15. A change in the amount of the personal property assessment of a taxpayer who was not named in the order was invalid. *Id.*

16. Where it appears from the record made by the board of State tax commissioners that a notice of a general and special review was given for the 19th of September, and the reviews were certified by the board to have occurred on September 19th and October 6th, the certification is insufficient, for uncertainty, and the changes made by the board in assessments are invalid. *Id.*

17. A township board has power to raise money for highway purposes only when the electors have failed to do so after the matter has been brought to their attention. *F. & F. Lumber Co.* v. *Township of Thompson*, 698.

Adverse possession against tax title, see ADVERSE POSSESSION (8, 9).

Public aid to private enterprise, see MUNICIPAL CORPORATIONS (11).

TELEGRAPHS AND TELEPHONES.

Where a telegram is sent to one person in care of another, delivery to the latter is sufficient. *Sweet* v. *Western Union Telegraph Co.*, 322.

TENANCY IN COMMON.

1. Though the deed to plaintiff in ejectment from several tenants in common was not properly executed by some of them, he was, as against defendant, who had no interest, entitled to recover the entire premises, under Act No. 55, Pub. Acts 1903. *Lamb* v. *Lamb*, 167.

2. Where a tenant in common conveys the entirety of the property by warranty deed to bona fide purchasers, who go into possession after an examination of the title, and then by like deed convey to others, who go into possession, there is an ouster of the cotenants sufficient to set the statute of limitations in motion as a basis for title by adverse possession. *Brigham* v. *Reau*, 256.

TORTS.

Waiver, see ASSUMPSIT (5).

TOWNSHIPS.

Deputy treasurer, see EMBEZZLEMENT (1, 2).

TRADE UNIONS.

Where, on an application for injunction to restrain a labor union from interfering with relator's workmen, the bill and affidavits established a case showing an interference with relator's rights by picketing its premises, and by making threats against its employés, and actual violence towards them, it was improper to deny temporary relief until defendant had been brought into court on an order to show cause. *Ideal Manufacturing Co.* v. *Wayne Circuit Judge*, 92.

TRESPASS.

1. One not in possession of the property cannot maintain trespass quare clausum fregit. *Hayward* v. *School District No. 9 of the Township of Hope*, 539.

2. Where the holder of a tax title on land subsequently conveyed to plaintiff agreed with defendant, an adjoining owner, that he would build his share of a partition fence "when his tax title was cleared up," but such title was subsequently declared void, the holder's failure to build any part of the fence was no defense to an action by plaintiff, the grantee of the owner, to recover for damages caused by the trespass of defendant's sheep. *Hammond* v. *Tuttle*, 699.

See LANDLORD AND TENANT (7).

TRIAL.

1. On the trial of an action for damages resulting from an explosion caused by adulterated kerosene oil sold by defendant, where a deputy oil inspector has testified as a witness for de-

TRIAL—Continued.

fendant, a rigid cross-examination is justified, and comment on his loose method of conducting inspections is within the proper bounds of argument. *Stowell* v. *Standard Oil Co.*, 19.

2. In an action on a building contract, after the evidence was in, court and counsel engaged in a colloquy as to allowing the written specifications to go to the jury, in which defendant stated that he wished them instructed that the writings did not constitute all the contract, to which the court replied, "Certainly this writing is not the complete contract; the jury will so understand it." Defendant also stated that he would ask the court to charge as to the implied provision that work done under the contract "must be done in good workmanlike manner," and the court answered, "The jury will so understand it." On the following day the jury were sent out without instructions, defendant's requests having been refused. *Held*, that there was no compliance with sections 10243–10246, 3 Comp. Laws, making the jury judge of the facts, and requiring the court to instruct them as to the law of the case. *Simons* v. *Haberkorn*, 130.

3. Proposed findings of fact, which are not statements of ultimate facts but are rather recitals of proofs, are objectionable in form. *Fairfield* v. *Hart*, 136.

4. Testimony by defendant that he agreed to pay plaintiff, an architect, the "usual commission" for certain plans, if accepted, does not support a finding of fact that defendant agreed to pay the usual commission, the plans not being accepted. *Id.*

5. A finding of fact that defendant agreed to pay the "usual commission" for certain plans does not support a conclusion of law that plaintiff is entitled to recover a specific sum, though there is evidence undisputed that that sum is a fair price for the plans furnished. *Id.*

6. Where there is no claim by exception or assignment of error that the conclusion of law is not supported by the findings of fact, and there is evidence undisputed that the amount of the judgment was a fair price for the services rendered, failure of the evidence to support a finding that defendant agreed to pay the usual price for such services is immaterial. *Id.*

7. Where the jury had had some experience in court during the term at which the case was tried, and could be presumed to know that no juror should find a verdict not based on his own convictions, derived from the whole case, and the court charged them to engage in no discussion that would tend to prevent their agreeing, consider the evidence and the facts, and reach a verdict, if they could, such as should thereafter satisfy their individual consciences, it was not error to refuse a request that it was the duty of the jury to consider the testimony, and to reconcile their opinions if able to do so, but that no individual was required to surrender his individual opinion. *Shaller* v. *Detroit United Ry.*, 171.

8. A charge that the jury should give such weight as they saw fit to defendant's failure to take the stand, while not strictly ac-

TRIAL—Continued.

curate, was *held* not to be erroneous when considered with a part of the charge, immediately following, which placed on plaintiff the burden of establishing his claim by a fair preponderance of evidence. *McDonald* v. *Smith*, 214.

9. A judgment will not be reversed for the failure of the court to direct the attention of the jury to specific items of damages as to which the evidence was conflicting, where no specific instruction thereon was asked. *Alderton* v. *Williams*, 297.

10. The refusal of a proper request is not reversible error where its substance was given in others. *Sweet* v. *Western Union Telegraph Co.*, 322.

11. Instructions on the use of expert testimony examined, and *held*, argumentative and open to criticism as containing a protest against established rules of evidence. *Buxton* v. *Emery*, 341.

12. The entry of the verdict in form as in assumpsit in an action on the case, being a clerical error, may be corrected at the next term. *Reynolds* v. *Cavanagh*, 388.

13. A verdict may be directed for a party having the burden of proof only when the testimony to establish his claim is undisputed; and in this respect testimony cannot be considered as undisputed because no witness directly denies it, since cross-examination may cast doubt upon it, or other testimony may dispute it by indirection. *Wilson* v. *Royal Neighbors of America*, 423.

14. An instruction on the credibility of a party as a witness which improperly assumes that he was guilty of perjury in a prior suit is reversible error. *Place* v. *Place*, 509.

15. A judgment will not be reversed for error which would have been corrected at the time but for appellant's failure to call the court's attention to it. *Id.*

16. Where there was no occasion for reference to the several counts of the declaration in the charge, and the issues were fairly presented without such reference, there was no error in overruling a request to charge that no recovery could be had on a particular count to which a demurrer had been sustained. *City of Battle Creek* v. *Haak*, 514.

17. That the jury ascertained the average of their views as to the amount of damages will not invalidate their verdict where there was no previous agreement to abide the result. *Id.* 515.

18. Where the verdict rendered was not in excess of the aggregate of the items of the bill of particulars, it was not objectionable on the ground that there was no tangible evidence as to any definite amount having been overcharged, and that it could not have been reached by any proper method of computation. *Id.*

TROVER AND CONVERSION.

1. Where defendant ordered some stereotype metal from another, with whom it had an understanding that the price

TROVER AND CONVERSION—Continued.

thereof should be applied on the latter's account with defendant, and the latter transferred the order to plaintiff, which had no knowledge of the understanding referred to, and shipped the metal to defendant, accompanied with a cash invoice, whereupon defendant immediately melted the metal, supposing, in good faith, that it was its own, under the special arrangement with the person from whom it had ordered it, but afterwards, on learning the terms upon which the metal had been shipped by plaintiff, repudiated the entire transaction, and insisted that it had no contract relations with plaintiff, its conduct constituted an unlawful conversion, for which trover would lie without any prior demand or refusal. *Great Western Smelting & Refining Co.* v. *Evening News Ass'n*, 55.

2. Where attorneys, who had been law partners, were sued for the wrongful conversion of a judgment recovered by them during their partnership, and they defend on the ground that they held a lien on the judgment for their services and that all over their lien has been tendered, the date of the dissolution of the partnership with reference to the time of collecting the judgment and disposing of its proceeds is immaterial. *Reynolds* v. *Cavanagh*, 387.

See ASSIGNMENTS; EXEMPTIONS.

TRUSTS.

1. A parol contract by which a part owner of land was authorized by other part owners to sell the same, and apply a part of the proceeds to the payment of a debt owed by himself and another party to the contract, is not, after performance, within the statute of uses and trusts. Sections 8829, 8833, 9509, 3 Comp. Laws. *Lasley* v. *Delano*, 602.

2. On a bill to set aside a deed as obtained by fraud, or to impress a trust upon the land conveyed, evidence considered, and *held*, insufficient to support a finding that the grantee promised at the time of the conveyance to make a certain payment to the grantor's daughter. *Sheldon* v. *Carr*, 654.

3. A parol agreement by the grantee of land to pay a certain sum of money to the grantor's daughter when the land should be again sold gives rise to no trust enforceable in equity by the heirs of the daughter. *Id.*

See BILLS AND NOTES.

VARIANCE—See ASSUMPSIT (3).

VENDOR AND PURCHASER.

Where, in purchasing standing timber, the purchaser used artifice to prevent an investigation by the vendors, and by positive assurances of fair dealing induced them to accept his statements both as to quantity and value, and to sell him the timber at about one-third its actual value, such statements were not mere expressions of opinion, but constituted such

VENDOR AND PURCHASER—Continued.

fraud as entitled the vendors to rescission. *Garr* v. *Alden*, 440.

See FRAUDS, STATUTE OF (3); GIFTS.

Bona fide purchaser, see JUDGMENT (1).

VERDICT—See TRIAL.

WAIVER.

Of defects in declaration by plea, see FRAUD (2).

Of defects in garnishment proceedings, see GARNISHMENT.

Of error, see APPEAL AND ERROR (24).

Of fraud, see FRAUD (20).

Of issues raised by demurrer, see PLEADING (3).

Of objection to testimony, see SAVING QUESTIONS FOR REVIEW (2).

Of right to insist that application is part of policy, see INSURANCE (1).

Of variance, see PLEADING (2).

WAREHOUSEMEN.

Where a warehouseman allows goods to be taken away without payment of storage and repair charges, and they are subsequently returned to him for storage, he can retain them until he is paid in full. Section 5031, 2 Comp. Laws. *Kaufman* v. *Leonard*, 104.

WATERS AND WATERCOURSES.

1. In an action for injuries to plaintiff's land by water from defendants' mill race, the right under a deed and by prescription to do the acts complained of are affirmative defenses, which, under Cir. Ct. Rule No. 7, cannot be shown under the general issue. *Scott* v. *Longwell*, 12.

2. The owner of a mill race must use care "proportionate to the danger" to prevent the water from escaping and percolating through the banks to the injury of adjacent property owners. *Id.*

3. Even if it be the duty of the owner of property adjacent to a mill race to construct a drain on his property to prevent injury from percolation of the water through the banks, he is only bound to use ordinary care. *Id.*

4. A count against a booming company for damages for injury to crops of a riparian proprietor by flooding, examined in connection with the evidence introduced thereunder, and *held*, that there was a material variance justifying an instruction for defendant as to that count. *Rickels* v. *Log-Owners' Booming Co.*, 111.

5. Where, in an action against a booming company for damages by flooding, plaintiff, by his declaration, limits himself to the

WATERS AND WATERCOURSES—Continued.

positive wrongful acts of defendant, makes no complaint of any acts of omission, and does not allege that defendant was guilty of continuing unlawful obstructions, it is not error to instruct that defendant is not responsible for the acts of its predecessors, but only for its own acts. *Id.*

6. The court may properly instruct, in such a case, that defendant had a right to close any artificial openings, basins, or channels, provided that it did not by such acts crowd the natural channel so that it could not have its ordinary free flow to the lake. *Id.*

7. Where plaintiff in an action for flooding does not sue as a riparian proprietor, but his complaint is for an obstruction of his drain by positive acts of defendant beginning in 1901, it is immaterial whether the river prior to 1893 flowed naturally in a stream of a certain width. *Id.*

8. In such case the jury are properly instructed that plaintiff is entitled to recover if defendant crowded the natural channel or changed or obstructed the natural flow of the water so as to impede or hinder the natural drainage of plaintiff's land, and thereby injure his crops. *Id.*

See INJUNCTION (2).

Adverse possession of riparian right, see ADVERSE POSSESSION (1).

WILLS.

1. Evidence on a will contest examined, and *held*, sufficient to require submission of the question of undue influence to the jury. *Buxton* v. *Emery*, 341.

2. The burden of proving mental capacity to make a will is on the proponent, and it is error not to so charge. *Id.*

3. Instructions as to mental capacity examined, and *held*, erroneous as placing the burden of proving its lack on contestant. *Id.*

Claim against estate, see WORK AND LABOR.

WITNESSES.

1. A question to an expert witness calling for an opinion on a state of facts not known to him, or stated hypothetically in the question, is properly excluded. *Stowell* v. *Standard Oil Co.*, 18.

2. A party may maintain the truthfulness of his own testimony although it is contradictory to the testimony of his witnesses. *McDonald* v. *Smith*, 213.

3. In a suit to remove a cloud from complainant's title, circumstances *held* to discredit the uncorroborated, though not directly contradicted, testimony of defendant's mediate grantor as to a lost lease. *Howatt* v. *Green*, 289.

4. It is not reversible error to overrule an interrogatory to a witness containing two questions where everything material and competent might have been obtained from the witness by other questions. *Wilcox* v. *Wilcox*, 365.

WITNESSES—Continued.

5. A claimant against the estate of a decedent for money expended in his behalf may testify as to expenditures about which deceased had no knowledge, but not as to those which he knew about. *Id.*

6. It is not error to restrict cross-examination where no reason for continuing it is apparent and counsel discloses none. *Brown* v. *Harris*, 372.

7. A husband cannot testify to conversations between himself and decedent which are relied upon as forming the contract between his wife and decedent on which the wife bases a claim against decedent's estate. Act No. 30, Pub. Acts 1903. *Finn* v. *Sowders' Estate*, 623.

8. An heir suing to set aside a deed made by his grandmother, or to enforce a trust on the property granted by it, cannot testify to conversations with her concerning the deed and the consideration moving her to execute it. Section 10212, 3 Comp. Laws. *Sheldon* v. *Carr*, 654.

See TRIAL (14).

Transactions with person since deceased, see SAVING QUESTIONS FOR REVIEW (2).

WORK AND LABOR.

One who accepts the terms of a will, and retains the property granted thereby as compensation for services rendered testator, cannot make a further claim against the estate for compensation. *Finn* v. *Sowders' Estate*, 623.

4998 034