MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

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ALFRED J. MURPHY AND JAMES PHELAN.

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OCTOBER TERM, 1904.*

HAMPEL *v.* DETROIT, GRAND RAPIDS & WESTERN RAILROAD CO.

1. NEGLIGENCE — IMPUTED NEGLIGENCE — INFANTS—RAILROADS — ACCIDENT AT CROSSING.
   The negligence of the driver of a vehicle is not imputable to an infant riding with him at his invitation so as to preclude recovery for her negligent killing by a railroad company at a crossing.
2. RAILROADS—ACCIDENT AT CROSSING—GROSS NEGLIGENCE.
   Evidence in an action against a railroad company for injuries arising from a crossing accident examined, and *held* that nothing was presented from which the company could be charged with such gross negligence as to make the negligence of the driver of the vehicle immaterial.

Error to Mecosta; Palmer, J. Submitted April 12, 1904. (Docket No. 40.) Decided October 18, 1904.

Case by Julius Hampel, administrator of the estate of Amelia Drager, deceased, against the Detroit, Grand Rapids & Western Railroad Company, for the alleged negligent killing of plaintiff's intestate. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

Joseph Barton and *Walter W. Drew*, for appellant.

Frederick W. Stevens (*Charles McPherson*, of counsel), for appellee.

HOOKER, J. August 23, 1899, Amelia Drager, who would have been 14 years old, had she lived until the 3d day of the following October, was killed by one of defend-

* Continued from Vol. 137.

ant's trains at a highway crossing. In December, 1901, this suit was commenced. No witnesses were sworn on the part of the defendant. After all the witnesses were sworn on the part of the plaintiff, the circuit judge directed a verdict in favor of defendant. The case is brought here by writ of error.

The accident occurred near Beghold's mill, which stands about 75 feet north of the highway, and 40 feet east of the railway track. At this point the railway track runs north and south, and the highway east and west. On the south of the highway, and west of the track, was a large pile of wood, partly on the railroad right of way and partly in the highway. It was 6 to 8 feet high, and obscured the view of the train coming from the south when one was traveling the highway from the west, though one could see the smoke from an approaching locomotive. The girl and her sister lived a half mile west of the crossing. Nine months in the year she attended school. To reach the schoolhouse, she crossed the railroad track. The school building was east of the track. Upon the day of the accident she and her sister were going east from home, carrying a bundle. John Fenning, who was driving a single horse before a buggy, overtook them, and invited them to ride. They accepted the invitation. The record discloses that, just before getting to the wood pile, Fenning looked for a train, and, seeing none, continued to travel toward the crossing, paying no further attention to the railroad, or to the trains that might be approaching. This was doubtless because, as he expressed it, he did not know any train was due. When the horse got within a few feet of the track, a train appeared, the horse turned to the left and reared, and the wheel of the buggy struck a log which projected into the highway about four feet. The inmates of the buggy were thrown toward the train, and Miss Drager was killed.

It is claimed no signals were given for the crossing. The testimony of the witnesses for the plaintiff is contradictory upon that point, one of them swearing she heard

the whistle; and, were it not for other questions in the case, the testimony as to whether the signals were given should have been submitted to the jury as a question of fact. An important question in the case is whether Mr. Fenning was negligent in approaching the crossing as he did.

It would not profit any one to set out the testimony in detail, but the proof is overwhelming that he was so negligent, that, if he was suing for damages, it would have been the duty of the judge to direct a verdict in favor of the defendant.. See *Lake Shore, etc., R. Co.* v. *Miller*, 25 Mich. 274, and notes, and the many cases cited there; *Freeman* v. *Railway Co.*, 74 Mich. 86; *Grostick* v. *Railroad Co.*, 90 Mich. 594; *Gardner* v. *Railroad Co.*, 97 Mich. 240, and the cases there cited; *Stewart* v. *Railroad Co.*, 119 Mich. 91; *Britton* v. *Railroad Co.*, 122 Mich. 359.

The next question of importance is whether the negligence of the driver is imputable to the plaintiff's intestate. Plaintiff's counsel concede that, had she been an adult, it would be, but earnestly and ably contend that, as she was an infant, she should not be charged with the negligence of the driver. It is urged that the doctrine of negligence rests upon the assumption that the relation of principal and agent or master and servant exists between the passenger and driver, and that, as an infant can be neither principal nor master, the doctrine cannot apply to an infant. The deceased was an infant 13 years old, in a carriage by invitation of its driver, through whose negligence, and without her fault, she was killed. Had she been an adult, his negligence would have been imputable to her, upon the fiction that he was her agent, under the doctrine of *Thorogood* v. *Bryan*, 8 C. B. 115, which is recognized as authority in this State. See *Mullen* v. *City of Owosso*, 100 Mich. 103. But this infant lacked the capacity to make him her agent, while there is not the least substance of a claim that either party supposed that such relation existed as a matter of fact.

It is said that the case is covered by *Apsey* v. *Rail-*

road Co., 83 Mich. 432, 440. The question of imputed negligence is not discussed in that case. It may be inferred that it was not raised. The decision in *Mullen* v. *City of Owosso* was carefully limited to cases of adults, by the writer of the opinion, who participated in the decision of the *Apsey Case*. In some jurisdictions the negligence of parents is imputable to children. Whatever the rule in this State may be as to children of very tender years, having no capacity to care for themselves, that doctrine is not sustained as to infants generally. See *Fye* v. *Chapin*, 121 Mich. 679, citing *Shippy* v. *Village of Au Sable*, 85 Mich. 280, and *Mullen* v. *Owosso*, supra. Here no question of the parents' negligence is raised, as in the *Apsey Case;* but, if a child is chargeable with its parents' negligence, does it follow that he should be held responsible for that of strangers at whose invitation he rides? The doctrine is at variance with the overwhelming weight of authority here and in England. If the case of *Apsey* v. *Railroad Co.*, supra, must be considered an authority for the proposition that the negligence of a driver is imputable to an infant, it should be overruled.

It is said the defendant was guilty of gross negligence, and the question of contributory negligence becomes immaterial. There is nothing in the record to indicate the case comes within the holdings of this court as to what constituted gross negligence. See *Schindler* v. *Railway Co.*, 87 Mich. 411; *Buckley* v. *Railroad Co.*, 119 Mich. 583; *Labarge* v. *Railroad Co.*, 134 Mich. 139.

Judgment is reversed, and a new trial ordered.

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

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HOFFMAN *v.* H. M. LOUD & SONS LUMBER CO.

1. SAVING QUESTION FOR REVIEW—UNRESPONSIVE ANSWER—WITNESSES.

   Reversal will not be granted because an unresponsive answer to a proper question was objectionable as hearsay, no motion having been made to strike it out.

2. SAME—RULING.

   Error assigned to the examination of a witness is unavailing where the record does not disclose that any objection was made to questions asked, or that any rulings were made with reference to which exceptions were taken.

3. TAXATION—SALES—DEEDS—PRIMA FACIE EFFECT—GRADUATION ACT.

   The graduation act of 1881 (Pub. Acts 1881, No. 229), as amended in 1882 (Act No. 7), did not destroy the prima facie effect of tax deeds issued thereafter pursuant to sales made before the passage of such acts.

4. SAME—DEEDS—RIGHT TO ASSAIL TITLE—STATUTES.

   Act No. 11, Pub. Acts 1882, did not have effect to repeal, as to titles theretofore obtained, the provision of the general tax law of 1869 (No. 169, § 164) relating to who might attack the validity of tax titles.

5. SAME—TIMBER—TROVER FOR CONVERSION.

   In trover for the conversion of timber taken from land which the plaintiff claims through tax titles, a contention by defendant, that though under the statute he cannot attack the validity of plaintiff's title as to the land, he can as to the timber, is untenable.

6. INTEREST—RATE—CHANGE OF STATUTE—HARMLESS ERROR.

   Where there have been two changes in the statutory rate of interest during the time for which interest is to be calculated, an instruction to use the middle rate is harmless to defendant where the amount so found is less than it would be under a proper computation.

ON REHEARING.

1. STATUTES—CONSTRUCTION—IMPLIED REPEALS.

   Repeals by implication are not favored, and, before it can be

said that the legislature intended to make a radical departure from the settled policy of the State, such intention must be made to appear by language that is unambiguous, and not susceptible of two constructions.

2. TAXATION—SALES—DEEDS—EFFECT—REGULARITY OF PROCEEDINGS.

The tax legislation of 1881 and 1882 did not repeal the provisions of the previous tax laws making the auditor general's deeds to unredeemed tax lands prima facie proof of the regularity of the tax proceedings.

Error to St. Clair; Tappan, J. Submitted April 12, 1904. (Docket No. 30.) Decided October 18, 1904. Motion for rehearing granted March 28, 1905. Reargued June 27, 1905. (Docket No. 2.) Former opinion affirmed July 24, 1905.

Trover by John M. Hoffman against the H. M. Loud & Sons Lumber Company and others. There was judgment for plaintiff, and defendants bring error. Affirmed.

Main J. Connine, for appellants.

Avery Bros. & Walsh and *Phillips & Jenks*, for appellee.

MOORE, C. J. This case has been here before. It is reported in 111 Mich. 156. Upon the last trial the plaintiff recovered a judgment for $2,222. The defendants have brought the case here by writ of error. The suit was commenced February 8, 1892. It is trover brought for the conversion of logs which defendants bought from one Monroe, who, plaintiff claims, cut the logs from timber on land belonging to him. It is plaintiff's claim that William H. Rix and Coolidge M. Comins obtained from the United States a patent of the land in July, 1872; that those men were partners engaged in lumbering; that their partnership ended in the spring of 1872; that it was then agreed verbally that Comins should have the timber; that he cut and removed all that was valuable dur-

ing the fall and winter of 1872 and 1873, when Rix and Comins abandoned the land, not even paying the taxes on it. The taxes were not paid for the years 1872 to 1881, inclusive, but for the taxes of each of these years the land was sold to the State. In 1882 the plaintiff bought the title of the State, obtaining a tax deed from the auditor general for the taxes of those years. In 1884 the plaintiff obtained another tax deed from the auditor general. January 20, 1886, William H. Rix deeded by quitclaim deed his interest in the land to Frank Hoffman, who conveyed the interest to the plaintiff. It is the claim of the plaintiff that in the winter of 1885 and 1886 John Monroe cut the timber into logs, and sold them to defendants, delivering them at the Au Sable river.

The defense, as stated by counsel, is:

1. That plaintiff's tax titles were void.
2. That Monroe cut the timber and sold it to the said trustees under a license from the original owners, Rix and Comins, which license inured to the benefit of defendants.
3. The statute of limitations.

The first assignment of error argued in the brief relates to the testimony of Weaver in relation to what he understood about a controversy between Monroe and Hoffman, it being the claim that this testimony was hearsay. The question put to the witness did not call for hearsay testimony, but was a proper question. His answer was not responsive. No motion was made to strike it out because not responsive, or because it was hearsay. This being the situation, we cannot reverse the cause because of the answer. See *People* v. *Howard*, 73 Mich. 12; *Baumier* v. *Antiau*, 79 Mich. 516; *Mulliken* v. *City of Corunna*, 110 Mich. 212; *Weiser* v. *Welch*, 112 Mich. 134.

Error is assigned upon the examination of the witness Annis. The record does not disclose that objection was made to the questions that the court ruled upon, or that exceptions were taken.

Error is assigned to the reading in evidence of the cross-examination of James Burton and the testimony of George

A. Loud. Previous to the trial in St. Clair county a stipulation had been made "that any testimony heretofore taken upon the trials in Iosco county, and reduced to writing by the official stenographer" might be read in evidence. We think the stipulation broad enough to cover what was done.

There are other assignments of error which relate to the admission of oral testimony. We have examined them, but do not deem it necessary to discuss them. One of the most important questions in the case is, Did the judge err in holding that the tax deeds held by plaintiff were prima facie evidence of title? The deeds are dated October 19, 1882. It is claimed that because of the amendment made to the tax law by Act No. 7, Pub. Acts 1882, the deeds were not prima facie evidence of title. It should not be forgotten that the land was sold to the State at least four times before the passage of Act No. 7. Its title under each of its sales when it was obtained was prima facie valid. We do not think the effect of the "graduation act" of 1881 (Pub. Acts 1881, Act No. 229), as amended by Act No. 7, Pub. Acts 1882, resulted in doing away with the prima facie effect of these deeds. See *Tillotson* v. *Saginaw Circuit Judge*, 97 Mich. 585; *Harding* v. *Auditor General*, 136 Mich. 358.

The next important question is, Did the court err in holding that defendant could not attack the tax title of plaintiff?

Section 1166, 1 How. Stat. (Laws 1869, Act No. 169, § 164), provides:

"No person shall be permitted to question the title acquired by such auditor general's deed, without proving that he, or the person through whom he claims title, had title to the land at the time of the sale thereof for nonpayment of taxes, or subsequently, which title was acquired from the United States or from this State."

It is said plaintiff cannot invoke this provision of law because he did not purchase until seven months after it had been repealed by Act No. 11, Pub. Acts 1882. We have

already said the State got a title long before Act No. 11, Pub. Acts 1882, was passed. If this was not a protection to the plaintiff, does the repealing clause have the effect for which defendant contends? It reads:

"The same is hereby repealed so far as relates to future assessment of taxes and the steps to collect the same. They remain in force only for the completion of all proceedings heretofore begun for the collection of taxes, except as otherwise provided by law, and for the protection of all rights gained thereunder and conveyance of land heretofore sold, or that may hereafter be sold, and all actions commenced and now pending under the provisions thereof."

We do not think this had the effect to do away with the provision relating to who might attack the validity of the tax title. See *Tillotson* v. *Saginaw Circuit Judge*, 97 Mich. 585.

Counsel says, even though the section is in full force when the title to the land is in issue, it does not apply where the title to the timber taken from the land is in issue, and therefore defendant should have been permitted to attack these titles. If counsel is right in this contention, a person owning land chiefly valuable for timber would have a title unassailable by one claiming title, but, if the same person became a trespasser and remover of the timber, he could attack the title. A statement of the proposition is its own answer.

There are other assignments of error, which we have examined, but the only further question calling for discussion relates to the rate of interest. The jury computed it at 6 per cent. Counsel says that because of the provisions found in Act No. 207, Pub. Acts 1899, which reduces the legal rate of interest to 5 per cent., it should have been figured at that rate. The logs were converted in the winter of 1885 and 1886. The verdict was rendered in April, 1903. The legal rate was 7 per cent. until October, 1891, when it became 6 per cent., and so remained until September, 1899, when it became 5 per cent. If the computation

had been made at these rates during these several periods of time, the amount would have been larger than the verdict which was rendered, so that defendant was not harmed. See 16 Am. & Eng. Enc. Law (2d Ed.), p. 1060.

Judgment is affirmed.

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

ON REHEARING.

MOORE, C. J. This case was here and is reported in 111 Mich. 156. It was here again and is reported ante, 5. Upon the application of the defendants, a rehearing was ordered. A reference to the two opinions which have been filed in the case will make a detailed statement here unnecessary.

The question about which this court was in doubt when it ordered the rehearing, and to which the arguments have been principally directed is, Was this court in error in sustaining the ruling of the trial court that the tax deeds offered by plaintiff were prima facie evidence of title? The deeds were in form as follows:

"This indenture made the 19th day of October in the year of our Lord one thousand eight hundred and eighty two, between Hubert R. Pratt, deputy auditor general of the State of Michigan, of the first part, and John M. Hoffman, of Port Huron, Michigan, of the second part, *Witnesseth:*

"That, whereas in pursuance of the provisions of law, the said party of the second part did on the 19th day of October, A. D. 1882, become the purchaser of the rights of the State in and to the following described lands situate in the county of Alcona and State of Michigan in said State which were bid off to the State for the taxes assessed thereon for the year 1872–3–4–5–6–7–8 and 1879, to wit: south half of the southwest quarter of section 36, in town 27 north of range 3 east, containing 80 acres more or less.

"And whereas the said party of the second part obtained a certificate from the auditor general for the purchase of the above described lands according to law, and paid to the State treasurer upon such certificate the sum of $43.92,

being the amount of purchase money thereof as provided by law, which certificate has been presented and surrendered to the said auditor general.

"Now therefore this indenture witnesseth that the said Hubert R. Pratt, deputy auditor general of the State of Michigan, in the name of the people of the State and by virtue of the authority in him vested by the laws thereof, in consideration of the premises and the payment of the purchase money above mentioned, the receipt whereof is hereby confessed and acknowledged, does by these presents remise, release, and quitclaim unto the said John M. Hoffman, party of the second part, and to his heirs and assigns forever all the rights acquired by the State in virtue of the original sale or sales, to the State in the premises above described, subject to all taxes duly assessed thereon.

"In testimony whereof the said Hubert R. Pratt, deputy auditor general as aforesaid, has hereunto set his hand and seal the day and year first above written.

"HUBERT R. PRATT, [L. S.]
"Deputy Auditor General
"of the State of Michigan."

"Signed, sealed, and delivered in presence of
"ABRAM HARNLEY,
"EDITH A. DEGUE."

The deed was duly acknowledged, and on its margin was printed the following: "No. 139, one certificate, Act 229, Laws of 1881, 20869, State tax land deed."

It is conceded that had the purchaser at the tax sale been an individual, instead of the State, his deed would have been prima facie evidence of title. It is insisted, however, on the part of defendants, that plaintiff obtained his deeds under the provisions of Act No. 229, Pub. Acts 1881, as amended by Act No. 7, Pub. Acts 1882, and that, as the deed provided for in the last-named act is not by its terms made prima facie evidence of title, it cannot be so regarded. It is also claimed that even though plaintiff's tax deeds were not obtained under the law of 1881, as amended by Act No. 7 of 1882, as it was dated October 19, 1882, and as the general tax law of 1869 was repealed by Act No. 11 of the Public Acts of 1882, the deeds are not prima facie evidence of title.

In support of these contentions, counsel for defendants cite *Ball* v. *Busch*, 64 Mich. 336; *Busch* v. *Nester*, 70 Mich. 532; and *Norris* v. *Hall*, 124 Mich. 170. On the part of the plaintiff it is claimed that Act No. 229, Pub. Acts 1881, as amended by Act No. 7, Pub. Acts 1882, was supplemental to the existing provisions of law, and was passed to enable the State to sell its large holdings of State tax lands, and that it did not repeal the provisions of the general tax law of 1869 as to the prima facie character of the deeds. The plaintiff further claims that he obtained his tax deeds under the general tax law of 1869, and, though it was not obtained until that law was repealed by Act No. 11 of the Public Acts of 1882, the benefit of the prima facie character of the deeds was saved by the proviso in the repealing clause; citing *Tillotson* v. *Saginaw Circuit Judge*, 97 Mich. 585, and *Harding* v. *Auditor General*, 136 Mich. 358.

There were three acts passed in 1882 relating to the question of taxes: Act No. 7, which amended Act No. 229 of the Public Acts of 1881; Act No. 9, which was a general tax law, intended to take the place of the general tax law; and Act No. 11, which repealed previous tax laws, except as they were saved by its proviso. It must be confessed that, in deciding cases as to the legal effect of tax deeds issued for the taxes of a series of years preceding and following the enactment of the three acts of 1882, language has been used which it is difficult to harmonize. As early as in 1843 it was provided that the deed given to purchasers at tax sales "should be prima facie evidence of the regularity of all the proceedings to the date of the sale." In a well-considered opinion written by Justice WING in *Sibley* v. *Smith*, 2 Mich. 486, the reasons are given for this provision of the law. He said:

"Where it is doubtful what construction should be placed upon a statute [the same as this one] the court is authorized to collect the intention of the legislature from the occasion and necessity of the law, from the mischief felt, and the object and the remedy in view, and the intention is to

be taken or presumed according to what is consonant to reason and good discretion. * * * An examination of the legislation of this State will throw light upon the intention of the legislature as manifested by the clause in question. The legislature for many years was changing statutes concerning tax deeds in an effort to make deeds more effective. This was a period of great depression in the money market. The treasury of the State was empty, and the state owed a very large debt. Eastern men were unwilling to hazard their money in the purchase of tax titles where the resident had so little interest in aiding them to perpetuate the evidence of their titles. The courts of this State as well as of other States had been exceedingly astute in searching out errors in tax sales, and this course of proceeding had prevailed to such an extent that at length it was generally believed that no valid title could be acquired under a tax sale. To obviate these difficulties a new system was devised in 1842, and another one in 1843, which was much better calculated to insure a sale of delinquent tax lands, as it provided that the deed to be given to purchasers at tax sales should be prima facie evidence of the regularity of all the proceedings to the date of the sale. * * * We prefer to act upon the rule that it is the duty of a judge to make such a construction as shall repress the mischief and advance the remedy, and this is held to be the case in an especial manner in respect to statutes of public utility."

In all the subsequent amendments made to the tax law prior to the passage of Act No. 7 of the Public Acts of 1882, this provision of the law was not changed, except to make it stronger. Section 1092, 1 How. Stat. (section 91, general tax law), provided that the tax deed "shall be prima facie evidence of the regularity of all the proceedings from the valuation of the lands by the assessors to the date of the deed inclusive and of title in fee in the purchaser." Did the amendment of Act No. 229 of the Public Acts of 1881, by the passage of Act No. 7 of the Public Acts of 1882, change the policy of the State in relation to the evidentiary quality of these deeds, and re-establish in relation to them the rule of strict construction of the common law, which requires that a party claiming title under special proceedings authorized by statute shall prove

that all the material requirements of the statute have been complied with, before the deed can be received in evidence? Before answering this question, it will be well to consider the existing provisions of the law, and the situation of the State in relation to its ownership of tax lands when Act No. 7 of the Public Acts of 1882 was passed. Section 1118, 1 How. Stat., provided that the State tax lands not redeemed or otherwise discharged should be offered for sale at the annual tax sales in each year. The subsequent sections provided for the preliminaries to the making of the sale, for the sale itself, and for the issuing of certificates of sale by the county treasurer. Section 1126 provided for the execution, upon the surrender of the certificate of sale, of a deed to the purchaser by the auditor general,—

"Which shall convey all the right acquired by the State under the original sale or sales: *Provided*, that such deed shall be subject to all the conditions, and have the same force and effect as is given by section 91 of this act [section 1092, 1 How. Stat.] to deeds executed in accordance with the provisions thereof."

Section 1129 provides for the sale of State tax lands at private sale by paying the amount for which the same was first offered in the county, as State tax land, with interest at 10 per cent. per annum. The next section (1130) provides for the execution of deeds to the purchaser by the auditor general. Section 1131 provides:

"All the provisions of law relative to deeds executed by the auditor general, on the surrender of certificates of sale of State tax lands, issued by the several county treasurers, shall be applicable to deeds executed by him for lands purchased at his office, pursuant to the provisions of this act."

It will be seen that the effect of these various provisions was to make all deeds executed by the auditor general of State tax lands prima facie evidence of the regularity of the proceedings, and of the title in fee of the purchaser. This, then, was the situation of the law when Act No. 229 of the Public Acts of 1881 was passed. It is a matter of

common knowledge with those at all familiar with the relation of the State to its tax lands that it was loaded up with them. The provisions of law in relation to their public and private sale to which we have called attention did not have the effect of securing purchasers. This being the situation, the legislature undertook to remedy it by the passage of Act No. 229 of the Public Acts of 1881. This act contained but three sections. The first section provided for the purchase by the original owner of the title within six months after the act took effect, at private sale, upon application to the auditor general. The second section provided for the purchase by any person after the act had been in effect six months, upon application to the auditor general. The purchase under both sections could be made upon more favorable terms than was provided by sections 1127, 1129, 1 How Stat. Section 3 provided for the execution of deeds by the auditor general, and it further—

"*Provided*, Nothing herein contained shall be construed to prevent any person from purchasing any of said lands under existing laws at any time."

No reference was made to the provisions of sections 1118–1125, 1 How. Stat., in relation to the public sale of State tax lands, nor was there any legislation in the act upon that subject, nor is there any suggestion therein as to what effect should be given to the deeds thereunder. The more favorable provisions of this act did not afford the relief it was hoped it would bring, and the legislature met in extra session in 1882, and Acts Nos. 7, 9, and 11, Pub. Acts 1882, were passed. As before stated, Act No. 7 amended Act No. 229, Pub. Acts 1881. The amendment to section 2 is not material to this controversy. The amendment to section 3 enabled one to purchase the lands for a period of four months after October 1, 1882, by paying the amount of the original taxes, then for four months by paying three-fourths of the amount of the taxes, then for a like period by paying one-half the amount of the taxes, and

then for a period of time by paying one-fourth of the amount of the taxes. There were other provisions in this section, which it is not necessary to recite. There were four new sections added to the act. Section 4 provided for the public sale of the lands. Sections 5 and 6 read:

"SEC. 5. Such auction sales by county treasurers shall be conducted in all respects as near as may be as sales of State tax lands have been heretofore conducted by such treasurers, and shall be continued from day to day in like manner, until all such lands are disposed of; and certificates shall be given to purchasers on such sales in substantially the same manner and with like effect as such certificates have been heretofore given by county treasurers to purchasers of State tax lands.

"SEC. 6. On presentation of such certificates to the auditor general and on all sales made by the auditor general he shall execute to the purchaser a deed conveying all the right, title, and interest of State in and to said State tax lands, but subject to all taxes assessed subsequent to the year eighteen hundred and eighty, and the deed shall so state."

It is not necessary to refer to section 7. There was no repealing clause to the act, and no statement made as to what the effect of the deed should be. No reference whatever was made to section 1131, 1 How. Stat., which we have heretofore quoted in full, nor to section 1092, 1 How. Stat. This act was approved March 13, 1882, and given immediate effect. On the following day Act No. 9 was approved and given immediate effect. This act was entitled "An act to provide for the assessment of property and the levy and collections of taxes thereon." It was a general scheme, and was intended from then on to cover the entire field embraced in its title. It provided for a hearing and a decree in the circuit court before the land should be sold for taxes. Section 84 reads:

"No tax assessed upon any property, or sale therefor, shall be held invalid on account of any irregularity in any assessment, or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, or on account of the property having

been assessed without the name of the owner, or in the name of any person other than the owner, or on account of any other irregularity, informality, or omission, or want of any matter of form or substance in any proceeding that does not prejudice the rights of the person whose property is taxed; and all proceedings in assessing and levying taxes, and in the sale and conveyance therefor, shall be presumed to be legal until the contrary is affirmatively shown. All records, statements, and certificates herein provided for shall be prima facie evidence of the facts therein set forth. The absence of any record of any proceeding, or the omission of any mention in any record of any vote or proceeding, or of mention of any matter in any statement or certificate that should appear therein under the provisions of any law of this State, shall not affect the validity of any proceeding, tax, or title depending thereon, provided the fact that such vote or proceeding was had or tax authorized is shown by any other record, statement, or certificate made evidence by the terms of this act or any other law of this State. No tax, or sale of property for any tax, shall be rendered or held invalid by showing that any record, statement, certificate, affidavit, paper, or return cannot be found in the proper office; and unless the contrary is affirmatively shown, the presumption shall be that such record was made and such certificate, statement, affidavit, paper, or return was duly made and filed. Where any statement, certificate, or record is required to be made or signed by a school district board or a township board, such statement, certificate, or record may be made and signed by the members of such boards, or a majority thereof, and it shall not be necessary that other members be present when each signs the same. The provisions of this section shall not be construed to authorize any showing impeaching the validity of any deed executed by the auditor general under the provisions of this act, but such deeds shall be held absolute and conclusive as herein provided."

Section 85 reads:

"In any suit or proceeding to enforce or set aside any tax, such tax shall be held illegal only for one of the following reasons:

"*First*, That no law authorizes such tax.

"*Second*, That the person or persons appointed to decide whether a tax shall be raised under a given law have

acted without jurisdiction, or have not imposed the tax in question.

"*Third*, That the person or property assessed was exempt from the taxation in question, or was not assessed.

"*Fourth*, That the tax has been paid.

"*Fifth*, That the supervisor or board of review, in assessing a person or property for taxation, or in the apportionment of the tax to the person or property in question, acted fraudulently.

"If any such illegality, omission, or fraud affects the amount of the tax only, the tax shall be sustained so far as the same is just and legal."

On the same day that Act No. 9 was approved, Act No. 11 was approved, and was given immediate effect. This was a repealing act of many laws relating to the assessment and levy of taxes. It concluded with these words:

"'An act to provide for a uniform assessment of property, and for the collection and return of taxes thereon;' and all acts amendatory thereof, be and the same all are hereby repealed, so far as relates to the future assessment of taxes and the steps to collect the same. They remain in force only for the completion of all proceedings heretofore begun for the collection of taxes, except as otherwise provided by law, and for the protection of all rights gained thereunder, and conveyance of land heretofore sold or that may hereafter be sold and all actions commenced and now pending under the provisions thereof."

It is apparent from this statement of the situation that the legislature supposed that by the passage of these three acts it had covered all the essentials of a complete system of taxation. Is there anything in this legislation to indicate that deeds issued by the auditor general either at public or private sale shall lose the prima facie quality which attached to them before this legislation was enacted? We have already stated the substance of all that was contained in Act No. 7, and that there was no repealing clause in it. It is a well-settled principle of law that repeals by implication are not favored. *Connors* v. *Iron Co.*, 54 Mich. 168; *Tillotson* v. *City of Saginaw*, 94 Mich. 244; *Lake Superior, etc., Iron Co.* v. *Auditor General*, 79

Mich. 351; *Merriman* v. *Jackson Circuit Judge*, 96 Mich. 603.

Before it can be said the legislature intended to make so radical a departure from the settled policy of the State as is contended for by counsel for defendant, we think it ought to be made to appear by some language not ambiguous and susceptible to two constructions. This is not done by the language used in Act No. 7. Is it done by the repealing clause in Act No. 11? It provides for the repeal of former acts, to use its exact language, "so far as relates to the future assessment of taxes and the steps to collect the same." It provides the prior laws remain in force "for the completion of all proceedings heretofore begun for the collection of taxes except as otherwise provided by law, and for the protection of all rights gained thereunder and conveyance of land heretofore sold or that may hereafter be sold." We do not think this had the effect of repealing the various provisions of the law in relation to the prima facie character of the deeds issued for the State tax lands. The language used in *Blackwood* v. *Van Vleit*, 30 Mich. 118, seems apropos here. In that case a tax deed given in 1856 for the taxes of 1854 was relied upon by the defendant. The statute in force when this deed was given made the deed prima facie evidence of regularity. The tax law of 1869 had a like provision. It contained a repealing clause similar to the one contained in Act No. 11, Pub. Acts 1882. Justice COOLEY, in speaking for the court, said:

"The plaintiff claimed in the court below that by the repeal of all previous acts the rule of evidence that made the deed prima facie evidence of title was annulled, and, as the act of 1869 only applied to proceedings had under it, the defendant was not aided by it, but was remitted to the rule that would prevail in the absence of any such statute, and must support his deed by proof of the regularity of the proceedings which culminated in it. The circuit court ruled otherwise.

"An examination of the statutes will show very clearly that the legislature has never designed to do away with

the provisions which render these deeds prima facie evidence of title. In every instance where an amendment has been made, this feature has been retained. If the rule of evidence has been abolished as to any of these deeds, it must be conceded that it has been done by inadvertence, as the rule itself has been a part of our State policy for a quarter of a century. This fact will not save the rule if an unquestionable repeal appears, but it may go far to explain any ambiguous or doubtful language. And we think the language of the saving clause in the act of 1869 is to be construed in the light of this State policy. The repeal was not to affect sales previously made. Now it may well be said that the repeal of a rule of evidence applicable to such sales would not affect the sales themselves; but the statute evidently meant not the sales as such, which, indeed, could not be affected by subsequent legislation, but the rights derived from such sales; and these would be very materially affected if the deeds were to be deprived of their quality as evidence of title. And when we find this quality preserved up to the time the act of 1869 took effect, and that that act gave it to all subsequent tax conveyances, the conclusion is irresistible that it was the intention of the legislature by the proviso to the repealing clause to preserve to the holders of previous conveyances the benefit of this rule of evidence."

See, also, *Tillotson* v. *Saginaw Circuit Judge*, 97 Mich. 585, and *Harding* v. *Auditor General*, 136 Mich. 358.

The purpose of the legislature in passing Act No. 229, Public Acts 1881, and Act No. 7, Pub. Acts 1882, was to so legislate as to secure sales of the large amount of land held as State tax lands. To acomplish this result, the price had been greatly reduced; in some contingencies the reduction amounting to more than 75 per cent. of what it had been. A deed of these lands which was prima facie evidence of title in fee would be much more valuable to a purchaser than one which did not possess that quality. It is inconceivable that, in attempting to legislate so as to secure customers for its lands, the State would deliberately take from the deeds which it gave to its customers the quality which made them valuable, and would say to the

purchasers that, before they could establish a title through the deed which the State proposed to give, the customer must show affirmatively the regularity of all the proceedings which led up to the deed. If the legislature had intended to so legislate as to make it impossible for the State to sell its lands, it could not do so more effectively than by taking away from its deeds the prima facie quality they had theretofore possessed. We do not think the legislature so intended, or that by the legislation enacted it accomplished any such anomalous result.

It becomes necessary now to give some attention to the cases cited by counsel for defendant in support of their contention. It will be remembered that in the case at bar the purchase was made at private sale at the office of the auditor general. In the case of *Norris* v. *Hall*, 124 Mich. 170, the purchase was made of the county treasurer at a public sale. It will be observed in the statement of facts that the trial court found as follows:

"I find that for the delinquent taxes of the years 1869 to 1880, inclusive, public sale was made May 4, 1884, under the law of 1882. The deeds executed by the auditor general upon the sale made May 4, 1884, are introduced in evidence by defendants. I find, as a matter of law, that all sales made on May 4, 1884, under the law of 1882, are invalid; that the tax deeds for the years extending from 1869 to 1880, inclusive, were made pursuant to a sale on May 4, 1884, under the law of 1882; and consequently that they are invalid."

An examination of the original record shows that this was the only finding either of fact or law made by Judge Coolidge in relation to the deed based upon the taxes of 1869 to 1880, inclusive. It is apparent the law of 1882 which Judge Coolidge had in mind was Act No. 9, and not Act No. 7, and that his conclusion was based upon the opinions in *Thomas* v. *Collins*, 58 Mich. 64; *Ball* v. *Busch*, 64 Mich. 336. These opinions held that Act No. 9, which provided for the public sale of the State tax lands, was prospective, and did not apply to sales for taxes levied before its enactment. Section 4, Act

No. 7, provides for the public sale of the lands at the tax sale of 1884. At this time these sales were made in October. It is apparent that if the provisions of Act No. 9 as to the time of sale did not apply, as was held in *Thomas* v. *Collins*, supra, and *Ball* v. *Busch*, supra, that the sale should have been held in October, and not in May. It is equally apparent that a deed based upon a sale made in May, and not in October, would be, as found by Judge Coolidge, invalid. It is apparent that a void deed would not possess any evidentiary value, and that, in affirming the action of Judge Coolidge in so holding, it was not necessary to say, as was said in the opinion, that the deed was "inadmissible in evidence, and is ineffectual, for the reason that there was no proof of the regularity of the tax proceedings. The law under which the sale took place did not provide that deeds issued thereunder should be prima facie evidence of title." Such a provision of law would not have helped the matter, for the deed showed upon its face that it was based upon a sale made in May, when the law required it to be made in October. A right result was undoubtedly reached in the case, but we think a wrong reason was given for it. In *Ball* v. *Busch*, 64 Mich. 336, the opinion is a short one, prepared by Justice SHERWOOD, who gave no reason why the deeds were invalid, but contented himself with saying: "That the several tax titles offered in evidence are clearly invalid, under our previous decisions, is clear, and the circuit judge did right in so holding;" citing a number of authorities, the last two of which are *Thomas* v. *Collins*, 58 Mich. 64, and *Busch* v. *Nester*, 62 Mich. 381. We have already referred to *Thomas* v. *Collins*. In *Busch* v. *Nester*, Justice CAMPBELL said, "We think the State deeds are prima facie evidence of title," but held that a purchaser did not have a right of entry on land on a mere tax certificate before deed. In *Busch* v. *Nester*, 70 Mich. 525, the discussion in the opinion written by Justice CHAMPLIN related largely to other questions than the effect of the tax

deeds. In relation to those the discussion is very brief. In it this language is used:

"Mr. Busch testified that he submitted his tax deeds to two attorneys, and they advised him that they were valid, and, believing the advice to be correct, he took possession. He further testified as follows: 'I don't think I ever claimed to be in possession of any other parcel of land there, except the W. ½ of section 26. I just had the timber cut off from them, and that was all.' The tax title under which he claimed the west half of section 26 was declared void in *Ball* v. *Busch*, 64 Mich. 336, which has been decided since this case was before us on the former occasion. This court said that the invalidity of the deeds appeared upon their face, and were properly rejected when offered in evidence at the trial as not being prima facie evidence of title. It is only fair to Mr. Busch, and to the attorneys with whom he advised, to say that the deeds were issued under the law of 1882, and which had been held constitutional and valid by a divided court in a case arising in Marquette county, and that the advice appears to have been based upon that decision."

It is apparent the law of 1882 which Justice CHAMPLIN had in mind was Act No. 9, and not Act No. 7, for it was the former which was construed in the case arising in Marquette county. A reference to the case cited by him will also show he was not quite accurate in stating what was decided. We quote from the opinion cited:

"We may properly say, in conclusion, the rejection of the deeds complained of, when offered in evidence, was correct. Their invalidity appeared on the face of the instruments. 1 How. Stat. §§ 1092, 1165, do not apply to such a case. The legislature did not intend to say that a paper shall be held prima facie valid when it carries upon its face the evidence that shows it void."

We have already shown that this court had held that the provision of Act No. 9 for the public sale of State tax lands was prospective, and that sales made in May for taxes levied before the act took effect were void. It is apparent the question involved in the last two cases referred to was not the value of the deeds as evidence of title, but was whether they were void. In the cases we have review-

ed at such length, we have endeavored to show they were held void, and for what reasons they were so held. As before stated, there is some language used in some of these opinions in conflict with the conclusion we have reached, but we do not think the decisions themselves are in conflict with it. In the opinion in *Hoffman* v. *Loud*, ante, 5, the following statement is made:

"It should not be forgotten that the land was sold to the State at least four times before the passage of Act No. 7. Its title under each of its sales when it was obtained was prima facie valid."

The first part is a correct statement of facts. The last sentence is not a correct statement of the law, and should be overruled. The statute refers to deeds, and not to the state of the title before the deeds are issued. The other questions suggested have been considered, but we do not deem it necessary to discuss them.

Judgment is affirmed.

CARPENTER, MCALVAY, GRANT, BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

MUSSELMAN GROCER CO. *v.* CASLER.

1. WITNESSES — EXAMINATION — DEVELOPMENT OF MATTERS ELICITED BY ADVERSARY.

   Where a matter is first brought out on cross-examination, it is proper, on re-direct, to show a full explanation of the transaction, if relevant.

2. EVIDENCE—PAROL TESTIMONY TO CONTRADICT RECORD—DEEDS.

   On the issue whether defendant owned land on January 15th, plaintiff having shown a deed from the record owner to defendant's brother, dated December 24th, and recorded July 5th, it is proper to show that defendant was entitled to a deed December 24th, on which day one was tendered him and refused, and that subsequently, shortly before it was recorded,

the name of the grantee was changed, and the deed delivered to defendant's brother, he having taken an assignment of defendant's rights.

3. FRAUD—SALES—FALSE REPRESENTATIONS TO OBTAIN CREDIT—OFFER TO SETTLE.

In an action commenced by capias to recover a debt alleged to have been fraudulently contracted, the admission of evidence that defendant ineffectually offered to settle is error.

4. SAME—PLEADING—AMENDMENT.

In an action commenced by capias to recover a debt claimed to have been fraudulently contracted, plaintiff alleged that defendant made false representations as to his financial condition for the purpose of obtaining credit. On trial, plaintiff sought leave to amend so as to allege that, after the making of the original representations, defendant's financial condition changed so that he was not entitled to credit, and that defendant's failure to notify plaintiff of this change was fraudulent. *Held*, that leave to amend was properly denied, the proposed amendment changing the cause of action.

Error to Wexford; Chittenden, J. Submitted April 15, 1904. (Docket No. 67.) Decided October 18, 1904.

Case by the Musselman Grocer Company against Spurgeon D. Casler for obtaining goods by false representations. Suit was begun by capias. There was judgment for defendant, and plaintiff brings error. Affirmed.

Smedley & Corwin (*Fred C. Wetmore*, of counsel), for appellant.

J. B. Hendee (*D. E. McIntyre*, of counsel), for appellee.

MOORE, C. J. This suit was commenced by capias to recover the value of upwards of $700 worth of groceries sold by plaintiff to defendant. It was the claim of plaintiff that the goods were obtained by means of false representations. The case was tried by a jury, which returned a verdict in favor of defendant. The case is brought here by writ of error.

Among other things stated in the affidavit made by Mr. Musselman in order to obtain the writ of capias was the following:

"Deponent further says that Spurgeon D. Casler in the month of January, 1901, was carrying on a retail store at Farnsworth, Wexford county, Michigan, carrying general merchandise, and that said Spurgeon D. Casler desired to buy goods from said Musselman Grocer Company on credit, and that, before selling any goods to said Spurgeon D. Casler on credit, this deponent wrote said Spurgeon D. Casler for a statement in writing of his financial condition, in order that this deponent, as creditman for said corporation, could pass upon the advisability of shipping goods to said Spurgeon D. Casler on credit.

"Deponent further says that on the 15th day of January, 1901, he received from said Spurgeon D. Casler a written statement in regard to his financial condition, in which statement the said Spurgeon D. Casler stated that he paid $500 in cash for the store building and ground at Farnsworth, Michigan, and that he paid $550 in cash for the stock of merchandise, and that he put on said real estate $150 in repairs, and that he had $200 cash on hand.

"Deponent further says that said statement was made by said Spurgeon D. Casler for the purpose of deceiving the said Musselman Grocer Company, and obtaining goods from said corporation on credit. Deponent further says that the said statement made by said Spurgeon D. Casler to said corporation was not true, and that it was made by the said Spurgeon D. Casler for the express purpose and intent of obtaining goods from said Musselman Grocer Company. Deponent further says that the said Musselman Grocer Company, nor this deponent, knew nothing of said fraud until on or about the 15th day of July, 1901.

"Deponent further says: That, believing said representations so made by said Spurgeon D. Casler to said Musselman Grocer Company to be true, the said Musselman Grocer Company sold and shipped goods to the said Spurgeon D. Casler at various times on credit, amounting, in all that remains unpaid, to $719.06. * * * That said goods would not have been sold if deponent had known the representations were false. * * *

"That the said Spurgeon D. Casler is now justly indebted to the said Musselman Grocer Company the sum of $719.06 for the goods so obtained, and that the same is

now due to the said Musselman Grocer Company over and above all legal set-offs. That demand has been made upon the said Spurgeon D. Casler to pay the same, and that he neglects and refuses so to do. Deponent therefore says that the said Musselman Grocer Company has a claim for damages against the said Spurgeon D. Casler in an action of trespass on the case for fraud perpetrated on the said Musselman Grocer Company, and said Musselman Grocer Company claims $1,000 damages.

"That the statement made by said Spurgeon D. Casler to this deponent and to Musselman Grocer Company is untrue. That the said Spurgeon D. Casler did not pay $500 for his store property and real estate at Farnsworth, and did not pay any sum whatever. That the deed of said real estate was made to J. E. Casler, and not to Spurgeon D. Casler, and that said deed was made and executed on the 24th day of December, 1900, but was kept off of record until the 5th day of July, 1901, for the purpose of preventing creditors from learning in whose name said real estate was bought, and that the keeping the same from record was done for the purpose of hindering and delaying and defrauding the creditors of said Spurgeon D. Casler. That said Spurgeon D. Casler never owned said real estate, and that on the 15th day of January, 1901, at the time he wrote the letter to this deponent, as creditman for said Musselman Grocer Company, the said Spurgeon D. Casler knew that the property did not belong to him, but belonged to J. E. Casler, and that he concealed this fact from said Musselman Grocer Company and from this deponent for the purpose of deceiving the said Musselman Grocer Company and obtaining goods from it on credit."

The averments in the declaration follow substantially the statements made in the affidavit, and conclude as follows:

"And the plaintiff avers that by means of said statement so made as aforesaid, and which was false and fraudulent, the said defendant obtained the property of this plaintiff to the amount aforesaid, which the said defendant has neglected and refused to pay to said plaintiff, and by means of the premises the said plaintiff has lost and been deprived of its property, of the value aforesaid, to the damage of the plaintiff of $1,000."

The defendant pleaded the general issue.

Plaintiff's counsel discuss the assignments of error under the following heads:

(1) The admission of irrelevant testimony which tended to prejudice plaintiff's case.

(2) The admission of evidence to contradict the records in the register of deeds' office, and the refusal to strike out the evidence in regard to the deed after it was shown that the deed had been changed, after its execution and acknowledgment, without the consent of the grantor.

(3) The admission of evidence of an offer to settle, and the argument of counsel thereon.

(4) The refusal of the court to allow plaintiff to amend its declaration, and to give plaintiff's eleventh request to charge.

(5) The charge to the jury that it was necessary for plaintiff to prove that the statements made by defendant in his letter were willfully made, and were false and fraudulent.

In disposing of the case, we will endeavor to follow the same order.

First. The testimony related to a $500 note which defendant received when he sold out, which plaintiff claims defendant agreed to send to him, but which found its way to the attorney for the defendant, and then into the hands of James E. Casler, defendant's brother. When the brother was on the stand, it was drawn out on cross-examination that he obtained the note from his brother's attorney; that he paid him no money for it, but was to stand behind his brother in the litigation he was having. If this testimony drawn out by plaintiff had any bearing upon the case, it was proper on the part of the witness to explain what there was of the transaction.

Second. It was the claim of plaintiff that when the letter of January 15, 1901, was written, the statement therein that defendant had paid O. J. La Batt $500 cash for his property was not true, and that the property at that time belonged to J. E. Casler; and, for the purpose of supporting that claim, he introduced in evidence the record of a deed in which J. E. Casler was grantee, which purported to have been made December 24, 1900, and was recorded

July 5, 1901. It was the claim of defendant that he bought the property from Mr. La Batt, and took from him an assignment of a land contract, and that he paid for the land upwards of $500. It is his further claim that when the deed of December 24, 1900, was made out, he was the grantee therein named, and that, because the title conveyed therein was not what he was entitled to, he declined to take the deed, and it was left with Mr. Farnsworth, the grantor, until about the time when it was recorded; that at this time J. E. Casler had bought the property from defendant, and his name was inserted in the deed as grantee; and that when the letter was written the property belonged to defendant. As bearing upon this claim, we think the evidence was admissible.

Third. Was the admission of evidence of defendant's offer to settle, and the comment of counsel thereon, error? The important question in the case, as presented by the pleadings, was whether the representations made were false, and did they lead to the giving of the credit? There is no claim this offer to settle resulted in anything. We think it had a tendency, especially in view of the use made of it by counsel, to prejudice the case of plaintiff, but we think it not sufficiently harmful to reverse the case. See *Chandler* v. *Allison*, 10 Mich. 460; *Pelton* v. *Schmidt*, 104 Mich. 345.

Fourth. The plaintiff asked the court to give the following charge:

"If defendant made this statement on the 15th day of January, 1901, to the Musselman Grocer Company, of his financial condition, and even if it was true at that time that he had bought and was the owner of the store building and ground where he was running his store, yet afterwards, when he became embarrassed, in the month of May, and transferred all his interests in this real estate to his brother James Casler, and he then knew that his financial condition had changed, and that he was still obtaining credit from this firm, the Musselman Grocer Company, it was his duty to notify the Musselman Grocer Company of his changed financial condition, in order that

they would not be misled by his former statement, and continue to give credit to him when he was not entitled to the same. If you find that he did not notify the Musselman Grocer Company, or Mr. Musselman, of his changed financial condition, and of the fact that he had transferred all his interest in the real estate to his brother, and continued from that time on to buy goods on credit from said firm, then I charge you, as a matter of law, that he is liable for all the goods that he bought from this firm, and did not pay for, after turning over real estate to his brother; and the undisputed evidence in this case is that, after the assignment of the real estate to his brother, he obtained on credit from said Musselman Grocer Company goods to the amount of $429.91 which he never paid for, and for which amount the plaintiff is entitled to a verdict, if you find that the defendant, Spurgeon D. Casler, did not correctly state to them his condition relative to the real estate after his brother had obtained this assignment of the land contract."

The judge was of the opinion that, under the declaration, the plaintiff was not entitled to the request. When he so intimated, counsel for plaintiff said:

"If that is the court's ruling, then we move that we be allowed to amend the declaration to that effect. My own opinion is that it is not necessary at all, but, if that is the court's opinion, we would ask leave to amend. We could not have done it until today, because we did not know the facts until now. Therefore we move the court now for leave to amend the declaration by inserting a count based upon the change in the defendant's condition—that he knew on the 4th day of May, having transferred his property to his brother, and put himself in a condition where he was not worthy of credit; that he did not inform the plaintiff, nor Mr. Musselman, the agent of the plaintiff, nor any of the agents of the plaintiff, of his changed condition, and on account of that change he was not entitled to credit, but still continued to buy, and did buy over $400 worth of goods, which he did not pay for, after the changed condition, and after the transfer of this property."

Counsel for defendant objected upon the ground that the amendment alleged a new and different cause of action, and the judge refused to grant the amendment. It is very clear the cause of action stated in the proposed

amendment was a very different cause of action from the one stated in the affidavit which is the basis of the proceeding, and different from the original declaration. We think the judge was right in holding the amendment was not permissible. See *Fish* v. *Barbour*, 43 Mich. 19; *Wilkinson* v. *Nichols*, 48 Mich. 354; *Bolton* v. *Nitz*, 88 Mich. 354; *Angell* v. *Pruyn*, 126 Mich. 16.

Judgment is affirmed.

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

PEOPLE *v.* BIRD.

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INTOXICATING LIQUORS—MINORS—HOSPITALITY.

Section 5391, 2 Comp. Laws, prohibiting furnishing liquors to minors, has reference only to acts by persons engaged in the business of liquor selling, and not to mere acts of hospitality in their homes by persons not so engaged.

Exceptions before judgment from Ionia; Davis, J. Submitted April 21, 1904. (Docket No. 36.) Decided October 18, 1904.

Calvin Bird was convicted of violating the liquor law. Reversed.

A. A. Ellis, for appellant.

William K. Clute, Prosecuting Attorney, for the people.

MOORE, C. J. Respondent was convicted of violating the provisions of the so-called liquor law, contained in section 5391, 2 Comp. Laws. He has brought the case here by appeal.

The record upon the part of the people discloses that respondent is not a saloon keeper or druggist, but is a laboring man. At the solicitation of his wife he obtained three bottles of beer, and brought them home. The money to buy the beer was furnished by respondent's father, William Bird. After the beer was brought to the dwelling house of respondent, the respondent, his wife, his father, and one Mattie White, who was about 16 years old, sat about a table. Mrs. Bird poured the beer out into glasses. After she had done so, respondent handed a glass of it to Miss White, who drank it. Afterwards another glass of the beer was handed to her by respondent, part of which she drank. It is also claimed that Mrs. Bird, in the presence of her husband, mixed some alcohol with water, and gave it to Miss White.

The question involved is whether this was a violation of the law. It is the claim of the people that it is not lawful for any person except a druggist to give to any minor beer, wine, or spirituous liquor. It is the claim of the respondent that the law relates to a business, and does not preclude one in exercising the hospitality of his home from giving to one of his guests beer, wine, or spirituous liquors, even though the guest is under the age of 21 years. It is stated by the prosecuting attorney that the question involved has never been passed upon by this court.

The title to the act relating to the question involved reads:

"An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving, or delivering spirituous and intoxicating liquors, and malt, brewed, or fermented liquors and vinous liquors in this State, and to repeal all acts or parts of acts inconsistent with the provisions of this act." Act No. 313, Pub. Acts 1887.

Section 5391, 2 Comp. Laws, so far as it is material to this action, reads:

"It shall not be lawful for any person, except a druggist, who shall be governed by section two of this act, to sell,

furnish, or give any spirituous, malt, brewed, fermented, or vinous liquors, or any beverage, liquor, or liquids containing any spirituous, malt, brewed, fermented, or vinous liquors, to any minor, to any intoxicated person. * * * The fact of selling, giving, or furnishing any liquid in any place where intoxicating liquors are sold or kept for sale, to any minor, or to any intoxicated person, * * * shall be prima facie evidence of an intent on the part of the person so selling, giving, or furnishing such liquid, to violate the law."

Many of the cases cited on the part of the people, like *State* v. *Best*, 108 N. C. 747, are cases where the liquor was furnished to the minors by a saloon keeper. Others are where the minor furnished the money to pay for the liquor, and do not afford much light upon the question involved here.

In one of the cases cited—*Johnson* v. *People*, 83 Ill. 431—it is said:

"It is not necessary to now determine whether a person would incur the penalty of this section by giving it as an act of hospitality at his house, as that question is not before the court."

In *Altenburg* v. *Commonwealth*, 126 Pa. St. 602, it is said:

"The general provisions of the act of 1887 [Laws 1887, Act No. 53] relate to and are designed to regulate the sale of liquors by the various classes of venders known to the law. They are not directed against the use of such liquors by the individual citizen, and they do not interfere with his right to supply his table with them, or furnish them to his family or his guests."

In the case of *Commonwealth* v. *Davis*, 75 Ky. 240, cited by counsel, the respondent and one Rison, a minor, contributed money to purchase whisky. The respondent procured the whisky, and gave part of it to Rison, who drank it. It was held this was a violation of the statute; the court saying of the statute, "The object was to make it unlawful for any person other than the father or guardian of a minor to place such liquors in his hands,"

etc. It will be seen this case does not meet the one under consideration.

In Black on Intoxicating Liquors, § 407, it is said:

"The provisions of the liquor laws being aimed at the suppression of an illicit or injurious traffic in intoxicants, it is considered that a person is not liable to indictment for furnishing liquor to a friend or guest at his private residence as an act of kindness or hospitality;" citing several cases.

If the contention of the people is true, while a father might furnish, at his own table, for his wife and all his children who had attained the age of 21 years, wine to drink, if he gave it to a son or daughter under 21 years of age he would be liable to the penalties of the law. And if one of his guests was under 21 years of age he would also be liable. The title of the act and all its provisions should be read together. When this is done, we cannot persuade ourselves that such a case as was made against the respondent brings him within its provisions.

The conviction is reversed, and a new trial ordered.

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

PEOPLE *v.* ELLEN.

BRIBERY—OFFICER—MATTER OFFICIALLY COGNIZABLE.

Where a proposition to let a contract for waterworks was one which might come before a city council for official action, the fact that the council had no authority to make the contract did not prevent the receipt of money by a councilman to influence his action on the same from constituting a violation of 3 Comp. Laws, § 11312.

Exceptions before judgment from the superior court of Grand Rapids; Newnham, J. Submitted June 17, 1904. (Docket No. 194.) Decided October 18, 1904.

Jacob P. Ellen was convicted of receiving a bribe. Affirmed.

Walker & Fitzgerald, for appellant.

William B. Brown, Prosecuting Attorney, and *Charles E. Ward,* Assistant Prosecuting Attorney, for the people.

MOORE, C. J. The respondent, who was an alderman of the city of Grand Rapids, was convicted of accepting a bribe. He has brought the case here by writ of error.

We quote from the brief of his counsel:

"There is but one question involved in this case: Was the proposed water contract as to which it is alleged the respondent was bribed 'a question, cause, or proceeding which might, by law, be brought before him in his official capacity' (as alderman of the city of Grand Rapids), as required by the statute under which this prosecution is brought, and as charged in the information filed against him?"

Counsel contend the answer to this question should be in the negative.

This precise question was before us in the case of *People* v. *Mol,* 137 Mich. 692. In that case Justice GRANT quoted the statute which it is claimed governs this proceeding (section 11312, 3 Comp. Laws), and held it applied to this case. As to that part of his opinion all the other Justices concurred.

The conviction is affirmed, and the case is remanded for further proceedings.

The other Justices concurred.

In re PALMER.

EXTRADITION—HABEAS CORPUS—POWER OF COURT.

The court cannot, on habeas corpus to inquire into the detention of one held on a warrant of rendition in extradition proceedings, inquire into the question of petitioner's guilt for the purpose of determining the question of flight, and the fact that the papers only show his presence in the demanding State shortly before the commission of the crime, and not at the time or since, is not controlling.

Certiorari to Wexford; Chittenden, J. Submitted July 7, 1904. (Calendar No. 20,591.) Decided October 18, 1904.

Habeas corpus proceedings by Frank W. Palmer to obtain his release from custody under an extradition from the governor of Ohio. There was an order dismissing the writ, and petitioner brings certiorari. Affirmed.

Charles A. Withey, for petitioner.

Harvey R. Keeler, for the State of Ohio.

MONTGOMERY, J. The petitioner is under arrest on a warrant of rendition issued by the governor on requisition from the governor of Ohio, accompanied by a duly authenticated copy of an indictment and an affidavit stating that petitioner is a fugitive from the justice of that State. The petitioner sued out the writ of habeas corpus before Hon. C. C. Chittenden, circuit judge, and on the refusal of Judge Chittenden to release him from custody has brought the proceedings here for review.

It is contended the papers, taken as a whole, show that no crime has been committed, and also that the petitioner is shown not to be a fugitive from justice.

Section 5278 of the Revised Statutes of the United States [U. S. Comp. Stat. 1901, p. 3597] provides that:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured," etc.

There is no doubt that the papers produced before the governor of Michigan fully complied with this section. The warrant of rendition is regular.

To what extent is the action of the executive in issuing the warrant of rendition open to review? It is to be noted that the statute confers no authority upon the courts. Such authority as we exercise must be derived from our general power to protect the individual citizen from unlawful arrest. Clearly, we may not, in the exercise of this restricted power, enter upon a trial of the alleged offender. This would put upon the demanding State a burden of two trials—the one at a place removed from the place where the alleged offense was committed. It is to be kept in mind that in this proceeding the Federal statute governs. The State courts are not permitted to hold to bail. And we are not aided in our jurisdiction by section 9887, 3 Comp. Laws. So, too, the decisions of courts of other States that a court may on habeas corpus go into the question of probable cause, based upon statutes governing proceedings in the several States, are without force or application in this proceeding.

The rule appears to be that the courts may look into the papers before the governor, and determine whether upon their face a crime is charged; but beyond this the court cannot go in determining the fact of the petitioner's guilt or innocence. Hurd, Habeas Corpus, 621 et seq.; 2 Moore, Extradition, § 632 et seq. The court may inquire into the

identity of the accused with the party named in the warrant of rendition, and may, it seems, inquire within certain limits into the question of flight. As the papers which were presented to the governor in this case were regular on their face, and as the identity is conceded, we can only consider the question of flight.

It would be mere evasion of the rule above stated to determine that there was no flight because there was no offense. That there is sufficient ground to *charge* an offense sufficiently appears from the indictment. We cannot try the question of petitioner's guilt. The affidavits disclose that the petitioner was present at Cleveland at a date shortly before that laid in the indictment, but not at that date or since. From this it is argued that he could not have fled from Ohio after committing the offense. The time laid in the indictment is not ordinarily so vital as to exclude proof of the offense at an earlier date. The case of *People* v. *Donald*, 48 Mich. 491, relied upon by the petitioner's counsel, was decided upon the peculiar words of the statute in this State, the prosecution under this statute being expressly differentiated from a prosecution at common law in this regard.

Our conclusion is that the circuit judge reached the correct conclusion. The writ of certiorari is dismissed, and the petitioner remanded.

The other Justices concurred.

In re CUMMINS.

1. CRIMINAL LAW — INDETERMINATE SENTENCE — SENTENCE FOR DEFINITE TERM.
   Under the indeterminate sentence law of 1903 (Act No. 136), a sentence for "the maximum and minimum period of five years" is for a definite period, and improper.

2. SAME—SENTENCE FOR DEFINITE TERM—VALIDITY—EFFECT.
   A definite sentence for five years for an offense for which no minimum punishment is provided is not void under the statute, but should be treated as an indeterminate sentence for the maximum period of five years and the minimum period of one year as provided by section 2 of the act.

Habeas corpus proceedings by John Cummins to secure his release from the State prison at Jackson. Submitted October 4, 1904. (Calendar No. 20,745.) Writ denied October 18, 1904.

Michael Kenny, for petitioner.

Charles A. Blair, Attorney General (*George S. Law*, of counsel), for the people.

MOORE, C. J. December 1, 1903, upon his plea of guilty, the petitioner was convicted of having committed the offense of larceny upon the 28th day of October, 1903. The following sentence was pronounced upon him:

"Therefore it is ordered and adjudged by the said court now here that the said John Cummins be confined in the State prison at Jackson, Michigan, at hard labor, for the maximum and minimum period of five years from and including this day."

It is the claim of the petitioner that this sentence is in violation of the indeterminate sentence law, which took effect before the crime for which the petitioner was sentenced was committed, and that the sentence is void.

By section 1, Act No. 136, Pub. Acts 1903, it was made the duty of the circuit judge to impose an indeterminate sentence upon the petitioner. Instead of doing so, he imposed a definite sentence for a certain time. The fact that it was called "for the maximum and minimum period of five years" did not change the fact that it was a sentence for a definite period of time. It does not follow, however, that, because the sentence was not imposed as required by the terms of the statute, it is void.

Section 2 of Act No. 136 reads:

"SEC. 2. If, through oversight or otherwise, any person shall be sentenced to imprisonment in the said State prisons for a definite period of time other than for life, said sentence shall not for that reason be void, but the prisoner so sentenced shall be entitled to the benefit and subject to the liabilities of this act, in the same manner and to the same extent, as if the sentence had been in the terms required in section 1 of this act: *Provided*, That in these cases where no minimum sentence is fixed by the court, the minimum limit of any such sentence in any case shall not be for a less period than one year, except in those instances where the minimum limit is now fixed or which may hereafter be fixed or provided for by law."

It has been held that Act No. 136, Pub. Acts 1903, does not repeal the general statutes providing for the punishment of crimes. *In re Lambrecht*, 137 Mich. 450. The general statute provides that for the offense for which petitioner was convicted the penalty shall not exceed five years. It does not fix a minimum term. It follows that, under the provisions of section 2, the sentence of petitioner is to be treated as though he was sentenced for the maximum period of five years and the minimum period of one year. Giving the statute this construction, there is no reason for saying the petitioner is deprived of the right to parole until his full sentence has expired.

The application for the writ is denied.

The other Justices concurred.

CLAPP *v.* TITUS.

1. MUNICIPAL CORPORATIONS—COUNCIL—POWERS—STATUTE—EMPLOYÉ—SERVICES—ORDER—REFUSAL OF PRESIDENT TO SIGN—MANDAMUS.

   Under the general village law (1 Comp. Laws, chap. 87, § 2769, subd. 26), providing that the council shall have authority to provide for the care, custody, and preservation of the public property, where, as the result of a conflict between the president and the council, the president had suspended the marshal, and the council, through its committee on fire and water, employed the suspended marshal, and allowed his claim for services in attending to the fire apparatus of the village, mandamus lies to compel the president to sign the orders for the amount allowed by the council; it appearing that, by reason of a fire having occurred, the apparatus was in need of the services rendered by relator, and that, without an appointment by the council, there would have been no one to care for it.

2. SAME—MANDAMUS—FORMALITIES—WAIVER.

   The fact that certain formalities were not observed in the presentation of an account to the common council of a village does not affect the claimant's right to mandamus, to compel the president to sign orders therefor, where he did not put his refusal to sign the orders on that ground.

Certiorari to Van Buren; Carr, J. Submitted October 4, 1904. (Calendar No. 20,651.) Decided October 18, 1904.

Mandamus by Willis Clapp to compel Lincoln H. Titus, president of the village of Paw Paw, to sign orders for certain sums voted to relator by the common council. There was an order denying the writ, and relator brings certiorari. Reversed.

Barnard & Lewis, for relator.

Lincoln H. Titus (*William G. Howard*, of counsel), for respondent.

MOORE, C. J. This is certiorari to review the action of the circuit judge in refusing to issue a mandamus to compel the respondent to sign two village orders voted to the relator by the village council, and countersigned by the clerk of the village.

This litigation grows out of an unfortunate difference of opinion between the respondent, who is president of the village of Paw Paw, and its village council. An ordinance of the village provides for the appointment by the president, by the consent of the council, of a village marshal and other officers, whose compensation shall be fixed by the council. It also provides for the appointment by the president, from the members of the village council, of certain committees—among them, a committee on fire and water. The president appointed this committee on fire and water. On April 12, 1904, he appointed James F. Bullard marshal, and Aaron Hathaway street commissioner. Upon the first of these appointments three of the trustees voted "No," and three refrained from voting. Mr. Hathaway's appointment was not consented to. At a meeting held April 18th the same appointments were sent to the council by the president, and neither one was assented to. It is not clear what actuated the council, unless it may be inferred from the opinion of the village attorney that, under the existing ordinances of the village, the duties of the street commissioner shall be performed by the marshal; and, in his opinion, one person only could be appointed to discharge the duties of the office of marshal and street commissioner. The relator was at this time village marshal. On the 18th of April, written notice was served upon him by the president of his removal from the office of marshal, and after that date the village was without a marshal. The village had a volunteer fire department, an engine house, a fire engine, and 1,500 to 2,000 feet of hose. After the president had removed the marshal, a motion was made at a regular meeting of the council that the relator be employed to collect electric light and other bills due the village, and care for the public

property, and to perform the duties theretofore performed by the marshal. The president refused to put the motion, and refused to entertain an appeal from his decision. After the removal of the marshal, the committee on fire and water hired the relator to look after the engine house, the fire engine, and the hose. During the time a fire occurred, at which the engine and all the fire hose was used. The relator dried the hose, and did such work as was necessary to be done. The claims for these services were presented in writing to the council, and referred to the committee on claims, which reported in favor of the allowance, and all the trustees of the village voted in favor of the allowance. By direction of the council, orders were drawn by the clerk, which he countersigned. They were presented to the president for his signature. His claim was that the council were seeking to, in effect, appoint a village marshal, and that the committee had no authority to hire Mr. Clapp, and refused to sign the orders.

It goes without saying that property like an engine house, a fire engine, and fire hose should have some care. The village of Paw Paw was organized under the general law found in chapter 87 of the Compiled Laws.

Subdivision 26, § 2769, 1 Comp. Laws, in defining the powers of the council, says it shall have authority "to provide for the care, custody, and preservation of the public property of the village." In the history of the village, an emergency had occurred, growing out of the conflict between the president of the village and the council. We have no doubt that under such circumstances the council could, temporarily at least, provide for the care of the village property. This it undertook to do, first through its committee, and then by unanimously allowing the obligation which that committee had incurred. See *Portland Lumbering & Manfg. Co.* v. *City of East Portland*, 18 Or. 21, and the cases there cited; *McConoughey* v. *Jackson*, 101 Cal. 265; *Brady* v. *Mayor, etc., of Brooklyn*, 1 Barb. 584; *Hill* v. *City of Indianapolis*, 92 Fed. 467; 1 Dillon, Municipal Corp. (4th Ed.) § 463.

The circuit judge found that certain formalities in the presentation of the account had not been observed. The president does not, and did not put his refusal to sign the orders upon that ground. We think that feature of the case is fully covered by *Kriseler* v. *Le Valley*, 122 Mich. 576, and cases there cited.

We think the circuit judge should have granted the writ of mandamus, and it is so ordered.

The other Justices concurred.

ASHLEY *v.* CALHOUN CIRCUIT JUDGE.

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DISCOVERY — INSPECTION BEFORE TRIAL — DOCUMENTS — SUBPŒNA DUCES TECUM.

Where suit is brought to recover the price paid a limited partnership for an option to purchase its plant, on the ground that the president and secretary thereof had no authority to make the contract, plaintiffs are not entitled to an order directing the firm to permit an inspection of its articles, by-laws, and records before trial, so as to enable plaintiffs to prove what authority its president and secretary possessed; such records being obtainable at the trial under a subpœna duces tecum.

Mandamus by Glover J. Ashley and others to compel Joel C. Hopkins, circuit judge of Calhoun county, to vacate an order requiring relators to produce certain books and papers. Submitted October 4, 1904. (Calendar No. 20,750.) Writ granted October 18, 1904.

The relators are officers and directors of a partnership limited known as the Hibbard Food Company, Limited, and are defendants in a suit brought by one Gubbins against them to recover $1,000 paid by him to them or to the partnership upon an option to purchase the real estate

and plant owned by said partnership. The case is at issue, and upon the application of the plaintiff, Gubbins, the respondent, as circuit judge, made an order that the relators produce certain records and documents belonging to said company, or sworn copies thereof, for his inspection, in order to prepare for trial. Relators now seek the writ of mandamus to compel the rescission of that order.

R. J. Kelley, for relators.

North & Salisbury, for respondent.

GRANT, J. (*after stating the facts*). The declaration is based upon a written contract purported to be entered into between said partnership and said plaintiff. The contract is signed: "The Hibbard Food Company, Limited, by C. J. Ashley, President; F. L. Hibbard, Secretary; R. M. Gubbins." By the contract, in consideration of $1,000 paid by the plaintiff, the partnership gave him an option to purchase the property of said partnership at any time within 15 days from the date thereof. The declaration alleges that the relators, as officers of said corporation, represented that they had authority to make said contract, but that they had no such authority, and that therefore the contract was void. Plaintiff sues to recover from them the money paid.

Obviously, it was of importance to the plaintiff to secure evidence upon the point at issue. That evidence would naturally be found by an examination of the records of the partnership. If by its articles or its by-laws the relators had no right to enter into such contract in the name of the partnership, the plaintiff, under his theory, is entitled to recover. Obviously, if they had such authority, he is not. The records are under the control of the relators. It is settled by the decisions of this court that production of books and papers will not be ordered unless their production is indispensably necessary. Neither, in the absence of any fiduciary relation between the parties, will they be ordered where they can be obtained by subpœna duces

tecum. *Cummer* v. *Kent Circuit Judge*, 38 Mich. 351; *Preston Nat. Bank* v. *Wayne Circuit Judge*, 137 Mich. 152.

Plaintiff planted his suit against the defendants upon the theory that they were not authorized to make the contract. It would undoubtedly be convenient for him to know before the trial whether any such authority was given. So it would be convenient for any litigant to ascertain beforehand evidence in the possession of the opposite party. That, however, is not the test. It is too apparent to require argument, that the documents required can be produced under a subpœna duces tecum, and that no long examination will be required to examine them, and obtain therefrom the necessary evidence. We think the case is ruled by the two authorities above cited.

The writ will therefore be granted.

The other Justices concurred.

GERRISH *v.* MUSKEGON SAVINGS BANK.

BAILMENT—SAFETY DEPOSIT VAULT—BANKS—NEGLIGENCE.

In an action of trover against a bank for the loss of valuables left for safe keeping by a depositor, who also rented a safety deposit box, evidence examined and *held* that the bank was a gratuitous bailee and that no such negligence on its part was shown as to require submission of the case to the jury.

Error to Muskegon; Russell, J. Submitted October 4, 1904. (Docket No. 1.) Decided October 18, 1904.

Trover by Anna E. Gerrish against the Muskegon Savings Bank. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Turner & Turner, for appellant.

William Carpenter, for appellee.

MOORE, C. J. This is an action of trover to recover the value of a quantity of jewelry and coins which were left with the defendant bank by the husband of the plaintiff and placed in its vault. Upon the close of the testimony the trial judge directed a verdict in favor of defendant. The case is brought here by writ of error.

The plaintiff was a depositor in defendant bank. Her husband was also a depositor. In addition to that, he hired from the bank a deposit box, which was kept in the vault of the bank, for the use of which he paid $3.50 a year. His version of what occurred when he left the package at the bank is as follows: He first narrated seeing his wife put the jewelry and coins into a package, and taking it to the bank.

"I went into one of the little closets or coops they have at the bank, and got my deposit box from Mr. Rece. I tried to get that package in my box. It wouldn't go with the other papers that I had there. I locked my deposit box, returned it to Mr. Rece, took this package around to Mr. Hammond, told him the circumstances. Mr. Hammond is the cashier of the bank. That was about the 9th of September, 1901. I told him the circumstances—that I couldn't get it in my deposit box. Asked him would it be necessary for me to rent another deposit box or could he put that away for me? His reply was, 'No, I will put that away safely for you, and be glad to do it.' * * * The next time I saw the package I should think was the last of October. I had been out of the city—myself and family. I got it from Mr. Rece. Mr. Rece is a clerk at the bank. I got this package from him. I took it home to Mrs. Gerrish. * * * I took it back to the bank because we were going away again, to leave the city, going some distance away. I delivered it to Mr. Rece during banking hours. He was there, attending to his duties in the bank. I had some conversation with him at that time. I says—I guess I called him Walter—I says, 'Walter, will it be necessary for me to go through the formality of seeing Mr. Hammond again about this box?' He replied,

'No;' he would take care of it for me. He put it in the vault, I suppose. I don't know."

On the cross-examination he testified:

"I first hired a deposit box in 1898 in this bank. I had one at that time, I think, and for that I paid the bank $3.50 a year—for the use of the box, the privilege of using the box. At the time I took this package there, the box wasn't filled. I had my private papers in it. I filled it so full that I couldn't get this package inside it. The question I asked was whether I would have to rent another box. Of course, if I rented another box, I expected to pay for that box, and the question was with me whether I would be allowed to leave this package in the vault without paying for another box to put it in, and I wanted to know whether Mr. Hammond would allow me to leave this package in the vault without paying for the privilege, and he told me that he would, or that I could. This was the first time, in September, and I was going away from home. I lived here in the city. Had a home of my own. It was furnished by me, occupied by me and my family. I was going to close it up—lock it up—and go away. I left the furniture and some of the fixtures there in the house, and I wanted to leave this package in the bank while I was away. * * * The reason I didn't put it in the safety deposit box is because there wasn't room in that box for it with the other papers. Leaving what I had in there, there wasn't room for this package. When I left it with them I expected it would receive the same measure of protection that my box would receive, and no more. I expected it would be put in the vault the same as any other package would be put in the vault. I did not expect that they would give any more care to this package than they would give to anything else placed in the vault, and I was willing to rely upon the safety that its being left in the vault would give to it while I was away, and I preferred to rely upon that than to rely upon leaving it in my own home with my other goods. Later on I sent for my safety deposit box."

This was the most favorable testimony for the plaintiff offered on her behalf. The testimony shows the box was put into the vault of the bank. During the winter burglars broke into the vault through its floor, which was made

of iron rails, with brick arches between; some portions of the floor having but one thickness of brick four inches wide. It is the claim of plaintiff that the bank was negligent in leaving this package in a vault constructed as this one was, or at least it was a question for the jury. We quote from the brief of counsel:

"It may have been that this jury would have said, if it had been left to them, that this defendant was negligent in putting a special deposit that they knew contained jewels and gold coin into such a vault, and that by so doing they did not use the diligence that the law requires, or that an ordinarily prudent man would use."

The record shows that in the vault the bank had a burglar-proof safe, in which its money and commercial paper of its own and that sent for collection was kept. The safe was not large. The mortgages, some money, books, and packages belonging to the bank, as well as the deposit boxes, were left in the vault. At the time of the burglary there were in the vault boxes belonging to the president of the bank, its vice-president, the cashier, and teller, and others. The burglars took the boxes of the cashier and teller. There was no claim made by the bank to the public that the vault was burglar-proof. When the whole of the testimony of Mr. Gerrish is read, it is made clear that when he found the package would not go in his deposit box he left it with Mr. Hammond, expecting it would be placed where it was placed, and that it would receive precisely the treatment it did receive. He did not expect to pay anything because the package was left with the bank, and the bank did not expect to make any charge for such care as it might give the package. The facts establish a clear case of gratuitous bailment. And no such degree of negligence was shown on the part of the bank as to make a case for the jury. See 3 Am. & Eng. Enc. Law (2d Ed.), p. 749; *Keen* v. *Beckman*, 66 Iowa, 672; *Carlyon* v. *Fitzhenry*, 2 Ariz. 266; *Whitney* v. *First National Bank*, 55 Vt. 154; *Davis* v. *Gay*, 141 Mass.

531; *Scott* v. *National Bank*, 72 Pa. St. 471; Story on Bailments (9th Ed.), § 23; *Knights* v. *Piella*, 111 Mich. 9; *Marshall* v. *Railroad Co.*, 126 Mich. 45.

Judgment is affirmed.

The other Justices concurred.

THOMAS *v.* SOUTH HAVEN & EASTERN RAILROAD CO.

1. CONTRACT—CONSTRUCTION OF SIDE TRACK—CONSIDERATION.
   Where defendant railroad company verbally agreed to construct a side track alongside plaintiff's building if he would move it to land owned by him near defendant's track, and repair and remodel it so as to make it suitable for a warehouse, and he did so, the expense incurred by plaintiff was a sufficient consideration to sustain the contract, though plaintiff, at the time defendant's promise was made, did not agree to remove and remodel the building.

2. STATUTE OF FRAUDS—CONTRACT NOT TO BE PERFORMED WITHIN ONE YEAR.
   An agreement to lay a side track by plaintiff's building, if plaintiff would repair and remodel the building, and move it to a certain point, may be performed within a year, and hence is not within the statute of frauds. (3 Comp. Laws, § 9515.)

Error to Van Buren; Carr, J. Submitted October 4, 1904. (Docket No. 2.) Decided October 18, 1904.

Assumpsit by Wesley J. Thomas against the South Haven & Eastern Railroad Company for breach of a contract to construct a side track. There was judgment for plaintiff, and defendant brings error. Affirmed.

Samuel H. Kelley, for appellant.

Thomas J. Cavanaugh, for appellee.

CARPENTER, J. Plaintiff recovered a verdict and judgment in the court below for the nonperformance by defendant of its alleged contract to construct a side track alongside of plaintiff's warehouse. Plaintiff's testimony tended to prove that defendant, acting through its general manager, verbally agreed to construct the side track in question if plaintiff would move to a piece of land near its track, owned by him, a large building situated remote therefrom, and repair and remodel the same so as to make it suitable for a warehouse; that he at once removed, repaired, and remodeled the building; and that defendant refused to construct the side track as agreed. Defendant denied the making of this agreement. The issue was submitted to a jury, who, as above stated, rendered a verdict in plaintiff's favor.

We are asked to reverse this judgment on the ground that, according to plaintiff's testimony, there was no consideration for the alleged contract. This point is not well taken. The expense incurred by the plaintiff in removing, repairing, and remodeling the building was the consideration, and it was a sufficient consideration. See *Sanford* v. *Huxford*, 32 Mich. 313; *Stevens* v. *Corbitt*, 33 Mich. 458; *People* v. *Taylor*, 2 Mich. 253.

In announcing this conclusion, we overrule defendant's contention that this consideration was insufficient because plaintiff did not, at the time of defendant's promise, *agree* to remove, repair, and remodel the building.

"It is not necessary that the consideration should exist at the time of making the promise, for, if the person to whom the promise is made should incur any loss, expense, or liability in consequence of the promise, and relying upon it, the promise thereupon becomes obligatory. Thus if A. promises B. to pay him a sum of money if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B. at the time of the promise does not engage to do the act." *People* v. *Taylor*, supra.

See, also, *Stevens* v. *Corbitt*, supra.

The contract in suit might have been performed within one year after it was made, and therefore it is not, as de-

fendant contends, within the terms of section 9515, subd. 1, 3 Comp. Laws, which makes void every verbal agreement "that by its terms is not to be performed in one year from the making thereof." See *Detroit, etc., R. Co.* v. *Forbes*, 30 Mich. 165.

Nor was the verdict, in our judgment, contrary to the weight of evidence or excessive.

The judgment is affirmed, with costs.

The other Justices concurred.

JUNE *v.* LABADIE.

MARRIED WOMEN—BORROWING FOR SEPARATE ESTATE.

One who lends money to a married woman individually to build a house on a lot, knowing that her money bought the lot, and supposing the title to be in her, has a right to assume that he is lending the money for her separate estate, and she cannot defend suit to recover the money on the ground that it was not for her separate estate because the lot had been deeded to her and her husband.

Error to Wayne; Donovan, J. Submitted October 5, 1904. (Docket No. 5.) Decided October 18, 1904.

Assumpsit by Mary J. June against Sophie E. Labadie and Joseph A. Labadie on a promissory note. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Reversed.

A. G. Pitts, for appellant.

John W. McGrath, for appellees.

GRANT, J. This suit is based upon a promissory note signed by defendant Sophie, and indorsed by the defendant Joseph, her husband, and is now before us for the sec-

ond time. For a more complete statement, see 132 Mich. 135. Upon the former trial the main defense was a set-off. Upon the second trial the court directed a verdict for the defendants upon the ground that the money was not borrowed for the separate estate of Sophie, but for that of her husband. Defendants gave evidence tending to show that Sophie borrowed the money from her sister to erect a house upon a lot, which lot was deeded to defendants as husband and wife, and that this fact was known to the plaintiff. Plaintiff testified that the money was loaned to Sophie individually; that she knew that Sophie's money bought the lot; that she loaned her the money to build a house upon the lot, and supposed the title was in her. Under these circumstances plaintiff had a right to assume that she was loaning money to her sister for her separate estate. The defendants cannot, under such circumstances, defend upon the ground that it was not her individual estate. A married woman has a right to borrow money for herself. What she does with the money after she borrows it is no concern of the lender. If the lender knows that the money is borrowed for the husband, or to be used for his estate, then recovery cannot be had. *Shaw* v. *Fortine*, 98 Mich. 254; *Martin* v. *Roberts*, 30 Hun, 255; *Wilder* v. *Richie*, 117 Mass. 382. We said in *Feather* v. *Feather's Estate*, 116 Mich. 384: "She [a married woman] may borrow money if she borrows it on her own account." A question of fact was raised which belonged to the jury, and not to the court.

Judgment reversed, and new trial ordered.

The other Justices concurred.

138 54
149 151

ANDREAS *v.* SCHOOL DISTRICT NO. 4, FRACTIONAL, OF THE TOWNSHIP OF LEAVITT.

1. SPLITTING CAUSE OF ACTION—SET-OFF—JUSTICE'S COURT.
   Where a defendant in justice's court interposes an indivisible cause of action for $150 as a set-off, then withdraws $50 of it, and has judgment for the $100, he is barred, on the principle against splitting causes of action, from suing for the remaining $50, though the justice, under 2 Comp. Laws, § 2741, could not render judgment for more than $100.

2. SAME—ACTION AGAINST PRINCIPAL AND SURETIES.
   That the defendant was not the only defendant in the action, and the claim interposed was a debt due him alone, is immaterial, the action being on a contract against him and others as his sureties, in which case he was the real defendant, authorized by the statute (1 Comp. Laws, § 776, subd. 11) to interpose such a set-off.

3. SAME—UNLIQUIDATED DAMAGES.
   That the claim on which defendant was sued was for unliquidated damages, so that under section 776, subd. 5, he had no right to interpose the set-off, is immaterial, he having successfully interposed it.

Error to Oceana; Russell, J. Submitted October 5, 1904. (Docket No. 8.) Decided October 18, 1904.

Assumpsit by Charles Andreas against school district No. 4, fractional, of the township of Leavitt, for an alleged balance due on a building contract. There was judgment for plaintiff, and defendant brings error. Reversed.

F. E. Wetmore and *Wallace Foote*, for appellant.

Hartwick & Skeels, for appellee.

CARPENTER, J. This case arises out of a contract whereby plaintiff agreed to build a schoolhouse for defendant. After plaintiff had completed the building, and when there was $150 of the contract price unpaid, defendant's building committee, alleging that plaintiff had not

performed his contract, refused to pay the balance. The school district then brought an action in justice's court against Andreas, plaintiff herein, and his sureties, on a bond conditioned on the faithful performance of his contract. The defendants therein pleaded the general issue and gave notice of a set-off due Andreas, amounting to $170. This $170 consisted of the $150 balance unpaid on the contract and several items for extras, aggregating $20. The trial took place before a jury, and after the evidence and arguments were concluded defendants "moved to withdraw $70 of their bill of set-off from the consideration of the jury." Plaintiff school district objected "to the withdrawal of any part of defendants' set-off at this time, unless they specified items." No items were specified. Defendants recovered a verdict and judgment of $100, which the plaintiff school district subsequently paid.

This suit is brought to recover the balance withdrawn in the first case, as above stated. It was commenced in justice's court, where plaintiff recovered a judgment. It was appealed to the circuit court, and on the trial in that court defendant insisted that the principle which prevents a party splitting up an indivisible cause of action constituted a defense. The trial judge denied the application of this principle, and plaintiff obtained a verdict and judgment. Was this decision correct? It is unnecessary to determine in this case whether or not plaintiff had the right to withdraw from the consideration of the first jury his items for extras. He did not indicate, and he refused to indicate, his intention to withdraw those items. His intent was to withdraw a balance of $70, of which at least $50 was a part of an indivisible balance due on the contract. He intended, therefore, to split up an indivisible cause of action. If he recovers in this case, it must be on the ground that the law will give effect to such an intent. The principle that an indivisible cause of action cannot be split up is well settled in this court. See *Dutton* v. *Shaw*, 35 Mich. 431; *Allison* v. *Connor*, 36 Mich. 283; *Milroy* v. *Mining Co.*, 43 Mich. 231; *Continental Ins. Co.* v. *Lumber Co.*, 93 Mich. 139.

It is contended that that principle is inapplicable to this case, because plaintiff, being one of several defendants, had no right to set off an indebtedness due to him alone. This view was adopted by the learned trial judge. In doing this he overlooked the fact that the action was upon a contract against plaintiff as principal and his codefendants as sureties, and that, therefore, under section 776, subd. 11, 1 Comp. Laws, the right of set-off existed. See *Busch* v. *Jones*, 94 Mich. 223; *McGraw* v. *Union Trust Co.*, 136 Mich. 521.

It is said that plaintiff had no right to assert his set-off in justice's court, because the claim upon which he was sued was for unliquidated damages. See section 776, subd. 5, 1 Comp. Laws. But he did assert it, and thereby obtained a judgment. The present claim of the plaintiff is that his judgment was the result of an erroneous ruling. The question before us is whether that erroneous ruling lessens the effect of the judgment. It is authoritatively settled (see 2 Freeman on Judgments, § 337) that it does not.

It is said that plaintiff had a right to split up his cause of action because the justice could not, under section 4721, 2 Comp. Laws, render a judgment for more than $100. This argument is not supported by authority and is opposed to reason. It cannot be urged that, because the defendant sued him in justice's court, the law compelled plaintiff to enforce his set-off there. Indeed, he himself contends, as above stated, that the law forbade such enforcement. We must therefore hold that plaintiff voluntarily chose to enforce his claim in the justice's court, and it is only just that he should abide the consequences of such choice. It is no argument against this conclusion that in England there is a statute which it is held (see *Webster* v. *Armstrong*, 54 L. J. Q. B. [N. S.] 236) gives the right, after one has asserted his claim in the mayor's court as a counterclaim to one there asserted against him, to recover the excess in another suit. We have no such statute.

It is contended that the judgment in the first suit is no bar

because, plaintiff's sureties being codefendants, the parties in that suit were not the same as in the present suit. This point is not well taken. Plaintiff was the real party in the first suit, and the judgment concludes the real parties. See *Bachelder* v. *Brown*, 47 Mich. 366. In our judgment, the principle of law which forbids the splitting up of an indivisible cause of action applies in this case.

The judgment is reversed, and a new trial granted.

The other Justices concurred.

CLEMENT *v.* PERE MARQUETTE RAILROAD CO.

1. RAILROADS—KILLING STOCK—FAILURE TO FENCE—VARIANCE.
   In an action against a railroad company for killing horses on its track, the negligence alleged being failure to maintain the statutory fence, and it being alleged that the horses went upon the track at a point where such fence was required, proof that the horses got upon the track as alleged is necessary to plaintiff's case, and evidence on the part of defendant that they went there over proper cattle-guards is proper.
2. SAME—CATTLE-GUARDS—SUFFICIENCY.
   The sufficiency of a cattle-guard in good repair, of a pattern approved by the commissioner of railroads, as provided by the statute (2 Comp. Laws, § 6294), is not to be questioned.

Error to Kalkaska; Chittenden, J. Submitted October 5, 1904. (Docket No. 13.) Decided October 18, 1904.

Case by Elisha Clement against the Pere Marquette Railroad Company for the alleged negligent killing of plaintiff's horses. There was judgment for plaintiff, and defendant brings error. Reversed.

Frederick W. Stevens (*Charles McPherson*, of counsel), for appellant.

Wayne Simmons (*Parm C. Gilbert*, of counsel), for appellee.

HOOKER, J. Defendant, a railway company, has brought error from a judgment rendered against it in an action for negligently killing two horses owned by the plaintiff. The declaration charges negligence consisting of a failure to erect and maintain the statutory fences upon the line of defendant's railway, and that plaintiff's horses strayed and went upon the defendant's right of way at a place where such fences were required, and were struck and killed by defendant's locomotive. By way of defense the defendant introduced proof that the horses entered by passing over the cattle-guards, which were such cattle-guards as had been prescribed by the commissioner of railroads in compliance with the statute, and that they were at the time in good condition and repair; there being a claim, and perhaps evidence tending to show, that these cattle-guards were adequate as against most horses and cattle.

Counsel for the plaintiff maintain that the only questions before the jury were:

First. Did the defendant maintain lawful fences?
Second. Were the horses killed upon defendant's right of way by its locomotive?

Counsel say that defendant had no right to bring into the case the question whether the horses were killed upon the highway, or crossed the cattle-guard to get upon the track. We think counsel have overlooked the necessity of proving that the injury resulted from defendant's failure to fence, and that, therefore, it was competent for defendant to show that the horses did not go upon the track across a part of the line that should have been fenced. To make out his case it was necessary to prove such an entry upon the right of way as he had alleged. Proof by the plaintiff that they came over the cattle-guard would have been a variance, and such proof for the defendant tended to disprove the charge.

In charging the jury the judge said that they might find for the plaintiff, although the horses were found to have entered over the cattle-guard, and not by reason of the absence of the statutory fence, provided they found

that the cattle-guard was not in good condition, or was not a good and sufficient cattle-guard, which would turn back and restrain stock under ordinary circumstances. He also said:

"It is a question of fact in this case whether the cattle-guard was in good repair. If it was not in good condition and of the proper pattern, and if the horses of the plaintiff went upon the right of way of defendant and were killed by reason of such defect, then the plaintiff is entitled to recover, and your verdict will be for the value of said horses."

The statute (Act No. 165, Pub. Acts 1889; 2 Comp. Laws, § 6294) contains a requirement for fences and cattle-guards, and contains the following proviso:

"*Provided*, that any fence or cattle-guard which shall have the written approval and indorsement of the commissioner of railroads of this State, and which fence is not less than four and one half-feet in height, and is otherwise equal in durability, strength, and sufficiency to turn animals and stock to the fences herein described, shall be a legal railroad fence or cattle-guard."

The record shows that the cattle-guard was of a kind prescribed in writing by the commissioner of railroads, and it is said that there was uncontradicted evidence that it was in good repair and condition. If that is true, it was error to leave to the jury the question of its condition and repair in the language used; but, in any event, it was error to instruct the jury that they might find the defendant liable if, in their opinion, the evidence showed that (although in good condition and repair) it was not good and sufficient, or would not turn back and restrain cattle under ordinary circumstances. The law precludes such an inquiry, for it provides that the action of the commissioner is conclusive upon that question. See *La Flamme* v. *Railway Co.*, 109 Mich. 511 (67 N. W. 556). It was also error to permit evidence on the part of the plaintiff that cattle-guards of that pattern, in good condition and repair, would not ordinarily turn cattle and horses.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

138 60
155 2 13

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

1. SALES—CREDIT—SEVERAL ITEMS—WHEN TIME BEGINS TO RUN.
   Where goods are supplied to a contractor from time to time, as required on a contract to furnish on 30 days' time the material necessary to complete several contracts, the 30 days begin to run, not from the date of the last item, but from the date of each invoice.

2. PRINCIPAL AND SURETY — DISCHARGE OF SURETY — EXTENSION OF TIME.
   The acceptance from a principal of a promissory note for an existing account, payable at a time beyond which the account would be payable, is an extension of the time of payment which discharges the sureties on the account debt.

Error to Wayne; Frazer, J. Submitted October 6, 1904. (Docket No. 22.) Decided October 18, 1904.

Assumpsit by the people of the State of Michigan, for the use and benefit of the C. H. Little Company, against James Grant, principal, and John Archer and Julius Porath, sureties, upon a statutory bond. There was judgment for plaintiff for less than the amount claimed, and plaintiff brings error. Affirmed.

Willard E. Warner, for appellant.

John E. Moloney, for appellees.

HOOKER, J. James Grant was principal, and the other defendants sureties, upon two statutory bonds given to secure payment for labor and materials upon public sewer contracts made by the former. The defendant Grant had a running account with the plaintiff for materials. Goods were sold to him upon 30 days' credit, and the items were numerous. Payments were also made from time to time. A monthly balance was made, and monthly statements of

account were furnished by the plaintiff to Grant. No interest charge was included in them.

On February 1, 1902, a balance was due of	$3,031 42
Items were furnished in February	211 60
Making a total March 1st of	$3,243 02

On February 7th defendant Grant gave to plaintiff his promissory note for $1,500, with interest at 6 per cent., due in one month, without the knowledge of the sureties. This was negotiated, and, being applied to the account,

Reduced the balance March 1st to	$1,743 02
March items	88 74
	$1,831 76
Less cash in March	72 74
Leaving balance April 1st	$1,759 02
Items in April	90 97
	$1,849 99
Less cash in April	210 17
Balance May 1st	$1,639 82

Upon the maturity of the note of February 7th, Grant paid the interest, and gave plaintiff a second note in renewal, payable 30 days after date; and upon April 6th he paid the interest, and again renewed the note. When the note of February 7th was taken, plaintiff made an entry upon its cashbook as follows: "James Grant on acct. $1,500." The amount was credited to Grant's account on the ledger, deducted from monthly balance, and never charged back to the open account. It was debited to "Bills receivable," to offset the credit entry. Grant had several contracts with the city of Detroit at this time, materials for which he purchased from the plaintiff. An action was brought on these bonds, which resulted in a directed verdict against Grant for $1,593.77, without costs, and against all defendants for $682.99, with costs. The plaintiff brings error.

The contest arises over the item of $1,500 and interest, for which the court held that the sureties were not liable; the judge being of the opinion that they had been discharged from their obligation by the acceptance of plaintiff's notes mentioned. It is contended, *first*, that these notes did not extend the time beyond the period of credit given defendant Grant, and therefore that the sureties are not discharged; *second*, that there was no consideration for an extension of time, as there was no agreement by Grant not to pay before the maturity of the note, nor by plaintiff not to sue the original claim.

We think these positions untenable. Defendants say in regard to the former that these goods were bought on 30 days' time, and that the 30 days did not begin to run until the last item of the account was purchased. We think this is not so. The arrangement was to sell materials for various jobs on 30 days' time. That meant 30 days' time from date of invoice. If we may not take judicial notice of so uniform a usage of trade, it is the only reasonable construction to place on the language, in view of the circumstances.

As to the latter contention, the case differs from one where there is a mere agreement to forbear suit for a given time, to give the debtor an opportunity to pay, as in the recent case of *Ferris* v. *Johnson*, 136 Mich. 227. Here the debtor gave his promissory note, whereby he promised to pay at a given time a debt that he had previously incurred. Under ordinary rules, he had no right to pay it before it was due, if it was a note based upon a consideration, and of that there is no doubt. An existing debt is a good consideration for a promise to pay, and it would be a surprise to business circles, were we to hold that a note given for an existing debt, whether due or not, was not based on an adequate consideration; and it would be equally a surprise were we to hold that, notwithstanding the note, the debtor might pay, or the creditor enforce payment, at any time. The inference to be drawn from the circumstances is that Grant was largely

in debt on February 7th to the plaintiff. It was not convenient for him to pay money, and he was asked to give bankable paper, which he did, and it was negotiated. There can be no doubt that both parties expected and understood that the amount represented by that note should not be paid or collected sooner than the time fixed in the note, and contracted to that end, as the terms of the note itself implied. We are aware that there is a want of harmony in the authorities upon this point, but we think the weight of authority sustains our conclusion. It is probable that the amount for which the note was given was due on February 7th, but, if not due at that time, as plaintiff's counsel argue, an additional consideration for the extension was the promise to pay interest before the expiration of 30 days. The case is fairly within the rule of *Smith* v. *Shelden*, 35 Mich. 46, and *Sweet* v. *Newberry*, 92 Mich. 521. See *Shayler* v. *Giddins*, 122 Mich. 660, and *Ferris* v. *Johnson*, 136 Mich. 227.

We find no error, and the judgment is affirmed.

The other Justices concurred.

MULVEY *v.* STEVENSON.

APPEAL AND ERROR—VERDICT—CONCLUSIVENESS.

A verdict and judgment founded on sufficient evidence will not be set aside.

Error to Wayne; Rohnert, J. Submitted October 6, 1904. (Docket No. 25.) Decided October 18, 1904.

Case by Josephine Mulvey against James Stevenson for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Lodge, Trevor & Brown, for appellant.

James McNamara and *Frank C. Cook*, for appellee.

GRANT, J. Plaintiff, while walking along one of the streets of the city of Detroit, on her way to work, was bitten by a dog. She sued the defendant as owner of the dog, and recovered damages.

The sole allegation of error is that the court should have directed a verdict for the defendant, on the ground that there was no evidence that the defendant was the owner of the dog. A review of the testimony would afford no valuable precedent as a guide in future cases. We are unable to agree with the learned counsel for the appellant. We think there was evidence that the defendant at the time was the owner of the dog which bit and injured plaintiff.

It is also urged that the court should have set the verdict aside on the ground that it is against the weight of the evidence. We agree with the circuit judge that there was sufficient evidence upon which to base the verdict, and do not think it is a case which justifies the interference of this court in overruling the judgment of the court below.

Judgment affirmed.

The other Justices concurred.

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s143 358

LINSELL *v.* LINSELL.[1]

1. ACTION ON ACCOUNT—WITNESS—CREDIBILITY—INSTRUCTION.
   Where, in an action to recover an alleged balance due, defendant alone testifies to payment, and plaintiff testifies as to statements of defendant that he did not want anything for the rent of certain premises, which rent he claims constituted the payment, the testimony of plaintiff justifies the jury in

[1]Rehearing denied December 7, 1904.

discrediting defendant's testimony, and a charge compelling the jury to credit defendant's testimony is erroneous.

2. VARIANCE — AMENDMENT — WAIVER — ESTOPPEL TO ALLEGE ERROR.

Where an objection was made when the trial commenced that there was a variance between plaintiff's pleadings and proof, in that she described her cause of action as arising out of certain notes, whereas her evidence was on the theory of an open account, and to meet the objection plaintiff was permitted to amend her bill of particulars, after which the objection was not urged, and the verdict was in defendant's favor, he is estopped, on error, to assert that the assumption that there was no variance, on which the trial proceeded, was unfounded.

Error to Wayne; Mandell, J. Submitted October 7, 1904. (Docket No. 45.) Decided October 18, 1904.

Assumpsit by Martha Linsell against Henry Linsell. There was judgment for plaintiff for less than the amount claimed, and plaintiff brings error. Reversed.

Frank C. Moriarty and *Lehmann & Riggs*, for appellant.

William E. Henze, for appellee.

CARPENTER, J. May 25, 1901, an interest of plaintiff's husband in the estate of his deceased mother was conveyed to defendant, his brother, for the agreed consideration of $1,000. Part of this consideration was paid in cash. The cause of action for the balance was assigned to plaintiff by her husband, who brought this suit to recover the same. Defendant testified that this balance was paid by the settlement of two accounts—the principal one of which was for rent—owed to him by his brother. The trial court, by his charge, in effect compelled the jury to credit this testimony. Was this error?

According to the testimony of defendant, the arrangement whereby the unsettled accounts were to be paid by the transfer of the interest in the estate was made several days before the transfer was actually made, at an inter-

view when no one but himself and his brother were present. His claim of payment, therefore, depends entirely upon the credit to be given to his unsupported testimony. Plaintiff testifies that when the deed was made, she said to the defendant, "that my husband should have the first show to take $500, and if he didn't do right with it, I should come in on the other $500," and that the defendant "didn't say anything." She also testifies that though she and her husband had occupied defendant's property, the latter said, shortly before the conveyance in question was made, that "he didn't want anything for the rent." It seems to us clear that this testimony of plaintiff justified the jury in discrediting defendant's testimony, and that therefore the charge under consideration was erroneous. See *Michigan Pipe Co.* v. *Insurance Co.*, 92 Mich. 488. See, also, *Goppelt* v. *Burgess*, 132 Mich. 28.

The suggestion is made in appellee's brief that plaintiff's pleadings describe her cause of action as arising out of certain note or notes, and that she cannot therefore recover on the open account which her evidenco tends to establish. This objection of variance was made when the trial commenced in the lower court. To meet it, plaintiff's counsel was permitted to, and did, amend his bill of particulars. Afterwards the objection was not urged. We are bound, therefore, to say that the trial proceeded upon the assumption that there was no variance. Defendant cannot now assert that this assumption, upon which he obtained a verdict, was unfounded. See *Wineman* v. *Fisher*, 135 Mich. 604.

The judgment of the circuit court is reversed, and a new trial granted.

The other Justices concurred.

WILTON v. CITY OF DETROIT.

138 67
155 169

1. MUNICIPAL CORPORATIONS — NOTICE OF CLAIM FOR INJURY — WAIVER.

   The notice of claim for negligent injury which the charter of Detroit (Act No. 463, Local Acts 1895, § 46) provides must be served upon the corporation counsel is not waived by consideration by the common council of claimant's claim though the assistant corporation counsel was present and made no objection.

2. SAME—ACTIONS—LIMITATIONS—SERVICE ON WRONG OFFICER.

   Filing and service of a declaration as commencement of suit is not sufficient under the charter of Detroit (Act No. 463, Local Acts 1895, § 46), where the service is made upon the wrong officer and proper service is not had until the year has passed; 3 Comp. Laws, § 9985. The saving statute (3 Comp. Laws, § 9738) has no application to cases barred by the law of 1895.

Error to Wayne; Rohnert, J. Submitted October 7, 1904. (Docket No. 41.) Decided October 18, 1904.

Case by Mary Wilton against the city of Detroit for personal injuries. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

William Look (*George Gartner*, of counsel), for appellant.

P. J. M. Hally (*Timothy E. Tarsney*, of counsel), for appellee.

HOOKER, J. The plaintiff claims to have been injured through defendant's negligence on July 6, 1901. On the 23d day of the same month she presented her petition for compensation to the common council, but she never served the notice upon the city counselor, required by Act No. 463, Local Acts 1895, § 46:

"No action shall be brought against said city, nor any

of its boards, commissions, or officers, for any negligent injury unless it be commenced within one year from the time when the injury was received, nor unless notice shall be given in writing within three months from the time of such injury to the head of the law department or to his chief assistant, of the time, place, and cause of such injury and of the nature thereof."

The petition was referred to the committee on claims and accounts, with whom it slumbered until October 29, 1901, when the committee listened to the testimony of some witnesses produced by the plaintiff. The assistant corporation counsel was present and made no objection to the proceeding. On November 19th the committee reported adversely on the claim, and it was denied.

On July 2, 1902, the plaintiff began an action upon this claim, filing declaration as the commencement of suit. Service was had upon the city comptroller, and this was set aside by the court. Some days later plaintiff caused another copy to be served properly.

It is now claimed that the defendant must prevail, under the plea of the statute of limitations hereinbefore quoted. We have held that the council might waive the statutory notice upon the city counselor, before the expiration of the time for service thereof, but expressed doubt of his being able to do so. In this case we find nothing to justify us in declaring the notice waived.

Again the case is barred by the statute of limitations applicable to this class of cases in Detroit. See Act No. 463, Local Acts 1895. The statute (3 Comp. Laws, § 9985) clearly points out what shall constitute commencement of suit by declaration, and it includes service of a copy personally upon the defendant. It is conceded that the first service was a nullity, because not upon the proper officer. The second was too late.

The case cannot be saved by 3 Comp. Laws, § 9738, as that section has no application to cases barred by the law of 1895 heretofore cited.

We are constrained to affirm the judgment.

The other Justices concurred.

DOUGLASS v. LONGCOR.

DEEDS — SUIT TO ANNUL — UNDUE INFLUENCE — DELIVERY — EVIDENCE — APPEAL.

Where, on a bill to annul certain deeds on the ground of undue influence, failure to understand them, and lack of delivery, complainant's testimony is freer from bitterness than that of defendant's brothers and sisters, and the circumstances shown lead to its credit, a decree for complainant will be affirmed, though defendant and two other witnesses testify to delivery of the deeds, and complainant fails to show ignorance of their purport.

Appeal from Van Buren; Carr, J. Submitted October 7, 1904. (Docket No. 46.) Decided October 18, 1904.

Bill by Celina L. Douglass against Mary E. Longcor to annul certain deeds. From a decree for complainant, defendant appeals. Affirmed.

Barnard & Lewis, for complainant.

David Anderson, for defendant.

HOOKER, J. This complainant, a woman past 87 years of age, filed the bill in this cause to annul certain deeds, which purport to convey from herself to the defendant lands which she received from her husband, upon which they lived many years. It is claimed that she was induced to make them by undue influence, and without understanding them, and that she never delivered them, and that they were taken and put on record without her consent. From a decree in favor of the complainant, the defendant has appealed.

The testimony is conflicting, and in such cases absolute certainty of justice is out of the question. The testimony of the complainant seems more free from bitterness than that of defendant's brothers and sisters, and there are

circumstances shown which lead us to credit it, though denied by the defendant and two other witnesses in relation to the circumstance of delivery. We therefore concur in the view taken by the circuit judge to the extent of holding that the deeds were obtained through undue influence, and were never delivered. We cannot be so sure that the complainant was ignorant of their purport.

The decree is affirmed, with costs.

The other Justices concurred.

WARE *v.* HALL.

HOMESTEAD—VACANT LOT—OCCUPANCY—INTENTION.

A widow, having only married children, and no means with which to build a house, or prospect of any, cannot claim homestead rights in a vacant lot which she has owned for 3½ years, and occupied only by making garden thereon.

Appeal from Berrien; Coolidge, J. Submitted September 13, 1904. (Docket No. 185.) Decided October 26, 1904.

Bill by Mary Jane Ware against Charles W. Hall to set aside an execution levy. From a decree for complainant, defendant appeals. Reversed.

The object of this bill is to cancel an execution levy made upon a vacant lot in Benton Harbor, which complainant claims as a homestead. The sole question presented by the record is whether she had taken sufficient steps to establish and maintain this lot as a homestead. She formerly lived in Kalamazoo, where she owned a lot and a small house, in which we may infer (though it does not clearly appear upon the record) that she lived. In

September, 1899, she sold that house and lot for $375, out of which she paid a mortgage upon them for $250. She then moved to Benton Harbor, where some of her children were living. While living there with her son she purchased the lot in question, for which she paid $150. She is a widow having four children, all of whom are married. She testified that they contributed a little towards her support. Subsequently she rented a house of the defendant, failed to pay the rent, and he brought suit therefor, obtained a judgment, and levied upon this lot in June, 1903. The lot was vacant when purchased, and was never occupied by her in any other manner or for any other purpose than to raise some vegetables upon it during the summer. It does not appear that it was fenced. Her son set out two small maple trees for her in front of the lot, but not at her request. She afterwards paid him 40 cents apiece for them. There were also two or three peach trees upon the lot. She had no money with which to build a house or even to pay her rent. She never made any plans for building, and testified that the reason was that she was too poor.

John J. Sterling, for complainant.

Harris S. Whitney, for defendant.

GRANT, J. (*after stating the facts*). Where one buys a piece of land with the intention of soon thereafter erecting a building thereon for the sole purpose of a homestead, there is reason in holding that such land comes within the protection of the Constitution as a homestead, and that he will have a reasonable time in which to erect the building. That is not this case. For three years and a half complainant had owned this lot. It could not exist indefinitely as a homestead in her intention alone. Something must be done within a reasonable time towards making it such a homestead. There was no such occupancy as, under any of the decisions cited, has been held to constitute a homestead. From her own testimony there was no imme-

diate or remote prospect that she could erect a house. She testified that her son, who was a carpenter, said that some time when he got able he would erect a house on the lot and give it to her. That was the only prospect she had. The facts are entirely different in the cases relied upon. *Reske* v. *Reske*, 51 Mich. 541; *Deville* v. *Widoe*, 64 Mich. 593; *Mills* v. *Hobbs*, 76 Mich. 126; *Corey* v. *Waldo*, 126 Mich. 706.

Corey v. *Waldo* comes nearest to sustaining the plaintiff's contention. But in that case the defendant and his wife were "proceeding as rapidly as circumstances would permit" to convert a homestead, which had been condemned by the city of Detroit for the purpose of opening a street, into another homestead composed of the lot which had been levied upon. Mr. Waldo was able to erect buildings thereon as a homestead, and we held that the reasonable time for him to carry that intention into effect by the occupancy which the Constitution and law require had not expired. Here the naked question is, Can one utterly insolvent, without any ability to earn money sufficient even to support herself, without any prospect of getting money to erect a building thereon, hold land indefinitely as a homestead? To so hold would be in direct opposition to the language of the Constitution and the law, which require ownership and occupancy combined. In all the cases cited, except possibly *Corey* v. *Waldo*, there were some acts of occupancy. Intention without occupancy cannot create a homestead, for the Constitution requires occupancy as well as intention. There must be some acts which, coupled with the intention, constitute the necessary occupancy.

Decree reversed, and bill dismissed.

The other Justices concurred.

STODDARD *v.* SAGINAW BUILDING & LOAN ASS'N.

1. BUILDING AND LOAN ASSOCIATIONS—LOANS—COMPETITIVE BIDDING—EVIDENCE—SUFFICIENCY.

   In a suit against a building and loan association for an accounting and a discharge of mortgages executed by complainant, which had been foreclosed, and to set aside sales made thereunder, on the ground that the mortgages were usurious, evidence examined, and *held* to show that there was no competitive bidding at the time the loans were made, as required by law.

2. SAME — INDUCEMENTS TO BORROWERS — ADVERTISEMENTS — FRAUD.

   Where there was evidence that the secretary of a building association made persistent efforts to induce an owner of land to borrow money of the association on the ground that he could borrow the money at less than the rate of interest he was then paying, and furnished him with advertising matter stating that a borrower could pay his loan by paying only 56 per cent. of the amount borrowed, and complainant testified that the secretary stated that it would be economy to borrow from the association, it cannot be urged that this was mere opinion, and not a representation by which the borrower should not have been misled.

Appeal from Saginaw; Snow, J. Submitted October 4, 1904. (Docket No. 3.) Decided October 26, 1904.

Bill by Walter S. Stoddard and Jane Stoddard against the Saginaw Building & Loan Association for an accounting and the cancellation and discharge of certain mortgages. From a decree for complainants, defendant appeals. Affirmed.

Wm. E. Crane and *George C. Ryan*, for complainants.

Nathan S. Wood, for defendant.

HOOKER, J. Defendant's brief states that on November 1, 1890, Walter Stoddard took 13 shares of its stock, and that on November 10, 1890, he borrowed money on 10 of these shares, bidding 26½ per cent. premium for the loan, and that on November 24, 1890, he bid 27½ per cent. for an additional loan; that on February 13, 1893, he made another loan, upon four other shares of stock, bidding 27½ per cent. It states further that he paid upon these loans a total of $1,528.17, paying regularly until November 21, 1900, when default in payments began. On July 30, 1901, the stock was canceled, and credited, and foreclosure of the mortgages given by the complainants to secure said loans was ordered by defendant's board of directors. Defendant claims that it had paid taxes upon the premises for five years, for which it had a lien. It thereupon proceeded to foreclose by advertisement, and bid in the parcels upon February 8 and 15, 1902, respectively.

A short time after the foreclosure sales the complainants filed the bill in this case, claiming that they were induced to make the mortgages by the fraudulent representations of defendant's secretary, that the contract was usurious, and that they had paid more than was by law due, and prayed for an accounting and a surrender and discharge of the mortgages. The defendant answered, and a hearing was had, proofs being taken in open court. The record shows that Walter Stoddard testified that he resided in Saginaw, and bought a home of one Burrows, giving him a mortgage for a portion of the purchase price, drawing interest. He subsequently received a letter from Mr. Fowler, defendant's secretary, stating that he had ascertained that there was a mortgage against the home of the witness on a contract, and that defendant would help him out by letting him have money on a better basis than that upon which he was then getting it. The witness received many such letters before paying any attention to them. He finally saw Fowler, and, according to his testimony, Fowler represented to him that by taking stock

with defendant, according to their plan, the loan would not cost more than 7 per cent. interest, and the stock would mature in eight years or less. Fowler sent him the pamphlet issued by the defendant, which purports to explain the method of business, and contains an illustration of results by showing an imaginary loan to John Brown. Fowler had several interviews, and complainant Walter Stoddard finally concluded to place the loan with defendant. He was instructed to attend a meeting, and did so He found a number of men about a table, probably directors. Fowler was there, and took him outside, and told him that bids less than 26½ per cent. would not be accepted; also that high bids were advantageous to the borrower, because they lessened the amount to be paid on the stock. Fowler afterwards arose in the meeting, and said that the association had some money to loan, and asked for bids. Stoddard bid 26½ per cent., and no one else bid, so it was struck off to him. He testified that on the other occasions no form of bidding was had, but he was told that he could have it the same as before.

This state of facts was not admitted. On the contrary, defendant sought to prove that the secretary did not represent that the stock would be paid up in eight years, or that the cost of the loan would be less than 7 per cent., and claims that, if such representations were made, they were mere matters of opinion. They also sought to show by the deposition of Fowler that he did not tell the complainant that bids less than 26½ per cent. would not be accepted, and that the loans were sold upon competitive bidding. Several directors testified upon this subject, and the records of the meetings in question were read in evidence. The learned circuit judge who heard the cause found that the allegations of the bill were sustained, and that the complainants were entitled to the relief prayed. Upon the accounting he found that the mortgages were fully paid upon the commencement of the foreclosures, including interest at 7 per cent., computed semi-annually, but that there was equitably due to the defendant the sum of

$314.71 for taxes and interest. The sales were canceled, and complainants required to pay that sum, failing in which the premises were to be sold. Costs were given to the complainants. The defendant has appealed.

The circuit judge evidently gave credence to the testimony of Walter Stoddard. The testimony is not without corroboration as to the practice of the defendant with relation to bids. Section 7 of the by-laws in force at the time and for some time afterwards provided that the "board of directors shall have power to fix the minimum rate of premium at which money on hand shall be sold," and Fowler testified that he told Stoddard that 25 per cent. was considered a fair premium among associations. One or more of the directors testified that it was never sold at less than 25 per cent., and at the time of Stoddard's transactions there was a rule that 25 per cent. should be the minimum premium. Several witnesses testified to being present at the meetings when complainant bid for his loans, and gave it as their opinion that there was competitive bidding, but upon cross-examination it was made to appear that they had no recollection, and based their opinion solely upon the minutes of the meetings produced on the trial. The minutes of the meeting of November 10th show two loans at 26½ per. cent. and two at 27 per cent. They state:

"Money offered for sale and sold to Lydia Goodby on 21 shares at 26½ per cent., Walter S. Stoddard on 10 shares at 26½ per cent., Henry A. Hare on 7 shares at 27 per cent., Lyman J. Perkins on 1 share at 27 per cent.

"Com. on L. J. Perkins loan reported approving loan.

"*Mr. Vincent:* I move that loan be approved subject to favorable report of attorney.

"*Mr. Moye:* I support.

"Motion carried.

"Com. on Lydia Goodby loan reported approving loan.

"*Mr. Vincent:* I move that the Lydia Goodby loan be approved subject to favorable report of att'y, and that the order be drawn for proper amounts.

"*Mr. Herrig:* I support.

"Motion carried.

"Com. on Henry A. Hare loan reported approving loan.

"*Mr. Herrig:* I move that the Henry A. Hare loan be approved subject to favorable report of att'y.

"*Mr. Moye:* I support.

"Motion carried.

"Com. on Walter S. Stoddard loan reported approving loan.

"*Mr. Vincent:* I move that W. S. Stoddard loan be approved subject to approval of att'y, and that the orders be drawn for proper amounts.

"*Mr. Moye:* I support.

"Motion carried. * * *"

There is nothing in this to show that any competitive bid was had on the first two loans, or that all of the parties bidding did not understand that 25 per cent. was a minimum, or that they had not all been told that 26½ per cent. was the minimum that would be accepted, as Stoddard says that he was told.

Another point has prominence in this cause. The bill alleges—and there is proof to support it—that the defendant's secretary made a persistent effort to induce Mr. Stoddard to borrow money of his association. If Stoddard was truthful, it was accomplished by leading him to believe that he could borrow money at less cost to himself than the rate he was then paying, viz., 7 per cent., and apparently it was not until he was so convinced that he consented to join the association. That this would depend upon the time required to mature the stock is apparent, hence it was necessary that complainant be made to think that it could and would be brought about within eight years. We understand that the claim that it would probably mature in that time is not disputed, and the advertising matter used and furnished the complainant states that:

"According to the past experience of similar associations, this value will be reached in between eight and nine years, although during that time but about $56 per share would have been paid in, the remaining $44 having accrued to the stock in profits. When the par value is reached it is paid to the shareholder in cash, when no money has been borrowed. If the person has borrowed from the

association during the continuance of the payments, such amount is deducted from the value of the shares."

It is a rather startling proposition that a borrower could pay his loan by paying only 56 per cent. of the amount borrowed. Doubtless it would be contended that this was neither meant nor said, but the statements made would not be unlikely to mislead many of those for whose benefit these associations are ostensibly created, viz., the industrial classes who desire homes. However that may be as to the borrowing class, this statement does show that by past experience a lender can realize a very large rate of interest in eight years. It is manifest that this must be paid by the borrowing class, and no one is more likely to understand this than those who conduct such associations.

The advertisement quoted from does not make a fair showing in its illustration of John Brown's imaginary loan. If it did it would not state that $331.60 shows the cost of a loan, as compared with $420 at 7 per cent., in view of the fact that dues and interest were payable weekly.

One cannot read the advertisement without understanding that the concern which issued it sought to impress possible patrons with the belief that it would be economy for them to borrow from the defendant. The complainant testified that the secretary so represented. Defendant's counsel urge that this was a mere opinion, not a promise nor a representation, and that complainant should not have been misled, because of the printed matter furnished, already referred to.

If the parties met on equal terms, and there was no deceit upon the secretary's part, that contention might be correct; but, if this advertisement was intended and cunningly devised to create an impression that the managers of the association knew to be incorrect or doubted, it might be a fraud, and the perpetrator could not shelter himself behind the claim that it was an opinion. Taken in connection with the alleged statements of the secretary and the circumstances of the case, a court might reasonably

find that the conduct was deceitful and fraudulent. The law gives special favors to such associations as these. It permits them to charge high rates of interest and to escape the payment of taxes—privileges denied to banks and other similar institutions. This is upon the theory stated, viz., that the poorer classes may be able to obtain homes. Experience has proved that such associations have not been free from the baleful influence of the desire for money-getting, and some—including this association—have eliminated fair competition, and required minimum bonuses of a high percentage, and, as we have seen in this case, resorted to advertising, which, while well designed to appeal to the cupidity of its patrons, is also liable to inspire undue expectations and confidence. This should not be countenanced. We are of the opinion that the finding of the circuit judge was warranted by the proofs. *Myers* v. *Building Ass'n*, 117 Mich. 392; *National Mut. Bldg. & Loan Ass'n* v. *Burch*, 124 Mich. 62.

The decree is affirmed, with costs.

MOORE, C. J., and GRANT and CARPENTER, JJ., concurred. MONTGOMERY, J., concurred in the result.

MICHIGAN BUGGY CO. *v.* SMALLEGAN.

COMMENCEMENT OF SUIT — DECLARATION AND RULE TO PLEAD — FILING—INDORSEMENT.

Where suit is commenced by filing declaration and service of a copy thereof, indorsed with a copy of the rule to plead, as prescribed by the statute (3 Comp. Laws, § 9985), it is not necessary that the copy served bear an indorsement of filing by the clerk.

Case made from Antrim; Wayne, J. Submitted October 4, 1904. (Docket No. 212.) Decided October 26, 1904.

Assumpsit by the Michigan Buggy Company against John Smallegan and John H. Smith, copartners as Smallegan & Smith, for goods sold and delivered. There was judgment for plaintiff, and defendants appeal. Affirmed.

Fitch R. Williams, for appellants.

Leavitt & Guile, for appellee.

HOOKER, J. This action was begun by filing a declaration, a copy of which was served. Afterwards an amended declaration was filed to correct an unimportant clerical error. Both declarations were served by delivery of copies, but neither copy showed an indorsement of the filing by the clerk, which in each instance appeared upon the original. The defendants did not appear, and their defaults were entered for not appearing and pleading, and judgment followed after defendants had appeared specially and moved to set aside the proceedings for want of jurisdiction, which motion was denied; and the defendants present the cause to us by case made.

It is claimed that the failure to serve a declaration properly is a jurisdictional question, and it is insisted that to omit the indorsements of filing from the copy served is not a service in compliance with law. The statute (3 Comp. Laws, § 9985) provides for the commencement of suit by filing declaration, entering a rule to plead, and serving a copy of the declaration and a copy of the rule. It is silent as to the indorsement of filing. We think that the service was proper.

Judgment affirmed.

The other Justices concurred.

THOMPSON *v.* BAY CIRCUIT JUDGE.

1. DISCONTINUANCE—STIPULATION—SETTING ASIDE—MANDAMUS.
   An order striking a stipulation to discontinue without costs from the files, on the ground that it was obtained by deception, unless within 30 days plaintiff pays the costs therein or discontinues a subsequent suit for the same cause of action, does not involve the question whether the settlement of the cause of action was fraudulent, but merely requires plaintiff to proceed with his cause or pay the costs, and mandamus will not be granted to vacate it.
2. SAME—FRAUD.
   The circuit court on motion and proper showing may set aside a discontinuance fraudulently obtained.

Mandamus by Martha J. Thompson to compel Theodore F. Shepard, circuit judge of Bay county, to set aside an order striking a stipulation of discontinuance from the files. Submitted October 4, 1904. (Calendar No. 20,743.) Writ denied October 26, 1904.

Petitioner brought suit in the circuit court of Bay county against the city of West Bay City for negligent personal injury, and had judgment, which was reversed on error in this court. *Thompson* v. *City of West Bay City*, 137 Mich. 94. The attorneys of the parties afterward stipulated to discontinue the cause without costs to either party, and petitioner subsequently brought another suit for the same injury against the city and another. Thereupon the city obtained an order striking the stipulation of discontinuance from the files unless petitioner should pay the accrued costs within 30 days or discontinue the second suit as to the city, on the grounds that the stipulation was obtained by deception, and that the understanding of the city's attorney was that it was made for the purpose of terminating the litigation. Petitioner applies for mandamus to compel the circuit judge to set aside the order striking off

the discontinuance, on the ground that the question of fraud presented could not be tried on motion and affidavits.

Fred W. De Foe, for relator.

S. G. Houghton, for respondent.

PER CURIAM. The writ will be denied. The case is distinguishable from *Voigt Brewery Co.* v. *Wayne Circuit Judge*, 103 Mich. 190. In that case the effect of the action of the circuit judge was to adjudge that a settlement of a cause of action was fraudulent. It was held that such question could not be thus tried. Here there is no such question. The plaintiff is merely required to proceed with her cause or pay the costs. If the discontinuance in such a case was obtained fraudulently, we think the court might set the same aside on motion and proper showing.

SANDS & MAXWELL LUMBER CO. *v.* GAY.

LAND CONTRACT—FORECLOSURE—JURISDICTION OF CHANCERY.

A suit in chancery to foreclose a land contract, on which less than $100 remains unpaid, involves a controversy concerning property within the statute (1 Comp. Laws, § 435), providing that circuit courts in chancery shall dismiss every suit concerning property, with certain exceptions, where the matter in dispute shall not exceed $100.

Appeal from Oceana; Russell, J. Submitted October 5, 1904. (Docket No. 7.) Decided October 26, 1904.

Bill by the Sands & Maxwell Lumber Company against James D. Gay and others to foreclose a land contract. From a decree dismissing the bill, complainant appeals. Affirmed.

Hartwick & Skeels, for complainant.

Wallace Foote and *M. H. Brooks*, for defendants.

MOORE, C. J. This is a bill to foreclose a land contract made between the complainant and James D. Gay, upon which complainant claimed there was $31.80 unpaid. It was the claim of defendants that nothing was unpaid on the contract. After the testimony was all in the solicitors for defendants moved to dismiss the bill of complaint, because the amount unpaid on the contract was less than $100, and for that reason the court did not have jurisdiction. The judge granted the motion, and the case was brought here by appeal.

The question involves a construction of section 435, 1 Comp. Laws, which reads:

"Such courts shall dismiss every suit concerning property, excepting suits between copartners, and suits for the enforcement of mechanics' liens, suits for the foreclosure of mechanics' liens, and suits for the foreclosure of mortgages, where the matter in dispute shall not exceed one hundred dollars, with costs to the defendant."

It is claimed by complainant that this is a suit for the foreclosure of a mortgage. It is true, as contended by the solicitors for the complainant, that this court has recognized that a grantor in a land contract may foreclose his contract upon the chancery side of the court; but it does not follow that, when less than $100 is involved, he may do so. The average man would not understand that, when one spoke of the foreclosure of a mortgage, the speaker meant the foreclosure of a land contract. This is certainly a suit concerning property in which the amount involved is less than $100, and it became the duty of the court to dismiss it, unless it is within the exceptions mentioned in the statute. We think the circuit judge was right in holding it was not within the exceptions.

The decree is affirmed.

The other Justices concurred.

POPP *v.* CONNERY.

MARRIED WOMEN — BUILDING CONTRACTS — AGENCY OF HUSBAND.

Where buildings are erected on the land of a married woman, with her knowledge and consent, out of materials selected by her, she is liable for the value of the materials furnished, though the business was conducted mainly by her husband, and the furnisher supposed he was furnishing her husband and that the title to the land was in him, and no misrepresentations were made.

Error to Saginaw; Beach, J. Submitted October 5, 1904. (Docket No. 11.) Decided October 26, 1904.

Assumpsit by John Popp and Joseph F. Wolf, copartners as Popp & Wolf, against Christina Connery for goods sold and delivered. There was judgment for defendant on a verdict directed by the court, and plaintiffs bring error. Reversed.

The defendant was erecting some houses on some lots owned by her. The contracts for their construction were made mainly by her husband in his own name. The business was mainly conducted by him, though she frequently gave instructions. The circumstances surrounding the construction of the buildings are fully stated in *Brand* v. *Connery*, 132 Mich. 88. Plaintiffs sold a bill of hardware for use in the construction of the houses. Her husband made the contract with plaintiffs. The goods were charged to him in the belief (though the husband made no representation of ownership) that the land was owned by him. By direction of the husband plaintiffs sent samples to the home of Mr. and Mrs. Connery for her selection. She selected them, and the price was agreed upon. The husband became insolvent and unable to pay. Plaintiffs, upon learning that the title was in defendant, then charged the goods to her, and, upon her refusal to pay, brought this suit. The court directed a verdict for the defendant.

Eugene Wilber, for appellants.

James H. Davitt, for appellee.

GRANT, J. (*after stating the facts*). The sole basis for recovery is stated by plaintiffs' counsel to be the fact "that the defendant owned the land, that she knew the buildings were to be erected, that she wanted them built, that she selected the materials, that they were taken to her home expressly that she might make the selections, that she agreed upon the prices, that she gave directions to the architect and builders, and that by the erection of these dwellings the value of her land was increased from $1,000 to $10,000." Plaintiffs rely upon *Frolich* v. *Carroll*, 127 Mich. 561, and the authorities there cited. Defendant's counsel rely upon *Holmes* v. *Bronson*, 43 Mich. 562, *Morrison* v. *Berry*, 42 Mich. 389, *Hillier* v. *Eldred*, 91 Mich. 54, and other similar cases.

In *Holmes* v. *Bronson* a furnace was sold to the husband and placed in his wife's house. The husband gave his note for the purchase price, paid a part of the principal and interest, and obtained several renewals. After the last renewal, learning that the title to the land was in the wife, the plaintiffs returned the husband's note and sued the wife.

In *Morrison* v. *Berry* the husband bought a gas machine, which was attached to the house owned by the wife, on representation that he owned the house. Upon learning that the representation was false, the vendors tendered back the note which the husband had given, demanded possession of the machine, and, upon refusal, brought an action of trover. The majority of the court held that the action could not be maintained, for the reason that there was no evidence to show that Mrs. Morrison had any knowledge of even the existence of a contract, or that she did any act whatever to afford any ground of action against her. Justice COOLEY dissented.

In *Hillier* v. *Eldred* a son bought a frame of a barn to put up on his mother's homestead, intending to make her a present of it.

In *Frolich* v. *Carroll* the contract to erect houses upon the wife's land was made by her husband. The contractor testified that he signed the contract upon the representation that the husband owned the premises. The chief difference between that case and this lies in the fact that Mr. Connery made no express representation as to the title. It was claimed there, as here, that there was not a scintilla of evidence to show any contract with the wife. The court found that the contract was in fact made on behalf of the wife, and in sustaining the conclusion of the court below we said:

"Margaret Carroll owned the land, she knew the buildings were to be erected thereon, she wanted them built, she used funds of her own and borrowed more to pay upon the contract, she drew her own personal checks to the complainant and other contractors, and she still owns the premises. She thereby recognized the contract as hers. The case is like any other case of contract made by an agent where the principal is undisclosed"—citing authorities.

It is clear from this record that the husband was making no presents to his wife. He was attending to her business in the same manner as any husband under like circumstances would attend to his wife's business. She knew he was doing this for her. While she did not herself make the application for the articles furnished by plaintiffs, she was present when the contract was made. She knew it was being done for her benefit, and to increase her property. Neither she nor her husband were produced as witnesses. Her husband was not purchasing a single article, like a gas machine or a furnace, but was purchasing materials to be used in the construction of her houses, and she knew that he was doing so. We think the case falls within the principle of *Frolich* v. *Carroll*, instead of the other cases above cited.

Judgment reversed, and new trial ordered.

The other Justices concurred.

MEESKE v. MILLER.

1. LANDLORD AND TENANT — SUMMARY PROCEEDINGS — RIGHT TO DISPUTE LANDLORD'S TITLE.

   In summary proceedings for the possession of leased premises, it appeared that after foreclosure of plaintiff's mortgage, defendant, the mortgagor, remained upon the land under an agreement to purchase and to pay rent, and that prior thereto a third person had bought a tax title, and defendant had also been paying rent to him. *Held* that the title to land was not in question so as to require dismissal of the proceedings, as defendant could not thus dispute his landlord's title.

2. CERTIORARI—FINDINGS OF FACT—CONCLUSIVENESS.

   On certiorari to a circuit court commissioner to review summary proceedings, his findings of fact on conflicting evidence are conclusive.

Error to Muskegon; Russell, J. Submitted October 5, 1904. (Docket No. 9.) Decided October 26, 1904.

Summary proceedings by Otto G. Meeske against Frederick W. Miller before a circuit court commissioner for the possession of certain leased premises. Plaintiff had judgment of ouster before the commissioner, which was reversed by the circuit court on certiorari, and plaintiff brings error. Reversed, and judgment entered for plaintiff.

Stephen H. Clink, for appellant.

W. E. Hoyt (*R. J. Macdonald*, of counsel), for appellee.

HOOKER, J. The complainant recovered a judgment of eviction before a circuit court commissioner, upon a claim that the premises were wrongfully withheld from him by Miller, his tenant. This judgment was reversed

in the circuit court on certiorari, and is before us on writ of error, issued at the instance of the complainant.

The return to the writ shows that Miller, being in possession as owner of the original title to the premises, mortgaged them to Meeske, the complainant. Subsequently the land was sold for delinquent taxes to one Foss, who took a deed for the same from the auditor general. Foss was a relative of Miller. Meeske foreclosed his mortgage in chancery, taking a commissioner's deed. A demand was then made for possession, after which an arrangement of some kind was made by which the defendant continued in possession. Complainant claimed that Miller agreed to purchase the land for the amount due, and meantime to pay $5 a month rent. Miller admitted the arrangement, and that he agreed to pay the debt for which the mortgage was foreclosed, but denied that he promised to pay rent. The proceeding was based upon a claim that he was complainant's tenant, and of nonpayment of rent.

Upon the trial before the commissioner, complainant first learned of the tax title by the production of the deed, and the testimony of Foss and the defendant that for six years the latter had been paying $60 a year rent to the former. Upon certiorari the circuit judge was of the opinion that title to land was brought in question, and that the commissioner should therefore have dismissed the proceeding, under the rule laid down in *Butler* v. *Bertrand*, 97 Mich. 59, and *Jenkinson* v. *Winans*, 109 Mich. 525.

It is shown beyond controversy that, at the time of the arrangement between Miller and Meeske, Foss had all of the title that he ever had, and that Miller knew of it. He saw fit at that time to recognize the title of Meeske, and by his agreement he became his tenant, either at an agreed rent, or at will or sufferance. The commissioner found that he agreed to pay rent, and that finding is conclusive of the question, there being evidence to that effect. No change in the title of complainant has occurred since that agree-

ment was made, as was the claim in the case of *Jenkinson* v. *Winans*, and the defendant was therefore not in a position to dispute that title. It is settled by those cases that when the proof shows that the title to the land is in controversy the commissioner should dismiss summary proceedings, for the reason that such is not a proper proceeding in which to try the title to land. In this case the title to land was not shown to come in question, for the reason that the defendant was not in a position to dispute his landlord's title, nothing having occurred after their arrangement to change their relations or the condition of the title. The evidence conclusively showed that defendant was in possession under the agreement with the complainant, whether he agreed to pay rent or not, as a purchaser of the land from him. If it were true that he had been paying rent to Foss for a number of years, it would make no difference; for defendant dealt with the complainant, and as between them became his tenant, and he is estopped from questioning his landlord's title as it then existed, whatever Foss might do, were he a party. It is suggested that complainant cannot recover because there was not a promise to pay rent. The reply to that is that there was evidence pro and con upon that question, and the judgment of the commissioner upon it is not subject to review, as already intimated.

The judgment of the circuit court is reversed, and a judgment of ouster will be entered here in accordance with the judgment of the commissioner which is hereby affirmed, together with costs of all courts to be taxed.

The other Justices concurred.

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CLEVELAND *v.* ROTHSCHILD.

PLEADING—AMENDMENT—CHANGE IN CAUSE OF ACTION.

In a suit to recover the purchase price of certain capital stock which defendant agreed in writing to purchase before the corporation was organized, plaintiff declared for the price of 1,250 shares at $5,000, as set out in the contract. On the trial it appeared that the corporation, by agreement of all parties, was actually organized with one-fifth the number of shares originally contemplated, but with the same assets, and defendant received 250 of the shares. *Held*, that an amendment of the bill of particulars in accordance with the proof did not introduce a new cause of action and should have been allowed, under the statute of amendments. 3 Comp. Laws, § 10268.

Error to Wayne; Rohnert, J. Submitted October 5, 1904. (Docket No. 12.) Decided October 26, 1904.

Assumpsit by William H. Cleveland against Sigmund Rothschild to recover the purchase price of certain corporate stock. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

Tarsney & Fitzpatrick and *R. I. Lawson*, for appellant.

Chamberlain & Guise (*Elliott G. Stevenson* and *Leo M. Butzel*, of counsel), for appellee.

MOORE, C. J. This suit is brought to recover the sum of $5,000 and interest thereon, which plaintiff claims is due him from the defendant. The case has been here before, and a reference to it as reported in 132 Mich. 625 will make a long statement here unnecessary. The declaration was upon the common counts, with a bill of particulars as follows:

"(1) For the price and value of 1,250 shares of the cap-

ital stock of the Cleveland Stone Company, a corporation, sold and transferred by plaintiff to defendant September 25, 1892, $5,000. * * * (2) September 25, 1892, it was agreed in writing between the said plaintiff and defendant that said defendant should receive 1,250 shares of the capital stock of the Cleveland Stone & Supply Company which said company was incorporated under the name and style of the Cleveland Stone Company, in consideration of $5,000 to be paid to said plaintiff as a bonus, which said sum of $5,000 so agreed to be paid to the plaintiff by the defendant the plaintiff seeks to recover in this action, together with interest thereon from October 1, 1892.

"Dated at Detroit this 19th day of March, A. D. 1896."

The plea was the general issue, with notice of set-off.

On the trial plaintiff moved to amend his bill of particulars by adding the following item:

"To the agreed price and value of 250 shares of the capital stock of the Cleveland Stone Company, said 250 shares being equivalent, both as to number of shares and value, to 1,250 shares of stock mentioned in a written agreement between the plaintiff and defendant and John H. Brown, dated September 28, 1892, $5,000."

Defendant objected to the proposed amendment, and it was denied by the court for the reason that it stated a new cause of action against which the statute of limitations had run. The judge was of the opinion he had no power, as a matter of law, to permit the amendment, and stated, if he thought he had any discretion, he would have exercised it, and permitted the amendment. The defendant claimed the plaintiff had not made out performance of the written contract of September 28, 1892. Also that the proofs show that some time in the month of April or May, 1893, the parties made a new agreement, and that recovery must be had upon such new agreement, or not at all. The learned trial judge took this view of the matter, and directed a verdict for defendant.

The defendant insists here, as he did in the court below, that the proposed amendment introduced a new cause of action, and the trial judge did not possess the power to allow it. Is this contention correct? The record discloses

that when the contract of September, 1892, was made the business was not conducted by a corporation, but one was to be formed for that purpose, which was to take over the business and agreement then existing between Mr. White, owner of the Anderson quarry, and Mr. Odette and Mr. Cleveland. The entire assets of the proposed company consisted of the business and agreement which it was to so take over. The company was to be capitalized in the sum of $50,000, for which 5,000 shares of stock of the par value of $10 each were to be issued. 1,250 shares of this stock were to be issued to defendant, for which he was to pay Mr. Cleveland $5,000 as a bonus. The record also discloses that plaintiff gave evidence tending to show that by the mutual consent of all the parties, including the defendant, instead of incorporating with a capital of $50,000, a company was incorporated with $10,000 capital, of which 250 shares of the par value of $10 each were issued to defendant.

The statute of amendments reads (section 10268, 3 Comp. Laws):

"The court in which any action shall be pending, shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein."

It will be observed that the assets of the proposed company and of the company which was in fact formed consisted of the same things. It will also be observed that defendant was to have one-fourth of all the shares of stock which were to be issued in the proposed company, and, if the evidence offered by the plaintiff is true, that he in fact obtained one-fourth of all the shares of stock in the company which was formed. We think it clear that he obtained just what was intended in the first instance, and that the proposed amendment did not set up a new cause of action. The statute we have quoted authorized the circuit judge to allow the proposed amendment. As he states he would have allowed it if he had supposed he had

any discretion in the matter, the judgment is reversed, and a new trial ordered. See *Welch* v. *Hull*, 73 Mich. 47; *Pratt* v. *Montcalm Circuit Judge*, 105 Mich. 499; *St. Clair Tunnel Co.* v. *St. Clair Circuit Judge*, 114 Mich. 417.

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

BARNES *v.* CITY OF WEST BAY CITY.

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HIGHWAYS AND STREETS — DEFECTIVE SIDEWALKS — PERSONAL INJURIES — CASE FOR JURY.

Evidence examined in an action against a city for injuries received from a fall on a defective sidewalk, and *held* to make a case for the jury, it being claimed that plaintiff was negligent in attempting to pass over the walk in question with knowledge of its defective condition.

Error to Bay; Shepard, J. Submitted October 6, 1904. (Docket No. 17.) Decided October 26, 1904.

Case by Lutheria A. Barnes against the city of West Bay City for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

This action was brought to recover damages for injuries sustained by the plaintiff from a fall on a defective sidewalk in West Bay City.

Plaintiff, a woman of mature years, and a companion, were returning home from their day's work at a factory at about six o'clock in the evening of November 18, 1902, when she stepped into a hole in the sidewalk and fell and was injured thereby.

It appeared in evidence that plaintiff had passed over the walk in question many times, and knew of its general dilap-

idated condition, and on the evening in question was walking slowly, "picking her way along," to avoid the dangerous places. There were other streets, not quite so convenient for her, by which she could have reached home, and there was an opportunity to avoid the particular place where the injury occurred by stepping off the sidewalk and walking on the ground. The evening was dark, and there was an electric light half a block away.

Defendant offered no evidence.

S. G. Houghton, for appellant.

De Vere Hall (*Gilbert W. Hand*, of counsel), for appellee.

MOORE, C. J. This action is brought to recover for injuries received by the plaintiff upon a defective sidewalk. The city offered no evidence. From a judgment obtained by the plaintiff, the case is brought here by writ of error. The sole question involved is, Do the facts show plaintiff guilty, as a matter of law, of contributory negligence? It is claimed by the city they do, and that the case is within *Irion* v. *City of Saginaw*, 120 Mich. 295, and like cases. On the part of the plaintiff it is claimed the testimony presented a question of fact for the jury, under *Styles* v. *Village of Decatur*, 131 Mich. 443, and like cases. The case is near the border line. It would profit no one to set out the testimony in detail. We will content ourselves with saying the testimony made a question of fact for the jury.

Judgment is affirmed.

The other Justices concurred.

HIRSH *v.* FISHER.

1. APPEAL AND ERROR—NOTICE OF PROCEEDINGS—WAIVER.
   Defendants in error will be held to have waived any failure to give them proper notice of the proceedings in error, where the case is heard without objection, and the record is prima facie sufficient to present the proceedings below.

2. NEW TRIAL—REHEARINGS—CIRCUIT COURT—CERTIORARI.
   Circuit Court Rule 21 authorizes the circuit court to grant a rehearing on a certiorari to a justice of the peace.

3. PROCESS — SERVICE ON JOINT DEFENDANTS — JUDGMENT — VALIDITY.
   Where partners are sued before a justice of the peace, and only one is served with process, a judgment for plaintiff against all is not void merely because of want of service on the other defendants. 1 Comp. Laws, § 840.

4. PLEA IN ABATEMENT—SPECIAL APPEARANCE.
   Where joint debtors are sued before a justice of the peace on the theory of the existence of a partnership between them, a special appearance by the only defendant served to have the proceedings dismissed on the ground that he was not a copartner is not equivalent to a plea in abatement requiring replication and proof by plaintiff to meet it.

5. AFFIDAVIT SERVED WITH SUMMONS — ADMISSIBILITY — KNOWLEDGE OF AFFIANT.
   An affidavit served with a justice's summons to the effect that defendants were justly indebted to the plaintiffs in a certain sum, as a balance due for goods sold and delivered, is admissible in evidence, though it does not state that affiant is agent, attorney, or bookkeeper for plaintiffs.

6. EVIDENCE—ADMISSIONS—PARTNERS.
   In a suit in justice's court against partners, only one of whom was served with process, to recover an alleged balance due on account for goods sold and delivered, oral testimony that the defendant who was served bargained for the goods, that they were accepted and used by defendants, and were not paid for, is admissible.

7. SECURITY FOR COSTS—JUSTICE'S COURT.
   Failure of a nonresident plaintiff to file security for costs in a

suit begun before a justice of the peace will not require reversal of a judgment for plaintiff where no proper demand was made and security was furnished in circuit court pending certiorari.

8. ATTORNEYS — APPEARANCE—JUSTICE'S COURT — PROOF OF AUTHORITY.

Proof of authority of an attorney to appear for plaintiff in justice's court is unnecessary, under section 762, 1 Comp. Laws, unless demanded, where joint debtors are sued, and one of them, with his attorney, remains in the court-room throughout the trial, without objecting to the appearance of the attorney for plaintiff.

Error to Mason; McAlvay, J. Submitted October 6, 1904. (Docket No. 28.) Decided October 26, 1904.

Assumpsit in justice's court by Sol. J. Hirsh and others, copartners as Hirsh, Wickware & Parks, against William Fisher, Isaac Fisher, and David Fisher, copartners as Fisher Bros., for goods sold and delivered. A judgment for plaintiffs was reversed by the circuit court on certiorari, and plaintiffs bring error. Reversed.

Fitch & Reek, for appellants.

V. A. Fitch (*A. A. Keiser*, of counsel), for appellees.

HOOKER, J. Plaintiffs commenced this action by summons issued by a justice of the peace. Judgment was rendered in favor of the plaintiffs, and the defendants removed the cause to the circuit court by certiorari, where the judgment was affirmed. A motion for rehearing was afterward granted, which rehearing resulted in a reversal of the judgment of the justice and the entry of a judgment in favor of the defendants for costs. The plaintiffs have brought the case to this court by writ of error.

The return of the justice shows that the summons described the defendants as copartners doing business under the name of Fisher Bros., and the officer's return states that he served the writ upon "Fisher Brothers, a copartnership, by delivering to William Fisher, one of said

copartners, a copy," etc. The plaintiffs appeared by attorney upon the return day of the summons, and defendants appeared specially by attorney, and moved to quash the proceedings on the grounds that William Fisher was not a copartner; that there was no proper service of the summons; and that the affidavit proving the claim, served with the summons, did not state that the affiant was agent, attorney, or bookkeeper of the plaintiffs. This motion to quash being denied, plaintiffs declared orally, and defendants refused to plead or take further part in the case. After an interval the justice proceeded to try the cause, both counsel being present; also defendant William Fisher. Testimony was introduced by reading the affidavit attached to the summons, and Mr. Reek, attorney for the plaintiffs, was sworn as a witness. He stated that:

"William Fisher, of Fisher Brothers, told him [the witness] that he [William Fisher] bargained for the goods declared upon; that they were accepted by the defendants, and used in their stock at their store, and were not paid for."

At this juncture counsel renewed the motion to quash, offering an affidavit in support of it, the substance of which was that William Fisher was not a member of the firm of Fisher Bros.; that he was a bankrupt, but had not yet received his discharge in bankruptcy. The plaintiffs objected to this motion upon the ground that defendants had appeared specially and refused to plead, and for other reasons. Other testimony was introduced by the plaintiffs, and judgment was rendered in favor of the plaintiffs and against the defendants for $64 damages and $3 costs.

Among the errors alleged in the affidavit for certiorari are the following, viz.: The justice erred:

"(1) In trying the cause on the return day, and before service was had upon two of the defendants.

"(6) In receiving in evidence the affidavit filed as proof of claim.

"(7) In deciding that the evidence offered was sufficient to make a case against Fisher Bros.

"(12) In not requiring a nonresident plaintiff to give security for costs.

"(14) In rendering judgment for the plaintiffs, when it was not shown that Henry Reek, who appeared for the plaintiffs, had authority to do so.

"(15) In rendering a judgment in the face of the fact that the Fishers' uncontradicted affidavit showed that William Fisher was a bankrupt, his case pending in a Federal court, and that he was not a copartner in the firm of Fisher Bros."

The other assignments of error are either covered by the foregoing or abandoned.

Before the cause was heard in the circuit court, on motion of the defendants' counsel, security for costs was ordered and filed. On April 17, 1903, the judgment was affirmed by a judgment duly entered. On April 21, 1903, a stay was ordered for the purpose of giving an opportunity for a motion for a new trial, etc., the time to make the same being extended to the first day of the succeeding term. On June 16, 1903, such motion was made, and it was granted on June 27, 1903, exception being duly taken. On July 7th the case was again heard, and on January 25, 1904, the judgment of the justice was reversed, defendants obtaining a judgment to that effect, and for costs.

Counsel for the defendants raise the preliminary question that the case is not properly before us, and therefore should not be considered. We find a writ of error and a return, accompanied by a certified transcript of the proceedings shown by the files and records of the circuit court, which include the return of the justice. The case has been heard without objection, and, if defendants have not been properly notified of any of the proceedings, we must treat the irregularity as waived.

The first point to be considered is the validity of the order granting a rehearing and the subsequent judgment of reversal. We know of no authority holding that the power of a court to grant new trials does not include a rehearing upon certiorari. This motion was made under a seasonable order "extending the time for the application for new

trial, rehearing, or such other steps as might be necessary to obtain a rehearing or a review." We are of the opinion that Circuit Court Rule 21 covers hearings upon certiorari, and that the motion in this case was in compliance with the rule.

The other questions relate to proceedings before the justice. The record shows that only one of the defendants was served with process, and the only appearance is said to have been special for the purpose of a motion to quash. The justice so understood it, and acted upon such understanding. It seems to have been the theory of plaintiffs' counsel that the service upon the copartner was a service upon them all, and that he might treat them all as before the court upon proof of such a service. He appears to have taken judgment against all upon such an understanding, but it does not follow that the judgment is erroneous for that reason. Actions are brought against individuals as such, and each has a right to be served with process before he is subjected to imprisonment or loss of property in consequence. But when joint debtors are sued before a justice of the peace, and all are not served with process, judgment is rendered against all, as was done in this case. See 1 Comp. Laws, § 840. In this case William Fisher was sued with others as a joint debtor. He only was served with process. The justice had jurisdiction to try the case, and did try it, and his judgment was not void for want of service on the other defendants.

Counsel for William Fisher appeared specially, and sought to have the proceedings dismissed upon the ground that he was not a copartner. Counsel say that this was equivalent to a plea in abatement, under *Fisher* v. *Northrop*, 79 Mich. 288; that plaintiff should have filed a replication, and offered proof upon this question. Had the defendant chosen to appear, one of the questions upon the trial might have been whether he was in fact a copartner and joint debtor as charged, and another whether he was a bankrupt discharged from this obligation. As to the

latter question the burden of proof would have been upon him, and as to the former there is evidence in the record making a prima facie case of partnership. So, if we were to treat this as a proper appearance and plea, we should be compelled to sustain the finding of the justice. The affidavit filed was not plea and evidence also. See *Jewell* v. *Lamoreaux*, 30 Mich. 155. We are of the opinion that the affidavit served with the summons and oral evidence made a prima facie case for plaintiffs, and that they were admissible; the latter question being one, however, not usually considered upon certiorari, where there is evidence properly admitted sufficient to make a prima facie case.

It is said that the judgment should be reversed because security for costs was not required by the justice, and for the further reason that plaintiffs' counsel offered no evidence of his authority to appear and prosecute the case. William Fisher was present, and, according to the record, all of the defendants were represented by counsel on the return day. No objection was made to the appearance of counsel before the justice, and, while the plaintiffs did not file security for costs, counsel for plaintiffs then and there said to defendants' counsel that if he desired security for costs he would step into an office near by and obtain a Mr. Stray to indorse his name on the docket as such, but defendants' counsel made no reply, and the matter appears to have dropped. Security was subsequently furnished in the circuit upon defendants' motion. We think this sufficient to justify a judgment of affirmance.

The affidavit for certiorari alleges that defendant Fisher and his attorney remained in the court-room throughout the trial, and that no proof was offered to show the authority of plaintiffs' attorney. The return of the justice is silent upon the subject.

The statute (1 Comp. Laws, § 762) provides:

"The authority to appear as attorney for any party may be either written or verbal; and such authority shall be proved by the attorney or other competent testimony, in all cases where requested by the opposite party, or where the opposite party shall not appear."

We are of the opinion that this should not have a technical construction. William Fisher, the defendant served, did appear—i. e., he was present with counsel throughout the trial—and he caused a motion to be made in the case, which he now says should be given the effect of a plea. No objection was made to the appearance of counsel for plaintiffs. Defendant William Fisher did appear in the sense of being present. We think that was an appearance within the meaning of the statute, and hence proof was unnecessary unless demanded.

The judgment of the circuit court is reversed, and that of the justice affirmed. Judgment will be entered accordingly.

The other Justices concurred.

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RABER v. HYDE.

1. TRESPASSERS—STATE LAND—TIMBER—TITLE.
   A trespasser on State tax lands acquires no title to timber he cuts thereon and can transfer none.
2. REPLEVIN—QUESTIONING TITLE.
   Where plaintiff in replevin claims railroad ties by virtue of a sale by a State trespass agent, the ties having been cut on State land, defendant, claiming under a sale by the trespasser, cannot question plaintiff's title.

Error to Cheboygan; Shepherd, J. Submitted October 4, 1904. (Docket No. 165.) Decided October 26, 1904.

Replevin by Philip W. Raber and Artemus D. Watson, copartners as Raber & Watson, against Robert N. Hyde. There was judgment for plaintiffs, and defendant brings error. Affirmed.

H. W. Harpster, for appellant.

Frost & Sprague, for appellees.

CARPENTER, J. This is an action of replevin to recover the possession of certain railroad ties. These ties were made by one William Meden, and it must be assumed on this record that they were made from timber growing on certain State tax lands. Before the ties were made, Meden had contracted to sell them to plaintiffs, the place of delivery being specified as Bellant's Landing, on Lake Huron. Meden had also, it seems, agreed in a prior contract to sell the ties to the defendant. The place of delivery specified in this contract was High Banks, a point on Lake Huron about two miles north of Bellant's Landing. Meden did in fact deliver the ties at Bellant's Landing, where they were inspected and accepted by plaintiffs. Shortly thereafter the ties were seized by a State trespass agent on the ground that, the timber having been cut on State tax lands, the ties belonged to the State. This State trespass agent subsequently sold the ties to plaintiffs. Still later, defendant, claiming the ties as his under his contract with Meden, seized them, and carried them away. Thereupon plaintiffs instituted this suit. The trial court directed a verdict in plaintiff's favor. Was this correct?

It is clear that the ties never belonged to Meden, and therefore do not belong to defendant. They do belong either to the State or to plaintiffs. Defendant insists that the title acquired by plaintiffs from the sale by the State was defective. If this is true, it does not aid defendant. The State does not question plaintiffs' title, and defendant, having no right to the possession of the ties, cannot question it. See *Allen* v. *Cowley*, 128 Mich. 530.

Defendant complains of certain rulings admitting testimony, which, under this view of the case, are unimportant. We decline, therefore, to consider them.

Judgment is affirmed, with costs.

The other Justices concurred.

ERIKSON v. ALPENA CIRCUIT JUDGE.[1]

MANDAMUS—PLEADING—ANSWER—SUFFICIENCY.

In a mandamus against a circuit judge, a motion to strike portions of his answer, on the ground that they relate to matter not within the knowledge of respondent, or based on the records and files in the cause, will be denied, the proper practice being to call the attention of the court on the hearing to such parts of the answer as are not entitled to consideration.

Mandamus by Charles S. Erikson to compel Frank Emerick, circuit judge of Alpena county, to vacate an order denying a writ of audita querela: On motion to strike from the files parts of the return of respondent. Submitted October 18, 1904. (Calendar No. 20,466.) Motion denied October 26, 1904.

A. H. McMillan (*Fred L. Eaton*, of counsel), for relator.

Ward B. Connine, for respondent.

PER CURIAM. The relator moves that we strike from the answer all matter not shown to be within the personal knowledge of the respondent, or based on the records and files in the cause. We are cited to no case which prescribes the practice resorted to by the relator of asking us to mutilate the judge's answer to the order to show cause. The value of the writ of mandamus consists largely of its summary character, and we are loath to ingraft upon the practice any unnecessary feature that will impair its efficiency. A better practice is to call the attention of the court, upon the hearing, to such parts of the answer and accompanying papers as are not entitled to consideration, when they can be eliminated or disregarded, care being taken to avoid a waiver through pleading subsequent to the answer.

[1] Rehearing denied March 7, 1905.

DAPPER *v.* SMITH.

ELECTIONS — PRIMARY LAW — CONSTITUTIONALITY — CANDIDATES — OATH.

The Kent county primary election law (Act No. 326, Local Acts 1903), which requires in section 3 that, before the name of any candidate shall be placed on the ballot at a primary election, such candidate shall on oath declare his purpose to become such, violates section 1 of article 18 of the Constitution prescribing the oath which shall be required of public officers, and providing that no other oath shall be required as a qualification for any office, since thereby voters are precluded from choosing as a candidate one who declines to himself seek the office.

Certiorari to Kent; Wolcott, J. Submitted October 28, 1904. (Calendar No. 20,800.) Decided October 28, 1904.

Mandamus by Emil A. Dapper to compel Connor H. Smith, county clerk of Kent county, to certify the names of candidates chosen by a mass convention to a place on the official ballot. There was an order denying the writ, and relator brings certiorari. Reversed.

Emil A. Dapper, in pro. per.

William B. Brown, for respondent.

PER CURIAM. The relator applied to the circuit court for mandamus to compel the respondent to certify the names of the candidates chosen by the socialist party of Kent county in a mass convention to the commission as entitled to a place on the official ballot. This application was denied, and certiorari is brought to review the ruling of the circuit judge. A prompt decision is indispensable to the preservation of relator's rights. Were this not so, we should feel that the grave questions involved not only merited, but demanded, a much fuller discussion than we are able to give them.

Briefly stated, the question involved is whether section 3 (Act No. 326, Local Acts 1903) of the act providing for primary elections in Kent county is in conflict with the Constitution, for the reason that it denies a place on the ballot to any candidate unless such candidate will declare on oath, in advance, the fact that he is a candidate for the office.

Section 1 of article 18 of the Constitution prescribes the oath which shall be required of public officers, and further provides that no other oath, declaration, or test shall be required as a qualification for any office or public trust.

This provision is not one designed for the benefit of the aspirant for public station alone; it is in the interest of the electorate as well. The provision of this law which requires that, before the name of any candidate shall be placed upon the ballot at the primary election, such candidate shall on oath declare his purpose to become such, excludes the right of the electorate of the party to vote for the nomination of any man who is not sufficiently anxious to fill public station to make such a declaration. The man who may be willing to consent to serve his State or his community in answer to the call of duty when chosen by his fellow citizens to do so is excluded, and the electorate has no opportunity to cast their votes for him. It is not an answer to this reasoning to say that the electors may still vote for such a man by using "pasters." We cannot ignore the fact that parties have become an important and well-recognized factor in government. Certain it is that this law fully recognizes the potency of parties, and provides for party action as a step toward the choice of an officer at the election. The authority of the legislature to enact laws for the purpose of securing purity in elections does not include the right to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. *Attorney General* v. *Detroit Common Council*, 58 Mich. 213.

We cannot escape the conclusion that the provision in question does most seriously impede the electors in the

choice of candidates for office, and that it is in conflict with the provisions of section 1 of article 18 of the Constitution. It by no means follows that reasonable provision may not be made by legislation for an initiative in placing upon the ballot the names of those to be voted for, as, for instance, by requiring a petition by a stated percentage of the voters of the party. But this provision goes further, and precludes the voters from choosing as a candidate one who declines to himself seek the office.

The order of the court below will be reversed and the writ granted.

LUDWICK *v.* KENT CIRCUIT JUDGE.

1. SPECIAL BAIL—SURETIES—JUSTIFICATION BY AFFIDAVIT—RULES OF COURT.

   3 Comp. Laws, § 10032 does not entitle a defendant arrested on a capias to be released from custody merely upon the justification of his sureties by affidavit without perfecting the bail according to the rules of court.

2. SAME.

   Where sureties of a defendant arrested on a capias justified by affidavit, the fact that the court had not, prior thereto, made any rule as to the perfection of special bail, did not entitle defendant to be discharged, under section 10032, 3 Comp. Laws, inasmuch as such a rule might be enacted before the expiration of the time limited for the taking of exceptions to bail, and also because the subsequent action of the court, in requiring the sureties to come in and justify, in effect established a rule that the approval by the court of the sureties was necessary to the perfection of the bail.

Mandamus by John J. Ludwick to compel Willis B. Perkins, circuit judge of Kent county, to grant an application for a discharge from custody. Submitted October 4, 1904. (Calendar No. 20,757.) Writ denied November 1, 1904.

Adams & Ryan, for relator.

Thomas Sullivan and *McKnight & McAllister*, for respondent.

CARPENTER, J. Relator is in the custody of the sheriff of Kent county by virtue of a capias ad respondendum issued by the circuit court of that county. He filed special bail required by section 10029, 3 Comp. Laws. The sureties thereon made the affidavit specified in section 10032, 3 Comp. Laws. This affidavit was made without notice to the plaintiff or to his attorney before the deputy clerk of the court. The deputy was not asked to determine, and did not determine, the sufficiency of the sureties. These same persons who thus undertake to become special bail had been rejected as sureties upon a bond tendered the sheriff for the discharge of relator under section 10000, 3 Comp. Laws. Relator, claiming that under these circumstances he was entitled to his liberty, applied to the court below for a writ of habeas corpus before the expiration of the time given plaintiff by section 10031, 3 Comp. Laws, to take exceptions to said bail. On a hearing in that court opportunity was given relator to obtain his release by producing his sureties in court and proving their ability to justify. Relator refused to produce them until exceptions (the time for taking which had not then expired) had been duly indorsed on said bond. The trial court thereupon denied relator's application for a discharge. He asks this court to issue a mandamus compelling the granting of that application.

Relator contends that, when the sureties on his bail bond made the affidavit heretofore referred to, that bond became effectual, and he was entitled to his discharge. If he is correct in this contention, the plaintiff had no right to object to his sureties, and no official had a right to reject them. A practice which thus permits sureties to be the final judges of their own qualifications will enable defendants sued by capias to be discharged without adequate security, and will thus defeat what we may presume to be

the object of the statute. Such a practice would be clearly distinguishable from the practice respecting sureties on replevin bonds, for those sureties are, in the first instance, approved by the officer executing the writ. See section 10657, 3 Comp. Laws. If the legislature intended to inaugurate such a practice, it may be presumed that it would clearly indicate that intent. It is contended that it has done so in section 10032, 3 Comp. Laws, which reads:

"Special bail may justify by affidavit, before any officer authorized to take a recognizance of special bail; and such affidavit shall set forth the township, or city, and county, in this State, in which the bail reside, and that they are severally worth the sum in which the defendant is held to bail, after all their debts are paid."

Our statute regulating the putting in of special bail has not been materially changed since the laws were revised in 1846. See chapter 98, Rev. Stat. 1846. Section 10032, 3 Comp. Laws, is section 5 of that chapter. That section, however, has an older history, which affords some aid in its construction. Our first statute regulating bail in civil cases was enacted by the governor and judges of the Territory November 13, 1820, and will be found in the Laws of Michigan of 1827, pp. 303–311. Section 15 of that law was the parent of section 5, Rev. Stat. 1846, chap. 98, and of section 10032, 3 Comp. Laws. It reads:

"That special bail may justify by affidavit in the court, where the action may be pending, or before one of the commissioners for taking bail, if such bail is pending in the Supreme Court, or before one of the justices of the county court, or a commissioner, if the action be pending in a county court, either in term time or in vacation; and such affidavit shall set forth, that the bail are residents in (mentioning the county), in this Territory, and that they are respectively worth so much within this Territory (mentioning the sum they are bail for), after all their debts are paid."

This section could not have received the construction contended for by relator, for section 11 requires notice of

justification of bail, and section 12 provides for "an order of allowance" when sureties justify. The law of 1820 was materially changed when the statutes were revised in 1838. See title 2, chap. 2, Rev. Stat. 1838. Section 5 of that chapter, which corresponds to section 15 of the Laws of 1820, reads substantially as does section 10032, 3 Comp. Laws. That that section could not be construed as contended by relator, is proved by section 4, immediately preceding, which reads:

"Exceptions to special bail may be taken and filed within ten days after the expiration of the time limited for filing special bail, and the defendant shall perfect bail within ten days after notice given of such exceptions, to the defendant or his attorney, or to the sheriff or other officer, by whom, or by whose deputy, the original writ in the suit was served: *Provided*, that it shall be competent for the court having authority * * * to prescribe by general rules * * * when and in what manner bail shall be perfected."

We come now to a consideration of our present law, adopted, as before stated, in 1846. The section in question (section 5, chap. 98, Rev. Stat. 1846; section 10032, 3 Comp. Laws) was copied almost verbatim from the former law. Did the legislature, in taking this section from the old law, intend that it should receive a different construction? This seems somewhat improbable, but, if it did, we must look for evidence of that intent not in the language of the section itself, but in other parts of the statute. Nowhere in the statute is it stated that a defendant in custody on a writ of capias ad respondendum shall be discharged when his sureties justify by affidavit. On the contrary, it is clearly made his duty by the preceding section (section 10031, 3 Comp. Laws) to perfect his bail. And such bail is ineffectual if he does not perfect it. See sections 10033, 10036, and 10037, 3 Comp. Laws.

What is meant by a perfection of bail? This question is answered by sections 10000 and 10033, 3 Comp. Laws, which requires bail to be perfected "according to the rules and practice of the court." Bail is not, therefore, per-

fected when the sureties justify by affidavit without notice and without allowance. And it results that the construction contended for by relator cannot be given to section 10032. I agree with the learned circuit judge that that section, properly construed, only prescribes the method of perpetuating the evidence of justification.

The statute clearly recognizes the right of the court to make rules regulating the manner of perfecting bail, and makes it the duty of the defendant to comply with such rules. This court has authority to make those rules (Const. art. 6, § 5), and in the event of its failure to act the circuit court has such authority (section 308, 1 Comp. Laws; *Wyandotte Rolling Mills Co.* v. *Robinson*, 34 Mich. 428).

This case must, however, be determined on the assumption that neither the Supreme Court nor the circuit court for the county of Kent ever exercised this authority. What effect has this on relator's rights? The omission of the court to adopt proper rules cannot deprive relator of his rights. Neither should that omission enlarge those rights to the prejudice of the plaintiff. I think there are two answers to the possible contention that such omission entitles relator to his discharge:

First. We are not at liberty to assume that the circuit court for the county of Kent, having full authority in the premises, may not adopt such rules before the expiration of the time given by statute for the perfection of special bail. That time had not expired, and would not for several days expire, when the proceedings were taken in the court below. If, before the expiration of that period, that court, by the adoption of general rules, should prescribe the manner of perfecting the special bail, it would be relator's duty to comply therewith.

Second. When it appeared on the hearing in the lower court that plaintiff objected to and proposed to except to the sureties as insufficient, and that they had once been rejected by the sheriff (which of itself has been held to be a sufficient objection; see 1 Burrill's Practice, p. 367), that

court thereupon notified relator, in effect, that he could not perfect his bail until it approved the sufficiency of the sureties. This action at once prescribed and announced to plaintiff the manner in which he must perfect his bail. The manner was obviously proper (see 1 Tidd's Prac. 259–278; 1 Burrill's Prac. 366, 367), and the notice, as we have just seen, was timely. Relator obtained in this manner all the rights to which he was entitled and all the rights which he would have obtained by a proper general rule. I do not think he can complain because the court has not expressly stated—as it would had it put its direction in the form of a general rule—that the same just practice will be applied in future cases.

In denying that the statutes should be construed as contended by relator, I necessarily deny his contention that a defendant in custody can, by having his special bail justify, at once anticipate exceptions and obtain an immediate release. Many days must ordinarily elapse before such bail will become effectual. See section 10031, 3 Comp. Laws. I do not think that this consequence furnishes a valid argument against the construction I contend for. An opportunity is afforded a defendant in custody on a capias to secure a speedy discharge by giving a bond to the sheriff conditioned upon putting in special bail. See section 10000, 3 Comp. Laws. The statutory proceedings for putting in special bail were not intended to be expeditious. They were intended for defendants already at large under bonds to the sheriff. If a defendant in custody resorts to those proceedings, he must accept the consequences of having voluntarily rejected an expeditious and accepted a dilatory method of securing his liberty.

In my judgment, the writ of mandamus should be denied.

The other Justices concurred.

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MORRILL *v.* MORRILL.

1. HUSBAND AND WIFE — TENANCY BY ENTIRETIES — RIGHTS OF WIFE.

A wife has no right to a share of the crops grown on land owned by her and her husband as tenants by the entirety, since at common law the exclusive control of such property was in the husband, and our married women's act (3 Comp. Laws, § 8690) is not applicable to such estates.

2. SAME—VERBAL AGREEMENT.

A verbal agreement between husband and wife that she shall have an equal share in the profits of land owned by them in entirety is void as an attempt to control the deed by parol.

Appeal from Van Buren; Carr, J. Submitted April 13, 1904. (Docket No. 53.) Decided November 9, 1904.

Bill by Frank E. Morrill against Cora Morrill to restrain the removal of certain crops. Defendant filed an answer in the nature of a cross-bill, asking for the appointment of a receiver and for an accounting. From a decree for defendant, complainant appeals. Reversed, and decree entered for complainant.

Thomas J. Cavanaugh and *L. A. Tabor*, for complainant.

W. G. Howard and *A. Lynn Free*, for defendant.

CARPENTER, J. The parties to this suit are husband and wife. They were married about 13 years ago. In December, 1901, they separated, and shortly afterward defendant filed a bill for divorce, which, upon a hearing, was dismissed. They own 80 acres of land as tenants by the entirety, upon which, in 1903, complainant had a crop of grapes. Defendant undertook to harvest this crop. Complainant filed this bill to enjoin such action. Defendant filed a cross-bill averring that she contributed the money

for the purchase of this property under a verbal agreement that, while the title should be taken as it was, she should have an "equal share in the profits arising from said premises." Upon this ground, as well as upon the ground that she had a similar right as a tenant by the entirety, she prayed for an accounting, and that the property be placed in the hands of a receiver. The controversy was heard by the lower court, and the prayer of this cross-bill granted.

Two questions are raised by this appeal: *First.* Has the wife a right to a share of the crops growing on lands held by her and her husband as tenants by the entirety? If the wife has a right to compel her husband to account for a share of the crops on land held by entireties when they are living separate, as in this case, she cannot be denied that right when they are living together. If she has such a right, it becomes important to determine where she obtained it. The common law certainly gave her no such right; for, according to its principles, the exclusive right to dispose of the crops and use the proceeds as he saw fit belonged to the husband. See *Pray* v. *Stebbins*, 141 Mass. 219; *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651; *Bertles* v. *Nunan*, 92 N. Y. 152. It follows, therefore, that if the wife has that right now she obtained it as the result of some statute of this State. The only statute which it can be claimed has any bearing on this subject is our married women's act. Section 8690, 3 Comp. Laws. I think it must be conceded that the decisions of this court have determined that this statute has no application to estates by entirety. See *Fisher* v. *Provin*, 25 Mich. 347; *Vinton* v. *Beamer*, 55 Mich. 559; *Speier* v. *Opfer*, 73 Mich. 35; *Naylor* v. *Minock*, 96 Mich. 182; *Dickey* v. *Converse*, 117 Mich. 449; *Doane* v. *Feather's Estate*, 119 Mich. 691. I think it unnecessary to determine whether the husband's exclusive control of these crops is an incident of estates by entirety, or whether, as held in *Hiles* v. *Fisher*, 144 N. Y. 306, and *Buttlar* v. *Rosenblath*, supra, it is a result of the marital unity. If

it is an incident of estates by entirety, then since, under our decisions, estates by entirety remain as at common law, that right continues to belong to the husband. If it is a result of the marital unity, the same conclusion must be reached, because we have held—as we were bound to hold—that the statute does not affect the marital unity. See *Snyder* v. *People*, 26 Mich. 106. And accordingly we have—as we were bound to do—rejected the authority of *Hiles* v. *Fisher* and *Buttlar* v. *Rosenblath*, supra. See *Dickey* v. *Converse*, supra. We are compelled to conclude from this reasoning that as a tenant by the entirety the wife has no such interest in the crops as to justify the decree complained of. It is contended, however, that the decision of this court in *Dickey* v. *Converse*, 117 Mich. 449, justifies the decree. In that case it was held that no interest in growing crops upon land held by husband and wife as tenants by the entirety was subject to seizure on an execution issued to collect a judgment against the husband; that the levy could not be supported either upon the ground that the husband owned the entire crops or on the ground that as a tenant in common he owned an interest of one-half therein which was subject to seizure. This decision proceeded upon the ground that estates by entirety at the common law continued to exist in this State, and that (quoting from *Patton* v. *Rankin*, 68 Ind. 245) "a crop raised on land held by a husband and wife by entireties is held by them in the same manner and subject to the same law as the land itself, and such crop is therefore not subject to levy and sale on an execution against the husband." To argue that *Dickey* v. *Converse* is an authority for the proposition that the wife has an interest in the crops which she did not have at common law is to argue that the conclusion reached in that case compels us to reject the premise upon which it is founded. Such an argument cannot be sound. *Dickey* v. *Converse* is, in my judgment, an authority against, rather than in support of, the proposition under consideration. It was there decided

that the husband has not—and this certainly means that the wife has not—such an interest in the crops that it might be taken on an execution. If the wife's interest in such crops cannot be taken on an execution, I do not think that it can be separated or set out to her on an accounting. I think that, construing *Dickey* v. *Converse*, as we are bound to do, in harmony with the former decisions of this court, the authority of which it recognizes, we are bound to say that, while the wife has such an interest in these crops that they cannot be taken on an execution against her husband, such interest does not interfere with his power of management, disposition, and control. Nor do I think it can be justly urged that this conclusion makes the right of the wife valueless. There may be instances—and perhaps this is one—where the wife needs legal protection from a cruel husband, who misappropriates property which in a moral sense may be characterized as a trust; but, after all, such instances are exceptional, and when they arise may ordinarily be dealt with in a suit for divorce. As a general proposition, it is of advantage to the wife and to the family that no outside person shall have the right to interfere with a husband who may be safely trusted to dispose of the profits arising from such an estate according to his judgment. It may be conceded that it is anomalous to hold that the wife's interest in this property is sufficient to prevent its being taken on an execution against her husband, and at the same time it is not sufficient to enable her to use it for her own benefit. But this is by no means a conclusive argument. The truth is, estates by entirety are anomalous. It is anomalous to hold that a wife has such an interest in the profits of such an estate that they cannot be sold for her husband's debt and at the same time to hold that they cannot be taken for her debt. It would also be anomalous to hold, as we are asked by complainant, that a wife's interest in the crops raised upon a piece of land is subject to partition and separation, and at the same time to concede, as I think we must, that her interest in the land is not.

Second. Can a wife make a binding verbal agreement with her husband that she shall have an equal share in the profits arising from land held by them as tenants by the entirety? If she can, then by an oral agreement the legal effect of the deed is changed, and it is settled that "no parol proof can be admitted to give the deed a different effect than such as the words in it legitimately import." *Jacobs* v. *Miller*, 50 Mich. 126.

It results from this reasoning that the decree appealed from should be vacated, and complainant be given a decree in accordance with the prayer of his bill.

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

FROHLICH *v.* PENNSYLVANIA CO.

1. CARRIERS—AGENCY OF CONSIGNOR.
   The consignor is the agent of the consignee in the shipment of the goods and whatever contract he makes with the carrier is binding on the consignee.

2. SAME—DEFECTIVE CAR—SELECTION BY SHIPPER.
   Where a glass manufacturer was accustomed to load such cars as were suited to his needs from among those which came to him loaded with materials, and he selected one which was defective, and injury to a shipment followed, the carrier was not liable on the ground of furnishing an unsuitable car.

Error to Wayne; Donovan, J. Submitted July 16, 1904. (Docket No. 73.) Decided November 9, 1904.

Case by Edward Frohlich, doing business as the Edward Frohlich Glass Company, against the Pennsylvania Company for damages to glass alleged to have been shipped in a defective car. From a judgment for plaintiff, defendant brings error. Reversed.

There is no substantial disagreement as to the facts of this case. Plaintiff, doing business in Toledo, Ohio, purchased from the Heidencamp Mirror Company, of Springdale, Pa., a carload of plate glass, in boxes weighing from 500 to 3,500 pounds each. The glass was consigned and shipped by the defendant railroad company to the plaintiff f. o. b. Springdale, Pa., freight allowance; consignee to pay the freight at Toledo, and deduct same from purchase price. The glass arrived in good condition. Plaintiff commenced to unload the car, and had removed one case. In attempting to remove the second, the iron roller upon which it was being moved plunged through the bottom of the car, causing a destruction of the contents of the case, weighing about 3,500 pounds. The car was an old coal car, with a trapdoor in the center, opening downwards for the purpose of dumping the load. It was worked with a chain, by which it was let down and raised up. In the bottom of the car were several holes. One or two of the plaintiff's witnesses testified that after it was unloaded they counted 17 holes. The glass was stacked in the two ends of the car, leaving a vacant space of about eight feet in the center. This space had no holes, and to plaintiff's employés appeared solid when they commenced unloading. The holes were under the boxes, and after their removal its defective condition was apparent. There was evidence that the car was suitable for shipping lumber, coal, or brick, or anything that would not be top-heavy. It is substantially conceded that it was unfit for shipping glass. Plaintiff's manager testified that he did not think the car fit for hauling glass. One of plaintiff's foremen testified that he never saw a car of glass loaded on such a car. The car was received on August 14th by the Heidencamp Mirror Company, loaded with sand, and was unloaded in the afternoon of that day. It was loaded with glass on the 15th or 16th, and shipped on the 18th. All the witnesses in the case appear to agree that the car should not have been loaded with glass. The custom between the Heidencamp Mirror Company and the defend-

ant was that the mirror company might take any of its cars which were consigned to that company when unloaded, without asking permission, and use them for shipping their products, provided they were suitable for their use. This car was selected and used by the Heidencamp Mirror Company in accordance with this custom. In furtherance of this understanding, the Heidencamp Company kept inspectors, whose duty it was to select and inspect the cars for shipping their products. One of them testified as follows:

"My duty was to inspect the cars to be loaded with glass by the Heidencamp Mirror Company, and to have supervision of the loading, * * * and to reject any cars unfit for loading glass."

Another testified that he was the yard foreman of the Heidencamp Mirror Company, and—

"My duties as yard foreman for this company is the loading of cars—seeing to everything that goes in and out. I do not remember the shipping of a car loaded with glass to Edward Frohlich Glass Company, at Toledo, Ohio. I load too many cars to remember each one. My duties include the inspection of cars, or the repairs, if any are necessary, before shipments are made. If the car is unfit for loading glass in any way, I report it, and reject it. It was part of my duty in August, 1902, to use cars from the railroad company, if any were needed in the business of the mirror company.

"*Q.* What was your custom about using cars which came in on your siding loaded with material consigned to the mirror company, and which you wanted to use? *A.* Mr. Agan told me that I could take Pennsylvania cars to load either east or west without asking express permission, and this is what I have been doing."

The freight agent for the defendant testified:

"The general custom was for me to allow them to take P. R. R. cars to load east and west for shipments that were suitable for them. The only express request that was necessary was where it was a foreign car which could be loaded only in one direction, and which belonged to other roads, and which must be loaded in the direction of

the home route. There was no express request for this particular car."

The clerk for the defendant at Springdale testified:

"My duties at that time were to keep record of the cars on the siding, and to look after the cars, and to see if they were in good condition. * * * If we find a car in bad condition, we mark it in the book. The inspection I make of the cars is that I take just a quick glance at them. I look inside of it generally to see if it is loaded. If I find a car in bad condition in any way, I mark the car in a bad condition in the book, and what the trouble is, and report it to Mr. Agan."

The above is all the testimony bearing upon the question. The sole act of negligence relied upon is that the defendant furnished an unfit car. The defendant requested the court to direct a verdict for it. This was refused, and the case left to the jury under the instructions, which will be found printed in the margin.[1]

[1] "This is an action or suit where the plaintiff claims damages by the negligent act of the defendant in furnishing a car that failed to bear up a package of glass which they claim tipped over and broke.

"I will first call attention to what I believe to be the law of the case, and then a moment to the facts of the case; and why I call attention to the law of the case is this:

"It is held in 22 Wallace—that is, the United States Supreme Court Report—page 123 in the *Pratt Case* (reading a part from the head-note 2):

"'If there is competent evidence of such a contract of a character to put before the jury, the weight, force, and degree of evidence is not open for consideration by the court.'

"That is, it means you should judge of the weight of it. I will read another paragraph in the same case:

"'If a common carrier [that would be a railroad company] by rail is negligent and careless in furnishing cars, and shall furnish cars unsuitable for the case, even though they be cars for cattle, which cars the owner himself sees, and which cattle the owner himself attends [that is, where he goes along with them], a common carrier [that would be the railroad company] is not relieved from responsibility, even though there have been an agreement that it should not be responsible.'

"That is, they will not allow a company to contract that they will not be responsible if they are in fact.

"A little more from the same case. They say here, in summing

Angell, Boynton, McMillan & Bodman, for appellant.

Wilkinson & Younglove, for appellee.

GRANT, J. (*after stating the facts*). 1. In a well-considered case by this court it was held that the consignor is the agent of the consignee in the shipment of goods, and that whatever contract he (the consignor) makes with the common carrier is binding upon the consignee. *McMillan* v. *Railroad Co.*, 16 Mich. 79, 118. It was there said that the authority of the consignor to enter into special contracts with the carrier is to be presumed, and the carrier is under no obligation to inquire into it. The same rule is held in *Ryan* v. *Railway Co.*, 65 Tex. 13, where many authorities are cited.

Upon the record now before us, there was an agreement between the Heidencamp Mirror Company and the defendant that the mirror company, from among the cars delivered to it upon its side track, might select such as it should deem fit and suitable in which to ship its glass. There is nothing in this agreement contrary to public policy. The

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up the *New York Cent. R. Co.* v. *Lockwood*, 17 Wall. 357, that the following propositions were established. These propositions that I am about to read were established in the case we are talking about; that is, I mean, in the case I am reading about:

"*First.* That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law.

"*Second.* It is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants. You see, they cannot even stipulate to cover negligence of their own.

"*Third.* In this case he might have gone much further than he did, and find, if the company had been careless and negligent in furnishing cars, they should not be relieved from responsibility for it, although it might be found that they were liable therefor.

"I am requested to charge you, and do charge you, this. Well, I will read their requests first. On the part of the plaintiff, I am requested to charge you, and do charge you— And what I read from their manuscript will be considered the same as though I read from a lawbook, and be adopted by the jury. I believe it to be the law. So far as you are concerned, it will be the same as though I read it out of the Reports.

mirror company knew the character and weight of the products it shipped, knew what kind of cars were suitable for that purpose, and agreed to assume the risk of selecting. Every freight car is not suitable for the transportation of all kinds of products. A car suitable for the shipment of sand is not necessarily suitable for the shipment of cases filled with glass, and very heavy. An old coal car, suitable for shipping coal or like material, is not necessarily suitable for the shipment of glassware. There was no guaranty on the part of defendant that all its cars were suitable, in form or structure, for the shipment of glass. Under the agreement the mirror company undertook to select such cars only as were suitable for its purpose. The plaintiff and consignee, under this record and the authorities above cited, were bound, under this agreement, by the acts of their consignor, the Heidencamp Mirror Company. If it selected a car unsuitable for the transportation of the goods sold, the only remedy for the consignee is against the consignor.

If this car had been furnished at the express request of

"I charge you that, under the plaintiff's evidence in this case, you would find a verdict for the plaintiff for the sum of $470, taking their evidence. That is their claim. That is their side of the case.

"I charge you that the testimony is uncontradicted that the car in which the glass was transported was a defective car, and not such a one as the company were carrying glass in.

"There is no evidence in this case that the Heidencamp Mirror Company had any notice or knowledge of the defective condition of the car, and that there is proof that the defendant company or inspector or agent had opportunities, and did examine the car before it was loaded. Whatever examination that was, is for the jury.

"I charge you that the testimony is undisputed that the plaintiff used the ordinary appliances for unloading the car—that is, such as they had used before; the same appliances which had been used before and since without accident—and that he was without negligence in using the usual appliances for unloading the car.

"I charge you that if the Pennsylvania Company, through its agents, by proper care, might have discovered—by ordinary care might have discovered the condition ordinarily of this car—then

the consignor, and the defendant, knowing the purpose for which it was to be used, had furnished the car in response to such express request, the defendant would have assumed all liability for defects, and would not be permitted to say that the defects were open to the knowledge of the shipper, who therefore assumed the risk.

The rule applicable in the case before us is thus stated by the text-writers:

"Where the shipper exercises his own judgment, is not deceived or misled by the carrier, and chooses a car for the transportation of his property, the carrier is not answerable for the sufficiency of the car, for in such a case he does not trust to the carrier, nor rely upon the duty of the carrier, but, on the contrary, freely exercises his right of choice, and relies entirely upon his own judgment, so that there is no reason for affirming that the carrier was guilty of any wrong." 4 Elliott on Railroads, § 1480.

Hutchinson on Car. § 295 *c; Chicago, etc., R. Co.* v. *Van Dresar*, 22 Wis. 511; *Ross* v. *Railroad Co.*, 49 Vt. 364; *Harris* v. *Railroad Co.*, 20 N. Y. 232; 6 Cyc. 385.

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the defendant would be liable for damages that arose by use of the same.

"If the car in question was unfit for the purposes to which it was applied, and if the unfitness was of such a character as to imply a fault on the part of the company or its agents in allowing it to be used, then the company would be responsible.

"I will put that in another way: Negligence—and this would be like an action for negligence—negligence, as defined in our State, is the doing of some act by a party which one of ordinary care and prudence would not do; doing something that is not carefully done—ordinarily and prudently done—or leaving undone something which an ordinarily prudent and careful person would not leave undone. Now, see what I mean by that. Leaving undone would be leaving an open well, or an opening somewhere that people might get into without some notice. Doing what they should do would be to take the affirmative; to take the burden and give notice. Transportation, we will say, on these street cars—when we get on we have a right to presume that they are whole; that they will not blow up; that there is no broken machinery in them that will throw us off the track. Affirmatively, the company who undertake to carry us, our horse, or our stuff—affirmatively they assume they

Under this record, it was error not to give the following request:

"If the shipper seizes a car which has been delivered to it loaded with sand, and, on its own account loads it with a commodity for which it is unsuitable, and damage to the goods results, the railroad company is not liable on the ground of negligently furnishing an unsuitable car."

The learned counsel for plaintiff cite and rely upon *Hunt* v. *Nutt*, (Tex. Civ. App.) 27 S. W. 1031. They say that case is on all fours with this. The consignor in that case shipped a car load of meal. He asked for a car for the purpose. The car was furnished. It was, to all appearances, suitable. The meal was in fact damaged by some substance that smelled like creosote or "sheep dip." The company in that case furnished the car. Something had been previously shipped in it which caused the damage. The shipper had no choice of selection, had not agreed to inspect, and the defect was a hidden one. It is clear that the railroad company was liable.

In *Pratt* v. *Railroad Co.*, 102 Mass. 557, a specific car,

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will do it with the ordinary care; with the ordinary prudence of ordinary people.

"Now, if the goods in question had been bottled goods, whether any kind of bottled goods put up in cases and different boxes, and it should turn out that the packing was not suited to bottled goods —they broke by reason of the bad packing—then the fault would be the packer, or, if the breaking of this glass had been traced to the actual packing of the boxes, then the fault would be the shipper or packer. But you have a peculiar case here. We have a case here where the buying itself is a little remarkable—where the buying makes the buyer liable from the time it is loaded on the car away down there at the purchasing place. Where the seller delivers the goods, whether it be a bale of cotton or wool, or a case of clothing, or a barrel of oil, or whatever it is, he delivers the goods before he gets any pay. But here the purchase is made away down in Pennsylvania, and the buyer, Frohlich & Co., assumed all the risk.

"Well, now, their duty is to be careful—to use ordinary care—but I call your attention to this: The Pennsylvania Railroad Company furnished cars; knew the nature of the business going on, the mirror business, the glass business, the shipping business. It must

at the shipper's request, was furnished to plaintiff for a specific purpose. It was defective. It was important to the plaintiff to ship his stock at once, rather than wait a week for better cars. He used the one furnished. It was defective, and there was evidence tending to show that he knew it. The court held that the carrier was bound to furnish a suitable car, and was not exonerated from liability, even though the plaintiff knew it to be defective, accepted and used it. It was said:

"Nothing less than a distinct agreement by the plaintiff to assume the risk would have that effect."

It was also said:

"If the plaintiffs expressly agreed to assume the risk of defective cars, rather than wait a reasonable time for other cars, they cannot recover."

This case was affirmed by the Supreme Court of the United States. *Railroad Co.* v. *Pratt*, 22 Wall. 123.

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have had some knowledge of that kind of business. Just as they knew in the case I mentioned this morning, in the Armory case—The Wabash knew that he was taking trunks over their line. They knew that they were sample trunks. They knew that they had samples in them, for they knew that they were not hand baggage, with a few shirts and drawers and collars, and the like, and they knew that they were sample cases, and that they have to care for the cases, with a view of their value in that way. So this railway knew that this was a glass business, and that any of the cars they put in the yard suitable for glass. That was some knowledge what they were to be used for. This is a peculiar case about that. They took a sand car, when they had sand in it, and loaded it up with glass. A little more: You will not need to dispute among yourselves about the utter and absolute unfitness of these cars, because that is conceded. The young men arguing the case say it was unsuited.

"You will ask yourselves— About the first thing you do, after you have elected your foreman, you will ballot on one question—guilty or not guilty of negligence. If guilty of negligence— I mean the defendant, I am talking about, because you can take a ballot either way. You can take a ballot for plaintiff or defendant. You can take a ballot on the negligence, guilty or not guilty, and then you can take a ballot of what is the amount due. I am not going to tell you how much is due. That is for the jury. I will not tell you

If there had been other cars, and the plaintiffs in that case had been authorized to inspect and select one that was suitable, and they had chosen one that was unsuitable, the obvious conclusion is that the court would have held the carrier not liable, provided the defects in the car selected were obvious. We are therefore of the opinion that the selection by the Heidencamp Mirror Company of unsuitable cars is binding upon it and its consignees, and that defects in cars suitable per se, which were so open as to be easily discernible upon inspection, were assumed by the plaintiff through the acts of its consignor.

2. The record in this case suggests another important question, but, as the case does not appear to have been tried upon that theory, and is not fully presented here, we decline to pass upon it. It is this: Assuming that the car upon which the goods were shipped was suitable in character and structure, and proper for use in the shipment of such goods, but was unsuitable and unsafe in

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which side is negligent. That is a matter for you to consider. Consider all the circumstances, like candid men, and say, if you find for the plaintiff, the verdict is $474, as I understand it, in round numbers. That figures interest and all. If you find for the defendant, it would be no cause of action. That is the way I figure it. Still there is some testimony that the claim was presented for $360. I leave that to the jury.

"*Mr. Wilkinson:* There is no testimony of that kind, but the statement of counsel, entirely unsupported by the evidence.

"*The Court:* I will put it this way, then: You will either find a verdict for the plaintiff for $474, or find a verdict of no cause of action. That is entirely for you now. Follow an officer.

"*Mr. Bodman:* There were some requests—

"*The Court:* I marked them.

"*Mr. Bodman:* I want to take the customary exceptions. I want to take an exception to the refusal of the court to charge as requested by the defendant in its 1st, 2d, 3d, 4th, 5th, 6th, and 7th requests to charge. I except also to the charge as given by the court as a whole, and to each and every part thereof, and particularly to the giving of such of the plaintiff's requests as were given.

"*Mr. Wilkinson:* I want to except to the refusal of the court to give the 1st, 3d, 4th, and 5th requests to charge as given, and to the charge of the court as a whole."

consequence of hidden defects, such as decayed flooring, or flooring of insufficient strength, would the defendant, under such circumstances, be liable? Or, perhaps, better stated thus: Did the arrangement for selection and inspection between the Heidencamp Company and the defendant impose upon the consignor the responsibility for hidden defects in cars otherwise suitable?

Reversed and new trial ordered.

The other Justices concurred.

FLYNN *v.* KALAMAZOO CIRCUIT JUDGE.

SHERIFFS—RETURN—AMENDMENT.

An amendment to a sheriff's return as to a matter of fact must be made by the sheriff voluntarily, and cannot be compelled by the court.

Mandamus by Lawrence Flynn to compel John W. Adams, circuit judge of Kalamazoo county, to vacate an order denying a motion for an amended return. Submitted October 4, 1904. (Calendar No. 20,634.) Writ denied November 9, 1904.

William A. Luby, for relator.

Osborn & Mills, for respondent.

HOOKER, J. A judgment having been rendered against the relator in the circuit court for the county of Kalamazoo, an execution was issued. The sheriff returned that he levied the same upon real estate belonging to the execution debtor, had it appraised under the law pertaining to homesteads, and sold it at public auction for $2,300. Relator claimed that this was a false return, and, on a motion to vacate the sale, sought to contradict the return.

This court held that this motion could not prevail in the face of the return standing of record in the case, and it was intimated that a proper practice would be to obtain an amendment of the return. See *Flynn* v. *Kalamazoo Circuit Judge*, 136 Mich. 23. Thereupon the relator filed a motion for an amended return, which was denied by the circuit judge upon the ground that an amendment to a return as to a matter of fact must be made voluntarily, and could not be compelled. The following cases cited by the respondent's counsel seem to sustain the decision:

In the case of *Sawyer* v. *Curtis*, 2 Ashm. 127, decided in 1830, it was held that—

"Where the sheriff has returned his writ 'Executed,' and he does not ask permission to alter or modify his return, the court has no power to do it, and cannot compel him to make any alteration in it as to matter of fact; and the sheriff is responsible for a false return to the party injured."

In *Humphries* v. *Lawson*, 7 Ark. 341, it was held that—

"The circuit court cannot compel a sheriff to amend his return to a writ, nor to return any particular state of facts. He has the privilege of amending, and is responsible for a false return."

See, also, *Boas* v. *Updegrove*, 5 Pa. St. 516.

In *Hewell* v. *Lane*, 53 Cal. 217, the court said:

"We are satisfied, however, that the sheriff cannot be compelled in this manner to contradict his return. He cannot, it is well settled, be compelled by the court to correct his return on file against his will."

In *Wilcox* v. *Moudy*, 89 Ind. 232, it was said that "a sheriff's return to a writ is made on his official responsibility, and he only can afterwards amend it, but it must be on leave. The court cannot compel him to correct it."

In *Washington Mill Co.* v. *Kinnear*, 1 Wash. T. 100, it was held:

"If the return be defective, he may be compelled to perfect it; but, if the record shows the return to be com-

plete and perfect, the party who desires to traverse it is required to bring his action against the sheriff, who, on a proper showing, may be compelled to respond in damages for any injury resulting from a false return.

"It is said in *Clarke* v. *Lyman*, 10 Pick., page 47:

"'The sheriff and his deputies have great and confidential powers intrusted to them. Their returns on writs and precepts are received as true, and are not to be controverted, except in an action for a false return, and then the falsity must be proved.'

"And in 2 Ashmead, *Sawyer* v. *Curtis*, page 127:

"'Where the sheriff has returned his writ executed, and he does not ask permission to alter or modify his return, the court has no power to do it, and cannot compel him to make any alteration in it as to matter of fact. The sheriff is responsible for a false return to the party injured.'

"To the same effect, *McBee* v. *State*, 1 Meigs, 122; *Mentz* v. *Hamman*, 5 Whart. 150; *Sample* v. *Coulson*, 9 Watts & S. 62."

See, also, note to case of *Malone* v. *Samuel*, 13 Am. Dec. 173 (3 A. K. Marsh. 350), and authorities there cited. In *Smith* v. *Gaines*, 93 U. S. 343, the Federal Supreme Court said:

"As regards the effort to compel the marshal to amend his return, we think his answer contains a reply which is conclusive. In making that return he acts under a heavy official responsibility. If false, he is liable to plaintiff and to defendant for any damages resulting from it. He must therefore be at liberty to make his own return, subject to that responsibility. Nor do we think his return can be questioned by the sureties. It is declared by the law to be the appropriate evidence of the right to proceed against them. It is an official act. If they had desired him to exercise it otherwise than he did, they might, by showing him property, have possibly rendered him liable for a false return, and, by paying the debt, avail themselves of this liability. But we do not think that either the spirit of the statute or the justice of the case permits an inquiry into the truth of the officer's return in the subsequent proceeding against the sureties. It is analogous to the return of nulla bona, as the foundation of a creditors' bill in chancery, which cannot be questioned."

Counsel for relator cites several cases said to support his contention, but the most of them fall short of it. See *Stetson* v. *Freeman*, 35 Kan. 530; *Boyer* v. *Lincoln*, 3 Ky. Law Rep. 537.

In *Davis* v. *Weyburn*, 1 How. Prac. 153, it was held that a sheriff could be compelled to perfect an incomplete return. The same was held in *Berry* v. *Griffith*, 2 Har. & G. 343.

Counsel for relator asserts that our former holding was, in effect, a decision that an amendment may be compelled, but we think it contains no such implication. It held merely that without an amendment the relief sought could not be granted.

The writ must be denied.

The other Justices concurred.

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SMITH v. HOCKENBERRY.

1. HUSBAND AND WIFE—CRIMINAL CONVERSATION—CONNIVANCE—EVIDENCE.

Evidence that plaintiff's wife had been criminally intimate with other men before she met defendant, does not warrant an inference that plaintiff connived at defendant's acts where no knowledge on his part of such prior misconduct is shown.

2. SAME.

That a witness relied upon to show an adulterous act was plaintiff's guest at the time he discovered defendant and plaintiff's wife in a compromising situation, does not warrant the inference that plaintiff knew and consented to the improper relation.

3. SAME—CONDONATION.

The fact that when plaintiff was informed of the improper relation between his wife and defendant "he did not make much of a reply," and continued to live with her, was not evidence that he consented to such relation. By continuing

to live with her after knowledge of her infidelity, plaintiff condoned her offense, but not the offense of her paramour.

4. SAME—CONSPIRACY.

Testimony of witnesses that plaintiff's wife had stated that plaintiff "knew of her criminal relations with other men, and did not object; that she had a network around defendant; and that she had taken good care, and had good witnesses," were admissible only on the ground that plaintiff and his wife were co-conspirators, and not as evidence that a conspiracy existed, or of plaintiff's connivance.

5. SAME—DAMAGES—EVIDENCE.

Defendant, on the question of damages, may show the prior, but not the subsequent, unchastity of plaintiff's wife.

Error to Eaton; Smith, J. Submitted October 6, 1904. (Docket No. 14.) Decided November 9, 1904.

Case by Howard Smith against Clinton Hockenberry for criminal conversation. There was judgment for defendant, and plaintiff brings error. Reversed.

Q. A. Smith and *O. J. Hood* (*George Huggett*, of counsel), for appellant.

Lyman H. McCall and *Frank A Dean*, for appellee.

CARPENTER, J. This is an action for criminal conversation. Plaintiff's testimony tended to prove that his family consisted of himself, wife, and two children; that while they were living in Potterville, Eaton county, defendant induced them to remove to his house in Charlotte, under an arrangement by which he was to room and board with the family. There was positive and direct testimony tending to prove that while this relation existed defendant debauched plaintiff's wife. This testimony was not contradicted. The jury, however, rendered a verdict for the defendant, finding, as we must assume, and as the charge of the court permitted them to do, that plaintiff connived at his wife's criminal intimacy with defendant. The most important question presented on this record is whether there was any evidence which justified this finding. There was no testi-

mony directly proving plaintiff's connivance, but defendant claims that there was testimony from which such connivance might legitimately be inferred. We will proceed to state and discuss that testimony.

(*a*) There was testimony tending to prove that plaintiff's wife had been criminally intimate with several other men before she met defendant. It is urged that this testimony warranted an inference of plaintiff's connivance, because he, "knowing of his wife's habits as to consorting with other men, took no steps to prevent it." It is obvious that this argument, if otherwise sound, is based upon the assumption that plaintiff knew that his wife had consorted with other men. If this assumption is not well founded, the argument must be rejected. There is no evidence that plaintiff had such knowledge. No circumstances of his wife's prior misconduct is ever shown to have come under his observation; no rumor of her want of chastity is ever shown to have reached him. It cannot, therefore, be assumed that he had such knowledge, unless he is chargeable with constructive notice of his wife's misconduct. He is not chargeable with such notice unless he owes to the man who wantonly destroys his domestic happiness an obligation of diligence. It is scarcely necessary to say that no such obligation exists.

(*b*) One of plaintiff's witnesses, who testifies to improper relations existing between plaintiff's wife and defendant, was at that time, on plaintiff's invitation, a guest in his house. The witness had arisen early in the morning, but after plaintiff had gone to work, and in moving about the house discovered plaintiff's wife and defendant in a compromising relation. We cannot assent to defendant's contention that, because plaintiff invited the witness to be a guest in his house, it may be inferred that he knew and consented to the improper relations existing between his wife and defendant.

(*c*) There was evidence that when plaintiff was informed of the improper relations existing between his wife and defendant "he did not make very much of a reply," and

he continued thereafter to live with his wife. Plaintiff, when told of his wife's infidelity, was not called upon to assert that he did not consent to the same. His silence, therefore, was no admission of such consent. By continuing to live with his wife plaintiff condoned her offense, but he did not condone the offense of her paramour. See *Sanborn* v. *Neilson*, 4 N. H. 501; *Sikes* v. *Tippins*, 85 Ga. 231.

In *Stumm* v. *Hummel*, 39 Iowa, 478, it was held that the trial court did not err in refusing to charge the jury that, "if plaintiff, after full knowledge of his wife's infidelity, continued to live with her upon the same terms as before her crime, this would be evidence to show that plaintiff connived at it;" and in charging that "plaintiff's forgiveness of his wife and continuance of the marital relation did not necessarily have the effect to establish connivance or assent." It cannot be claimed that this is an authority for the proposition that connivance cannot be inferred because the husband continues marital relations with his wife after knowledge of her infidelity. I think, however, that the language of the court in disposing of the question indicates that such inference cannot be drawn. That language was as follows:

> "The law will not hold a party remediless for an injury of this kind because through the exercise of Christian virtue, the influence of family interest, or even in the want of what may be regarded as true manly spirit, he forgives an erring wife, and trusts in her reformation and promise of future good conduct and virtue."

The question of whether connivance may be inferred from condonation by the husband of his wife's infidelity must be disposed of, then, not by authority, but on principle. If the husband did actually connive at his wife's intimacy with defendant, it might justly be inferred that he would continue his marital relations with her. But we encounter an altogether different question when we are asked to infer such connivance from a continuance of the marital relations. The husband may have continued the

marital relations from one of several possible reasons. He may have continued them because he connived at his wife's improper conduct, because that course was best for the interests of his children, because he lacked spirit to resent his humiliation, or because he was moved by love for his erring wife or by pity for her condition. There is nothing in this case which enables us to say whether any one of these, or some other possible reason, determined plaintiff's action. We depart from the law of sound reason and legal evidence and enter the field of pure speculation if, under such circumstances, we attempt to infer the particular reason which moved plaintiff to condone his wife's offense. Those decisions which deny the right of a jury to attribute to a particular cause an injury which may as well be attributable to another (see *Muddle* v. *Stride*, 9 C. & P. 380; *Gilbart* v. *Dale*, 5 Ad. & El. 543; *Midland Railway* v. *Bromley*, 17 C. B. 372; *Marquette R. Co.* v. *Kirkwood*, 45 Mich. 56) are in point, and sustain this conclusion.

(*d*) Witnesses were permitted to testify that plaintiff's wife had stated, though not in his presence, "that her husband knew of her criminal relations with other men, and did not object; that she had a network around defendant; and that she had taken good care, and had good witnesses." These declarations were admissible only upon the ground that plaintiff and his wife were co-conspirators, but they furnished no evidence that the conspiracy existed (see *Solomon* v. *Kirkwood*, 55 Mich. 256; *Mawich* v. *Elsey*, 47 Mich. 10), and therefore they cannot be considered as furnishing any evidence of plaintiff's connivance.

Other items of testimony less significant than these are relied upon by defendant. The above reasoning would compel us to say of them, as of these, that they do not justify the inference that plaintiff connived at his wife's infidelity, and that the court therefore erred in his charge and in his refusal to charge.

As there was no evidence of a conspiracy, the court also erred in receiving in evidence the declarations of the wife

that her husband knew of her criminal relations with other men, and that she had a network around defendant.

The trial court permitted defendant to prove that plaintiff's wife was guilty of criminal intimacy with other men, both before and after her intimacy with defendant. The testimony relative to such intimacy before plaintiff's cause of action accrued was properly admitted. The proof that his wife lacked chastity before defendant met her clearly lessened plaintiff's damages. See *Ellsam* v. *Faucett*, 2 Esp. 562; *Rea* v. *Tucker*, 51 Ill. 110; *Torre* v. *Summers*, 2 Nott. & McC. (S. C.) 267. The testimony relative to the intimacy after the cause of action accrued should, however, have been excluded. See *Ellsam* v. *Faucett*, supra; *Rea* v. *Tucker*, supra; *Torre* v. *Summers*, supra. The ground upon which this testimony is excluded is not stated in these decisions, but I assume that it rests in part at least upon the assumption that defendant's wrong may have contributed to the subsequent misconduct of plaintiff's wife, and that to admit such testimony might enable him to use a circumstance to mitigate damages which actually enhances them. I do not think that any other question presented by the record demands discussion.

Judgment reversed, and a new trial ordered.

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

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SKINNER *v.* KELLEY. [1]

1. EQUITY—PLEADING—ESCROW—SUFFICIENCY OF ALLEGATIONS.
   A bill to quiet title and to secure a judicial determination of the effect of a deed, alleging that the deed was deposited with a certain person, who was directed not to deliver the same until after the grantor's death, and then to deliver it to the

[1] Rehearing denied May 12, 1905.

grantee and to no other person, and that the parties both planned that if the grantor survived the property should belong absolutely to the grantor, sufficiently alleges that the deed was deposited with the direction that it was to be delivered to the grantee only in case he survived the grantor, and at her death.

2. ESCROW—CONDITION OF DELIVERY—EVIDENCE.

In a suit to quiet title and to obtain a judicial determination of the effect of a deed deposited in escrow, evidence *held* to show that the grantor never authorized the delivery of the deed, except on condition and in case the grantee should survive her.

Appeal from Washtenaw; Kinne, J. Submitted October 6, 1904. (Docket No. 24.) Decided November 9, 1904.

Bill by Maurice G. Skinner, administrator of the estate of Amelia W. Kelley, deceased, and others, against Louis W. Kelley to quiet title to land. From a decree dismissing the bill, complainants appeal. Reversed.

Frank A. Stivers (*John F. Lawrence*, of counsel), for complainants.

M. R. Salter (*J. M. Everden* and *George P. Stone*, of counsel), for defendant.

MONTGOMERY, J. The bill in this case was filed to quiet title and to have a judicial determination as to the effect of a deed and will, executed by Amelia Kelley in her lifetime, and deposited with Judge Cheever, as hereinafter stated. The claim of complainants is that the deed was deposited with Judge Cheever with the direction that it was to be delivered to the grantee, Obadiah A. Kelley, only in case he survived Amelia, and at her death. The defendant in this court claims that the bill of complaint does not charge such a case.

We think that while the allegations are not as specific as might be desired, that the theory now presented is fairly foreshadowed. The bill does aver that the deed was de-

posited with Judge Cheever, and that he was expressly directed not to deliver the deed until after decedent's death, and then to deliver it to Obadiah A. Kelley, and to *no other* person. The bill also avers that the parties, Mr. and Mrs. Kelley, both planned and intended that in case Mrs. Kelley survived her husband, the property should belong absolutely to Mrs. Kelley. The facts, as they appear by the record, are as follows: Obadiah A. Kelley married Amelia Kelley May 29, 1880. About the same year he became involved in a long lawsuit with his son, Louis L. Kelley, about certain lands, which subsequently became the property of Amelia Kelley, and which are the same lands involved in the present suit. The result was a long and bitter contest, and there was intense feeling against Louis L. Kelley on the part of Obadiah A. Kelley and his wife, Amelia. The lands were conveyed to Amelia Kelley by her husband May 13, 1882, and the deed duly recorded. Some time previous to November 28, 1892, Obadiah A. Kelley came to the office of Judge Noah W. Cheever, and stated that he and his wife had talked the matter over of making some arrangements for his benefit in regard to these lands. He said they wanted to arrange it so that in case he survived his wife, he could have the title to this land. Mr. Cheever told him he thought he could arrange it. On November 28, 1892, they called at Judge Cheever's office together. They both then stated they wished to have papers drawn so that in case Obadiah A. Kelley survived his wife, he could have the title to this land. Judge Cheever suggested the making of a deed, and having it delivered to him in escrow. In course of the conversation, after discussing the matter, he suggested also the will. The purpose of Mr. and Mrs. Kelley, and the object and intent of the papers drawn by Judge Cheever and executed by Mrs. Kelley, as testified by Judge Cheever himself, was as follows:

"They had both of them, in all the conversations I had with them in regard to this land, stated repeatedly that they did not want the son, Louis L. Kelley, to have this

property. They have always stated that, and they stated it then, but they did want some provision made, if possible, so that in case Amelia Kelley died before Obadiah, that he should have the property. They finally agreed upon the proposition that the deed and will should be executed by Amelia Kelley and left with me, and, in case Amelia Kelley died first, that the deed was to be delivered to Obadiah A. Kelley, and to no one else, and, in case Obadiah A. Kelley died first, that Mrs. Amelia Kelley should continue to have the absolute title to this property the same as she had had it. * * *

"When they stated to me what they wished to do, I did not make any special examination of the authorities upon the question of the delivery in escrow, but I knew from previous examinations that there was a large conflict of authorities, both in the text-books and in the reports, in regard to the validity of such a delivery, if there were any conditions; and to make the thing entirely sure, as it appeared to me, I advised that a will also be drawn and executed to cover that contingency. The reason I suggested a deed in escrow was that, if it would work, it was a cheap and easy way to settle the matter; but feeling that there was some uncertainty as to the law under those conditions, I had the will prepared and executed by her."

The transaction occurred in the office of Judge Cheever, and both the will and deed are in his handwriting. The deed is the usual form of quitclaim, the consideration being "one dollar and love and affection." The will devised the land to Obadiah. After the papers were made, Judge Cheever made the following indorsement on the deed:

"This deed has been delivered to me in escrow, to be delivered to the within grantee, Obadiah A. Kelley, on the death of the grantor, Amelia Kelley, and not before.

"Dated November 28, 1892.

"NOAH W. CHEEVER."

Judge Cheever testifies that this memorandum was made for his own convenience, and was not made by direction of the parties. The circuit judge treated this memorandum as very persuasive, if not controlling, upon the question of fact, and found that the only restriction upon the depositary was that the deed should not be delivered in the grantor's lifetime.

A careful consideration of the case leads us to the conclusion that the grantor never authorized the delivery except on condition and in case her husband should survive her—a condition not fulfilled, as Mrs. Kelley survived her husband. The testimony of Judge Cheever is clear and convincing.

No other question need be discussed, as the conclusion reached shows complainants entitled to the relief prayed.

The decree is reversed, with costs of both courts to complainants.

The other Justices concurred.

CASWELL *v.* PILKINTON.

FRAUDULENT CONVEYANCES — PAYMENT OF DEBTS—HUSBAND AND WIFE.

The conveyance by a debtor of his interest in a decedent's estate, to pay an antecedent debt created by the debtor and his wife, who already had a homestead, for the purpose of purchasing property, the title to which was not taken in the debtor alone, but was taken in the name of himself and wife as tenants by the entirety, was fraudulent as against other creditors of the debtor.

Error to Ionia; Davis, J. Submitted October 6, 1904. (Docket No. 26.) Decided November 9, 1904.

Attachment proceedings by Frank E. Caswell against Silas H. Pilkinton. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

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

Chaddock & Scully, for appellee.

MOORE, C. J. This case was commenced by writ of attachment. The affidavit states that the plaintiff "has good reason to believe and does believe the defendant has assigned and disposed of a portion of his property with intent to defraud his creditors." Application was made to dissolve the attachment before the circuit court commissioner. An appeal was taken to the circuit court, a trial was had, and by direction of the circuit judge a verdict was rendered in favor of the defendant, and the attachment was dissolved. The case is brought here by writ of error.

After the testimony on the part of the plaintiff was closed, defendant offered no evidence, by demurred to that offered on the part of plaintiff, thereby admitting it was true. The appellant insists that, if a verdict should have been directed at all, it should have been for the plaintiff, but, in any event, that the testimony disclosed a case which should have been submitted to a jury.

The plaintiff bases this claim upon testimony which tends to show the following: In 1889 the defendant failed. Prior to his failure he was indebted to Robert Dutton. In 1892, and for a time prior thereto, he owed Mr. Dutton approximately the sum of $2,000. The note involved in this case represents a portion of this indebtedness. It is dated June 15, 1895, and is for the sum of $311.89, payable one year after date. This note was indorsed over to the plaintiff on or about the 15th day of June, 1901. The plaintiff commenced this suit against him on the 14th day of January, 1902. On May 12, 1875, the defendant and his wife purchased two and one-fourth acres of land for the sum of $1,300, of which amount Mrs. Pilkinton furnished $1,160. This land was situated in the village of Portland, and constituted the homestead of the parties. The deed was taken in their joint names. On May 10, 1882, the defendant purchased village lots numbered 59 to 67, inclusive, in Bailey's Addition to the village of Portland, taking the title in his own name. On May 6, 1889, the defendant purchased from Maynard & Satterlee one-half

acre of land situated in the village of Portland, and took the title in his own name. On the 9th day of December, 1892, for a consideration expressed in the deed of $300, defendant and his wife conveyed said lots to his father, Stephen Pilkinton. At the same time defendant gave his father an assignment of his notes and accounts.

Plaintiff claims there was no actual consideration passed for these transfers, except that the father had signed a note at the bank for the use and benefit of defendant. Defendant claims that he also owed his father $900. The defendant retained the notes and accounts in his own hands, and paid up this note at the bank, all except the sum of $156, which is still unpaid. On the 15th day of October, 1897, Stephen Pilkinton, defendant's father, conveyed to defendant's wife the said lots 59 to 67, inclusive, and said half acre of land for an expressed consideration of $156, and, plaintiff claims, without any consideration whatever. On October 10, 1895, Charles H. Maynard and Orville S. Satterlee and wives conveyed to the defendant and his wife 10¼ acres of land situated in said village of Portland for an expressed consideration of $666.25. The defendant and his wife mortgaged this parcel, together with their homestead, to Charles H. Maynard, in the sum of $700. This money was used to pay for the 10¼ acres of land, and said mortgage remained unsatisfied and undischarged at the time of the trial. On May 29, 1902, defendant and his wife conveyed said 10¼ acres of land to their children for an expressed consideration of $1 and love and affection, reserving to the said grantors a life estate in said premises. The deed was made subject to the mortgage to Mr. Maynard.

Stephen Pilkinton died on the 30th day of September, 1900, leaving a will. Defendant would be entitled to about $650 from his father's estate. On November 5, 1900—four days after the will was admitted to probate—the defendant assigned all his interest in his father's estate to Charles H. Maynard to secure the payment of the balance due on the mortgage given Mr. Maynard on October 10,

1895, and on the same date the assignment was recorded. Plaintiff claims this was done without Mr. Maynard's knowledge. After the commencement of this suit, and before the trial, the wife of defendant died.

It is the claim of plaintiff that a fair inference from this state of facts is that defendant had conveyed a portion of his property with the intent to defraud his creditors.

It is the claim of defendant that plaintiff has failed wholly to make a case. He insists that defendant had a right to prefer his creditors, and that, as he owed Mr. Maynard, he might use what was coming to him from the estate of his father to pay that claim, and, as the one claim was equal to the other, the remaining creditors cannot complain. The trouble with this contention is that the debt paid was not simply the debt of the defendant, but it was a debt created by himself and wife when they already had a homestead, for the purpose of purchasing property the title to which was not taken in the husband alone, but was taken in the name of the husband and wife; and when the one-sixth interest which defendant had in his father's estate which might be reached by the creditors of defendant was used to pay the joint indebtedness of the husband and wife, and thereby cancel a lien on real property owned by them in the entirety, it brought about a result which gave the creditors of defendant a right to complain.

Defendant also claims (we quote from brief of counsel):

"Defendant, at the time he purchased the ten acres, had not one dollar's worth of property liable to execution. He was not creating an estate in the entirety at the expense of his creditors, and therefore the case of *Newlove* v. *Callaghan*, 86 Mich. 297, has no application to the facts in this case."

Undoubtedly, this was the situation when the 10 acres were purchased; but when, later, he used property which might be reached by creditors to extinguish a lien upon an estate in the entirety, it brought the case within the

principle announced in *Newlove* v. *Callaghan*, supra. We think there was a case to be submitted to the jury.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

SPROAL *v.* LARSEN.

MORTGAGES—PAYMENT—SUBROGATION.

One who advances money on a mortgage to pay a prior mortgage on the same premises, and afterward learns that the mortgagor has no title because of an ad interim conveyance, will be subrogated to the rights of the prior mortgagee, though the property is a homestead.

Appeal from Mason; McAlvay, J. Submitted October 6, 1904. (Docket No. 27.) Decided November 9, 1904.

Bill by Oliver Sproal against Augusta Larsen and others to be subrogated to the rights of a mortgagee and to foreclose the mortgage. From a decree for complainant, defendants appeal. Affirmed.

Henry C. Hutton, for complainant.

Fitch & Reek, for defendants.

CARPENTER, J. February 18, 1891, the first-named defendant, Augusta Larsen, whose name was then Augusta Ohse, owning the land in controversy, mortgaged the same to one John W. Gary. Soon thereafter Augusta conveyed the same by warranty deed to her husband, August Ohse. August subsequently died, leaving as his heirs at law his widow, Augusta, and two infant children, Paulina and Herman, defendants in this suit. Afterwards Augusta

married her codefendant Frank Larsen. In May, 1895, defendant Augusta applied to complainant for a loan for the purpose of paying off said mortgage to Gary, and offered to secure said loan by a new mortgage on said premises. There was presented to complainant's attorney an abstract brought down to February 17, 1891, showing title in defendant Augusta. Complainant was led to believe, and did believe, that that title continued in her. He thereupon advanced the money required to pay the money secured by said Gary mortgage, which was accordingly paid, and he obtained a new mortgage on said property, signed by defendant Augusta and her husband. Having subsequently ascertained that defendant Augusta had no title to the mortgaged property, complainant instituted this suit, asking to be subrogated to the rights of the mortgagee in the Gary mortgage, and that that mortgage be foreclosed for his benefit. From a decree granting complainant relief, defendants appeal to this court.

Justice MONTGOMERY, speaking for this court (see *Palmer* v. *Sharp*, 112 Mich., at page 423), said:

"In numerous cases in this State, parties who have accepted security in good faith upon a loan made for the purpose of discharging existing incumbrances upon the same real estate have, upon its appearing that the security was ineffectual or invalid, been allowed to be subrogated to the rights of prior lienors; there being no person intervening entitled to superior equities. Such was the holding in *Detroit Fire & Marine Ins. Co.* v. *Aspinall*, 48 Mich. 238, and in *Lockwood* v. *Bassett*, 49 Mich. 550; and the same doctrine was recognized in *Kelly* v. *Kelly*, 54 Mich. 48."

This principle and these authorities clearly entitle complainant to relief.

The fact that the property is a homestead does not, as contended by defendants, make the doctrine of subrogation inapplicable. That circumstance did not lessen the rights of the original mortgagee, and therefore it does not affect complainant, who, by subrogation, has acquired those rights.

Gerber v. *Upton*, 123 Mich. 605, relied upon by defendants, is clearly inapplicable. There complainant purchased land at an administratrix's sale. Part of the purchase money paid by him was used in discharging a mortgage upon the land. His title was held defective because of the homestead rights of children. He was denied the right of subrogation to the rights of the mortgagee because, as it is to be clearly inferred, he knew the facts, and was presumed to know that the law gave the administratrix no right to sell the children's homestead. In the case at bar, complainant's mistake was not one of law. He did not know the facts. It may also be said that the defendant in *Gerber* v. *Upton* had no right to be subrogated to the rights of the mortgagee, because the property he acquired at the administratrix's sale was primarily liable for the mortgage indebtedness.

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

The other Justices concurred.

RHODES *v.* BOULDRY.

1. ESTATES TAIL.
   An estate tail general is one limited to a man and the heirs of his body without any further specification.
2. SAME—WILL—ESTATE CREATED.
   A devise of lands "not only to [the devisee] but to the heirs of his body" creates an estate tail general, and under the laws of this State creates a fee. 3 Comp. Laws, § 8785.

Appeal from Jackson; Peck, J. Submitted October 6, 1904. (Docket No. 16.) Decided November 9, 1904.

Bill by Lorenzo M. Rhodes, administrator of the estate of Truman Bouldry, deceased, against Silas Bouldry,

George W. Carter, May Covey, Bert Bouldry, Royal Bouldry, and Demmon Bouldry to obtain a construction of the last will and testament of Deming Bouldry, deceased. From a decree for complainant, defendants Covey and Bouldry appeal. Affirmed.

One Deming Bouldry died testate. By his will he devised to Silas W. Bouldry, his stepson, the land described in the bill of complaint. Silas mortgaged the land. The mortgage was purchased by, and duly assigned to, defendant Carter and his brother, now deceased, who were copartners. Said mortgage was foreclosed, and the land purchased by them, and subsequently sold and conveyed to Truman Bouldry, of whose estate complainant is administrator. Truman mortgaged this and other lands, and the mortgage so given and the bond accompanying the same were at the time of the death of Truman owned by defendant Carter. His claim against the estate upon said bond and mortgage was allowed at the sum of $4,611.42. The defendants May Covey and Bert, Royal, and Demmon Bouldry are the children of Silas, who is still living. The personal estate being insufficient to pay the debts and expenses of administration, complainant is compelled to sell real estate for that purpose. The children of Silas claim that their father has only a life estate in the land, under the provisions of the will of Deming Bouldry. The second clause in the will, in the usual language, devises the land to Silas.

The third clause reads as follows:

"I bequeath the above-described lands, not only to the said Silas W. Bouldry, but to the heirs of his body."

The object of the bill is to obtain a construction of the above devise; complainant and defendant Carter insisting that by the will the title in fee vested in Silas. The court below decreed that "the title rests in fee simple absolute in the estate of said Truman Bouldry, as assignee of Silas W. Bouldry, the devisee thereof under the will of Deming Bouldry."

Thomas E. Barkworth, for complainant.

R. S. Woodliff, for defendants Covey and Bouldry.

Parkinson & Campbell, for defendant Carter.

GRANT, J. (*after stating the facts*). An estate tail general is one "limited to a man and the heirs of his body, without any further specification." 1 Washb. Real Prop. § 200. "To hold in fee tail or in tail, is 'where a man holdeth certain lands or tenements to him and to his heirs of his body begotten;' that is a general tail." 3 Stroud's Jud. Dic. 2004. See, also, 11 Am. & Eng. Enc. Law (2d Ed.), p. 371. The devise in this will created an estate tail general under all the authorities. It would be difficult to find language more appropriate to create such an estate. Estates tail are abolished by statute. 3 Comp. Laws, § 8785. This case is ruled by *Goodell* v. *Hibbard*, 32 Mich. 47, and *Eldred* v. *Shaw*, 112 Mich. 237.

The decree of the court is correct, and is affirmed, with costs to the complainant.

The other Justices concurred.

NOWLAND *v.* RICE'S ESTATE.

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTS—CONCLUSIVENESS OF ALLOWANCE.
   The order of the probate court allowing an administrator's first account, if not appealed from, is conclusive upon him, so that the second account should begin with the balance due on the first.

2. SAME—APPEAL FROM PROBATE COURT—TRIAL BY JURY.
   Disputed questions of fact on appeal from the probate court must, if either party so asks, be tried by jury.

3. SAME—QUESTIONS FOR COURT.
   On the hearing of an account in probate court, the propriety of

charges and investments by a guardian, and his compensation, and the allowance to administrators for services, rest with the probate judge or the circuit judge on appeal.

4. SAME—FINDINGS.
The findings on the hearing of an administrator's account should state what items are allowed, and what rejected.

5. SAME—SETTLEMENT WITH HEIRS.
Settlement with the heirs does not relieve an administrator from his duty to file an account and obtain a settlement with the probate court. The settlement only affects the matter of distribution.

Error to Wayne; Donovan, J. Submitted October 6, 1904. (Docket No. 30.) Decided November 9, 1904.

Moses R. Nowland, administrator of the estate of George Rice, deceased, appealed from the order of the probate court allowing his final account. To review the judgment rendered, the administrator brings error. Reversed.

The appellant was appointed administrator of the estate of George Rice, deceased, in November, 1887. On May 13, 1889, he filed an account. This account was heard by the probate court, passed upon, and allowed, with a balance due the estate of $338.72. He filed no further account until he was cited in February, 1901, to file another account. In accordance with that citation, he filed an account ignoring the first, and making a new one covering the time of the first account. He reported with his first account that a suit was pending in the circuit court which delayed his final account, and also that there were still some debts which he had been unable to collect. No appeal was taken from the order allowing that account. A hearing was had upon the second account, and the probate court found there was due from the administrator $542.68. From this order he took an appeal to the circuit court, where a balance was found due to the estate from him of $560. A jury was impaneled to try the case, and after it

had proceeded for some time the court discharged the jury, took additional testimony, and decided the case, making a written finding of facts and law.

B. T. Prentis and *S. W. Burroughs*, for appellant.

Thomas Hislop, for appellee.

GRANT, J. (*after stating the facts*). 1. There are 46 assignments of error, but it is unnecessary to state or discuss them. The order of the probate court allowing the first account, being unappealed from, is conclusive upon appellant. If he desired to dispute any of the findings of the court upon the items of that account, he should then have appealed. He cannot reopen it 12 years after it has been adjudicated, upon the assumption that it is erroneous. Parties interested in the estate had a right to assume that the account as allowed was correct, and to rely upon the order of the court as final. *Morton* v. *Johnston*, 124 Mich. 561.

The second account should have been commenced with the balance due upon the first, to which should have been added the receipts, if any, and credits for expenditures, if any. Disputed questions of fact on appeals from the decisions of the probate court must, if either party so asks, be tried by a jury. *Grovier* v. *Hall*, 23 Mich. 11; *In re Stebbins' Estate*, 94 Mich. 304.

It is established in *Gott* v. *Culp*, 45 Mich. 265, 276, that, under the statute (1 Comp. Laws, § 673), in a guardian's account, the propriety of charges and investments by a guardian and his compensation are things with which the jury cannot meddle.

In *Mower's Appeal*, 48 Mich. 441, it is held that the allowance to administrators for services rests with the probate judge or the circuit judge on appeal.

In *Re Pfeffer's Estate*, 117 Mich. 207, three items were in dispute—the compensation for the administrator, the amount allowed for services of his attorney, and the amount allowed for services of the commissioner on claims.

The question of the administrator's compensation was reserved by the court, and the other two questions submitted to a jury.

Among the findings of the circuit judge is the following:

"I find that a probate case on appeal is to be tried and determined on the same principles that would be administered by the probate court itself. That court, in adjusting accounts of administrators, is governed by broad principles of equity; and it is at all times competent for the administrator, unimpeded by technical rules, to show the fairness of his dealings, the real nature of his transactions, and to restrict the amount for which he should be held liable to that which equity demands. Upon any other rule, he might be made to bear the burden of events for which he was in no degree responsible, and when he was acting in the most conscientious discharge of his duties; and I have not used any technical rule, but have made most liberal allowance I can conscientiously do towards the administrator. I have not found the administrator liable for the amount found by the probate court due the estate June 27, 1889, with interest to date, which would amount to between seven and eight hundred dollars, but have given him credit for various sums paid by him since, and made liberal allowance for his services, and still find him indebted to the estate in the amount of $560."

The court did not find what items he rejected and what he allowed. It is therefore impossible, upon this record, to determine whether the court disallowed items which belonged to the jury to determine. If the only item in dispute after the date of the first account were the extraordinary allowance of $100 as administrator, there would have been nothing for the jury to pass upon.

2. It is urged that the heirs had either expressly or impliedly assented to the action of the administrator in the settlement of the estate and the distribution of the funds. No receipts were taken, and no agreement evidenced by any writing. Some of the heirs dispute any such agreement, or any assent to discharge the administrator without filing an account. We think, under the appellant's own claim, he was not relieved from his duty to file his account

and obtain a settlement with the probate court. If he has settled with the heirs, that question will come up on the distribution of the estate. The sole object of this proceeding is to determine how much of the estate is still in his hands.

Judgment reversed and new trial ordered.

The other Justices concurred.

FOWLES *v.* RUPERT.

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s143 247

1. APPEAL AND ERROR—SUFFICIENCY OF PLEADINGS—WAIVER.
   By pleading to a declaration in justice's court, without objecting to its lack of formality, defendant waives the right to assign error on the introduction of evidence under it.

2. SALES—BREACH OF CONTRACT—PURCHASER'S RIGHT TO CONTROL PROPERTY.
   Plaintiff sold defendant all the hay in certain stacks, to be baled before taken away, defendant to furnish baler and plaintiff to assist in baling and deliver the hay at the railroad. Defendant directed the baler which stacks to bale first, but the baler left the premises because plaintiff forbid his baling unless he baled certain other stacks first. *Held*, that the purchaser had the right to direct the order of baling, and plaintiff could not recover as for breach of contract.

Error to Calhoun; Hopkins, J. Submitted October 6, 1904. (Docket No. 32.) Decided November 9, 1904.

Assumpsit by Louis Fowles against Conrad Rupert for breach of a contract to purchase certain hay. There was judgment for plaintiff, and defendant brings error. Reversed.

Tompkins & Stewart, for appellant.

North & Salisbury, for appellee.

MOORE, C. J. This case was commenced in justice's court. The plaintiff filed with the justice a written contract, reading as follows:

"C. Rupert & Sons of Newark, N. Y., bought from L. Fowles all the hay in stacks on his farm except two stacks which had rain on it after it was cut and before it was stacked for four dollars and fifty cents a ton. Fowles is to cut or rake from stacks all the outside and stained hay not fit for market. Fowles is to help bale and deliver and load on cars at Renton without charge and board men and team and find fuel for engine while baling. Hay to be baled first September or soon after the baler can be got there, R. & Sons to have cars at station to load hay in when baled."

He declared orally in assumpsit and for breach of contract. The defendant filed a written plea of the general issue and gave notice of set-off. He also set out verbatim the written contract, and averred he was at all times ready to perform it, but was prevented from doing so by the acts of plaintiff, whereby he had sustained damages in the sum of $500, which he would recoup against any claim of plaintiff. A trial was had before the justice, who rendered a judgment in favor of plaintiff. An appeal was taken to the circuit court. A trial was had before a jury, which rendered a verdict in favor of the plaintiff. The case is brought here by writ of error.

The appellee has not furnished us with a brief. The appellant presents 29 assignments of error. We shall discuss but few of them, for the reason that most of them are eliminated by our view of the effect of the testimony offered on the part of the plaintiff. The defendant was the only one of the firm making the contract who lived in Michigan. He lived in Battle Creek. The hay he purchased was baled and shipped to New York. The evidence discloses that Mr. Rupert hired a man by the name of Brown to bale the hay, and he in turn had as his foreman in charge of his baler a man by the name of McConnell. Part of the hay mentioned in the contract was in one field and a part in another. In one field there was more

timothy in the hay than in the other field, which had more clover. The baler was in operation about the 1st of September at a neighbor's of the plaintiff. Mr. Fowles saw Mr. McConnell there, and asked him to bale the stacks of hay having the most clover first. Mr. McConnell replied, "All right." Later he saw Mr. Rupert, who told him to bale the other hay first, as it was better cured, and he was afraid the clover hay had not had time to sweat out, and would heat in the bales. On Thursday, September 4th, Mr. McConnell moved into the field where the stacks had the most timothy. Mr. Fowles furnished the necessary help, and they commenced baling the hay, and continued to do so until Saturday. As fast as the hay was baled, it was drawn to Renton, and loaded into the cars, all of which were filled, and more bales were carried over to Renton than the cars would contain. It is claimed by defendant that three additional cars were put on the siding on Sunday. On Monday Mr. McConnell quit baling.

The plaintiff testified:

"Mr. Rupert left the premises because I wanted him to go back on the other place and bale the other hay first as he agreed to do. He didn't do that. He left."

The agreement here referred to was the talk he had with Mr. McConnell a day or two before the baling commenced at the plaintiff's. Mr. Carr, a witness for the plaintiff, testified, referring to a conversation between Mr. Fowles and Mr. McConnell just before the balers left the farm:

"Mr. Fowles told him that he wanted him to go back and bale this clover hay. The rain would damage it more, and he would have to bale that first. He said Mr. Rupert had told him to go on and bale this timothy, and Fowles wanted this clover baled, and he said if he could not bale the timothy he would move out."

On the cross-examination he testified:

"I did not hear Mr. Fowles tell Mr. McConnell that they could not bale any more hay there. We did not go to work, and I could not work unless the rest of them did. Mr. McConnell was not ready to go to work when he came

there that morning about seven o'clock. He had not fired up yet. He immediately started to fire up when he came. He was getting ready to go to work. They were talking about the hay business. Mr. Fowles told him he could not bale any more of that timothy hay. He didn't stop him from baling it. He just told him he could not go up and bale any more of that until he went up and baled the clover."

The defendant testified:

"I first learned that Mr. McConnell had ceased to bale there on Monday. I was at my boarding place, and learned it from Mr. Fowles. He called me up on the telephone. * * * He called me up, and told me that they had left. He said he would not let them bale the timothy hay and keep the heavy mixed hay and clover, as he called it. He gave no other reason."

Mr. McConnell testified:

"We went back there on Monday. We were there between six and seven o'clock in the morning. By 'we' I mean my men and myself. Mr. Fowles came down a little while after. His men came down a little while after. I told him Mr. Rupert told me to bale out the timothy hay first, and Mr. Fowles told me I could not do that. He said he was not going to let his timothy go and then have his clover hay on hand. He did not say that the clover hay was liable to be more damaged—not to my recollection. * * * I fired up Monday morning to go to work. Mr. Fowles' men did not render any assistance in baling that morning. They did not remain there, ready to go to work when I got ready. They went back with Mr. Fowles. One of them stayed a few minutes, but he drove away. When I got ready to press hay that day, none of the assistants to be furnished by Mr. Fowles was present. I remained there, and waited for him until about nine o'clock, I think, in the neighborhood. We then went to Mr. McGregor's about two o'clock, I should think."

It is true that upon the trial Mr. Fowles said one reason why he forbid the baling of any more timothy was because there were no cars to load the hay into, but his cross-examination shows he had no information upon that

subject until after his talk with Mr. McConnell. The record discloses that he afterward sold all the hay which was not spoiled at an average price of seven dollars a ton, delivered at Battle Creek. This suit was commenced the same day the balers left Mr. Fowles' premises. He at that time had delivered hay amounting at the contract price to $103, and had received from defendant $50.

The first assignment of error calling for discussion relates to the admission of testimony tending to show a breach of the contract. It is claimed this was inadmissible, for the reason that the declaration did not sufficiently describe a breach of the contract. No objection was made to the declaration in justice's court. Defendant pleaded to it, set out verbatim the contract referred to therein, claimed he was ready to perform it and was prevented from doing so by plaintiff, and sought to recoup his damages. He did not misunderstand the claim of plaintiff, but tried it out in justice's court. If the objection had been made promptly, the declaration could easily have been made more formal. We think it too late now to make the objection.

The next assignments of error requiring attention relate to the admission of testimony bearing upon the question of damages and the refusal to strike it out. The claim is that defendant was not shown to have violated the contract. It is very clear, taking the testimony as a whole, that Mr. Fowles insisted upon deciding the order in which the hay should be baled, and, when his right to do so was not conceded, made it impossible for the employés of defendant to go on with the baling. This he had no right to do. Rupert & Co. had bought all of the hay. They had a right to decide the order in which it should be baled, so long as it did not result in loss to the plaintiff. The plaintiff, then, being responsible for the failure to bale the hay, he is not entitled to damages for a failure to bale and take it away. See *Hudson* v. *Feige*, 58 Mich. 148; *Rayburn* v. *Comstock*, 80 Mich. 448. We think the court should have told the jury that the plaintiff, under his own

showing, was not entitled to any damages under his claim of a breach of the contract. We do not deem it necessary to discuss the other phases of the case.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

MARTIN v. MILWAUKEE, BENTON HARBOR & COLUMBUS RAILWAY CO.

MASTER AND SERVANT — ACTION FOR SERVICES — EMPLOYMENT — QUESTION FOR JURY — EVIDENCE.

In an action for services, evidence examined, and *held* to authorize the submission of the question of plaintiff's employment by defendant to the jury.

Error to Berrien; Coolidge, J. Submitted October 7, 1904. (Docket No. 37.) Decided November 9, 1904.

Assumpsit by Walter S. Martin against the Milwaukee, Benton Harbor & Columbus Railway Company for work and labor done. There was judgment for plaintiff, and defendant brings error. Affirmed.

Samuel H. Kelley, for appellant.

Gore & Harvey, for appellee.

MOORE, C. J. This action was commenced in justice's court, where plaintiff obtained a judgment of $146. The case was appealed to the circuit court by defendant. A trial was had before a jury, which returned a verdict in favor of the plaintiff for $293. From a judgment for that amount the case is brought here by writ of error.

It was the claim of plaintiff that he entered the employ of the St. Joseph Valley Railway Company in July, 1896,

and continued therein and in the employ of defendant until April, 1898. The defendant succeeded to the rights and liabilities of the St. Joseph Valley Railway Company in August, 1897. The defendant claims that plaintiff was not in its employ or in the employ of its predecessor, but was in the employ of the Berrien Construction Company. After the verdict was rendered, a motion was made for a new trial for the following reasons:

1. The verdict of the jury is against the law.
2. The verdict of the jury is against the evidence.
3. There is no evidence to support a judgment for the sum of $293 in favor of plaintiff in said cause.
4. The amount of the verdict is so excessive as to show that the jury were actuated by passion or prejudice.
5. There was no evidence showing a contract that would justify the amount of the verdict in favor of the plaintiff.
6. That defendant is in possession of new and further evidence showing the verdict should be for defendant, and which, on another trial, defendant can produce.

This motion was overruled.

The questions involved are purely questions of fact. There was testimony on the part of the plaintiff that he was employed by the president of the St. Joseph Valley Railway Company, and that he assisted the surveyors in running the lines of the road upon its extension; that he helped secure its right of way, the deeds to which ran to the St. Joseph Valley Railway as grantee until the organization of the defendant company, when they ran to it as grantee.

There was also furnished to him a pass, reading as follows:

"MILWAUKEE, BENTON HARBOR & COLUMBUS RAILWAY COMPANY.

"Pass W. S. Martin, Employee, until December 31, 1897, unless otherwise ordered.

"A. A. PATTERSON, Jr.
"Pres. and Gen. Mgr.
"No. ———."

There was also other testimony tending to support his theory of the case, both as to the employment and the value of his services. It is true there was testimony—and much of it—to support defendant's theory of the case, but it cannot be said there was no case for the jury, nor can it be said the verdict was not based upon the testimony.

Judgment is affirmed.

The other Justices concurred.

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COOK v. UNIVERSALIST GENERAL CONVENTION.

1. WILLS—BEQUESTS TO CHARITIES—CONSTRUCTION—CY PRES DOCTRINE.

   Testatrix bequeathed the remainder of her estate to the "Universalist Japan Mission Fund," for the support of the "Universalist Mission in Japan," and it appeared that the testatrix was a Universalist in faith, and that the Universalist General Convention was the only organized corporation or society of the Universalist denomination having a mission in Japan, and a fund to support the same. *Held*, that the cy pres doctrine had no application to the bequest, since there was no doubt of testatrix's intention.

2. SAME—TRUSTEE—IDENTIFICATION—PAROL EVIDENCE.

   Testatrix bequeathed the remainder of her estate to the "Universalist Japan Mission Fund," for the support of the "Universalist Mission in Japan." *Held*, that, for the purpose of identifying the trustee intended by testatrix to disburse the fund, parol evidence was admissible to show that testatrix was a Universalist in faith, and had contributed to such fund in her lifetime, and that the Universalist General Convention was the only society or corporation of the Universalist denomination having a mission in Japan, and a fund to support it.

Error to Van Buren; Carr, J. Submitted October 7, 1904. (Docket No. 36.) Decided November 9, 1904.

John Cook appealed from an order of the probate court allowing a bequest in the last will and testament of Ann Smith, deceased, in favor of the Universalist General Convention. There was judgment for contestant, and the claimant brings error. Reversed.

One Ann Smith died testate, leaving no children. After bequests for the erection of headstones over the graves of her father, mother, and herself, and several bequests to her collateral heirs, the seventh clause of her will provides:

"After satisfying all the foregoing demands, I bequeath the remainder of my estate to the Universalist Japan Mission Fund, for the support of the Universalist Mission in Japan."

Upon the distribution of the estate, the Universalist General Convention made claim to this bequest, which amounted to about $1,000. The heirs contested the claim. The probate court held that the manifest intention of the testatrix was to make the bequest to the Universalist General Convention, to be used by it for the support of its mission in Japan. One of the heirs appealed to the circuit court.

Testimony was offered and received establishing the following facts: The testatrix was a Universalist in faith. She had contributed in her lifetime to the support of this same "Japan Missson Fund." She took and read the church paper, in which this fund was designated as "The Universalist Japan Mission Fund." The Universalist General Convention is a corporation organized under the law of the State of New York, is empowered to receive bequests, and is the only society or corporation of the Universalist denomination which has a mission in Japan, and a fund to support it.

When the appellant had rested its case, the circuit court, upon motion of the appellee, struck out the above testimony, and directed a verdict against the claimant. The reason given by the court below for its direction is that the "seventh clause of the will is too indefinite and uncer-

tain to warrant the award of the residue to the Universalist General Convention."

Lincoln H. Titus (*William G. Howard*, of counsel), for appellant.

Benjamin F. Heckert and *T. J. Cavanaugh*, for appellee.

GRANT, J. (*after stating the facts*). The doctrine of cy pres, as defined in 12 Cyc. 1191, and 8 Am. & Eng. Enc. Law (2d Ed.), p. 534, has no application to the facts of this case. The devisee is not seeking to change the intention of the testatrix, or by extrinsic evidence to carry out her scheme as near as it is practicable to do so, or to change an illegal or impossible condition, limitation, or object into the nearest practicable one. There is no doubt of the testatrix's intention. It is clearly expresed within the four corners of the instrument. No other inference can be drawn than that she intended to and did provide that a portion of her estate should be devoted, under the direction of the Universalist Church, to which she belonged, to the support of the Japan mission of that church, as it was known to her, as it had been carried on, and to which she had before contributed. The purpose is lawful and commendable. It should be carried out, "unless there is such an uncertainty that the law is fairly baffled." *Tuxbury* v. *French*, 41 Mich. 12.

The attack by the heirs is based mainly upon the claim that the will provides no trustee to execute the beneficent bequest. The object of the extrinsic evidence is to identify the trustee. A layman, even, would readily understand that the testatrix recognized the existence of an organization having charge of the fund, and one which would immediately be intrusted with the execution of her bequest. No other church than the Universalist, and no other than the Japan mission, are mentioned. There is only one Universalist mission in Japan, and that one is sustained by the claimant corporation. Extrinsic evidence is always

necessary to identify the devisee, and beneficent bequests are not to be defeated by mere misnomers. All that reason and the law require is that the beneficiary shall be so described and named as to be capable of identification.

A legacy to the "Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church," for the education of girls in India, was held to mean "The Woman's Foreign Missionary Society;" it being the only foreign missionary society in that church engaged in work of that character. The *Woman's Foreign Missionary Soc.* v. *Mitchell*, 93 Md. 199. A "Presbyterian Infirmary on Division street in Baltimore city" is held to mean "The Union Protestant Infirmary;" being the only infirmary on that street. *Reilly* v. *The Union Protestant Infirmary*, 87 Md. 664. Where the bequest was to the "Board of Missions," extrinsic evidence was admitted to show that the testatrix meant the "Board of Missions of the Presbyterian Church in the United States," although there were other denominations having boards of identical names. The extrinsic evidence in that case was very similar to that in this. *Gilmer* v. *Stone*, 120 U. S. 586.

A bequest to the "Canandaigua Orphan Asylum, at Canandaigua, Ontario county, New York," was held to mean the "Ontario Orphan Asylum," located there. *Bristol* v. *Ontario Orphan Asylum*, 60 Conn. 472. A bequest to the "Methodist Episcopal Church School," situated in B., was held to mean a school at that place of a different name, but controlled by that church. *Ross' Ex'r* v. *Kiger*, 42 W. Va. 402. For further illustration, see Page on Wills, § 539.

Cases of this character might be multiplied almost indefinitely. Misnomers in property and beneficiaries are exceedingly common. It is enough if the testator uses language which is sufficiently clear to enable courts by extrinsic evidence to identify either the property (*Oades* v. *Marsh*, 111 Mich. 168), or the beneficiary and trustee.

Should one make a bequest to the law or the medical department of the University of Michigan, or to a depart-

ment of any college, would a bequest be defeated because the name of the trustee to execute the trust was not mentioned, although it is clearly implied? If a bequest should be made to "The Woman's Hospital Fund of the City of Lansing," and it were shown that the only hospital in that city was "The Women's Hospital Association of the City of Lansing," and there was in fact a fund commonly known as "The Women's Hospital Fund," should the clear intent of the testator be defeated because he failed to mention the trustee which alone has charge of the fund?

We think the learned circuit judge was in error in excluding the evidence, and that this is one of those cases where extrinsic evidence is proper to identify the beneficiary in which the title to the bequest will vest.

Judgment reversed and new trial ordered.

The other Justices concurred.

ADAMS v. OSBORNE.

1. JUSTICES OF THE PEACE—PROCESS—SERVICE—ALIAS SUMMONS—GARNISHMENT.

   Where a garnishee summons was issued simultaneously with the first summons in a suit in justice's court, and was duly served, but the officer was unable to obtain service of the original summons, either personally, or by leaving it at defendant's last place of abode, the suit did not fail, but plaintiff was entitled to sustain it by suing out and serving an alias summons followed by an attachment as provided by § 717, 1 Comp. Laws.

2. GARNISHMENT—ATTACHMENT—SERVICE—FAILURE OF SUIT.

   A debt impounded by garnishment proceedings instituted simultaneously with a short summons followed by an alias summons and attachment, as provided by sections 717 and 990, 1 Comp. Laws, is released by return of the attachment not personally served, section 745 having no application to such a case.

Case made from Kent; Perkins, J. Submitted October 17, 1904. (Docket No. 125.) Decided November 9, 1904.

Assumpsit in justice's court by William M. Adams and George W. Hart, copartners as Adams & Hart, against George W. Osborne for goods sold and delivered. Plaintiffs recovered judgment in the justice's court, and defendant appealed to the circuit court by writ of certiorari. From a judgment for plaintiffs, defendant appeals. Reversed.

Sawyer & Bishop, for appellant.

Don E. Minor (*Fred M. Raymond*, of counsel), for appellee.

HOOKER, J. There are two ways in which a justice of the peace may obtain jurisdiction in the case of a nonresident defendant, in an action upon contract, where such defendant does not appear: (1) Where such defendant is seasonably served personally with a short summons within the county; (2) where he has property within, or a debt owing to him from persons living in, said county, and such property or debt is duly impounded by writ of attachment or garnishment in accordance with law.

In this case the plaintiffs reside in the county of Kent, and the defendant in Wexford, and they so resided at the time this action was begun. A short summons was issued in Kent county, on June 12, 1903, returnable in six days, and at the expiration of that time an alias summons was issued, returnable on June 24, 1903. Each of these was seasonably returned by the officer, with a certificate that, after diligent search, he had been unable to find the defendant, or his last place of abode. On the latter date an attachment was issued, returnable July 2, 1903. This was returned on that date, with a certificate that the officer had made diligent search and inquiry during all of the time allowed by law, and had been unable to find the defendant within the county; that corresponding diligence

had failed to disclose that he had a last place of residence in said county, or any goods and chattels therein. It was further certified that on June 27th the officer served a certified copy of the writ of attachment upon the Grand Rapids & Indiana Railway Company, etc., "the garnishee defendant named in the cause in which said writ of attachment is issued," etc. This alluded to a garnishee summons which was issued simultaneously with the summons first mentioned, and duly served. The defendant did not appear in answer to either summons, or upon the return day of the attachment. On that day the cause was adjourned, in compliance with section 736 of the Compiled Laws, to August 3d, at which time the defendant appeared specially and moved to dismiss the proceedings, which motion being denied, he took no further part in the case, and the plaintiffs proceeded with it and ultimately obtained a judgment. The cause was removed to the circuit court by certiorari, where the judgment was affirmed. The defendant has appealed.

The important questions in the case are two:

1. Had the justice jurisdiction to issue the writ of attachment?

2. Was there a proper service upon the garnishee?

We find no authorities denying the right of a resident to take a short summons against a nonresident, and none warranting the inference that an alias summons is limited to cases where the defendant is or has been a resident of the county where the suit is commenced; i. e., one who can be said to have "a last place of abode." Counsel seem to argue that the garnishee suit ended when the first summons was returned without service of any kind. They cite the case of *Iron Cliffs Co.* v. *Lahais*, 52 Mich. 394, as in point, saying:

"Indeed, the cases are identical, except that the reason why the service of the first summons was void was different from the case at bar. There they left the summons at the defendant's last place of abode too soon; with us, they never left it there at all. The court, in deciding the case, says:

" 'All the proceedings in the case are special and statutory, and must be strictly construed. To entitle the defendant to the benefit he claims under them, he must show they are clearly within the provisions of the statute. * * * At the time Clark made his disclosure, Lahais had no valid legal proceedings pending against Brunette. On the return day of the first summons against him, no service of the process had been made, and the suit thus commenced went down for the want of jurisdiction in the court to continue it by issuing further process. The garnishee proceedings, being merely ancillary, went down with it, and for the same reason.'

"This is exactly the point claimed by us, namely, that the service of the copy of the attachment upon the garnishee defendant, the Grand Rapids & Indiana Railroad Company, could have had no effect whatever in giving the justice jurisdiction, because the garnishee proceedings, being ancillary to the original summons, lapsed on the 18th day of June, when that summons was returned without any valid service having been made."

It must be admitted that, if the *suit failed* for want of a proper service of the first summons, the garnishee proceedings fell with it. Did it fail?

Section 717 of the Compiled Laws provides:

"If it appear by the return of the constable that the summons was not personally served, and the defendant shall not appear on the return day thereof, the plaintiff may thereupon take out a new summons against the defendant, in continuation of his suit, returnable not less than three nor more than twelve days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein, and if such summons be returned that the defendant cannot be found after diligent inquiry, the plaintiff may, in further continuance of his suit, have an attachment against the defendant in actions upon contract, on filing an affidavit as to the amount claimed to be due, and executing a bond as in other cases."

The return states that the officer was diligent during all of the time allowed by law, and was unable to obtain service in either method required by section 716. Counsel apparently intended to be understood as saying that, inasmuch as the summons was not left at defendant's last place of abode, no alias could be lawfully issued, notwith-

standing the fact that he had no last place of abode in the county. Section 717 is broad enough in terms to authorize it, and is silent about requiring any kind of a service. The case cited (*Iron Cliffs Co.* v. *Lahais*) is not necessarily conclusive, because in that case the return showed a failure of the officer to continue his efforts sufficiently long, and the result was said to be a discontinuance of the suit. A second (i. e., alias) summons could not be said to be a continuation of a suit in which there was no longer life. It is not there held that a case should fail where the officer's return shows compliance with the statute, and we are of the opinion that in the present case the alias and attachment had substantial foundation, and had the effect of continuing the action against the principal defendant. *Segar* v. *Lumber Co.*, 81 Mich. 347.

The second question seems to rest upon defendant's construction of section 745, 1 Comp. Laws, which provides for the commencement of suits by attachment in certain cases:

"That any person or corporation indebted to the defendant in any attachment suit, or who has any property or effects belonging to said defendant may be summoned as a garnishee of such defendant in such attachment proceedings. The proceedings against the garnishee shall be conducted in the manner prescribed in chapter two hundred and two of the Compiled Laws of Eighteen Hundred and Seventy-One, and the amendments thereto, now or hereafter passed. Such garnishee proceedings may be commenced simultaneously with the issuing of the writ of attachment, or while such attachment suit is pending, and shall be deemed auxiliary to the proceedings in attachment, but shall be entered separately upon the justice's docket, the same as in other garnishee cases."

It is insisted that the foregoing language precludes the commencement of garnishee proceedings earlier than the time of issuing the writ of attachment. This must manifestly be so in cases commenced under that statute. See 1 Comp. Laws, § 721 et seq. But this case is not so commenced, as we have seen. See 1 Comp. Laws, § 716.

In cases begun by attachment, section 731 is applicable, and that provides for the service of a certified copy upon a garnishee when garnishment proceedings are commenced simultaneously with the issue of the writ. This would seem to imply that such service is not required where the garnishee proceeding is commenced later, as section 745 clearly states that it may be, if jurisdiction is acquired over the principal case, by seizing property, and personal service, or perhaps either. Section 990 provides for the commencement of garnishee proceedings before a justice of the peace in any action founded upon contract or judgment or decree. It may be commenced any time after the commencement of such action, during its continuance. This action was commenced by the issue of a short summons. The garnishee process followed immediately, and was kept alive, awaiting the result of the principal suit, which also was continued in life by proceedings in strict compliance with law until the attachment was returned not personally served. Then both proceedings fell, as the writ of garnishment was not issued in accordance with either section 731 or 745; i. e., simultaneously with the writ of attachment. See opinion of Carpenter, J., in circuit court, in the case of *Record Printing Company* v. *Adams*, 7 Det. Leg. News, issue of Dec. 15, 1900, bottom paging 191.

The judgment is reversed, and the cause dismissed, with the costs of all courts.

The other Justices concurred.

AMERICAN FOUNDRY & MACHINERY CO. *v.* CHARLEVOIX CIRCUIT JUDGE.

1. INJUNCTION—BOND—NECESSITY.
   Where replevin has been brought to recover machinery sold to the builder of a mill, title to remain in the seller until he is fully paid, an injunction staying removal of the machinery, until the rights of a mortgagee of the land can be adjudicated does not stay the action at law so as to require a bond under section 502, 1 Comp. Laws.
2. SAME.
   Where, in such a case, no injury would be done to the machinery by permitting it to remain in the mill until the determination of the questions involved, and irreparable injury would result to the mortgagee by its removal, and the mortgagee, under the allegations of his bill, is under no obligation to pay the debt, or, if he were, should be permitted to make payment and avoid the destruction of his security, no bond should be required.

Mandamus by the American Foundry & Machinery Company to compel Frederick W. Mayne, circuit judge of Charlevoix county, to vacate an order granting a preliminary injunction. Submitted October 18, 1904. (Calendar No. 20,718.) Writ denied November 9, 1904.

The relator seeks the writ of mandamus to compel the respondent to vacate an order granting a preliminary injunction. Upon filing the bill the injunction was ordered and issued. Relator filed an affidavit, and moved for a dissolution of the injunction, which respondent refused.

The material facts alleged in the bill of complaint are: That a corporation known as the Charlevoix Sugar Company constructed a factory and refinery. That it authorized the issue of bonds, not exceeding the sum of $250,000, and a mortgage to secure the same, to the United States Mortgage & Trust Company; said mortgage to cover all the real estate, property, chattels, and effects of

said corporation as collateral security for the payment of the bonds. That bonds were issued. That complainants own some of said bonds. That the mortgage was executed July 24, 1902. That the Charlevoix Sugar Company made a contract with the National Construction Company, of Detroit, Mich., to build, construct, and equip the necessary buildings for said sugar company, and to furnish all machinery required. That in the equipping of said factory said National Construction Company purchased from the relator, the American Foundry & Machinery Company, certain machinery. That said machinery was firmly and securely attached to said factory—built into it on a brick and concrete base—and cannot be removed without causing the destruction of the walls of the factory. That by the terms of the contract between the relator and the National Construction Company the relator agreed to furnish to the construction company this machinery for the sum of $32,106.

The contract for the purchase price thereof provided:

"It is further expressly agreed by and between the parties hereto that the sale of the machinery herein is a conditional and not an absolute sale and is conditioned upon the payment by said second party of the purchase price thereof in the manner hereinbefore provided; that the machinery covered by this contract shall be and remain personal and not real property until the purchase price hereinbefore stated is fully paid to said first party, and that the title to said machinery and to every part and portion thereof shall remain vested in said first party, its successors or assigns until the purchase price thereof, hereinbefore stated, is fully paid, or until any notes, drafts, or acceptances or renewals thereof taken on account of said purchase price by said first party, or any judgment or judgments rendered thereon, or any part thereof and the taxable costs thereon, shall have been fully paid, satisfied, and discharged. It being expressly agreed that the taking of any note, bond, certificate of stock, or other property by way of security, or the conversion of same into cash to apply on the purchase price of said machinery, or the filing of any claim of lien by said first party, shall in no way constitute or be held to be a waiver by said first party of

this term of this contract, or of its right to repossess itself of said machinery so long as any portion of said purchase price remains unpaid and said second party is in default therefor, and in event of this second party failing to pay said first party the amount due it under this contract in the manner hereinbefore provided, then and thereupon it shall be lawful and the said first party is hereby licensed and empowered, without process of law, to enter upon the premises wheresoever the said machinery may be situate, without the giving of any notice of its intention to do so, and to remove the same or any part thereof and retake the same into its possession, custody, and control and treat any and all payments theretofore made on account of said purchase price as having been paid for the reasonable use, wear and tear of said machinery."

That the said relator knew that said sugar company had issued bonds and executed and delivered said mortgage to secure them; knew that said bonds would be sold and disposed of to the public, and that the bondholders would look to the said factory and property for its security.

The bill alleges upon information and belief that said National Construction Company has paid the relator in full; that the relator, claiming that its contract with the National Construction Company had not been fulfilled, and that there was still an amount due, brought suit in replevin for the machinery; that the sheriff of the county, by virtue of said writ, had levied upon said property, and was about to remove the same; that said replevin suit is at issue, and ready for trial; that complainants have no desire and do not intend to prevent or delay the trial of said cause; that the complainants applied to the United States Mortgage & Trust Company to commence action to restrain relator from removing said machinery, but that said company has refused to do so; that complainants are one of the cestuis que trustent to be benefited by said mortgage; that said action of replevin was commenced against the sugar company and the National Construction Company; that the complainants are not interested in the outcome of the replevin suit, but insist that the rights of the bondholders in said property will remain the same whichever party

prevails in that suit; that the rights of the bondholders are superior to those of relator, and that the relator has no right to remove the machinery, for the reason that it is a part of the realty, and a part of the security claimed by them. The bill prays that the relator may be enjoined from removing the machinery until the further order of the court, and the rights of the parties may be determined.

The bill further alleges that the Charlevoix Sugar Company is insolvent; that the machinery in dispute was delivered to the National Construction Company after the mortgage to the trust company was duly recorded; asks for an accounting between relator and the National Construction Company to determine the amount due, so that the complainants, or the trust company for the bondholders, may have the opportunity to protect their security by the payment of the claim, should it be found that the title of the relator to the property is paramount to the lien of the bondholders.

The affidavit made by the attorney for the relator, in opposition to the preliminary injunction, sets up the contract of sale to the National Construction Company, the failure to pay, and the proceedings in the replevin suit, the levy of the sheriff, the appraisal of the property at $16,000, and the giving of a bond in the sum of $32,000. The court did not require, and the complainants in the chancery suit did not give, a bond under 1 Comp. Laws, § 502.

Anderson & Rackham, for relator.

Lisle Shanahan, for respondent.

GRANT, J. (*after stating the facts*). The statute provides that "no injunction shall issue to stay the trial of any personal action in a court of law, until the party applying therefor shall execute a bond with one or more sufficient sureties to the plaintiff in such action at law," etc. 1 Comp. Laws, § 502.

The trial at law is not stayed by the injunction, and counsel assert in their brief that the case has since been tried.

There is no evidence of this in the record, and we cannot now consider it. The respondent, in refusing to dissolve the injunction, stated that "the trial of the cause is not sought to be restrained, and whether the present restraining order would be of any force to prevent the removal of the property after judgment I do not now determine." No precedents under this statute or a similar one are cited. Probably the question is new. The claim of the bondholders is that this ponderous machinery was sold and purchased with the knowledge that it must necessarily become so affixed to the realty as to become a part of it. The bill of complaint asserts that the bondholders had no knowledge of the contract between relator and the National Construction Company, and that they are innocent mortgagees.

Suppose that a vendor were to sell brick, stone, or iron to form a part of the structure of a building, upon the condition that the title thereto should remain in him until payment of the purchase price; that the building were constructed; and the owner should sell or mortgage it to a party who had no knowledge of such contract of sale—would the vendor have the legal right to tear down the building to take his brick, stone, or iron? As between the vendor and vendee, the vendee may be bound by such conditions; but it does not follow that the vendor would possess such right against an innocent vendee or mortgagee. The court now has only the allegations in the bill to act upon. The evidence may disclose a different state of facts. It is not claimed that the property will suffer injury if left in the building until the rights of the parties are determined. If the allegations of the bill are true, the removal of this property will result in great and irreparable injury to the bondholders. If the contention of the bondholders is correct, they are under no obligation to pay the debt due the relator. They ought not, therefore, in good conscience, to be required to give bond to pay it until the right of relator to seize its property is determined. If it is determined in the suit at law that that right exists, and

there is a balance still unpaid, the bondholders ought in good conscience and equity to have the right of payment, and thus avoid the destruction of their property.

The contention on behalf of relator appears to be that, to restrain the removal of the property is, in effect, to restrain the trial of the suit at law, and therefore in violation of the statute. We think otherwise. We agree with the circuit judge in holding that the statute does not apply to such a case as this, and that it was no abuse of discretion to keep this property in place and intact until the rights of the parties are determined.

The writ is denied.

The other Justices concurred.

WM. BARIE DRY-GOODS CO. *v.* CASLER.

1. FINDINGS OF FACT—REVIEW.
   Where there is evidence to support the findings of fact of the trial judge, the evidence will not be reviewed.
2. SAME—PROPRIETY.
   It is proper for findings of fact to show that plaintiff at the trial waived one of the alleged causes of action.

Certiorari to Eaton; Smith, J. Submitted October 20, 1904. (Docket No. 58.) Decided November 9, 1904.

Proceedings by the Wm. Barie Dry-Goods Company against Spurgeon D. Casler under the fraudulent debtors' act. There was judgment for defendant, and plaintiff brings certiorari. Affirmed.

Smedley & Corwin, for appellant.

J. B. Hendee (*Garry C. Fox*, of counsel), for appellee.

HOOKER, J. The plaintiff instituted this proceeding under the fraudulent debtor act. The sufficiency of the affidavit was determined by this court in 131 Mich. 23. The case was afterwards tried at circuit upon the merits, without a jury, and the defendant was found not guilty, and an order dismissing the proceedings was made. All the testimony is returned, upon certiorari sued out by the plaintiff; and it is contended on its behalf that said testimony conclusively shows defendant's guilt, and that the court erred in finding him not guilty. Exceptions were taken to several of the findings of fact, and to the conclusion of the judge upon them that defendant was not guilty.

The question before us is therefore reduced to the single one of whether the undisputed facts conclusively show guilt, so that we can say that it was error for the court to find otherwise. It is not enough for us to be able to say that we would have rendered a different judgment upon disputed questions of fact.

The circuit judge found:

FACTS.

(1) That Spurgeon D. Casler was engaged in mercantile business at Farnsworth, Mich., from December 5, 1900, until July 5, 1901. On that day he sold to Van Valkenburg this stock of goods for $805.79, taking in payment $205.79 in cash, and two notes, of $100 and $500, respectively, due in five years from their date. The smaller note was paid within a few weeks or months after it was given. At the time he sold to Van Valkenburg, the defendant owed to various creditors an aggregate sum of more than $1,500, of which $417.29 was due to the plaintiff.

(2) That soon after the sale plaintiff's agent secured two notes from the defendant, for the sum of $158.64 each, payable on demand; and, soon after, this defendant secured employment in Wexford county.

(3) He was there sued by the plaintiff, and judgment was taken for $323.02 damages and $23.30 costs.

(4) About the same time proceedings were commenced

there upon this claim under the fraudulent debtor act. This resulted in his discharge.

(5) Defendant employed J. B. Hendee as his attorney, and delivered the $500 note to him as security for his compensation. This was all the property that defendant had.

(6) Execution issued from the Wexford circuit to the Eaton county sheriff, who, with counsel for plaintiff, found defendant at his father's home.

(7) Demand was made that he pay the execution. He replied that he could not, for the reason that the only property he had was the $500 note, and he had turned that over to Hendee for services. He told plaintiff's counsel that he would turn out the note, if he could arrange it with Hendee, to which counsel replied that the note was on long time, and not worth the paper it was written on, and that he did not want it.

(8) It was not shown nor claimed on the trial that defendant had any other property.

(9) In January, 1902, application was made for the warrant in this case, on two grounds, viz.: *First*, defendant had disposed of his property with intent to defraud his creditors; *second*, he had rights of action and money, and evidences of debt, which he unjustly refuses to apply to the payment of said judgment.

(10) On the trial plaintiff waived any claim that defendant had disposed of his property with intent to defraud his creditors, and asked judgment in its favor on the second charge.

(11) After the warrant in that case was issued, James Casler, defendant's brother, procured the $500 note from Hendee, and turned it out to the maker, in part payment for his stock of goods, at its face value, including interest. It was not shown that defendant was in any way a party to, or had anything to do with, the transaction, or that any part of the note, or the money paid upon it, came to his hands.

LAW.

"I am of the opinion that the plaintiffs have failed to show any facts which would justify the holding of defendant as a fraudulent debtor. It seems to me there is nothing upon which to base such a holding, unless it may be that expressed in the eleventh finding of fact. I am of the

opinion, if this has any bearing, it would be upon the allegation that defendant 'disposed of his property with intent to defraud his creditors,' and, claim under that having been waived, I do not consider it, except to make this statement: That I am not satisfied it would apply to that. I do not see how it can apply to the second allegation, under the facts. The case will be dismissed, with legal costs to be taxed."

From the foregoing, it is seen that the court found against the plaintiff upon the merits and upon both points, though he also found that the plaintiff waived the first point upon the trial.

Plaintiff excepted to several findings of fact, viz., the fifth, upon the point that the evidence failed to show that the note was turned out to Hendee to secure payment for his services; the seventh, that the testimony does not warrant the finding that plaintiff's counsel said that he did not want the note, etc., and that the evidence showed that Smedley's reason for refusing the note was that the offer was conditioned upon its acceptance as payment in full for several claims that he had; the eleventh, that the court erred in not finding that the defendant knew of the transaction between James Casler and Van Valkenburg, which is called "buying back the stock." We have examined the testimony critically, and find evidence tending to establish each and every finding of fact made by the learned circuit judge. It is argued in relation to the eleventh that, upon the showing made, Hendee had not such an interest in the note as permitted him to sell it to James Casler upon his promise to see that he was paid. We need not discuss that question, for, if counsel be right in this claim, it does not follow that defendant either had the note, or that the stock was bought back for him, or that he could have turned over either to the plaintiff. Counsel argue that the tenth finding, i. e., of a waiver of the first claim upon the trial was one that the judge had no right to make, because not supported by any evidence. They say that:

"The findings of the court should be statements of the ultimate facts found, and not of the probative facts. Neither evidence, argument, nor comment has any legitimate place in findings of facts."

We think it was proper for the court to make this finding of a material incident of the trial, which could appear in no other way. It is not important, however, as the court has found the merits against plaintiff upon both questions of fact, and none the less so though this may be thought to fully appear only from the finding of law.

The judgment of the circuit court is affirmed.

The other Justices concurred.

WOOLCOTT *v.* WOOLCOTT.

DEEDS—SUPPORT OF GRANTOR—PROVISION.

Where a father conveyed land to his son on condition that the latter should support him during the remainder of his life, and the father subsequently left the son's residence after a quarrel which the father provoked, he is only entitled to recover from the son for reasonable expenditures made for his support and a reasonable provision for the future.

Appeal from Berrien; Coolidge, J. Submitted October 21, 1904. (Docket No. 72.) Decided November 9, 1904.

Bill by Samuel Woolcott against Elmer L. Woolcott and Elizabeth A. Woolcott to set aside certain deeds. On settlement of the decree, defendants appeal. Modified.

G. M. Valentine and *G. W. Bridgman*, for complainant.

Gore & Harvey, for defendants.

MONTGOMERY, J. This case was before the court for consideration at the June term of 1903, and is reported in 133 Mich. 643. We there determined the rights of the respective parties in the land involved, and remanded the case to the circuit court in chancery to ascertain the cost of complainant's support after he ceased to live with defendants, and what will be a proper allowance for the future. From a decree of the circuit judge fixing these amounts the defendants appeal.

The decree awarded for the period up to the date of the decree $5 per week for board, $75 per year for clothing, $100 per year for incidentals, and $40 per year for medical attendance.

An examination of the testimony discloses that complainant was not able to state with entire accuracy all of his expenditures. Perhaps this was to be expected, and we ought not to split hairs in an attempt to make provision for the complainant's remaining days. Yet we are bound to limit the allowance to compensation for reasonable past expenditures and to a reasonable provision for the future.

We think, under the proofs, an allowance of $5 per week for board, while fairly liberal for the locality, was not excessive. The allowance for clothing was higher than complainant's testimony supports. This should be fixed at $50 per year. We think the item of $100 for incidentals should be deemed sufficient to include medical attendance. The total allowance up to date of decree below should be at the rate of $410 per year, and for the future $8 per week. The provision for future application to the court in case of changed conditions will be retained in the decree. Defendants will have credit for payments made toward the complainant's support since the former

hearing. The terms of the decree as to the remedy for enforcement of this order, if not agreed upon by counsel, will be fixed upon settlement of the decree.

The other Justices concurred.

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138 178
158 254

BOWINS *v.* ENGLISH.

1. EVIDENCE—PAROL EVIDENCE TO VARY WRITING.
   In a suit to enforce specific performance of a written contract, by which it was claimed complainant was made the heir of deceased, which writing was clear and unambiguous, statements made by deceased and his first wife as to their feelings toward complainant and her relation toward them were incompetent.

2. ADOPTION—EXECUTORY CONTRACTS—BREACH—RIGHTS OF CHILD.
   A written contract to adopt complainant was not signed by her foster mother, and deceased, her foster father, never took any steps to adopt her. Complainant knew, when a mere child, that she was not the daughter of her foster parents, and certain conveyances by way of gift were made to her by her foster parents in the name of her natural father. The contract on its face authorized complainant's foster parents to make her their heir, but contained no covenant binding them so to do. *Held*, that complainant was not entitled to recover the property of her foster parents as their heir.

Appeal from Washtenaw; Kinne, J. Submitted October 21, 1904. (Docket No. 73.) Decided November 9, 1904.

Bill by Stella May Bowins against Margaret English, individually and as administratrix of the estate of John G. English, deceased, and others, for the specific performance of a contract of adoption. From a decree dismissing the bill, complainant appeals. Affirmed.

The purpose of this bill is to enforce the specific performance of a contract by which it is claimed that the complainant is the heir at law of John G. English, deceased, and is the owner in fee of all his real estate, subject to his widow's right of dower. The contract reads as follows:

"Know all men by these presents, that I, Thomas Bunker, of the county of Jackson in the State of Michigan, being the sole surviving parent of an infant girl child named Parthena Jane Bunker now of the age of six months, said child being born on the 11th day of March, A. D. 1864.

"In consideration of the love and affection which I have and bear for the said infant child, and my desire to see her properly raised and educated, and also for divers other good causes and considerations, me, the said Thomas Bunker, hereunto moving, do by these presents give the said child, Parthena Jane, unto John G. English and Cordelia A. J. English, his wife, of the county of Washtenaw in the State aforesaid, and hereby authorize them and unite with them in changing the name of said child to Stella May English. The said John G. English and Cordelia A. J. English, his wife, hereby agreeing to take said child and adopt her as their own child under the name of Stella May English, to clothe, educate and care for her as their own child and entitled to her services until she becomes of the age of 21 years. The said Thomas Bunker hereby and by these presents committing the custody of the person of said child, Stella May English, unto the said John G. English and Cordelia A. J. English, his wife, fully and in all respects whatever, hereby relinquishing all claims and right to control said child as her father unto them, the said John G. and Cordelia A. J. English until said child arrives at the age of 21 years.

"And it is further mutually covenanted and agreed by and between the parties hereto that the said John G. English and wife may procure an act of the legislature of the State of Michigan, authorizing them to adopt said child as their own, in case the same may be deemed necessary to constitute her their heir. And the said John G. English and Cordelia A. J. English, his wife, hereby agree to clothe and educate the said Stella May English according to their condition and position in life."

Complainant was at the date of the contract a few months old. Mr. English and his wife had no children. Complainant was brought up by Mr. English and his wife, educated in school and in college, and in 1892 was married. After their marriage she and her husband continued to live on the farm. Mr. English lived with them until after the death of his first wife, and until he remarried.

Mrs. English, though mentioned in the body of the contract as a party, did not sign it. Before her death she deeded her land to her husband for 20 years, "after which time the said described premises to belong to and become the property of Stella May Bunker during the natural life of said Stella May Bunker." Shortly before Mr. English remarried he deeded to complainant 70 acres of land. In this deed she is named as Stella May Bunker. Mr. English also made a loan of $900, taking back a mortgage to complainant, in which she is named as Stella May Bunker. Mr. English died intestate January, 1902.

The case was heard upon pleadings and proofs, and the bill dismissed.

A. J. Waters (*A. J. Sawyer*, of counsel), for complainant.

A. F. & F. M. Freeman, for defendants.

GRANT, J. (*after stating the facts*). We held in *Albring* v. *Ward*, 137 Mich. 352, that heirship, except that based upon consanguinity, can be created only by a constitutional law.

If executed articles of adoption under a void law are not a sufficient basis to make one a legal heir and to constitute an agreement to convey land, certainly an agreement to adopt and to take steps, if necessary, to secure such adoption, cannot be made the basis of an agreement to convey land, and cannot be held to be sufficient to take the place of adoption under a constitutional law.

Mrs. English did not agree to adopt the child. Mr. English never did adopt her, and took no steps to that end.

Complainant knew, when a mere child, that she was not the daughter of her foster parents. All conveyances from her foster parents to her by gift named her as Stella May Bunker.

If complainant bases her right of action upon the written contract, then all statements made by Mr. and Mrs. English as to their feeling towards complainant and her relation toward them are incompetent evidence, because the writing is clear, and must speak for itself. Upon its face there is nothing in it which in law bound Mr. English to make the child his lawful heir, or to convey to her any property. It may have been the equivalent of an apprenticeship until she was 21 years of age. If so, Mr. English fully performed it by supporting, caring for, and educating her during the time specified. The case is ruled by *Albring* v. *Ward*, supra.

The decree is affirmed, with costs.

The other Justices concurred.

RIKER v. OAKLAND CIRCUIT JUDGE.

MUNICIPAL CORPORATIONS — STREET LIGHTING — CONTRACTS — INJUNCTION — ADEQUATE REMEDY AT LAW.

Where complainant claimed he had a valid and enforceable contract with a city for lighting its streets at the time the city repudiated the same and accepted the bid of another, complainant was not entitled to restrain the city from entering into a new contract with such other therefor, since, so far as the remedy by injunction was concerned, the rights of the public were paramount to those of an individual contractor, and complainant had an adequate remedy at law.

Mandamus by John D. Riker, mayor, William J. O'Riley, clerk, and the common council of the city of Pontiac, to compel George W. Smith, circuit judge of Oakland county, to vacate an order refusing to dissolve an

injunction. Submitted October 4, 1904. (Calendar No. 20,740.) Writ granted November 15, 1904.

On July 13, 1904, the common council of the city of Pontiac advertised for bids for lighting the city in accordance with plans and specifications which the council had duly adopted. Bids thereupon were to be received until 7 o'clock p. m. July 25th. One Jules G. Hoffman duly filed a written bid to light said city in accordance with said plans and specifications. He was the lowest bidder. The lighting committee recommended that the contract be awarded to Hoffman. A resolution was thereupon unanimously adopted by the common council awarding him the contract. There was nothing in the plans, specifications, or bid to indicate that a contract should be drawn in accordance therewith, but the resolution of the council accepting the bid did provide for entering into such a contract.

On account of the illness of his father, the city attorney could not immediately prepare the contract, and no other steps were taken until the 8th of August. Mr. Hoffman then appeared before the council and demanded that a contract be drawn up and executed. A resolution was then adopted reconsidering that approving the bid of Hoffman, his bid rejected, and another bid, made by the Pontiac Standard Lighting Company, was accepted, and the mayor and city clerk directed to sign such contract with that company. Thereupon Mr. Hoffman filed a bill in equity to enjoin the making of a contract with that company, and praying that the common council be directed by a decree of the court to make, sign, and execute a contract in accordance with the plans and specifications and proposal of said Hoffman, and the approval thereof by the common council. A preliminary injunction was issued. Upon the coming in of the answer, the court refused to dissolve the injunction, and the relators, the mayor and the common council, apply for the writ of mandamus to compel the dissolution of said injunction.

M. F. Lillis (*John H. Patterson* and *Peter B. Bromley*, of counsel), for relators.

Aaron Perry and *James H. Lynch*, for respondent.

GRANT, J. (*after stating the facts*). We find it unnecessary to determine the legal rights of the parties. Municipalities, although through their officers they may at times let contracts not in accordance with the legal rights of the parties, ought not, except under very extraordinary circumstances, to be restrained by the courts. The rights of the public, so far as the remedy by injunction is concerned, are paramount to the rights of individuals who claim to stand in the position of contractors. Prompt action on the part of municipal officers is, as in this case, essential to secure to the public the speedy accomplishment of those things necessary for their use and protection. If Mr. Hoffman had a legal contract by reason of his bid and its acceptance, he has a clear remedy at law. This as well as other courts has denied the remedy by injunction in such cases. *City of Detroit* v. *Wayne Circuit Judge*, 128 Mich. 438; *Chandler* v. *Detroit Board of Education*, 104 Mich. 292; *Riehl* v. *City of San Jose*, 101 Cal. 442; *People* v. *Campbell*, 72 N. Y. 496.

The circuit judge was in error in issuing the injunction. The writ will therefore issue as prayed.

MOORE, C. J., and MONTGOMERY and HOOKER, JJ., concurred. CARPENTER, J., took no part in the decision.

138 184
154 N.W. 657

HATCH *v.* WAYNE CIRCUIT JUDGE.

1. TRIAL—REFUSAL OF JUDGE TO PROCEED.
   Where it appears on the trial of an action that a suit for the same cause of action has been determined by a judgment in favor of defendants, and plaintiff contends that the judgment presents no obstacle to his recovery, because he was not present when the case was disposed of, the judge should direct a verdict either for or against plaintiff, and has no right to refuse to proceed with the trial.

2. MANDAMUS—DISCRETION—AWARD NOT BENEFICIAL.
   The plaintiff in a suit will not be awarded a mandamus to compel the court in which the suit was brought to proceed to trial, where it would be the court's duty upon such trial to direct a verdict for defendant.

3. JUDGMENT—VALIDITY—COLLATERAL ATTACK.
   A judgment in form on the merits cannot be falsified by evidence not of record, to the effect that plaintiff, against whom the judgment was rendered, was not present and introduced no witnesses at the trial; but relief from such a judgment can be obtained only by having the judgment entry corrected by the court which committed the error, or in a court having appellate jurisdiction.

Mandamus by William B. Hatch, administrator of the estate of Charles L. Andress, deceased, to compel Robert E. Frazer, circuit judge of Wayne county, to proceed with the trial of a cause. Submitted October 4, 1904. (Calendar No. 20,649.) Writ denied November 15, 1904.

William B. Hatch (*Bernard B. Selling*, of counsel), in pro. per.

Davis & Bromley, for respondent.

CARPENTER, J. Relator commenced a suit in the circuit court for the county of Wayne against Lucy A. Andress and Anna Morris. When this suit came on for trial before respondent and a jury, it was made to appear that a suit for the same cause of action against defendants, in-

stituted by relator as plaintiff, in the Oakland circuit court, had been determined by a judgment, in form on the merits, in favor of defendants. Relator contended that this judgment presented no obstacle to his recovery in the present suit, because, when the case was disposed of, plaintiff was not present, and swore no witnesses. Respondent decided against this contention of relator, and declined to proceed further with said trial. Relator seeks by this proceeding a mandamus to compel respondent to proceed with the trial of his case.

Respondent had no right to refuse to proceed with the trial. It was, at the least, his duty to direct a verdict either for or against plaintiff. If, however, it was respondent's duty to direct a verdict for defendants on the ground that the judgment in the Oakland circuit court was a bar to this suit, relator has no real grievance. It would be an abuse of our discretionary powers to issue a writ of mandamus compelling respondent to try such a case, for it would only result in wasting money in prosecuting fruitless litigation.

It seems, therefore, our obvious duty to determine whether or not respondent should have directed a verdict for defendants. Relator contends that the judgment rendered in the Oakland circuit court does not bar his recovery in this suit, because he introduced no witnesses, and was not present when the case was tried. As the record does not show the circumstances relied upon by relator to lessen the effect of the judgment, it is obvious that his contention cannot prevail, unless it is competent to prove the falsity of the judgment record by evidence not of record.

Tucker v. *Rohrback*, 13 Mich. 73, *Wood* v. *Faut*, 55 Mich. 185, and *Hoffman* v. *Silverthorn*, 137 Mich. 60, cited by relator, are all inapplicable.

In *Tucker* v. *Rohrback*, supra, this court held that an adjudication that plaintiff and another did not have a claim against defendant was no bar to a suit in which plaintiff alone sought to enforce that claim.

In *Wood* v. *Faut*, supra, it was held that it was competent to prove that a judgment of no cause of action was rendered on the ground that suit was prematurely brought. This holding proceeded upon the theory that such evidence did not contradict the record.

In *Hoffman* v. *Silverthorn*, supra, it was held, not that a record could be contradicted by parol evidence, but that, in the absence of affirmative testimony, it would not be presumed that an order denying a mandamus decided the merits of a controversy.

The law touching the question under consideration is correctly stated in 1 Greenleaf on Evidence (16th Ed.), § 305*g*, as follows:

"This record [the record of a court] is, in legal theory, not a testimonial report by the officer of the proceedings, nor a copy of some other written act; it is the proceeding and the act itself; * * * and consequently it cannot be shown that something was done which is not noted in the record, or that a thing noted in the record was in truth done differently."

It follows that if there was, as relator claims, error in entering a judgment on the merits, he can obtain relief by, and only by, having the judgment entry corrected; and this relief must be sought in the court that erred, or in a court having appellate jurisdiction.

It may not be out of place to say in this connection—though this circumstance is not material to our decision—that, while relator has asked the Oakland circuit court to set aside said judgment, it does not appear that he has ever applied to have the judgment entry amended.

The mandamus applied for should be denied. But under the circumstances, no costs will be awarded.

The other Justices concurred.

BOARD OF TRADE OF GRAND HAVEN *v.* DE BRUYN.

CONTRACTS—CANCELLATION—MEETING OF MINDS.

On a bill to cancel a contract by which a board of trade agreed to extend certain favors to defendants to induce them to locate their factory in complainant's city, evidence examined, and *held* that the purpose of defendants to remove only a portion of their works was not in view of the parties at the time of making the contract, and that it should be canceled.

Appeal from Ottawa; Padgham, J. Submitted October 5, 1904. (Docket No. 6.) Decided November 15, 1904.

Bill by the Board of Trade of Grand Haven against John C. De Bruyn, Nicholas Bosch, and John Boda, doing business as the Valley City Machine Works, for the cancellation of a contract. From a decree for complainants, defendants appeal. Affirmed.

George A. Farr, for complainants.

Frank A. Rodgers, for defendants.

MOORE, C. J. The circuit judge made a decree in favor of the complainants, declaring a contract dated the 13th day of November, 1900, purporting to be made between the complainants and said defendants, null and void. From this decree the defendants have brought the case here by appeal.

It is the claim of defendants that there is no ambiguity in the contract; that the parties to it knew what it contained when it was signed; that, if Mr. Watson and Mr. Thielman did not have the authority to enter into this contract and bind the other complainants, as they represented to the defendants, then they would be liable to the defendants for any damage defendants suffered by reason of it, and that the bill should be dismissed.

The testimony is conflicting, but a careful perusal of the

record satisfies us, as it doubtless did the circuit judge, of the existence of the following facts: Some time prior to November, 1900, the city of Grand Haven raised a sum of money to be expended in the effort to get new business enterprises to settle in Grand Haven. A board of trade, so called, was brought into existence, through whom and a board of five trustees the money so raised was to be expended. The complainants constitute that board of trade. They elected a president and secretary. The officers of the association learned that the defendants, doing business at Grand Rapids under the name of the Valley City Machine Works, owing to the necessity of having more room, had expressed a desire to establish their business in a new location. Mr. Watson, president of the board of trade, and Mr. Thielman, secretary, entered into negotiations for the removal of the plant to Grand Haven. These men say the negotiations proceeded upon the theory that the entire plant was to be removed to Grand Haven, and they are corroborated by other witnesses. The defendants also submitted the following to complainants:

"TO THE HON. BOARD OF TRADE,
"City.

"*Gentlemen:* In order to locate our business here, we respectfully submit that you assist us by donating the land known as the Blecker Place, fronting on First St., namely three lots, sixty six foot front, plus the three cornered strip back of same, between the railroad tracks. $5,000 cash to be used in erecting and improving necessary buildings. Also make us loan in cash," etc.

On the 19th day of October Mr. Bosch wrote to one of the complainants as follows:

"Mr. GEORGE W. MCBRIDE,
"Grand Haven, Mich.

"*Dear Sir:* In the event of our firm moving to your city it is my best judgment that it will be to my interest to dispose of our home here and either rent or buy again in your city. It occurs to me that you would be the right man to confer with in this matter. * * * Your answer will be appreciated."

Mr. Bosch also sent a letter to Mr. Watson containing, among other things, the following:

"October 22, 1900.

"Mr. D. O. WATSON:

"In regard to your favor of the 20th inst., which arrived in this p. m.'s mail, would say we hardly know what answer to give you, because, to begin with, we cannot give you any assurance as to the number of men to be employed, but we will say that if we had reason to believe that in coming to your town we could not continue the steady gait of increase in business we now enjoy, we would not make any change. Consequently all we can give you on that point is what you can for yourselves figure out, basing it on the ratio of increase from October, 1895, until the present time, and add to that what in your judgment would add on account of the advantage gained by being in your town, and might add an advantage over the past years on account of experience gained. Up to 1895 the writer had never, to his knowledge, seen the inside of a machine shop. We then continued business against odds that offered very little encouragement for success. Our equipment was small and incomplete, and mortgaged for about all it was worth. And the small weekly pay-roll of a little over $50 was met with a struggle. We are not afraid to come to Grand Haven, but can guarantee you only this. That if we do come, it is with the confidence of success, and we see no real reason with the foundry added, why we could not in a short time double our present force and continue to increase."

Mr. Watson and Mr. Thielman say that with no other thought in mind than that the entire plant was to be moved to Grand Haven they entered into a contract, which is the basis of this controversy, the material parts of which are as follows:

"This agreement made and entered into this 13th day of November, A. D. 1900, by and between John C. De Bruyn, Nicholas Bosch and John Boda, doing business and composing the name of the Valley City Machine Works of the city of Grand Rapids, Kent county, Michigan, party of the first part, and the Board of Trade of the city of Grand Haven, Ottawa county, Michigan, a corporation, by Dudley O. Watson and William Thielman, duly authorized to represent and act and enter into this covenant for and in behalf of said Board of Trade, as appears by a resolution duly adopted at a meeting of said Board of Trade on or about November 8th, A. D. 1900, party of the second part,

"*Witnesseth:* In consideration of the premises and of the agreement of the said parties herein expressed. The said party of the second part hereby promises and agrees to purchase and hold title to the property on First street, in the city of Grand Haven, Ottawa county, Michigan. * * *

"The said second party further agrees to build and erect on said premises a machine shop, dimensions as follows: 50 feet in width by 100 feet in depth and 16 feet in height, with a concrete floor covered with pine flooring, and wooded truss roof with iron on outside, also an engine and boiler room 20 feet in width by 35 feet in length and 16 feet high, with a concrete floor. The whole to be built and completed according to plans and specifications furnished by J. H. Daverman & Son of Grand Rapids, Michigan.

"The said second party further agrees to have said buildings ready for occupancy on or before the 1st day of April, A. D. 1901.

"The said second party further agrees to make a loan to said first party in the sum of fifteen hundred (1,500) dollars, to be paid back by said first party to said second party. * * *

"The said first party in consideration of the premises, hereby promises and agrees that on the performance of the conditions and promises by said second party hereinbefore set forth, the said first party will occupy the buildings when completed and operate and use the said buildings and premises for the purpose of manufacturing machinery and such other work incident thereto. * * *

"It is agreed that when said first party begins operations upon said premises that they will organize a company to be known as the Western Michigan Tool Works. * * *

"In witness whereof the said parties have hereunto set their hands the day and year above written.

"JOHN C. DE BRUYN,
"NICHOLAS BOSCH,
"JOHN BODA,

"Composing the Members of the Valley City Machine Works of Grand Rapids, Mich.

"BOARD OF TRADE OF THE CITY OF GRAND HAVEN, MICH., by

"DUDLEY O. WATSON,
"WILLIAM THIELMAN."

Some modifications were added to the contract under date of December 5th, which it is not necessary to state here. When this contract was drawn, Mr. Watson and Mr. Thielman supposed the board of trade was incorporated. It turned out upon the trial it was not. When the plans for the building were received, they called for a more expensive building than Mr. Watson and Mr. Thielman expected, and there was some modification made December 5th, and some delay growing out of the situation ensued. The following letter was sent by defendants:

"GRAND RAPIDS, Jan. 15, 1901.

"Mr. D. O. WATSON.

"*Dear Sir:* From our conference with you the last time you were here relative to Grand Haven Board of Trade and ourselves, we expected some answer from you by this time. I write for such information as you can give us. We are obliged to give Mr. Ranniville, from whom we rent, an answer what we intend to do about staying in present quarters. To sign a lease now might cause us considerable trouble when we get ready to move."

Soon after this letter was sent some of the complainants learned it was not the intention of the defendants to remove their entire plant to Grand Haven, and upon inquiry of defendants it developed that they intended only to move that portion of their plant engaged in the manufacturing of ironworking machinery. This portion of their business began, according to the testimony of defendants upon the trial, in the spring or summer of 1900. Some attempt was made to harmonize the differences between the parties, which failed. No part of the plant was removed to Grand Haven, but a part of it was removed to Holland.

In October, 1901, Daverman & Daverman sued Mr. Watson and Mr. Thielman, claiming $400 for preparing the plans for the buildings mentioned in the contract. The complainants, in January, 1902, filed this bill of complaint, setting out in detail what has been here recited, and also averred that defendants threatened to sue com-

plainants for a breach of said contract, and asked that it might be canceled.

It is clear from what we have already said that the only purpose of complainants in causing negotiations to be entered into with defendants was to secure the removal of their plant to Grand Haven. It is equally clear that the only contract which Mr. Watson and Mr. Thielman were authorized to make, and the only one they supposed they were making, was one which should secure the removal of the plant of defendants from the city of Grand Rapids to the city of Grand Haven. The construction now sought to be given to this contract is not such a one as complainants authorized to be made, nor such as defendants had any reason to suppose Mr. Watson and Mr. Thielman were authorized to make, and it should be canceled.

The decree is affirmed.

The other Justices concurred.

HELLER *v.* PEOPLE'S SAVINGS BANK.

138 192
148 554

GARNISHMENT—AFFIDAVIT—AMENDMENT.

An affidavit for garnishment describing the suit to which it is ancillary as pending when in fact it has ripened into judgment, cannot be amended on appeal to the circuit court to conform to the fact, as the garnishee has a right to rely upon the accuracy of the statements in the affidavit.

Error to Saginaw; Snow, J. Submitted October 6, 1904. (Docket No. 18.) Decided November 15, 1904.

Garnishment proceedings by Adolph G. Heller and Daniel F. Patzer against the People's Savings Bank as garnishee of Mary Smith, defendant. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Reversed.

John A. Combs (*James H. Davitt*, of counsel), for appellant.

Hugo P. Geisler, for appellees.

CARPENTER, J. Plaintiffs are assignees of a judgment obtained before Edward S. Pease, a justice of the peace in the county of Saginaw, against George W. Smith and Mary Smith, his wife. They commenced this garnishment proceeding before Theodore N. Eiler, another justice of the peace in Saginaw county. The affidavit for garnishment stated that:

"Mary Smith, widow of George W. Smith, is justly indebted to said Adolph G. Heller and Daniel F. Patzer in the sum of $300, or thereabouts, upon a judgment heretofore rendered by Edward S. Pease, a justice of the peace in and for said county of Saginaw, for $288.88, damages and costs, and for the recovery of said demand said Heller and said Patzer have commenced a suit before Theodore N. Eiler, justice of the peace in and for the city of Saginaw and county aforesaid."

In fact, no suit was commenced upon said judgment, the design of said plaintiffs being to carry on the garnishment proceedings as ancillary to the judgment already obtained. The justice rendered judgment for the garnishee defendant. An appeal was taken to the circuit court. That court permitted plaintiffs to file an amended affidavit of garnishment, which differed from the first, in that it particularly described the judgment assigned to plaintiffs, and contained no statement that suit had been commenced upon the same. The trial in the circuit court resulted in a judgment for plaintiffs.

The important question raised by this appeal is this: Had the circuit court authority to permit plaintiffs to file their amended affidavit of garnishment?

Garnishment proceedings are always ancillary to a principal suit which is either pending or determined. The first affidavit of garnishment clearly described that principal suit as pending. It was in fact, as described in the

amended affidavit, already determined. It was certainly proper, if not necessary, to state in the first affidavit whether the principal suit was pending or determined. And as the liability of the defendants in garnishment would depend in a measure upon the result of said principal suit (see 1 Comp. Laws, § 1000), they had a right to rely upon the accuracy of this statement. The amendment then materially changed the affidavit of garnishment.

While clerical errors may be corrected (see *Wattles* v. *Wayne Circuit Judge*, 117 Mich. 662; *Union Nat. Bank* v. *Muskegon Circuit Judge*, 117 Mich. 678; *Emerson* v. *Spring Co.*, 100 Mich. 127), I think it clear that material changes cannot be made by amending affidavits of garnishment. If changes as material as this may be so made, it is difficult to understand why defects in an affidavit cannot be cured by amendment. We have held such defects fatal. See *Coe* v. *Hinkley*, 109 Mich. 608; *Weimeister* v. *Manville*, 44 Mich. 408; *Conway* v. *Ionia Circuit Judge*, 46 Mich. 28. They would not have been fatal if they could have been cured by amendment.

Judgment must be reversed, with costs of both courts. No new trial is awarded.

The other Justices concurred.

AIRIKAINEN *v.* HOUGHTON COUNTY STREET-RAILWAY CO.

1. WITNESSES—EXAMINATION—HARMLESS ERROR.
   The error in overruling a proper question to a witness is cured by subsequently allowing a question calling for a similar answer to be put and answered.

2. SAME.
   Asking an improper question cannot be regarded as prejudicial, where the court promptly sustained an objection to it and

stated that it was improper, and objecting counsel made no request to charge in reference to it.

3. TRIAL—ARGUMENT OF COUNSEL—REFERENCE TO ABSENCE OF WITNESSES.

Where, in an action against a street-railroad company for negligence, it appeared that there were upwards of 50 passengers on the car at the time of the accident, and the company produced only the motorman and one passenger as witnesses, and counsel severely criticised one of plaintiff's witnesses, counsel's argument on failure of the company to bring in the conductor or other passengers, if unwarranted, is unprejudicial.

4. STREET RAILROADS—KILLING STOCK—NEGLIGENCE—CARE REQUIRED—INSTRUCTIONS.

In an action against a street-railroad company for negligently killing a cow on its tracks, instructions as to care required examined, and *held* not prejudicial to defendant.

5. SAME—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* to make a case for the jury.

Error to Houghton; Streeter, J. Submitted October 7, 1904. (Docket No. 44.) Decided November 15, 1904.

Case by Charles Airikainen against the Houghton County Street-Railway Company for the negligent killing of a cow. There was judgment for plaintiff, and defendant brings error. Affirmed.

Gray, Haire & Stone, for appellant.

W. A. Burritt, for appellee.

MOORE, C. J. In August, 1902, a cow belonging to plaintiff, which he allowed to run at large, was killed while on the track near a crossing, by a car belonging to the defendant. From a judgment in favor of the plaintiff the case is brought here by writ of error.

Counsel for appellant say the questions involved are:

(1) Whether the court erred in refusing to permit the witness Davey to testify whether, in his judgment, the cow could have got across the track before the car struck it if it had not suddenly stopped.

(2) Whether the following question, put by plaintiff's counsel to the witness Wint, was not improper, and prejudicial to defendant, viz.: "You are the man that was running the car at the time Mr. Boivin was injured?"

(3) Whether the remarks of plaintiff's counsel to the jury, suggesting that, if the defendant had put the conductor and the fifty-seven passengers on the car upon the stand, they would have testified against defendant, were not improper, and prejudicial to the defendant.

(4) Whether the court erred in refusing to instruct the jury as requested by defendant in its third request to charge.

(5) Whether the court erred in instructing the jury upon the question of what constitutes gross negligence.

(6) Whether the court erred in refusing to direct the jury to find a verdict for the defendant as requested by its fourth request to charge.

(7) Whether the court erred in overruling and not granting defendant's motion for a new trial for the foregoing reasons, and because the verdict of the jury was against the weight of evidence.

We will consider these questions in the order presented by counsel.

1. Mr. Davey was a passenger. He testified to seeing the cows, and the distance the cows were from the car, and what they did. He was then asked:

"*Q.* When you saw her step upon the track, did you think that she would clear the track before the car reached her?"

Upon objection the question was excluded. We do not need to decide whether this was error, because almost immediately, upon the cross-examination, he stated:

"I did not see it [the cow] stop, but it was on the track the last time I saw it. I thought it was going to get across, and was surprised that the collision occurred."

It will be observed the defendant obtained the opinion of the witness as fully as though the question of counsel had been answered, and the error, if it was one, was not reversible error.

2. The record shows in relation to this assignment of

error as follows: Mr. Wint was the motorman. At the commencement of his cross-examination the following occurred:

"*Q.* You are the man that was running the car at the time Mr. Boivin was injured?

"*Mr. Gray:* If your honor please, I have been anticipating something of that kind. I think it is entirely improper. No reference should be made to any prior accident. It certainly will tend to prejudice the jury.

"*The Court:* I think that is so, Mr. Burritt. It does not seem to me to be necessary to go into the facts of other accidents. You cannot prove negligence in this accident by other accidents.

"*Mr. Burritt:* That is not the purpose. It is only to refresh the witness' memory."

This occurrence was one of the reasons assigned on the motion for a new trial. In disposing of the motion the trial judge said:

"In the brief counsel urges:

"'True, the court held that the question was improper, but in a very mild way, and we do not think it can be said that the impression produced (and, we say, deliberately and intentionally produced) on the minds of the jury was removed by the court's remarks.'

"I can hardly agree with counsel. An explanation was made, although it does not appear in the record, which would do away entirely with any question of deliberate intention on the part of the counsel in asking the question. Nor does it seem to me a very mild way in which the court held the question improper. Mr. Gray did not simply object to the question. With force he characterizes it as entirely improper, and designed to prejudice the jury; and, while making no formal objection, his remarks were adopted and enforced by the court in the first sentence, 'I think that is so, Mr. Burritt,' including everything and indorsing everything that has been said by Mr. Gray with regard to the question. At the time that seemed to be all that was necessary, even supposing the question had been one deliberately introduced in the case by the attorney. If it were not enough in the mind of the objecting counsel, he could have requested reference to it in the charge."

The question was an improper one. The court so told

the jury, and apparently judge and counsel alike thought all had been said that was necessary. If cases are to be reversed because of the situation shown here, it would be necessary to reverse nearly every hotly contested case.

3. This is based on the following: During the argument of counsel for plaintiff to the jury the following proceedings were had:

"*Mr. Burritt:* Where is the conductor that was on that car?

"*Mr. Gray:* I object to that, your honor.

"*Mr. Burritt:* I was saying, gentlemen of the jury, that they say that this lady, our witness, is the star actor. The motorman has testified. Where is the conductor who was running this car, and who had charge of it? Why don't they bring him here?

"*Mr. Gray:* To that we object, your honor, as entirely improper.

"*The Court:* I think that counsel has a right to comment on witnesses that were not produced that were on the car.

"*Mr. Gray:* I take an exception.

"*Mr. Burritt:* I say, gentlemen of the jury, where are the fifty passengers? The testimony is that there were fifty passengers on the car. We have only one of these passengers here.

"*Mr. Gray:* We object to that statement for the same reason, and take an exception.

"*Mr. Burritt:* We might have had, gentlemen of the jury, fifty-seven or fifty-eight star actors here had the railroad company wanted other star actors. They only brought one."

The defendant had sworn one passenger and the motorman as witnesses. The record shows the car had a conductor and upwards of 50 passengers. It was not shown any effort had been made to obtain their attendance, nor was the absence of any of them accounted for. It is evident counsel had criticised severely one of the witnesses for the plaintiff. Under these circumstances we do not think, if the allusion made exceeded the latitude to which he was entitled in making his argument, that it constituted reversible error.

4, 5, and 6 may be considered together. The defendant offered four written requests to charge. The first two were given. The third and fourth were not given. The third reads as follows:

"It is not the duty of street-railway companies to stop or reduce the speed of their trains or cars when they see cows or other animals alongside their tracks. It is only when such animals are on their tracks, or the men in charge of the trains or cars have good reason to believe that they will go thereon before said trains or cars shall have passed, that the company is called upon to stop or reduce the speed of such trains or cars. When they have notice or knowledge of such a situation that to proceed will probably result in injury to or the destruction of persons or property, then they are required to use all possible precautions to guard against such injury or destruction; but until they have notice or knowledge of such a situation it is their right to proceed at the usual speed along and upon their own tracks and right of way, and they will not, in such cases, be liable for injury to or the destruction of persons or property happening upon sudden emergencies which they could not reasonably anticipate. And the court instructs you that in this case the defendant was not obliged to stop its cars, or reduce the speed thereof, at the time and place in question, unless the situation was such that the motorman knew, or had good reason to believe, that to proceed as he was going would result in injury to or the killing of the cow. If he did not know or have good reason to believe this, then the defendant would not be liable in this case, notwithstanding the cow was killed by being struck by the car. And you are instructed in this connection that the law is slow to impute to men in charge of street railway or other trains or cars carrying passengers such reckless and wanton conduct as would be that of running against animals on the tracks, where the result might be not only the killing of the animals, but the derailing of the trains or cars, and injury to or the death of the passengers; and jurors should not infer such conduct except upon clear proof of its existence."

The fourth was a request to direct a verdict in favor of defendant.

The first and second of defendant's requests read:

"(1) Under the declaration in this case there can be no recovery by the plaintiff for any ordinary negligence on the part of the street-railway company. Plaintiff can only recover in case it is established by a preponderance of the evidence that the acts of the street-railway company, which it is alleged resulted in the killing of plaintiff's cow, were, under the circumstances testified to, willful, or wanton and reckless. If, therefore, you find from the evidence that the defendant, if guilty of anything, was only guilty of ordinary negligence, or that it was not guilty of willful or wanton and reckless conduct, your verdict should be for the defendant. This is the rule in cases where the plaintiff in a suit is himself guilty of negligence contributing to the injury or destruction of himself or his property, and under the law in this State it is contributory negligence for a person to allow his cows or cattle to run at large without being in the charge of any one. It is for this reason that the plaintiff in this case must prove gross negligence on the part of the defendant, in order to entitle him to recover.

"(2) The plaintiff cannot recover in this case unless you find that a preponderance of the evidence has established the fact that the defendant was guilty of gross negligence in the killing of plaintiff's cow, as testified to. I instruct you that 'gross negligence' means an intentional failure to perform a manifest duty in reckless disregard of the consequences, as affecting the life or property of another, and also implies a thoughtless disregard of consequences without the exercise of any effort to avoid them. Unless, therefore, you find from the evidence that the defendant, when it saw plaintiff's cow upon the track, or had good reason to believe it would go or stay upon the track, did nothing to prevent running against the cow, but ran on in reckless disregard of the consequences of collision with the cow, you cannot find a verdict for the plaintiff, but must find for the defendant."

In addition to giving these requests, the judge also charged:

"The plaintiff claims there was a clear and unobstructed view, from the point where the cow was struck, up the defendant's track, for a distance of several hundred feet, and that the cow was in plain view of the motorman who was running the car, and that he saw, or should have seen, the cow, and her apparent danger. The plaintiff charges the

defendant with gross negligence; and, for the plaintiff to recover, he must prove by a preponderance of evidence that the cow was killed as a result of the gross negligence of the defendant. The term 'gross negligence' means an intentional failure to perform a manifest duty in reckless disregard of the consequences, as affecting the life or property of another. It implies a thoughtless disregard of the consequences, without the exercise of any effort to avoid them; but it is not meant that the motorman must have actually intended to do the particular wrong complained of.

"It was the duty of the motorman, while running the car, to keep it under control, and to be on the alert to avoid accidents, and, if he saw the cow on the track, or in such close proximity to the track as to be in peril, and he could have avoided the injury by slacking the speed of the car, or by stopping the car, it was his duty to do so, if he could; and his failure to do so would be wanton and reckless conduct—would be gross negligence on his part, which would render the defendant liable for the killing of the cow."

In the recent case of *Kotila* v. *Street Railway Co.*, 134 Mich. 314, there is a very full discussion of the care required by motormen in cases like the present. In that case there is a full collation of cases. We think, if there was any one entitled to complain of the charge of the court, it was not the defendant.

7. Did the court err in not directing a verdict for defendant and not granting a new trial because the verdict was against the weight of evidence? We have already referred to the fact that counsel on both sides assumed the jury were familiar with the premises. The trial judge heard and saw the witnesses. There was testimony on the part of the plaintiff to the effect:

"There was more than one cow on the track. I think there was about three cows on the track there, feeding, or somewhere, and I said to Mrs. Maynard, 'they will run over them cows sure,' and I watched them for that purpose—for a witness—and the other cows got off, and this one did not. The cows were right inside the tracks between the rails. When I first saw the cows on the track I could hear the car coming up the hill. That was when I made the remark to Mrs. Maynard, and then I watched the car, of course. It was a good ways from the cows,

too. The cows were on the track when the car came in sight, and they continued on the track. The car never slackened at all—just like it comes down the hill any time. They generally slacken there at the curve, but they did not. The car was running quite fast. From the point where the cows were standing on the track you can see a long ways up the track. There is nothing along the track to obstruct the view down the track. * * * I cannot say how long the cow was on the track, because I do not know how long it would take them to come down from the hill up there. They must have been up there by Klondyke street anyway, when I heard them coming. Two of the cows got off the track. The second cow barely got off just in time, and the other one was nearly off, all but her hind hip. The speed was not slackened at all from the time the car got in sight before it struck the cow."

On the cross-examination the motorman testified, among other things:

"From the point where the cow was struck by the car, and up the track in the direction of Calumet, there was a clear, unobstructed view for several hundred feet. It is down grade as you come this way, and the car I had charge of was propelled by electric power, and I was acting in the capacity of motorman. I had the hand brake on, and I was coming down the hill the usual gait. When I want to give the car speed, I let off the brake and put on power. I reduce speed, of course, by putting on the brake. That car had air brakes and hand brakes. As motorman I have perfect control of the car. I can run it up over a high trestle, or in coming down that steep grade I can stop the car at pretty near any point I see fit. I had the brake on at that time. I do not mean by that that the air brake was on. I did not apply the air brake. You could not stop the car any quicker by the air brake than you could by the hand brake. If I knew I had to stop the car coming down the hill, I could stop it in two car lengths. I could not stop the car coming down that grade within a distance of forty or fifty feet. It is a conundrum within what distance I could stop the car coming down that hill if I had the air brake on and applied the brake and plugged the car. I could not stop it within the length of the car. If you plug a car, and the circuit break falls out or anything, you would be likely to go a little further.

If the circuit breaks do not fall out, I could probably stop the car within a car and a half or two car lengths. When I was coming down that morning I saw those cows by the side of the track, grazing. I was then probably three hundred feet away from the first two. Those two cows were not between the rails then. They were on the side. The third cow was just a little way behind them. The three cows were not inside of the rails when I saw them first. They were walking along when I first saw them, and the next time I looked up they were on the track going across. I continued to look down the track. The cows did not walk by the side of the track at all. They went across the track. They were not standing by the side of the track when I saw them first. They were walking up along taking a bite and walking along. I did not stop to see what they were doing exactly. The last time I saw the cows before they went on the track I was probably two hundred feet from them. They were then going across the track. Of course, I put on the brakes then, and used every effort to stop the car. All I did was to put the brakes on, which reduced the speed."

There was other testimony in the case. In view of all the testimony, we think it cannot be said there was no case for a jury. Nor is there such a showing as to warrant us in reversing the case because the trial judge overruled the motion for a new trial.

Judgment is affirmed.

The other Justices concurred.

McCRADY v. PRATT.

1. PARENT AND CHILD — BOARD OF CHILD — LIABILITY OF PARENT — EVIDENCE.

   Where suit is brought against a father for the board of his son, the burden is on plaintiff to show, by a fair preponderance of the evidence, that at the time the son went to the plaintiff's to board, he was authorized to procure board upon his father's

credit, and that the board was furnished relying upon the father as paymaster, and upon him alone.

2. SAME.

In an action against a father for the board of the son, evidence examined and *held* that there was none on which to base a finding that the son had authority to bind his father for board after he reached the age of 21.

Error to Kent; Perkins, J. Submitted October 7, 1904. (Docket No. 47.) Decided November 15, 1904.

Assumpsit by Eliza McCrady against Stephen N. Pratt for services rendered. There was judgment for plaintiff, and defendant brings error. Reversed.

M. C. Huggett, for appellant.

Smedley & Corwin, for appellee.

MONTGOMERY, J. The plaintiff recovered a verdict and judgment of $50.25 for boarding the defendant's son. The theory upon which the case was submitted to the jury may be best stated by quoting the charge of the circuit judge:

"It is claimed on the part of the plaintiff that the defendant's son, Charles M. Pratt, with the knowledge and consent of the defendant, and at his request, came to the plaintiff's boarding house and requested board, and said that his father would pay for it, as he was learning the drug business and did not earn much money.

"It is claimed by the plaintiff that she relied upon these representations and boarded the defendant's son, and that at one time when he was sick that she nursed him and took care of him about two weeks; that he remained with her something like a year, when he began to run behind in his board bill, and shortly afterwards left the city.

"The plaintiff further claims that the defendant, Stephen Pratt, the boy's father, afterwards came to the city of Grand Rapids, and that she saw him and had a talk with him about the balance due her for the board of his son.

"Plaintiff further claims that in this conversation defendant admitted that he had told his son to come to Grand

Rapids and select a boarding place, and that he would pay his board until he was twenty-one years old. * * *

"On the part of the defendant it is claimed that he never agreed to pay for this board, or any of it; that he never authorized his son to procure board from the plaintiff; and that he did not agree to pay any of the boy's board after he became twenty-one years of age.

"Now, as a matter of law, I charge you that a father is not ordinarily liable for the board furnished to his son, unless he agrees to pay the same; and I charge you that unless you find that the father told the son to pick out a good boarding house, and that he would pay his board, the father is not liable. That is, the defendant in this case is not liable. But should you find from the evidence in the case that the defendant did agree to pay his son's board, then he is liable, and the plaintiff should recover.

"The burden of proof to prove this agreement rests upon the plaintiff. She must satisfy your minds by a fair preponderance of evidence that, at the time this son came to her boarding house, he was authorized by the father to procure board upon the father's credit, and that she boarded the son, relying upon the father as the paymaster, and upon him alone."

This instruction fairly states the rule of law. The serious question, however, is whether there is a basis for a finding that the son had authority to bind the defendant for his board after he became 21 years of age. There is no proof in the record that the defendant agreed with plaintiff, or any one acting for her, to pay his son's board for any period whatever. The only evidence of any agreement to pay the son's board for any time is found in defendant's statement to plaintiff, as testified to by her, which was, in substance, that defendant had agreed with his son to pay his board until he was 21. The payments for the son's board were made by remittances of the father to the son. There was no privity between defendant and plaintiff, unless it be said that the promise of defendant to his son carried with it authority for the son to pledge his father's credit. Such an interpretation of the testimony would be of doubtful accuracy at best, but, if it be adopted, that authority was clearly limited to the period covered by

the promise to the son. In other words, if there was an agency created, it was a special agency, and any attempt to bind the defendant for the son's board after the latter reached his majority was in excess of the authority granted.

This is not a case in which the agent has been held out as having authority beyond that actually given to him. There was no communication whatever between the plaintiff and defendant, and, as the defendant during his son's minority sent the money to pay his board bills to the son, there is no evidence of any satisfaction of the alleged contract by which the latter undertook to bind him.

The plaintiff's case rests finally upon the son's representations of his authority. That, under the circumstances of this case, an alleged principal cannot be bound by the false representations of an assumed agent as to his authority, is well settled. Mechem on Agency, § 100; *Rice* v. *Peninsular Club*, 52 Mich. 87; *Swanstrom* v. *Improvement Co.*, 91 Mich. 367.

The judgment is reversed, and a new trial ordered.

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

BUTLER *v.* DETROIT, YPSILANTI & ANN ARBOR RAILWAY.

1. TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.
   Where in a personal injury case the severity of plaintiff's injuries is contested, it is error for the court to charge that defendant does not dispute that plaintiff was injured as alleged, but bases his defense on his nonliability for the injury.

2. SAME.
   The court should not intimate that "plaintiff could best describe his injuries."

3. SAME.
   The jury should not be told that they must believe the theory

of one party or the other "right through," where they might have found that the injury occurred as plaintiff claimed, but that its extent was trivial.

4. SAME.

It is error for the judge to refer to a previous trial of the same case, in which plaintiff had verdict, and state that for some unfortunate remark or ruling another judge thought the case better be tried again, and that he would like to get to the end of it and reach the just rights of the parties.

Error to Wayne; Donovan, J. Submitted October 19, 1904. (Docket No. 52.) Decided November 15, 1904.

Case by Charles Butler against the Detroit, Ypsilanti & Ann Arbor Railway for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Corliss, Andrus, Leete & Joslyn, for appellant.

Edward M. Vining (*J. Emmet Sullivan*, of counsel), for appellee.

HOOKER, J. The plaintiff was riding upon the defendant's car platform, having paid his fare, at a time when a controversy arose between the conductor and one Miller in relation to the latter's fare. Miller was put off from the platform, and plaintiff testified that he also was thrown off and hurt by defendant's motorman. This was disputed, but it was clearly a question for the jury. The defendant has appealed.

It was claimed on the part of the plaintiff that he was seriously injured, having several ribs broken, and that he was a sufferer therefrom for a long period. The defense sought to show that he was not seriously hurt, and there was testimony that his early complaint was confined to small injuries; that he was silent about injury to his ribs or trunk; that he attended to his business and walked considerable distances; that he was not confined to the house; that soon afterwards he went to a fair, and was strong

enough to go to Wayne to commence a suit but a few days after the injury; that he also had a successful fight with his two farm laborers two years later.

In his instructions to the jury, the judge said:

"The real defense in this case by the railway company is not that Butler was not injured; is not that Butler's ribs were not broken; is not that his wrist was not twisted; is not that he is making up a case in any way. That is not it. The theory of the defense in this case by the company is this: That Miller—the man having no authority to put anybody off—that Miller, being rightfully put off, grabbed hold of Butler and dragged him down."

Again he said:

"I take it, if the man is injured, he has been injured as described in this case. * * * Now, you heard the testimony about the extent of the injury, and I need not go into it any more than the doctor and Mr. Butler— We will say the two doctors and Mr. Butler swore to the extent of the injuries, and no doctor was put on to contradict them, excepting what they could draw from the physicians —Dr. Zimmerman and Dr. Bennett. * * * 'There can be no recovery in this case under the declaration for any injuries that the plaintiff may have sustained to his back.' Well, it depends upon what you call his ribs. To his ribs was the main burden of the case. I will say that it will depend upon what you call it. I do not know any particular injury to his back testified to, but two broken ribs and another injured rib, and the rest seems to have been contradicted, the injury sworn to by Butler."

Again he said:

"If you believe the testimony of the witness Moore, I will not particularize, and call any witness by name, and plant the case on his testimony. You will either believe for the plaintiff or the defendant in this case. I am not going to hold up any one witness—possibly might hold up the plaintiff, he being the one that could describe his injuries. But I am not going to plant this case upon the testimony of any one witness. You will either believe the theory of the plaintiff and the evidence on his side right through, or the theory and the evidence of the railway right through. I will not plant it upon any one man of their picking out. That is for you to take up."

Complaint is also made of the following language of the court:

"(a) I have known of cases where two witnesses would outswear ten if they had better knowledge of the facts, circumstances, and surroundings. * * *

"(b) I am not going to hold up any one witness—possibly might hold up the plaintiff, he being the one that could describe his injuries. * * *

"(c) Without any anger or malice clearly proven on the part of the company against him, * * * Butler went off with Miller; * * * had his two ribs broken, and his wrist, or was thrown off. * * *

"The case has been tried twice before. Some unfortunate remark or ruling has given the judge the idea that it should be tried again. You will either believe the theory of the plaintiff and the evidence on his side right through, or the theory and evidence of the defendant right through."

It was error to give the jury to understand that the defendant did not dispute any of the hurts described in the portion of the charge quoted, and in saying that, if injured at all, it was as described. It was also out of place to say, by implication, that the claim of two broken ribs and injury to the back was uncontradicted. If no other physicians than those named by the court were called, it was the right of the defendant to show that plaintiff's conduct was inconsistent with the claim of severity of injury made, and it had a right to have that question fairly submitted to the jury upon the question of damages.

The language in relation to the value of the testimony of two witnesses as against ten was perhaps, in the main, unobjectionable, when taken in connection with all said upon the subject; but it would have been better had he omitted the intimation that the "plaintiff could best describe his injuries."

It was not proper to say that the jury must believe the theory and evidence of one side or the other "right through." The jury might have found with the plaintiff upon the incidents of the fight, and yet disbelieved his testimony as to the extent of his injury, in the light of cir-

cumstances shown. This would have had a material bearing on the amount of damages to be awarded.

A witness stated a conversation with the motorman relating to the affair, which talk occurred some time afterward. Plaintiff's counsel insist that this was impeaching testimony. If a proper foundation was laid, it may have been properly admitted. It was not substantive testimony of the facts so stated, however; and if, as counsel claim, the judge so treated it, he committed an error in so doing. It is doubtful, however, if this was so intended or so understood.

Again, it was prejudicial for the judge to say:

"Now, I hope you have not lost sight of the case by this grand jury coming in and out, and some little confusion, because we could not avoid it. I hope you have not lost sight of this case here, because the case has been tried twice before. Some unfortunate remark or ruling has given the judge the idea that it should be tried again —once in my division and once in another division—and we would like to get to the end of this case, and we would like to reach the just rights of the parties."

If, as is not improbable, the jury knew that the plaintiff had already recovered two verdicts, they would be likely to think that "some unfortunate remark or ruling" was an unimportant matter, not justifying further resistance by defendant.

The judgment is reversed, and a new trial ordered.

MOORE, C. J., and GRANT and MONTGOMERY, JJ., concurred. CARPENTER, J., took no part in the decision.

CHURCH v. ANTI-KALSOMINE CO.

1. PATENTS—TRANSFER—CONTRACTS—CONSTRUCTION.
   On a bill to compel the reassignment of certain patents for wall finish, the contract of assignment examined, and *held* to render defendant the absolute owner of the patents, and not to constitute a mere license for their use for five years, as alleged in the bill.

2. SAME—CORPORATIONS—DIRECTORS—RESOLUTION—EFFECT.
   The contract being plain and unambiguous, defendant's rights thereunder were not affected by a resolution passed by its directors at the expiration of the five-year period, declaring the contract "and all things connected with and pertaining thereto terminated, and at an end."

Appeal from Kent; Wolcott, J. Submitted October 20, 1904. (Docket No. 57.) Decided November 15, 1904.

Bill by Melvin B. Church against the Anti-Kalsomine Company to compel the reassignment of a contract. From an order overruling a demurrer to the bill, defendant appeals. Reversed.

Hyde, Earle & Thornton, for complainant.

T. J. O'Brien (*Burlingame, Belden & Orton*, of counsel), for defendant.

CARPENTER, J. In his bill of complaint complainant sets forth at length the same written contract executed by himself and defendant which is set forth at length in a former case between the same parties decided by this court. See 118 Mich., at pages 226–228. He avers that the inventions therein described whereby wall coatings might be applied by the use of cold water instead of hot water were patented, and that the patents were by a written instrument assigned to defendant "as required by said contract." He claims therein that defendant's right to

these patents expired at the end of the five-year period mentioned in said contract, and prays for a reassignment of the same.

The defendant demurred to the bill of complaint. The trial court overruled this demurrer, and defendant appeals to this court. We shall consider but one of several reasons stated for the demurrer, viz., that the effect of the contract and the assignments set forth in the bill of complaint conveyed to defendant an absolute title to the patents, and not merely an exclusive right for the period of five years.

Complainant contends that defendant's demurrer and argument in support thereof assumes that the bill is framed on the theory that under a proper construction of the contract and assignments the title of defendant ended at the expiration of said five-year period, whereas the true construction of the bill is that the contract was ambiguous, and "at the time it was understood and agreed that the patents were to be owned by defendant only for the life of the contract;" that is, for a period of five years. As no effect can be given to an oral contract inconsistent with the terms of a contemporaneous written one, the construction of the bill contended for by complainant will not entitle him to relief unless we may say that either the contract or the assignment is consistent with the alleged contemporaneous agreement that the rights of the defendant should end in five years. Whether or not there is such consistency must be determined by construing the written contract and assignments. No time need be spent in construing the assignments, because they transfer to defendant the title to which its contract entitles it. The question is, then, What title to the patented inventions did the written contract entitle defendant?

The contract was made January 27, 1892. It recites the claim of complainant:

"That one Haire, now living in England, has made a new improvement and discovery in wall coating by means of which the product * * * may be used and applied with a brush after mixing the same with cold water.

* * * An improved article which may be applied with cold water would be superior, it is claimed, to anything now in use or heretofore known, and the ownership of such discovery and invention by the first party [defendant], it is also claimed, will result in increased gains and profits, * * * and he [complainant] has proposed, in consideration of what follows herein, to make the first party [defendant] the owner, within certain territory, of the invention and improvements in question."

That complainant also "claims to have discovered and invented certain improvements by which the same result may be produced." That these discoveries and improvements "are severally patentable." It is therefore agreed that complainant "will cause and procure to be transferred to the first party [defendant] the invention and discoveries of the said Haire, * * * will also procure from the said Haire an agreement and undertaking * * * that all inventions and improvements which he shall make in the future in the direction of wall finish or wall coating of any kind shall belong exclusively to the first party [defendant] within the territory of the United States and Mexico, and that * * * the said Haire * * * will make and sign such papers as may be necessary to assure to the first party the ownership of such discoveries and inventions, and will also, on request, sign such applications for patents as the first party shall deem necessary." That complainant "will also make such applications as may be necessary for the issuance of a patent or patents within the United States covering any invention or improvements made by him in the direction in question, and will also make like applications in the future, when requested, for any further improvements. All patents which may be issued to the said Haire or to the second party [complainant] shall belong and be assigned to the first party [defendant] hereto."

It was also a part of this agreement, and apparently the consideration for complainant's promises, that the latter should continue in defendant's employ for five years at an annual salary of $5,000 a year, and, in addition there-

to, should receive one-half the net profits in excess of $40,000 per annum. The contract shows this amount was fixed at $40,000 because it was assumed that the defendant was making that amount from its business before this contract was made. It was also agreed that at the end of the period of five years the capital stock of the company, which was assumed to be worth $400,000, should be increased at the rate of $1 for each 10 cents of its average annual increased earnings during said five-year peroid, and that this increased capital stock should be divided equally between complainant and defendant.

Is this language consistent with an alleged contemporaneous agreement that defendant's interest in the patents should cease at the expiration of five years?

For the express purpose of making defendant "*the owner within certain territory*," viz., the United States and Mexico, complainant agreed to "procure to be transferred to the first party [defendant] the inventions and discoveries of the said Haire" and "also to procure from the said Haire an agreement * * * that all inventions and improvements which he shall make in the future * * * *shall belong exclusively to the first party* [defendant] *within the territory of the United States and Mexico;*" that patents shall be procured by said Haire for said inventions and discoveries; that complainant will also procure patents for inventions and improvements then made or made in the future by him in the same direction; and "that all patents which may be issued to said Haire or to the second party [complainant] shall belong and be assigned to the first party [defendant] hereto."

We are able to draw but one inference from this language, viz., that defendant should be the absolute owner of these patents during their life. And this inference is strengthened, rather than weakened, by the rights the contract secured to complainant as a consideration for said assignments. He secured employment for the period of five years, and this circumstance is the one thing in the contract which created a five-year period. That there is no relation between this five-year period and defendant's

rights in the patents is proved by the fact that when said period expires—that is, when said complainant's employment terminates—complainant obtained by the increased stock a permanent interest in defendant's business, to which he would have no right except upon the assumption of the latter's continued ownership of the patents.

We conclude, therefore, that under the proper construction of the contract defendant was to become the absolute owner of the patents, and that any prior or contemporaneous oral agreement that said ownership should cease at the end of five years is inconsistent with its terms.

In reaching this conclusion we have not overlooked complainant's contention that a resolution passed by defendant's board of directors at the expiration of said five-year period declaring that the contract "and all things connected with and pertaining thereto are now terminated and at an end" is inconsistent with the construction now placed on said contract. It is by no means clear that by this resolution defendant's directors intended to admit that their title to the patents was ended, and therefore it may be argued that it is not in fact inconsistent with our construction. If it is in fact inconsistent, then it may be said that the bill contains an averment that defendant has made an admission that the contract should be construed as contended by complainant. If defendant made such an admission, the most that can be said is that it had a mistaken notion of the proper construction of a written contract. Such mistaken notion would not lessen its rights nor be considered by the court in construing a contract which, like the one in question, is clear and unambiguous. See *Scully* v. *Detroit Iron Furnace Co.*, 132 Mich. 333.

We are constrained, therefore, to hold that the learned trial judge erred in overruling defendant's demurrer. The order appealed from will therefore be reversed, with costs of both courts, and the record remanded for further proceedings.

The other Justices concurred.

MICHIGAN MILLING CO. *v.* ANN ARBOR RAILROAD CO.[1]

ADVERSE POSSESSION.

The use of a strip of railroad right of way for a railroad scale by an abutting mill owner is not adverse and hostile to the railroad company, though exclusive, where the railroad company builds and maintains a switch over the scale, has exclusive possession of the key to the switch, and receives and delivers cars over the switch for the mutual benefit of the parties.

Cross-appeals from Washtenaw; Kinne, J. Submitted February 5, 1904. (Docket No. 85.) Decided November 29, 1904.

Bill by the Michigan Milling Company against the Ann Arbor Railroad Company to restrain the removal of a side track. From the decree rendered both parties appeal. Reversed and bill dismissed.

Frank E. Jones and *Jasper C. Gates*, for complainant.

A. J. Sawyer & Son (*Alex. L. Smith*, of counsel), for defendant.

MOORE, C. J. In 1902 the city of Ann Arbor passed an ordinance providing for a change in the grade of the road of the defendant company so as to carry the railroad track over the streets by an overhead bridge. In order to construct the railroad in accordance with the provisions of the ordinance, it became necessary to raise the grade of the embankment on the company's right of way about 13 feet between Washington and Liberty streets. The complainant owns a tract of land abutting on First street between Washington and Liberty streets, and extending

[1] Rehearing denied May 12, 1905.

back to the railroad company's right of way. At this point the right of way of the railroad company is 50 feet wide. The complainant carried on a general milling business upon its property. Its main building is located as indicated on Exhibit A. In the rear of the building is a set of railway scales built by the complainant for the purpose of weighing cars shipped by the complainant over defendant's railway. These scales are about 36 feet long by 10 feet wide. Until shortly before the beginning of the suit there was a side track from the main track of the railroad across the scales, and some little distance northerly upon the complainant's property. In order to raise the embankment as contemplated, it became necessary to remove this side track, which was done a short time before this suit was begun. This action is brought for the purpose of enjoining the defendant from interfering with the scales or the land upon which they stood, it being claimed that the title was in the complainant both by deed and by prescription. The title of the railway company was derived under a deed from Kling & Weber to the Toledo & Ann Arbor Railroad Company dated September 6, 1878, which granted "a strip of land fifty feet wide along the line of railroad of said party of the second part as now located, that is, twenty-five feet on each side of the middle of said line over and across the property known as the City Brewery property," etc.

The defendant claims it and its predecessors have been in possession of said railroad right of way ever since, and that it is in substantially the same location now that it always was; there having been no change in the center line of more than a few inches. It is the claim of complainant that the map shows the original line of the road opposite the property of complainant to be on a curve of 1 deg. 42 min., and that this would bring the right of way outside of the scales.

At the time of the making of this deed of September 6, 1878, the grantors owned the property on both sides of the railway track, and were using it as a brewery plant.

There was at that time a building in the rear of the mill of the complainant, instead of the railway scales which are now there, and a small building on foundations extending about 20 feet westerly from the main building, about 33 feet in length. This building was subsequently taken down. The foundation walls were located as indicated upon the map, Exhibit A, by D, D, D.

The complainant's title to its property was derived under a series of mesne conveyances from Kling & Weber, the last being a deed from Allmendinger & Schneider to the complainant. This deed is dated April 21, 1900, and conveys "all that part of the following described lands which lie east of the track of the Ann Arbor Railroad Company * * *," this being followed by a description of the property on both sides of the railroad by metes and bounds.

In the year 1887 the building in the rear of the main mill building was taken down, and Allmendinger & Schneider, who then owned the milling company's property, built at their own expense the railway scales in question. The first load was weighed on them on the 25th day of November, 1887. There had been a side track put in by the railroad company before this time, which was taken up temporarily when the scales were constructed, but was relaid over the scales. The evidence showed that the scales were put in at a cost to Allmendinger & Schneider of about $600, and that they made changes in their milling machinery and apparatus to enable them to operate in connection with the scales at an expense of about $2,000.

It is the claim of defendant that no question was ever made between the owners of the milling company property and the officers of the railroad in regard to the ownership of the ground upon which the scales are located; that the scales have been used by complainant, in connection with the railroad company, for the purpose of weighing cars and their loads shipped by and to complainant over the line of defendant's railroad; the railroad company placing cars upon the siding and scales in question and

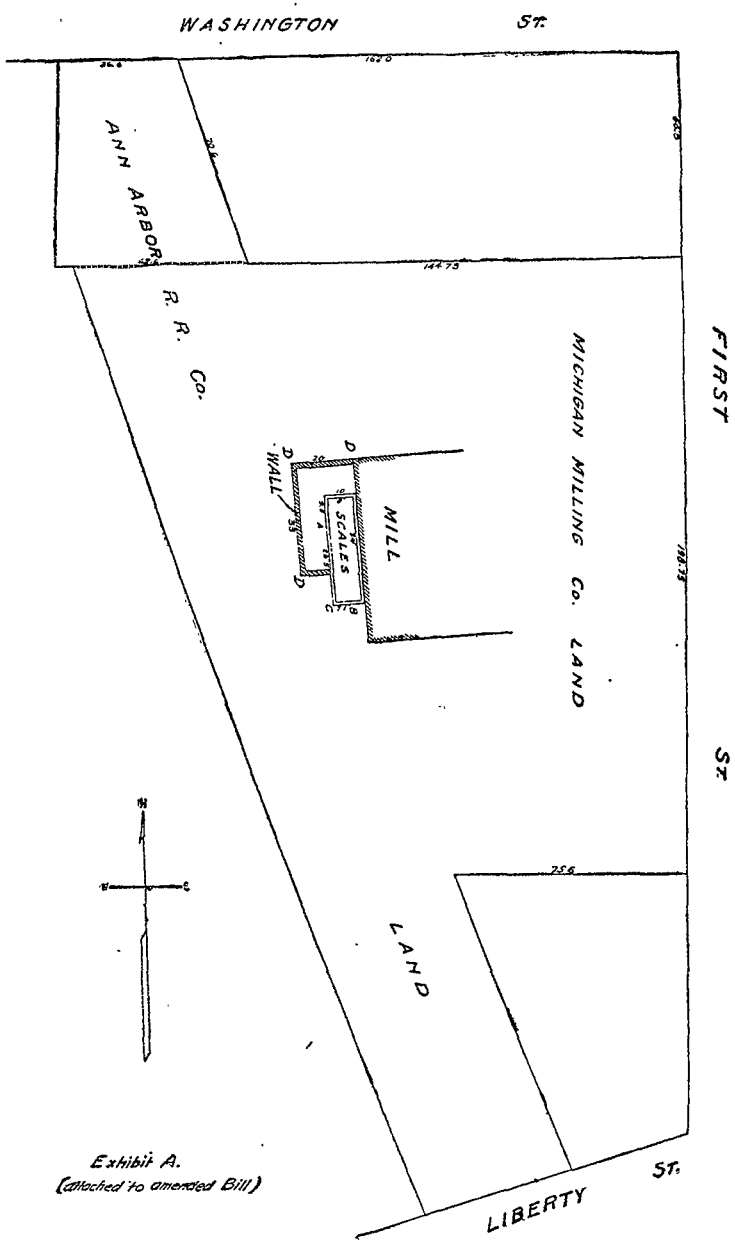


Exhibit A.
(attached to amended Bill)

removing them when requested. The roadbed in question was prepared by complainant, the rails were laid by defendant, and since then the track has been kept in repair by the railroad company. Practically no use was made of the scales by any one but complainant. The scale beam was inside the mill. The switch to the siding was in the control of the railroad, and its employés had the key to the switch.

The bill of complaint alleges that the property described therein "has been used, possessed, and occupied by complainant and its predecessors in ownership as parts and portions of, and as together constituting, one business plant, for the period of fifteen years and upwards, and that complainant and the said predecessors in ownership for during said period have been in actual, continuous, visible, notorious, distinct, hostile, and exclusive possession of the whole of said plant, including the scales and every part thereof, and of the whole of the land and real estate upon which said plant, including every part of said scales, is located."

It alleges the tearing out of the side track, and the threat to destroy the scales and to build the embankment, and prays for an injunction, and that defendant shall be compelled to permit a connection to be made over said scales with defendant's track. Defendant denied complainant had obtained title by adverse possession, and avers the necessity of building the embankment, and its intention to provide complainant with a connection with its road.

The circuit judge was of the opinion that complainant had obtained title by prescription to the land upon which the platform scales rest, and granted a permanent injunction "restraining the defendant from trespassing upon the real estate and property known as the Central Mills property, and from tearing down or in any manner interfering with the said platform scales, the foundation thereof, and the coal shed and grainroom situated on the southwest part of the said Central Mills property, adjoining the lands and right of way of the defendant," and said, "This

embraces all the relief to which, in my opinion, the complainant is now entitled."

Both parties have appealed.

Complainant says the questions involved are:

"1. Who has the title to the land occupied by the scales and the land south of the scales and west of the mills?

"2. It being conceded by the answer that complainant has a statutory right to a side track for the benefit of its mill, and connected with defendant's main track, is complainant entitled to a decree requiring defendant to comply with the statute in that regard?"

Defendant contends the questions involved are:

"1. Had the complainant title by deed to the triangle in controversy?

"2. Had it acquired title by prescription?"

Counsel for complainant say in their brief:

"The amended bill appears on pages 27 to 37 of the record, and the amended answer on pages 44 to 61. It was on these that the cause was heard and decided. Why the original bill and answer are also printed, we cannot understand."

A careful reading of the amended bill of complaint does not disclose to us an averment therein that complainant got title by deed to the land covered by the scales, and the land directly south thereof and west of the mill. The averments of the bill are that as early as in 1878 their predecessors came into possession of the property indicated on the plat by the lines D, D, D; that the side track was put in and the scales erected in 1887, and the property covered thereby had been in the possession of complainant and its predecessors since 1878. It is true that in the oral argument, as well as in the brief, it is claimed that, if the right of way opposite complainant's premises was laid out upon a curve of 1 deg. 42 min., it would leave the scales and side tracks untouched by the right of way. There is no mention of this claim in the amended bill, and we are unable to find that the fact is established by the testimony. We then are confronted with the question, Did complain-

ant get title by prescription? In relation to this question, counsel for complainant say:

"It is undisputed that when Ailes & Allmendinger purchased the City Brewery property, in 1882, the buildings were standing thereon which covered the space D, D, D, substantially as shown on Exhibit A; that Ailes & Allmendinger then took possession of all these buildings, believing that they owned the land upon which they were standing. It is unquestioned that the addition D, D, D, was an essential part of the brewery plant, and that the side track and scales, which have always been within the same westerly boundary, have been an essential part of the milling plant, without which it could not be successfully operated. Moreover, this side track and these scales from 1883 and 1887, when they were respectively constructed, have always been used exclusively by Ailes, Allmendinger & Schneider, and their successors in title, including the present complainant, and for their business. On the hearing below, defendant's counsel contended that our possession of the scales and side track had not been exclusive, and based this contention on the fact that defendant's servants always placed the cars on the scales and side track, and removed them therefrom. We reply: These cars were then in our service, and were transporting our goods to and from our mill, and we were paying this defendant for the use of these cars, and for the work of its servants and locomotives in delivering these hired cars of ours, loaded with our goods, upon our scales and our siding. Substantially, defendant was our servant, moving our hired cars loaded with our goods upon land in our possession, and the title to which we were claiming."

Had the buildings remained substantially as they were in 1882, there can be no serious question but that their continued use by the predecessors of the complainant would have ripened into a title; but the record discloses they were torn down in 1887, and the scales were erected by complainant's predecessors, and, upon a roadbed prepared by it, rails were laid by defendant, over which cars owned by defendant and other railroads for the use of complainant have been transported for the mutual advantage of both parties. The railroad not only got pay for the freight to and from complainant's plant, but it was re-

lieved of the necessity of furnishing some other portion of its railroad track for the use of said cars while they were being loaded and unloaded. Suppose the railroad company was in fact the owner of the title in fee of the land where this side track and scales were put at the time they were constructed; would the use that has been made of this track and scales as disclosed by the record be an indication of a possession on the part of the complainant that was adverse and hostile to defendant? We think not. It is a use which inures to their mutual benefit, and which is not inconsistent with a title in fee in either of them. See *Perkins* v. *Nugent*, 45 Mich. 156, and cases cited therein; *Marble* v. *Price*, 54 Mich. 466; *Chabert* v. *Russell*, 109 Mich. 571; *Smith* v. *Hitchcock*, 38 Neb. 104. We think the learned judge reached a wrong conclusion in relation to complainant having obtained title by prescription.

Counsel say they are entitled to a decree requiring defendant to accommodate them with a side track, in accordance with the provisions of section 5249 of the Compiled Laws of 1897. Defendant, by its answer, avers it intends to provide a connection with complainant's plant. In view of the conclusion we have reached in relation to the other branch of the case, we think this question may be safely left to future developments, and should not be passed upon by us now.

The decree is reversed, and bill of complaint dismissed, with costs.

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

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KNICKERBOCKER *v.* WORTHING.

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153 5 59

1. JUDGES—DISQUALIFICATION—RELATIONSHIP TO ATTORNEY—SUIT ON CONTINGENT BASIS.

   A circuit judge, who was a brother-in-law of plaintiff's counsel, who was conducting the case on a contingent basis, was not disqualified to try the case under 1 Comp. Laws, § 1109, where, in a recess prior to the trial, the contingent fee agreement was abrogated, and counsel in open court waived any lien he had or might have upon any judgment which plaintiff might obtain.

2. HUSBAND AND WIFE — ALIENATION OF AFFECTIONS — SUIT FOR DIVORCE—BAR.

   Where defendant husband, in a bill for divorce on the ground of cruelty, makes a bona fide defense, but does not in terms charge his wife with adultery, his failure to do so will not bar him from maintaining a suit against a third person for alienation of affections and criminal conversation based on acts prior to the divorce suit.

3. SAME.

   A decision of the Supreme Court reversing a decree denying a divorce, and holding that the evidence showed complainant entitled to a divorce on the ground of extreme cruelty, is not a bar to an action subsequently brought, but tried before the decision was rendered, by defendant in the divorce suit, against a third person for the alienation of affections and criminal conversation, though adultery was in effect alleged as a defense in the divorce suit.

4. WITNESSES—COMPETENCY—HUSBAND AND WIFE—ADULTERY.

   Under section 10213, 3 Comp. Laws, a wife cannot testify, even by consent of the husband, in an action brought by the husband against a third person for alienation of the wife's affections, when another count of the declaration charges adultery, though the evidence purports to be restricted to the count charging alienation of affections.

5. SAME — CROSS-EXAMINATION — QUESTIONS IMPUTING WANT OF CHASTITY.

   Asking a witness on cross-examination questions imputing to her a want of chastity, in the apparent belief that they are

competent, is not such misconduct as to warrant reversal. MOORE, C. J., dissenting.

6. ALIENATION OF WIFE'S AFFECTIONS—ADULTERY — EVIDENCE — INSTRUCTIONS.

In an action for the alienation of a wife's affections, where the charge limited the jury to the time fixed in the declaration, it was not error to refuse a request that, before plaintiff could recover, the jury must be satisfied that defendant committed adultery with plaintiff's wife substantially at the time and place and under the circumstances alleged.

7. SAME—INSTRUCTIONS—IGNORING TESTIMONY.

In an action for the alienation of a wife's affections, a charge that plaintiff must prove, first, an adulterous disposition on defendant's part towards plaintiff's wife; second, an adulterous disposition on her part towards defendant; and, third, an opportunity for the gratification of this adulterous disposition, *held* properly refused, as ignoring testimony almost directly proving adulterous intercourse, and as calculated to lead the jury to understand that the various elements must be established by distinct and segregated testimony.

8. SAME.

In an action for the alienation of a wife's affections, a charge that mere opportunity to commit adultery is not sufficient to establish the offense; that there must be evidence of such facts, circumstances, times, and places of association as to naturally lead a man of ordinary care and prudence to the conclusion that the parties were having illicit sexual intercourse, *held* to sufficiently embrace the element of disposition to commit adultery.

9. SAME—INSTRUCTIONS—CHARACTER OF DEFENDANT.

In an action for the alienation of a wife's affections, where evidence of defendant's previous good character is erroneously admitted, defendant is not entitled to a charge giving him the benefit thereof.

Error to Hillsdale; Chester, J. Submitted April 5, 1904. (Docket No. 43.) Decided November 29, 1904.

Case by Frank J. Knickerbocker against Aaron Worthing for the alienation of his wife's affections. There was judgment for plaintiff, and defendant brings error. Affirmed.

F. A. Lyon, for appellant.

Frankhauser & Cornell and *Paul W. Chase* (*Grant Fellows*, of counsel), for appellee.

MOORE, C. J. On the 23d of May, 1901, Mary E. Knickerbocker brought suit against the plaintiff in this suit for divorce. June 1, 1901, this suit was begun against the defendant, charging him with alienating the affections of plaintiff's wife. The declaration contained two counts. The first charged the defendant with having alienated her affections by unlawfully and wrongfully poisoning her mind against him and causing their separation by means of making her presents, and lavishing his wealth and money upon her, associating himself with her, and talking disparagingly of him to her. The second count in the declaration charges the defendant with having committed adultery with her.

The testimony in the divorce case was completed in February, 1902. It was decided in December of that year by the circuit judge, who refused to grant a decree for divorce. The case was appealed to this court. An opinion was filed December 1, 1903, reversing the decree of the court below. The case is *Knickerbocker* v. *Knickerbocker*, 135 Mich. 102. The trial of this case was held in May, 1902. The jury returned a verdict in favor of plaintiff. The case is brought here by writ of error.

There are nearly 600 pages of the record. There are 135 assignments of error, upon all of which counsel says he relies. In his discussion of them he has grouped them as follows:

First. As to the jurisdiction of the court to hear, try, and determine the cause.

Second. The permitting of any evidence in the cause tending to show criminal conversation as alleged in the plaintiff's second count in his declaration, because of the fact that the plaintiff had failed to set up this charge in his answers to the bill of complaint in the divorce case, such cause having been submitted to the court for its de-

cision upon the testimony introduced therein and the pleadings in said cause.

Third. The refusal of the court to permit Mr. and Mrs. Knickerbocker to be sworn and examined as witnesses in the cause upon request of defendant's counsel and the consent of both Mr. and Mrs. Knickerbocker.

Fourth. Errors of the court in admitting and rejecting testimony in the cause.

Fifth. Misconduct of plaintiff's counsel in the examination of witnesses.

Sixth. The refusal of the court to grant the defendant's several requests to charge.

Seventh. Errors of the court in charging the jury.

In disposing of them we follow the order in which they were presented.

1. Did the court have jurisdiction to try the case? The circuit judge is a brother-in-law of one of the counsel for plaintiff. This fact was known to defendant's counsel for a long time. After the trial was entered upon it appeared the counsel for plaintiff had this case on shares. Their fees and the money advanced by them in the way of expenses depended upon their winning and collecting a verdict. It is the claim of counsel for defendant that he did not know this until the trial was entered upon. It is claimed by counsel for plaintiff that he learned it months before in the examination of Mr. Knickerbocker in the divorce case. After the situation was disclosed at the beginning of the trial, counsel for defendant objected to the circuit judge trying the case, because he was related to one of the attorneys, who was to be paid out of the judgment if paid at all. His contention is that section 1109, 1 Comp. Laws, should apply. A recess was taken, and, to guard against any contingency, the attorneys and client rescinded and abrogated the agreement with reference to compensation, and this fact was made to appear to the satisfaction of the circuit judge. Counsel also in open court waived any lien they had or might have as attorneys upon any judgment plaintiff might obtain. The judge held that he was not disqualified, and proceeded with the

trial. We need not decide whether the judge would have been disqualified had the contract continued. As it was abrogated, the case certainly is not within the statute. Morever, the contract was originally void on the ground of public policy. See *McCurdy* v. *Dillon*, 135 Mich. 678.

2. Did the court err in allowing evidence tending to show the truth of the allegations contained in the second count of the declaration? Counsel says plaintiff failed to set up this charge in his amended answer in the divorce case, and is now debarred from charging the defendant with said offense. It is true, the defendant in that case did not say in so many words that his wife and Mr. Worthing had committed adultery, but he, in effect, so charged them. This court so regarded the allegations of his answer, and passed upon that question in disposing of the case. Counsel also says that because the court passed upon that phase of the case, and found the charge of adultery was not made out in the divorce case, the decree in that case is conclusive upon that question; citing as to both of these claims *Gleason* v. *Knapp*, 56 Mich. 291. There is language in the opinion in that case which tends to justify the claim of counsel, but when the case is considered carefully it will be found to be distinguishable from this one. In the case of Gleason's wife against him no answer was put in. In the case of Gleason against his wife nothing was done by him except to file his bill of complaint. In the case brought by him against Knapp the court found the facts sworn to by him were entirely contradictory to his sworn bill against his wife. The question involved in the case of *Knickerbocker* v. *Knickerbocker* was whether the wife was entitled to a divorce upon the ground of cruelty. We held that she was. The question involved here is whether the affections of Mrs. Knickerbocker were alienated by the unlawful acts of the defendant. We think the case comes within *Corry* v. *Lackey*, 105 Mich. 363.

3. Did the court err in refusing Mr. and Mrs. Knicker-

bocker to be sworn? The question arises in a somewhat peculiar way. Counsel for defendant was authorized to speak for Mrs. Knickerbocker, and offered to call her as a witness, and also offered to allow Mr. Knickerbocker to be called as a witness. Counsel for plaintiff stated to the court that, if it could lawfully be done, he had no objections, but he believed it was unlawful. After taking the question under advisement, the court declined to permit the calling of these witnesses. Counsel say, as there were two counts, the testimony at least ought to have been allowed under the first count. Counsel also says (we quote from his brief):

"It certainly would be a strange public policy that would say that a wife, who had always borne the best of a reputation, and stood as high in the community as any woman in that community, should not have the right, when charged with infidelity, to go upon the stand and protect her good name and reputation, when all parties in interest in open court should give their consent. As we said in the court below, so we say now, that, if this is public policy, we think that public policy should be reformed; and we do not believe that this court or any other court is going to hold that Mrs. Knickerbocker, under these circumstances, had not the right to go on the stand and deny the charges which were made against her, and that this denial of such right was justified because of public policy."

We cannot overlook the fact that the question of adultery is involved in the case. It is difficult to see how the testimony of the husband or wife could be given tending to prove or disprove the charge contained in the first count without its also having a bearing upon the question involved in the second count. If the testimony was permitted to be given, it would be beyond the power of the judge or counsel to confine its effect to the first count alone. Section 10213, 3 Comp. Laws, so far as it is material, reads:

"A husband shall not be examined as a witness for or against his wife without her consent nor a wife for or against her husband without his consent. * * * Nor

shall either, during the marriage or afterwards without the consent of both be examined as to any communication made by one to the other during the marriage; but in any action or proceeding instituted by the husband or wife in consequence of adultery the husband and wife shall not be competent to testify."

This section has been repeatedly construed by the court. It was held the wife was not a competent witness for the husband in a criminal conversation case in *Mathews* v. *Yerex*, 48 Mich. 361, which case was reaffirmed in *Reynolds* v. *Schaffer*, 91 Mich. 494. In *Carter* v. *Hill*, 81 Mich. 275, which was a case for the alienation of the affections, there were three counts in the declaration, one of which was for adultery. In that case it was held the husband was not a competent witness in his own behalf. All of the above cases were cited by Justice MONTGOMERY in his opinion in *Hanselman* v. *Dovel*, 102 Mich. 505, where it was held the husband was not a competent witness in a criminal conversation case, even after he had been divorced from his wife. It is very likely, as counsel suggest, that a great injustice may be done in requiring a woman to keep still when a charge of unchastity is made against her, as in this case; but it sometimes happens an individual must submit to a wrong that a greater good may come to the public. This action is such a one as is described by the statute which declares the husband and wife may not be witnesses.

4. Did the court err in admitting and rejecting testimony in the case? Under this head a great many assignments of error referring to several witnesses are discussed. It is not practicable to take up and deal with each of them. We have examined the brief and the record with care. While much of this testimony may not have had very much value standing alone, it related in some degree, at least, to the questions involved in the case. It is possible the court might properly have allowed more latitude in the cross-examination of Miss Mather as to whether her testimony had been influenced by the testimony of Mr.

Kitchen, but, taken as a whole, we do not find as to this feature of the case any reversible error.

5. Was the counsel of plaintiff guilty of misconduct in the cross-examination of witnesses?

Counsel for plaintiff concedes that in the heat and excitement of the trial he transgressed the rules, but insists no harm was done to defendant. Complaint is made of the cross-examination of Mrs. Westbrook and of Mr. Rogers. A part of the cross-examination of Mrs. Westbrook, of which complaint is made, is as follows:

"*Q.* Will you swear that you didn't write to Mrs. Knickerbocker substantially what I have asked you—that God had put it in your way to give her a home? I am not haggling about words. *A.* I don't see how I could have written it.

"*Q.* Will you swear that you didn't say it? *A.* That I didn't say it? I know I didn't say it.

"*Q.* Did you say in your letter that God had put it in your way to give her a home? *A.* I don't think so.

"*Q.* Will you swear that you didn't? *A.* I will swear that I don't remember it.

"*Q.* Didn't you admit, on the other trial, saying something of that kind? *A.* I say now I might have said it.

"*Q.* Ain't you right here on the stand denying it now? *A.* No.

"*Q.* Because you understand that that link of testimony would connect Mr. Worthing? *A.* No.

"*Q.* Don't you know that you are stating right now what isn't true, when you say you don't remember any such thing? *A.* I do not.

"*Mr. Lyon:* We object to that question, if your honor please.

"*The Court:* The answer may stand.

"*Mr. Lyon:* We insist this witness is entitled to fair treatment.

"*Mr. Frankhauser:* I will give her fair treatment if she will come in and fix up her testimony.

"*Mr. Lyon:* We take an exception to the remark of counsel.

"*The Court:* The remark ought not to have been made.

"*Q.* Well, perhaps I ought not to have said that. * * *

"*Q.* Let's see, you lived in Detroit about ten or eleven years ago? *A.* I don't remember just how long ago.

"*Q.* If you lived there about ten or eleven years ago, what business were you in then? *A.* Well, I sewed.

"*Q.* Living there with your stepfather? *A.* No; we had a double house, and I had rooms adjoining.

"*Q.* Who lived there with you, if anybody? *A.* My daughters.

"*Q.* At one time there, isn't it a fact that a certain railroad man was caught in bed with you? *A.* Never; no, sir; never.

"*Mr. Lyon:* That is objected to, if your honor please.

"*The Court:* The objection is good.

"*Mr. Lyon:* And we wish to have an exception on the record to counsel asking it.

"*Q.* And didn't your stepfather talk with you about it, and accuse you of it? *A.* Never.

"*Mr. Lyon:* Now we object, if your honor please, to counsel asking these questions.

"*The Court:* The objection is good."

Mrs. Westbrook was an important witness in the case. She was sister of Mrs. Knickerbocker. The charge made against Mrs. Knickerbocker and Mr. Worthing was a grave one. The case itself was a close one. In the case of *Knickerbocker* v. *Knickerbocker*, in which the testimony was largely the same as in this case, it being our duty to pass upon the facts, we reached the conclusion that the charge was not established. Mrs. Westbrook's testimony in the main was against the plaintiff, and, if believed, would go far to establish that plaintiff's cruel conduct was the occasion of the change wrought in his wife toward Mr. Knickerbocker. The defendant had a right to have her testimony weighed upon its merits. Counsel had a right to discredit this witness, if he could, by a close and rigid cross-examination conducted within the rules of cross-examination. He did not content himself with doing this. He is an able lawyer. He subjected the witness to a rigid and searching cross-examination conducted at great length. He put question after question to her, and finally put to her a question the simple putting of which was an accusation of dishonor. When the witness indignantly repudiated the accusation, counsel ignored the ruling of the

court, and repeated the accusation by an equally objectionable question. The minds of the jury were poisoned, and the mischief was done. The case comes, I think, within the recent cases of *People* v. *Mills*, 94 Mich. 637; *People* v. *Gotshall*, 123 Mich. 474; *Gould* v. *Gregory*, 126 Mich. 594, and cases therein cited. It is undoubtedly true, as stated by counsel, that in the heat and excitement engendered by the trial he went further with the cross-examination than he intended, but that did not cure the mischief done by it.

6. Did the court err in refusing the several requests preferred by the defendant? There were 33 of these requests, all of which were refused except as covered by the general charge. We shall refer to only such of them as we deem necessary to dispose of the case. The defendant preferred the following requests:

"13. The second count in the plaintiff's declaration charges the alienation of his wife's affections by means of adultery having been committed with her by the defendant. Now, I charge you that, before the plaintiff can recover under this count, he must satisfy you that the defendant committed adultery with the plaintiff's wife substantially at the time and place and under the circumstances alleged by the plaintiff in his declaration.

"14. In order to establish the charge of adultery, the plaintiff must, *first*, prove an adulterous disposition on the part of the defendant towards Mrs. Knickerbocker; *second*, an adulterous disposition on her part toward the defendant; and, *third*, the opportunity for the gratification of this adulterous disposition. If any one of these elements is lacking, the plaintiff must fail. Mere opportunity is not sufficient; neither is the adulterous disposition without the opportunity sufficient; neither would it be sufficient to prove an adulterous disposition on the part of the defendant, coupled with the opportunity, unless the plaintiff goes farther, and proves an adulterous disposition on the part of the plaintiff's wife.

"15. The offense of adultery is a most grave and serious one, for which no person can be required to answer except upon distinct and positive specifications, to which the proof must be strictly confined. In considering the evidence produced to establish this charge, the testimony is

always to be examined with great care and solicitude, the character, motives, intelligence, memory, and credibility of the witnesses should be considered with great care, and every circumstance weighed and considered, in order that no reasonable doubt of guilt remain. When I say 'reasonable doubt' I do not mean the reasonable doubt which the law requires in the trial of criminal causes, but that reasonable doubt which the law requires the jury shall not possess in the decision of civil causes of this kind. It means, in cases of this kind, simply that the evidence must satisfy the conscience of the jury in such a manner that they are convinced to a moral certainty that the offense has been committed.

"16. It is a matter of common knowledge that a large proportion of such charges are fabricated, and that they are often allowed to be proved by incomplete testimony. This renders it necessary that the jury should exercise the utmost care in considering the testimony, and not convict unless the chain of circumstances is entirely complete.

"17. The plaintiff cannot recover under this charge if the testimony is capable of being reconciled in favor of the innocence of the defendant. Before the plaintiff can recover, the testimony must be inconsistent with the theory of innocence, or with any theory except that of guilt. If two constructions can be placed upon the testimony, one of guilt and the other of innocence, it is your duty to adopt the construction of innocence."

The entire charge of the court upon that branch of the case was as follows:

"Adultery is a crime naturally committed in secrecy, and it is not necessary, in order to convict of adultery, to produce evidence of witnesses who claim to have caught the parties in the act; but it is simply necessary to show facts and circumstances from which, if found to exist, adultery may be naturally inferred as the natural result of such circumstances. Mere opportunity to commit adultery is not sufficient to establish the offense. It must be evidence of such facts and circumstances, times and places, and association together, as would naturally lead a man of ordinary care and prudence to the conclusion that such parties were having illicit sexual intercourse. And if you find that the conduct and actions of this defendant and Mrs. Knickerbocker were such as to convince you that adultery was committed, you have a right to so find, even

though there is no witness who testifies to seeing them engaged in the unlawful act. But if the evidence of such facts and circumstances do not naturally lead to that conclusion when viewed in the light of men of ordinary care and prudence, then you should not find this defendant guilty of adultery. And you are to determine this question from all of the evidence bearing upon it, giving it due and careful consideration, that you may justly determine the truth or falsity of this claim.

"Gentlemen, there are two classes of evidence, namely, direct evidence, which is evidence from eyewitnesses, who see the things about which they testify; and circumstantial evidence, which is evidence of facts and circumstances, which, when established, lead the mind to certain conclusions or inferences taken therefrom. And I charge you that circumstantial evidence and direct evidence are both equally lawful means of establishing facts; that is to say, the law recognizes circumstantial evidence to be as convincing, when it does convince, as direct evidence. It makes no difference in this case as to plaintiff's right of action, whether Mrs. Knickerbocker was willing to accept presents, or receive attentions, or have sexual intercourse with the defendant or not. If you find the defendant guilty under either count in this declaration and the instructions I have given you, her willingness to contribute to such wrongs would not relieve defendant from liability. However, this testimony is for your consideration in determining the amount of damages, if you come to that question."

It will be observed that the thirteenth request is not covered. I think it a proper statement of the law, and it, or its equivalent, should have been given. See *Dunn* v. *Dunn*, 11 Mich. 284; *Green* v. *Green*, 26 Mich. 437; *Freeman* v. *Freeman*, 31 Wis. 235. It will also be observed that the propositions involved in request 14 were not covered by the general charge. What I have said as to request 13 will apply with equal force to this. See 8 Am. & Eng. Enc. Law (2d Ed.), p. 269; 2 Bishop, Mar., Div. & Sep. § 1370; *Freeman* v. *Freeman*, 31 Wis. 235, and the many cases there cited. Request 15 was doubtless intended to challenge the jury to the gravity of the charge. It does not contain a correct statement of the law as to

the degree and weight of evidence in this State as applied to a civil case. It is not necessary the plaintiff should sustain his case by evidence amounting to a moral certainty; but in a civil case, as well as in a criminal case, the charge of adultery is a grave and serious one, and testimony which is introduced for the purpose of establishing it should be examined with great care. The character, motives, intelligence, and credibility of the witnesses should be weighed in the light of surrounding circumstances. If, as a result of all the evidence, so considered, the plaintiff has established by a preponderance of proof the fact of adultery, it would be the duty of the jury to so find. While the request to charge was not a correct statement of the law, I think the learned judge failed to caution the jury in relation to the gravity of the offense and their duty in scrutinizing the testimony. We do not regard the sixteenth and seventeenth requests as correct statements of the law. The following request was preferred:

"The long and uniform good standing and reputation of the parties charged should be considered in their favor. Parties who have led a moral and chaste life until they have reached the age of fifty years or more are not liable of a sudden to commit this act. And if you find that the uniform standing and reputation of the parties charged in this case has always been good, that fact should weigh in their favor, and be taken into consideration by you in arriving at your verdict."

Instead of giving the request, the court said:

"The defendant has offered evidence of his good character. This was permitted, because this declaration charges him with commission of a crime; that is, intending to commit the crime of adultery. You are instructed that good character, if established, is of importance to a person charged with crime. It is not unusual, perhaps, for good men to commit crime; but it is possible, and men who stood high have been guilty. You should consider whether a person with a good character would be less liable to commit a crime than one with a bad character. You will consider this evidence with all the rest, and give the

defendant all the benefit of it that you believe him entitled to."

This question was passed upon in *Adams* v. *Elseffer*, 132 Mich. 100, under which decision the charge of the circuit judge was even more favorable to the defendant than it ought to have been. We have examined the other requests, and think they either ought not to have been given or were sufficiently covered by the general charge.

7. Did the court err in his charge to the jury? It is the claim of counsel that the judge in his charge to the jury gave undue prominence to the claim of the plaintiff and the evidence of his witnesses in support of it; that this was the more detrimental because he failed to give the same prominence to the claim of defendant and the evidence in support of it. We cannot agree with this contention of counsel. A careful reading of the charge in connection with the record convinces us that the trial judge made a successful effort to carefully and impartially present to the jury the claims of the respective parties.

For the reasons I have herein indicated, I think the judgment ought to be reversed, and a new trial ordered.

MONTGOMERY, J. The facts are sufficiently stated in the opinion of the Chief Justice. I agree with him that the circuit judge was not disqualified. I also agree that the plaintiff's action is not barred by the failure to charge adultery in terms in the answer interposed in the chancery case. There is no doubt that a bona fide defense was made in that case. It would be going beyond anything held in *Gleason* v. *Knapp*, 56 Mich. 291, relied upon by defendant's counsel, and going beyond the requirements of public policy, to hold that because the husband (if such were the fact) chose to make his defense without introducing that element he is barred from maintaining this action against another. Much less can it be said that the decision of this court in the divorce case, rendered long after the trial of the present case at the circuit, such decision being upon a question of fact, can or should have the slightest effect

upon the verdict of the jury in the present case. I also agree that the court was right in excluding the testimony of Mr. and Mrs. Knickerbocker, and for reasons sufficiently stated in the opinion of the Chief Justice.

Mrs. Westbrook was called as a witness for defendant, and on cross-examination the following questions were propounded by plaintiff's counsel. The answers of the witness and the rulings of the court are also given:

"*Q.* Let's see, you lived in Detroit about ten or eleven years ago? *A.* I don't remember just how long ago.

"*Q.* If you lived there about ten or eleven years ago, what business were you in then? *A.* Well, I sewed.

"*Q.* Living there with your stepfather? *A.* No; we had a double house, and I had rooms adjoining.

"*Q.* Who lived there with you, if anybody? *A.* My daughters.

"*Q.* At one time there, isn't it a fact that a certain railroad man was caught in bed with you? *A.* Never; no, sir; never.

"*Mr. Lyon:* That is objected to, if your honor please.

"*The Court:* The objection is good.

"*Mr. Lyon:* And we wish to have an exception on the record to counsel asking it.

"*Q.* And didn't your own stepfather talk with you about it, and accuse you of it? *A.* Never.

"*Mr. Lyon:* Now we object, if your honor please, to counsel asking these questions.

"*The Court:* The objection is good."

It is insisted that the propounding of these questions constituted such misconduct on the part of counsel as calls for a reversal of the judgment. This contention apparently proceeds upon the view that proof of want of chastity is not admissible for the purpose of impeachment, and that, as this must have been known to plaintiff's counsel, he should be held to have abused his privilege in putting the questions quoted. It is true that as original testimony for the purpose of direct impeachment the want of chastity of a female witness cannot be shown. It was also held in *People* v. *Mills*, 94 Mich. 637, that it was not error to exclude the inquiry attempted in that case on

cross-examination. The statement in the opinion is very brief, and, if understood as holding that the court may not, in its discretion, permit, on cross-examination, an inquiry into the past life of a female witness, and an inquiry as to her chastity, is misleading. In *People* v. *Harrison*, 93 Mich. 596, Mr. Justice DURAND, speaking for the court, said of such an inquiry:

"It was the duty of the circuit judge upon the cross-examination of the witness to permit such reasonable interrogation upon the subject as would fairly disclose to the jury her true character, and thus enable them to judge of the weight which should be given to her testimony."

It was, however, held that the court had not abused his discretion in the *limit* placed upon the inquiry in that case. The cases are numerous which hold that on cross-examination of a witness the test is not whether the question propounded would be proper if put to another witness for purposes of impeachment, but that, on the contrary, within limits fixed by the discretion of the trial court, the jury may be made acquainted, through the cross-examination, with the past life and character of the witness, and that only in case of a clear abuse of such discretion will the appellate court reverse the ruling of the trial judge. *Beebe* v. *Knapp*, 28 Mich., at page 72; *Leland* v. *Kauth*, 47 Mich. 508; *McBride* v. *Wallace*, 62 Mich. 454. In my judgment, it would not have been reversible error for the circuit judge to have permitted an answer to the questions put. The matter was within his discretion within the rule of the cases cited; but, even if the inquiry was not admissible, it would by no means follow that the propounding of these questions in the apparent good faith belief that they were competent should be held reversible error. The lawyer is not bound to guarantee that his position on the legal questions that arise during the progress of a trial shall in all cases be unassailable. To impose such a burden upon counsel would render fair discussion of legal questions impossible, and

would withdraw from the trial judge the great aid now derived from arguments of counsel. The law is not so.

In addition to the cases which have held that, even when questions relating to the past life of the witness, which, in the opinion of this court, should have been excluded, have been answered, yet the court would refuse to disturb the ruling on the ground that the circuit judge's discretion would not be interfered with (as in *Beebe* v. *Knapp*, supra, and *Threadgool* v. *Litogot*, 22 Mich. 272), it has been held that, where questions along this line are excluded, the propounding of such questions in good faith does not constitute error. *People* v. *Palmer*, 105 Mich. 579. See, also, *Fosdick* v. *Van Arsdale*, 74 Mich. 305, and *Prentis* v. *Bates*, 93 Mich. 235, in which my own views are set forth at length.

People v. *Gotshall*, 123 Mich. 474, is not, when fairly construed, out of harmony with these cases, for in that case want of good faith was apparent. The case of *Gould* v. *Gregory*, 126 Mich. 594, follows *People* v. *Gotshall*.

Error is assigned upon the refusal to give the defendant's thirteenth request, which, in substance, asked an instruction that, before the plaintiff could recover under the second count, the jury must be satisfied that the defendant committed adultery with the plaintiff's wife substantially at the time and place and under the circumstances alleged. I think the charge of the court very clearly limited the jury, as to the adultery charge, to the time fixed in the declaration, and that it was not error to refuse to give this instruction.

The fourteenth request was as follows:

"In order to establish the charge of adultery, the plaintiff must first prove an adulterous disposition on the part of the defendant towards Mrs. Knickerbocker; second, an adulterous disposition on her part towards the defendant; and, third, the opportunity for the gratification of this adulterous disposition. If any one of these elements is lacking, the plaintiff must fail. Mere opportunity is not sufficient; neither is the adulterous disposition without the opportunity sufficient; neither would it be sufficient to

prove an adulterous disposition on the part of the defendant, coupled with the opportunity, unless the plaintiff goes farther, and proves an adulterous disposition on the part of the plaintiff's wife."

This request ignores the fact that there was testimony which came very near being direct evidence of adulterous intercourse, and by its peculiar, argumentative phraseology was well calculated to give the jury to understand that the various elements named must be established by distinct and segregated testimony. Such an instruction could not have furnished a clearer guide than that given, viz.:

"Mere opportunity to commit adultery is not sufficient to establish the offense. It must be evidence of such facts and circumstances, times and places, and association together as would naturally lead a man of ordinary care and prudence to the conclusion that such parties were having illicit sexual intercourse."

The jury could not fail to understand from this that the disposition to commit adultery must be present.

The refusal to give the instruction asked as to the effect to be given to the defendant's evidence of previous good character was not error, for the reason that the defendant had greater benefit from this testimony than he was entitled to. The evidence was not admissible. *Adams* v. *Elseffer*, 132 Mich. 100.

I am satisfied that the question of fact was fairly submitted to the jury, that there was ample testimony to support the finding, and that, if the defendant has been in any way wronged, it is not in our power, keeping within the lines of our duty, to interpose.

The judgment should be affirmed.

HOOKER, J., concurred with MONTGOMERY, J.

CARPENTER, J. I agree in the conclusion reached by Justice MONTGOMERY, and, except as herein stated, I concur in his opinion. I agree that we should not reverse the case because of the questions imputing want of

chastity asked witness Mrs. Westbrook by plaintiff's counsel. I agree with Justice MONTGOMERY that we should say that the asking of these questions did not constitute reversible error, because it is to be presumed they were asked in good faith, under the belief that the inquiry was within the discretion of the trial judge. This is as far as it is necessary to go, and it is as far as I think we should go in the case. I therefore express no opinion on the proposition that it would not have been reversible error for the circuit judge to have permitted an answer to these questions.

GRANT, J., did not sit.

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OLIVIER *v.* HOUGHTON COUNTY STREET-RAILWAY CO.

1. PERSONAL INJURIES — DEATH — MEASURE OF DAMAGES — SURVIVAL ACT.

   Under section 10117, 3 Comp. Laws, providing that actions for negligent injury to persons shall survive, in an action by an administrator for injuries to his decedent, who died a few hours after the injury, plaintiff may recover the amount decedent would have earned during the period he would probably have lived, without any deduction for what it would probably have cost him for food, clothing, and other personal expenditures.

2. SAME — EVIDENCE — HARMLESS ERROR.

   In an action for personal injuries by an administrator, under the survival act (3 Comp. Laws, § 10117), evidence that decedent left a family is immaterial, but its admission is harmless, where plaintiff disclaimed any recovery on such evidence, and the court so instructed the jury.

Error to Houghton; Streeter, J. Submitted July 16, 1904. (Docket No. 85.) Decided November 29, 1904.

Case by Charles O. Olivier, administrator of the estate

of Cyrille Boivin, deceased, against the Houghton County Street-Railway Company, for negligent injuries to plaintiff's intestate, resulting in his death. There was judgment for plaintiff, and defendant brings error. Affirmed.

Gray, Haire & Stone, for appellant.

W. A. Burritt, for appellee.

MONTGOMERY, J. On the 21st of June, 1902, plaintiff's intestate received injuries through defendant's negligence, which, 14 hours later, on June 22, 1902, caused his death. This suit is brought, under the survival act (section 10117, 3 Comp. Laws), to recover compensation.

The first trial resulted in a small verdict and judgment for the plaintiff, the trial judge holding that recovery for loss of earnings of decedent was limited to the time intervening between his injury and death. That judgment was reversed by this court (see 134 Mich. 367) on the ground that a recovery might be had "for loss of earnings for the period during which the evidence fairly shows that he [the deceased] would have lived, but for the injury."

A second trial has been had, and a verdict of $7,300 rendered for plaintiff. On this trial the jury was instructed, in accordance with our decision, to compute the loss of earnings during the period deceased would probably have lived. But the trial court refused to instruct them, as requested by defendant, that they should deduct from this amount what it would probably cost decedent for his food, clothing, and other personal expenditures. The principal question raised by this appeal is the claim of defendant that the refusal of this request was erroneous.

In my opinion, the trial judge correctly interpreted and applied the decision of this court given on the former hearing of this case. 134 Mich. 367. In that case it was held that the plaintiff might recover for the loss of earnings which the evidence fairly shows that deceased would have made during the period which he would have lived,

but for the injury. This rule is to my mind the only just one to apply. The present plaintiff sues in a representative capacity. He ought to be able to demand the same damages that the deceased might have exacted if the action had been brought to trial during the latter's lifetime. If this be not so, then the statute is in part inoperative, and the action does *not* survive to the legal representative, except in a limited degree. But we held in *Kyes* v. *Telephone Co.*, 132 Mich. 281, and in *Olivier* v. *Railway Co.*, 134 Mich. 367, that the administrator is entitled to the same damages that deceased could have recovered, had he lived to bring the suit to a successful issue. See, also, 4 Sutherland on Damages (3d Ed.), § 1241, citing above cases. I am not able to discover any just reason why these rulings should not be decisive of the present case. When the deceased received his injury, he stood entitled to recover then and there the loss sustained by being deprived of the power to earn money during the period he would have lived, had he not suffered the injury. It would not, under these decisions, have been any answer for defendant to say that "while this is precisely what we have deprived you of, you cannot recover it all, as we have, in addition to crippling you, shortened your life." To admit such an answer is going a step beyond refusing compensation for loss of life. It is permitting a defendant to assert the excessiveness of his own tort to escape paying full compensation for the injury. This should not be permitted. If not permitted in an action by the injured party, it should not be allowed in an action by his legal representative.

Still more inequitable is the suggestion that the plaintiff's damages ought to be reduced because the defendant, by the severity of the injuries inflicted, succeeded in relieving the deceased of the burden of supporting himself after a short period, as the injury shortened his life. In the first place, such a contention erroneously presupposes that the tort feasor is concerned in the manner in which his victim shall dispose of the damages which he receives for

his injuries. With all respect for the contention, it may be stated that it is none of the defendant's business how the injured party disposes of the money received in compensation for the injury. The fallacy is in assuming as a premise (although not so stated) that the action is, in some sense, to recover for the cost of the injured party's maintenance. This is in no sense true. The action is to recover the damages which have resulted as a present loss to the injured party, in being deprived of a capacity to earn money, which capacity he had before the injury, and which he now has not. That capacity he had, with an assurance of a continuance for his expectancy of life (subject, of course, to ordinary vicissitudes as to sickness). He has it not now for any period. If we subtract nothing from such expectancy, we have as a result the period of earning capacity of which the injured party is deprived.

The cases cited which have arisen under the death act, and have from time to time been considered, have no application, for the reason that in those cases the damages recoverable are those *sustained* by the next of kin. In this case the damages which are recoverable are those sustained by the deceased.

I think it also follows from the above reasoning that testimony to the effect that deceased left a family was immaterial. But in view of the disclaimer of any claim for damages based upon this testimony, and of the very careful charge of the circuit judge, I think the error in the admission of this testimony did no harm to defendant, and that the judgment ought not for this reason to be reversed.

The judgment should be affirmed.

The other Justices concurred.

CHICAGO, KALAMAZOO & SAGINAW RAILWAY CO. *v.* KALAMAZOO CIRCUIT JUDGE.

PRELIMINARY INJUNCTION—DISSOLUTION—DISCRETION.

The coming in of a sworn answer fully meeting the allegations of the bill does not deprive the court of all discretion to refuse dissolution of a preliminary injunction.

Mandamus by the Chicago, Kalamazoo & Saginaw Railway Company and others to compel John W. Adams, circuit judge of Kalamazoo county, to dissolve a preliminary injunction. Submitted June 7, 1904. (Calendar No. 20,516.) Writ denied November 29, 1904.

E. M. Irish and *W. G. Howard*, for relators.

Dallas Boudeman and *Taggart, Denison & Wilson*, for respondent.

PER CURIAM. This is an application for mandamus requiring the respondent to vacate a preliminary injunction. The relator has argued his case at great length and very forcibly, but the argument proceeds upon the theory that the answer fully meets the charges in the complainant's bill, and that the circuit judge should have accepted the answer as true. While it is undoubtedly true that as a general rule a court will, upon the coming in of a sworn answer fully meeting the allegations of the bill of complaint, dissolve a preliminary injunction, this rule is not so rigid as to deny any discretion in the court. 2 High on Injunctions (3d Ed.), § 1508.

We are not able to say that there was a clear abuse of discretion in maintaining the injunction in the present case until the hearing.

The writ is denied.

AMERICAN MISSIONARY ASS'N *v.* HALL.

1. MANDAMUS—PROPRIETY—REFUSAL TO REMOVE ADMINISTRATOR.
   Mandamus will not lie to review the order of a probate judge refusing to remove an administrator.
2. FOREIGN EXECUTORS—APPOINTMENT WITH WILL ANNEXED—REMOVAL—FOREIGN COURTS—DECREES—EFFECT.
   The fact that a foreign executor, appointed executor to administer property located in this State, as authorized by the statute (3 Comp. Laws, § 9284), is thereafter removed by the court of his domicile, does not require his removal as executor here, as a matter of law.

Certiorari to Huron; Beach, J. Submitted October 4, 1904. (Calendar No. 20,657.) Decided November 29, 1904.

Mandamus by the American Missionary Association and others to compel Charles L. Hall, probate judge of Huron county, to remove an administrator. To review an order denying the writ, relators bring certiorari. Affirmed.

George W. Radford, for relators.

Fred H. Aldrich, for respondent.

MONTGOMERY, J. Mabel Crawford, a resident of Ohio, died testate. Her will was admitted to probate in the probate court of Lucas county, Ohio, on May 23, 1891. William R. Stafford was appointed executor by that court.

As the testatrix left a large estate in Michigan, proceedings were had in Huron county to have her will admitted to probate there. On May 17, 1893, the will was admitted to probate by the probate court of Huron county, and William R. Stafford was granted letters testamentary, under section 9284, 3 Comp. Laws.

In May, 1900, the probate court of Lucas county, Ohio, removed Stafford from his trust. In June, 1903, an ap-

plication was made by relators to the probate court of Huron county (the respondent acting as judge of that court) to remove Stafford as executor in this State. This application was based wholly upon a showing of his removal by the Ohio court. The respondent, being of the opinion that he was not precluded by the decision of the Ohio court from exercising his own judgment, denied the application of the relator. No appeal was taken, but, after the time for appeal had elapsed, an application was made to the circuit court to compel the probate judge to revoke the appointment of Stafford. This application was denied, and the present proceeding is certiorari to review the decision of the circuit court.

We do not think mandamus the proper remedy. The probate judge, having jurisdiction to consider and decide the question presented, did so in the regular way. If he erred, appeal was the proper remedy. If the remedy by mandamus was open, we would be wholly unable to assent to the broad contention of relators' counsel that the action of the probate court of Ohio was conclusively binding upon the Michigan court. Administration of estates lying within this State is not committed by our law to foreign tribunals. Under section 9284, the courts of this State are given authority to exercise a discretion in the appointment of an executor or administrator with the will annexed. If the court may appoint, it may retain. It is a startling proposition that a foreign court may interfere to remove an officer of our courts, or an appointee of such court, to a position of trust. If such foreign court has not this power, it cannot indirectly cause such removal by making an order which shall bind the court. True, we are bound to give full faith and credit to the determinations of the Ohio tribunal. We are not, however, required to permit the courts of a sister State to determine matters committed by the law to our jurisdiction. While the administration in this state is ancillary, it is independent.

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

The other Justices concurred.

COX v. RAIDER.

1. SPECIFIC PERFORMANCE—EQUITY.
   Specific performance is not a matter of right.
2. SAME—ESTOPPEL.
   Where the contract purchaser of land, on inquiry, disclaims any interest in the land, and, in reliance thereon, a third person purchased it of the vendor as a part of a larger tract, which would be less valuable without the tract in question, specific performance is properly denied.

Appeal from Newaygo; Palmer, J. Submitted October 4, 1904. (Docket No. 101.) Decided November 29, 1904.

Bill by Nicholas Cox against John F. A. Raider and Neils Jensen to compel the specific performance of a land contract. From a decree dismissing the bill, complainant appeals. Affirmed.

Grove & McDonald, for complainant.

W. D. Fuller, for defendants.

MONTGOMERY, J. On the 12th day of October, 1900, the defendant Raider, being the owner of a tract of land in the village of Grant, Newaygo county, Mich., sold on contract to one Henry Caplin the lot in controversy in this suit. The size of said lot is 32 feet by 100 feet. The consideration was $200, payable $50 on delivery of said contract and $150 one year from the date of said contract, to wit, October 12, 1900. Caplin paid the $50 due on the delivery of the contract, went into possession of the lot, and built a store building thereon, which he occupied until it burned down. He made other payments on said contract until October 22, 1901, when there remained $100 of the purchase price unpaid, of which the time of payment was extended to October 11, 1902.

On the 18th day of January, 1903, Caplin assigned all his right and title to said contract to the complainant in consideration of the sum of $25, which complainant agreed to pay if he (complainant) got the lot and made anything out of it. On March 31, 1903, the complainant paid to defendant Raider $125, which exceeded the amount due by more than enough to pay all the expenses of executing and making a conveyance according to contract, and asked him for a deed, and Raider said he could not give him a deed because he had assigned his interest in the contract, but received the $125, giving the following receipt:

"Received of Nicholas Cox $125 as custodian. This money is intended (by Cox) to fulfill on a certain contract given to me by one Henry Caplin, but which I have some time since assigned to one Phillips. As soon as it is legally decided who is now entitled to the deed for said land, the money shall apply, if in favor of Mr. Cox, otherwise I will refund the above amount."

On January 17, 1903, the defendant Raider sold by contract to one James A. Phillips a tract of land (of which the lot in controversy is about one-sixth part), describing the whole tract by metes and bounds, and specifying the following exception:

"Except a piece off the southwest corner of lot four 32x100 feet sold to one Sanders, and any legal interest one Harry Caplin may legally claim under certain contract to him which the above first party assigns to the above second party as part of this agreement."

This last-mentioned contract was assigned by Phillips to defendant Jensen on February 17, 1903. Mr. Phillips and defendant Jensen went together when Phillips bought the land from Raider, and knew of Caplin's interest. He knew of the exception in Phillips' contract.

On April 1, 1903—the next day after complainant paid defendant Raider the balance in full for the lot—the defendant Jensen caused written notice to be delivered to complainant that the defendant Raider had assigned his interest in said contract to him, and that he (Jensen) can-

celed the contract on account of nonfulfillment of the terms thereof. On the following day complainant notified the defendant Jensen that he had paid the balance on the contract in full to Raider, and on the 15th day of April, 1903, complainant tendered $125 to defendant Jensen as payment in full on said contract, and demanded from him a relinquishment and conveyance of all his right, title, and interest in and to said land contract. Jensen refused to accept the money, claiming that the contract was forfeited.

The bill of complaint sets forth the foregoing facts, and prays for specific performance of the contract. Defendant Jensen defends as assignee of the Phillips contract, and claims that before it was made Caplin stated to Phillips that he had given up his contract, and let the lot go back to Raider; and that Caplin made similar statements to him before he bought the land of Phillips and received an assignment of his contract. He further claims that he owned other land contiguous to the Phillips land, and took an assignment of the Phillips contract in the belief that Caplin had given up all rights under his contract. The Caplin lot fronts on a street, and partially obstructs passage therefrom to the remainder of the Phillips land, and he claims that he would not have purchased said land if he had supposed that the Caplin contract could be enforced as against him. For these reasons Jensen objected to the court granting the relief prayed for in the bill. The case was heard in open court, and a decree made dismissing the complainant's bill. The complainant appeals.

The testimony fairly establishes the following facts: After the purchase of the land Caplin erected a store building thereon, and conducted a merchandising business therein until the fall of 1901, when the building was destroyed by fire, and Caplin left the lot with the remains of the building thereon, and removed from the village, and engaged in the business of a traveling salesman. He failed to pay the taxes on the property and to make the payment of $100 October 11, 1902, as per the receipt given

him by Raider October 22, 1901. Under these conditions Phillips applied to Raider for the purchase on contract of the Caplin lot and of land in the rear of, and of a lot adjoining, the Caplin lot on the front, and, knowing that Caplin had a claim at one time to the lot in suit, went to him in company with one Davis, and asked him what interest he had in the lot, and Caplin told him that he had none; had all the use of it he wanted, and had let it go back to Raider. In reliance upon these acts and statements, Phillips contracted to purchase the land before mentioned for $500. He paid $100 down, and is to pay $200 in one year and $200 in two years, with 7 per cent. interest. The date of Phillips' contract is January 17, 1903.

Defendant Jensen owned land and buildings adjoining or near the Caplin lot, and desired to secure the land covered by the Phillips contract, and asked Caplin what interest he had in the lot, and was informed that he claimed none. In reliance upon this statement, Jensen paid Phillips what he had paid Raider, and took an assignment of the contract, dated February 17, 1903. He cleared off the remains of the building and performed some other work on the lot and upon the adjoining land covered by the Phillips contract. He claims it was worth $10. Jensen took all the possession he could of the land, and exercised acts of ownership over it.

There is an apparent equity in refusing specific performance in this case. The defendant has, in reliance upon the contract vendee's statements that he had abandoned the contract, changed his position, and has bought this lot as a portion of a larger tract, the remainder of which is made more valuable by his ownership of the lot in question.

The complainant contends that this defense is an attempt to establish the title to land by estoppel, and that the testimony was therefore incompetent. We do not think that the conclusion reached by the circuit judge need be rested upon estoppel. The remedy by specific performance is within the legal discretion of a court. Specific perform-

ance is not a matter of strict right. *Rust* v. *Conrad*, 47 Mich. 449; Fry on Specific Performance, § 44. And when the conduct of the contract purchaser has created conditions which render it inequitable for the court to interfere and specifically enforce the contract, there is no hardship in treating an abandonment as conclusive and in refusing to permit a retraction.

The result reached by the circuit judge accords with equity, and the decree is affirmed, with costs.

The other Justices concurred.

FLANAGAN v. SANDERS.

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1. NEGLIGENCE—ELEVATOR SHAFTS—PROTECTION—DUTY TO TRESPASSERS.

   The owner of a store building owes no common-law duty to a trespasser to maintain guards about an elevator shaft on his premises.

2. SAME—DETROIT CHARTER—CONSTRUCTION.

   Section 714 of the charter of Detroit of 1893, requiring that elevator shafts in stores or buildings in the city shall be provided with and protected by a substantial railing and sufficient automatic trapdoors, etc., does not impose a duty on the owners of store buildings in favor of trespassers, nor render them liable to trespassers for injuries proximately resulting from failure to provide elevator wells with automatic gates.

Error to Wayne; Rohnert, J. Submitted October 5, 1904. (Docket No. 10.) Decided November 29, 1904.

Case by Mollie A Flanagan against Fred Sanders and others for personal injuries. There was judgment for defendants, and plaintiff brings error. Affirmed.

Corliss, Andrus, Leete & Joslyn (*Ray B. Morgan*, of counsel), for appellant.

Brennan, Donnelly & Van De Mark, for appellees.

MONTGOMERY, J. The plaintiff, a young woman 27 years of age, was a saleswoman in charge of the toilet goods department of Shafer's store in Detroit at the time this cause of action arose, and had held such position for upwards of four years.

Shafer's store occupied the first eight floors of the Majestic building, a building fourteen stories high, situated on the corner of Woodward and Michigan avenues, directly opposite the city hall, the busiest locality in the city.

Defendants occupied the six-story building adjoining the Majestic building on the north, and known as 141 and 143 Woodward avenue. They were the lessees of the whole building, and occupied the basement, ground floor, and fourth floor themselves in their confectionery and ice cream business. The remainder of the building was rented by them to numerous tenants for office purposes. In the rear of this building defendant maintained a frieght elevator running from the basement to the top of the building. On the ground floor the elevator could be reached only by a door opening on the alley. This door led to an inclosure about 18 feet long and 8 feet wide. This inclosure was provided with no other doors or windows. At its inner end, and about 8 feet from the door, was the elevator opening, extending practically the full width of the inclosure. This opening or well-hole was provided with a picket gate, which extended across the inclosure in front of the hole. The gate was not automatic, but was operated by hand, sliding up and down in grooves. If a person, in using the elevator, pushed the gate up above his head, and then took the elevator to some other floor, and forgot to push the gate down, it would remain up, and the opening in the floor would be left with no guard or protection whatever. It was not provided with trapdoors.

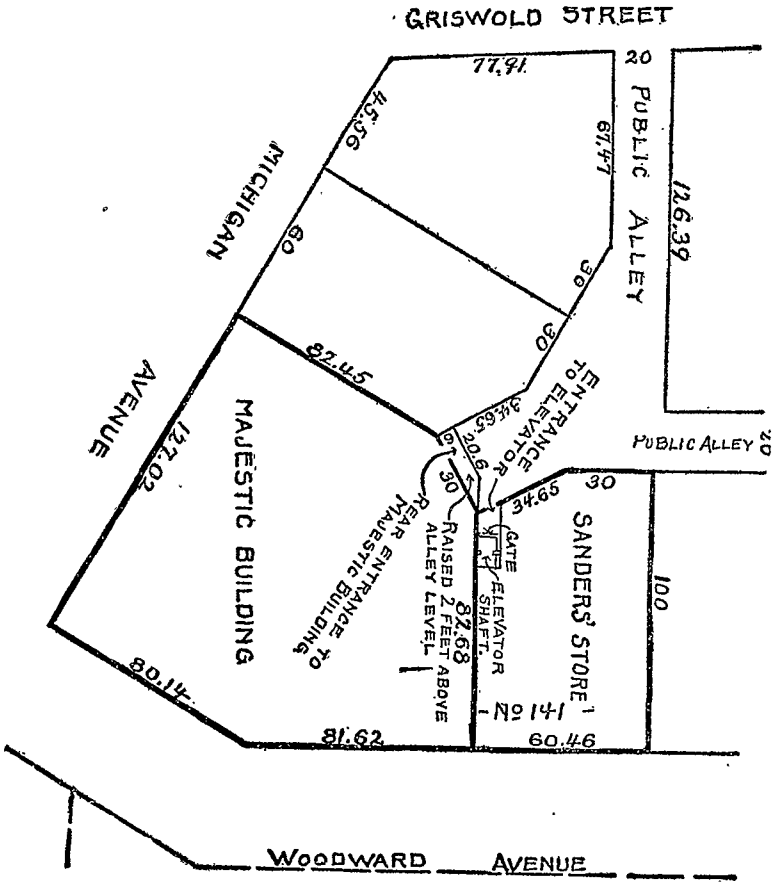
On the morning in question—Monday, October 7, 1901—plaintiff arrived at the Michigan-avenue entrance to the Shafer store, at about 8:15 o'clock, and found it surrounded by a large crowd. The business had a few days before been sold to Pardridge & Walsh, and for three days previous the store had been closed in preparation for a sale, which had been widely advertised. The plaintiff, with other employés, had worked until 12 o'clock Sunday night in arranging her stock. Upon reaching the Michigan-avenue entrance, plaintiff was instructed by the night watchman to go around to the alley entrance. This she did, in company with Mrs. Dorothy Gray, another saleswoman, entering the alley from Griswold street. Neither had ever before been in the alley. The alley is L-shaped, running south from State street in the rear of the Woodward-avenue stores to the Majestic building, then running west and opening on Griswold street in the rear of the Michigan-avenue stores.

The plaintiff and Mrs. Gray proceeded along the alley towards the Majestic building. They entered a door which they thought was the rear door of the Majestic building. It proved to be the door leading to the Sanders' elevator inclosure. Plaintiff, who entered the door ahead of Mrs. Gray, stepped into the open well hole and fell a distance of 11 feet to the brick floor of the basement, whereby she received very serious injuries.

Section 714 of the charter and laws of the city of Detroit (1893), upon which the plaintiff relies, reads in part as follows:

"In any store or building in the city of Detroit in which there shall exist or be placed any hoist-way, elevator, or well-hole, the openings thereof through and upon each floor of said building, shall be provided with and protected by a substantial railing, and also with good and sufficient trap-doors opening and closing automatically as the elevator passes from floor to floor: *Provided*, however, that such hoist-way, elevator, or well-hole may be inclosed in brick or by substantial woodwork, furred, lathed, and plastered or sheathed with corrugated iron."

The following diagram shows the situation of the premises and the location of the elevator shaft:



This action was planted and prosecuted on the theory that this statute imposed upon the defendants a positive duty, and that the neglect of this duty gave rise to a cause of action in favor of one occupying the relation to the property which this plaintiff did. The court submitted the case to the jury upon this theory. A verdict was returned for defendant. Plaintiff brings error, and alleges that the court erred in various instructions given and in

refusing certain requests preferred by the plaintiff's counsel.

At the threshold of the case lies the question whether the plaintiff is in position to complain of the defendant's failure to observe the requirements of this statute if there was such omission, for, if she is not entitled to assert that this statute imposed a duty upon defendant for her benefit, the other questions involved become immaterial.

It is clear that at the common law the defendant owed the plaintiff no duty to maintain guards about the elevator shaft for her protection. She was not upon defendant's premises by invitation or license. A closed door stood between the alley and the elevator shaft. This entry way was not designed for use by the general public, but was used only by those who were concerned in using the elevator for handling freight. Our own cases upon this question are decisive. *Pelton* v. *Schmidt*, 97 Mich. 231; *Ryan* v. *Towar*, 128 Mich. 463.

Is the rule different where a duty is imposed by statute? There are cases in which a statute imposed added duties in the care of one's premises, in which it is held that the duties are public in their nature, and that a neglect of duty can only be redressed by the public. Such a statute was considered in *Taylor* v. *Railroad Co.*; 45 Mich. 74. There are statutes imposing duties the neglect of which may be considered as evidence of negligence in an action brought by one sustaining a relation to the offending party which entitles him to invoke such statute, as in *McRickard* v. *Flint*, 114 N. Y. 222; *Parker* v. *Barnard*, 135 Mass. 116. It does not follow, however, that the legislative intent was to impose a duty upon owners of buildings as to trespassers. It is hardly conceivable that any such purpose to reverse all the rules relating to the duty owed by the owner of a private building was in the legislative intent. It was certainly not expressed.

We think that the most that can be said of this legislation is that in the interest of those to whom the owners of buildings owe care the measure of that duty is fixed.

But we think it was not intended to create new relations, nor to impose upon such owner duties to strangers, trespassers, or others in no way entitled to occupy or be present on the premises. In this view no other verdict than that reached on the trial would be justified.

The judgment is affirmed.

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

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FINN *v.* ADAMS.

1. JUDGMENTS—VACATION—EQUITY.
   A judgment at law may be vacated by a court of equity in a proper case, but the exercise of such jurisdiction is rare, and is only exercised after it has been made clearly to appear that an injustice has been done.

2. PARENT AND CHILD—SUPPORT OF CHILDREN—IMPLIED AGENCY.
   Where, as in this State, the statute (2 Comp. Laws, § 4495) imposes a legal duty upon a parent to support his minor children, a total abandonment of a child raises an implied agency on the child's part to bind the parent for necessaries.

3. SAME—JUDGMENT—SETTING ASIDE.
   On a bill to set aside a judgment and sale in attachment, founded on a claim for necessaries furnished the minor children of a life convict, evidence examined, and *held* that it would be inequitable to sustain the bill.

4. MONEY RECEIVED—LIFE CONVICT.
   Where, after complainant's incarceration for life, defendant collected a claim which had belonged to complainant prior to incarceration, which was paid to defendant as guardian of complainant's children in recognition of defendant's claim that the right to the money had passed to him as such guardian, complainant's remedy against his debtor not being thereby affected, he was not entitled to recover the money from defendant as money received to his use.

Appeal from Marquette; Stone, J. Submitted October 6, 1904. (Docket No. 29.) Decided November 29, 1904.

Bill by Lawrence Finn against Sidney Adams and George W. Shaw to vacate a judgment and sale in attachment. From a decree dismissing the bill, complainant appeals. Affirmed.

John L. Heffernan (*C. F. Button*, of counsel), for complainant.

Hill & Smith, for defendants.

MONTGOMERY, J. The bill in this case was filed to vacate a judgment in attachment and sale thereunder of the property attached to defendant Adams and also a sale by him to the defendant Shaw. The attachment proceedings were admittedly regular, and the title which passed was good in law. The bill also attempts to charge the defendant Adams, as trustee of a fund of $192, received of F. W. Read & Co., as hereinafter stated.

The theory of the complainant appears to be that there was concealment of the fact of the pendency of the attachment suit at a time when defendant Adams had an opportunity to communicate the fact, and that there was in fact no valid claim existing in favor of the defendant Adams (plaintiff in attachment) on which to base the attachment proceedings.

The facts are involved. It appears that in December, 1887, the complainant was convicted of the murder of his wife, and sentenced to the State prison at Jackson for life. That at the time of his incarceration he left two minor sons, 14 and 16 years of age, respectively, and he also owed some small debts. His property consisted of the lot in question, then of small value, not exceeding $300, and a claim against F. W. Read & Co., of $192, for money which had been deposited with them in the expectation that it would be repaid in lumber with which complainant expected to build a house on the lot in question.

Under the advice of an attorney that complainant had, by his sentence, suffered civil death, and that his estate had descended to his children the same as though he was actually dead, an aunt of the children filed a petition in the probate court for the appointment of the defendant Adams as guardian of the children. Such appointment was made. Later, acting under an order of the circuit court in chancery, the defendant sold the lot in question to one Blackbird. Defendant Adams loaned Blackbird the purchase price and other money with which to pay for improvements, taking security back from Blackbird for the same. Under this security defendant Adams has succeeded to the rights of Blackbird. Defendant Adams also received from Read & Co. the $192 in their hands. Defendant Adams paid out for the use of the two boys in the purchase of necessaries, for board, clothing, and medical attendance, $429.52, and in addition paid to the older son $150 after he attained his majority.

Upon discovering, in 1893, that these entire proceedings were void, defendant Adams visited the complainant in prison, and stated to him the facts as to the expenditures made by him, and asked that the complainant deed the land to him to answer his demand. This complainant declined to do. Adams secured an assignment of the claims from most of the parties who directly furnished the necessaries to the two boys, and brought suit in attachment, causing a levy to be made upon the land in question. The suit proceeded to judgment. A sale of the property was made, and Adams became the purchaser. It appears that the attachment proceedings were instituted before Adams' visit to complainant, and that they were not referred to in the interview.

It is the contention of the complainant that Adams had no claim against him, and that if he (complainant) had been notified of the suit he could have successfully defended against him. If the claim asserted by Adams in the attachment suit had been wholly unconscionable, there would be much force in this contention. If, on the

other hand, the demand upon which that suit was based was one which, in justice and equity, the defendant was under obligations to pay, and the whole interest of complainant in the land sold did not exceed the amount justly owing by the complainant, we are not able to perceive how the complainant has suffered any wrong which a court of equity will take cognizance of. A judgment at law may be vacated by a court of equity in a proper case, but the exercise of such jurisdiction is rare. It is only exercised after it has been made to appear clearly that an injustice has been done. *Cleveland Iron Mining Co.* v. *Husby*, 72 Mich. 61; *Mueller* v. *Marsh*, 116 Mich. 378. In the present case there can be no doubt that the complainant was under legal obligation to furnish his minor sons with the necessaries of life. *Courtright* v. *Courtright*, 40 Mich. 633. And, while the authorities are not fully agreed, we think the better rule is that, where the duty to maintain one's children is made a legal duty by statute, as by our statute (section 4495, 2 Comp. Laws), the same agency to bind the father for necessaries is to be implied where there is a total abandonment of a minor child, incapable of supporting himself, as is implied in the wife on desertion by her husband. *Stanton* v. *Willson*, 3 Day, 37; *Dennis* v. *Clark*, 2 Cush. 353; *Lamson* v. *Varnum*, 171 Mass. 237; *Zilley* v. *Dunwiddie*, 98 Wis. 428; 21 Am. & Eng. Enc. Law (2d Ed.), pp. 1052–1054, and cases cited. The evidence is not full as to whether all the money expended on behalf of those minors was so essential as to justify the application of the doctrine of implied agency, but, as that question was necessarily determined in the attachment case, and as we see no reason for questioning the good faith of Mr. Adams' claim in that regard, we assume that the expenditures were such as fall fairly within the rule.

But it is insisted that Adams' money did not pay for these necessaries, and that, therefore, *he* had no claim, although others may have had. This is stating the form, rather than the substance, of the transaction. Adams in

fact paid the money for the necessaries. This, as between complainant and Adams, ought to be sufficient. But if we go further, and take account of the fact that Adams nominally received the money on an ineffectual sale of this lot, we may further find from the record that it was money which he himself advanced, and that he has succeeded to all the rights which Blackbird acquired. We are convinced that, in any view we may take, it would be grossly inequitable to set aside this judgment and sale.

Is complainant entitled to recover the $192 received by defendant of Read & Co.? The circuit judge held that he was not, and on the ground that there was no privity between complainant and defendant. The complainant contends that this view is mistaken, and that the money was received by defendant as money coming through the complainant. We are not able, however, to distinguish this case from *Corey* v. *Webber*, 96 Mich. 357; for while the defendant, when he received this money, did so in recognition of the fact that the claim against Read & Co. had once belonged to complainant, it was received by him upon the claim that the right had passed to defendant as guardian of complainant's children, and was paid by Read & Co. in recognition of that claim. Complainant's remedy against Read & Co. was in no way affected or postponed. No specific fund of complainant was diverted. The case is within the principle of *Corey* v. *Webber*, and cases cited.

The decree dismissing the complainant's bill is affirmed, with costs.

The other Justices concurred.

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McVEAN v. DETROIT UNITED RAILWAY.

1. STREET RAILROADS—INJURIES TO TRAVELERS—NEGLIGENCE.
   A street-railway motorman, approaching a vehicle from behind, and seeing other vehicles in a narrow space between the track and curb, and observing that the horse attached to the vehicle appears to be frightened, is bound to immediately bring his car under control, so far as it is possible for him to do so.

2. SAME—CONTRIBUTORY NEGLIGENCE.
   Plaintiff, a girl 15 years of age, was riding with her sister in a buggy drawn by a horse ordinarily gentle, but which became frightened at the approach of a street car at a high rate of speed, causing dust and leaves to fly into the air. Plaintiff, who was obliged to act quickly, and not knowing the speed of the car or its exact distance from her, attempted to alight, to hold the horse by the head until the car passed, when the car struck her. *Held*, that plaintiff was not guilty of contributory negligence, as a matter of law.

Error to Oakland; Smith, J. Submitted October 20, 1904. (Docket No. 62.) Decided November 29, 1904.

Case by Ethel McVean, by next friend, against the Detroit United Railway for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Defendant's track runs over North Saginaw street, in the city of Pontiac. The street is 30 feet 2 inches wide, the distance between the west rail and the curb being 12 feet and 7 inches. The car projected 22¼ inches beyond the track.

Plaintiff, 15 years old, was riding with her sister in a buggy drawn by one horse. Her sister was driving, sitting on the right side of the buggy, next to the curb; plaintiff, on the left side, next to the track. They were going south. Defendant's car approached them from be-

hind. The horse became somewhat frightened. Plaintiff jumped from the buggy, with the intention, as shown by the testimony of her sister, of getting the horse by the head and holding him while the car passed. As or immediately after she jumped from the buggy, the car struck her, inflicting serious injury. The horse was gentle and accustomed to cars. The negligence charged is that the defendant ran the car at an excessive and unlawful rate of speed, thereby causing the dust and leaves to fly in the air, which frightened the horse, and that the motorman did not keep his car under sufficient control.

The jury found, in reply to special questions propounded to them by the defendant, that the act of plaintiff "in getting out of the buggy was the act of an ordinarily prudent person of her years, under similar circumstances, taking into account the narrowness of the street and the speed of the approaching car; that, if the car had been traveling at the rate of four or five miles per hour, the motorman could have stopped the car in time to prevent hitting the plaintiff; and that the commotion of the leaves and dust raised by the speed of the car frightened the horse." She obtained a verdict and judgment.

Brennan, Donnelly & Van De Mark (*James H. Lynch*, of counsel), for appellant.

Patterson & Patterson, for appellee.

GRANT, J. (*after stating the facts*). Defendant's counsel insist that there was no negligence on the part of the defendant, and that the plaintiff was guilty of contributory negligence in jumping from the buggy. The defendant, both in reason and under the authorities cited by the defendant, could not be held liable for the commotion of leaves and dust caused by running at the ordinary and lawful rate of speed. The case was not submitted to the jury upon that theory.

The evidence on the part of the plaintiff tended to show a speed as high as 20 miles an hour, and that this unusual

rate of speed caused an unusual commotion of leaves and dust, which frightened the horse.

The motorman admitted that, when he saw the horse appeared to be frightened, he did not at once bring his car under control, but gradually reduced its speed. There were other vehicles in this narrow space, and we think it was the duty of the motorman, on seeing that any horse in such a place was frightened, to immediately bring his car under control, so far as it was possible for him to do so.

The plaintiff was not, as a matter of law, guilty of contributory negligence. We cannot say that it was an imprudent thing for her to alight for the purpose of getting the frightened horse by the head, in the attempt to hold him while the car passed. She was obliged to act quickly. She could not tell the speed of the car, or the exact distance it was from her when she began to alight. It may have seemed to her that there was ample time for her to alight and seize the horse by the head before the car passed.

The questions of negligence on the part of the defendant and of the plaintiff were properly submitted to the jury. This case is ruled by the following decisions, and the cases which are there cited: *Chauvin* v. *Railway*, 135 Mich. 85; *Selleck* v. *Railway Co.*, 93 Mich. 375; *McClellan* v. *Railway Co.*, 105 Mich. 101; *Montgomery* v. *Railway Co.*, 103 Mich. 46.

Judgment affirmed.

The other Justices concurred.

THOMAS *v.* SULLIVAN.

1. DEEDS—DELIVERY—PRESUMPTION.

Where a deed is delivered by the grantor to a third person, there is no presumption that such delivery is for the use of the grantee.

2. SAME—SUFFICIENCY OF EVIDENCE.

On a bill to cancel a deed delivered to a third person, evidence considered, and *held* not to show a delivery for the use of the grantee.

Appeal from Berrien; Coolidge, J. Submitted October 20, 1904. (Docket No. 63.) Decided November 29, 1904.

Bill by John Thomas, Jr., against Catherine Sullivan for the cancellation of a deed. From a decree dismissing the bill, complainant appeals. Reversed, and decree for complainant.

Gore & Harvey, for complainant.

Lawrence C. Fyfe, for defendant.

MOORE, C. J. The parties to this litigation are brother and sister. Their parents were John Thomas, Sr., and Catherine Thomas. The bill is filed for the purpose of having a deed to certain real estate made in December, 1880, in which Catherine Thomas was grantor, and Catherine Sullivan was grantee, canceled. The circuit judge refused to grant the prayer of the bill of complaint and dismissed the bill. The case is brought here by appeal.

The record discloses that Catherine Thomas obtained title to the land described in the deed in 1863. It was a vacant lot in the village of Benton Harbor at the time the deed in controversy was made. After this deed was made, and before the death of the grantor, John Thomas, Sr., built a brick store building upon the premises, in the upper story of which he and his wife lived for a few years prior to her death, which occurred September 14, 1885. After the death of Mrs. Thomas, John Thomas, Sr., continued to occupy and control the premises until his death, which occurred in August, 1901.

It is the claim of defendant, and she so testified, that after her mother's death her father told her he would carry the deed made by her mother in December, 1880, over to

the county seat, and have it recorded. She also testified that about 1893, in the presence of Mrs. Wright and Mr. Hicks, her father took the deed out of his safe and delivered it to her, when she read it and Mr. Hicks read it, and there was some talk about the necessity of its being recorded; that she then gave the deed back to her father, who returned it to the safe. The testimony of Mrs. Wright and Mr. Hicks tends to sustain this testimony, though neither of them are very clear or positive in their statements. The following is a fair sample of the way Mrs. Wright testified:

"*Q.* Tell us what was done and what was said there at that time? *A.* I think that at that time that he asked Mr. Hicks if that deed would hold water, and I think that Mr. Hicks made the statement that that deed was all right; it was a genuine warranty deed. And Mr. Thomas, I think, made a statement of some little affairs that I could not just remember or repeat the whole conversation, and he said that that property at his death went to Mrs. Sullivan; and, if I remember right, Mr. Hicks took the deed and read it, and handed it to Mrs. Sullivan, and she read the deed.

"*Q.* Then what was done? *A.* I think Mrs. Sullivan gave the deed to Mr. Thomas, and he put it in the safe.

"*Q.* So that deed was handed to Mrs. Sullivan, and she read it then and there? *A.* Yes, sir.

"*Q.* What did Mr. Thomas say to Mrs. Sullivan, if anything, at that time he [Hicks] handed her the deed? *A.* I don't remember any particular conversation."

The following from the testimony of Mr. Hicks will show how indefinite his testimony was:

"*Q.* Would you please tell us what the conversation was at that time? *A.* Well, Mr. Fyfe, I can only tell the substance of it.

"*Q.* Give us the substance of it. *A.* The substance was of inquiry from Mr. Thomas in reference to whether that deed should be recorded or not, and I said at that time it was not a necessity whatever; that Mrs. Sullivan evidently owned the place, and it rested with her—something of that description—and he seemed to be satisfied. She had the deed then in her hands, and I think I took it

from her and read it, and passed it back to her or him. I don't remember now. I can't remember.

"*Q.* Do you remember who gave her the deed? *A.* Well, to the best of my knowledge, he was sitting on a lounge. There is a lounge on the side of the room, and he sat on that, and I think he handed her the deed, or handed it to me. I think he handed her the deed. That is the best of my knowledge. That is as I remember it at present. In fact, it had got out of my mind until I heard Mrs. Wright state the facts here—state as she did—and it is quite a stretch of memory now to call it to mind."

A question is raised as to the competency of Mrs. Sullivan to testify, it being claimed that she was barred by the statute. It was also claimed that Mr. Hicks was not a competent witness, because he testified in relation to knowledge which came to him as the legal adviser of Mr. Thomas. It is also claimed that, giving the fullest effect to this testimony, it did not establish a delivery of the deed by Mr. Thomas to his daughter. Because of our view of another feature of the case, which will appear later, it is not necessary to pass upon either of the above questions. There is nothing in the record to show that, after this talk participated in by the father and daughter, Mrs. Wright, and Mr. Hicks, that any one but Mr. Thomas, Sr., had possession of the deed until after his death. The estate of Catherine Thomas was never probated. John Thomas, Sr., made a will, which was duly probated. His administrator with the will annexed took possession of the real estate described in the deed, and refused to pay the rental value thereof to John Thomas, Jr., and Catherine Sullivan. On December 23, 1901, they joined in a petition to the judge of probate, representing that "they were, and now are, the owners in fee simple, and entitled to the possession, use, rents, and income of the following described premises, to wit." Then followed a description of the land described in the deed, and a prayer that the administrator be required to account to them for rent. A few days thereafter Mrs. Sullivan received by mail the deed which had been recorded in the office of the

register of deeds. On the 27th of January, 1902, she withdrew her name from the petition. She testified that she did not know who sent the deed to the register's office, nor where it came from before it was sent there. The record does not disclose where the deed was found, or who sent it to the register. Mrs. Sullivan says that, when she joined in the petition referred to above, she supposed her father had destroyed the deed, and did not want to have litigation with her brother; that, when she learned the deed was in existence, she concluded to assert her rights under it.

So far we have not referred to what the record discloses in relation to why the deed was put in the possession of John Thomas, Sr., instead of being delivered by Mrs. Thomas to her daughter Mrs. Sullivan. All the testimony there is upon that subject is as follows: The deed was witnessed by Wells Brown and C. S. Boyle. It was admitted that Mr. Boyle was sick at the time of the trial, but, if present, would testify "that Mr. Thomas came across the street to his store and asked him to go over to his house, as he desired him to witness a paper, and he went over, and Mr. Wells Brown was there, and he saw a deed signed, and that Mr. Brown signed it, also himself, as a witness, and that Mr. Thomas told him he wasn't going to put it on record then, but wanted to have it ready, so that he could put it on record at some future time when it became necessary."

About four months before John Thomas died, he made a will in which he devised and bequeathed most of his property, including the property described in the deed, to his two children, John Thomas and Catherine Sullivan, share and share alike, and stated therein:

"This accords with the will of my wife Catherine I. Thomas, made verbally to myself, that whereas my son forced me out of the tanning business to the detriment of my business as a whole, and in disregard of any duty he might owe to his parents, a deed was made and given into my keeping, with the injunction of a mother's love, that

should my son do better thereafter, this deed should be destroyed and both children share alike."

It will be observed that Mr. Boyle does not suggest any direction by the grantor, Mrs. Thomas, as to what should be done with the deed. Mr. Thomas, in his will, says it was delivered with the injunction that, if the son did better, the deed should be destroyed. If this recital in the will is competent evidence, it is clear the condition has never arisen under which the deed was to be delivered to Mrs. Sullivan. If it is not competent evidence, then the record is bare of any direction upon the part of the mother that the father should deliver the deed to the grantee. The rule is well settled that, if a deed is delivered by the grantor to the grantee, the presumption arises that it is for his use, but, if it is handed to a stranger, there is no such presumption, for the delivering to the stranger may have been by mistake or for safe-keeping simply, or for some other purpose wholly independent of an intent to transfer the estate.

In *Trask* v. *Trask*, 90 Iowa, 318, it is said:

"A delivery to a third person does not authorize a presumption that it is done with the intention of passing the title. The facts and circumstances attending the transaction must be such as to show that the grantor intended that the deed should be delivered by the custodian to the grantee. Every such case must be determined by the intention of the grantor."

In *Mitchell's Lessee* v. *Ryan*, 3 Ohio St. 382, the court say:

"If the deed be delivered to the grantee, the natural presumption is that it is for his use, and no words are necessary. But if it be handed to a stranger, there is no such natural presumption; and hence, unless there be something besides the mere act of delivery to evidence the intent, it is impossible to say that the grantor designed to part with the title. For the delivery may be by mistake, or for mere safe-keeping, or for some other cause wholly independent of a purpose to transfer the estate."

We understand this to be the rule.

It is clear, we think, that there is an entire failure to show a delivery of the deed to John Thomas, Sr., with the intent to have it transfer the estate to Catherine Sullivan. We deem it unnecessary to discuss the other interesting questions raised by counsel.

The decree is reversed, and one will be entered here granting the relief prayed, with costs of both courts.

The other Justices concurred.

ERWIN v. OTTAWA CIRCUIT JUDGE.

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EXECUTORS' ACCOUNTS — PRODUCTION OF BOOKS — APPEALABLE ORDERS.

An order of the probate court to produce for examination certain books and papers, to be used in a pending controversy over the removal of an executor and the settlement of his account, is not appealable to the circuit court under 1 Comp. Laws, § 669.

Mandamus by David D. Erwin, guardian ad litem and next friend of Edward P. Ferry, an incompetent, and others, to compel Philip Padgham, circuit judge of Ottawa county, to vacate an order dismissing certain appeals from the probate court. Submitted November 15, 1904. (Calendar No. 20,741.) Writ denied November 29, 1904.

Nims, Hoyt, Erwin, Sessions & Vanderwerp and *Kingsley & Wicks* (*George A. Farr*, of counsel), for relators.

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

HOOKER, J. We are asked to issue a peremptory mandamus to compel the respondent to vacate two orders dis-

missing appeals taken by the respective relators from an order made by the probate court of Ottawa county, requiring relators to produce certain books of account and documents alleged to relate to the management by Edward P. Ferry, executor, of the affairs of the estate of William M. Ferry, deceased, of which he was administrator.

William M. Ferry is alleged to have died at his home in Grand Haven, Ottawa county, Mich., in the year 1867. Edward P. Ferry, his son, was made executor of his will, and has so continued to the present time.

On June 26, 1903, certain relatives, claiming to have interests in the estate, filed in the probate court having jurisdiction of the estate a petition asking the removal of Edward P. Ferry from the office of executor, and that he render an account of his doings as such executor. It is claimed that in this litigation there are upon one side Edward P. Ferry, the executor, and upon the other all of the residuary legatees and devisees under the will, including the distributees of such as are not living. A hearing was had upon the petition on July 21, 1903, and at such hearing there appeared before the probate court John Vanderwerp and David D. Erwin, of Muskegon, and Edward S. Ferry, of Salt Lake City, Utah, of which latter place Edward P. Ferry is, and for some years has been, a resident. Edward S. and W. Mont. Ferry are sons of Edward P. Ferry, and upon application of the parties mentioned as having appeared David D. Erwin was appointed "guardian ad litem and next friend" of Edward P. Ferry, who was shown to be an incompetent person, over whom W. Mont. Ferry and Edward S. Ferry were general guardians, appointed by a Utah court. On the same day Erwin, as guardian, etc., filed an answer and a cross-petition in which he prayed for the discharge of Edward P. Ferry from his trust as executor of his father's will. Issue was joined upon the cross-petition, and the hearing was set for October 27, 1903. On October 19, 1903, the appellees filed a petition asking that the relators be ordered to produce

certain books and papers, which it was alleged would throw light upon the administration of the estate, and aid in determining the correct state of the account. A citation was issued returnable October 27, 1903, and this was returned duly served within the jurisdiction of the court on each of the relators. The relators Edward S. and W. Mont. Ferry appeared in person and by counsel, and filed objections to the jurisdiction of the court and the proceedings. Erwin answered, and a trial was had, which is said to have lasted four days. As a result the probate court made an order on November 4th requiring the production and deposit with the probate court within a time fixed, for examination, certain books and papers which related to the affairs of the estate, some or all of which he found to have been surreptitiously removed from the State of Michigan by the relators, or some of them.

Separate appeals were taken under 1 Comp. Laws, § 669, by Erwin and the two Ferrys (relators), and subsequently these appeals were dismissed by the respondent upon the ground that the orders were not appealable.

The questions before us are: (1) Were the orders appealable? (2) If not, should the writ be denied upon the ground that the appellees have waived their right to question the validity of the appeals?

The true nature of the proceeding appealed from is one ancillary to the then pending controversy over the removal of the executor and his account, designed to place before the court evidence in the control of the relators pertinent and indispensable to a proper determination of those questions. So far as the question of waiver is concerned, we think it disposed of by the returns of the respondent, which indicates that the appellees sought to dismiss the appeal, and conditioned their notice of hearing upon a failure of their motion. Hence we need not consider the question of the possibility of a court, through a waiver, acquiring jurisdiction over the subject-matter of a controversy of a nature not appealable.

The statute upon which the relators rely to support their right to appeal is section 669 of the Compiled Laws:

"(669) SEC. 25. In all cases not otherwise provided for, any person aggrieved by any order, sentence, decree, or denial of a judge of probate, may appeal therefrom to the circuit court for the same county, by filing a notice thereof with the judge of probate within sixty days from the date of the act appealed from, with his reasons for such appeal, together with such bond as is required in the next section."

On the other hand, the appellees base their proceeding upon sections 9355 and 9356, which are as follows:

"SEC. 9355. If any executor or administrator, heir, legatee, creditor, or other person interested in the estate of any deceased person, shall complain to the judge of probate, on oath, that any person is suspected to have concealed, embezzled, conveyed away, or disposed of any money, goods, or chattels of the deceased, or that such person has in his possession or knowledge, any deeds, conveyances, bonds, contracts, or other writings, which contain evidence of, or tend to disclose the right, title, interest, or claim of the deceased to any real or personal estate, or any claim or demand, or any last will and testament of the deceased, the said judge may cite such suspected person to appear before the court of probate, and may examine him, on oath, upon the matter of such complaint.

"SEC. 9356. If the person so cited shall refuse to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the common jail of the county, there to remain in close custody until he shall submit to the order of the court. The probate judge shall cause the examination to be taken down by a stenographer, or in such mode as shall in his discretion seem to him best, and said judge shall direct all such interrogatories and answers to be reduced to writing, signed by the party, and filed in the probate court."

Various cases heretofore decided by us sustain the validity of these statutes and the power of the probate court to compel the production of books and papers under them. The case of *Perrin* v. *Calhoun Circuit Judge*, 49 Mich.

342, was one in which most of the questions before us were involved. It is again alluded to in the final disposition of the case in *Perrin* v. *Lepper*, 72 Mich. 454, and settles the authority of probate courts to make and enforce such orders under the statute. See, also, *Palmer* v. *Jackson Circuit Judge*, 90 Mich. 1, and the case of *Eames* v. *Manly*, 117 Fed. 391.

The statute is a broad one in terms, but as early as in the 5th of Michigan this court called attention to the fact that probate proceedings were necessarily summary, and that—

"To allow a writ of error to the circuit court for the purpose of reviewing its proceedings upon these appeals would interminably procrastinate the settlement of estates, and operate as a most oppressive burden upon the public. This consideration of itself, were the question a doubtful one, would induce us to hesitate long before we recognized this remedy; but a consideration of the nature of the writ and the remedy satisfies us that it lies in no case where the proceedings are not after the course of the common law, and only after judgment on an issue formed according to it; and it is not enough that the proceedings are in a court which ordinarily and primarily exercises common-law jurisdiction. It is true this court has exercised jurisdiction in cases of appeals from probate judges to the circuit courts, and also in appeals from commissioners of claims to that court (citing cases); but all these cases were after trials in the circuit upon issues of fact, and where the proceedings were after the course of the common law; and no instance is known of the exercise of this jurisdiction where the appeal was from an interlocutory order or discretionary ruling, and where the office of the appeal was to obtain a review, and not a trial of a question of fact." *Holbrook* v. *Cook*, 5 Mich. 230.

We have frequently since held it inapplicable to orders made by the probate court. Thus, in *Walker* v. *Hull*, 35 Mich. 488, it was held that an order appointing a special administrator was not reviewable, though one appointing a general guardian is for obvious reasons. See *Goss* v. *Stone*, 63 Mich. 319. While in that case the court carefully preserved the right of appeal from orders affecting

the merits of a proceeding, it is said that the exceptions include "such interlocutory and subsidiary orders as are made during the pendency of suits or proceedings, and which end with or before them," illustrating by the following, viz.: "Such instances occur in the appointment of guardians ad litem (*Walker* v. *Hull*, 35 Mich. 488), temporary allowances of some kinds (*Moore* v. *Moore*, 48 Mich. 271), and the usual orders and directions regulating the current procedure." In *Sparrow* v. *Ingham Circuit Judge*, 109 Mich. 272, the statute was held not to apply to the case of one committed to an insane asylum; and in *Lorimer* v. *Wayne Circuit Judge*, 116 Mich. 682, an order determining heirs was held not appealable. An order for widow's allowance has been held not appealable in several cases. *Moore* v. *Moore*, supra; *Freeman* v. *Washtenaw Probate Judge*, 79 Mich. 390; *In re Power's Estate*, 92 Mich. 106; *Bordwell* v. *Saginaw Circuit Judge*, 119 Mich. 421; *In re Koch's Estate*, 121 Mich. 667.

If it were the rule that any order of the court made with a view to obtaining testimony were subject to review before the testimony could be procured and the trial proceed, there would be no end to delay. It is well illustrated in the present case, where an order to a witness to produce testimony was litigated four days in the trial court, and over a year later is still in this court upon a question not going to the merits. Such orders, though perhaps final upon the merits of the ancillary proceeding, are not final, nor are they decisive of the merits of the proceeding to which they are ancillary; and unless they deprive one of a right or property they are not appealable, as we have seen, and this must depend upon the nature of the order, rather than upon the circumstances of the particular case. Under the decisions cited, there can be no doubt of the power of a court through subpœna duces tecum, or by a special order, to require one to produce testimony, or appear and be examined, or discover property. That is as far as the order in this case goes. Upon its face it is reg-

ular. There is no reason why an executor should not make disclosure of facts pertaining to the administration of his trust; and, if non compos or dead, his personal representative should do the same, as was held in the case of *Perrin* v. *Calhoun Circuit Judge*, supra. There may be circumstances which will relieve these relators from the production of the books in question, but this is not the method, nor is it the forum, in which to raise the question. Hence we have no occasion to discuss or pass upon the many objections which are raised in the briefs of counsel. It is enough to say that orders of this kind are not appealable. Thus the right to appeal cannot depend upon the place where the books are, or where the representatives of the executor or the executor himself reside, or upon the jurisdiction that the Utah courts may have over either, or whether the proceedings in the probate court of Ottawa county were regular in all things, or whether the petition speaks truly, or the court's conclusion was justified by the evidence, upon the relations of the various parties to this estate.

The writs are denied, with costs.

The other Justices concurred.

KILBY MANUFACTURING CO. *v.* MENOMINEE CIRCUIT JUDGE.

MECHANICS' LIENS — SUBCONTRACTOR — LIABILITY OF CONTRACTOR AND OWNER—PLEADING—AMENDMENT.

Relator contracted to erect a factory, and subcontracted part of the work. The subcontractor brought suit to enforce a mechanics' lien, alleging performance, and that a delay had been caused by relator and waived by it. Relator denied the waiver, alleging damages by the subcontractor's delay, which were recoverable by the owner against relator, and asking that the owner be required to pay relator the balance after

paying the subcontractor's claim as established. *Held*; that relator was not a mere stakeholder, and was properly refused permission to amend by omitting the prayer for personal judgment against the owner because there were other matters of difference between him and the owner not ready for trial.

Mandamus by the Kilby Manufacturing Company to compel John W. Stone, circuit judge of Menominee county, to permit an amendment to an answer to a bill of complaint. Submitted November 15, 1904. (Calendar No. 20,744.) Writ denied November 29, 1904.

Gillett & Clark, for relator.

Brown & Trudell (*John L. Stoddard*, of counsel), for respondent.

MONTGOMERY, J. The relator, in January, 1903, entered into a contract with the Menominee River Sugar Company, by the terms of which relator agreed to construct and equip completely a modern sugar plant, in accordance with plans and specifications given, for the price of $800,000. It was agreed that the building was to be completed ready for the making of sugar by October 1, 1903. On the 14th of March, 1903, the relator sublet a portion of the work of constructing the sugar factory to James H. Tennant, under the name of Bay City Stone Company. The factory was not completed on time. In April, 1904, the subcontractor, Tennant, filed a bill in chancery to enforce a lien for a balance of $21,682.81, claimed to be due him. This bill alleged that complainant had performed the contract between himself and relator fully, that the delay in completion was owing to relator's acts and neglect, and that the relator had waived the delay. The relator and the Menominee River Sugar Company were made defendants. Several answers were filed. The Menominee River Sugar Company denied that the contract had been completed according to its terms, either as to time or manner, but was unable to answer

whether, as between relator and complainant, the former had waived the latter's defaults. The sugar company expressly disclaimed the purpose of recouping in this proceeding the claim which it had against the relator. The answer of the relator made in the first instance denied performance by Tennant, denied the waiver averred, and alleged that damages had resulted from Tennant's failure to perform his contract; stating, however, that the damages were not believed to be as great as the sugar company claimed, but that they were such as the sugar company would be entitled to as against the Kilby Company. The answer asked affirmative relief, and that the sugar company be required to pay over to the Kilby Company the balance due after paying the Tennant claim as established.

Later an application was made by relator to amend this answer by making more specific some of the allegations and by omitting the prayer for a personal decree against the sugar company, for the reason, as stated, that the mutual rights of the Kilby Company and the sugar company were not ripe for settlement or litigation except as concerned the construction of the buildings themselves and the performance of Tennant's contract. This amendment was not permitted by the circuit judge, and the relator asks mandamus to compel the entry of an order permitting such amendment. On the hearing of the application it was admitted (as is, indeed, implied in the proposed answer itself) that there were other matters of difference between the parties defendant over and beyond those which related to the performance of the contract between the complainant and the Kilby Manufacturing Company.

The circuit judge refused the amendment on two grounds:

First. That while, under section 10710, 3 Comp. Laws, the sugar company might have entered into a recoupment, yet the authority to do so, given by this statute, was permissive, and that the company might elect to reserve its action against the Kilby Company.

Second. That, inasmuch as the record showed other matters of dispute between the parties, it would result in requiring the sugar company to split up its cause of action if it be forced to enter upon recoupment in this case, confining such recoupment to such damages only as it sustained by Tennant's default on his contract.

The relator's contention made before us is that in this controversy the relator stands in the position of a middleman, with no interest except to see that his accounts with the other two parties should be settled on the same basis. This position is, to our minds, unsound. There is no privity between Tennant and the sugar company which would entitle the latter to maintain a suit at law against the former. If it should transpire that the damages recoverable by relator in an action against Tennant correspond precisely with the damages which the sugar company suffered on that branch of its contract with the relator, such correspondence would be a mere coincidence, for the result would be reached on a different issue; i. e., Did Tennant perform his contract with the relator to the latter's acceptance? rather than the issue, Did the relator perform his contract with the sugar company? So far from the relator being the stakeholder here, the exact reverse is true. The sugar company occupies that position. It is, of course, open to relator to contest Tennant's claim in this proceeding.

As the conclusion which we reach is that the amended answer would not have availed to effect the attempted change of the relations of the parties, it follows that a writ of mandamus should not be granted. We do not consider the question of our jurisdiction to determine this question on application for mandamus, as to which question see *St. Clair Tunnel Co.* v. *St. Clair Circuit Judge*, 114 Mich. 417; *Grand Rapids, etc., R. Co.* v. *Charlevoix Circuit Judge*, 133 Mich. 122.

The other Justices concurred.

HUGHES v. LOVE.

PARTNERSHIP — ACCOUNTING — DECREE — CONSTRUCTION — MARKET VALUE.

Where, on a bill for partnership accounting, the cause is referred to a commissioner to state the account, with directions to charge defendant with the amounts received by him from the sale of certain timber if it can be ascertained from defendant's books, and, if not, then with the market value, and to credit defendant with the original cost of the timber, the expense of manufacturing and selling the same, with interest on money advanced by defendant, defendant is chargeable with what he received at retail, and is not entitled to have the same charged at its wholesale market value.

Appeal from Mecosta; Palmer, J. Submitted November 15, 1904. (Docket No. 79.) Decided November 29, 1904.

Bill by Fred W. Hughes against William Love for a partnership accounting. From a decree settling the account, defendant appeals. Affirmed.

Mark Norris and *Albert Crane*, for complainant.

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

MOORE, C. J. This case has been here before. It is reported in 129 Mich. 145. A reference to the opinion there filed will aid in understanding the questions involved here. After the case was affirmed here, an accounting was had before a circuit court commissioner, who found there was due the complainant $4,112.70. Exceptions were taken to the findings of the commissioner, and a hearing was had before the circuit judge, who sustained the findings. The case is brought here by appeal.

Most of the questions involved are questions of fact, which have required an examination of the record, but do

not call for discussion. One question, however, is an important one, and its disposition will necessarily dispose of many of the others. It grows out of what construction should be put upon the decree which was affirmed by this court when the case was here before.

The claim of counsel for defendant is clearly stated in his brief, as follows:

"The decree in this case provides, in reference to the manner of stating the account, as follows:

"'That this cause be referred to Alton W. Bennett, Esq., one of the commissioners of this court, to take and state the account between the parties hereto touching the transaction aforesaid; that in stating said account the commissioner charge the said defendant with the amounts received by him from the sale of said timber, lumber, bark, and other forest products, if the same can be ascertained from defendant's books, and, if not, then with the market value thereof; that the commissioner credit the defendant the original cost of said timber, etc., and the expense of cutting, logging, hauling, manufacturing, and selling the same, with interest on the money advanced by defendant, at six per cent. per annum; that defendant also be credited with the loss in closing out his Portland store, not exceeding $300 in all for that item.'

"It will be observed that the decree provides that the defendant be charged with the amounts received by him from the sale of said timber, etc., if the same can be ascertained from defendant's books, and, if not, then with the market value thereof. Upon the hearing we urged that under this decree the defendant was to be charged with the amount received by him from the sale of the Robbins timber; that he was not to be charged, under this decree, with moneys received from the sale of some other timber. It is obviously the meaning of the decree, and any other decree would be a most unjust and oppressive confiscation of property. This amount was to be determined, if it could be, from defendant's books. It was to be determined by tracing the timber derived from the Robbins land by the aid of defendant's books, and ascertaining how much the defendant received for this particular timber. By the aid of defendant's camp books it is easily and readily ascertained how much he received for a considerable portion of this timber product, to wit, wood, bark, posts, poles, and railroad ties, and a portion of the lumber, for the reason that the books show to whom it

was sold, and for what price, and how much was paid; but, so far as a large portion of the lumber and the shingles were concerned, it was practically impossible to ascertain how much was sold and how much was salable, or when the same was sold, or what amount was received therefor. Under those circumstances we urge that what the complainant is entitled under the decree to receive for such lumber and shingles is the market value thereof. The question, therefore, arises what was the market value thereof, and how can the same be ascertained? We contend that the term 'market value' should, under the circumstances of this case, be construed to mean the value of this material at wholesale at Millbrook."

It was the idea of the commissioner that, as he was unable to ascertain from the books of the defendant the amounts received by him for the various forest products, he should be charged with the average retail price at the Portland yard, and credited with the original cost of the timber and the expenses for preparing the same for market and the cost of selling the products manufactured therefrom. Which of these constructions is the right one? A portion of the decree which was affirmed in this court reads as follows:

"The defendant has cut, removed, and disposed of or appropriated to his own use, and sold through his own lumber yard at Portland, Michigan, all of the timber, lumber, bark, and other forest products taken and manufactured from the lands aforesaid, and received the proceeds thereof; but, although thereto requested, has refused to account to complainant for his share of said proceeds. Therefore it is further ordered, adjudged, and decreed that this cause be referred to Alton W. Bennett, Esq., one of the commissioners of this court, to take and state the account between the parties hereto touching the transaction aforesaid; that in stating said account the commissioner charge the said defendant with the amounts received by him from the sale of said timber, lumber, bark, and other forest products, if the same can be ascertained from the defendant's books, and, if not, then with the market value thereof; that the commissioner credit the defendant with the original cost of said timber, etc., and the expense of cutting, logging, hauling, manufacturing, and selling

the same, with interest on the money advanced by defendant at 6 per cent. per annum; that defendant also be credited with the loss in closing out his Portland store, not exceeding $300 in all for that item."

This language is not ambiguous, but clearly contemplates that defendant shall be charged with what he received at retail for these products, and shall be credited with the cost of the timber and the expenses incurred by him in its manufacture and sale. We are of the opinion the commissioner and the circuit judge put a right construction on the language of the decree.

The decree is affirmed, with costs.

The other Justices concurred.

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RAUSCH *v.* BRIEFER.

1. EJECTMENT—DEFENSES—EQUITABLE TITLE.
   The defense of equitable title is not available in ejectment.

2. JUDGMENTS—RES JUDICATA—MATTERS CONCLUDED.
   Where defendant in ejectment files a bill to enjoin the suit at law on the ground of equitable title, and is defeated on the merits, he cannot again raise the question in the suit in ejectment.

3. EJECTMENT—RIGHT OF POSSESSION—LEASE—ESTOPPEL.
   Defendant in ejectment cannot claim a right of possession under a life lease, where his plea and evidence are that he repudiated it, claiming the agreement was for a deed, returned it, and never recognized its validity during his occupation.

Error to Macomb; Tappan, J., presiding. Submitted November 16, 1904. (Docket No. 92.) Decided November 29, 1904.

Ejectment by Christian Rausch against Charles Briefer

and Sarah Briefer. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

This is an action of ejectment. After suit was commenced, defendant Charles Briefer filed a bill in equity to enjoin the prosecution of the suit at law. It is conceded that the legal title is in plaintiff. Defendant's father died in 1854, and his widow afterwards married the plaintiff. Plaintiff afterwards, in 1855, purchased the land, paying the full value thereof. Defendant's claim in the chancery suit was, and now is, that his father had contracted with the former owner for the purchase of the land; that he paid a part of the purchase price; that plaintiff, after his marriage, fraudulently obtained the benefit of that contract; and that in equity the land belongs to the defendant. Issue was duly joined in the chancery suit, the case tried upon the merits, and the bill dismissed; the court holding that there was no foundation for the defendant's claim. After the termination of the chancery suit default of defendant for want of plea was entered, and judgment rendered thereon. A new trial was granted, in which judgment was rendered for the plaintiff.

Defendant's father died before defendant was born, and he lived with, and was brought up by, the plaintiff, as one of the family, until he was 21 years of age. The land purchased by plaintiff was 40 acres. After defendant's marriage he was permitted to occupy 20 acres of the land. By the assistance of plaintiff, a log house was moved on it, some small buildings built, and defendant has occupied and cultivated it since that time. The buildings were moved on and erected with the assistance of the plaintiff. After defendant claimed to have learned about the land contract which his father had made, plaintiff executed to him a life lease of the 20 acres, which was signed by both the plaintiff and the defendant. Defendant claims that he thought it was a deed; that he could not read, and that the instrument was read to him; that on reaching home his wife read

the instrument to him. He then said he did not want that; he wanted a deed. He testified that he thereupon took the lease back to the plaintiff's home, that plaintiff was not at home, and that he left it with his mother. He testified that he refused to accept it. Nothing further was done for some years, when defendant, asserting ownership of the land, began to commit waste. Plaintiff thereupon brought this action. Defendant, in his plea, alleged that when the lease was executed plaintiff informed him that it was a deed; that he could not read; that he procured it to be read to him, and thereupon returned it to the plaintiff.

An examination of the plea and notice, which are not printed in the record, discloses that after his default was set aside and he obtained permission to amend his plea he amended it by giving notice (1) that an agreement had been entered into between himself and the plaintiff that in consideration of and satisfaction for certain work and labor done by him for the plaintiff, plaintiff agreed to convey to him the land; (2) that plaintiff fraudulently obtained title in the manner above set forth; and (3) that he had acquired title by adverse possession.

S. F. Griffiths, for appellants.

O. C. Lungerhausen and *Byron R. Erskine*, for appellee.

GRANT, J. (*after stating the facts*). 1. There are two complete answers to defendant's right to assert an equitable title: *First.* Such defense is not available in a suit at law. *Harrett* v. *Kinney*, 44 Mich. 457. *Second.* That question was litigated, and determined against defendant, in the chancery suit. It is therefore res adjudicata.

2. Under defendant's plea and testimony he had made neither a lease nor a contract for a lease. He asserted an agreement or promise for a deed. As soon as he ascertained that it was a lease, he repudiated it, returned it, never occupied the land under it, and never recognized its validity. He asserted a possession hostile

to the lease and to any title of plaintiff. If he had accepted and recognized the lease, it would have been a bar to his assertion of any other interest in the land. The declaration and the plea put the lease out of the case. *Paige* v. *Willet*, 38 N. Y. 31; *Van Dyke* v. *Maguire*, 57 N. Y. 431; 1 Am. & Eng. Enc. Law (2d Ed.), p. 719; 11 Am. & Eng. Enc. Law (2d Ed.), p. 447.

The court correctly instructed the jury that:

"His own evidence is to the effect that he wholly repudiated the instrument, and I instruct you, as a matter of law, under the evidence in this case, he could not claim right to possession thereunder at the time of the commencement of this suit."

Judgment affirmed.

The other Justices concurred.

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ATTORNEY GENERAL, *ex rel.* REECE, *v.* SHEKELL.

MUNICIPAL CORPORATIONS—OFFICERS—CITY ATTORNEY—APPOINTMENT—TERM—JACKSON CITY CHARTER.

Under Jackson City Charter of 1903 (Act No. 523, Local Acts 1903, tit. 4, § 5), the term of office of the city attorney appointed May 18, 1903, expired on the first Monday in May, 1904, and he was not entitled to hold office under such appointment for two years.

Quo warranto by Charles A. Blair, attorney general, on the relation of Albert O. Reece, against John E. Shekell to try title to the office of city attorney for the city of Jackson. Submitted November 17, 1904. (Docket No. 276.) Judgment for respondent November 29, 1904.

John W. Miner, for relator.

Wilson & Cobb, for respondent.

MOORE, C. J. This is a quo warranto proceeding to determine the title to the office of city attorney of the city of Jackson. On the 18th day of May, 1903, relator was appointed to the office by the mayor, which appointment was confirmed by the common council, as required by the charter of said city, which fixed the term of said appointment at two years. Relator entered upon the performance of the duties of the office, and continued to perform them until on or about the 7th day of June, A. D. 1904. At the 1903 session of the legislature a new charter for the city of Jackson was passed, in which the term of the office of city attorney was fixed at one year. On June 6, 1904, the mayor, relying upon the provision of the new charter, appointed the respondent to said office, which appointment was duly confirmed by the common council, and the respondent is now performing the duties of the office. No charges were at any time preferred against the relator, nor was any attempt ever made to remove him, except as stated above.

Relator contends that by virtue of the provisions of the old charter of said city (section 16, chap. 5, Act No. 376, Local Acts 1897) he was appointed to the office for the term of two years, and that, in the absence of an expression of the legislature of its intention to accomplish such a result, relator's term of office cannot be abolished, or in any way interfered with, except by preferring charges and his removal from office, and that relator cannot be removed or his term shortened merely by implication.

Section 16 reads:

"The city attorney shall be appointed by the mayor by and with the consent of the common council, shall hold his office for the term of two years, and in addition to the other duties prescribed in this act, shall be the legal advisor of the council and of all officers of the city, and shall act as the attorney and solicitor for the corporation in all legal proceedings in which the corporation is interested; he shall prosecute for offenses against the ordinances of the city, and shall attend the meetings of the common council and board of public works when required."

It is conceded the legislature has the power to abolish, cut down, abridge, limit, or extend the term of office of an office created by the legislature when not within any constitutional prohibition, but it is said it would lead to unlimited difficulty and confusion if such changes could be brought about by uncertain language used in legislative enactments, or by placing such construction upon an act of the legislature as is arrived at by implication or inference from the terms and language, and not from the unequivocal intent of the act itself.

The important question, then, is, Did the legislature, by the adoption of the new charter, indicate its intention to shorten the term for which relator was appointed? The new charter was signed June 10, 1903, and given immediate effect. See Act No. 523, Local Acts 1903. Section 5, tit. 4, reads as follows:

"The mayor and city attorney shall hold their offices for the term of one year from and including the first Monday in May of the year when chosen and until their successors are elected or appointed and qualified and enter upon the duties of their respective offices: *Provided*, that the first appointment for city attorney hereunder, shall be made on the first Monday in May of the year nineteen hundred four, and that the appointment of city attorney before said date shall be made in accordance with the provisions of section sixteen of chapter five of the charter of the city of Jackson, as amended by Act number three hundred seventy six of the Local Acts of the State of Michigan for the year eighteen hundred ninety seven."

It is claimed by relator that the latter part of this section indicates an intention either to continue him in office for the full term for which he was appointed, or is so ambiguous that it cannot be said to indicate an intention to shorten his term of office. It is also urged that the provision for the first appointment on the first Monday in May, 1904, is a clerical error, and should have read the first Monday in May, 1905. It must be confessed that, taking all the provisions of the section, they are not as clear as one could wish. We may take notice that the bill which

finally became Act No. 523 was introduced into the legislature before the relator was elected to the office of city attorney. At that time it was not known whether the bill would become a law before the appointment of a city attorney in the spring of 1903, and it was doubtless to provide for that contingency that the latter portion of the section was framed as it is. While it provides that any appointment made before the first Monday in May, 1904, shall be made in accordance with the provisions of the old charter, there is nothing to indicate the intention of the legislature to have it continue for the term fixed in the old charter. Indeed, the language of the section is inconsistent with that idea, for it in express terms provides "that the first appointment for city attorney hereunder shall be made on the first Monday in May, 1904." This left the term of the relator a one-year term, and all of his successors under the terms of the new charter were to be elected to one-year terms. This had the effect of having the terms of the mayor and of the city attorney commence and end at the same time. We do not think we would be warranted in saying the legislature intended the first appointment under the new charter to be made the first Monday in May, 1905, when they have clearly expressed their intention to have it occur the first Monday in May, 1904. We think the respondent was legally appointed.

The prayer for judgment of ouster is denied.

The other Justices concurred.

PEOPLE *v.* MINER.

RAPE—EVIDENCE—TESTIMONY AT EXAMINATION—USE AT TRIAL.

Where prosecutrix in rape is not constant in her accusation of respondent, her stepfather, and claims at the trial that her testimony at the examination was false, her deposition

there taken is admissible only for the purpose of impeachment, and not as substantive evidence of respondent's guilt.

Error to Benzie; Chittenden, J. Submitted November 17, 1904. (Docket No. 294.) Decided November 29, 1904.

George B. Miner was convicted of statutory rape and sentenced to imprisonment in the State prison at Jackson for a period of not less than five nor more than twenty years. Reversed.

D. G. F. Warner, for appellant.

M. E. Louisell, Prosecuting Attorney, for the people.

GRANT, J. Respondent was convicted, under 3 Comp. Laws, § 11489, of rape upon a girl 13 years of age. She is his stepdaughter. The girl was prosecutrix, and made the complaint upon which he was arrested and examined before a magistrate. Upon that examination she detailed the time, place, and circumstances of the crime. He was held for trial before the circuit court. Upon trial in the circuit court the prosecutrix, when produced as a witness on behalf of the people, denied that the prisoner had ever had sexual intercourse with her. The people then introduced her deposition taken before the examining magistrate. The claim of the people is that the girl's mother and the prisoner brought undue influence upon her to induce her to testify falsely, in order to acquit the prisoner.

Under the instructions of the circuit judge, the jury were permitted to convict the prisoner upon the testimony of the prosecutrix taken before the examining magistrate, if they believed it to be true, notwithstanding she denied its truthfulness upon the trial. The court distinctly said to the jury:

"If you believe the story told here on this witness stand is true, your verdict will be, 'Not guilty;' but, if you be-

lieve the story she told on the examination before the magistrate, then your verdict will be 'Guilty.' "

This same question was before us in the case of *People* v. *Elco*, 131 Mich. 523, in which the majority of the court held that, where a witness whom the people were bound to produce had made prior statements contradictory to those made upon the trial, such prior statements could be introduced to impeach her testimony. The respondent was entitled to have the witnesses against him produced in open court. The people could not introduce the prosecutrix's deposition taken upon the examination, where the prosecutrix herself could be produced upon the trial. We are cited to no case which has gone further than to hold that prior statements can be introduced for the purpose of impeachment. No case holds that they be considered by the jury as substantive evidence of the commission of the crime charged. The case is ruled by *People* v. *Elco*.

The crime charged is one of the most heinous and revolting known to the law. If the sole evidence is that of the alleged victim, and she has asserted under oath the commission of an offense, and afterwards denied it under oath, and there is no other evidence pointing to guilt, it would seem that neither law nor justice would permit a conviction.

Without reciting them, we may say that there are other evidences in this record tending to show the guilt of the respondent.

Conviction reversed, and new trial ordered.

The other Justices concurred.

In re OWEN'S ESTATE.

WILLS—LEGACIES—ESTATE CHARGED WITH PAYMENT.

Where a will devises all testatrix's real property to her daughter, and bequeathed to her all her mortgages, notes, and other securities, "with the understanding that she shall pay" certain specific legacies out of her portion of the estate, the legacies are a charge upon the estate in general, including the real as well as the personal property.

Error to St. Clair; Law, J. Submitted November 17, 1904. (Docket No. 108.) Decided November 29, 1904.

Petition by Niram B. Sackett against Matilda J. Broadbridge, executrix of the last will and testament of Matilda Owen, deceased, to compel the payment of certain legacies. The petition was granted in the probate court, and defendant appealed to the circuit court. There was judgment at the circuit affirming the order of the probate court, and defendant brings error. Affirmed.

One Matilda Owen died testate. By the second clause of her will she bequeathed to Marcus D. Terry and her daughter, Matilda J., all her real estate, and an interest in boats and vessels. By the third clause she bequeathed to the same parties all her "mortgages, notes, bonds, or other securities, * * * with the understanding that they shall pay to Burt Sackett the sum of five hundred dollars, and to Augusta Lenz the sum of one hundred dollars out of their portion of my estate."

By a codicil she revoked the provisions of her will to Terry, and made her daughter, Matilda, the sole legatee; charging her with the payments of the same amounts to Sackett and Lenz as were contained in the original will, and in the identical language, and $100 to her sister. The probate court entered an order that these legacies were a charge

upon the estate in general, including the real property. The claim of the appellant is that these legacies are chargeable upon the personal estate only. On appeal the circuit court affirmed the order of the probate court.

Moore & Brown, for appellant.

James Swan and *Niram B. Sackett*, for appellee.

GRANT, J. (*after stating the facts*). The case is before us upon the record only, no bill of exceptions having been settled. There is no room for construction, for the intent of the testatrix too clearly appears within the four corners of the will. The will evidently makes disposition of all her property. She made certain specific bequests, and devised the residue (naming the real and personal property) to her daughter, charged with the payment of three specific sums to the persons named, not out of the notes, mortgages, etc., mentioned, but out of the entire portion of the estate devised to her. The language is wholly inappropriate to express an intention to make these three bequests a charge upon any specific portion of the property devised.

Judgment affirmed.

The other Justices concurred.

VILLAGE OF ROYAL OAK *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

CONDEMNATION PROCEEDINGS—CROSSING RAILROAD—REVIEW.

On review of proceedings to condemn land for a street across a railroad right of way, the fact that no allowance was made for keeping the crossing in repair will not be considered, in the absence of an exception to the verdict on that ground.

Error to Oakland; Smith, J. Submitted November 17, 1904. (Docket No. 102.) Decided November 29, 1904.

Condemnation proceedings by the village of Royal Oak against the Detroit, Grand Haven & Milwaukee Railway Company to open a street. There was judgment for petitioner, and respondent brings error. Affirmed.

L. C. Stanley, for appellant.

Fred A. Baker, for appellee.

GRANT, J. This is a proceeding to open a street across the right of way of the respondent's road in the village of Royal Oak, between Fourth street and Third street. The respondent contends that the proposed street crosses a part of its station grounds. The evidence does not bear out this contention.

The case is ruled, both in its facts and the conclusions to be deduced therefrom, by *Com'rs of Parks and Boulevards of Detroit* v. *Railway Co.*, 93 Mich. 58.

It is also urged that the verdict should be set aside because the record shows indisputably that no allowance was made for keeping the crossing in repair, and that the jury awarded only the first cost of construction. No exception was taken to the verdict below upon this ground, and it cannot now be considered here.

Judgment affirmed.

The other Justices concurred.

DOUDT *v.* LOVERIDGE.

LAND CONTRACT AS MORTGAGE—EVIDENCE.

Evidence examined and *held* that the dismissal on the merits of a bill to have a land contract declared a mortgage was proper.

Appeal from Branch; Yaple, J. Submitted November 18, 1904. (Docket No. 110.) Decided November 29, 1904.

Bill by Addie Doudt and Louisa Doudt against Henry C. Loveridge and Jessie M. Loveridge to have a land contract declared a mortgage, and for an accounting. From a decree dismissing the bill, complainants appeal. Affirmed.

Charles M. Weaver, for complainants.

Campbell & Johnson, for defendants.

HOOKER, J. The complainants in this cause owned a farm and personal property in Branch county. Upon the farm was a mortgage of $400, owned by one Baldwin, with some accumulated interest.

They had managed this farm for some years, and were so engaged when, in August, 1897, they were arrested upon a charge of malicious injury to property. They employed counsel, giving him a mortgage of $500 upon the property to secure his payment and disbursements, which he claims was so applied, including payment to a firm of lawyers whom he was authorized to employ as associates. They also gave a chattel mortgage, the property covered by which was ultimately sold by the sheriff. Addie Doudt was ultimately convicted and imprisoned for a year and a half in the Detroit house of correction. Louisa Doudt was never convicted, being released from custody in September, 1898, something over a year after her arrest.

Counsel obtained from Addie a bill of sale to Louisa of her interest in the personal property. There was some litigation or threatened litigation with the sheriff, which counsel looked after, and $225 was ultimately realized from that source and applied on services, and a portion upon the $500 mortgage. H. C. Loveridge ultimately took assignments of both real-estate mortgages, and fore-

closed them, bidding the premises in for $1,075.52 in September, 1900. The premises were not redeemed. Complainants appeared in the case by counsel, but are said to have been poor and unable to pay him, and were compelled to abandon their defense.

On May 29, 1901, they entered into a contract whereby they leased the land from Loveridge for one year at a rental of $75. At the same time he executed and delivered to them a writing wherein he agreed to sell and deed to them the premises at any time before February 1, 1902, for $1,200 upon demand and payment according to its terms. After the expiration of this period and the lease, a demand was made for the possession, which being refused, summary proceedings were instituted, and thereupon the complainants filed the bill in this cause to have said last-mentioned agreement declared a lien, and for an accounting.

Upon the hearing the bill was dismissed. Our consideration of the testimony leads us to the same conclusion reached by the learned circuit judge. The question is wholly one of fact, and it would be profitless to discuss it further.

The decree is affirmed, with costs.

The other Justices concurred.

STEBBINS v. DEMOREST.

1. LANDLORD AND TENANT—CROPPERS—RIGHTS.
   A cropper acquires only the right to make and harvest a crop and to enter for that purpose.

2. SAME—LEASE—RIGHTS OF LESSOR.
   After leasing premises, reserving the right to a cropper to enter to harvest a growing crop, the lessor has no right to permit the cropper to plow up the crop and sow another in its place, and if the cropper does so he is a trespasser.

3. SAME—CROP MADE BY TRESPASSER—CONVERSION—TROVER.
A crop made by a trespasser on leased land under authority of the lessor belongs to the lessee, and he may maintain trover against the cropper for its conversion.

Error to Shiawassee; Smith J. Submitted November 18, 1904. (Docket No. 117.) Decided November 29, 1904.

Trover by John C. Stebbins against John Demorest for the conversion of certain oats. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

A. G. Shepard, for appellant.

Walsh & Pardee, for appellee.

HOOKER, J. One Mrs. Murphy, being the owner of a farm, leased the same upon shares to plaintiff by an instrument in writing. This instrument was signed by both parties, and contained their respective agreements in relation to the use of the place, the furnishing of seed, division of crops, etc.; but it seems to have contained the essential elements of a lease, giving the right to exclusive possession, except as limited by the following provision:

"And first party reserves the wheat fields now in wheat, from the operation of this lease until harvested, and the right to go on and harvest the same next season."

Plaintiff took possession under the lease.

At the time the lease was made, the wheat fields mentioned had a growing crop upon them, sown by the defendant as a cropper, by authority of Mrs. Murphy. This wheat turned out poorly, and defendant, being of the opinion that portions of it were not worth harvesting, desired to sow oats upon the ground. He had conversations with Mrs. Murphy and the plaintiff. The former was in doubt regarding her right to authorize it, while the latter denied it and refused to allow the defendant to do so, and they were unable to come to any agreement about it. De-

fendant sowed the oats, however. Plaintiff testified that they were sown without his knowledge, and that he forbade defendant harvesting them. He did harvest them, however; doing the work and drawing them away upon Sunday, to avoid the service of any process to prevent it. Subsequently he drew one-third of the oats to Mrs. Murphy, as her share; that being the aliquot part of the wheat that was her due under the original cropping arrangement.

The plaintiff thereupon brought an action of trover for the conversion of the oats before a justice of the peace, and obtained a judgment, from which the defendant appealed. Upon the trial at circuit, the judge directed a verdict for the defendant, and the plaintiff brings error.

At the time of making the original contract for cropping, the defendant acquired only the right to sow and harvest wheat upon the premises. This gave him the necessary right of entrance for these purposes, and nothing more.

The subsequent lease gave to plaintiff all other rights of possession and use, and, when defendant entered and sowed and harvested oats, he was a trespasser, for he had no such right, and Mrs. Murphy's consent, if given, does not affect the question. The fact that he sowed oats as a trespasser did not give him title to the crop.

Counsel for the defendant claims that the plaintiff had no right to the possession of the farm until the wheat was harvested, which he says was but a week or so before the oats were cut and drawn away. Our understanding is that the defendant was a cropper, with only the rights of a cropper, viz., to make and harvest a crop of wheat. He had no exclusive possession of the land, and no right to use the land for a spring crop when he found his wheat turning out poorly. The plaintiff was in full possession of the place after April 1st, subject to the obligation of permitting defendant to harvest his crop, which he permitted. As the growing crop of oats did not belong to the trespasser, it became the property of the owners of the

premises—i. e., the lessee, plaintiff—who can maintain trover therefor.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

STEVENSON *v.* STERLING.

STATUTE OF FRAUDS—AGREEMENT TO PAY EMPLOYÉ'S BOARD.

The statute of frauds has no application to a case where an employé, working for a stated salary and expenses, procured board on the credit of his employer, and it was understood by all parties that the employer was responsible for the board.

Error to Montcalm; Davis, J. Submitted November 18, 1904. (Docket No. 121.) Decided November 30, 1904.

Assumpsit by Hampton E. Stevenson against Lew Sterling for the amount of a board bill. From a judgment for plaintiff, defendant brings error. Affirmed.

Frank A. Miller and *V. H. & H. H. Smith*, for appellant.

L. C. Palmer, for appellee.

GRANT, J. This suit was brought in justice's court to recover $8.50, which plaintiff claimed to be due him from the defendant for a few days' board for his employé named Hubbs. Plaintiff produced evidence tending to show that Hubbs was employed by the defendant for a stipulated sum and his traveling expenses; that Hubbs told the plaintiff of the arrangement, and also told defendant of the arrangement he had made to board with plaintiff when

doing business at Stanton, where plaintiff lived and kept an hotel; that this arrangement was known and understood by the defendant; that defendant recognized his liability, and during Hubbs' employment, thinking the price was too high, discontinued the board there, and procured board for Hubbs at another place. The defendant admitted a contract with Hubbs for employment, and that he was to pay expenses not exceeding a certain amount per week.

The case was submitted to the jury upon the theory of an original liability on the part of the defendant to pay plaintiff for Hubbs' board. Defendant denied any contract or arrangement with Stevenson whereby he was to pay it. The court submitted the case upon the theory that there was an arrangement between Sterling and Hubbs that Sterling was to pay Hubbs' expenses; that he understood Hubbs' board at the hotel was a part of that expense, and that the three parties understood that defendant was to pay for it.

The record contained 77 pages, and the briefs of counsel 53 pages. There are 49 assignments of error; some relating to the rulings upon testimony, some upon the charge of the court, and others upon the refusal to grant requests. No principles or rules of law are involved which are not familiar to the profession. It would be of no benefit to enter into a discussion of them. The court properly instructed the jury that the statute of frauds had no application, and, as above stated, left it to them to determine whether there was such an arrangement between the three as to constitute an original liability on the part of the defendant. There were no errors in the rulings of the court upon the testimony.

The judgment is affirmed.

The other Justices concurred.

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Case 1
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138 302
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146 2717

TOEPEL *v.* WAYNE CIRCUIT JUDGE.

CONTEMPT—REVIEW—CERTIORARI—MANDAMUS.

Mandamus or certiorari will not be granted to review the ruling on a motion to quash contempt proceedings prior to the final determination thereof.

Mandamus by Otto T. Toepel to compel Joseph W. Donovan, circuit judge of Wayne county, to quash certain contempt proceedings. Submitted November 28, 1904. (Calendar No. 20,837½.) Writ denied November 30, 1904.

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

PER CURIAM. Application for writ of mandamus or certiorari to review a motion to quash contempt proceedings. Denied for reason that these writs are not proper remedies at this stage of the proceedings. See following authorities: *Palms* v. *Campau*, 11 Mich. 109; *Detroit, etc., R. Co.* v. *Backus*, 48 Mich. 582; *Grand Rapids, etc., R. Co.* v. *Weiden*, 69 Mich. 572; *People* v. *Thompson*, 108 Mich. 583; 4 Enc. Pl. & Prac. 236. Also the following unreported memorandum cases: *Detroit, etc., R. Co.* v. *Salliotte* (19,972½), decided May 13, 1903, and *In re Keenan* (20,581½), decided June 16, 1904.

In re MOSER.

138 302
Case 2
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1. WITNESSES—PRIVILEGE—SELF-CRIMINATING EVIDENCE.

The protection against self-incrimination afforded by the State and Federal Constitutions is personal to the witness, and cannot be used by him for the protection of others, no matter how closely associated they are with him.

2. SAME — INCRIMINATING TENDENCY OF TESTIMONY — DETERMINATION OF QUESTION.

The witness himself is not the sole judge of whether his testimony will tend to incriminate himself, but he must answer a question put to him unless the answer may actually tend to criminate him. Where it is perfectly apparent that the answer cannot injure him the court should compel him to answer.

3. SAME—CORPORATE OFFICERS—PRODUCTION OF BOOKS.

The president of a corporation, subpœnaed to testify before the grand jury, which was investigating charges of corruption against municipal officers in connection with a contract between the city and the corporation, could not refuse to produce the books of the corporation, by invoking the provisions of the State and Federal Constitutions protecting witnesses from self-incrimination, where he himself was not connected with the corporation at the time covered by the investigation, and was in no way connected with or interested in the contract under investigation, and had no personal knowledge of the entries which were being investigated, so that nothing contained in the books could in any way incriminate him. MOORE, C. J., dissenting.

4. SEARCHES AND SEIZURES — CORPORATE BOOKS — COMPELLING PRODUCTION.

One cannot be compelled to produce his own books, or the books of another which are under his control, where their production would tend to criminate him, nor can his clerk be required to produce them; but when, as the agent of a corporation, he makes entries on the corporate books, and those books are in the actual and legal possession and control of another officer of the corporation, or of the corporation itself, such officer may be compelled to produce them, in a proper case, under a subpœna duces tecum, and such compulsion does not amount to an unjustifiable search and seizure, within the prohibition of the Constitution.

Certiorari to Saginaw; Beach, J. Submitted November 20, 1903. (Docket No. 239.) Decided December 7, 1904.

Augustus G. Moser was convicted of contempt in refusing to produce certain books of account before a grand jury. Affirmed.

The petitioner was convicted of contempt of court, in refusing to produce before the grand jury, in obedience to a subpœna duces tecum, certain books of account of the Bartlett Illuminating Company. The case is before us for review on certiorari. The defenses now urged are (1) that the entries might tend to criminate the petitioner; (2) that, as the avowed purpose in demanding the books was to obtain evidence against other officers of the Bartlett Illuminating Company, compulsory process for their production was in violation of section 26, art. 6, of the Constitution of Michigan, and of the fifth amendment of the Constitution of the United States.

The material findings of the court are:

"1. That on the 9th day of April, 1903, and for some days prior, said grand jury were engaged in investigating and inquiring into certain alleged violations of the provisions of section 11312 of the Complied Laws of 1897, which said section makes it a felony for certain municipal officers to corruptly accept any gift or gratuity, or any promise to make any gift or to do any act beneficial to such officer, under an agreement or with an understanding that his vote, opinion, or judgment shall be given in any particular manner or upon a particular side of any question which is or may be by law brought before him in his official capacity.

"2. That said books and records referred to in said subpœna contain material and necessary evidence to aid said grand jury in making an investigation, in determining whether said section of the statute had been violated.

"3. That said respondent on said 9th day of April, 1903, was the president of said company; was in possession and had full control of the books and records described in said subpœna; that it was within his power and ability, if he so desired, to produce to said grand jury the books and records called for by said subpœna.

"4. That said respondent on said 9th day of April appeared before said grand jury and refused to produce the books and records called for by said subpœna, and further refused and declined to produce any one of said books and records to said grand jury as commanded by said subpœna.

"5. The respondent's refusal to produce said books to said grand jury for the year 1900, and from January 1 to

July 22, 1901, was not for the reason that the entries contained in said books or records would tend to criminate him, and he repeatedly stated to said grand jury that the books and records called for by said subpœna, from January 1, 1900, to July 22, 1901, could in no way tend to criminate him.

"6. That said respondent's refusal to produce the books and records called for by said subpœna for the year 1900, and from January 1 to July 22, 1901, was a violation of section 1098 of the Complied Laws of 1897.

"7. That the production of the books of the Bartlett Illuminating Company for the year 1900 and the year 1901, containing the accounts up to the 22d day of July of that year, could in no way tend to criminate the respondent, and that he should produce to this court, before said grand jury, the books and records called for in said subpœna, from January 1, 1900, to July 22, 1901.

"8. That the respondent was in no way connected with or interested in said municipal contract; that in fact he was not in this State at the time, nor interested or connected with said company until nearly a year after said matter was closed, and that no bill is pending before said grand jury against him; and that said jury is not considering any matter in which he is personally interested."

Weadock & Purcell and *James H. Davitt*, for petitioner.

John F. O'Keefe, Prosecuting Attorney, for the people.

GRANT, J. (*after stating the facts*). Under the Constitutions of Michigan and the United States, no witness can be compelled to give testimony which might tend to criminate himself or expose him to a criminal prosecution. The provision in each Constitution is the same. Many cases have arisen in the courts, both of the States and of the United States, under this provision. The only difficulty has been in determining whether the facts of each case bring the party under the protection afforded him by the Constitution.

The shield afforded is personal to the witness, designed for his own protection, and not for the protection of others.

The witness himself is not the sole judge of whether an answer to a question will tend to criminate himself. The due administration of the law does not permit him to arbitrarily hide behind a fancied or intangible danger to himself. It gives him no right to attempt to avert real danger from others, no matter how closely he may be associated with them. Unless the answer to the question may tend to criminate himself, he must answer, whatever the consequence may be to others; otherwise the administration of justice would be seriously obstructed.

The position on behalf of the petitioner appears to be that the witness himself is the sole judge, and that, when he says the answer may tend to criminate him, the controversy is closed. The Constitution vests in the witness no such arbitrary power, and we are cited to no decision which goes to that extent.

Counsel for petitioner cite and rely upon *People, ex rel. Taylor*, v. *Forbes*, 143 N. Y. 219, and *Adams* v. *Lloyd*, 3 Hulst. & Nor. 351. The language of those cases extends the right of the witness to protect himself as far as any which I have examined. In *Adams* v. *Lloyd* it is said:

"Where the judge is perfectly certain that the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege, then the judge is right in insisting on his answering the question."

In *People, ex rel. Taylor*, v. *Forbes* the testimony of the witness and the facts elicited clearly showed that the replies to the questions put might naturally tend to criminate the witness. In that case the court say:

"The weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution. * * * Where it is not so perfectly evident and manifest that the answer called for

cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected."

In *Ex parte Senior*, 37 Fla. 1, it is said:

"It has never been recognized that he [the witness] alone has the right in all cases to decide whether his answer will tend to criminate him. Such a rule would be mischievous and enable unscrupulous witnesses to defeat the ends of justice."

In the recent case of *Ex parte Irvine*, 74 Fed. 954, it is said:

"The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. * * * It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime."

Considering the importance of the question, I deem it proper though this opinion may be long, to here quote the language of Chief Justice Marshall in *Burr's Trial* [Fed. Cas. No. 14,692 *e*]:

"It is a settled maxim of law that no man is bound to criminate himself. This maxim forms one exception to the general rule which declares that every person is compellable to bear testimony in a court of justice. For the witness who considers himself as being within this exception, it is alleged that he is, and from the nature of things must be, the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question if he will say, upon his oath, that his answer to that question might criminate himself.

"When this opinion was first suggested, the court conceived the principle laid down at the bar to be too broad, and therefore required that authorities in support of it might be adduced. Authorities have been adduced, and have been considered. In all of them the court could perceive that an answer to the question propounded might criminate the witness, and he was informed that he was

at liberty to refuse an answer. These cases do not appear to the court to support the principle laid down by the counsel for the witness, in the full latitude in which they have stated it. There is no distinction which takes from the court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions, no direct answer to which could in any degree affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. The *Case of Goosely* [Fed. Cas. No. 15,230], in this court, is perhaps the strongest that has been adduced. But the general doctrine of the judge in that case must have referred to the circumstances which showed that the answer might criminate him.

"When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule, and of the exception to that rule, by observing that course which, it is conceived, courts have generally observed. It is this: When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may* criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily, then, from this statement of things, that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. * * *

"The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer *may* disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be, and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer." 1 *Burr's Trial*, 243.

Other cases might be cited, but these we deem sufficient. It follows that, if the facts are as stated in the finding of the court, the petitioner was properly convicted of contempt. The question was determined by the court below upon the testimony of the petitioner, given before the grand jury. From that it is established that, during the time in which the books sought and ordered to be produced were kept, and the entries therein made, the petitioner had no connection whatever with, and no interest in any form in, the Bartlett Illuminating Company, or any of its officers. He did not during that time live in this State, but lived in Little Rock, Ark. He testified that he knew nothing about those entries personally, and had no part in making them. He testified as follows:

"I was not here during the letting of the contract by the city to the Bartlett Illuminating Company for lighting. I had no connection whatever with that matter. That was long before I came here. I was not in the city at that time. * * * I had nothing to do with the books in 1900. I don't think there is anything in these books that would tend to criminate me in 1900. * * *

"*Q.* Does the customers' ledger contain anything for the year 1900 that might tend to criminate you? * * * *A.* Personally; no, sir.

"*Q.* You decline to produce the customers' ledger for 1900? *A.* Yes, sir.

"*Q.* Not because it would tend to criminate you; that's not the reason you decline to do it? *A.* Not the books for 1900; no, sir.

"*Q.* There is nothing in the books of 1900 that would tend to criminate you? *A.* No, sir."

He further testified that he refused to produce the books under the advice of his attorneys.

"They have advised me not to produce any of the books. They said I shouldn't do it, because I didn't have to do it."

He nowhere testified that his attorney advised him that there was anything in the books during the time covered that could in any way tend to criminate him. In one part of his examination, after testifying that he did not see how the production of the books during that time could in any way criminate him, he said:

"I decline to answer these questions on the ground our attorney says. 'We don't have to.' That is the sole reason I decline to produce them."

Again he testified that he did not decline to produce them for the year 1900 because they would tend to criminate him, for he said they would not, but he declined to produce them on the advice of his attorney. These statements are reiterated several times during his examination. The only basis furnished in his testimony which could be construed as protecting him is this:

"*Q.* The only question is this: Whether or not you decline to produce those books before this grand jury because there is evidence in the books that would tend to criminate you; that is what we want to know; and whether that is the reason why you decline to produce the books? *A.* I decline to answer the question on the ground it might have a tendency to criminate me.

"*Q.* The production of the books? *A.* Yes, sir.

"*Q.* You think, then, there is some evidence in those books, that, if it should come to the light of this grand jury, might tend to criminate you? *A.* I decline to answer.

"*Q.* You decline to answer that question? *A.* Please state the question again.

"(Question read.) *A.* It might."

This testimony is followed by the statement again that he had no connection whatever with the letting of the con-

tract which the grand jury were investigating; that it was long before he came there; that he had nothing to do with the Saginaw business then, and knew nothing about it. It is then asked why there was evidence in the books which might tend to criminate him, to which he replied:

"There may be some little things that would come up from time to time, where I might have given a few things away, perhaps—lamps or things of that kind—that might have a tendency to criminate me, although there is nothing in it; absolutely nothing."

From this evidence, I think it manifest that he only based his claim for the privilege upon the entries made upon the books after he became the president of the company, and not that there was anything in the former entries which could by any possibility tend to criminate him. I think it apparent that the sole basis for the petitioner's refusing to produce the books was his desire to protect the officers of the corporation during the time under investigation, and those with whom they dealt as officers of the municipality.

In re Peasley, 44 Fed. 271, is very similar in its facts to this case, and the Federal court (Judge Gresham presiding) held the witness guilty of contempt.

In *Brown* v. *Walker*, 161 U. S. 591, it was held that the Federal act of 1893 shielded the witness from criminal prosecution in consequence of his testimony. The court, however, recognized the rule applicable here, in holding that the witness could not refuse to testify against his fellow officers, saying:

"It would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

See, also, *U. S. Express Co.* v. *Henderson*, 69 Iowa, 40.

2. Does the production of these books under the order of the court amount to unjustifiable search and seizure prohibited by the Constitution? The learned counsel for

the petitioner state their position upon this point as follows:

"There is no difference in principle between the forcibly seizing and carrying away of such books by the sheriff or other court officer, and the compulsory production of them on a subpœna duces tecum. If the officers of this company, whom the people are seeking to indict, have any rights in the information contained in those books, or in the books themselves, which would enable them to resist the sheriff if he sought to take the books away by force, then obedience to a subpœna duces tecum cannot be compelled unless the law will sanction an attempt to do by indirection what it would be unlawful to do directly. * * *

"And therefore we contend that, even if there was nothing in these books which would involve Mr. Moser in a criminal charge, still he was right in his refusal to produce them if they contained evidence of the guilt of other officers and members of the corporation—persons who, if actually present, would have a right to take them and keep them for their own protection, as against all the powers of the prosecution."

The difference between seizing record books and documents of another upon a search warrant, and the production of the same upon a subpœna duces tecum, is apparent. In the former the owner is absolutely deprived of all possession and control thereof, and they and their contents are subject to the gaze and examination of others. In the latter the records and documents are not taken from the possession of the owner. They are produced in court by him in his possession, and only such matters therein as pertain to the issue involved can be subject to the examination of the proper officers of the court. The production of books and papers for inspection and use in suits, both civil and criminal, is as old as the law itself. Whether the production is by search warrant or by a subpœna duces tecum, the necessity therefor must be shown to the court, and the particular documents or records required sufficiently specified in the application; and, in either process, courts will permit only the examination of such parts thereof as relate to the issue before the court. The pro-

cess for search and seizure is the one usually resorted to to determine whether property stolen or unlawfully seized is in the possession of another. The usual process to secure evidence from records and documents is by subpœna duces tecum, and no case is cited where an attempt has been made to proceed by search warrant. No private individual can be compelled to produce his books or papers for the purpose of affording evidence against himself in a criminal prosecution. Neither can the subterfuge of subpœnaing his clerk, who has access to or temporary possession of the books for the purpose of his employer's business, be resorted to, to compel a production of the books. The possession of the clerk in such case is the possession of his employer. The books of a corporation are not the private property or books of petitioner or any other officer of the company. The corporation is a distinct entity. *Randall* v. *Dudley*, 111 Mich. 437; *Rough* v. *Breitung*, 117 Mich. 48, and authorities there cited.

The petitioner asserts that the conduct of his predecessor, the former president of the corporation, is under investigation by the grand jury. Mr. Moser testified that he, as president, had possession and control of the books required. They are not in his possession as owner thereof, but as an officer of the company. The former president presumably was entitled to the control in the same manner as is Mr. Moser, but when he ceased to be president he ceased to be entitled to the actual possession or control of the books, and the right of actual possession became vested in Mr. Moser, as president. If the former president made or caused to be made entries upon the books of his principal which tend to convict him of crime, neither the corporation itself, which is not subject to a penalty, nor any agent thereof who has the actual and legal possession of the books, can refuse to produce such entries.

The question was not involved in *Boyd* v. *U. S.*, 116 U. S. 616. The court characterized the proceeding in that case as "an attempt to extort from the party his private books and papers to make him liable for a penalty, or

to forfeit his property." It was equivalent to compelling him to produce evidence of his own criminality. It did not involve entries which he had made in books belonging to another.

In *Re Peasley*, 44 Fed. 271, the grand jury were investigating certain alleged violations of the interstate commerce law by the general agent of a railroad company. Mr. Peasley was its treasurer, and had control and possession of the documents sought to be produced before the grand jury. He was held guilty of contempt for refusing to produce them. That case seems to be the parallel of this.

In *Brown* v. *Walker*, 161 U. S. 591, the auditor of a railroad company was asked whether it had transported coal at a lower rate than those established between terminal points, and whether any rebate, refund, or commission had been paid by the company, and to state the amount, if any. He was held guilty of contempt in declining to answer. If the books had contained entries of such rebates and illegal rates, in the handwriting of the officer of the company whose conduct was under investigation, or made by his authority, and the auditor had control or possession of the books, could he refuse on the ground of an unjustifiable search and seizure? There would be no seizure of the officer's books or papers. Neither would there be any seizure of the corporation's books or papers. The officer in whose possession they are would produce them in court, still in his possession, and show the entries required, if there were any.

In *U. S. Express Co.* v. *Henderson*, 69 Iowa, 40, the agent of an express company was subpœnaed to produce the books of the corporation, for the purpose of showing that the company had transgressed the law. The refusal to produce was based upon the identity of the witness with his employer, and this was held insufficient.

We think the rule is this: One cannot be compelled to produce his own books, or the books of another, which are under his control as agent or otherwise, where their

production would tend to criminate him; neither can his clerk, whose possession is his possession, be required to produce them; but when, as the agent of another, he chooses to make entries on the books of that other, and those books are in the actual and legal possession and control of another officer of the corporation, or of the corporation itself, such officer may be compelled to produce them, in a proper case, under a subpœna duces tecum.

The unreported case of *Frazer* v. *Circuit Judge* does not apply here. In that case the officers of the Detroit City Railway Company, in whose possession and control the books were, and who were under investigation by the grand jury, were ordered by a subpœna duces tecum to produce the books. It requires no argument to show that they were thus required to produce testimony against themselves and were therefore within the protection of the Constitution. In that case the circuit judge found "that Robert J. McKenny, the person against whom the order for the production of said books and papers is sought, is but an employé of the said Detroit City Railway Company, as one of its bookkeepers, and has no control over said books and papers independent of the officers of said corporation, and has access to them and uses them simply in a clerical capacity; said books being under the actual and legal control of the officers of said company at the office of said company."

The order of the court below is affirmed.

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

MOORE, C. J. (*dissenting*). A grand jury was convened in Saginaw county. It was charged by the circuit judge to investigate the conduct of parties connected with certain municipal contracts. While pursuing the investigation, Augustus G. Moser was examined as a witness before the grand jury. By a subpœna he was commanded to bring certain books of the Bartlett Illuminating Company, a corporation of which he has been president

since July 24, 1901. Mr. Moser appeared before the grand jury, but refused to produce the books. This action was reported to the circuit judge, who, after a hearing, made an order that Mr. Moser produce all original books of the Bartlett Illuminating Company for the year 1900, and all the books for the year 1901, to and including the 22d day of July, 1901, called for by said subpœna, and, in case respondent is not able to seal said books of the year 1901 so as not to disclose the entries made therein on and after the 22d day of July, 1901, that then he produce a copy or transcript of all entries of January 1, 1901, to July 22, 1901; that said books be produced before said grand jury at the court-house in the city of Saginaw on or before the 29th day of April, 1903, at 9:30 o'clock in the forenoon of said day, and, in default thereof, that he stand committed to the common jail of the county. The case is brought here by certiorari to review the action of the circuit judge.

It is insisted the relator was under no obligations to produce the books, for two reasons: *First*, that the entries might tend to criminate him; and, *second*, that, as the avowed purpose of the people in demanding them was to obtain evidence against his fellow officers and directors of the Bartlett Illuminating Company, compulsory process for their production was in violation of section 26 of article 6 of the Constitution of Michigan, and of the fifth amendment of the Constitution of the United States.

The circuit judge was of the opinion that the production of such portion of the books as his order required Mr. Moser to produce would not tend to criminate him. This opinion is based upon the following testimony of Mr. Moser:

"I don't see how it [the books] would have a tendency to criminate me, because I wasn't here at that time. * * * I decline to produce the books on the advice of our attorneys. * * * I don't know whether the production of the books would tend to criminate me or not. * * * I have been connected with the Bartlett Illuminating

Company since July 23, 1901, as president of the company. I was not here during the letting of the contract by the city to the Bartlett Illuminating Company for lighting. I had no connection whatever with that matter. That was long before I came here. I was not in the city at that time. * * * I had nothing to do with the books in 1900. I don't think there is anything in these books that would tend to criminate me in 1900. * * *

"*Q.* Does the customers' ledger contain anything for the year 1900 that might tend to criminate you? * * * *A.* Personally; no, sir.

"*Q.* You decline to produce the customers' ledger for 1900? *A.* Yes, sir.

"*Q.* Not because it would tend to criminate you; that's not the reason you decline to do it? *A.* Not the books for 1900; no, sir.

"*Q.* There is nothing in the books of 1900 that would tend to criminate you? *A.* No, sir."

Counsel for petitioner insist this testimony should be read in connection with the following testimony of Mr. Moser, and, when so read, brings him within the rule that he shall not be compelled to produce testimony which may tend to criminate him:

"*Q.* Why? *A.* As I stated awhile ago, on the advice of our attorneys.

"*Q.* Do you decline to produce those books to this grand jury for the reason that the production of those books would tend to criminate you? *A.* I decline to produce the books on the advice of my attorneys. Yes, sir.

"(Question read.) *A.* It might have a tendency to criminate me.

"*Q.* You say, then, Mr. Moser, that the production of those books—the entries that they contain—might have a tendency to criminate you, and that is the reason why you declined to produce them? *A.* Well, I don't see how it would have a tendency to criminate me, because I wasn't here at that time.

"*Q.* What this grand jury wants to know is whether or not there is evidence in those books that, if produced, would tend to criminate you, and that is the reason why you decline to produce those books before this grand jury. *A.* No, sir; I decline to produce the books on the advice of our attorneys.

"*Q.* You don't decline to produce the books because the production of the books would tend to criminate you? *A.* Why, I don't know whether the production of the books would criminate me or not.

"*Q.* The only question is this: Whether or not you decline to produce those books before this grand jury because there is evidence in the books that would tend to criminate you; that is what we want to know; and whether that is the reason why you decline to produce the books? *A.* I decline to answer the question on the ground it might have a tendency to criminate me.

"*Q.* The production of the books? *A.* Yes, sir.

"*Q.* You think, then, there is some evidence in those books, that, if it should come to the light of this grand jury, might tend to criminate you? *A.* I decline to answer.

"*Q.* You decline to answer that question? *A.* Please state the question again.

"(Question read.) *A.* It might.

"*Q.* You mean that, do you? *A.* Yes, sir. I have been connected with the Bartlett Illuminating Company since July 23, 1901, as president of the company. I was not here during the letting of the contract by the city to the Bartlett Illuminating Company for lighting. I had no connection whatever with that matter. That was long before I came here. I was not in the city at that time. I did not know Mr. Hermann. Did not know Mr. Bonta at that time, only by reputation. He was connected with the same company I was, but I hadn't met him at that time. I had nothing to do with the business in Saginaw then, and knew nothing about it. There has been nothing crooked going on, to my knowledge, since this contract was let to the Bartlett Illuminating Company. I have not done anything that is crooked.

"*Q.* Why, then, is there evidence in those books that will tend to criminate you? *A.* Well, there may be some little things that would come up from time to time, where I might have given a few things away, perhaps—lamps or things of that kind—that might have a tendency to criminate me. Although there is nothing in it; absolutely nothing.

"*Q.* Have you been giving away lamps—to aldermen, you mean? *A.* I decline to answer that question.

"*Q.* Because it would have a tendency to criminate you? *A.* It might have a tendency to criminate me.

"*Q.* Have you given lamps to any one else, except aldermen? *A.* Certainly; yes, sir.

"*Q.* Now, what else have you done that is criminating? *A.* I don't think I have done anything that is criminating.

"*Q.* You say these books contain evidence that might tend to criminate you? *A.* Well, it might in some way. I don't know exactly. But I am not going to take any chances.

"*Q.* You think you have been doing something that is crooked? *A.* No, sir, I don't think so. This is not simply bluff I am putting up to keep this grand jury from seeing these books. I had nothing to do with the books in 1900. I don't think there is anything in these books that would tend to criminate me in 1900. I refuse to produce these books before this grand jury under the advice of our attorneys, Weadock and Davitt. They have advised me not to produce any of the books. They said I shouldn't do it, because I didn't have to do it. I came here in 1901, in July. Up to July there is nothing in those books in which I am in any way interested personally, of the customers' ledgers. There are entries in the meter books for the years 1900, 1901, and 1902, in which I am interested personally.

"*Q.* Do those books contain a record of anything you gave away at that time? *A.* I decline to answer that question.

"*Q.* Because it would tend to criminate you? *A.* Might have a tendency to criminate me.

"*Q.* Does the customers' ledger contain anything for the year 1900 that might tend to criminate you, or in which you are in any way interested? *A.* It might.

"*Q.* For 1900, before you came here? *A.* You said in any way interested. I understood?

"*Q.* Well, anything that would tend to criminate you? *A.* Personally?

"*Q.* Yes, personally? *A.* No, sir.

"*Q.* You decline to produce the customers' ledger for 1900? *A.* Yes, sir.

"*Q.* Not because it would tend to criminate you; that is not the reason you decline to do it? *A.* Not the books for 1900; no, sir.

"*Q.* There is nothing in the books of 1900 that would tend to criminate you? *A.* No, sir.

"*Q.* Got a cashbook for the year 1900? *A.* Yes, sir.

"*Q.* Anything in that book for the year 1900 that

would tend to criminate you? *A.* I don't think so. There is nothing in the books of 1900 that will criminate me—I don't think in any book. I decline to produce the cash-book for 1900.

"*Q.* You don't decline to produce the books for the year 1900 because they might in any way tend to criminate you personally? *A.* I decline to produce the books on the advice of my attorney.

"*Q.* And that is the only reason you decline to produce them? *A.* And there might be things appear in there that might have a tendency to criminate me in some way. I don't know. I don't propose to take any chances on them. I don't know of a thing criminal, or that might tend to be criminal, that I did in 1900, in connection with the business of the Bartlett Illuminating Company. Mr. Weadock was the one, mainly, who advised me not to produce these books. I first talked with him about it perhaps last week, or week before last—since this grand jury has been called. I don't remember whether or not I told Mr. Weadock what was in the books. I don't know that I told him what books they were. (Witness is here given the instructions by prosecuting attorney that he is not obliged to answer any question that might tend to criminate him, and that if he commits perjury an indictment might be found against him by the grand jury.) I don't believe I can say how many customers' ledgers there are for the year 1900.

"*Q.* The books are in your possession? *A.* Oh, yes.

"*Q.* Under your control? *A.* Yes, sir.

"*Q.* And you are able to produce them here if you want to? *A.* Yes; I could produce them.

"*Q.* If you want to? *A.* Yes, sir.

"*Q.* You decline to produce them? *A.* Yes, sir.

"*Q.* Not because they tend to criminate you for the year 1900? *A.* Perhaps.

"*Q.* Perhaps? *A.* I don't see how it could; no, sir. I decline to answer these questions on the ground our attorney says we don't have to. That is the sole reason I decline to produce them.

"*Q.* Will you look at your books and see, and then report to the grand jury what they show? *A.* Why, Mr. Attorney, why don't you get that information from the secretary? He is the man that handles the books. * * *

"*Q.* How many members of the common council were carried upon the free list, as appears from the records and

books in your office prior to the time that you became connected with the company? *A.* I decline to answer that question, also.

"*Q.* Because it would tend to criminate you? *A.* Yes, sir.

"*Q.* For no other reason? *A.* That is all.

"*Q.* That is your only reason? *A.* Yes, sir.

"*Q.* And yet you admit you had no connection with the company prior to that time? *A.* I was connected with another company on the same basis as the Bartlett Illuminating Company—with another branch concern.

"*Q.* You had nothing to do with the business of this branch? *A.* No interest, except I was interested indirectly in it.

"*Q.* Have any stock in it? *A.* No, sir.

"*Q.* Or an employé of the company? *A.* Not of this Bartlett Illuminating Company; no, sir.

"*Q.* Have you ever had any talk or conversation at any time or place with Alderman Hermann on this subject? *A.* I decline to answer that question.

"*Q.* Why? *A.* Might have a tendency to criminate me.

"*Q.* What—the talk you had with Hermann? *A.* Yes, sir.

"*Q.* You were mixed up in it with him—is that what you mean to say? *A.* I said I declined to answer the question that you put to me, on the ground that it might have a tendency to criminate me.

"*Q.* Yes; because you were mixed up in the matter with him? *A.* I didn't say so, Mr. O'Keefe.

"*Q.* Well, why would it tend to criminate you, if you had nothing to do with it? *A.* I am president of the company, and general manager when Mr. Hermann is out of town.

"*Q.* Do you have any knowledge of any crookedness in connection with this company? *A.* Crookedness; no, sir.

"*Q.* In letting this contract to the city? *A.* No, sir; none whatever. There wasn't any. The contract didn't warrant it. If they contract to give you lights for $65, that don't warrant them spending money. * * *

"*Q.* Has any officer of the company instructed you not to submit the books of the company to this grand jury, and, if so, who is he? *A.* Well, I can't be positive about

that. I am not sure whether Mr. Bonta told me not to do it or not, but our attorney—

"*Q.* When did you see Mr. Bonta since this grand jury was called? *A.* Oh, I met him in Chicago about a week or ten days ago.

"*Q.* What did he tell you about transferring the names of certain aldermen from the F. L. list to the regular customers' list? *A.* I decline to answer that question.

"*Q.* Why? *A.* It might have a tendency to incriminate me.

"*Q.* Did you have any conversation with him upon that subject? *A.* I decline to answer that question also.

"*Q.* Because it might tend to criminate you? *A.* Yes, sir.

"*Q.* Are you president of the company? *A.* Yes, sir.

"*Q.* What is the man you met in Chicago? *A.* He is vice-president."

On the part of the people it is said:

"There are four cases that settle beyond controversy the law upon every question presented by the petitioner against his contention, viz., *In re Peasley*, 44 Fed. 271; *U. S. Express Co.* v. *Henderson*, 69 Iowa, 40; *Brown* v. *Walker*, 161 U. S. 591; *Wertheim* v. *Trust Co.*, 15 Fed. 716, note on page 721."

The note referred to in the last case discusses the use which may be made of the subpœna duces tecum, and does not aid in solving the question before us. The case of *U. S. Express Co.* v. *Henderson*, supra, was one where the privilege was claimed not because the production of the books would tend to criminate the witness, but because they would tend to criminate the employer, and the court held that was not sufficient. In the disposition of the case, the court said:

"If it had been claimed that the books called for tended to render the witness criminally liable, it may be that he could not properly be required to produce them."

In re Peasley, supra, and *Brown* v. *Walker*, supra, were both cases under the interstate commerce act, which act required persons to testify, and provided, among other things:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding." 27 U. S. Stat. at Large, 443.

And it was held that because of that provision the witness could not avail himself in this class of cases of the constitutional provision that he shall not be compelled to be a witness against himself. We have no such provision in this State applying to such a proceeding as was under investigation by the grand jury.

Amendment 5 of the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation."

Section 32, art. 6, of the Constitution of this State, is as follows:

"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."

In the case of *People, ex rel. Taylor*, v. *Forbes*, 143 N. Y. 219, the witness had testified, in the broadest terms, that he had no connection with the transaction which was the subject of inquiry by the grand jury, but refused to answer further questions put to him upon the ground that the answer might tend to criminate him. The court adjudged him guilty of contempt. In reversing his conviction, after quoting the constitutional provisions, the court said:

"These constitutional and statutory provisions have long been regarded as safeguards of civil liberty quite as sacred and important as the privileges of the writ of habeas corpus, or any of the other fundamental guaranties for the protection of personal rights. When a proper case arises, they should be applied in a broad and liberal spirit, in order to secure to the citizen that immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed. The security which they afford to all citizens against the zeal of the public prosecutor, or public clamor for the punishment of crime, should not be impaired by any narrow or technical views in their application to such a state of facts as appears from the record before us. The right of a witness to claim the benefit of these provisions has frequently been the subject of adjudication in both the Federal and State courts. The principle established by these decisions is that no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission, or of his connection with it, may be obtained. The cases cover the point so completely that no comment or explanation is necessary, and it would not be useful to quote at much length from the language in which the decisions are expressed. It will be quite sufficient for every purpose of the opinion to note where they may be found: *Counselman* v. *Hitchcock*, 142 U. S. 547; *Emery's Case*, 107 Mass. 172; *State* v. *Nowell*, 58 N. H. 314; *Ex parte Boscowitz*, 84 Ala. 463; *Minters* v. *People*, 139 Ill. 363; *Temple* v. *Commonwealth*, 75 Va. 892; *Printz* v. *Cheeney*, 11 Iowa, 469; *People* v. *Mather*, 4 Wend. 230; *In re Hackley*, 24 N. Y. 84; *People* v. *Sharp*, 107 N. Y. 427; 1 Burr's Trial, 245. The question was fully discussed at an early day by Chief Justice Marshall on the trial of Aaron Burr, and every phase of it so completely explained and exhausted that his views were followed in the subsequent decisions. A single quotation from the language used will illustrate the scope and extent of the immunity which the witness can lawfully claim:

"'Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the

court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness by disclosing a single fact may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.' * * *

"The testimony which the relator voluntarily gave before the grand jury, in general terms exonerating himself from all connection with the transaction, seems to have had great weight with the learned trial judge. It was argued that the relator could not possibly be put in peril by his answer to the question, since he had already testified that he had no connection with the transaction. But the conclusion was not warranted by the facts. The testimony of the witness might be ever so strong and clear in favor of his innocence, but it did not conclude the public prosecutor, in the absence of some constitutional or statutory provision securing the relator from prosecution. The general statements of a person charged with crime, in regard to his innocence, avail but little against incriminating facts and circumstances. His protestations of innocence and his broad general denial of any knowledge of or connection with the transaction might be overcome by facts and circumstances if the district attorney could be permitted to draw them from the witness. Any one who has had much experience in the conduct of criminal trials is aware of the fact that frequently the most dangerous proof that a person charged with crime has to meet are his own statements made for the purpose of warding off suspicion, or of satisfying others with regard to his innocence. It is not unusual on such trials to confront the accused with his own declarations made for the very purpose of exonerating himself from all suspicion, but which, when all the evidence is collected, are so far at war with all the facts and circumstances as to furnish evidence of guilt. The witness, by answering the general questions as to his connection with the affair, whether his answers were true or false, did not waive his right to remain silent when it was sought to draw from him

some fact or circumstance which, in his judgment, might form another link in the chain of facts, and capable of being used under any circumstances to his detriment or peril. The circumstances relating to the purchase of the jugs, and the means employed to place them under the banquet room, were important as furnishing a clue that might lead to the identification of the guilty person or persons, and the witness was or appeared to be so related to the transaction that he might lawfully refuse to furnish the same, notwithstanding his general statements to the effect that he had nothing whatever to do with them. The witness who knows what the court does not know, and what he cannot disclose without accusing himself, must in such cases judge for himself as to the effect of his answer, and if, to his mind, it may constitute a link in the chain of testimony, sufficient to convict him, when other facts are shown, or to put him in jeopardy, or subject him to the hazard of a criminal charge, indictment, or trial, he may remain silent. While the guilty may use the privilege as a shield, it may be the main protection of the innocent, since it is quite conceivable that a person may be placed in such circumstances, connected with the commission of a criminal offense, that, if required to disclose other facts within his knowledge, he might, though innocent, be looked upon as the guilty party. *Adams* v. *Lloyd*, 3 Hurlst. & Nor. 363."

In the case of *Temple* v. *Commonwealth*, 75 Va. 892, the court, in disposing of the case, used the following language:

"It is argued, however, that it is a question within the discretion of the court, always, whether the witness shall be compelled to answer, and that the court must judge in the case before it whether the witness will criminate himself, and that the witness is not to judge of that fact for himself.

"Upon this question there has been some conflict in the English decisions. But in this country the great weight of authority is in favor of the rule that where the witness, on oath, declares his belief that the answer to the question would criminate or tend to criminate him, the court cannot compel him to answer unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer cannot possibly have such tendency. See *Fries* v. *Brugler*, 21

Am. Dec. 52, 57 (12 N. J. Law, 79), and cases there cited.

"In the famous Burr trial, Chief Justice Marshall said:

"'It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact, which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be, and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer.'

"In the case of *People* v. *Mather*, 4 Wend. 229, 254. Judge Marcy said:

"'If the witness thinks the answer may in any way criminate him, the court must allow his privilege, without exacting from him to explain how he would be criminated by the answer which the truth may oblige him to give. If the witness was obliged to show how the effect is produced, the protection would at once be annihilated.'

"See, also, *Queen* v. *Boyes*, 101 Eng. C. L. R. 309, 329 [1 Best & Sm. 311]. I think, upon the authority of these decisions, it may be safely said that wherever a party, on oath, declares that the answer to the question propounded to him will criminate himself, the court must accept that answer as true, and as making a prima facie case in which the witness must be excused unless there is something in the circumstances of the particular case which makes it appear either that the witness contumaciously refuses to answer, or where it appears that, from all circumstances, he is clearly mistaken as to any possibility of his future prosecution. The witness ought not in any case to be compelled to answer after declaring on oath that such answer may criminate himself, especially after he has taken the advice of counsel, unless it clearly appears to the court that he is mistaken. In the case before us it appears that the plaintiff in error, while held in jail as a witness, consulted with counsel, who advised him that he would criminate himself if he testified in the case against Berry, and gave the same testimony which he had given before the grand jury. The court might well have inquired into the fact whether he had actually received such advice of counsel, or, if it believed that such counsel was disreputable,

and that the advice was given simply to protect the offender or to shield a contumacious or bribed witness, all these matters might have been properly inquired into by the court. But here we have a case where a witness states that he has consulted counsel, and that counsel has advised him not to answer the question propounded to him, because it would criminate himself; and there is not a suggestion in the record that there was any motive, either in the witness or in his counsel, other than to raise the legal question whether he could be compelled to testify in a case where such testimony might tend to criminate the witness."

See, also, *Boyd* v. *United States*, 116 U. S. 616; *Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Burr*, Fed. Cas. No. 14,692 *e; Adams* v. *Lloyd*, 3 Hurlst. & Nor. 351, at 361–363; *People* v. *Lauder*, 82 Mich. 109; *Entick* v. *Carrington*, 19 How. State Trials, 1063; Cooley, Constitutional Limitations (6th Ed.), pp. 364–373; *In re Archer*, 134 Mich. 408.

Applying these principles to the case at bar, I think the privilege claimed by Mr. Moser was within his constitutional right, and should have been respected.

I think it not necessary to discuss the second question raised by counsel, and that the conviction should be set aside and the petitioner discharged.

BYRNE *v.* WERNER.[1]

138 328
146 709
138 328
158 255

VENDOR AND PURCHASER — CONVEYANCE OF PARTIALLY CONSTRUCTED BUILDING—BUILDING MATERIALS—PASSING OF TITLE.

Cut stone and structural iron belonging to the owner of a partially completed building, secured by him for use in the building, and lying on the lot on which the building stood and on an adjoining one, passed by the owner's warranty deed of the lot on which the building stood. MOORE, C. J., and HOOKER, J., dissenting.

[1] Rehearing denied January 30, 1905.

Error to Marquette; Stone, J. Submitted April 7, 1904. (Docket No. 20.) Decided December 7, 1904.

Trover by Samuel E. Byrne, Jr., against Jacob P. Werner and another for the alleged conversion of certain building material. There was judgment for plaintiff, and defendants bring error. Reversed.

Ball & Ball, for appellants.

Button & Culver, for appellee.

CARPENTER, J. Plaintiff brings this suit to recover for the conversion of certain cut stone and structural iron. The property originally belonged to plaintiff's father, Samuel E. Byrne. Both parties claim to have acquired his title. Plaintiff claims to have acquired it by a bill of sale executed in 1896. It is defendants' claim that in 1887 the property in controversy was transferred by Samuel E. Byrne to Henry C. Thurber, and that they have acquired Thurber's rights. It is clear that defendants have acquired the rights of Thurber, and that, therefore, the validity of their claim depends upon whether Byrne transferred the property to Thurber. The facts respecting the transfer are as follows:

In 1887 Byrne conveyed to Thurber by a warranty deed (intended to be a mortgage) lots 4 and 5 of block 17 in the city of Marquette. At that time there was situated upon these lots a partially completed building in the process of erection. There was also situated on the land conveyed and on an adjoining lot the cut stone and structural iron involved in this case, which was intended to be used in the completion of the building. The stone had been cut and dressed for the front of the building. Each piece of the structural iron was of the dimensions provided in the plan of the building, and fit for the place where it was to go. At that time it was intended that the building would be completed. The plan of completing the building was,

for some reason, abandoned, and defendants used the stone and iron for another purpose.

Did the title to that material pass to Thurber by his deed? The learned trial judge held that it did not. It is urged that the building material had not become a part of the land, and was, therefore, in a legal sense, personalty at the time of the conveyance to Thurber. If this be true, it is not, in my judgment, decisive of this controversy. Though the building material was personalty, it is our duty to declare that it passed with the partially completed building, if the parties so intended, and if that intent may be ascertained from a proper construction of the conveyance of the land upon which said building stood. The question is, then, not whether the building material was in fact personalty, but whether it was intended to transfer it with the conveyance of the partially completed building. And this intent is to be determined by a proper construction of the conveyance; that is (see *Norris* v. *Showerman*, 2 Doug. 16; *Davis* v. *Belford*, 70 Mich. 120), by applying the language of the conveyance to its subject-matter. No uncertainty results from this rule. Upon the land conveyed to Thurber was an incomplete building in the process of erection. Situated upon that land and upon the adjoining land was building material designed to be used for the completion of the building. It was surely intended that the incomplete building should be transferred to Thurber. It was surely intended that the building would be speedily completed with the building material at hand. And I think it therefore equally certain that it was intended that such material should pass with the conveyance. In my judgment, there is no sound principle of law which compels us to defeat this intention. On the contrary, I maintain that it is our clear legal duty to give it effect. I think, therefore, that the building material became the property of Thurber. This conclusion is sustained by authority.

In *Wistow's Case of Gray's Inn*, (14 Hen. VIII.) 11 Coke, 50*b*, it was resolved that a millstone temporarily

severed from the mill, with the intention that it should be replaced, passed with the conveyance of the mill. "So of doors, windows, rings, etc. The same law of keys, although they are distinct things, yet they shall pass with the house."

In *Conklin* v. *Parsons*, 1 Chand. (Wis.) 240, it was held that rails placed along the boundary line, "not laid up into a fence, but which had been placed on the land for the purpose of building the fence," passed with the conveyance of the land.

In *Ripley* v. *Paige*, 12 Vt. 353, there was a controversy as to whether certain rails passed with the conveyance of land from plaintiff to defendant. Defendant offered to prove that when the conveyance was made the rails were distributed upon the farm for the purpose of being there erected into a fence. The court said:

"Upon this branch of the case we are inclined to regard the rails, if it was evident from the manner of their distribution upon the land, and other appearances, that they were designed for immediate use in fencing the land, as we should the materials of a fence accidentally fallen down, or of one purposely taken down to be immediately reconstructed, or those of an intended wall distributed in like manner. As fences always pass by a deed of the soil on which they stand if the grantor has an unrestricted right to convey both, so we are disposed to think that such materials for a fence may, in all these cases, as against the grantor, be treated as being within the operation of his deed."

In *Hackett* v. *Amsden*, 57 Vt. 432, it was held that stone posts, which it seems were deposited on a farm for the purpose and with the intention of building necessary fences, could not be seized and sold as personalty; the court saying:

"Whatever the rule may be elsewhere, it seems to be settled in this State that suitable materials, deposited upon a farm for the purpose and with the intention of building necessary fences with them thereon, pass by a conveyance of the land as a part of the realty."

In *Wadleigh* v. *Janvrin*, 41 N. H. 503, it was held that certain stanchion timbers, staples, tie chains, and planks, which had been removed from a barn for the purpose of making repairs, passed to plaintiff by a conveyance from defendant of the land upon which the barn stood, notwithstanding the fact that the latter had formed a plan unknown to the former to make changes in the barn and to dispense with their use. The court said:

"It was entirely immaterial what purpose the defendant had formed, so long as he had not carried it out. By the conveyance the barn passed to the plaintiff just as it then was, with portions afterwards carried off by the defendant dissevered from the rest. The plaintiff saw the barn in the process of repair. He had a right to infer, and to act upon the inference, that the dissevered portions constituted an integral portion of the edifice."

In *Palmer* v. *Forbes*, 23 Ill. 301, it was held that the title to rolling stock and the material provided for the repair of tracks was transferred by a mortgage of the real estate of a railroad company; the court saying:

"It is a familiar principle to all that rails hauled onto the land designed to be laid into a fence, or timber for a building, although not yet raised, but lying around loose and in no way attached to the soil, are treated as a part of the realty, and pass with the land as appurtenances."

This decision and reasoning go farther than it is necessary for us to go in the case at bar.

In *McLaughlin* v. *Johnson*, 46 Ill. 163, it was held that rails which had once been and which were intended to again be used for a fence passed with the conveyance of the land notwithstanding the fact that at the time of such conveyance they were actually in temporary use on adjoining land. See, also, *Curtis* v. *Leasia*, 78 Mich. 480.

Harris v. *Scovel*, 85 Mich. 32, is not inconsistent with these views. There it was held that rails piled on land did not pass with its conveyance. The rails had once formed part of a fence. The grantor had taken down the fence because it was no longer needed, intending to use

the rails elsewhere. It is clear that there was no ground upon which the grantee could assert that it was intended that the rails should pass with the land.

Johnson v. *Mehaffey*, 43 Pa. St. 308, relied upon by plaintiff and the learned trial judge, is, in my judgment, clearly distinguishable from the case at bar. In that case it was held that rolls originally purchased to be put in a mill did not pass upon a conveyance of the mill. At the time of the sale these rolls had for nearly three years remained on the property, unused, and in a rough, unfinished state. They were not necessary to the operation of the mill, for the mill had always run without them. This afforded a ground for saying that it was not intended that the rolls should pass to the purchaser of the mill. That gound does not exist in this case, for the building material in question was necessary for the completion of the building.

Woodman v. *Pease*, 17 N. H. 282, cited by plaintiff, is very similar to *Johnson* v. *Mehaffey*, supra, and is likewise distinguishable from the case at bar. It is true that the court in deciding each of these cases stated that personalty does not become a part of real estate until actually annexed thereto. If by this it was intended to assert that, notwithstanding the obvious intent of the parties, property originally personalty, will not, unless actually annexed thereto, pass on a conveyance of real estate, the court made a statement not necessary to its decision—which might have rested upon the intention of the parties concerned—and which, as already indicated, I cannot approve. Other cases cited by plaintiff are even more easily distinguishable.

In *Cook* v. *Whiting*, 16 Ill. 480, it was held that the "simple intention" of the vendor, before he sold his farm, to erect posts into a fence and hewed timber into a granary, without having done anything towards those objects more than to haul said posts and timber onto the farm, "is not sufficient to pass the property in said posts and timber."

In *Peck* v. *Batchelder*, 40 Vt. 233, the court gave effect to the obvious intention of the parties in deciding that certain property, viz., detached extra blinds and windows, did not pass with the sale of the house.

It was held in *Carkin* v. *Babbitt*, 58 N. H. 579, where the controversy arose between the owner and an attaching creditor, that lumber designed for the erection of a house was personalty. The facts in that case were very unlike those in the case at bar. The lumber was "neither in form nor position as it was designed to be permanently used." There was nothing "to distinguish it from ordinary lumber suitable for building purposes." Nor could the court apply in that case the principles applicable to a controversy between mortgagor and mortgagee.

I think, therefore, that the defendants were entitled to a verdict, and that the judgment should be reversed, with costs, and a new trial ordered.

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

MOORE, C. J. (*dissenting*). In 1886, Samuel E. Byrne, father of the plaintiff, was the owner of part of lots 4 and 5 of block 17 in Marquette, and commenced the erection of a building thereon. He had plans and specifications drawn, specifying each piece of structural iron to go into the building, with the size and length of each piece. He ordered a considerable quantity of structural iron, each piece of which was of the dimensions provided in his plans, and fitted for the place where it was to go. After commencing to lay the foundation, he brought some of the structual iron upon the premises and some on an adjoining lot, where it would be most convenient to put into the building. He also purchased some building stone, which was cut and dressed for the front of the building by the masons hired by him, some of which were on the premises and some on an adjoining lot. He continued the work of building until the following year. A considerable quantity of the structural iron was built into the structure and

some of the stone was used. After finishing the basement story, the work was suspended, but Mr. Byrne intended to go on with the work, and the iron and stone were left there for that purpose. Mr. Byrne gave Mr. Thurber a warranty deed of the premises April 20, 1887, and no work was done on the building after that time. The deed was intended to operate as a mortgage, and Byrne expected, notwithstanding the deed, to complete the building. Mr. Byrne had, in 1883, mortgaged the premises to one Michael Hagerty to secure the payment of $2,500, which remained unpaid. He also executed mortgages on the property—one to Campbell & Wilkinson, February 14, 1885, for $1,100, and one to James Dwyer, July 20, 1887, for $1,400. The Thurber title was sold on execution July 13, 1889, for $2,000. Henry C. Thurber, by warranty deed dated April 23, 1889, acknowledged February 4, 1890, conveyed the premises to Peter White for $4,000. After making this purchase from Thurber, Mr. White purchased all these other mortgages and the execution lien. The several deeds and mortgages above enumerated covered the real estate, and made no mention of building material. The structural iron and stone remained on the premises as they were left at the suspension of building operations. April 15, 1902, Mr. White, by warranty deed, conveyed the premises to the defendants. The deed, when first drawn, included the building material on the premises, for which this suit was brought, but at the request of the defendants it was stricken out of the deed, and a separate bill of sale was given for it. Defendants moved the material out of the way, and proceeded to put up a business building on the premises, using therein a small portion of the material involved in this suit, and disposing of the rest. Samuel E. Byrne executed a bill of sale of the said building material to the plaintiff May 20, 1896. The plaintiff brought an action of trover for this building material, and recovered judgment. A motion for a new trial was made, which was overruled. The case is brought here by writ of error.

In overruling the motion for a new trial the circuit judge filed a written statement, which states so admirably the questions involved, that we reproduce it here:

"1. The first reason assigned for the motion is that the court erred in refusing to charge the jury as requested by defendants' counsel in the first request. This request related to the subject of fixtures, and was to the effect that the property which was the subject-matter of this suit passed by virtue of the deed from Samuel E. Byrne, Sr., to Thurber. This deed was in the usual form of a deed of lands. There was evidence tending to show that it was intended by the parties thereto to be a mortgage. But as the rule, when applied to mortgages, is no more favorable to the plaintiff than when applied to a deed, it is not very material here. I refused this request at the trial upon a somewhat hasty examination of such authorities as were at hand. A more careful examination of the authorities has confirmed my position at the trial. The evidence was undisputed that Samuel E. Byrne, Sr., had, as early as 1886 or 1887, commenced the erection of a building, and had purchased the structural iron and stone in question to go into the building, and that the same had been prepared for the building, and had been delivered upon or near the premises, with the intention to place the same in the structure. My recollection of the evidence is that work on the building had ceased for want of funds at the time of the deed to Thurber, but of this I am not positive. It certainly had ceased before the deed to White. These were articles to be annexed to the land.

"'The question as to the necessity of actual annexation also arises as to articles which have not yet been annexed to the land, but have merely been brought on or near the land with the intention of annexing them. Such articles are, by the weight of authority, perhaps, to be considered as still personalty, though the contrary has quite frequently been decided.' 13 Am. & Eng. Enc. Law (2d Ed.), pp. 601, 602, and cases there cited.

"It seems to me that it cannot be said that this iron and stone formed or constituted a necessary accessory to the enjoyment of the land, which seems to be the rule laid down by some of the courts as the true test where annexation had not actually taken place. Much of the iron in question never went into the building since erected by defendants, but was exchanged for that more modern and suitable. The old rule

seems to have been that there must be physical annexation, but under some circumstances that rule has been relaxed where the article is shown to be a necessary accessory to the enjoyment of the land. The fact that a place was prepared in which to put an article does not necessarily make the article part of the realty. Id. 608, 610. Notwithstanding the language of our Supreme Court in the case of *Curtis* v. *Leasia*, 78 Mich., at page 483, I understand that in a case like the one under consideration the question may be said to be an open one in this State.

"Having ruled as I did upon the trial, and finding upon further examination no reason to change the ruling, I feel like adhering to the ruling, and must refuse a new trial upon this ground. Upon this subject I refer to the following case: The reasoning of Lowrie, C. J., speaking for the court, in *Johnson* v. *Mehaffey*, 43 Pa. St. 308, is very satisfactory. The action was replevin for two rolls which had been cast for a certain rolling mill. The mill was sold to the plaintiff, who claimed the rolls. The rolls had been sold on execution as the personal property of the grantor. The rolls had been paid for and delivered at the mill, where they remained for about three years, in a rough and unfinished condition, without having been put into the mill. After stating these facts, the court said:

"'These rolls were cast for this rolling mill, and paid for and delivered beside it, and lay there two or three years without being turned or finished off or put into the mill, and then the mill was sold by the sheriff. Do the rolls go with the mill to the purchaser? The test question is, Were they elementary parts of the mill at the time of the sale? And as matter of fact it is quite plain that they were not, for the mill had always run without them. No doubt they were intended to be made part of the mill, but we do not see how we can take the intention, without fact, in order to declare what constitutes the mill. If we do, then the sale of a half-built or half-ruined house would include all the materials provided for its completion or repair. A very provident man is quite sure to have on hand materials which he sees will some time be necessary for the repair of his works, or for supplying deficiencies in them; but his having them with this intention does not make them constituent parts of his works. Thus he will provide extra saws for a sawmill, or bolting cloth for a flourmill, or extra castings for the running gear, or lumber, nails, screws, and other materials, to make improvements or repairs; but this prudence does not convert personal into real property, so long as the fact remains that they are not yet made constituent elements of the mill or other structure. That

fact we can ascertain and define with reasonable certainty, but we can have no measure for the ever-varying degrees of prudent forethought. And if mere intention could affix such articles to the realty, then a mere change of intention would unfix them, or prevent their becoming affixed, and we should thus be without any rule at all to guide us. Besides, it is rather a contradiction in terms to say at the same time that they are parts of the structure, and are intended to be made so. That these rolls will fit no other mill does not make them part of this one, or prove them so. Furniture for a dwelling house, shelving and drawers for a store, boilers, and flywheel for an engine, the frame for an addition to a house, have often this very peculiarity, and great loss would arise if they should not be applied according to the intention with which they were made. Yet they cannot be a part of the real estate without a purpose of annexation actually effectuated, though this peculiarity of adaptation may, by inference or corroboration, supply the want or the weakness of direct evidence of annexation, whenever this fact can be reasonably said to be left in doubt by the other evidence.'

"2. It will be borne in mind that defendants' requests upon the subject of abandonment were all given. The second reason for the motion is that the jury disregarded the clear weight of evidence and the charge of the court upon this subject. The jury were charged that abandonment is the relinquishment or surrender of rights or property by one person to another; that it includes both the intention to abandon and the external act by which the intention is carried into effect; that to constitute an abandonment there must be the concurrence of the intention to abandon and the actual relinquishment of the property, so that it may be appropriated by the next comer. In view of the fact that Samuel E. Byrne, Sr., had in 1896 made a bill of sale of this property to the plaintiff, and that both the plaintiff and his vendor testified that they never intended to abandon it, I cannot say that the verdict was against the clear weight of the evidence upon this subject.

"3. Upon the question of adverse possession or the statute of limitations the jury were charged as requested by defendants' counsel. Now for the first time defendants' counsel take the position that 'the uncontradicted evidence of the case showed continued adverse possession of the property by the defendants and their grantor for more than six years prior to the beginning of the suit.' The evidence showed that the lot and real estate, with a par-

tially constructed wall, had been unoccupied for a long term of years before the defendants commenced the erection of their building in 1902. The premises near the sidewalk were in a somewhat dangerous condition, as they were upon a level with the walk, and Mr. White had placed guards there to prevent persons from going upon the wall, and a small candy store had stood there for a short time. I do not think that there was any evidence that Mr. White had done or performed any act that would indicate that he claimed to own the structural iron and stone that lay loosely scattered about upon and near the premises covered by his deed. In fact, all of his acts were more consistent with assertion of ownership of the real estate, than with an open, adverse claim of the ownership of this personal property, until he sold the same by bill of sale to the defendants in 1902. So I cannot agree with defendants' counsel that the verdict was even against the weight of the evidence upon this subject.

"4. The court, upon its own motion, and without request from defendants' counsel, fully charged the jury upon the subject of estoppel. Defendants' counsel claim that the jury disregarded the evidence in the case and the charge of the court, and that defendants were entitled to a verdict upon that ground. In the light of the testimony of Samuel E. Byrne, Sr., it is not fair to say that the evidence upon the subject was undisputed. A question of fact was raised by the testimony of Mr. White and Mr. Byrne, which was for the jury to consider. Mr. White had testified to the representations claimed to have been made by Byrne that all of the material went with the premises, and that, relying upon that, he purchased from Mr. Thurber, in the spring of 1889, and that he and Thurber walked upon the premises, and that he then took possession of this personal property. It appeared by reference to the deed from Thurber that it was executed in Washington, D. C., some time after its date. There is no doubt that this fact may have influenced the jury. It was unexplained by Mr. White. It also appeared that at the time Mr. Byrne, Sr., had a talk with Mr. White about his getting a deed from Thurber, he, Byrne, contemplated finishing the building. Had the building been completed, this material would, in all probability, have gone into it, and the security or value of the property would have been increased. So there was some force in Mr. Byrne's claim in his testimony that, while he did refer to the material as

possessing a value, he did not say that it went with the land. I simply refer to this to show that there was here a question of fact for the jury, and that I cannot say, as matter of law, that the defendants were entitled to a verdict upon the ground of an estoppel."

It is said the court erred in admitting the testimony of Byrne as to the gross cost of the structural iron. Mr. Byrne had testified that the structural iron cost him $62 a ton; that it had remained about the same price from then until now, and that he did not think over a fourth was affixed to the structure; that he was positive not more than a third was affixed. He was then asked for its gross purchase price, and the judge said that in connection with his other testimony, where he stated he thinks there has been no change, he would, for that reason only, permit the answer. We think this ruling was not error. See *Kendrick* v. *Beard*, 90 Mich. 589; *Johnston* v. *Insurance Co.*, 106 Mich. 96.

It is said the evidence did not warrant a verdict for the plaintiff, and the court erred in submitting the case to the jury.

1. Samuel E. Byrne, Sr., was estopped by his words and acts from claiming ownership of the materials as against Mr. White after his purchase from Thurber.

2. If the plaintiff, or his grantor, ever had any right of action, it was barred by lapse of time before this suit was commenced.

There is nothing in the record to show that the judge was requested to take the case from the jury. Upon the question of estoppel the jury were charged:

"I first call your attention to this question of estoppel that is claimed here by the defendants in this case. It seems that at one time this property had been deeded by Mr. Byrne, Sr., to Mr. Thurber, of this city, and subsequently Mr. White obtained the interest that Mr. Thurber had by a deed of conveyance made in 1889, as I remember it. The claim of Mr. White here is that before he made the purchase from Mr. Thurber of the land or any of this property that he had certain conversations with Mr. Byrne,

Sr., at a time when Mr. Byrne had not yet parted with this property by his bill of sale to his son, and the claim of Mr. White is that at an interview had between him and Mr. Byrne, at which Mr. Byrne desired him (White) to obtain the interest of Mr. Thurber, that Mr. White expressed the belief that the property was not worth the amount he would have to pay Mr. Thurber, together with the mortgages that were upon the property—referring to the Campbell & Wilkinson mortgage, the Dwyer mortgage, and the Hagerty mortgage; and Mr. White claims before you in his testimony that Mr. Byrne said to him: 'There is a great deal there that you don't see, that you don't count. There is material enough to almost finish the building. It all goes with it.' And Mr. White claims that in many talks had with Mr. Byrne before he (White) became interested by purchasing from Mr. Thurber, Mr. Byrne said to him that that property would all pass if he dealt with Thurber, and belonged to the property, and would go into and with the lot or building. Now, gentlemen, the first question that arises, Was this statement made by Mr. Byrne to Mr. White? While the court advises you that this personal property, consisting of this structural iron and stone, would not pass by a deed of the realty simply to Mr. Thurber, whether that was a mortgage or a deed, it would not pass by virtue of the instrument, it would have been perfectly competent for Mr. Byrne by an oral arrangement—by a verbal agreement—with Mr. Thurber at that time to have passed over and conveyed to him this personal property. And if, before Mr. White purchased this real estate of Thurber, and took, as he claims, Mr. Thurber's interest in this personal property—for I understand that it is claimed that accompanying this transaction of the deed from Thurber he took, by virtue of a verbal arrangement with Thurber, the right to receive this personal property, and claims that it was pointed out to him and delivered to him by Mr. Thurber; and it is for you to weigh this evidence and say whether Mr. White is correct or not; that being his claim, I say, that if Mr. Byrne gave him to understand by any conversations with him that Mr. Thurber owned not only the real estate, but also owned the personal property there; that it belonged to him, would pass to him (White) if he dealt with Thurber—then Mr. Byrne is estopped, and his vendee, his son, is estopped, from claiming any interest in this property. For a man cannot stand by,

or cannot induce another to purchase property in which he claims an interest, if he gives such purchaser to understand that he will get a good title if he deals with somebody else with reference to it. He is estopped from asserting any such claim. If you stand by while I am purchasing a horse of your neighbor, and say that your neighbor owns that horse, and, if I buy him, I will get a good title, and I purchase the horse and pay my money for it, you are estopped—your mouth is closed—from ever afterwards claiming that you owned the horse at that time; because you have by your conduct and language induced me to part with my money, and it is inequitable and unjust for you to make a claim inconsistent with that. The doctrine is a familiar one in the books. When a person by his words or conduct voluntarily causes another to believe in the existence of a certain state of things, and thereby induces him to act upon that belief, so as to change his previous condition, the person inducing such belief will be estopped from afterwards denying the existence of such a state of things to the prejudice of the person so acting. In other words, if a person knowingly and voluntarily so conducts himself in relation to his business as to justify persons dealing with him in supposing and believing that a certain state of facts exists, and such person so dealing with him relies upon that inference and belief, the person so conducting himself will not afterwards be permitted to deny that such state of facts did exist, to the prejudice of the person acting upon such belief.

"You will remember that in the conduct of the trial yesterday, and while Mr. White was upon the stand, the court asked him this question:

"'You may state whether the fact that Mr. Byrne, Sr., stated to you that this material was to go with the building, and the other conversations you have referred to, had any influence upon you in purchasing the property.'

"And you remember that Mr. White claimed and said in answer to that:

"'Most decidedly. I wouldn't have touched it—I wouldn't have paid him $4,000—without the complete understanding that all the material there belonged to or went with the building. Mr. Byrne's own argument was that it was ample to cover the $4,000.'

"I do not wish to emphasize this language by calling your attention to that; more than to call your attention

to the point involved. You will weigh the testimony of Mr. Byrne upon the opposite side of this question, in which he denies that he said to Mr. White that it would go with the building, or with the transaction or trade with Thurber. Now, who is right about this, gentlemen? If you shall say that Mr. Byrne used this language, it having been perfectly competent and proper for Mr. Byrne to have conveyed this property by oral arrangement to Mr. Thurber, if you shall say that he did do that, or, even if he didn't do that at all, but gave Mr. White to understand by language that a reasonable man would believe and be induced to act upon, that he had so conveyed it over to him, by a verbal or other arrangement, so that if he (White) did deal with Thurber he obtained the interest in this personal property, then I say Mr. Byrne is estopped from claiming this property; and his son, who afterwards became the alleged owner of it by virtue of a bill of sale, could take no greater title than his father had; and, if his father had parted with his title to that property, then he could convey no interest in it. So much for this doctrine or claim of estoppel on the part of the defendants."

Mr. Byrne denied most emphatically Mr. White's testimony as to Byrne's telling him the title to the iron and stone passed to Thurber by the deed.

In *Maxwell* v. *Bridge Co.*, 41 Mich. 453, the court said:

"The doctrine of estoppel rests upon a party having directly or indirectly made assertions, promises, or assurances upon which another has acted under such circumstances that he would be seriously prejudiced if the assertions were suffered to be disproved or the promises or assurances to be withdrawn. But as the doctrine, when applied, operates to take away legal rights, it is no more than common justice to require that the facts which are supposed to call for its application shall be unquestionable, and the wrong which is to be prevented shall be undoubted. *Fredenburg* v. *Lyon Lake Church*, 37 Mich. 476; *Cronin* v. *Gore*, 38 Mich. 381. Moreover, the question of its application in any case is a mixed question of law and fact, and in cases of jury trial must be submitted to the jury under proper instructions. Now, however clear the facts in support of the estoppel may seem to be, it is always possible that there may be qualifying or overruling

facts; and the conclusions from the evidence must be drawn by the jury, not by the court."

In relation to the claim of plaintiff being barred by lapse of time, we think it sufficient to refer to what was said by the learned trial judge in overruling the motion for a new trial.

We now come to the most difficult question in the case; that is, whether, as claimed by defendants, the court erred in the instruction given to the jury that the structural iron and stone did not become a part of the realty, and refusing the request of defendants' counsel on that subject. It must be confessed there is a good deal of conflict in the authorities. They are collated at length in 13 Am. & Eng. Enc. Law (2d Ed.), at pages 601 to 610, and in the notes thereto. We are impressed with the reasoning of Chief Justice Lowrie in *Johnson* v. *Mehaffey*, 43 Pa. St. 308, from whose opinion Judge Stone quoted so copiously. There is an expression used in *Curtis* v. *Leasia*, 78 Mich. 483, by Justice SHERWOOD, that tends to support the claim of defendants, but it is obiter dictum. The court held in the case that the rails which were claimed to be realty were not realty, but were personal property. See *Harris* v. *Scovel*, 85 Mich. 32. In this case it appears the defendants made new plans for a building, which rendered the structural iron and dressed stone unfitted for use therein. Was this material up to that time real estate, and from that time on personal property? If so, would the same result have followed had Mr. Byrne changed the plan of the building while he owned the property?

We are inclined to agree with the trial judge as to the weight of authority, and that the judgment should be affirmed.

HOOKER, J., concurred with MOORE, C. J.

MALLAR v. MALLARIAN.

MORTGAGES—FORECLOSURE—DEFICIENCY DECREE—REDEMPTION—SUIT TO SET ASIDE SALE.

Where a mortgagee bid in the property at foreclosure sale at less than one-half its value, and sought to recover the deficiency by garnishment proceedings, but was unsuccessful, and the mortgagor then redeemed and immediately sold the property, the mortgagee could not assert, on suit to set aside the foreclosure sale, that it was invalid for irregularities, he having chosen his remedy, and not being in a position to say that he was ignorant of the law in not knowing that defendant had a right to redeem. HOOKER, J., dissenting.

Appeal from Wayne; Rohnert, J. Submitted October 7, 1904. (Docket No. 33.) Decided December 7, 1904.

Petition by John H. Mallar against Dickran H. Mallarian and Krekore Mallarian to set aside a certain mortgage foreclosure sale. From a decree dismissing the petition, complainant appeals. Affirmed.

Robert T. Speed, for complainant.

Anderson & Rackham, for defendants.

GRANT, J. Complainant foreclosed a mortgage executed by defendant to him. Decree was duly entered, and also a personal decree for any deficiency that might result upon the sale. The sale was made, the land bid in by the complainant for $300 (although he testified that he bid only $200), and, at the instance of the complainant, the sale confirmed. A few days after, he brought suits upon the decree for deficiency against defendant, and issued writs of garnishment. The return of the garnishee showed an indebtedness of only $9.47. Defendant, within the time allowed by law, redeemed the sale. Complainant refused to receive the redemption money, and filed a peti-

tion to set aside the sale for two reasons: (1) Because no notice of sale was posted as required by law; (2) because the sale was not made by any one authorized by the decree.

We deem it unnecessary to determine whether either of the objections is valid. The entire proceedings were conducted under the direction of the complainant and his solicitor, who was not Mr. Speed, the solicitor of record in this court. Complainant testified that the land was worth $700. According to the return of the officer, the land was sold to the complainant for $300. According to the complainant's testimony upon the hearing of this petition, he bid only $200. The defendant treated the sale as valid, and redeemed therefrom, as the law authorized him to do, and immediately sold and deeded the land to his brother. Complainant, in my judgment, cannot now be permitted to assert the invalidity of his sale from which he has received all that the law gives him. Had he bid off the land at something near its fair value, and the defendant had redeemed, complainant would have been satisfied.

It is urged that it is unfair in the defendant being allowed to redeem from this sale and immediately sell the land, thereby preventing the decree for the deficiency to be realized therefrom by execution. Complainant deliberately sought to obtain more by his conduct than he was entitled to, for he bid in the property at less than one-half its value, and intended, from his testimony, to bid it in for less than one-third its value, and to recover the residue from the defendant on the personal decree. The conduct of one is no more commendable in morals than is the conduct of the other. If the defendant is solvent, the complainant can realize from his sale what he intended to. If he is not now and never shall become solvent, complainant must lose it. In either event he has deliberately chosen his remedy, and will not now be heard to say that he was ignorant of the law in not knowing that the defendant had the right to redeem.

I think the decree should be affirmed, with costs.

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

HOOKER, J. (*dissenting*). The complainant filed a bill to foreclose a mortgage, and obtained a decree requiring defendant to pay $901, failing in which the premises were to be sold at foreclosure sale by or under direction of the sheriff. On November 15, 1902, the premises were sold under the decree for $300, by one Van Dyke, and the complainant was present and became the purchaser, acting under instructions from his counsel. The report of sale was filed by the sheriff, and shows that he sold the premises for $300 to the complainant, and that there was a deficiency of $671.72, and on December 15, 1902, a decree for the deficiency was made. On December 20, 1902, complainant sued the defendant in justice's court in Detroit to recover the amount due on the decree for the deficiency, and a writ of garnishment was served on the Calvert Lithographing Company. The principal action was dismissed on the return day, and a new action was begun in the circuit court upon the same day. The Calvert Company was again garnished, and on January 13, 1903, filed its disclosure. We are not informed what the disclosure showed, or what has become of the proceedings instituted in the circuit court. Meantime, and soon after the action was commenced in the justice's court, the defendant redeemed the property for $302.20, and on the same day conveyed the premises to his brother for $303.25. The complainant refused to receive the redemption money, and afterwards filed a petition alleging the foregoing facts, and that the proceedings to sell the land were irregular, and the sale void, and praying that the same be set aside, together with the decree for the deficiency, and for other relief. The prayer of the petition was denied upon the hearing, and complainant has appealed.

Complainant's proposition appears to be that the sale was absolutely void, and therefore he has a right to have it set aside, regardless of his own participation in it. The

grounds upon which it was claimed that the sale was void are:

1. Because no notice of sale was posted.
2. Because the sale was made by one not authorized by the decree.
3. Because the publication was commenced before the decree was entered.
4. Because the proceedings were not enrolled previous to the time that the sale was made.

Of these the last two are abandoned by counsel, as shown by his brief. Was there proof of notice of the sale? The report of the sheriff contains the statement that:

"Previous to said sale I caused notice thereof to be publicly advertised for six successive weeks, as follows, viz.: By causing printed notices thereof to be fastened up at least six weeks prior to the day said premises were advertised to be sold, in three public places in the city of Detroit, county of Wayne and State of Michigan, where said premises were to be sold, an affidavit showing the fastening up of which notices is hereto annexed, marked 'Exhibit A,' and made a part of this, my report; and by causing a notice of such sale to be printed once in each week during the time preceding said sale in the Detroit Legal News, a public newspaper printed in said county of Wayne, as appears by affidavit following this report, marked 'Exhibit B,' which notice contained a description of the mortgaged premises."

The affidavits referred to were not attached, and the statement quoted is the only evidence contained in the record of a publication or posting of notice of the sale. This was insufficient to justify confirmation, as has been held in the cases of *Perrien* v. *Fetters*, 35 Mich. 235, and *New York Baptist Union* v. *Atwell*, 95 Mich. 239.

In the case of *Grand Rapids National Bank* v. *Kritzer*, 116 Mich. 688, doubt was expressed of the right to question collaterally the return of an officer after confirmation. If it cannot be so questioned, it must follow that the absence of the affidavits is an irregularity, which does not render the sale absolutely void. See *Averill* v. *Jackson City Bank*, 114 Mich. 20. In the case of *New York*

Baptist Union v. *Atwell*, 95 Mich. 239, a title resting upon a deed was not sustained, in an ejectment case, for want of proper notice. In that case, however, the affidavits were attached, and failed to show a posting in the township as required by the statute. It is also true that the case may be said to have gone off on another and jurisdictional question. It is a general rule that confirmation of a sale is an adjudication of the regularity of the proceedings. See 12 Am. & Eng. Enc. Law (1st Ed.), p. 219; 17 Am. & Eng. Enc. Law (2d Ed.), p. 993, and cases cited.

Again, sales may be confirmed by the acts of the parties. The defendant, who, of all the parties, would seem to have the better right to complain, has acquiesced in this sale, and paid the money to redeem from it, thereby waiving any question of regularity of the sale. This case is novel in one particular; i. e., that it is the complainant and purchaser who seeks to set aside the sale, while the defendant asks to have it sustained.

It is claimed that the former should be estopped from questioning the proceedings, but, if an estoppel in pais may have such an effect in any case, some of the elements are lacking here. The defendant has not paid his debt. He has so managed as to pay $300, and get his property back by a redemption, and then by immediately deeding to his brother for a nominal consideration beyond the amount required to redeem has placed the property beyond reach. The brother can be protected by the return of his consideration, and we do not attach much importance to the fact that the complainant bid less than the property was worth. He is a foreigner by birth, and apparently supposed that he was obtaining a complete title, not subject to redemption, and it was but natural that he should try to buy at a low price.

The propriety of denying this relief by way of punishment is doubtful, especially as the defendant as well as the complainant would be benefited by a sale at an advanced price. It seems manifest that in punishing the

complainant by denying this relief we are assisting the defendant to escape a just liability by placing the property beyond the reach of an execution for the deficiency. There is and should be a large discretion in the circuit judge upon such questions as this, with which we would not lightly interfere, but the denial of relief in this instance clearly works injustice, and we may properly review and correct the decision.

It is said that we should refuse this relief for the reason that the complainant has not offered to bid a larger sum upon another sale, but, while this may reasonably be required where the defendant seeks to obtain a resale, no such earnest of good faith is required here.

The order should be reversed, and the prayer of the petition granted, but without costs of this proceeding. It should also be conditioned on his payment of the expenses of a resale.

WASHINGTON LODGE, NO. 54, I. O. O. F. *v.* FRELINGHUYSEN.[1]

1. INJUNCTION — INJURY TO PROPERTY — NUISANCE — ADJOINING LANDOWNERS.

   Injunction will not lie at the suit of an adjoining landowner to restrain the owner of an hotel building from constructing a passageway 14 feet above an alley, and to secure the removal of existing passageways connecting the defendant's building, on the ground that by means of fans in the window of the hotel kitchen, opposite complainant's building, disagreeable odors are forced into the alley and into the rooms of complainant, where it appears that irreparable damage to defendant's property would result, even though the passageways may, to some degree, tend to retain in the alley the odors which are emitted from the kitchen when the wind is in a certain direction.

[1] Rehearing denied January 30, 1905.

2. SAME—PASSAGE OVER ALLEY—REMOVAL—LACHES.

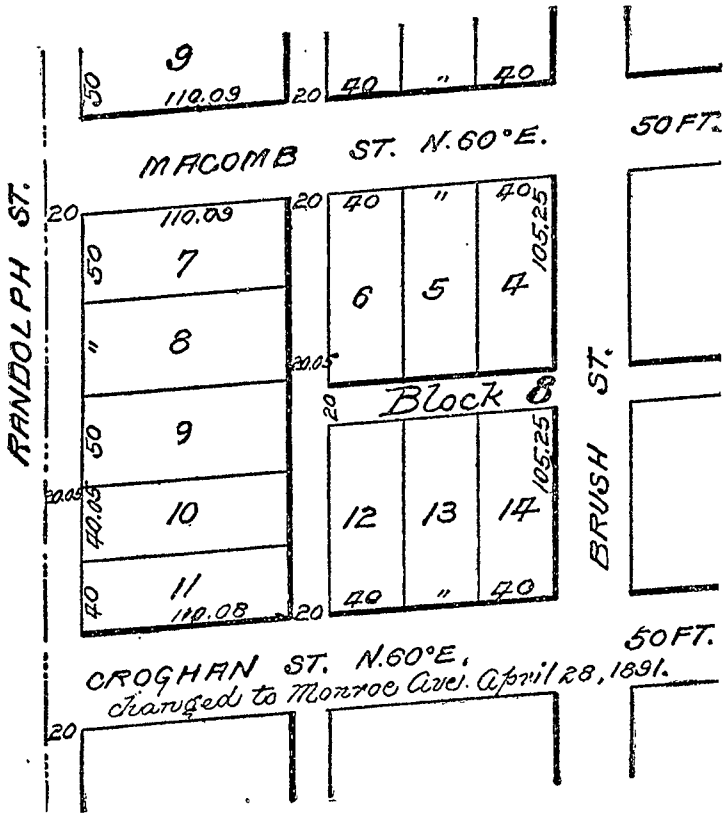
Complainant's president, at the time of the contemplated erection of an hotel, expressed his approval of its erection. Twelve years after its erection, including certain passageways over an alley, complainant sued to secure their removal, and to enjoin the construction of another. The additional passageway would create no greater interference with light or circulation of the air than the old ones. A decree for complainant would ruin the defendant's property for hotel purposes. The defendant had obtained permission from the city for the construction of the passageways. *Held*, that laches barred relief if complainant was otherwise entitled to it.

Appeal from Wayne; Brooke, J. Submitted October 18, 1904. (Docket No. 48.) Decided December 7, 1904.

Bill by Washington Lodge, No. 54, Independent Order of Odd Fellows, against Elizabeth M. Frelinghuysen to restrain the obstruction of an alley. From a decree dismissing the bill, complainant appeals. Affirmed.

In 1835 and 1846 Edmund A. Brush platted certain lands in the city of Detroit, which plats were duly recorded. One of the blocks is surrounded by Randolph street, Macomb street, Brush street, and Monroe avenue. An alley 20 feet wide runs north and south through the block from Monroe avenue to Macomb street. The complainant is the owner of lot 10 and a part of lot 9, and the northerly 1½ feet of lot 11, all fronting on Randolph street, and abutting on said alley. The defendant is the owner of the southerly 38½ feet of lot 11, on the corner of Randolph street and Monroe avenue, and also abutting on said alley. She also owns lot 12, on the opposite side of the alley, which lot fronts on Monroe avenue, and extends along the east side of said alley. Both parties derive title through mesne conveyances from Mr. Brush. The alleys on the plats are not marked "alley," and there is nothing to show the purpose for which they were dedicated, except their width and their location in reference to the lots, but they have always been used as alleys.

The following is the plat referred to in the opinion:



In 1891 and 1892 the defendant constructed upon lots 11 and 12 the Hotel Ste. Claire. The office, bar, and dining rooms, parlors and sleeping rooms, of the hotel, which is seven stories high, are on lot 11. The kitchen is on the second floor of the building, on lot 12. The third floor of that building is also used for sleeping rooms. In order to connect the kitchen with the dining room of the hotel, a passageway was constructed over the alley, 14½ feet above it. The third floors of the buildings are also connected in the same way; these passageways being directly above each other, 16 feet wide and 2 stories high. The com-

plainant's building is several stories high, with windows and doors facing out and upon the alley. The descriptions in the deeds are as follows: "Lot No.— in Block No.— of the subdivision of the Brush Farm, according to the plat of record, in the office of Register of Deeds, in Liber —," etc.

While the defendant was advised that it was not necessary to obtain the consent of the common council, yet, in order to avoid possible litigation with the city, she did obtain the permission of the common council. It was not practicable for the defendant to construct this hotel without using both buildings and constructing these overhead passageways. No objection was made by the complainant to the construction of the passageways until the filing of this bill of complaint, April 16, 1903.

February 24, 1903, the defendant obtained permission from the common council to construct another passageway over the alley, immediately south of the present passageways. The first passageways are within a few inches of the line of complainant's property. The new passageway does note create any additional obstruction to light, air, or access. The purpose of the bill is to restrain the building of this new or enlarged passageway, and to secure the removal of the present ones. The case was heard upon pleadings and proofs, and the bill dismissed.

George Gartner, for complainant.

Fred A. Baker, for defendant.

GRANT, J. (*after stating the facts*). One ground of complaint is that by means of fans in the window of the hotel kitchen, opposite the complainant's building, disagreeable odors are forced into the alley, and across it into the rooms of the complainant.

The covered passageway does not cause these unpleasant odors. If forcing them from the kitchen into the alley is a nuisance to the complainant or to others, it can easily be abated by the erection of a ventilator or some

other means. The defendant may be compelled to abate the nuisance of obnoxious odors, but should not be compelled to take down this passageway, at irreparable damage to property, even though it may, to some degree, tend to retain in the alley the odors which are emitted from the kitchen, when the wind is in a certain direction. This ground of complaint can therefore be eliminated from the case.

The other ground for complaint is that the passageway interferes to some extent with light and the free circulation of air in the alley, thereby affecting the ventilation of the rear of the complainant's building. The first story of its building is occupied as a dry goods store, whose occupant does not complain; the second story, for offices and rooms for society purposes in the rear. The third floor is used entirely for society purposes, and on the fourth floor there is a hall in front, committee rooms, and dining room, with a kitchen in the rear. In the rear are also situated toilet rooms, water-closets, and an ash chute. The upper stories are occupied mainly for meetings in the evening. In the winter time the windows are closed, and the ventilation is not affected by the passageway.

The complainant, through its officers, were fully informed of the character of this building at the time plans were made for its erection, and while it was being erected. Defendant, by petition, applied to the common council for permission to construct this passageway across the alley, and permission was granted. It was placed at a sufficient height to permit the passage underneath of fire engines and all ordinary vehicles which could be used in the business of those whose property abuts upon the alley. The then president of the complainant expressed his approval of the erection of the hotel. It is manifest that the officers of the complainant desired its erection. It supplanted an old building three or four stories high. It was believed that it would increase the value of the complainant's and other property in the vicinity, and that it did so is beyond question. It was then known that upon the land east of

the alley was to be erected the hotel, with its offices, sleeping and dining rooms, and that across the alley was to be located the kitchen. There is no room for a kitchen in the building on the east of the alley. If compelled to tear down this passageway, it would mean virtually the abandonment of the property as a hotel, and cause large and irreparable damage. It is not constructed for or adapted to any other purpose. Complainant's property is assessed at $37,000, while that of the defendant exceeds in value several times that amount.

For 12 years the complainant kept silent and acquiesced in the erection and continuance of this structure. Only when the defendant was about to extend this superstructure one story in height on the south of the present structure did it make complaint. It evidently did not then make complaint because the additional structure proposed would create any additional injury, for it evidently does not. It creates no greater interference with light or the circulation of air than does the old one.

This case is controlled by the principle enunciated in *Edwards* v. *Mining Co.*, 38 Mich. 49, where the court said:

"An injunction is not a process to be lightly ordered in any case. Where the effect will be to present to the owners of a valuable mill the alternative either to purchase complainant's lands at his own price, or to sacrifice their property, any court having the power to order it ought very carefully to scrutinize the case and make sure that equity requires it. In theory its purpose is to prevent irreparable mischief. It stays an evil the consequences of which could not adequately be compensated if it were suffered to go on." Citing many authorities.

In that case the mining company had erected a large stamp mill—probably not so expensive as the hotel property in question here—upon a stream running through Mr. Edwards' land, or land that he purchased after the mill was erected. The stamp sand was carried downstream

and deposited upon his land. It was held that equity would leave him to his remedy at law.

Lord Camden, in *Smith* v. *Clay*, Ambl. 645, decided in 1767, and more complete report in a note to *Deloraine* v. *Browne*, 3 Brown's Ch. 633, in 1792, said:

"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing."

The complainant's claim is that the defendant must now tear down her passageway, ruin her property for the purpose for which it was constructed, and cause her irreparable damage, in order that it may obtain a little light and air. The proposition does not appeal with any force to a court of equity and conscience. Complainant should have spoken sooner. It will not be heard to now invoke the conscience of a court of equity, but will be left to its remedy, if it has one, in a court of law.

This disposal of the case renders it unnecessary to determine the question of the rights of abutting property holders in the alley. No other property holder is here complaining, and it does not appear that any other one can possibly be damaged by this passageway.

Decree affirmed.

The other Justices concurred.

BRADLEY *v.* PERKINS.

1. MASTER AND SERVANT — APPRENTICES — DISCHARGE FOR DISOBEDIENCE.

An apprentice is not guilty of willful disobedience, or such refusal to work, as justifies the master in discharging him,

or imposing a penalty, where, on the foreman asking him to work extra hours at night, he told him that he did not want to work, because it was cold, on account of which his feet were troubling him, and that he should take the work to some one nearer a stove, and the foreman said nothing further, but got another man to do the work.

2. SAME—CONTRACT—INFLICTION OF PENALTY.
Where a contract of apprenticeship authorizes the master, in case of breach, merely to discharge the apprentice, and not to impose a penalty, the statement of the master to him that he could leave, or continue to work on an agreement to remain 30 days above the time provided in the contract, amounts to a discharge, which, not being warranted, justifies him in leaving, and suing for what is otherwise due under the contract on wrongful discharge.

3. SAME—DISOBEDIENCE—RIGHT TO DETERMINE.
The provision in a contract of apprenticeship that if, for any acts of disobedience of the apprentice, the master shall deem it best to discharge him, half the apprentice reserve fund shall be forfeited to the master, does not give the master authority to determine what constitutes an act of disobedience, but merely to discharge in case of such an act.

Error to Kent; Perkins, J. Submitted October 20, 1904. (Docket No. 67.) Decided December 7, 1904.

Assumpsit by Harry Bradley, by next friend, against Willis J. Perkins to recover an apprentice reserve fund. There was judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff was apprenticed to the defendant to learn the machinist trade. The period of service provided for was three years. Aside from the regular compensation for his services, the agreement provided that at the "expiration of the second year there shall be a total apprentice reserve fund of $72.00 in the possession of Perkins & Company in favor of the second party, subject to forfeiture in whole or in part, as herein specified." It also provided for the payment of the $72 at the expiration of the third year of faithful service. The contract further provided that the "party

of the second part agrees on penalty of forfeiture of entire apprentice reserve * * * to remain and continue in the service of said party of the first part for the full term of three years; and if for any acts of disobedience, said party of the first part shall deem it best to discharge said party of the second part, then the one-half of the apprentice reserve * * * shall be forfeited." It also provided that refusal to work the same number of hours as other men in the shop are required to shall constitute just cause for dismissal.

There was a valid requirement of the defendant with its employés, in cases where there was necessity of hurrying the work, that they should work overtime. Such work overtime was paid for, and applied upon the contract. Plaintiff had frequently worked, when requested, in accordance with such requirement. He continued in defendant's service two years and ten months. He then left its employ under circumstances detailed by him as follows:

"We were working overtime there, nights, erecting. They took the stove down in the machine shop, and it was very cold. It was along in the winter, and it was cold, and I had been having trouble with my feet being chilled. I was troubled with my feet on account it was cold all the time. The shop was cold; and I thought, after I worked ten hours, I didn't want to work after that on account of the cold. The foreman came around with a job. He wanted me to work that night. I told him it was cold. I didn't want to work. I had trouble with my feet. To take the job to some one nearer the stove. And he didn't say anything, but walked off with the job. He gave it to somebody there in the shop. He didn't say anything to me about being angry. Said nothing to me about being punished the next day if I didn't do it. I had trouble on and off three or four weeks with cold feet—with chilblains. The stove had been down three days. There was no way of keeping warm while I was there at the lathe attending to my work. I was not there afterwards, after they put up the stove. The superintendent came around the next morning. He wanted to know why I didn't work. I told him on account it was so cold there, and I had trouble with my feet. He said that was no excuse at all. I told him I thought

it was. I stood around all day with cold feet, and they were all complaining around where I was of being cold. We had talked of different things. All I remember, then, he told me for penalty I would have to serve thirty days onto my time, or else quit. I thought a minute, and told him I didn't like that very well, and I turned around and went out of the office, thought about it a little while, and then I went and gave in my time into the office. I took off my overalls and went to the office. I went to the superintendent first when I went into the office, and told him I would give in my time; that I was quitting on account of what he said. He didn't say anything. He went to the office after the money, and he told the bookkeeper to give me my pay, and I told him I had some back money here. 'No, sir;' he says, 'you forefeit all that if you quit.' I told him I didn't think that way. I meant by 'back money' the $72."

Plaintiff testified that immediately after this interview he went to Mr. Perkins, and Mr. Perkins declined to take him back, except upon the imposition of the penalty of thirty days' more work.

Defendant's version of the transaction, as testified to by its foreman, Turner, is as follows:

"I remember January 24th having some extra work to do, and asking him to stay and work with others. We had some tool steel cams to make for a gas engine—three of them. They were to be bored and turned. The order came in that they were in a hurry for them. I think I had five men that I wanted to stay that night. I think three or four remained altogether. I asked Harry Bradley to remain to bore and turn a cam. I showed him the piece of work about six o'clock, and explained what was to be done to it, and asked him to stay and do it. I showed him the cams, gave him the dimensions on them, told him what had to be done with them. He said he was not going to stay. I asked him to stay the same as I did the other men that stayed. One of the other men stayed. There were other men on their machines staying that night. He said he was cold. If he said anything about chilblains I did not hear it, or I don't remember of hearing it. The first thing he said he was not going to stay. I told him they wanted him to stay pretty badly. I told him he had better stay and do the work, or he would have

to settle with the superintendent for it. That was Mr. Houn. I didn't listen to him then. I saw he was angry. I thought he was not going to stay. I turned around. I had some business with some of the other men, and I left him. He seemed to be angry. I don't remember the name of the man who did this piece of work that night. I don't remember the man that did it. I remember I had a part of it done that night in this same room. * * * I do not remember any remark to me about giving the work to some other man. He might have said such a thing, but I don't remember of it. I reported the refusal of Harry to work at that time to the superintendent in the morning."

The superintendent, Houn, testified as follows:

"Three men were required to remain for that extra work that night. It was the custom among our employés, when extra work was required, to have more or less of them remain for it. That was one of the rules of our shop. The next morning I came down, and met Mr. Turner, the foreman, at the office. I had a report from the foreman that Harry Bradley had refused to remain and work the night before. I called Mr. Bradley into the office. I asked him why he didn't stay the night before. He said he had cold feet; it was cold. Well, I didn't take much stock in that, and I told him that was a poor excuse for not staying; that he had stayed there all day and said nothing about it, and other men stayed there all day and said nothing about it. I told Mr. Bradley that it was customary for us to lay the boys off a week or ten days at a time, or try to get them to behave themselves, and that they seemed to come back feeling good-natured and cheerful, and said they wished they had another week. It seemed to be a good thing for them, but that we would adopt a new plan, by setting them back thirty days; and he hesitated about going to work. I told him he might go to work or quit; he could suit himself. He said that he couldn't afford to lose any time, and I said, 'Then you better go to work,' and I left the room, and told the boy to go out and go to work; but he could suit himself and quit. * * * About half or three-quarters of an hour after this conversation he [plaintiff] left his work, demanded his time, and I simply told him he could have it, and took him over to the bookkeeper and ordered his time paid."

This suit was brought to recover this apprentice reserve

fund of $72. The court instructed the jury that, if the plaintiff was guilty of willful disobedience to the orders of the foreman in refusing to work, he could not recover; but, if there was no such willful disobedience, he was entitled to recover. The court stated the question to the jury concisely thus:

"If you find from the evidence in this case that the plaintiff had good excuse for not working that night, as he claims, and so informed the foreman of the shop, who immediately procured another man in the shop to do the work which he was requested to do, the plaintiff is entitled to recover the full sum of $72. The question is, Was there just cause for imposing this additional requirement upon the plaintiff as to the term of his apprenticeship."

The jury rendered a verdict for the plaintiff.

Clapperton & Owen, for appellant.

Smedley & Corwin, for appellee.

GRANT, J. (*after stating the facts*). 1. The contention of defendant is that plaintiff had abandoned his employ, had thereby forfeited his right to the apprentice reserve fund, and that the evidence shows conclusively an act of willful disobedience to the defendant's foreman, which justified the position taken by the superintendent. We cannot concur in the view that an act of willful disobedience was conclusively established.

Plaintiff's version is that when the foreman asked him to work he told him he did not want to work, because it was cold; that he had trouble with his feet; to take the job to some one nearer a stove; and that the foreman said nothing further, but got another man to do the work. The work was done by another employé, and there is no evidence that the defendant was injured by the action of the plaintiff.

If the jury believed the plaintiff, there was no such refusal to work as would justify the defendant in discharging the plaintiff or imposing a penalty for disobedience. *Shaver* v. *Ingham*, 58 Mich. 649, and authorities cited.

2. It is next contended that the plaintiff was not discharged, and that it was his duty to remain until the completion of his three years. The defendant, on the basis of a breach of the contract by plaintiff, told him that he could leave, or continue to work, upon the agreement to remain 30 days above the time provided in the contract. Defendant, under the contract, had no right to make such a requirement, even if he would have been justified in discharging him. The plain inference from the language is, "You are discharged, but you can continue in our employ if you will stay thirty days longer than the original contract provides." In other words, it required the making of a new contract. Plaintiff's acceptance would have annulled the former contract and substituted the other in its place. This he was under no obligation to do, and was justified in leaving. *Trawick* v. *Railway Co.*, 68 Ill. App. 156; *People's Co-operative Ass'n* v. *Lloyd*, 77 Ala. 387; *Whitmarsh* v. *Littlefield*, 46 Hun, 418.

3. It is also urged that the defendant under the contract was entitled to determine for himself the question of willful disobedience. This is based upon the following provision of the agreement:

"If for any acts of disobedience of said party of the second part said party of the first part shall deem it best to discharge said party of the second part, then one-half of the apprentice reserve * * * shall be forfeited to said first party."

This provision does not give the defendant the authority to pass upon what constitutes an act of disobedience. It means that, when an act of disobedience has been committed, the defendant might discharge him should he deem it best. Upon this point, see *Jones* v. *Transportation Co.*, 51 Mich. 539; *Sloan* v. *Hayden*, 110 Mass. 141.

Such arbitrary power must be evidenced by very clear language; but there is nothing in this contract which justifies the conclusion that it was lodged in the defendant.

The judgment is affirmed.

The other Justices concurred.

FULLAGAR v. STOCKDALE.

1. DEEDS—CONSTRUCTION—ESTATE CREATED.
   A deed to a remarried widow, her husband, and her heirs, both she and her husband at the time having children by former marriages, cannot be construed to vest the entire estate in the husband and wife as tenants by the entirety.

2. SAME.
   A deed may be construed by considering its language, the surrounding circumstances, and the situation of the parties.

3. RULE IN SHELLEY'S CASE—ABROGATION.
   The rule in Shelley's Case has been abrogated in this State by the statute, 3 Comp. Laws, § 8810.

4. DEEDS—CONSTRUCTION—HEIRS—CHILDREN.
   Where the father of a remarried widow granted land to her husband, herself, and "her heirs," and to the heirs and assigns of "the party of the second part," and both she and her husband at the time had children by former marriages, the word "heirs" must be construed to mean "children," and the deed to convey to her and her husband as one grantee, and to her two children, each an undivided one-third of the land.

5. SAME—CHILDREN—CONVEYANCE OF INTEREST.
   A conveyance by one of the children, during the life of his mother, of his interest to his stepfather, vested in the stepfather an undivided one-third of the land.

6. SAME—PRACTICAL CONSTRUCTION.
   After a conveyance to a remarried widow, her husband, and her children by her first husband, one of the children conveyed his interest in the land to his stepfather. *Held*, that the failure of the other child to question the mother's right to live on the property during her lifetime did not constitute such a practical construction of the deed between the parties as conveying the entire estate to the husband and wife as tenants by the entirety as to authorize that child to claim the interest of her brother through a deed executed by him to her after his mother's death.

Appeal from Allegan; Padgham, J. Submitted October 20, 1904. (Docket No. 89.) Decided December 7, 1904.

Bill by Sarah Fullagar and Anthony Weber, administrators of the estate of Harriet Gibbs, deceased, against David Stockdale, administrator of the estate of William Gibbs, deceased, Sarah Beach, and John F. Gibbs, to remove a cloud from the title to certain land. From a decree for complainants, defendants appeal. Reversed.

Fidus E. Fish, for complainants.

C. R. Wilkes, for defendants.

CARPENTER, J. February 21, 1867, John Pierce and Olive Pierce, of the first part, conveyed to "William Gibbs, Harriet Gibbs, and the heirs of said Harriet Gibbs," of the second part, and to the "heirs and assigns" of the said party of the second part, the land in controversy in this suit. Said William Gibbs and Harriet Gibbs, of the second part, were husband and wife. Said Harriet Gibbs was the daughter of the parties of the first part. She was at the time of this conveyance the mother of two infant children by a former husband, namely, Sarah Yates (now Fullagar, the first-named complainant) and Frank Yates. After the conveyance was made there was born to William and Harriet a son, namely, defendant John F. Gibbs.

In 1878, by quitclaim deed, Frank Yates conveyed his interest in said land to said William Gibbs. William Gibbs died in 1888, leaving a will, which was afterwards probated, by which he devised a life estate in said property to his widow and the fee to his son, said John F. Gibbs. Harriet Gibbs continued to live on said property with her daughter Sarah until 1902, when she died intestate. After such death said Frank Yates, by quitclaim deed, transferred his interest in said property to his sister, the first-named complainant. This bill was then filed to remove the cloud cast upon complainants' title by the deed from Frank Yates to William Gibbs and by the probate of the latter's will.

Complainants contend that by the conveyance in question William and Harriet Gibbs acquired the entire title

of the land as tenants by the entirety, and that this title vested in Harriet as the survivor, and that, therefore, William Gibbs acquired no interest by the conveyance from Frank Yates.

The first two named defendants contend that the deed conveyed a one-third interest to William and Harriet Gibbs as tenants by the entirety, and a one-third interest to each of the latter's children, namely, Sarah and Frank Yates, and that, therefore, the deed from Frank Yates to William Gibbs transferred an undivided one-third interest in the property.

The court below granted complainants relief, and the defendants just referred to appeal to this court.

The question presented by this controversy depends, as conceded, upon a proper construction of the deed. For the purpose of enabling the court to properly construe such deed, complainants proved in the lower court that when it was executed there was living a child of said grantee, William Gibbs, and that "the object of making the deed was that it would cut off this child and insure the property to Harriet Gibbs' two children." The grantors "wanted to cut off William Gibbs' daughter by his first marriage. * * * They wanted Frank Yates and Sarah Yates to have that forty acres after Harriet and William Gibbs were dead." The witness who gave this testimony (and it was all given by one witness) says that he "don't recall there was any talk;" that, "if Mrs. Gibbs should have any other children, they [the grantors] wanted them cut off." This evidence warrants the conclusion that the grantors intended to convey an estate to William and Harriet Gibbs until the death of the survivor, and to convey the remainder to the children of said Harriet.

If we give effect to this testimony—and I think to do so we would violate the principle which prevents the legal effect of an instrument being changed by parol testimony —(see *Morrill* v. *Morrill*, ante, 112), it would not support complainants' contention that the deed should be construed to vest the entire title in William and Harriet

Gibbs as tenants by the entirety; for that construction would give the children of Harriet nothing, and in the event of William surviving his wife it might all pass to the child whom the grantors desired to exclude. It may also be said that, if the conveyance had been so drawn as to carry out this claimed intention of the grantees, it would have immediately vested in said Frank Yates an undivided interest amounting to at least one-third. While Frank Yates could not have the possession of this property until the death of William and Harriet, he nevertheless (see section 8795, 3 Comp. Laws) would have had a vested remainder, which he could convey, and which, therefore, was conveyed by him to his stepfather, William Gibbs.

We reach the same conclusion by a proper construction of the deed; that is, by ascertaining its meaning by considering, as we certainly can, the language, the surrounding circumstances, and the situation of the parties. See *French* v. *Carhart*, 1 N. Y. 96; *Coleman* v. *Beach*, 97 N. Y. 545; *Seymour* v. *Bowles*, 172 Ill. 521.

The grantees named in the deed are "William Gibbs, Harriet Gibbs, and the heirs of said Harriet Gibbs." The entire title is transferred to these grantees and to their "heirs and assigns." Complainant asks us to say that, according to this language, nothing was transferred to the heirs of Harriet Gibbs. She asks us to construe this conveyance as if they were not mentioned as grantees therein. It is true that there was a rule of the common law, called the "Rule in Shelley's Case," by which, if an estate was granted to one for his life, and by the same instrument the remainder was granted to his heirs generally, or to the heirs of his body, the word "heirs" was a word of limitation, and not of purchase. *Frazer* v. *Chene*, 2 Mich. 90. That is, the word "heirs" simply indicated the character of the estate transferred to the grantee. Under that rule the heirs of the grantee obtained nothing in such a conveyance. If this rule ever could have been used in construing the deed in question—and this I doubt—it is

sufficient to say that it has been abrogated by statute in this State. See section 8810, 3 Comp. Laws. It is also true that the word "heirs" has a technical legal meaning, and as such it describes those who succeed to one's ownership of real estate on his death. In that sense a living person has no heirs. And therefore, if the word "heirs" is given that meaning in the deed under consideration, the grant to the heirs of Harriet Gibbs is meaningless, and transferred nothing. But the word "heirs" is often used as synonymous with "children;" doubtless because the latter are heirs apparent.

There is presented to us the alternative between saying that the grantors intended nothing when they granted the estate to the heirs of Harriet Gibbs, or of saying that they intended the estate should pass to the children of Harriet Gibbs. There is no difficulty in making a choice. We can say, as this court once before said (see *See* v. *Derr*, 57 Mich. 372):

"As Charles Derr [Harriet Gibbs] is a party to the deed, and therefore shown by it to be living, the word 'heirs' must be construed as used in its popular, and not uncommon, sense, as 'children,' and meant to so describe them."

See, also, *Fountain County Coal & Mining Co.* v. *Beckleheimer*, 102 Ind. 76; *Tucker* v. *Tucker*, 78 Ky. 503; *Heard* v. *Horton*, 1 Denio, 165; *Heath* v. *Hewitt*, 127 N. Y. 166; *Fanning* v. *Doan*, 128 Mo. 323; *Seymour* v. *Bowles*, 172 Ill. 521; *Love* v. *Francis*, 63 Mich., at page 193. Contra, *Booker* v. *Tarwater*, 138 Ind. 385.

We conclude, therefore, that the conveyance in question transferred to Sarah Fullagar, to Frank Yates, and to William and Harriet Gibbs (these, as husband and wife, are to be considered as one grantee only) each an undivided one-third of the land in controversy. See *Tucker* v. *Tucker*, 78 Ky. 503; *Anderson* v. *Tannehill*, 42 Ind. 141; *Hulett* v. *Inlow*, 57 Ind. 412; *Hardenbergh* v. *Hardenbergh*, 10 N. J. Law, 45; *Barber* v. *Harris*, 15 Wend. 615; *Johnson* v. *Hart*, 6 Watts & S. 319. As

the interest of Frank Yates was duly conveyed to William Gibbs, the latter died possessed of such interest.

We cannot agree with the learned circuit judge that the parties in interest placed upon this deed a practical construction in harmony with his decision. It is true that no one during Harriet's life disputed her right of occupancy. But the conveyance of the interest of Frank Yates to William Gibbs, and the latter's will, was a denial that the entire estate was held by the husband and wife as tenants by the entirety. It may also be said that after this conveyance was made the parties in interest acted precisely as they would have acted if they intended to recognize its validity and to give it full legal effect. After that time the only party having authority to question the right of possession of William and Harriet was complainant herself. Surely, her failure to question it does not now enlarge her rights. Indeed, it does not appear that she was called upon to question it, since during a portion of this time she and her husband occupied the land as tenants of her mother.

It follows that, in our judgment, the decree of the lower court was erroneous, and that decree must therefore be reversed, and a decree entered dismissing complainants' bill, with costs.

The other Justices concurred.

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138 368
140 568
138 368
142 [2]335
142 [3]697

138 368
152 [2]462
153 [1]109
153 [1]110
153 [1]112
153 [1]113

GREGORY *v.* DETROIT UNITED RAILWAY.

1. STREET RAILROADS—NEGLIGENCE—CONSTRUCTION OF TRACK—RAILS ABOVE STREET SURFACE—OVERTURNING OF VEHICLE—PRIOR ACCIDENTS.

In an action against a street-railway company for injuries from the overturning of plaintiff's cutter in striking the rails of defendant's track, which were alleged to have been negli-

gently left above the surface of the street, where the sole question was the condition of the street, and whether its condition was negligence, evidence of prior accidents of a similar character at the same place was inadmissible.

2. SAME—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

An instruction that if the jury believed that any witness for defendant testified under a fear of losing his employment, or a desire to avoid censure, or fear of offending, or a desire to please his employer, such fact might be considered in determining the weight to be given to his testimony, was erroneous, when not coupled with any caution that the jury would not be justified in drawing unfair inferences simply because the witnesses were employés, and there was nothing in the testimony itself or in the manner of the witnesses to justify the conclusion that the testimony was tainted in the manner suggested by the instruction.

3. SAME—EVIDENCE—CONDITION OF TRACK—SUFFICIENCY.

Where none of the witnesses for the plaintiff who testified as to the condition of defendant's track where the accident occurred had made such an examination as entitled their testimony to much weight, but, on the contrary, eight for the defendant testified to a careful examination, and that it was in good condition—two of them being officers of the village in which the accident occurred—a verdict for plaintiff was contrary to the clear weight of the evidence.

Error to Oakland; Smith, J. Submitted October 21, 1904. (Docket No. 78.) Decided December 7, 1904.

Case by Allen J. Gregory against the Detroit United Railway for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Defendant's road runs through the village of Oxford. The main street (Washington) extends north and south through the village. The track is laid in the center of the street. On reaching Oxford street the track turns by a very sharp curve from Washington into Oxford street. A guard rail is placed between the main or running rail near the inner line of the curb, and fastened to the inner rail by a cast-iron plug placed between the guard and

main rails. A bolt passes through both rails, and the plug securely fastens all together. The guard rail was 1½ inches from the main rail, and a half inch higher. This device answers the same purpose as grooved rails and curves in paved streets. The guard rail is necessary for the operation of the cars.

Plaintiff, on February 10, 1903, was riding in his cutter, and crossed the track where was located this guard rail. He claims that the runners of his cutter struck the inner or main rail, and that his cutter was thereby overturned and he was injured. This suit is brought to recover damages. The negligence charged consists in leaving the main rails above the surface of the street.

The plaintiff recovered verdict and judgment.

Brennan, Donnelly & Van De Mark, Frank E. Jenkins, and *James H. Lynch*, for appellant.

Kinsman & Arnold, for appellee.

GRANT, J. (*after stating the facts*). 1. The first assignment of error arises upon the admission of testimony. Evidence was received, under objections and exception, to show prior accidents of a similar character at this same place. Such testimony is only admissible to show notice and knowledge of the defects. *Grand Rapids, etc., R. Co.* v. *Huntley*, 38 Mich. 537; *Corcoran* v. *City of Detroit*, 95 Mich. 84; *Alberts* v. *Village of Vernon*, 96 Mich. 549.

Defendant's counsel upon the trial admitted that the condition of the rails and street at this point was the same as it had been from the 1st of December previous. The sole question, therefore, was the condition of the street, and whether its condition was negligence. Proof of prior accidents was immaterial, and would naturally tend to prejudice the defendant.

2. Error is assigned upon the following instruction:

"If you believe that any of the witnesses testified under a fear of losing his employment, or a desire to avoid

censure or a fear of offending, or a desire to please his employer, then such fact may be taken into consideration in determining the degree of weight which ought to be given to the testimony of such witnesses."

This charge could have been applicable to none other than the witnesses for the defendant. We find nothing in this record to justify this instruction. The language is identical in substance with that which was condemned by this court in *Marquette, etc., R. Co.* v. *Kirkwood*, 45 Mich. 51. In that case the court instructed the jury that, if they found it necessary to consider the testimony given by the agents and employés of the railroad company, they should bear in mind the interest they have in protecting their company and shielding themselves from blame. The reason for condemning such instructions is found on pages 53, 54, and we need not restate it here. The effect of such an instruction is apparent in this case, for the overwhelming weight of the evidence on the part of the employés of the defendant, who put down the planking at this place and who examined it, shows that the planking was flush with the main rails; and, if it was, it is conceded that there is no liability. Possibly counsel may not commit error in criticising witnesses upon this ground, but that is a very different thing from the judge calling attention to it in the language of this instruction. The effect of such an instruction, standing alone, is to permit the jury to set aside the testimony of the most reliable and truthful witnesses simply because they are employés. This instruction was not coupled with any caution that the jury would not be justified in drawing unfair inferences simply because they were employés. This instruction is very different from that given in *McDonell* v. *Boom Co.*, 71 Mich. 61, 66, and *Lovely* v. *Railroad Co.*, 137 Mich. 653.

In order to justify the above instruction, there must be something in the testimony itself or in the manner of the witness to justify the conclusion that the witness' testimony is tainted by fear of losing his employment, of of-

fending, or a desire to avoid censure, or to please his employer. In cases where corporations or individuals doing a large business are litigants, the great majority of the witnesses are employés, and, when instructions of this kind are deemed proper, they should be coupled with the caution above indicated.

In *Lovely* v. *Railroad Co.* this court cautioned the jury that "no inference unfair to men should be drawn because they are in the employ of the railroad company."

3. Defendant made a motion for a new trial on the ground that the verdict was contrary to the clear weight of the evidence. None of the witnesses for the plaintiff who testified as to whether there was any planking there, or as to its condition if there was, made such an examination as entitled their testimony to much weight. On the contrary, eight for the defendant testified to a careful examination, and that the planking was flush with the top of the rails and in good condition. Two of these witnesses were village officers. The case falls within *Cole* v. *Railway Co.*, 132 Mich. 122; *Brassel* v. *Railway Co.*, 101 Mich. 5; *Whipple* v. *Railroad Co.*, 130 Mich. 460. The court should have granted the motion.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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138 372
143 294

DICK *v.* SUPREME BODY OF THE INTERNATIONAL CONGRESS.

1. BENEFICIAL ASSOCIATIONS—TRIBUNALS—HEARINGS—OBJECTIONS TO EVIDENCE—WAIVER.

Where, at the hearing of his claim before the tribunal of a beneficial association, the beneficiary objects to the introduction of certain evidence, and his objection is overruled, he cannot be held to have waived his objection on appeal by not

appearing, where he is told that appearance is unnecessary and that his claim will be properly presented and considered in his absence.

2. SAME—HEARINGS—RULES OF EVIDENCE.
The validity of a decision of the tribunal of a beneficial association is not lessened by the circumstance that technical rules for the admission of evidence were disregarded. Within the limits of common fairness such tribunals may prescribe their own rules of evidence.

3. SAME—WITNESSES—COMPETENCY—PHYSICIANS.
Section 10181, 3 Comp. Laws, forbidding the disclosure by physicians of information acquired in attending patients, applies as well to hearings before the tribunals of beneficial associations as to proceedings in the courts of the State.

4. SAME—TRIBUNAL OF ORDER—CONCLUSIVENESS OF DECISION.
The decision of the supreme tribunal of a beneficial association, on appeal by a beneficiary, is not conclusive, though so provided by its by-laws, where the tribunal receives and acts upon the testimony of a physician admitted in violation of § 10181, 3 Comp. Laws.

5. SAME—ASSAILING CONCLUSIVENESS—LAW AND EQUITY.
The conclusiveness of an adjudication of the supreme tribunal of a beneficial association as to liability on a membership certificate may be questioned, not only in equity but in a court of law, when set up as a defense to an action on the certificate.

HOOKER and GRANT, JJ., dissenting.

Error to Wayne; Mandell, J. Submitted October 21, 1904. (Docket No. 75.) Decided December 7, 1904.

Assumpsit by Emma C. Dick against the Supreme Body of the International Congress on a policy of insurance. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

W. G. Howard, for appellant.

Walker & Spalding, for appellee.

CARPENTER, J. Plaintiff's husband, John A. Dick, died July 10, 1901. At that time he was a member of

defendant order, and, as such, his life was insured for the sum of $1,000. Plaintiff was his beneficiary, and she brought this suit to recover said insurance. She obtained a verdict and judgment in the court below.

Defendant contends that a verdict should have been directed in its favor, because this controversy had been determined in its favor by the tribunals of its order, and that such determination was final. The question raised by this claim is the only one we are called upon to consider. The facts essential to an understanding of this question are these:

The by-laws of defendant provide that the supreme board of trustees—

"Shall pass on all death claims. * * * If, in its judgment, any such claim is not a valid one, they shall notify * * * the beneficiary, * * * and fix the time * * * when the claimants or their attorneys may appear before the supreme board of trustees * * * and present such evidence, either orally or by affidavit, as they may have to establish the justness of said claim, and the said supreme board of trustees shall try, hear, and decide upon the justness and the validity of such claims, and their decisions shall be binding * * * unless an appeal is taken to the supreme body. * * * It, the supreme body, shall have the power when an appeal is made * * * to decide as to the validity of all death claims, * * * and its decisions shall be final and binding upon every member and his beneficiaries. No suit at law or equity shall be commenced or maintained by any member or beneficiary against the supreme body."

Defendant's board of trustees, suspecting that decedent had obtained his insurance by making false statements respecting his condition of health, notified plaintiff that, in their judgment, her claim was not valid. A hearing was had before them, and the claim rejected. On this hearing plaintiff presented several affidavits tending to prove the validity of her claim. The only other testimony was the statement of defendant's general manager. This witness narrated a conversation between himself and deced-

ent's physician in which the latter said that deceased came to him in January, 1900, and stated that he became sick in February, 1899, and had lost 50 pounds in this interval. This statement, which tended to prove that the insurance had been obtained by false statements, was objected to as incompetent, hearsay, and privileged, but it was nevertheless received and acted upon. From this decision rejecting her claim plaintiff appealed to the defendant body. Neither she nor her counsel was present when her case was there considered. They were told it was not necessary for them to be present, and led to believe that the case would be heard on substantially the same testimony as that introduced before the board of trustees. And it was so heard. The affidavits of plaintiff were laid before the appellate tribunal, but, instead of the hearsay statement of the physician, his affidavit stating substantially the same facts was introduced. That tribunal rejected plaintiff's claim.

Can we say, as a matter of law, that this determination was binding upon plaintiff? If we can, the judgment of the lower court should be reversed. If we cannot, it should be affirmed.

Defendant not only used the physician's affidavit as testimony, but, it is to be inferred, based its decision solely upon such affidavit. Section 10181, 3 Comp. Laws, prohibits the use of such testimony on the ground that it violates a sacred confidential relation. If plaintiff had a right to invoke this law, it cannot be said that she waived that right. Through her counsel she objected to this testimony in the lower tribunal, and defendant's officers had no right to assume that she withdrew this objection in the appellate tribunal. It may therefore be inferred that defendant willfully introduced the testimony under consideration, and upon such testimony rendered a decision adverse to plaintiff. From this conduct, can any inference unfavorable to the validity of the adjudication pronounced by defendant be drawn?

It is clear that the validity of adjudications of this char-

acter is not lessened by the circumstance that technical rules for the admission of evidence are disregarded. See *Derry* v. *Great Hive L. O. T. M. M.*, 135 Mich. 494, *Barker* v. *Great Hive L. O. T. M. M.*, 135 Mich. 499. It is likewise true that within the limits of common fairness such tribunals may prescribe their own rules of evidence. *Derry* v. *Great Hive L. O. T. M. M.*, *Barker* v. *Great Hive L. O. T. M. M.*, supra. And I think it is also true that no error of such tribunals in admitting testimony will be considered by a court unless such error affected its decision. But it must not be supposed that such tribunals are above the lawmaking power of the State. They have no right to violate any law which that power prescribes for their guidance. And if such violation results in their depriving a claimant of the hearing to which he is lawfully entitled, their adjudications are of no legal effect. See *Rose* v. *Supreme Court, Order of Patricians*, 126 Mich. 577.

Did defendant violate a law which was prescribed for its guidance when it admitted in evidence the affidavit in question? The legislature has said:

"No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient." Section 10181, 3 Comp. Laws.

If this statute applied to its proceedings, defendant flagrantly violated it. Did it apply? The proceedings were in their nature judicial, and there can be no doubt that the legislature had power to prescribe rules which it was defendant's duty to observe. Did the statute prescribe such a rule? "The statute is one passed for the sole purpose of enabling persons to secure medical aid without betrayal of confidence." See *Grand Rapids, etc., R. Co.* v. *Martin*, 41 Mich. 671. Did the legislature, in passing this statute, which prescribes a rule of evidence to be observed in judicial proceedings, intend to permit this confidence to be betrayed in any judicial proceedings which it had the power to regulate? To impute any such inten-

tion to the legislature is to assume that it designed to defeat its manifest purpose. There is nothing in the statute to limit its operation to any particular judicial tribunal or to any particular class of judicial proceedings. We must therefore assume that it was intended to extend to all proceedings of a judicial character which the legislature had the power to regulate. This statute was, therefore, in my judgment, violated when the physician's affidavit was used as testimony. See *Fennimore* v. *Childs*, 6 N. J. Law, 386; *Gallagher* v. *Kern*, 31 Mich. 138.

Did this violation of the statute deprive plaintiff of the hearing to which she was lawfully entitled? Plaintiff was entitled to the hearing prescribed by defendant's by-laws. The construction which defendant itself placed on these by-laws—and, in my judgment, their proper and necessary construction—required it to dispose of controversies upon testimony of some character produced before it at a time and a place where plaintiff had an opportunity of being heard. We have held, in accordance with fundamental constitutional principles, that an adjudication made by such tribunal is not binding upon a party who is denied the opportunity of being heard. See *Rose* v. *Supreme Court, Order of Patricians*, supra.

The most obvious and essential rights secured to claimant by the opportunity of being heard are these: The right to present testimony, and the right to hear and meet testimony presented against her. If her claim was rejected upon testimony obtained when she was not present, and of which she knew nothing, we should not hesitate to say that she was denied the opportunity of being heard, even though permitted to introduce testimony tending to support her claim. In such a case it would be clear that, though given a hearing in form, claimant was deprived of all advantage of such hearing, and was therefore denied the hearing to which she was lawfully entitled.

Is it not equally clear that when defendant rejected plaintiff's claim because of testimony admitted against objection, and which the law in positive terms forbade it

to consider, that there was a denial of the hearing to which plaintiff was lawfully entitled? I think it is. Plaintiff was deprived of all the advantages of introducing testimony when that testimony was disregarded by defendant and her case decided upon testimony which it had no lawful right to consider. It was defendant's duty to observe the law prohibiting the use of this testimony. It was plaintiff's right to have that law observed. This right and this duty were just as clear and obvious as if they had been expressly stated in the by-law which provided for the hearing of plaintiff's claim. If such by-law had in express terms provided that this law excluding the physician's affidavit should be observed, no one would for a moment maintain that a determination by defendant in violation of such provision was binding upon plaintiff. Defendant could not insist that such determination complied with the contract which it violated. The only distinction between the supposed case and the actual one is this: In the supposed case the provision for the observance of the law is expressed; in the actual case, that provision is necessarily implied. This distinction affords no ground for the application of a different legal principle. I think, therefore, that plaintiff was denied the hearing to which she was entitled, and was therefore not bound by defendant's adjudication.

I think it may also be said that the statute in question not only forbade the use of the physician's affidavit as testimony, but by necessary implication forbade all judicial tribunals (including the judicial tribunal of defendant) from determining controversies (at least without the consent of parties) upon such testimony. And the law will not permit defendant to retain the unlawful advantage obtained by violating its prohibitions.

If defendant's tribunal had been a court of law, its determination could have been successfully assailed. It is true it could have been assailed in only one way: That is, by review before an appellate constitutional tribunal. Defendant's adjudication cannot be so reviewed, and it

must, therefore, be open to some other kind of an attack, or such tribunals have an authority not possessed by courts established by the Constitution.

It is contended by defendant that the conclusiveness of its adjudication may be assailed only in a court of chancery. But I think it is settled by our decisions that it can be assailed, when it is asserted as a defense, in a proceeding at law. See *Rose* v. *Supreme Court, Order of Patricians*, supra; *Lamson* v. *City of Marshall*, 133 Mich. 250.

To uphold the binding effect of the adjudication made by defendant, we must declare either that the legislature intended to except the judicial proceedings of defendant from the operation of a law which, according to its obvious and natural construction, applies to all judicial proceedings, or we must declare that the defendant has the right, which no other person or body of persons in this State has, to violate at will a constitutional legislative enactment. I think that neither of these alternatives can be accepted, and that the judgment of the court below should therefore be affirmed, with costs.

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

HOOKER, J. (*dissenting*). The plaintiff's husband was a member of the order of the Supreme Body of the International Congress, a mutual benefit association, having been admitted upon an application containing the following agreement:

"This application and the laws of the supreme body now in force or that may hereafter be adopted, are made a part of the contract between myself and the supreme body, and I for myself and my beneficiary or beneficiaries, agree to conform to and be governed thereby."

The certificate issued upon said application was for $1,000, payable to himself and wife as beneficiaries, and was expressly made subject "to the rules, regulations, and by-laws of the defendant then in existence, or which may

thereafter be adopted and subject to the conditions, limitations, and agreements made by the insured in his application for membership."

Before and at all times after he became a member the following by-law, numbered section 54, was in force:

"The supreme board of trustees shall have full power to suspend a benefit member from all of the benefits of the order whenever a complaint is made by the commissioner, record keeper, or finance keeper of a subordinate assembly, or by a deputy supreme commissioner, or deputy grand commissioner, that such member has obtained his membership by false representations as to his age, physical condition, habits, or occupation at the time of his admission, or who may after his admission become addicted to the use of opium or narcotics, or form habits which may injure the health or endanger the life of said member. Such suspension shall be binding on the member without a formal trial until the member has by evidence convinced the supreme board of trustees that such complaint has no foundation, which he must do within thirty days from the date of notice mailed him by the supreme record keeper of the filing of such complaint. The findings and decisions of the supreme board of trustees in all such cases will be final. The supreme board of trustees may reinstate a member so suspended, if at any time it may appear that the cause for such suspension has been removed."

Under this he was suspended March 29, 1900, and on April 27, 1900, he was reinstated on furnishing an affidavit of good health. He died of cancer in July, 1901. Sections 55 and 102 of the by-laws are as follows, viz.:

"SEC. 55. The supreme board of trustees shall pass on all death claims arising from the death of a member holding a supreme body benefit certificate, and on all disability claims. If in its judgment any such claim is not a valid one, they shall notify the claimant of disability benefits, or the beneficiaries or beneficiary of the deceased member thereof, and fix a time which shall not be less than sixty nor more than one hundred and twenty days from the date of such notice when the claimants or their attorneys may appear before the supreme board of trustees, at the office of the supreme record keeper, or some other place to be designated by the supreme board of trustees, and present

such evidence, either orally or by affidavit, as they may have to establish the justness of said claim, and the said supreme board of trustees shall try, hear, and decide upon the justness and validity of such claims, and their decision shall be binding on such claimants unless an appeal is taken to the supreme body. The notice of such appeal from the decision of the supreme board of trustees must be filed with the supreme record keeper within sixty days thereafter. The decision of the supreme board of trustees, unless an appeal is taken to the supreme body, in all such cases shall be final, and no suit at law or in equity shall be commenced or maintained by any member or beneficiary against the supreme body."

"SEC. 102. It (the supreme body) shall have the power, when an appeal is made under the laws of the order from the action or findings of the supreme board of trustees, to decide as to the validity of all death claims, or any other claim which a member may have against it, and its decision shall be final and binding upon every member and his beneficiaries, and no suit at law or in equity shall be commenced or maintained by any member or beneficiary against the supreme body."

Proofs of death were seasonably made, and the claim was disallowed by all of the tribunals of the order. Thereupon the plaintiff brought this action upon the contract in a court of law, and recovered a verdict and judgment for $1,110.90, and costs, from which judgment the defendant has appealed.

The real question in this case has to do with the efficacy of the rule contained in sections 55 and 102 of defendant's by-laws, by consenting to be bound by which the deceased took his insurance, upon an agreement that the decisions of the order should be binding upon him and his privy, the beneficiary, whomever might ultimately be such, and that no suit at law or in equity should be commenced or maintained upon the claim.

It would seem to be a very simple proposition that when one made such an agreement he would be bound by it, and could under no circumstances bring an action at law or in equity against the association, if such agreement was valid. That such an agreement is valid is beyond ques-

tion, and is admitted in this case. It is claimed, however, that the plaintiff is not bound by it under the circumstances of this case, and that in the face of such agreement the beneficiary may still resort to a court of law to enforce a claim upon a policy. Before entering upon an inquiry as to this question, we will set forth the facts upon which counsel predicate their claim that the case is exceptional.

Upon the presentation of the claim of loss the trustees gave the notice provided for in section 55, and upon the hearing the supreme board of trustees rejected the claim. At said hearing the plaintiff was represented by counsel. Counsel for plaintiff assert that there was evidence tending to show that deceased was in good health down to 1899. Deceased's application was also introduced, stating that he had never had cancer; also the proofs of loss showing that he died of cancer, and had been ill for two years; also his affidavit, made April 14, 1900, stating that on the date of his examination for insurance, and up to July, 1899, he was in sound bodily health, to the best of his knowledge and belief, and upon which affidavit he was reinstated. It is stated further that the only other testimony of any kind was a statement by Mr. Harris, defendant's general manager, that he saw deceased's physician, one Robbins, who said that deceased came to him first in January, 1900, and stated that he began to be sick in February, 1899, and lost 50 pounds from that time to the time of his consulting said physician. This statement was objected to as incompetent, and hearsay, and privileged, and that, therefore, the board had no right to consider it.

Upon the appeal the affidavit of Dr. Robbins, who was the physician referred to, was introduced, in which he made oath to the conversation stated by him to Harris. Plaintiff's counsel was not present. He had correspondence with the defendant about it, as follows:

"J. O. BECRAFT,

"Dowagiac, Mich.

"*Dear Sir:* Yours of yesterday at hand with reference to the appeal of Mrs. Dick under Certificate 3,090. I am

entirely ignorant of the method of procedure in these appeal matters, and I assume that the matter will be taken up on affidavits and showing already on file before your Board.

"Will you kindly advise me if I am correct in that respect, and also whether it would be necessary or advisable for either Mrs. Dick or myself to be present."

"Hon. J. B. WHELAN, Justice,
"Detroit, Mich.

"*Dear Sir:* Your letter to J. O. Becraft, Supreme Record Keeper of the International Congress, has been sent by him to me for reply. You will recollect that I am one of the trustees of the organization. The affidavits and showing made before the Board of Trustees can be used on the appeal; either party can present any additional evidence they desire. It will not be necessary for you or Mrs. Dick to be present unless you desire to be. I will see that the matter of the appeal is submitted to the Supreme Body whether you are there or not if you so desire."

"Hon. W. G. HOWARD.

"*Dear Sir:* In reference to the Dick claim, I think we will leave it to you to present to the Supreme Body as you suggest in yours of the 13th inst. You all know the facts in the matter, and I could do no good by coming out.

"Please have the Secretary notify me of the action taken by the Supreme Body and oblige."

"JOHN B. WHELAN,
"Detroit, Mich.

"*Dear Sir:* In further answer to your favor of July 9th, 1902, filing appeal in the claim of Emma Dick, beneficiary under Certificate No. 3,090, I beg to advise you that the Biennial Meeting of the Supreme Body will will be called to order at 1 p. m. Tuesday, March 3rd, 1903.

Yours truly,
"J. O. BECRAFT,
"Supreme Record Keeper.
"Dic. J. O. B."

The following is a copy of Robbins' affidavit:

"Frederick W. Robbins, M. D., of the city of Detroit, in the said county and State, being duly sworn, says: That he is a practicing physician in the city of Detroit, and has been for a period of eighteen years last past, and

as such physician attended John A. Dick, deceased, in his lifetime. Then he diagnosed said Dick's ailment for the first time January 25, 1900. That said Dick stated to deponent at the time of said diagnosis, that he (Dick) first began to be sick and lose flesh in February, 1899, and from that date up to January 25, 1900 (being the time of said diagnosis), he (the said Dick) had lost fifty pounds in flesh. That deponent, on making said diagnosis, found that said Dick was suffering with cancer of the stomach. At that time could feel no nodular tumor, but a sense of resistance, as if the stomach wall was thickened. On February 6, 1900, hydrochloric acid was absent; lactic acid was present; a tumor was well marked. Thus the previous diagnosis confirmed. Up to this time there is no reason to believe that the said Dick thought himself to have other than chronic dyspepsia. The above facts concerning the diagnosis of said John A. Dick are entered in a book of record of my cases which I keep."

All of the evidence taken upon the first hearing was laid before the supreme body, as counsel for plaintiff had reason to expect it would be from the correspondence. The following are the minutes of that trial:

"Extractions from the minutes of the biennial meeting held March 3rd and 4th, 1903.

"Committees on Appeals and Grievances:—P. P. Harris, Jere Mosher, H. M. Lee.

"The report of the Committee on the claim of Emma C. Dick, beneficiary under Certificate No. 3,090 was then read. The report of the committee is as follows:

"The claim of Emma C. Dick as beneficiary under Certificate No. 3,090 for $1,000.00 issued to John A. Dick, late a member of Cadillac Assembly No. 40, of Detroit, Michigan. John A. Dick was examined for membership of the Order under date of December 23, 1898, and was initiated as a member February 6th, 1899, and his certificate of membership was issued March 7th, 1899. On July 12th, 1901, notice was received of his death July 10th. The Committee find the facts as follows:

"The claim was presented to the Board of Trustees and rejected July 3rd, 1902, and an appeal was taken to this Body. Your Committee return, as part of their report, the evidence bearing on the case for the action of the Supreme Body. It is the opinion of your Committee that the action of the Board of Trustees is correct in this in-

stance, still the whole matter is before the Supreme Body for its action.

"The evidence was then read to the Supreme Body in full, on both sides of the case, and, after considering and discussing the same, it was moved by Brother Fassett, supported by Brother Chandler, that the claim of Emma C. Dick as beneficiary under Certificate No. 3,090 issued to John A. Dick for $1,000.00, brought to this Body by the said claimant on appeal, be, and the same is, hereby rejected. Carried unanimously."

From the foregoing it appears that at the first trial plaintiff was represented by counsel, and could have been at the second. He knew that the evidence previously taken would be introduced at the second, and that other evidence might be. It is apparent that there was, to say the least, a plausible reason for believing that the deceased had misrepresented his true condition, and apparently the defendant's officers so believed, and acted honestly in the rejection of the claim. It is stated by defendant's counsel that "no active fraud or bad faith on the part of the defendant is claimed in this case," and this is not denied.

The court charged:

"I do not charge, and it is not charged here, that this defendant organization was guilty of any moral bad faith, or any fraud, but they were guilty of legal bad faith in hearing this appeal in the manner in which it was heard."

And plaintiff's brief states the question before us thus:

"The only question presented, then, upon this record, is whether a hearing before the tribunals of the order, wherein the only evidence against the claim was a physician's statement of matters which he claimed to have learned from Mr. Dick while acting as his physician, and which were necessary to enable him so to act, and the disclosure of which are therefore forbidden by statute, which evidence was on this ground objected to by plaintiff's attorney, is such a hearing, and whether the decision rejecting the claim solely on this evidence is such a decision, as to bar a suit at law."

She admits the validity of the by-law, but asserts that it does not preclude a suit; that where, "owing to fraud or

oppression, the hearing provided for by the rules of the order is not such as the party is entitled to, an action at law is maintainable;" and says that "the hearing and decision [of the order] will be vitiated by a disregard of common fairness;" and that "in the case at bar the requirement of common fairness was disregarded by receiving, against objection, a physician's statement, made in violation of the statutory prohibition, of a disclosure claimed to have been made to him by the assured to obtain his medical assistance;" citing 3 Comp. Laws, § 10181.

At the same time she admits that a hearing is not vitiated because the tribunal failed to comply with the technical rules governing courts in the admission of evidence, and this is clearly the rule, as indicated by the cases which she cites; i. e., *Derry* v. *Great Hive L. O. T. M. M.*, 135 Mich. 494; *Barker* v. *Great Hive L. O. T. M. M.*, 135 Mich. 499. We are not aware that it has ever been held that ex parte affidavits and hearsay evidence may not be received and acted upon by such tribunals. They are often convincing, especially when made under strong corroborating circumstances. They are excluded in courts of law under the law of evidence; but can we say that such tribunals as this may not adopt their own rules of evidence? If that right may not be inferred from the two cases last cited, the contrary is certainly not implied.

Counsel apparently concede that there was no fraud. The only oppression mentioned consists in admitting evidence prohibited by the statute. If this was received in good faith, it can hardly be said to have been oppressive. Furthermore, if the society might settle its own rule of evidence, it might lawfully hear this testimony.

The statute is entitled to no such broad interpretation as is claimed for it. It is merely a rule of evidence. It has appeared under the title "Evidence" in the statute ever since the compilation of 1838, and should not receive a construction that would prohibit a communication by a physician to another person. We do not intend to imply, by our failure to deny it, that the rule contended for as to

fraud and oppression is the law. Plaintiff's counsel cite *Rose* v. *Supreme Court, Order of Patricians*, 126 Mich. 577, in support of the claim. That is a case where the plaintiff was denied a trial by the courts of the order, which is a different question from that before us. See *Barker* v. *Great Hive L. O. T. M. M.*, 135 Mich. 499. There are Michigan cases which hold that such agreements as the one before us are binding, except where fraudulent (see *Hembeau* v. *Knights of Maccabees*, 101 Mich. 165; *Fillmore* v. *Knights of Maccabees*, 109 Mich. 13), but in neither of these cases was a jurisdiction based on such fraud or oppression sustained.

We have frequently alluded to the danger of rules based on such foundations, and, as the facts of this case do not justify a discussion of the question, we think it better to leave it until we have before us a case of "fraud or oppression" in the proceedings.

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

GRANT, J., concurred with HOOKER, J.

ATTORNEY GENERAL, *ex rel.* POTTER, *v.* MCVICHIE.

LIMITED PARTNERSHIPS — ELECTION OF MANAGERS — CUMULATIVE VOTING OF STOCK—STATUTES—CONSTRUCTION.

The minority representation law (3 Comp. Laws, § 8553), securing to minority stockholders in corporations the power of electing a representative in boards of directors, and providing for cumulative voting of stock, is not applicable to an election of managers of a limited partnership association organized under 2 Comp. Laws, §§ 6079–6089, since by 2 Comp. Laws, §§ 6057, 6083, the authority of a manager to contract for the partnership is preserved to some extent in limited partnership associations; and the fact that by Const. art. 15, § 11, certain provisions thereof are made applicable alike to

all associations having any of the powers of corporations, does not indicate that the word "corporation," in all legislation, is to be comprehensively construed.

Quo warranto proceedings by Charles A. Blair, attorney general, on the relation of Waldo T. Potter, to determine the right of Donald McVichie and others to offices of managers of a limited partnership. Submitted October 21, 1904. (Docket No. 71.) Dismissed December 7, 1904.

Charles A. Blair (*W. T. Potter*, of counsel), in proper.

Young & Bell and *William P. Belden*, for respondents.

HOOKER, J. The Anthony Powder Company, Limited, was organized on January 31, 1890, under Act No. 191, Pub. Acts 1877 (2 Comp. Laws, §§ 6079–6089). The original articles of association show that the capital was to be $10,000, divided into 2,500 shares, of $4 each. Subsequently the shares were increased in number to 10,000. The articles also provided that the board of managers should consist of five persons. Their term of office was one year.

At the annual meeting of stockholders held February 2, 1904, the relator was present, owning 5 shares of stock. There being 5 managers to be elected, he and others sought to cumulate their votes for the relator, under the minority representation law (3 Comp. Laws, § 8553). Upon that basis he received a total of 24,250 votes. All of the managers being voted for at once, the remaining stock—5,150 shares—was voted for each of the respondents. The meeting refused to recognize the right to have cumulative votes counted, and credited Potter with 4,850 votes—that being the number of shares so voted—and declared the respondents to be elected members of the board of managers.

The relator thereupon instituted these proceedings to inquire into their right to the office, and prays judgment

upon the right of the relator to such office. The only question raised is whether the minority law (§ 8553, 3 Comp. Laws) applies to this association.

Counsel for the relator discuss four propositions, viz.:

"The relator takes the position that it does apply, for the following reasons:

"1. Under the Constitution, the statutes, and the decisions of our Supreme Court, a partnership association is a corporation.

"2. If, in the opinion of this court, it is not a common type of a corporation, yet we maintain that partnership associations are governed by the law of corporations.

"3. Should this court hold that the question whether or not a partnership association is a corporation, or is governed by the law of corporations, depends partly on the statute and partly on its articles of organization, then relator submits that the Anthony Powder Company, Limited, is a corporation, and is governed by the law relative to corporations.

"4. The stockholders' minority law is entitled to a liberal construction."

The importance of these questions rests upon the conclusion that the minority representation law necessarily applies in case we may say that a partnership association is a corporation, or is governed by the law pertaining to corporations generally. Certain provisions of the Constitution are made applicable to "all associations and joint stock companies, having any of the powers or privileges of corporations, not possessed by individuals or partnerships." See Const. § 11, art. 15. But it does not follow that the term "corporation," as thereafter used in legislation, must in every instance be so comprehensively construed. Had the Constitution makers so intended, they could easily have said so, and the fact that the provision was limited to the term as used in the preceding sections indicates a contrary intention. We have therefore to ascertain the intention of the legislature in passing the minority law.

At the time it was passed the directors or trustees of an ordinary corporation constituted a board by which the

corporation was managed and its business was done. A majority of a quorum of the board, only, could do business for the corporation, except as such majority delegated power. It is radically different as to members of ordinary copartnerships where each member has authority to contract for the copartnership. This feature is preserved to some extent in limited partnerships and in partnership associations. See 2 Comp. Laws, §§ 6057, 6083.

The application of the minority law to corporations in general does not make it possible for the minority member or members to act against the wish of the majority of the board. To apply it to partnership associations would enable minority stockholders to elect one or two of several managers, who, though a minority, without authority from or the consent of a majority, could lawfully bind the association by their acts and contracts. There is nothing in the minority act which justifies an inference of an intention to authorize this as to general corporations, and if this unusual, if not unreasonable, policy is to be established under the act, it must be through a construction which applies it to partnerships or partnership associations—possibly both—where individual agency is preserved by the terms of the organic law. The act provides, in terms, that cumulative voting is proper in elections for directors of any corporation. But the legislature for years has avoided applying the name "corporation" to these associations, and designated them by the name of "partnerships;" and it is not, in our opinion, unreasonable to conclude that it was not their intention to include them under the term "corporations" in this statute. An opposite construction would make the law a sword susceptible of use for aggression, whereas it was obviously intended as a shield for defense.

Judgment of ouster must be denied, and the proceedings dismissed, with costs.

The other Justices concurred.

SHERMAN v. FISHER.

1. MORTGAGES—PRIORITY—FORECLOSURE—PARTIES.
   The assignee of a junior mortgage is not bound by proceedings to foreclose the senior mortgage, to which he was not a party.

2. CITY TAXES—TAX ROLLS—COMPLETION—NOTICE—PROOF.
   Under Detroit Charter of 1883 (Act No. 326, Local Acts 1883) providing in section 6 for publication of notice of the completion of the tax rolls, and in section 9 for publication of notice of their receipt by the receiver of taxes, the absence of proof on file that such notices were published is insufficient to create a presumption that they were not published as required by law, there being no provision of the charter requiring such proof to be filed.

3. SAME—TAX LEASES—ESTOPPEL TO ASSERT.
   Where the attorney of the purchaser of real estate on foreclosure of a first mortgage purchased certain tax leases with his own money after plaintiff's title had matured under foreclosure of a junior mortgage, and he testified that he did not know whether the price of such leases had been charged to his client, such facts were insufficient to justify a finding that the attorney purchased the leases for his client, so as to raise an estoppel as against plaintiff.

4. SAME—VESTING OF TITLE.
   Title under a city tax lease vests in the purchaser from the date of the lease.

5. LANDLORD AND TENANT — ESTOPPEL TO DENY LANDLORD'S TITLE.
   While a tenant is estopped to dispute his landlord's title as of the date of his lease, he may show that such title has been subsequently extinguished.

6. TAX LEASES—VALIDITY—LANDS BID IN BY CITY.
   Where a purchaser of certain tax leases from a city obtained a lease or leases covering all of the years for which the land had been bid in by the city, all of the leases bearing the same date, it was no objection to the validity thereof that, inasmuch as the city had bid in the land, it was not authorized to tax it thereafter.

Error to Wayne; Brooke, J. Submitted October 21, 1904. (Docket No. 76.) Decided December 7, 1904.

Assumpsit by Mary Sherman against Truman S. Fisher for rent. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Reversed.

Walker & Spalding, for appellant.

Charles C. Stewart, for appellee.

HOOKER, J. In 1887 one Abbott owned certain premises in Detroit, and subsequently gave two mortgages thereon. The junior mortgage was assigned to Theeck, and the assignment was duly recorded. The senior mortgage was foreclosed. The property was purchased at the sale by Walker, and the period of redemption expired. These proceedings did not bind Theeck, who was not a party to them. See *Walker* v. *Fisher*, 117 Mich. 72.

Subsequently the junior mortgage was foreclosed, and the interest derived from the foreclosure sale came to be vested in Sherman, the plaintiff. Fisher, the defendant, entered upon the premises previous to the foreclosures, as a tenant of Abbott, and there has been considerable litigation over the right to the amount due from him for rent. See *Walker* v. *Fisher*, supra; *Sherman* v. *Spalding*, 126 Mich. 562.

In the present case Sherman has brought suit for rent under a lease which she claims to have made with Fisher in 1897; i. e., after the foreclosure of the junior mortgage. The only question that counsel for the defendant raises is whether he can maintain his defense by showing that Spalding acquired title to the premises, subsequent to the leasing, by three tax leases, acquired under the charter of the city of Detroit.

The circuit judge was of the opinion that the leases were valid, but that Fisher, having attorned to plaintiff, who had come lawfully into possession of the premises, could

not set up Spalding's subsequently-acquired title against her, his lessor. He therefore directed a verdict for the plaintiff for $137.53, and the defendant has appealed.

The tax leases were dated November 6, 1897, and that for 1895 recites that the premises were sold for taxes on June 1, 1896. It is claimed that redemption expired as to that sale on November 6, 1897, subsequent to the date of the lease. Defendant apparently concedes that, if his title accrued on the date of sale for taxes, the proof was not admissible. The tax leases were offered and received in evidence, whereupon evidence was offered on behalf of the plaintiff that whereas, under section 6 of the charter (Local Acts 1883, Act No. 326, chap. 10), the board of assessors were required to cause notice to taxpayers of the completion of the rolls to be published in two daily papers, and section 9 requires the receiver of taxes to give six days' notice of the receipt of the rolls by publication and posting. There is not on file evidence that either of said provisions were complied with. It is urged that this overcomes the prima facie case made by the introduction of the leases, under section 19 of the charter, and the claim of title based thereon.

Is proof of the publication of these notices indispensable to the authority to sell? If so, the title claimed under the leases fails; if not, it should be sustained. If we infer that this notice is in the nature of a notice that the assessment is open to review—and that is perhaps what it was designed for—absence of proof upon file that it was given is not sufficient to create a presumption that it was not given as required by law, as the charter does not require the filing of such proof. In the case of *Boyce* v. *Peterson*, 84 Mich. 490, it was so held under a similar statute. We see no reason for not applying the same rule to the less important notice of the delivery of the roll to the controller. This disposes of the question of title so far as it depends on the validity of the tax leases.

It is claimed, however, that this title was purchased by Spalding, in his capacity of attorney for Walker, and

hence that it is not available by Fisher against Sherman. If Sherman can say that the purchase of the tax titles by Walker inured to her benefit, as owner, or representative of the owner, of the equity of redemption, this is perhaps a valid claim, or at least might be in a court of equity, assuming, of course, that Spalding's purchase was for Walker.

At the time that Spalding claims to have obtained title, Mrs. Sherman's title had matured under the foreclosure of the junior mortgage, and Spalding's title did not accrue, upon his theory, until November 6th. She was then an owner subject to the Walker mortgage, and there may be some doubt whether the purchase of tax titles procured by Walker, if they could be said to have been so procured, could be set up against her—a question, however, which we do not decide. Whether or not this is so, Walker could not be compelled to purchase such titles, or pay taxes in the interest of Mrs. Sherman, and the record fails to show that he did. What testimony there is, in addition to the leases, which clearly convey the legal title to Spalding, indicates that Spalding paid for them with his own money. He stated that he did not know whether this had been charged to Mr. Walker. This is not sufficient to justify a jury in finding that the lands were purchased for Walker. See *Connecticut Mut. Life-Ins. Co.* v. *Bulte*, 45 Mich. 113.

The title being in Spalding, the next inquiry is whether it vested before the date of the lease. We are of the opinion that there can be but one answer to that question. It is that it did not. *Busch* v. *Nester*, 62 Mich. 381; *Hess* v. *Griggs*, 43 Mich. 397; *Hemmingway* v. *Drew*, 47 Mich. 554; *Boardman* v. *Boozewinkel*, 121 Mich. 323.

We have repeatedly held that while a tenant cannot dispute his landlord's title as of the date of his lease, he may show that it has been subsequently extinguished. See cases cited in opinion of Mr. Justice MOORE in the case of *Sherman* v. *Spalding*, 126 Mich. 563, 564; *Jenkinson* v. *Winans*, 109 Mich. 526.

It is suggested that, as the city had bid in the land for previous years, it was not authorized to tax it for 1895. If there would otherwise be any force in this contention—which we do not decide—it is lost by the fact that Spalding obtained a lease or leases covering all of these years, which leases all bear the same date.

The judgment is reversed, and a new trial ordered.

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

ORSLAND v. WAYNE CIRCUIT JUDGE.

138 395
146 440

JUDGMENT—REFUSAL TO ENTER—MANDAMUS.

Where relator, though entitled to a judgment which would determine the particular suit, was not entitled on the record to a judgment finally determining the matters in controversy, which was the judgment denied, mandamus will not be granted to compel the entry of a judgment determining the suit, not shown to have been applied for.

Mandamus by Hallock Orsland to compel Joseph W. Donovan, circuit judge of Wayne county, to enter a final judgment. Submitted November 15, 1904. (Calendar No. 20,790.) Writ denied December 7, 1904.

Lord & O'Connor, for relator.

Bowen, Douglas, Whiting & Murfin, for respondent.

PER CURIAM. Relator obtained judgment by default in the Wayne circuit court upon suit commenced by filing declaration against one Sarah A. Harris. Upon motion of attorneys of said Harris, respondent set aside the default and judgment and the alleged service upon the ground that "no service of process was ever had, and no proof of service of process ever filed." Respondent subsequently refused to

permit relator to amend his return of service, and still later denied relator's motion to enter final judgment. We are asked to issue a mandamus compelling respondent to enter such judgment.

Relator was not entitled, on this record, to a judgment which finally determined the matters in controversy. He was entitled, however, to a judgment which determined the particular suit. And this may properly be called a final judgment. See *In the Matter of Hicks*, 20 Mich. 129; 2 Burrill's Prac. 132. We do not think, however, that relator made it clear to respondent that this was the kind of final judgment he desired. It appears from respondent's return that he denied relator's application because, as the record stood, he was not entitled to a judgment on the merits, and we infer that he supposed that relator asked for such a judgment. Under these circumstances, it would not be proper to compel respondent, by a writ of mandamus, to enter judgment in the form in which relator is entitled to have it. When relator makes his wishes clearly known, it is not to be presumed that his right will be denied by respondent.

The mandamus applied for is denied, but no costs will be awarded.

CARR *v.* CARR.

138 396
147 658

1. MORTGAGES—FORECLOSURE—LIMITATIONS—REVIEW.

Where, in a suit to restrain the foreclosure of a mortgage, defendant answered by cross-bill for foreclosure, and the court found that limitations pleaded had not run against the mortgage, but granted a decree for only a small part of the alleged debt, from which complainant did not appeal, the decision of the issue of limitations is not reviewable on the defendant's appeal, but is not so conclusive as to require a decree for defendant for the full amount of the debt.

2. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED.
In a suit by the heirs of a mortgagor to restrain the foreclosure of the mortgage, defendant's testimony that he had received a payment within 15 years in a letter from the mortgagor, which he claimed had been destroyed, was inadmissible, since it related to a matter which, if true, was equally within the knowledge of the deceased mortgagor.

3. SAME—HANDWRITING—KNOWLEDGE OF WITNESS.
Where the wife of a mortgagee had never seen the mortgagor, and had never seen him write, she was not competent to testify that she saw and read a letter from such mortgagor to her husband, containing a draft for a payment on the mortgage.

4. LIMITATIONS—ACKNOWLEDGMENT OF DEBT.
A letter from a mortgagor accepting the mortgagee's proposition to settle on the basis of payment of a part of the debt secured by the mortgage is not such a recognition of the entire debt as to prevent the running of limitations against the same.

Appeal from Calhoun; Hopkins, J. Submitted November 15, 1904. (Docket No. 103.) Decided December 7, 1904.

Bill by Mary E. Carr and others against Hugh Carr to restrain the foreclosure of a mortgage. Defendant filed an answer in the nature of a cross-bill asking for the foreclosure of said mortgage. From a decree for defendant for less than the amount claimed, he appeals. Affirmed.

F. A. Culp and *Hatch & Anderson*, for complainants.

Powers & Powers, for defendant.

MOORE, C. J. December 20, 1873, James Carr made a mortgage to his brother, Hugh Carr, the defendant, for the sum of $1,400, due seven years from date, with interest at 10 per cent. per annum. April 15, 1902, James Carr died intestate, leaving the complainants, Mary E. Carr, his widow, William Carr, his son, and Eva Elwell, a daughter, as his only heirs surviving. November 20, 1902, defendant commenced foreclosure of the mortgage

by newspaper advertisement. January 24, 1903, complainants filed this bill, obtained an injunction restraining the foreclosure proceedings at law, alleging the mortgage was barred by the statute of limitations, and praying that it be declared void and be discharged of record.

Defendant answered, denying the mortgage was barred by the statute of limitations, and by way of answer in the nature of a cross-bill asked that the mortgage be foreclosed in accordance with the usual practice of foreclosing mortgages in chancery.

The case was heard upon pleadings and proofs in open court. A decree was made dismissing the complainants' bill, and granting a foreclosure on defendant's cross-bill for the sum of $550, with interest at 10 per cent. from November 29, 1901, with costs in favor of the defendant. The defendant claims there is due upon the mortgage $5,694, and has brought the case to this court by appeal. The complainants have not appealed.

The record shows that about 1876 Hugh Carr returned to Ireland, and has never been back to this country. It was the claim of complainants that a day or two prior to his leaving James Carr paid to him $500 or $700 to apply on the mortgage; that October 19, 1881, he sent him $100 for the same purpose; and that he never afterwards made any payment, and that the statute of limitations had run against the mortgage. It is the claim of defendant that only one payment has ever been made to him, and that was of $100, made about 14 years before the deposition of Hugh Carr was taken to be used upon the trial. In his disposal of the case the trial judge said he did not think the statute of limitations had run against the mortgage, and in his opinion said, among other statements:

"The testimony as to the number and amount of the payments made upon the mortgage are conflicting, and, excepting as to one payment of $100, made in 1881, unsatisfactory. It appears from the evidence that the defendant went to Ireland in 1876, and has never returned to this country. It is also shown that he made numerous

requests by letter from time to time for payment on the mortgage debt, some of these requests being urgent and threatening. At last, on September, 1901, he made what he designates his final offer to accept $550 in full payment of the debt, at the same time stating that this amount is less than a third of what is his due, and threatening, if this amount is not paid, he will proceed to have the mortgage foreclosed without further delay. James Carr, under date of November 29, 1901, replies to this letter, saying that he accepts the offer, and asks to have the mortgage, with a proper discharge, sent to some one in this country representing the defendant, with whom the business can be transacted. This arrangement was not carried out, though James Carr, before his death, which occurred April 15, 1902, wrote other letters urging the defendant to send on the mortgage, and agreeing to pay the amount specified in defendant's letter of Nov. 29, 1901."

He thought it proper this agreement should be enforced, and made the decree as before stated.

Section 9725, 3 Comp. Laws, reads:

"No suit or proceeding shall be maintained to foreclose a mortgage on real estate, either at law or in equity, unless commenced within fifteen years from and after such mortgage shall become due and payable, or within fifteen years after the last payment was made on said mortgage: *Provided, however*, that this act shall not be construed to apply to mortgages which have been due fifteen years or more, or the last payment upon which was made fifteen years or more prior to the passage of this act, but in all such cases no suit or proceedings shall be maintained to foreclose the same unless commenced within five years after this act shall take effect."

The defendant insists that, as the trial judge found the statute of limitations had not run against the mortgage, and as complainants have not appealed, that question cannot now be considered by this court. This position undoubtedly states the general rule, but defendant is seeking affirmative relief by an answer in the nature of a cross-bill. He is not content with the relief granted to him in the court below. He says, instead of having a decree for something more than $500, he should have one for more

than $5,000. He claims this amount by virtue of a mortgage, which, upon its face, was due nearly 22 years before he began foreclosure proceedings, which mortgage he could not, by reason of the statute, foreclose at that date, unless he could show a payment had been made thereon within 15 years of the commencement of the foreclosure. He undertakes to make this showing by testimony. This showing is disputed by complainants, and is an important element in the case. We agree with the trial judge that the testimony as to the number and amount of the payments is conflicting, but we think the claim of complainants in that regard is supported by a very clear preponderance of the testimony. The testimony all discloses that James Carr was an unfortunate victim of the drink habit, and that he wasted the proceeds of his farm. A receipt is introduced in evidence from the bank showing that October 19, 1881, James Carr, with $100, bought a draft in favor of Hugh Carr for £20 8s. drawn on the Munsted Bank, Dublin. Mrs. Carr swears she saw her husband with the money, previous to going to Battle Creek for the draft, which was to be inclosed in a letter addressed to the defendant, which letter she saw; and that afterwards her husband received a receipt from his brother for the money, and a letter, both of which she saw and read, but neither of which she was able to find after his death. Hugh Carr, in his deposition, testified he received $100 from James Carr, but that it was about 14 years before his deposition was taken, and that he never received any other sum from him to apply on the mortgage. We shall have more to say about this testimony later.

On the 23d of January (blank year) Hugh Carr wrote his brother:

"i think that you might be ashamed all this time and not paid any if you done any thing you might a had every cent of it payed now twelve or thirteen years and never tried to pay any thing, their must be something the matter you dont care one straw how i get on now look at the interest and all you surely could have paid the interest every

year, but i think you want to pay nothing and if you do not pay some and send me some before May i will go down to the Queens Counceler to Belfast and give it to him, and if you have any wit for yourself and for me you will save the trouble and expense, i will be humbugged no longer, if you had done any thing, but you would do nothing there is nothing fare about you."

On January 28, 1892, he wrote him:

"James you spoke of money matters and I think that it was near time in 15 years that you could do nothing you might had every farthing paid and could if there had not been something wrong you did not care how i got along if you were all right, sometime i thought of going to Belfast and giving it into the hand of the Queens Counceler, and other times i thought of going over to you but you spoak as you were going to give me some, if you send me the 16 hundred and send me fifty pounds a year i will forgive you all the interest and when you count that up that is a good deal."

In our opinion, these letters are utterly inconsistent with the idea that a payment had been made about the year 1889 as testified to by Hugh Carr. Hugh Carr's testimony is supported by the testimony of his wife to the effect that she saw the draft, and read the letter in which it came. The time when this occurred is not stated by defendant, but is said to have been about 14 years before their depositions were taken. Both these witnesses also testified that James had frequently acknowledged the debt in letters which he sent. None of these letters were produced, and it was claimed they were destroyed. The testimony of Hugh Carr was incompetent under the statute. It related to matters which, if true, must have been equally within the knowledge of his dead brother. His wife never saw James Carr, and never saw him write. She did not possess the requisite knowledge to enable her to testify to his handwriting. Taking the record as we find it, we think it clear the last payment on this mortgage was made in 1881.

It is said, however, that the letters written by James Carr are sufficient to take the mortgage out of the oper-

ation of the statute; citing *Rumsey* v. *Settle's Estate*, 120 Mich. 372. The only letters written by James Carr which are introduced in evidence which refer to the mortgage are in reply to correspondence which began in September, 1901, in which Hugh wrote:

"Now James i give this last chance if you send me one hundred pounds and gives John Mcomb ten pounds i forgive you all the rest, that is not one third you owe and if not i will fight to the end."

In the following November James wrote:

"wel hugh you made me a proposal to settle up with you and i have made maind for to myself except if you send the mortgage hear as soon as you have a mind to and have it already for discharge and you will have your money and that will end it up send it to John Kerr or any lawyer or any one you have a choice and i will try and settle up with you and John Mcomb at once and do it as quick as you can for i want it done with as i dont nowe how soon something may happen so do it right off."

Then followed other correspondence relating to a settlement upon the basis of £100, which correspondence was terminated by the death of James. Even if the promise to pay in writing would take the case out of the statute, it will be noted there was no such recognition of the entire amount claimed and a promise to pay it as would prevent the running of the statute.

As the complainants have not seen best to appeal from the amount of the decree, it will be affirmed, with costs of this court in favor of complainants.

The other Justices concurred.

AMERICAN STEEL & WIRE CO. *v.* EDDY.

1. CORPORATIONS — STOCKHOLDERS — LIABILITY TO CREDITORS — ACTION TO ENFORCE.

   2 Comp. Laws, § 7057, creating a liability on the part of stockholders of a corporation from which the capital stock has been withdrawn, authorizes suit by a creditor of the corporation against a holder of preferred stock.

2. SAME — IMPAIRMENT OF ASSETS — PAYING DIVIDENDS — GOOD FAITH.

   Under such statute the good faith of the corporation and its stockholders in paying and receiving dividends which in fact impair its capital stock is immaterial.

3. SAME—ISSUE OF IMPAIRMENT—EVIDENCE.

   On the issue of whether the capital stock was in fact impaired by the payment of dividends, the fact that the corporation held a guaranty that certain assets purchased by it should net a certain amount on a date subsequent to the payment of the dividends is not controlling, but the guaranty is merely a fact to be considered with other facts, such as the solvency of the guarantors, etc., in determining whether the capital was impaired.

4. SAME—OWNERSHIP OF STOCK—USING FUNDS OF ANOTHER.

   One who subscribed to and accepted preferred stock, acted as a director, and participated in the management of the affairs of the company and the declaration of dividends, and to whom the dividend complained of as an impairment of the corporation's assets was paid, must be deemed a stockholder, although he used the money of his sister in payment for the stock, and merely loaned it to the company; receiving the dividend as interest for his sister, and paying it to her.

Error to Bay; Shepard, J. Submitted November 15, 1904. (Docket No. 83.) Decided December 7, 1904.

Petition by the American Steel & Wire Company, a judgment creditor of the Miller Hardware Company, against Selwyn Eddy, to enforce stockholder's liability.

There was judgment for defendant, and plaintiff brings error. Reversed.

George E. & M. A. Nichols (*Charles W. Nichols*, of counsel), for appellant.

T. A. E. & J. C. Weadock, for appellee.

HOOKER, J. The Miller Hardware Company, a corporation, began business in Bay City on February 17, 1894; being organized by the stockholders of a corporation theretofore existing, named W. H. Miller & Co., for the purpose of succeeding to the business of the latter. Its authorized capital was $70,000. On the day of its organization its stockholders' meeting adopted a resolution to purchase all of the assets and good will of W. H. Miller & Co., and to assume all of its liabilities, upon its guaranty that said assets should net to it (the Miller Hardware Company) at least $70,000 over and above the debts and liabilities—all of the accounts and bills receivable not collected on or before February 1, 1897, to be deemed uncollectible and valueless—and that the common stock of the new company should be issued to the stockholders of W. H. Miller & Co. in exchange for the stock certificates of that company, share for share. This was done.

On March 14, 1894, a by-law was adopted providing for the issue of $30,000 of preferred stock, and on April 2, 1894, a certificate for 125 shares was issued to Selwyn Eddy, in terms following, viz.:

"Incorporated under the laws of the State of Michigan, Act No. 232, Public Acts of 1885, as amended.

"No. 13. 125 Shares.

"The Miller Hardware Company, Bay City, Mich.

"Preferred Stock bearing fixed dividends.

"This certifies that Selwyn Eddy, of Bay City, Mich., is the owner of one hundred and twenty-five shares of ten dollars each, of the preferred stock of the Miller Hardware Company, fully paid and non-assessable. Transferable on the books of the company in person or by attorney on surrender of certificate.

"Fixed dividends will be paid on this stock at the rate of 8 per cent. per annum, payable semi-annually on the first day of April and October of each year, at the office of the Company. This stock is redeemable at the expiration of three years from the date hereof.

"In witness whereof the president and secretary have hereunto affixed their signatures and the corporate seal of the company, at Bay City aforesaid, on this second day of April, A. D. 1894.

"W. H. MILLER,
"President.
"EDWARD WILLIAMSON,
"Secretary."

Fifteen thousand dollars of such stock was issued to Selwyn Eddy, and a similar amount to John F. Eddy. A written guaranty to make the assets net to the Miller Hardware Company $70,000, in accordance with the resolution, was given by W. H. Miller & Co., upon which was indorsed the following, signed by the stockholders:

"In consideration of the foregoing the undersigned severally covenant and agree to and with said Miller Hardware Company to pay to and make up to it any deficiency or shortage of the sum of $70,000 in the amount realized by said Miller Hardware Company as aforesaid, in proportion to our respective holdings or interests in the stock of W. H. Miller & Company as set opposite our respective signatures."

The excess of assets over liabilities so transferred by W. H. Miller & Co., listing all accounts and bills receivable at face value, was $73,565.29; giving to the Miller Hardware Company, on the face of the inventory, $3,565.29 surplus over its capital stock of $70,000. This sum was charged in its books to W. H. Miller & Co., and carried as an asset during the period that the Miller Hardware Company did business, and it opened a surplus account of $7,000 upon its books. It is claimed that this was $3,434.71 in excess of the actual surplus, based on face values.

The Miller Hardware Company continued its business until June 1, 1897, when it made a voluntary assignment

for the benefit of its creditors. During the time it did business it paid annual dividends to its stockholders, of which defendant Selwyn Eddy received the sum of $3,600. It is said that this was 8 per cent. interest upon its stock, according to its terms. At the time of the assignment the plaintiff was a creditor of the Miller Hardware Company, and it ultimately realized from the assignee 55 per cent. of its claim. It afterwards obtained a judgment against the Miller Hardware Company for the remaining 45 per cent., and subsequently brought this action against Selwyn Eddy under the statute (2 Comp. Laws, § 7057) which provides:

"SEC. 21. If the capital stock of any such corporation shall be withdrawn and refunded to the stockholders before the payment of all the debts of the corporation for which such stock would have been liable, the stockholders of such corporation shall be jointly and severally liable to any creditor of such corporation, in an action founded on this statute, to the amount of the sum refunded to him or them respectively."

It has appealed from an adverse verdict and judgment.

Although there are many assignments of error, the questions discussed are thus stated by counsel for the appellee:

"The questions involved in this case relate principally to the refusal of the court to give certain of plaintiff's requests to charge, and the charge of the court, and to the admission of certain testimony. We think they may be summarized as follows:

"*First.* Should the court have directed a verdict for any amount against the defendant?

"*Second.* Was it error to admit the testimony of the witness Pratt and the defendant Eddy as to their good faith and belief as to the condition of the company, and the charge of the court in that connection?

"*Third.* Was it not the duty of the court to charge the jury that they should not, in determining the question as to whether there were any profits out of which dividends could be paid at the different periods, take into consideration any account which had rested for an unreasonable

length of time, or which had outlawed, or where the debtor had failed or become bankrupt, or where it was in suspense, etc.?

"*Fourth.* Was the error of the court in admitting the testimony offered on the part of the defense in relation to defendant's stock being taken as a loan, and that the dividends were paid to his sister, cured by the charge?

"*Fifth.* Were the remarks of the court in reference to certain testimony of witness Pratt reversible error?"

This cause was before us on a former occasion, when we held that the statute cited authorizes a suit against a stockholder by a creditor, and that a holder of preferred stock has no more right to receive a portion of the capital stock, to the injury of creditors, than a holder of common stock. *American Steel & Wire Co.* v. *Eddy*, 130 Mich. 266.

Counsel for the plaintiff assert that, while the secretary's annual statements of the financial condition show a net profit larger than the amount distributed, this was only made possible by retaining among the listed assets large amounts of worthless bills receivable and accounts which it was the duty of the company to charge off, and which were already lost, and therefore were not in fact available as assets.

Upon the other hand, counsel for the defendant insist that these items were included in the best of faith, especially as the guaranty did not become a liability until 1897, according to its terms, and that such dividends or interest, having been paid in good faith, cannot be called a withdrawal or refunding of the capital stock.

Counsel for the defendant were permitted to introduce testimony tending to show that the Eddys were asked to furnish this money as a loan, and that it was so furnished by them from the funds of their sister, who was the real owner of the stock or security, though kept in her brothers' names for convenience, and that she received the interest and dividends that were paid. Error is alleged upon the reception of this testimony. In his charge the court instructed the jury that this proof would not constitute a

defense, and it is urged that this cured the error of its admission, if it was erroneously received.

Upon the former hearing we held that those who deal with a corporation may rely on the preservation of the capital stock, and denied its right to divide it among the stockholders, as dividends, to the injury of creditors. We also indicated that this could not be done through a subterfuge, and that the statute (2 Comp. Laws, § 7057) applied to holders of preferred stock.

It does not become a question of good faith, either of the corporation or stockholder. Whenever it is satisfactorily proved that the assets of a corporation are so reduced as to impair the capital, the creditors have a right to follow them into the hands of the stockholders to whom they have been paid as dividends, and who must be held to hold such assets as a trust fund for the benefit of creditors. This is clearly indicated by our former opinion. It was therefore error for the court to instruct the jury that it was a question of good faith on the part of the stockholders. See former opinion, 130 Mich. 266, and other cases cited by counsel: 1 Cook on Stock, Stockh., and Corp. Law, § 548; *Ft. Payne Bank* v. *Alabama Sanitarium*, 103 Ala. 358, 370; 2 Clark & M. Priv. Corp. 1637; *Lexington Life, etc., Ins. Co.* v. *Page*, 17 B. Mon. (56 Ky.) 412, 416; *Grant* v. *Ross*, 100 Ky. 44; *Finn* v. *Brown*, 142 U. S. 56; *Main* v. *Mills*, 6 Bin. 98; *Flitcroft's Case*, L. R. 21 Ch. Div. 519; *In re Oxford Building and Investment Society*, L. R. 35 Ch. Div. 502; *Leed's Estate, Building and Investment Co.* v. *Shepherd*, L. R. 36 Ch. Div. 787; *Gratz* v. *Redd*, 4 B. Mon. (43 Ky.) 178; *Davenport* v. *Lines*, 72 Conn. 118; *Osgood* v. *Laytin*, *42 N. Y. (3 Keyes) 521.

It is urged that the capital stock was not impaired when these dividends were paid, because the corporation had a guaranty from the original company and its stockholders that these assets should net $70,000 in 1897. This guaranty was a part of these assets. But like all other assets, it may have been good or worthless. The question of the

impairment of the capital through the worthlessness of assets is not complicated by the guaranty, except that it furnished an additional asset to be considered. Certainly the fact that it postponed the day of the guarantor's liability could not justify the assumption that the original assets were good until that time should come, by reason of a real or imaginary duty of the company to the guarantors to carry them on the books and try to collect them. This is not a question of bookkeeping, merely, but of capital and assets, and actual values, and actual responsibility of guarantors. If, as contended, all were worthless and irresponsible, this capital was impaired, and should not have been paid out as dividends. These were questions of fact for the jury, and were submitted to them.

There remains the question of the evidence as to the ownership of the stocks, and the claim that the money paid for the preferred stock belonged to Eddy's sister. This testimony was admitted, and afterwards ruled out by the charge. Counsel for defendant maintain that this cured the error, if there was one. The substance of this claim is that although Eddy subscribed to and accepted preferred stock, and became and acted as a director, and participated as such in the management of the affairs of the company and the declaration of dividends, in reality he used the money of his sister, loaning it to the company, and received the dividend as interest for her, to whom he paid it. The authorities hold that one who loaned money, but took stock absolute upon its face, is liable as a stockholder. Counsel cite *Griswold* v. *Seligman*, 72 Mo. 110; *Baines* v. *Babcock*, 95 Cal. 581; *McDowall* v. *Sheehan*, 129 N. Y. 200.

The question before us differs from those considered in the above cases in this, viz.: Here the capital stock is said to have been paid out by way of dividends to a stockholder, and this is a proceeding to compel him to repay it. In those cases it was a question of his liability as a stockholder. We have no doubt that the money paid must be

considered as a purchase of stock, and not a loan; that Eddy, and not his sister, is the stockholder; and that he received the dividends. If they were in fact paid to her, it may be that the fund could be followed into her possession, and she compelled to refund, but that has not been attempted. The stockholder has received it as a stockholder, and the creditors may look to him for it, whether he paid it to another or not.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

COTTRELL *v.* MORAN.

SUMMARY PROCEEDINGS—DEFENSES—EQUITABLE TITLE.

In summary proceedings defendant cannot set up his equitable title and have a deed executed by him declared a mortgage, that being a matter within the exclusive jurisdiction of equity.

Error to Macomb; Tappan, J., presiding. Submitted November 16, 1904. (Docket No. 93.) Decided December 7, 1904.

Summary proceedings by William Cottrell against Gilbert J. Moran for the possession of certain real estate. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

J. A. Weeks (*Edgar Weeks*, of counsel), for appellant.

Martin Crocker, for appellee.

HOOKER, J. The defendant in a summary proceedings case has appealed from a verdict and judgment of restitution. The circuit judge directed a verdict for the complainant. To comprehend the case, allusion should be made to the state of the title.

The defendant, Gilbert J. Moran, was owner of the premises (a farm) on November 19, 1884, and on that day he gave a note and mortgage to the complainant for $3,500, due in two years, with interest at 7½ per cent. April 8, 1889, Moran executed and delivered to complainant a warranty deed, the consideration of which was $4,363.84, being the amount due at that date upon the note and mortgage. April 8, 1889, a land contract was executed, which counsel concede was a defeasance, and made this transaction a mortgage, and it has been so treated. January 20, 1896, defendant gave to complainant a warranty deed of the premises, the consideration being $4,920.78, amount then due on the original debt. The same day, as a part of the same transaction, complainant gave and defendant accepted a lease of the premises for one year at a rental of $200 for the term. He also executed and defendant accepted a writing, which reads as follows:

"Having this day leased to Gilbert Moran for the term of one year, the farm described as follows: The east half of the southwest quarter of section 19, in township 3 north, of range 14 east, Macomb county, Michigan, containing 78 acres of land. I gave Mr. Moran the privilege of purchasing said farm during the term of his lease for the sum of four thousand nine hundred twenty-one dollars, providing the terms of lease are lived up to rigidly, excepting said Cottrell has an opportunity to sell said farm in which case Mr. Moran has an option of 30 days to purchase at price offered; and if he does not elect to purchase then he is to surrender farm receiving reasonable compensation for his crops, in 30 days from notice and in case Mr. Moran sells said farm he is to have for his commission all he sells farm for over and above $4,921, provided he keeps the agreements in his lease.

"Dated Mt. Clemens, Mich., Jan. 15th, 1896.

"WILLIAM COTTRELL."

Counsel contend that this transaction did not pass the title, but was a mortgage of the premises. On February 20, 1902, the parties entered into a new lease for one year at a rental of $150 per year. Defendant has occupied the

premises continuously from 1884 to the time this proceeding was begun.

Two points are involved in the case: (1) Was jurisdiction ousted by the alleged question of title? (2) If not, should the case have been submitted to the jury?

The deed of 1896 conveyed the legal title to the complainant, if it was not vested in him by the earlier one. Defendant's title was at most an equitable one, to have the deed declared a mortgage; and this claim of title was enforceable (if at all) through equitable proceedings, which good conscience requires should have been a bill to redeem, seasonably filed; and it is, perhaps, more than doubtful if equity would grant such relief upon any other kind of a bill, or in the absence of laches.

In this proceeding it was not competent to set up the equitable title, which a court of law could not vindicate. We have often held that equitable titles cannot be considered as against legal ones in courts of law. See *Harrett* v. *Kinney*, 44 Mich. 457; *Geiges* v. *Greiner*, 68 Mich. 156; *Gates* v. *Sutherland*, 76 Mich. 233; *Shaw* v. *Hill*, 83 Mich. 327; *Michigan Land & Iron Co.* v. *Thoney*, 89 Mich. 232; *Paldi* v. *Paldi*, 95 Mich. 411; *Moran* v. *Moran*, 106 Mich. 12; *Gage* v. *Sanborn*, 106 Mich. 279; *Rausch* v. *Briefer*, ante, 284.

In *Gage* v. *Sanborn*, supra, it is said:

"These cases do not attack the regularity of the proceedings themselves, but raise a question dependent upon extrinsic facts, constituting a legal defense in a proper tribunal, viz., an adverse claim of a title paramount to the levy. At least, this seems to have been the view taken in *Riggs* v. *Sterling*, 51 Mich. 158, and this distinction is intensified by the dissenting opinion of Mr. Justice COOLEY in that case."

As this is conclusive of defendant's claim, further discussion is unnecessary.

Judgment affirmed.

The other Justices concurred.

138 413
140 s596
138 413
f138 415
p138 457
138 413
142 s127
138 413
146 s506
138 413
f155 s164

RUMSEY v. GRIFFIN.[1]

1. TAXATION—TAX SALES—INCLUDING DRAIN TAX.
   The auditor general has authority to include delinquent drain taxes in his petition for sale of land for nonpayment of taxes.

2. SAME—ADVERTISEMENT—ERRORS—POWER TO CORRECT.
   The auditor general has power to set aside a sale of land for taxes because of a defect in publication of the notice thereof, and to resell the land.

3. SAME—SETTING ASIDE DEED—GROUNDS.
   After confirmation of a sale of land for taxes, the sale and deeds issued thereunder can be set aside only on the grounds that the taxes were paid, that the land was exempt from taxation, or for want of jurisdiction to enter the decree.

Appeal from Gratiot; Stone, J. Submitted November 16, 1904. (Docket No. 86.) Decided December 7, 1904.

Petition by Chauncey J. Rumsey against Albert A. Griffin and Perry F. Powers, auditor general, for leave to file a bill of review. From a decree dismissing the petition, petitioner appeals. Affirmed.

Petitioner's land was sold at the annual tax sale in 1902, purchased by the State, and by the State sold to defendant Griffin. Petitioner filed his petition in the circuit court asking leave to file a bill of review. It is claimed that the sale is void on account of a void drain tax assessed by the drain commissioner in the year 1882. Both the auditor general and defendant Griffin filed answers. A prior sale to the State was set aside by the auditor general for the reason, as appears by the answer, that the decree was prematurely entered. Various irregularities are alleged against this drain tax and the proceedings thereunder. So far as the facts therein set forth are

[1] Rehearing denied January 30, 1905.

material, they are either denied by the answers or are not admitted, leaving the petitioner to proofs. No proofs were taken. The case was heard upon the petition and answers, and the petition dismissed.

Nichol & Locke, for petitioner.

Albert McClatchey, for defendant Griffin.

GRANT, J. (*after stating the facts*). Counsel, in his printed brief, raises two objections to the validity of the tax deed: (1) That the auditor general is not authorized by law to include in his petition delinquent drain taxes; (2) that the auditor general had no power to set aside the first sale on account of a defect in the publication, and to resell the land.

The first objection is settled against the contention of the petitioner by *Blondin* v. *Griffin*, 133 Mich. 647 *Hilton* v. *Dumphey*, 113 Mich. 241. The second question is ruled against him by *Schulte* v. *Auditor General*, 131 Mich. 677; *Bump* v. *Jepson*, 106 Mich. 644.

We have repeatedly held that, after confirmation of the decree, tax sales and deeds issued thereunder can be set aside for only three reasons, two of which are specified in the statute—that the taxes were paid, or the land was exempt from taxation. The third is lack of jurisdiction to enter the decree. *Burns* v. *Ford*, 124 Mich. 274; *Berkey* v. *Burchard*, 119 Mich. 101; *Spaulding* v. *O'Connor*, 119 Mich. 45.

There is no claim that the taxes were paid, or that the land was exempt. The court had jurisdiction to determine all the questions raised. It did determine them, entered decree, the lands have been sold, and the title of the State has passed to a third person. It follows that leave to file a bill of review was properly refused.

Decree affirmed, with costs.

The other Justices concurred.

RUMSEY *v.* GRIFFIN.

TAX SALES—VALIDITY.

This case, involving the sale of land for certain delinquent drain taxes, is controlled by the preceding case, *Rumsey* v. *Griffin*, ante, 413.

Appeal from Gratiot; Stone, J. Submitted November 16, 1904. (Docket No. 85.) Decided December 7, 1904.

Petition by Chauncey J. Rumsey against Albert A. Griffin and Perry F. Powers, auditor general, for leave to file a bill of review. From a decree dismissing the petition, petitioner appeals. Affirmed.

Nichol & Locke, for petitioner.

Albert McClatchey, for defendant Griffin.

MONTGOMERY, J. The same questions are raised in this case that are raised and determined in the case of *Rumsey* v. *Griffin*, ante, 413, in which an opinion is handed down herewith. This case involves the same drain, and the same contentions are made against the validity of the proceedings. It is ruled by that case, and the decree is affirmed, with costs.

The other Justices concurred.

NOLLER *v.* WRIGHT.

1. CORPORATIONS—VALIDITY OF STOCK—STOCKHOLDERS' MEETINGS—RIGHT TO ATTEND—TRESPASS—EJECTION.

   In an action for trespass for ejecting plaintiff from a stockholders' meeting, where there was evidence that the stock under which plaintiff claimed rights was issued to him in compliance with an order of the circuit court, proof of an attempt at cancellation by the company was immaterial until something had been shown militating against the validity of the stock.

2. SAME—NOTICE TO ATTEND—ADMISSIBILITY.

   The secretary of the corporation having testified that in issuing notices of the meeting to stockholders he was governed by the records as they appeared on the books, the notice to plaintiff to attend the meeting was admissible.

3. SAME—EXAMINATION OF WITNESS—DISCRETION OF COURT.

   The exclusion of a question put to plaintiff, whether he had not had considerable litigation with the company was discretionary with the trial court.

4. SAME—VALUE OF STOCK—EVIDENCE.

   Evidence tending to show the value of the stock was properly rejected, its value being immaterial.

5. EXPERT EVIDENCE—OPINIONS—IMPROPER QUESTION—CURE BY ANSWER.

   A question to a medical witness *held* improper as invading the province of the jury, but cured by the answer.

6. CORPORATIONS—STOCKHOLDERS' MEETINGS—RIGHT TO ATTEND—TRANSFER OF STOCK.

   Officers of a corporation cannot justify a trespass in ejecting a stockholder from a meeting on the ground that the stock had not been properly transferred to him on the books of the company, where he had done everything required of him to procure the transfer, and he had been adjudicated the owner of the stock.

7. SAME—PROXIES.

   Where plaintiff was not denied the right to attend a stockholders' meeting on the ground that his proxies were irregular, it was no defense to an action for assault in ejecting him

therefrom that defendants had no information as to the validity of his proxies.

Error to Wayne; Frazer, J. Submitted November 17, 1904. (Docket No. 100.) Decided December 7, 1904.

Trespass vi et armis by John W. Noller against William Wright and George Wright. There was judgment for plaintiff, and defendants bring error. Affirmed.

H. H. Markham (*Edward S. Grece*, of counsel), for appellants.

J. Emmet Sullivan, for appellee.

HOOKER, J. The defendants have appealed from a judgment of $175 rendered against them by the circuit court for the county of Wayne in an action of trespass vi et armis.

The bill of exceptions shows that a corporation called the Peninsular Tool Manufacturing Company held its annual meeting upon its premises, and that the alleged trespass occurred upon that occasion. The defendants were officers of that company, and the plaintiff came to the place claiming to be a stockholder entitled to be present at, and take part in, the meeting. The defendants denied such right, and upon his refusal to depart forcibly ejected him, using no more force than was necessary to overcome his resistance.

The defendants claimed the right to show that the certificate of stock introduced in evidence by the plaintiff had been canceled by the company, and to that end offered the minutes containing a resolution which they relied upon as effecting such cancellation. The court refused to admit this evidence upon the ground that the stock certificate showed upon its face that it was issued by order of the court to one Patterson, who afterwards assigned it to the plaintiff.

The plaintiff testified that he purchased 74 shares of

stock from Patterson for $175, for himself, his brother, and Mr. Culverwell, plaintiff's share being 30 shares, and that he received and presented to defendants proxies from them, and the certificates of stock which were issued to them by the officers of the company. He also offered in evidence a notice of the meeting which Patterson had received from the secretary of the company. Mr. Patterson testified that he received the certificate of stock in April, 1902; that while he held the stock he attended meetings, and was recognized by the defendants as a stockholder, and was never informed that the stock had been canceled. He obtained the stock at constable's sale on a justice's judgment.

An offer was made by defendants' counsel to show the minutes of a meeting of the directors of the company held January 15, 1901, at which the stock of George Rakestraw (presumably this should be Norman Roadhouse) and others was ordered canceled. This evidence was excluded upon the ground that the certificate issued to Patterson showed on its face that it was issued in obedience to a mandate of the circuit court for the county of Wayne dated April 4, 1902, proof of which order was made. The court thereupon stated that the counsel could not go back of that action, and that plaintiff was not a trespasser by entering the room.

Counsel proposed to show that the execution sale was invalid, and the court held (1) that it was a collateral issue, and a point that these defendants could not set up in defense; and (2) that the question was concluded by the proceedings in the circuit court.

The statement of the case made in defendants' brief is, in short, that the plaintiff is principal owner and officer of a rival company, which had its place of business near the defendants' plant; that when defendants' company was organized one Roadhouse assigned patterns of an auger, agreeing in consideration of 340 shares to procure a patent, and assign it to defendants' company. He failed to obtain the patent, and the auger being, therefore, of

no value, the company canceled the stock in January, 1901. Patterson bid in some of the Roadhouse stock after such cancellation, and Noller obtained it from him. It is said that the stock had not been transferred on the books of the company. The record fails to support a number of these statements, and there is sufficient in it to indicate that this stock was issued to plaintiff in compliance with an order of the circuit court for the county of Wayne. We discover nothing in the record to militate against its validity, and until there was such evidence proof of a previous attempt at cancellation by the company was immaterial.

Of the assignments of error we may say that the notice to Patterson to attend this meeting was admissible, as it tended to show a recognition of his ownership of this stock. The secretary also testified on cross-examination that in issuing this notice he was governed by the records as they appeared on the books.

The exclusion of the question to the plaintiff, "You had considerable litigation with the company prior to this?" should not reverse the case. The question raised a collateral issue, and, while the court might have permitted it, we will not review the exercise of his discretion.

The plaintiff was asked to state a conversation with defendants' counsel shortly before he purchased the stock, and this was excluded. Counsel claim that they should have been permitted to show by him that the stock was worthless. We do not see that want of value in the stock affected plaintiff's rights to attend this meeting. Its validity could not, upon this record, depend upon this conversation, in view of the compulsory issue of the stock after the adjudication of Patterson's right to it.

A medical witness was asked:

"If Mr. Noller is now suffering pain or weakness in the ankle, some pain in the back, what would you say was the cause of these, which he did not have before this injury?"

He answered:

"Injury to the ankle of that kind would cause not only pain, but weakness there for some time, and it was not impossible that the pain he suffered further than that could be referred to the injury."

The answer cured some of the objectionable features of the question. It cannot be said to have invaded the province of the jury, though the question was open to such a criticism. We find nothing in the answer that will warrant a reversal of the case.

The admission of the execution is an unimportant matter, as it was not essential to the plaintiff's case.

It is said that the remaining assignments of error "depend on two things:" *First*, was he [Noller] in such a position, as a stockholder, if such at all, as to entitle him to the right to attend the meeting; and, *second*, if not, had he the right by authority of any proxy he produced, or by any other authority? The record conclusively shows that the plaintiff was a stockholder, and had a right to attend this meeting.

It is said that the stock was not transferred upon the books, as required by 2 Comp. Laws, § 7052. If there is evidence that it was not so transferred, it was not plaintiff's fault. He presented his stock, and, instead of transferring it, or asking him to wait to have it transferred, or denying his right to attend upon that ground, defendants denied his having any rights as a stockholder upon the claim that the stock was canceled, notwithstanding the fact that they had been defeated upon that very question in a court of record, and had acquiesced in and performed the decree.

The second objection is predicated on the want of information as to the proxy. No such reason was given for the denial of plaintiff's right, and there is nothing tending to show any irregularity in, or suspicion of, them when presented.

The judgment is affirmed.

The other Justices concurred.

FIRST NATIONAL BANK OF CASSOPOLIS *v.* CARTER.

138 421
149 366

1. PLEADING — WRITTEN INSTRUMENT — EXECUTION — DENIAL ON OATH.

The statute (1 Comp. Laws, § 826) creating a presumption of execution of a written instrument declared upon and filed with the justice, cannot be first availed of by plaintiff in the Supreme Court in a case where the pleadings were oral and plaintiff merely declared on all the common counts in assumpsit.

2. BILLS AND NOTES—ALTERATION—ORDER FOR SCHOOL SUPPLIES.

Where, at the time an order for school supplies, in form a promissory note, was signed by school officers, it had attached to it a memorandum stating that the matter might be left to a vote of the district at the annual meeting, which was taken off before the order was transferred, there was a material alteration which avoided the instrument.

Error to Cass; Carr, J. Submitted November 18, 1904. (Docket No. 115.) Decided December 7, 1904.

Assumpsit by the First National Bank of Cassopolis against Charles W. Carter and others for the amount of an alleged school order. There was judgment for defendants, and plaintiff brings error. Affirmed.

Lyle & Eby and *Marshall L. Howell*, for appellant.

Harsen D. Smith, for appellees.

MOORE, C. J. This case was commenced in justice's court. Plaintiff declared orally on all of the common counts in assumpsit, and alleged that the school order filed in this cause was duly transferred by the American School Supply Company to the plaintiff for a valuable consideration, before due.

The defendants' plea was in writing. It was the gen-

eral issue, with "notice that the said school order was signed by them as officers of the school district mentioned in said order, said order to be approved by said district at its annual meeting if it so wished, or, if not, to be void; and they did not sign said order as guarantors of the same, or in any capacity other than as officers of said district."

On the day of trial in justice's court defendants were allowed to amend their plea as follows: That said order upon which said suit is brought is not the order signed and delivered by said defendants, inasmuch as the words, "Williamsville, Mich., Due Jan. 1, 1903," set out in said order, were not written therein at the time of the signing and delivering by said defendants. The case was appealed to the circuit court, where it was tried by a jury. From a verdict in favor of the defendants the case is brought here by writ of error.

Upon the trial a paper reading as follows was offered in evidence:

Treas. Green Allen P. O.

STATE OF MICHIGAN. $37.50

County of Cass Town of Calvin Dist. No. 6 June 3 1902

Assessor of District No.....6, ...Township of.....Calvin.....will pay to the AMERICAN SCHOOL SUPPLY CO., *or Bearer the sum of* THIRTY-SEVEN & $\frac{50}{100}$ DOLLARS,

any school fund belonging to said District for COMPLETE ENCYCLOPEDIA OF MODERN SCHOOL METHODS ILLUSTRATED; *comprising Reading, Grammar, Writing, Arithmetic, Business Course, History, Geographical Maps and Stand.*

Issued by authority of Officers of said District and payment guaranteed by School Officers P. O. Address.

Williamsville, Mich.
Due Jan 1 1903

C. W. CARTER.
E. WINTERS.
GREEN ALLEN.

20540

The cashier of the bank testified:

"I am personally acquainted with the parties who signed that instrument.

"*Q.* You may state if you would have bought that instrument if it had not been for the fact that their names appeared there, as they do upon the paper as guarantors

and makers of that instrument. *A.* We relied upon the signers for payment."

On the cross-examination he testified:

"*Q.* Didn't he [Corcoran] tell you that he was around selling these school supplies to the different school districts? *A.* Yes, sir.

"*Q.* And taking orders on the school districts? *A.* Yes, sir.

"*Q.* And made some arrangements with you that after he would get these orders in that he would sell them to the bank? *A.* Yes, sir. And I agreed that I would take them upon some discount. I understood that he was selling to the districts, and taking an order, issuing an order, obtaining an order upon the district.

"*Q.* From the officers? *A.* Yes, sir. That is the way I understood it.

"*Q.* You knew that it required the signatures of the officers of the district in order to make a valid order drawn upon the assessor, didn't you? *A.* Yes, sir.

"*Q.* And you knew, I suppose, when you bought this order, that those names represented the names of men who were officers of the district, didn't you, or supposed that they were officers? *A.* Yes, sir.

"*Q.* And you believed that they signed this order in the capacity of officers, didn't you? *A.* Well, yes. We bought that order on the signatures as they appear. I knew that district number 6 was worth it, and could be forced to pay a valid order issued upon it to the amount of $37.50; but that was not the reason that I bought it.

"*Q.* Didn't you rely upon the district for your pay? *A.* If the order had been signed differently, I should not have bought it."

No other witnesses were sworn for plaintiff.

On the part of the defendants it was shown (we state the substance, not the details, of the testimony) that it was represented to the persons who signed the order, and who were school officers, that they were to incur no individual responsibility, but were to be regarded as acting for the school district; and that the articles ordered were to be shown to the annual meeting by the agent who took the order, and, if the school electors did not favor the purchase of the articles, they were to be taken away, and no

liability incurred; that the agent said the part of the paper which he would sign would protect them fully, and that the paper presented by the bank was only a part of the paper signed by defendants.

It was also testified that when Mr. Carter and Mr. Winters signed the paper it did not have the words, "Williamsville, Mich., Due Jan. 1, 1903," upon it, and when Mr. Allen signed it the words, "Due Jan. 1, 1903," were not there; that there was delivered to Mr. Carter and Mr. Winters at the time they signed a compared copy of the paper which they signed, which reads as follows:

Treas.

P. O.

STATE OF MICHIGAN. $37.50

County of Cass Town of Calvin Dist. No. 6 June 3 1902

Assessor of District No....6, ...Township of.....Calvin.....will pay to the AMERICAN SCHOOL SUPPLY CO. *or Bearer, the sum of* THIRTY-SEVEN & $\frac{50}{100}$ DOLLARS,

out of any school fund belonging to said District for COMPLETE ENCYCLOPEDIA OF MODERN SCHOOL METHODS ILLUSTRATED; *comprising Reading, Grammar, Writing, Arithmetic, Business Course, History, Geographical Maps and Stand.*

Issued by authority of Officers of said District and payment guaranteed by School Officers P. O. Address

C. W. CARTER.
E. WINTERS.

STATE OF MICHIGAN SCHOOL AID VOUCHER.

..Calvin.....Township, ..Cass.....County, ..June 3.....1902

THIS CERTIFIES, *That we have received from School District No. Six their official voucher on the proper fund for Complete Encyclopedia of Modern School Methods; consisting of Reading, Language, Grammar, Phonics, Penmanship, Number and Exchange Drill, Fractions, Tables of Weights and Measures, Business Methods, Bookkeeping, History, Business Forms, Civil Government, Political History and Stand with 12 books, Teachers Manual and Report Blanks.*

To be shipped care of Mr. C. W. Carter, Vandalia, Michigan, about the 10th day of June, 1902.

If not received on time or damaged, please notify, that we may serve all faithfully.

AMERICAN SCHOOL SUPPLY CO.,
CHICAGO, ILL.

JOHN CORCORAN, Solicitor.

This matter may be left to a vote of the district at annual meeting.

The testimony of defendants was not disputed.

The oral testimony was objected to for the reason—

"That the defendants in this suit cannot contradict the writing that they have signed and put into circulation; that the agreement that they came to, and all prior talk, was merged in the agreement which they subsequently signed, and they cannot come here at the present time with parol evidence and contradict it. Further object that this is inadmissible under the pleadings—the evidence as to fraud."

The objection to the admission of the writing was stated by counsel to be:

"We object to that as a contemporaneous agreement in writing upon an attached paper. Any testimony as to that is inadmissible under the pleadings in the case."

The first assignments of error relate to the reception of testimony showing the circumstances under which this paper was given. Counsel say that, as defendants did not, with their plea, deny on oath the execution of the note, the testimony is incompetent; citing 1 Comp. Laws, § 826, and cases.

That section reads:

"When any written instrument, purporting to be executed by one of the parties, is declared upon or set off, it may be used in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by oath at the time of declaring, or pleading, or giving notice of set off, if such instrument shall be produced and filed with the justice."

We do not think the point now made was made in the court below. Plaintiff's pleading was informal. It was upon the common counts in assumpsit. It did not declare upon the order. And while it was said in the court below that certain evidence was not permissible under the pleadings, we are unable to find from the record that it was suggested either in justice's court or the circuit court that the objection was because defendants had not denied upon oath the execution of the order. We think it too late to take that position now.

Error is assigned upon the court's failure to give plaintiff's requests to charge and upon the charge as given.

In our view of the case, it will not be necessary to discuss these assignments. When the paper offered in evidence by the bank was signed by defendants, it contained nearly as much again language as it contained when it came to the bank. The lower half of it, which qualified the upper half, had been separated from it. The upper half, with material words added after it was signed, was delivered to the bank.

In *Wait* v. *Pomeroy*, 20 Mich. 425, a memorandum written under a promissory note qualified its obligations. Chief Justice CAMPBELL, speaking for the court, said:

"The only question raised in this case is whether the destruction of a memorandum, written under a promissory note, and qualifying it, vitiates the note in the hands of a bona fide holder having no knowledge of the alteration. We think it quite clear upon the authorities that the note and memorandum constituted but one contract, and were in law a single instrument. There are some decisions which have held particular memoranda immaterial. But no case has been cited, and we have found none, which holds that, if material, it may be disregarded. The cases are fully collected in 2 Pars. Bills & Notes, 539 et seq. And while a memorandum on a separate paper is said by Mr. Parsons not to affect parties taking without notice, it is otherwise where all is in one instrument. To use the language of the Court of Queen's Bench in *Warrington* v. *Early*, 2 Ellis & Bl. 763:

"'This forms part of the contract. If would clearly have been so if it had been written in the body of the note, and we think a memorandum of this kind written in the corner of the note is equally part of the contract, because the contract must be collected from the four corners of the document, and no part of what appears there is to be excluded.' * * *

"There seems at first a plausibility in the argument that a party, by signing a note with a separate memorandum beneath, puts it in the power of the holder to gain easier credit for the note than it would be likely to gain if altered in the body. But, as it was well suggested on the argument, no one is bound to guard against every possibility of felony. And practically it is a matter of everyday occurrence to feloniously alter negotiable paper as successfully by changes on the face as in any other way.

The public are not very much more likely to be defrauded in one way than in another. There can never be absolute safety except by looking to the character and responsibility of the persons from whom such paper is received, and who are always bound to respond for the consideration if it is forged. *Little* v. *Derby*, 7 Mich. 325. If a party makes a contract in such a manner as is authorized by law, he has a right to object to being bound to any other."

In *Bradley* v. *Mann*, 37 Mich. 1, the maker of a note, before negotiating it, and after it was indorsed without the consent of the indorser, added a clause providing for the payment of interest. Justice GRAVES, in speaking for the court, said:

"The undertaking of the plaintiffs in error in regard to the amount was not left open and in blank, but was defined and settled when they prepared, indorsed, and sent the instrument to Whittlesey; and they could not be made liable as upon a different undertaking without their consent. The moment he made the alteration in the amount there remained nothing to which their indorsement was applicable, no engagement they had consented to be liable upon, and it is their undertaking, and not that of Whittlesey, which is in question. The circumstance that the instrument had not left Whittlesey's hands and assumed the legal character of a finished note, or the fact, if it was so, that it was meant for Whittlesey's accommodation simply, could have no force to make his unauthorized alteration binding on them without their assent, or to invest him with right to vary the extent of the liability they had predetermined for themselves. When the paper left their hands the amount of the obligation they assumed was as securely liquidated to preclude change without their consent as it would have been if the instrument had then become effective, and the indorsement had been as the defendant in error insists it was, and as it may have been, a nonaccommodation one. The authorities are so full and distinct against the doctrine of the charge that it is only necessary to cite them. *Miller* v. *Finley*, 26 Mich. 249; *Holmes* v. *Trumper*, 22 Mich. 427; *Wait* v. *Pomeroy*, 20 Mich. 425; *Trigg* v. *Taylor*, 27 Mo. 245; *Waterman* v. *Vose*, 43 Me. 504; *Fay* v. *Smith*, 1 Allen, 477; *Draper* v. *Wood*, 112 Mass. 315; *McGrath* v. *Clark*, 56 N. Y. 34; *Benedict* v. *Cowden*, 49 N. Y. 396; *Fulmer* v. *Seitz*, 68 Pa.

St. 237; *Wood* v. *Steele*, 6 Wall. 80; *Aetna National Bank* v. *Winchester*, 43 Conn. 391; *Schnewind* v. *Hacket*, 54 Ind. 248."

And it was held the indorsers were released.

If we apply the principles announced in these cases, we must regard the half of the paper detached after it was signed as a very material portion of it. Reading all of the paper as it then was, it indicates very clearly a transaction to which the American School Supply Company upon the one side was a party, and School District No. 6 was another party, and brings the case within the principle announced in *Bailey* v. *Tompkins*, 127 Mich. 74. The cutting or tearing off the lower half of the instrument was a material alteration of it. The court might very properly have directed a verdict in favor of the defendants.

Judgment is affirmed.

The other Justices concurred.

WISE *v.* STATE VETERINARY BOARD.

VETERINARY SURGEONS—POWER OF STATE VETERINARY BOARD.

The State veterinary board, organized under Act No. 191, Public Acts 1899, has no power to determine whether a college of "veterinary medicine and surgery," existing under 2 Comp. Laws, chap. 218, is a regular school or college, or to refuse a certificate to practice to a person holding a diploma from such college.

Mandamus by Harry W. Wise to compel the State veterinary board to issue a certificate. Submitted November 29, 1904. (Calendar No. 20,749.) Writ granted December 7, 1904.

Relator, a graduate as a veterinary physician and sur-

geon from the Grand Rapids Medical College, applied to the respondent for a certificate to practice his profession. A certificate was denied him, and he asks the writ of mandamus to compel respondent to issue to him such certificate. The case is before us on petition, answer, and stipulation. The stipulation admits the truth of the allegations in paragraphs of the petition numbered 2, 3, 4, and 5. These read as follows:

"2. That on the 1st day of April, 1902, having passed the required examination, he graduated from the veterinary department of the Grand Rapids Medical College, and was awarded a diploma conferring upon him the degree of doctor of veterinary medicine and surgery and master farrier, which diploma was duly issued to him by order of the board of trustees of said college.

"3. That he matriculated as a student in the veterinary department of said college at the beginning of the college year in October, 1900, and regularly and continuously attended the veterinary department of said college and took the regular course of instruction prescribed by the faculty of said college and of said veterinary department during the college year of 1900–1901 and during the college year of 1901–1902, and that he attended said veterinary department as a student for at least six months in each of said years.

"4. That since his residence at Owosso he has practiced his profession of veterinary medicine and surgery, and has succeeded in building up a practice which yields him an income of at least $1,500 a year; that he has found in practicing his said profession that the knowledge and clinical experience which he acquired in attending the veterinary department of said medical college abundantly fitted him to carry on his said profession successfully; and that, having put such knowledge and experience to the test in actual practice of said profession, he is well satisfied with the course of study and with the instruction which he received at the veterinary department of said college, and that he has been enabled thereby to practice his said profession successfully and to the satisfaction of those who have had occasion to employ him in his said practice.

"5. That, as your petitioner is informed and verily believes, the Grand Rapids Medical College is a corporation organized and existing under Act No. 39 of the Laws of

1855, being chapter 218 of the Compiled Laws of 1897; that the articles of association of said college were duly approved by the secretary of State and filed in his office on the 10th day of August, 1897; that amendments were made thereto on the 26th day of August, 1897, and duly filed in the office of the secretary of State; that the purpose for which said college was organized, as set forth in the articles of association, is 'to establish and operate a college to teach medicine and surgery, chemistry, dentistry, veterinary medicine and surgery, and horseshoeing; to grant and issue diplomas in various departments of the college in conformity to law and in accordance with the practice in similar institutions in the United States.'"

The Grand Rapids Medical College is organized under chapter 218, 2 Comp. Laws.

Section 8143 provides:

"Every diploma granted by such trustees shall entitle the possessor to all the immunities which, by usage or statute, are allowed to possessors of similar diplomas granted by any similar institution in the United States."

Section 8145 provides that any institution of learning incorporated under the act shall be subject to the visitation and examination of the superintendent of public instruction, and to a board of visitors, three in number, to be appointed by said superintendent. Said board is empowered to visit such institution, examine its courses of study, modes and character of instruction, and such other matters as may be of interest to the citizens of the State. It is also required to make a full report to the superintendent of public instruction, setting forth the result of their examination and conclusions as to the condition of the institution.

The respondent is organized under Act No. 191 of the Public Acts of 1899. The board is required by section 2 to elect a secretary, and to "from time to time provide and furnish to said secretary a list of all regular colleges and schools of veterinary medicine and surgery, having a course of not less than two years, with sessions of at least six months in each year." Under section 3 any person is

entitled to a certificate from said board upon satisfactory proof "that he is the lawful and regular possessor of a diploma from a regular veterinary college or school, within the meaning of this act, and that such diploma was issued by such college or school directly to him."

Hatch & Wilson, for relator.

Norton & Jamison, for respondent.

GRANT, J. (*after stating the facts*). The relator has complied fully with the provision of the statute. The respondent contends that it is clothed with the power to determine whether a school or college of veterinary medicine and surgery organized under the laws of this State, whose articles of association are duly filed and approved by the proper State authorities, is a regular school or college; or, as stated in the brief of counsel, that it "has the right to determine whether any school or college is living up to the requirements of Act No. 191 of the Public Acts of 1899."

Whether, as the relator seems to contend, any such power or control is lodged in the superintendent of public instruction, is not before us. The sole question is, Is the respondent clothed with this power? An educational institution, properly incorporated under the provisions of the law, is a regular school or college within the meaning of the law. This statute, neither in express terms nor by implication, has lodged in this board the power to determine whether any school or college has a curriculum of studies, equipment, appliances, etc., such as the members of the board may deem essential to properly qualify a graduate to practice his profession. If respondent's contention be correct, this board has power to determine whether a department of veterinary medicine and surgery in the Michigan Agricultural College or in the University of Michigan, is "regular."

A similar question arose in Kentucky, where a graduate of the school of pharmacy of the Michigan University presented a diploma to the State board of pharmacy of

that State, and demanded a certificate. The provision of the statute in that case was: "Graduates in pharmacy shall be such as have obtained a diploma from a regular incorporated college of pharmacy." It was held that the board had no discretion in the matter, and that the relator was entitled to a certificate upon presentation of her diploma. *State Board of Pharmacy* v. *White*, 84 Ky. 626.

The case of *People, ex rel. Sheppard,* v. *State Board of Dental Examiners*, 110 Ill. 180, does not apply to this case. There the statute required that a diploma should be presented "from the faculty of some *reputable* dental college, duly authorized by the laws of this State, or some other of the United States," etc. It was held that the board was clothed with power to determine whether a college was reputable. "Regular" and "reputable" are not synonymous words. "Regular" is defined as "conformed to, or made in accordance with a rule; agreeable to an established rule, law, type, or principle, to a prescribed mode, or to established customary forms." "Reputable" is defined as "being in good repute; held in esteem; estimable." Cent. Dict. A school or college may be regular—i. e., regularly incorporated—and not be reputable. The reason for the use of the word "reputable" in the Illinois statute is stated by the court as follows:

"As a part of the current history of the times, and as an aid in arriving at the legislative intention, we know there were colleges of different kinds authorized by the laws of States in which they were located, in which there were pretended to be annually delivered full courses of lectures and instruction upon the arts and sciences professed to be taught that were not 'reputable,' because they graduated for money, frequently without any reference to scholarship. A diploma from such an institution afforded no evidence of scholarship or attainments in its holder. It was a fraud, and deserved no respect from anybody; and it was as against such diplomas the law was intended to protect the public, and therefore required that the colleges be 'reputable.' Whether a college be reputable or not is not a legal question, but a question of fact."

The law of this State has fixed the status of these schools and colleges. When they have complied with the law of incorporation and filed their articles of association, they then become regular schools and colleges, and a diploma therefrom entitles the "regular possessor" to a certificate to practice his profession. The legislature may undoubtedly prescribe the curriculum for schools of its own creation, and may lodge in some board the power to determine whether its graduates are entitled to admission to practice; but it has not done so by this act.

The mandamus is granted, but without costs.

The other Justices concurred.

FOX v. MICHIGAN CENTRAL RAILROAD CO.

1. CARRIERS—INJURY TO PASSENGER—INTOXICATED PASSENGER—CONTRIBUTORY NEGLIGENCE.

   A passenger in a state of beastly intoxication is not chargeable with contributory negligence in going on the platform of a moving train so as to bar recovery for injuries received from a fall from the train.

2. SAME—SUFFICIENCY OF EVIDENCE.

   In an action against a railroad company for injuries to an intoxicated passenger, caused by his falling or being thrown from the platform of a train while in motion, evidence examined and *held* to justify a refusal to direct a verdict for defendant. GRANT, J., dissenting.

3. RELEASE—JOINT TORT FEASORS—INTOXICATED PASSENGER—INJURIES.

   Where plaintiff was injured while intoxicated by falling from a railroad train, and his wife thereafter sued to enforce her statutory right of action against the saloonkeepers, and their bondsmen, from whom plaintiff had obtained the liquor, which cause of action plaintiff and the wife thereafter released, such release did not discharge any right of action plaintiff had against the railroad company for the injuries sustained.

Error to Calhoun; Hopkins, J. Submitted October 20, 1904. (Docket No. 56.) Decided December 14, 1904.

Case by Arthur E. Fox against the Michigan Central Railroad Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

S. S. Hulbert (*O. E. Butterfield* and *Henry Russel*, of counsel), for appellant.

Hatch & Page, for appellee.

MOORE, C. J. The plaintiff, while intoxicated, stepped off the platform of a moving train belonging to defendant. He sued, and recovered a judgment for the injuries he received. The case is brought here by writ of error.

No error is assigned in relation to the admission of testimony or the charge of the court. The only one assigned is:

"The court erred in not sustaining defendant's motion to take the case from the jury upon the grounds stated in said motion."

The reasons stated in the motion are:

"(1) Because the contributory negligence of the plaintiff bars his recovery, because, among other points, as a matter of law, he was not in the exercise of due care or ordinary care in going out upon and being on the platform of the moving train while he was in that intoxicated condition; and because the brakeman did act with sufficient promptness to satisfy the law, the plaintiff not being entitled to throw upon the brakeman the risk, hazard, and necessity of accurately and instantly judging plaintiff's intoxicated condition, and of acting effectively in regard thereto; and because the negligence of the company was not gross, wanton, and reckless. * * *

"(2) The release by the defendant to William G. Noneman and others, in evidence in this case, is a complete bar to this action."

1. It is said:

"When a situation involving an instant choice of acts—

of alternatives—is forced upon A. by the negligence of another, A. is not held, at his peril, to choose and act correctly, and with that same careful judgment which he would have exercised if he had time for a deliberate, instead of instant, determination. * * * Under the circumstances, the company can only be held for gross, wanton, and reckless negligence. Under all the circumstances, the failure of the brakeman to instantly and correctly sense the situation, especially when considered with his subsequent prompt effort to deter plaintiff from going out on the platform—an act which did not necessarily involve danger to plaintiff—cannot be considered as gross, wanton, or reckless." Citing sections 103, 104, Baldwin on Personal Injuries.

The testimony of Miss Bestel and Mr. Hoskins, which is not contradicted, is to the effect that at the station, just before taking the train, plaintiff "was very much under the influence of liquor; beastly drunk; staggering around." The plaintiff was a witness, but claimed he was so drunk when he was on the train and at the time of the accident that he could remember but little about what occurred. His testimony throws very little light upon the situation. The only testimony giving a connected account of what occurred is the testimony of one of the passengers (Mr. Anderson), which in part is as follows:

"Saw him on March 7, 1902, in the Michigan Central depot at Marshall, about noon. My attention was called to him because he was staggering and very intoxicated. In every way, he looked like an intoxicated person. I was going to Battle Creek on the noon train that day, and did go on that train. Saw plaintiff on the train, but did not see him get on. First time I noticed him was after we reached Nichols Station, or was about leaving that station. I was sitting in the front end of the smoker, about the third or fourth seat from the front, on the left-hand side. * * * He was beastly drunk. He was staggering, and his face was covered with drool, and all over his mouth, and his clothes were displaced. I saw the brakeman at that time. I called the brakeman's attention. He came up to the front of the coach as we were leaving Nichols Station, and I called his attention to plaintiff, who was trying to get out of the door. I said: 'That man ought not to be allowed

on the platform.' He didn't say anything. I saw he was not going to start to stop him, and I started for the door. The brakeman certainly must have heard me, because he turned around and looked at him when I spoke. The brakeman had time, after I spoke to him and told him that plaintiff ought not to be allowed on the platform, to have intercepted him, if he had acted at once. I got to the door, and started to open the door, and the brakeman came right behind me. Plaintiff was on the platform, and just as I opened the door he fell off the platform under the coach on the left-hand side. He looked, apparently, to have gone under the wheels, but I cannot say. I said to the brakeman: 'You ought to stop this train. That man is run over.' He said, 'O, no; he is not;' and he didn't stop the train."

On the cross-examination he testified:

"*Q.* Mr. Anderson, how soon after Mr. Fox went to the door and started out on the platform did you start after him? *A.* Just a very few seconds. I do not know how many.

"*Q.* And the brakeman was practically right on your heels? *A.* He was back of me; yes, sir.

"*Q.* Going the same way that you were? *A.* He had started back through the car, and, as I started toward the door, followed me toward the place where Fox was. * * * At the time I started out on the platform after plaintiff, the plaintiff was trying to open the door. He was staggering so he could hardly get it open. He grabbed for the knob and missed it, and grabbed for it again. He was so drunk he could hardly stand up.

"*Q.* This was after you told the brakeman that he ought not to let that man out on the platform? *A.* No, sir; he was trying to get on the platform, but he had not got out yet.

"*Q.* You saw plaintiff fumbling with the door knob, or groping for it and trying to get it, and then you spoke to the brakeman, that he ought not to let him get out? *A.* I said that he ought not to be allowed on the platform. I did not say he should not do it.

"*Q.* Then Fox, continuing in his efforts, got the door open, and you started after Fox? *A.* No, sir; Mr. Fox started to open the door, and had it nearly open, and then I started to stop him from going out.

"*Q.* And the brakeman after you? *A.* Yes, sir.

"*Q.* It was all a matter of a few seconds? *A.* Yes, sir."

On the redirect examination he testified:

"*Q.* You stated the brakeman started after you called his attention, that he looked at Fox, and that he started back? *A.* Yes, sir; he did not start toward Mr. Fox. He started back. I think he had time to reach Fox before he got on the steps, when I called his attention to him. It was only two or three seats back. I spoke out loud, and I am sure he heard me, because he looked at Fox, and paid no further attention to him. He said nothing until he got out on the platform. I asked him to stop the train, and he said, 'No, he is not hurt,' and we could not see him from the platform."

The testimony of the policeman who helped place the plaintiff on a stretcher when he was found lying on the ground and was removed to the hospital was to the effect that "plaintiff was then so drunk as not to realize his condition, and was not able to help himself." This testimony is uncontradicted. The defendant showed upon the trial that an unsuccessful effort had been made to produce the brakeman as a witness at the trial.

The authorities cited by counsel for defendant do not throw much light upon the question.

Van Zile on Bailments & Carriers, § 653, reads:

"It is a general rule that a passenger must exercise ordinary care and diligence in avoiding injury. But while this is true, it may be said that it is the duty of the carrier to warn the passenger as to dangerous situations, and, failing to do so, the carrier will not be permitted to defend upon the ground of contributory negligence upon the part of the passenger in an action for an injury received because of such danger. This duty to warn the passenger against danger does not apply, of course, to every case. The circumstances of the particular case are to be taken into consideration. As, for example, where a passenger cannot be said to understand the danger of his situation, or where the passenger is a young person, inexperienced, and not aware of the danger in which he is placing himself, or one who is somewhat demented or even intoxicated, or deaf and dumb or blind—such persons require

more attention, and the duty of the carrier is to extend to them greater care than to the ordinary passenger. These, of course, are but examples. Each case must stand upon its own particular circumstances."

In Cooley on Torts (2d Ed.), p. 768, it is said:

"Where the business of a carrier is to transport both persons and property, his obligation and his consequent liability in respect to the two are different. For the safe transportation of the property he is responsible as insurer, with the exceptions already stated, but in the case of passengers he only undertakes that he will carry them without negligence or fault. But as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men, and his undertaking and liability as to his passengers goes to this extent: That, so far as human foresight and care can reasonably go, he will transport them safely. He is not liable if injuries happen from sheer accident or misfortune, where there is no negligence or fault, and where no want of caution, foresight, or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his servants. And this liability is applied with great strictness, as well as great justice, when he undertakes to transport passengers by the powerful and dangerous agency of steam."

In *East Saginaw City R. Co.* v. *Bohn*, 27 Mich. 503, Justice COOLEY, speaking for the court, said:

"That the duty of the railway company not to permit persons to ride in unsafe places on their cars is the same, and rests upon the same reasons, with their duty not to make use of vehicles wholly unsafe, appears to me entirely clear. There are, without doubt, some limitations upon that duty, growing out of the manner in which their business is usually and properly conducted, but it does not become necessary to consider those limitations at any length in the present case. Such carriers could not, in reason, be required to be insurers of their passengers against all dangers, nor, perhaps, to employ a person to keep watch upon their passengers to protect them against

dangers resulting from their own folly or neglect. Perhaps it is admissible that the driver should be also conductor, in which case he could not be expected to watch against persons falling off the rear platform or crawling out of the window. If, however, it was dangerous for passengers to stand or sit on the front platform, where the driver himself would be, it would not only be his right and duty to notify any who might occupy it of the danger, but, if they were of an age not to be likely to understand the risk, or able to judge for themselves, or if he knew them to be insane or otherwise unable to exercise discretion, the duty would not be fully performed without an enforcement of proper regulations to compel their occupying positions less exposed."

In *Kingston* v. *Railway Co.*, 112 Mich. 40, Chief Justice LONG, speaking for the court, said:

"The court charged the jury:

"'If you find that, at the time he was upon this place, he was intoxicated, then he could not recover in this case, because in the case of an intoxicated man the company was not expected and the law would not require of this company that it should guard an intoxicated man against injury, standing in the place he was standing.'

"This charge was erroneous. It was asserted by the plaintiff that he was pushed off or thrown off by defendant's conductor, and the fact that he was intoxicated would not give the conductor the right to push him off. The question of his intoxication was a matter to be taken into consideration by the jury in determining whether or not the plaintiff was in the exercise of due care in standing upon the running board while he was in that intoxicated condition, but his condition would be no excuse to the company if its conductor negligently and wrongfully pushed him off.

"In Thomp. Neg. p. 1174, it is said:

"'Intoxication on the part of the plaintiff at the time of the accident does not constitute negligence, in law, warranting a nonsuit or a peremptory instruction for the defendant, but is a circumstance to go to the jury on the question of contributory negligence.'

"This seems to be the general rule. *Stuart* v. *Machias Port*, 48 Me. 477; *Alger* v. *City of Lowell*, 3 Allen, 402."

See, also, *Pittsburg, etc., R. Co.* v. *Caldwell*, 74 Pa. St.

421; *Brennan* v. *Railroad Co.*, 93 Mich. 156; *Louisville, etc., R. Co.* v. *Johnson*, 108 Ala. 62.

In the case at bar it is shown beyond any reasonable question that the plaintiff, while beastly drunk, was making an effort to go from a place of safety to a place of danger. The attention of the brakeman was called to the situation by a passenger who saw the danger. The brakeman looked and the jury might have inferred he saw the condition of the plaintiff. Instead of going to the drunken man and attempting to prevent his exit from the car, he went in the other direction. It was not until after the passenger, seeing the failure of the brakeman to act, attempted to prevent the danger, that the brakeman made any effort in that direction. This effort came too late.

Under the facts disclosed by the record and the law we have cited, we do not think it can be said the court erred, as to this feature of the case, in refusing to direct a verdict for the defendant.

2. This defense is based upon the following facts: Previous to the trial of the case at bar, Mrs. Fox, the wife of plaintiff, sued the saloonmen who sold Mr. Fox the liquor which made him intoxicated, and their bondsmen. Afterwards, and before the case was tried, the case was settled, and Mr. Fox joined in a receipt releasing the defendants in that action from liability. It is now said the saloonmen who were defendants in that case and the defendant in this case are joint tort feasors, and the release of one released all. The trouble with this proposition is that the wife had a cause of action given to her by the statute against the saloon keepers and their bondsmen, while the plaintiff had no such cause of action, and in joining in said release he did not release any right of action he might have against the railroad company.

Judgment is affirmed.

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

GRANT, J. (*dissenting*). Plaintiff purchased a ticket and took defendant's train at Marshall, where he lived, to go to Battle Creek, a few miles distant. He had voluntarily become intoxicated when he purchased his ticket and entered the train, but was able to walk to and board the train without any difficulty, so far as this record shows. He entered the water-closet, which was close to the door. As the train reached Nichols Station, a short distance from Battle Creek, he emerged from the closet, stood with his back to the interior of the car, opened the door, went upon the platform, and, through his intoxication, either fell or jumped from the train, supposing the train was leaving Battle Creek, and was seriously injured. He brought suit against the railroad company and recovered a verdict. He alleges in his declaration that he was in a state of intoxication; that his condition was known to the defendant; that the defendant, through its employé, a brakeman, had been notified by a passenger of his condition; that said brakeman was able to prevent the plaintiff from going out upon the platform, but that he made no attempt to do so, and "willfully, wantonly, maliciously, and negligently permitted said plaintiff to pass out of said door and onto the platform of said moving train."

I find it unncessary to discuss what duty a railroad company owes to a passenger who enters a train in an intoxicated condition. See *Strand* v. *Railway Co.*, 67 Mich. 381. Admitting that the carrier owes a peculiar duty to such a passenger, that duty is only required when the carrier is notified or has knowledge of the intoxicated condition of the passenger. In my judgment, no such notice or knowledge is shown by the evidence in this case.

Plaintiff, after testifying to his drinking just before boarding the train, and to going into the water-closet, said:

"I came out of the water-closet and came to the car door, and came out because I thought I heard the conductor hollering, 'Battle Creek.' I thought the car had started, and was leaving Battle Creek. Came out of the

closet and opened the door and started to get off the train. That was my intention. Came out on the platform. The car was in motion. I knew it to be a fact that the car had started. Then I fell off. I do not remember whether I stepped on the steps or not."

The only testimony relied upon to show that the brakeman knew plaintiff's condition is that of Anderson, a fellow passenger. The brakeman, after diligent search, could not be found, and we have not the benefit of his testimony. According to the testimony of Anderson, the brakeman was passing through the car, with his back to the door. Anderson saw the condition of plaintiff, as it appeared from his face, and dress, and action, as he emerged from the closet. The brakeman did not see it. It is but a step or two from the closet to the door. Plaintiff stood with his back to Anderson and to the brakeman, when Anderson spoke and said: "That man ought not be allowed on the platform." Anderson did not tell the brakeman why he made the statement. There was no more in the statement to indicate that he was intoxicated than that, in the judgment of Anderson, he was insane, or for some other reason should not be allowed to go out of the car. The only reason Anderson had for believing that the brakeman heard him was that he turned and looked towards the plaintiff. What was there in the action or looks of plaintiff as he stood by the door, with his back to the brakeman, to indicate that he was in a state of intoxication or that he needed assistance? Was the brakeman bound to instantly leave his other duties and accept the statement of Mr. Anderson as true, at the risk of imposing liability upon his employer? Mr. Anderson, seeing that the brakeman did not immediately respond to his statement, got up and started for the door. The brakeman seeing him do this, instantly followed, and, before either could reach him, although they were only about three seats back, plaintiff had opened the door, gone out upon the platform, and fallen or jumped off. All this was done in a few seconds.

It would be a rule, in my judgment, not justified by reason or by authority, to say that the brakeman was bound to act instantaneously on such a statement made by a passenger. Plaintiff was sober enough to buy a ticket, walk to and board the train, walk in and out of the closet, go to the door, open it, and walk out upon the platform. He thought he had heard the name of the station where he desired to alight called, and it is very probable that he had heard the brakeman announce that as the next station. If the brakeman heard Mr. Anderson and looked around at plaintiff, there is no testimony to show that at that instant there was anything to indicate to the brakeman that plaintiff was intoxicated. Was the brakeman bound to act instantly upon the statement by a passenger that another ought not to be allowed upon the platform, and to assume that such passenger was drunk, and to rush instantly to his rescue? I cannot so hold.

I think the judgment should be reversed, and no new trial ordered.

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CULVER v. SOUTH HAVEN & EASTERN RAILROAD CO.

1. TRIAL—MISCONDUCT OF COUNSEL—BOTH AT FAULT.
   Reversal will not be granted for misconduct of counsel where counsel on both sides are equally guilty.

2. EVIDENCE—TESTIMONY AT FORMER TRIAL—IMPEACHMENT.
   Where, to contradict plaintiff, the court reporter is sworn, and testifies as to plaintiff's answers to two questions on a former trial, using an abstract from his notes to refresh his recollection, it is not competent for plaintiff to then read to the jury the entire abstract of his testimony on the former trial.

3. MASTER AND SERVANT—INJURIES TO SERVANT—PLEADING AND PROOF—INSTRUCTIONS.
   Where, in an action by a brakeman against a railroad company for personal injury, the declaration counts on a defect in the

track, an instruction that permits recovery on the theory that a coupler was defective is erroneous, and is not cured by a subsequent one that plaintiff, to succeed, must make out a case as alleged in his declaration.

4. SAME—DUTY OF MASTER—CARE REQUIRED—INSTRUCTIONS.

An instruction, in an action for injury to a brakeman, from his foot being caught between a bolt and a spike in the track, that it was defendant's duty to keep the space between the rails in a reasonably safe condition for the use of its employés, is erroneous; the company not being under the absolute duty to keep its tracks in a reasonably safe condition, but being required only to exercise reasonable watchfulness and care in inspecting its tracks and in keeping them in a reasonably safe condition.

Error to Van Buren; Carr, J. Submitted October 20, 1904. (Docket No. 68.) Decided December 14, 1904.

Case by William Culver against the South Haven & Eastern Railroad Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Samuel H. Kelley (*Edward Maher*, of counsel), for appellant.

T. J. Cavanaugh and *L. A. Tabor*, for appellee.

MOORE, C. J. The plaintiff sued defendant to recover damages received by him while acting as a brakeman. He recovered a judgment for $15,000. A motion was made for a new trial, which was overruled. No request was made of the trial judge that he file his reasons for overruling the motion, and none were filed. The case is brought here by defendant by writ of error.

Counsel for defendant contend:

(1) The verdict was against the overwhelming weight of the evidence.

(2) That Culver was not in the exercise of ordinary care, being guilty of contributory negligence.

(3) That the defendant did not receive a fair trial, owing to misconduct.

(4) That the learned trial court erred in ruling upon evidence.

(5) That the learned trial court erred in charging the jury.

We will consider these questions in the order presented.

1 and 2 may be considered together. Was the verdict overwhelmingly against the weight of evidence? Can we say, as a matter of law, Culver was guilty of contributory negligence? Without going into details, we may say an examination of the record satisfies us the plaintiff presented a case making it the duty of the trial judge to submit it to a jury under proper instructions.

3. This assignment of error relates to the conduct of plaintiff's counsel during the taking of testimony and while presenting the case to the jury. We have no hesitancy in saying that if the conduct of Mr. Tabor, about which complaint is made, was the only improper conduct of counsel, we should reverse the case, and direct a new trial. The misconduct, however, was not confined to counsel upon one side. We do not feel it our duty to attempt from this record of nearly 300 pages to decide who of the counsel was most to blame. We do say the conduct of Mr. Tabor on one side and Mr. Maher on the other was such as ought not to be permitted in any court of record anywhere.

The language of Justice Shauck in *Cleveland, etc., R. Co.* v. *Pritschau*, 69 Ohio St. 438, 446, is pertinent here:

"If it be assumed that the orderly administration of justice is not to be insisted upon, and that the truth may, by accident, be evolved from such scenes as were here enacted, it is sufficient that the misconduct of counsel was in its natural effect prejudicial to the rights of the plaintiff in error, and it does not appear from the record that it did not in fact result in such prejudice. An examination of the cases cited and others justifies the conclusion that for such misconduct, and even for that which is less flagrant, judgments are always reversed, unless it is made to appear that its natural effect has been averted by court or counsel, or both. * * * Throughout the record a trial judge, personally distinguished for learning and probity,

appears as a grieved observer of continued improprieties which he thought himself powerless to suppress. It is entirely clear that he was unable to end them by admonition and entreaty, but he was clothed with ample power to suppress them inexorably. The county in which he sat has the complement of county buildings. * * * It is much more important to observe that the trial judge should not have permitted such conduct on the part of counsel as would result in a mistrial. This was due not only to the parties to the suit, but to the public. * * * The observations of the trial judge from time to time show that he had an intelligent appreciation of the gravity of the offenses which were committed before him. Why he thought it less important to suppress them than to give correct instructions to the jury as to the law of the case does not appear."

4. Did the court err in the admission of evidence? As a rule, he did not, but in one instance we think an error was made, which may have made a difference with the final result. There had been a former trial of the case, in which Mr. Culver was a witness. For the purpose of contradicting him the court reporter was sworn as a witness, and testified as to the answers made by Mr. Culver on the former trial to two questions, using an abstract taken from his notes to refresh his recollection. The plaintiff was then allowed to read to the jury the entire abstract of the testimony given by Mr. Culver on the former trial. We do not think this was competent. The other assignments of error in relation to this branch of the case are either not well taken or are not at all likely to occur again.

5. Did the trial judge err in his charge to the jury? He gave all of defendant's requests to charge which it was proper for him to give. With one exception, we think the remaining portion of his charge was a correct statement of the law. It is the claim of plaintiff, and so stated in his declaration, that while attempting to couple a car his foot caught between a bolt which projected through the rail of the track and a spike which projected up from the

railroad tie, and while thus caught that he was run down by the car and severely injured.

Among other things, the judge charged the jury:

"You are instructed that the defendant owed it as a duty to the plaintiff as a brakeman on the road to keep the coupler on the caboose of the train on which he was directed to work in a reasonably safe condition for use, and so it could be safely coupled onto another car at any time when necessary. And if you find that at the time plaintiff was injured it was broken, or out of repair so it could not be safely used or coupled onto another car, and plaintiff was so informed by the conductor; and because of its being so broken or out of repair the conductor directed the plaintiff to go to the car then being backed up to be coupled onto the caboose, but that the coupler on that car was not so constructed that it could be coupled onto the caboose from its sides, but was so constructed that, in order to open it, plaintiff was obliged to go in front of it, between that car and the caboose, and while there in the discharge of his duty, and while in the exercise of ordinary care and prudence, was injured by being run over—then the plaintiff is entitled to recover in this case."

It will be observed that this charge would permit the jury to give plaintiff a verdict for a cause of action not stated in his declaration. It is true that in another part of the charge the jury was told plaintiff must make out a case as alleged in his declaration, but we are not able to say it may not have been misled by the charge we have quoted. The court also charged as follows:

"You are instructed that it was the defendant's duty to keep the space between the rails and tracks in a reasonably safe condition for the use of its employés when there in the discharge of their duty."

The duty which the law imposes upon the company is to exercise reasonable watchfulness and care in inspecting its tracks and in keeping them in a reasonably safe condition. The law does not impose the absolute duty to keep them in a reasonably safe condition. *Anderson* v. *Railroad Co.*, 107 Mich. 591; 3 Elliott on Railroads, § 1268. Under this instruction, if the company had exer-

cised all ordinary care and watchfulness, and the roadbed had for some reason suddenly become unsafe, the company would be held liable. To illustrate: If some one had driven the spike there, or immediately after inspection had placed some obstruction upon the roadbed, thereby making it unsafe, the defendant would have been liable.

For the reasons assigned, the judgment is reversed, and a new trial ordered.

The other Justices concurred.

MACK *v.* SHARP.

1. CRIMINAL LIBEL—FALSE CHARGE OF CRIME.
   One who circulates a libel may be guilty of the offense denounced by 3 Comp. Laws, § 11762, making it a misdemeanor to falsely charge another with the commission of a crime.

2. MALICIOUS PROSECUTION — DEFENSES — EVIDENCE — GUILT.
   In malicious prosecution, it may be shown that plaintiff was in fact guilty of the offense charged against him by defendant, notwithstanding his acquittal.

3. WITNESSES—PRIVILEGE—ATTORNEY AND CLIENT.
   It is not necessary that a fee be asked or accepted by an attorney, to entitle a client to protection under the rule against an attorney testifying to disclosures made by his client.

Error to Livingston; Smith, J. Submitted November 15, 1904. (Docket No. 84.) Decided December 14, 1904.

Case by Glenn S. Mack against James Sharp for malicious prosecution. There was judgment for plaintiff, and defendant brings error. Reversed.

William P. Van Winkle and *W. E. Scott*, for appellant.

Odell Chapman and *Henry C. Smith*, for appellee.

MONTGOMERY, J. This is an action for malicious prosecution. The plaintiff was, at the instance of defendant, arrested upon a charge of criminal libel. He was acquitted, brought this action, recovered substantial damages, and defendant brings error. Numerous assignments of error appear in the record, but we discuss only such as are likely to arise on a new trial.

1. The court held and instructed the jury that one could not be guilty of an offense under section 11762, 3 Comp. Laws, who circulates a libel. This view of the law is opposed to the authorities. 18 Am. & Eng. Enc. Law (2d Ed.), p. 1056.

2. The court also ruled throughout the case that in this action the defendant was not at liberty to prove that the plaintiff was in fact guilty of the criminal offense imputed to him in the prosecution instituted by the defendant. It is well established by authority that in an action for malicious prosecution it is a complete defense to show that the plaintiff was in fact guilty of the offense charged against him by defendant, and this though the proof of guilt is furnished by evidence not known to defendant when the prosecution against the plaintiff was instituted. This testimony is not in such case offered in support of probable cause, but to show that the plaintiff has suffered no wrong by his arrest. The law considers that, if a criminal is fortunate enough to escape conviction, he should rest content with his good luck, and not belabor one who suspected his guilt and acted accordingly. As was said in *Newton* v. *Weaver*, 13 R. I. 617:

"The action for malicious prosecution was designed for the benefit of the innocent, and not of the guilty. It matters not whether there was proper cause for the prosecution, or how malicious may have been the motives of the prosecutor, if the accused is guilty he has no legal cause for complaint."

See, also, *Threefoot* v. *Nuckols*, 68 Miss. 123; *Whitehurst* v. *Ward*, 12 Ala. 264; *Parkhurst* v. *Masteller*,

57 Iowa, 478; *Turner* v. *Dinnegar*, 20 Hun, 465; *Lancaster* v. *McKay*, 103 Ky. 616.

Inasmuch as it is essential to the plaintiff's action to show a termination of the criminal action as a basis for his suit for malicious prosecution, it is competent to establish this fact by the verdict of acquittal. 2 Black on Judgments, § 529. But it is not conclusive evidence of the plaintiff's innocence. Id.

Plaintiff's counsel cite the case of *Josselyn* v. *McAllister*, 25 Mich. 45, as sustaining the ruling of the circuit judge. It does not appear that the precise question of whether the actual guilt of plaintiff could be given in evidence as a defense was discussed in that case. It is true that testimony which might have amounted to an admission of one element of the offense was held properly excluded on the ground that defendant was not shown to have had knowledge of the fact when the prosecution was instituted by him. It was said that, "if Josselyn acted without any knowledge or suspicion of the supposed fact, it could in no way affect his motives"—a proposition obvious enough in itself, and quite conclusive as to the admissibility of the proposed testimony in that case, for the opinion shows there were joined in that action counts for malicious prosecution and false imprisonment, and by a reference to the report of the case at a former hearing (22 Mich. 304) it will be seen that the counts for malicious prosecution were *disposed of* on the first trial at the circuit, so that in the first opinion it was very pertinently said, "As no state of facts relied upon would have made the arrests lawful, the defense depends, so far as this class of testimony is concerned, purely on the consideration of malice."

The case of *Patterson* v. *Garlock*, 39 Mich. 447, also cited, does not sustain the ruling below. Indeed, some of the language employed by Mr. Justice GRAVES makes strongly for what we hold to be the correct rule. In that case testimony offered by the plaintiff to establish his innocence was received. The court held that, while it was

not bound to make affirmative proof of his actual innocence, yet such testimony was admissible.

Mr. Justice GRAVES said:

"It requires no reasoning to show that, where the question is whether one man has fair ground to charge another with a crime, it cannot be laid down that the abstract fact of his guilt or innocence must be necessarily impertinent and immaterial."

There was error in the court's ruling.

3. One Byron Hicks was called as a witness to testify to statements made to him by Mack at about the time of his arrest. Mr. Hicks is an attorney, and testified that this conversation occurred in his office. The court excluded the testimony on the ground that the relation of attorney and client existed. The record shows that the witness did in fact advise the plaintiff at that time, and that he asked the plaintiff certain questions relating to the matter. He testified that he could not state whether the plaintiff consulted him as to the law or not, but we think his further testimony discloses that he was so consulted. It is not necessary that a fee be asked or expected in order to entitle the client to invoke the protection of this relation. Weeks on Attorneys, § 143. It should be stated that Mr. Hicks does not appear to have been in any sense a volunteer witness, and that his testimony bears every evidence of candor.

The other questions presented are so far dependent on those discussed that they are quite unlikely to arise again.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

SCHMID *v.* BENZIE CIRCUIT JUDGE.

MANDAMUS—JUDGE—DISCRETION—TRIAL.

Mandamus will not be granted to compel a circuit judge to proceed with the trial of a chancery case while an action at law between the same parties, involving the same subject-matter, is pending on writ of error in the Supreme Court; his refusal to proceed under such circumstances not being an abuse of discretion.

Mandamus by Frederick Schmid to compel Clyde C. Chittenden, circuit judge of Benzie county, to proceed with the trial of a case in chancery. Submitted November 15, 1904. (Calendar No. 20,746.) Writ denied December 14, 1904.

B. M. Thompson, for relator.

D. G. F. Warner and *Thomas Smurthwaite*, for respondent.

PER CURIAM. The merits of the controversy involved in the present proceeding are stated in *Mack* v. *Village of Frankfort*, 123 Mich. 421; *Schmid* v. *Village of Frankfort*, 131 Mich. 197.

While the suit at law was pending, brought by the relator against the village of Frankfort, the village filed a bill of complaint, setting forth the invalidity of the park bonds, which are the subject of litigation; that Mack & Schmid, the purchasers thereof, were not bona fide purchasers; and asked that the bonds be declared void and be delivered up and canceled, and for an injunction to restrain the defendant from negotiating the bonds. The relator, the defendant in the suit, answered, asserting that they were good-faith purchasers, and that they paid full value therefor, and asked that the bill be dismissed. The answer also set up the validity of the bonds in the hands of

the relator as bona fide purchasers, prayed affirmative relief that the village be decreed to pay the interest then due upon the bonds, and the bonds be declared valid. The complainant's default for not answering the cross-bill was entered. Subsequently the solicitors for the respective parties stipulated that the default be set aside; that the replication and plea be treated and considered as filed; that the cause be considered at issue, and be for hearing and submitted at the then term of court. That stipulation was, on motion, set aside by the respondent, and the respondent refused to proceed with the hearing of the chancery case until the termination of the suit at law, in which verdict and judgment have been entered against the relator, and which is now pending on writ of error in the Supreme Court.

The relator asks the writ of mandamus to compel the respondent to proceed with the hearing of the chancery case. We do not think that the respondent has abused his discretion in refusing to hear the case until the determination of the suit at law, now pending in the Supreme Court.

For this reason, the writ will be denied.

In re BUTLER.

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1. CRIMINAL LAW—HABITUAL CRIMINALS—STATUTES—REPEAL.
Sections 11785 and 11786 of the Compiled Laws, providing for additional punishment of habitual criminals, are not repealed by section 2112 pertaining to an allowance of good time for good behavior in prison.

2. SAME—SENTENCE—PRESUMPTIONS.
Though a convict previously convicted cannot be subjected to the increased penalty provided by 3 Comp. Laws, §§ 11785, 11786, unless he is sentenced to imprisonment for at least a year for the offense committed, without reference to

the increased penalty, where a criminal has been twice convicted, and is sentenced on a third conviction to imprisonment for 20 years for larceny, it will be presumed that he was given the maximum punishment of 5 years' imprisonment for the larceny, and that the remainder of the sentence was therefore properly imposed, under section 11786.

3. HABEAS CORPUS—IRREGULAR SENTENCE—WRIT OF ERROR.
Where a criminal has been properly convicted, but irregularly sentenced, the irregularity cannot be reviewed by habeas corpus, since the writ cannot be substituted for a writ of error.

Habeas corpus proceedings by James Butler to obtain his release from imprisonment in the State prison at Jackson. Submitted November 17, 1904. (Calendar No. 20,816.) Prisoner remanded December 14, 1904.

Thomas, Cummins & Nichols, for petitioner.

Charles A. Blair, Attorney General (*George S. Law*, of counsel), for respondent warden.

HOOKER, J. On October 19, 1897, the petitioner was sentenced to confinement in the State prison for 20 years upon a conviction of the offense of larceny from a dwelling in the daytime, the penalty for which is such confinement for a period not exceeding 5 years. It was alleged in the information and proved upon the trial that he had been twice before convicted and sentenced to terms of one year or more, and the brief for the petitioner states that "it is supposed that this penalty was imposed by reason of the provisions of sections 11785 and 11786 of the Compiled Laws of 1897." These sections are as follows:

"When any person shall be convicted of any offense, and shall be duly sentenced therefor to confinement in the State prison of this State, for one year or more, and it shall be alleged in the indictment on which such conviction is had, and admitted or proved on the trial, that the convict has before been sentenced to a like punishment by any court in this State, or in any other of the United States, for a period not less than one year, he shall be

sentenced to be punished by imprisonment in the State prison not more than seven years, in addition to the punishment prescribed by law for the offense of which he shall then be convicted.

"When any such convict shall have been twice before sentenced to imprisonment at hard labor, for a period of not less than one year at each time, by any court in this State, or in any other of the United States, he shall be sentenced to imprisonment at hard labor for life, or for a term of not less than seven years in addition to the punishment prescribed by law for the offense of which he shall then be convicted."

Two points are relied upon as grounds for the petitioner's discharge: (1) That sections 11785 and 11786 were repealed by section 2112; (2) that under section 11785 it was necessary to the validity of an increased sentence that the record show that at least one year of the term was not included in the additional penalty imposed under section 11786.

Section 2112 is a statute pertaining to an allowance of good time for good behavior in prison. It is in no sense an imposition of additional penalty upon confirmed criminality, to be imposed by the court, but is a reduction of such penalty, to be allowed by the prison board, upon the basis of the prisoner's conduct subsequent to sentence. *In re Canfield*, 98 Mich. 644.

The second point is a technical one. It is first argued that under neither of these sections (11785 and 11786) can one be subject to increased penalty unless he is sentenced to confinement for at least one year for the offense committed, without reference to the penalty. If this be conceded, we are justified in presuming that the maximum punishment (i. e., five years) was imposed under the statute punishing such offense, and that the remainder was imposed under the provisions of section 11786. Again, the defendant's conviction was affirmed, after sentence, by this court. See *People* v. *Butler*, 122 Mich. 36. If the technical error now relied upon had been then raised it would have been considered, but it was not.

Had it been held fatal, the cause would have been remanded for sentence, when the full penalty could have been imposed, as before. It is even doubtful if this question could have been raised in habeas corpus in the first instance. See the following authorities cited by the attorney general: *In re Underwood*, 30 Mich. 502; *Hamilton's Case*, 51 Mich. 174; *In re Coffeen*, 38 Mich. 311; *In re Maguire*, 114 Mich. 80; *In re Bishop*, 172 Mass. 35. These cases sustain the rule that when there is a valid conviction and an irregular sentence, which may, under the law, be corrected by a new sentence, habeas corpus will not be permitted to perform the function of a writ of error.

The petitioner's prayer is denied, and he will be remanded to the custody of respondent.

The other Justices concurred.

RUMSEY *v.* AUDITOR GENERAL.

BILL OF REVIEW—TAX SALES—DECREE—VALIDITY—VACATION.

Where a petition to file a bill of review shows a decree authorizing a sale of petitioner's lands for nonpayment of taxes, which decree petitioner claims is invalid, and the answer, in effect, admits that there are no taxes against the land which have not been extinguished, and that there is no existing lien, petitioner should be allowed to file such bill to set aside the decree.

Appeal from Gratiot; Stone, J. Submitted November 16, 1904. (Docket No. 87.) Decided December 14, 1904.

Petition by Chauncey J. Rumsey against Perry F. Powers, auditor general, and another, for leave to file a bill of review. From a decree dismissing the petition, petitioner appeals. Reversed.

Nichol & Locke, for petitioner.

M. R. Salter, for respondent.

MOORE, C. J. This proceeding contains many of the features passed upon in *Rumsey* v. *Griffin*, ante, 413. The petitioner is the same person. It relates to the same tax and to the same tax proceedings, but to a different description of land.

The petition contains this averment:

"Your petitioner further shows that the said lands of your petitioner are now held by the State of Michigan under and by virtue of the said State bid, and the said auditor general holds out and pretends that he has authority to and will sell said lands or the State's bid."

The answer in this case differs very materially from the other. It says:

"1. The S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 14, town 9 north, range 1 west, county of Gratiot, was assessed for drain taxes in 1882 under the drain law of 1881. That such drain taxes were reassessed under the provisions of the drain law of 1885, and returned, advertised, and subsequently bid to the State, but, acting under authority of law, the auditor general did on June 30, 1900, cancel such bid, and reject the taxes so returned to him, and charge the same back to the county of Gratiot. That such taxes have not been, and could not be, for the reason, charged back, reassessed upon the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 14, and they are therefore actually, and as a matter of fact, wholly extinguished.

"2. For the reason that there are no taxes under the assessment for drain purposes made in 1882, now delinquent under the original assessment or a reassessment, and charged against such land, the allegations of petitioner are not of force, as they do not and cannot refer to an existing lien, and petition should for this reason, and for the reason that there are no taxes of 1882 for drain purposes now charged against the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 14, be dismissed."

This case, like the other, was heard upon petition and answer, and the petition dismissed. This action of the trial

court does not give the petitioner the relief to which he was entitled under the pleadings. The petition shows a decree authorizing a sale of petitioner's lands, which decree the petitioner claims is invalid. The answer admits, in effect, that there are no taxes against the land which have not been extinguished, and no existing lien. If this is true, the decree should be set aside. The petitioner should be allowed to file his bill of review to accomplish that purpose.

The decree of the court below is reversed, and one will be entered here in accordance with this opinion.

The other Justices concurred.

FRIESEKE *v.* FRIESEKE.

1. GUARDIAN AD LITEM—NEGLECT—RELIEF IN EQUITY.
   Equity will relieve an insane defendant from the consequences of the neglect of her guardian ad litem appointed on complainant's nomination.

2. BILL OF REVIEW — INSANE DEFENDANT — DECREE OBTAINED THROUGH NEGLECT OF GUARDIAN.
   Where a decree of divorce against an insane defendant rests entirely upon testimony elicited by leading questions to which her guardian ad litem made no objection and the decree was not opposed though barely supported by the evidence considered in its most favorable light, an application by defendant's general guardian to file a bill of review should be granted.

3. SAME—DECREE FOR ALIMONY.
   The application should also be granted in such a case where it appears that through the guardian's neglect defendant's allowance for permanent alimony in lieu of dower was based on evidence disclosing only one-fifth the value of complainant's property.

4. GUARDIAN AD LITEM — PROPRIETY OF APPOINTMENT — NOMINEE OF COMPLAINANT.

A near relative or close friend of an insane defendant should be appointed guardian ad litem, rather than some person nominated by complainant.

Appeal from Shiawassee; Smith, J. Submitted November 16, 1904. (Docket No. 88.) Decided December 14, 1904.

Bill by Herman C. Frieseke against Marie Frieseke for a divorce. On petition of defendant for a rehearing, the petition was dismissed, and defendant appeals. Reversed.

Watson & Chapman, for complainant.

Albert L. Chandler, for defendant.

CARPENTER, J. This is an appeal from an order denying a rehearing after a decree of divorce had been pronounced in favor of complainant and against defendant. The facts, so far as material to this decision, are these: At the time this suit was commenced defendant was insane, and confined in the insane asylum at Pontiac. The subpœna was served upon her personally. After the lapse of time for appearing, complainant filed a petition for the appointment of a particular named person as guardian ad litem for defendant. This petition, together with notice of hearing the same, was also served on defendant and the superintendent of the asylum. At the day set for hearing said petition the trial court appointed complainant's nominee guardian ad litem. This nominee was not related to defendant, and does not appear to have been a special friend of defendant. The solicitor for the guardian ad litem and for complainant stipulated for an early hearing of the case. On this hearing, complainant, his daughter, and said guardian ad litem (the latter testifying to the condition of defendant), were the sole witnesses. Upon this testimony, and on the day of the hearing, complainant was given a divorce on the ground that

defendant had been guilty of extreme cruelty, and alimony in the shape of an annuity of $200 during her life was given defendant in lieu of dower and all other claims upon complainant.

It is stated in the petition for rehearing, among other things, that the complainant's charges of extreme cruelty were untrue; that the testimony given on the hearing, if properly analyzed, did not warrant a decree of divorce; that complainant himself has been guilty of acts of extreme cruelty, which are there specified; that the allowance for alimony is grossly inadequate, because complainant has property amounting in value to over $40,000.

In his answer to this petition, respecting the charges of his own extreme cruelty and the valuation of his property, complainant contents himself with saying that he objects to their consideration, "for the reason that they do not in any manner tend to weaken complainant's cause for a divorce, but, if the facts were all true, which this complainant denies, they would only tend to show that complainant might be entitled to a divorce."

Under the circumstances we must conclude, even if complainant had made a case entitling him to a divorce, which is extremely doubtful, as we shall hereafter show, defendant had a complete defense to that case in her counter charges, and that the allowance for alimony was grossly inadequate. (For the award of alimony, as will more fully appear hereafter, must have been made on the assumption that complainant was worth about $8,000.)

It is clear, therefore, that the decree works an injustice to defendant, and it ought to be vacated unless it may be said that she did not avail herself of the proper opportunity to present her testimony. It cannot be said that defendant neglected the proper opportunity to present her case, because she personally did not attend to her defense. She was incapable of doing that. Under the circumstances she had to depend upon the good faith and diligence of her guardian ad litem. That guardian ad litem, as heretofore stated, was the nominee of com-

plainant, and apparently not a special friend of defendant's. We accept the decision of the trial court, which exonerated said guardian ad litem from all charges of bad faith. But if, through his neglect, defendant lost rights because her case was not properly presented, the consequences should in equity—and this is a suit in equity—be chargeable to complainant, who nominated him, rather that to defendant, who was powerless to act.

Assuming, as claimed by said guardian ad litem, that, though he used all diligence, he could find no testimony tending to prove the charges of complainant untrue, it was nevertheless his duty to defendant to insist that complainant should obtain no unfair advantage by asking leading questions, or in any other way; to object to a decree against defendant unless the testimony clearly warranted it; and to see that the financial condition of complainant be clearly proved, in order that a proper award of alimony be made to defendant.

Said guardian ad litem, though represented at the hearing by a solicitor, made no objection to leading questions. To show the opportunities he neglected, we quote from complainant's testimony:

"*Q.* I want to know if you know of any time when she would exclude herself from the children? *A.* Yes.

"*Q.* When was it? Shut herself away from the children? *A.* Yes. * * *

"*Q.* What interest did she manifest in the success of your daughter while she was away from home? Did you talk and try to read the letters your daughter wrote, or talk about your daughter or Fred while in school? What was her manner? Appear to care anything for them? *A.* No, she never had any interest, and, knowing that fact, we never talked much about it.

"*Q.* Some time in her record you must have learned she cared nothing about them? *A.* Yes.

"*Q.* When was it that you learned from her manner that she cared nothing about hearing about what your children were doing in school? *A.* That gradually grew on her all these years; kept getting worse from time to time until it reached this stage.

"*Q.* Did you ever start in to read your daughter's letters? *A.* I often showed her the letters, laid them down for her to read. I never read them to her that I can remember.

"*Q.* She paid no attention to them? *A.* That I can't remember. I can't say she didn't read them, but not to my knowledge. She didn't pay any attention to them. As far as her manner indicated itself, she rather not pay any attention to them. * * *

"*Q.* That finally became her manner toward you, and the domestic relations between the children and each other? *A.* Yes.

"*Q.* That continued for a space of— *A.* For that time.

"*Q.* For more than ten years? *A.* Yes, for most of our married life.

"*Q.* What can you say about this conduct toward yourself and towards your children having destroyed all the social relations and tender relations of home, so far as the wife was concerned? *A.* I can only say this: That it destroyed them entirely. There was no harmony in our household. Not that we had any words, or anything of that kind, but there was a cold indifference during all our life.

"*Q.* You set out in your bill that it caused you great mental anguish and suffering. Is that true? *A.* Yes, sir.

"*Q.* How did it affect your children as to taking all the playfulness and joy and pleasure from them in the home? Did it destroy that? *A.* It made our household gloomy, of course, excepting such times as they would come to me."

We quote from the examination of complainant's daughter:

"*Q.* About how long after the marriage was it before she began to manifest a coldness toward you and your brother, if at all? *A.* Almost immediately. * * *

"*Q.* Was it cold indifference toward you children? *A.* Yes, sir.

"*Q.* What can you say of that making the household a very solemn and melancholy place? *A.* Well, it did.

"*Q.* Did it take all the good time and enjoyment of you children and your father out of your home? *A.* It certainly did. * * *

"*Q.* Did her manner indicate to you that she didn't care anything about it, and would be better pleased if you weren't succeeding very well? *A.* Yes, sir. * * *

"*Q.* Did it grow worse as time went on? *A.* Yes, sir.

"*Q.* Was it almost unbearable along the latter years? *A.* It was."

It is to be presumed that this testimony—weak as it is—would have been still weaker if it had not been drawn out by these leading questions. This presumption finds support in certain other testimony, namely:

Complainant himself testified:

"I, of course, don't say by that [referring to his testimony that defendant's action made his home unpleasant] she is entirely to blame. Of course, things were unpleasant between us all, and, of course, it made it unpleasant."

And the daughter testified:

"She was cold and distant in a way, and still in a way she was kind. She was kind toward father. I cannot say that she ever ill-treated him to my knowledge."

It is obvious that by asking these leading questions complainant obtained an advantage—an unfair advantage—and it was clearly the duty of the guardian ad litem to object to it.

Complainant testified that during the latter portion of their married life defendant occasionally occupied a separate bed for more than a month at a time. Unless this constituted an act of extreme cruelty—and I do not understand that to be claimed—it may be said that the record does not show that defendant ever did to complainant or to complainant's children a cruel act, or ever said to complainant or to complainant's children a cruel word.

I think it fair to say that the ground upon which complainant seeks a divorce is that his home was unpleasant partly, and only in part, because defendant, by her manner and actions, indicated toward his children cold indifference; and this indifference was mingled with kindness. If this matter had been presented, as it should have been, by the guardian ad litem to the trial court, we cannot be-

lieve that a decree of divorce would have been granted complainant.

Neither did the guardian ad litem, acting through his solicitor, make proper proofs respecting complainant's wealth. As already stated, the only witness upon that subject was complainant himself, and the only testimony on that subject was brought out by the cross-examination of the solicitor of the guardian ad litem. We quote that testimony:

"*Q.* I wish you would tell the court what are your present means. Give a general idea as to your property. * * * *A.* That would be hard to estimate at this time for the reason my property—my brother and I own everything together.

"*Q.* What is the income from your manufacturing business? *A.* It would be hard to make an estimate on that.

"*Q.* About what? *A.* A good deal of that is in real estate, and hard to put a price on.

"*Q.* I say about what is your income from the brick business? *A.* The income of the brick business? From two to three thousand a year.

"*Q. By the Court:* You get half of that? *A.* Yes, sir.

"*Q.* You own a home? *A.* Yes, sir.

"*Q.* What is the value of that? *A.* The home I consider worth about $3,000.

"*Q.* What would you say your interest in the brick business? Would you say $5,000 would be a fair valuation of your interest in it? *A.* It would be so long as the business continued. If it discontinued, it would not be that."

We get from this testimony simply an estimate of the value of the home and the value of complainant's interest in the brick business. It is fairly to be inferred from this testimony that much of the property owned by complainant and his brother is real estate. The value of that real estate is not shown. It is clear that the guardian ad litem and his solicitor did not bring out evidence which they should have known would have increased the allowance for alimony to defendant.

Under these circumstances, we are bound to say that the guardian ad litem neglected his duty; that, as a consequence, defendant did not have the hearing which in equity she was entitled to have; and that the consequences of this neglect should be borne by complainant, whose nominee the guardian ad litem was, rather than by defendant. In such a case, therefore, it is clearly our duty (see *Sheldon* v. *Hawes*, 15 Mich. 519; *Johnson* v. *Shepard*, 35 Mich. 125; *Mickle* v. *Maxfield*, 42 Mich. 310; *Murray* v. *Ingersoll*, 100 Mich. 286; *Kinsel* v. *Kinsel*, 126 Mich. 693) to reverse the order of the circuit court denying the defendant a rehearing, and to remand the case for further proceedings.

We think it proper to say that complainant should not have been permitted to select defendant's guardian ad litem. The trial court should have appointed to this office some near relative or close friend of defendant, or some other person who could be relied upon to guard her interests. And under the circumstances of the case we feel called upon to say that the legal guardian of defendant should be substituted in the place of the present guardian ad litem. The defendant will recover costs of this court.

The other Justices concurred.

SOUTH ARM LUMBER CO. *v.* SILVERTHORNE.

APPEAL AND ERROR—QUESTIONS CONSIDERED—QUESTIONS ARGUED.
Reversal will be granted only on some ground urged in appellant's original brief.

Appeal from Marquette; Stone, J. Submitted November 17, 1904. (Docket No. 99.) Decided December 14, 1904.

Bill by the South Arm Lumber Company against Asa K. Silverthorne and others, copartners as Silverthorne & Co., to enforce a lien for the sawing of certain lumber. From a decree for complainant, defendants appeal. Affirmed.

A. B. Eldredge and *A. F. Miller*, for complainant.

Clark & Pearl, for defendants.

CARPENTER, J. Complainant sawed a quantity of lumber for defendants. He brings this suit to enforce a lien against a part of that lumber for a balance of the saw bill claimed to be unpaid.

The only ground stated in defendants' original brief for the reversal of the decree—and this, therefore (see *Gould* v. *Gregory*, 133 Mich. 382), is the only ground upon which we should reverse it—is that the trial court reached a wrong conclusion from the testimony.

It is urged that the proper conclusion of fact to be drawn from this testimony is, not that there was a balance of $1,700 due complainant, as the learned trial judge found, but that it had been paid by defendants.

It is sufficient to say that a careful examination of the testimony convinces us that the trial court reached a correct conclusion.

The decree is therefore affirmed, with costs.

The other Justices concurred.

SHOOK v. MARION MANUFACTURING CO.

1. BROKERS — CONTRACTS—SALES—MACHINERY—COMMISSIONS—RESALES.

   A season contract of agency in writing for the sale of threshing machinery, which by its terms ends September 30th of the season, and provides that no commissions shall be paid for the sale of secondhand machinery once before sold by the agent, has no reference to commissions for the second sale of machines which had once been sold by the agent before the date of the contract.

2. SAME.

   A similar contract for a prior year in existence when the machinery was first sold would not deprive the agent of his commission for its subsequent sale after that contract had expired.

3. SAME—ORAL AGREEMENT.

   A provision in such written contract forbidding its change unless approved in writing by the principal does not invalidate an oral agreement for commissions on sales not within its terms.

4. APPEAL AND ERROR — IMMATERIAL ERRORS — JUDGMENT RIGHT ON MERITS.

   Alleged errors in the rulings admitting testimony will not be considered where, in any view that may be taken of the case, a verdict should have been directed for defendant in error.

Error to Bay; Shepard, J. Submitted November 17, 1904. (Docket No. 112.) Decided December 14, 1904.

Assumpsit by Helen M. Shook against the Marion Manufacturing Company for commissions on the sale of certain machinery. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

Lee E. Joslyn, for appellant.

Pierce & Kinnane, for appellee.

CARPENTER, J. By direction of the trial court, plaintiff recovered a verdict for commissions claimed to have been earned by her in July, 1901, by making a sale of a threshing machine for defendant. This threshing machine was a secondhand one. It had once before, namely, in 1899, been sold by plaintiff, as defendant's agent, to one Daniel Dean. Dean did not fully pay for it, and defendant reacquired title by the foreclosure of a purchase-money chattel mortgage. For said sale to Dean, plaintiff did not receive, and does not claim, any commission.

Plaintiff effected the second sale of this machine—the sale for which she claims commission in this suit—under a verbal agreement with defendant's general agent that she should receive her regular commission; that is, the commission provided in a written contract between the parties. Upon the assumption that this verbal agreement was of binding force, the trial court directed a verdict in plaintiff's favor.

The principal ground upon which defendant asks us to reverse the judgment is that, by a written contract between the parties, plaintiff was not entitled to compensation for making a sale of secondhand machines once sold by her, except under conditions which did not exist in this case. The only written contract set forth in the record bears date December 5, 1900, and was for the season ending September 30, 1901. If this contract should be construed as claimed by defendant—and this is by no means certain—it has no application to the sale in question. That contract has no reference to plaintiff's commissions for the second sale of machines which had once been sold by plaintiff before the date of this contract.

Neither can we say from the record that the contract with defendant under which plaintiff acted when she first sold the machine in question, namely, when she sold it to Daniel Dean, deprived her of commissions in the event of its being returned and resold.

Defendant contends that a provision in the written contract between the parties forbidding its change, unless

such change was approved in writing by defendant, applied to and prohibited the verbal agreement between its agent and plaintiff respecting the commissions in suit. Our conclusion, already stated, that this written contract had no reference to the sale in question, sufficiently shows that, in our judgment, the verbal agreement under consideration was not a change of said written contract. Nor does it appear to be a change of any other written contract.

Complaint is made of rulings admitting testimony. We do not consider these complaints, because, in any view that may be taken of the case, it was the duty of the trial court to direct a verdict for plaintiff.

Judgment is affirmed, with costs.

The other Justices concurred.

NEELY v. DETROIT SUGAR CO.

1. TRIAL—INSTRUCTIONS—ARGUMENT.

   An instruction that the jury ought to discard all those statements of counsel that might perhaps result in influencing them, or possibly might have been designed to influence them, *held* not objectionable when considered with the rest of the charge.

2. WATERCOURSES—OBSTRUCTION—RIPARIAN RIGHTS—INJURY TO FEE.

   Where plaintiff was in possession under a land contract from W., who more than 30 years before had obtained deeds to the property, and who, with plaintiff, had been in continuous possession for that period, and who had assigned to plaintiff any cause of action he might have, plaintiff was entitled to any damages to the fee by reason of the obstruction of his mill pond and race thereon.

3. LANDS—SALE—ORAL PROOF.

   Where, in an action for damages to a mill pond and race, defendant's witness stated that he at one time owned the mill

property, a statement elicited on cross-examination that he had sold to a certain party, under whom plaintiff claimed, was not objectionable as an admission of oral proof of sale.

4. WATERCOURSES—OBSTRUCTION—DAMAGES—INSTRUCTIONS.

In an action for damages to plaintiff's mill pond and race by obstruction of the steam, an instruction that, if the plaintiff used the creek above the mill in a certain manner, then such user "would be an unreasonable use thereof, and would render it liable in this action to the plaintiff for the damages it has occasioned him, if any," was not, when read with the rest of the charge, subject to the objection that it permitted a recovery for "all the damages it has occasioned him," whether or not resulting from an unreasonable use.

5. SAME—RAISING QUESTION.

In an action for damages to mill property by obstructing the creek by depositing refuse therein, in which it was claimed that the injury had continued for three or four years, a witness for plaintiff was asked if he was acquainted with the fair rental value prior to the time suit was instituted, and what that value was. Defendant objected that the question "should be confined to the rental value during the time that the mill has been shown to have been idle, and this is incompetent and immaterial." *Held*, that this did not suggest that defendant was claiming that the plaintiff ought, as soon as practicable, to remove the deposit, and that the failure to do so affected the measure of recovery, and therefore the question could not be raised on appeal.

Error to Oakland; Smith, J. Submitted November 17, 1904. (Docket No. 109.) Decided December 14, 1904.

Case by Thomas Neely against the Detroit Sugar Company for damages caused by the obstruction of a mill pond. There was judgment for plaintiff, and defendant brings error. Affirmed.

H. H. Hatch, for appellant.

Davis & Bromley, for appellee.

MOORE, C. J. This is an action brought by the plaintiff to recover damages. The plaintiff claimed to be in possession of a flouring mill situated in the village of Roch-

ester, on Paint creek. The mill was operated by water power, and connected with it was a raceway and a small pond, of about two acres in extent. Upstream from the plaintiff's pond, and adjoining his pond, was located a tract of land owned by the defendant, the Detroit Sugar Company. In the year 1899 the defendant erected on its land a factory for the manufacture of sugar from beets. It used the water of Paint creek in the factory, taking the water from a small dam that extended across the creek above the factory. The drainage from the factory led into Paint creek above the pond of the plaintiff.

The claim of the plaintiff was that the defendant had caused to be discharged into the creek beets, beet tops, and other refuse from its factory, and also mud more or less mixed with lime; that, after the first season's operation of the defendant's factory, these beets, beet tops, and other refuse floated downstream and obstructed the flow of water to the plaintiff's mill wheel; that, after the second season's operation of the defendant's factory, plaintiff's pond and race were partially filled by the discharge of mud and lime therefrom. A season's operation of the sugar factory is generally referred to as a "campaign."

The defendant's sugar factory was completed in the fall of 1899, and its first campaign began on the 2d day of November and continued until the 30th day of December of that year. The next campaign began on the 18th day of October, 1900, and ended on the 30th day of December of that year. The next campaign began on the 9th day of October, 1901, and continued until the 28th day of December of that year. This suit was commenced on the 16th day of July, 1902. The case was tried before a jury. From a judgment in favor of plaintiff, the case is brought here by writ of error.

The record contains nearly 150 pages. The jury were also taken to view the premises. In the bill of exceptions it is said a large amount of testimony was introduced by both parties not set forth in the bill of exceptions.

A reading of the charge made by the trial judge will

greatly aid in understanding the errors which are discussed by counsel. The charge is as follows:

"Counsel of great ability and learning have spent six hours in arguing this case to you and setting forth the claims of their respective clients, and that makes it unnecessary for me to spend any length of time in reviewing the facts claimed in this case. Briefly stated, Mr. Neely and the Wilsons claim to be in possession of a mill and mill privilege and water power, and that the water privilege has been in use by them and their grantors a long time, and that the sugar-mill factory was built at a comparatively late period (in 1899, if I recollect the date); and it is the claim of the plaintiff that the sugar company have caused or allowed such amounts of dirt, lime, sediment, or lime mud, beets, and beet tops, to be deposited in the creek, and that they have been conveyed by Paint creek to the pond in question in such an unreasonable amount thereof as to have greatly injured the power furnished by the mill pond and Paint creek, and it is his claim that he is entitled by reason thereof to the loss of the rental value that has been occasioned to a large amount, and that he is entitled to recover the costs of removing the deposits of lime mud, dirt, and sediment, and which he also claims would be very large.

"The claim on the part of the defendant, briefly stated, is that the pond in question furnishes but very little addition to his water supply; that it has not been filled up to any material or appreciable extent, unless by natural causes, and that there has been no use of the creek as a deposit for sediment, lime, or mud, or the refuse from the factory, to any unreasonable amount, in this creek, at all, and that even if deposits of sediment have been conveyed from the factory to the pond in question, and along the raceway onto the plaintiff's premises, still that there is a more practical way of removing it than that claimed by the plaintiff. The claim by the plaintiff is that it must be removed by hand power—that is, by shoveling and by use of wheelbarrows—while the claim of the defendant is that, by cutting or making an opening into the dam, it can be flushed out by the force of the stream, by the water itself, at a small expense.

"Now, all of the other claims principally growing out of these circumstances, and all this evidence, tend to support one or the other of these principal claims which are pre-

sented to you. Now, to sustain the plaintiff's claim, he must prove all parts of his claim, or, more correctly speaking, he must prove each one of his various claims that are material to the issue, by a fair preponderance of evidence. It is not for the defendant to disprove the claims of the plaintiff, but it is for the plaintiff to first prove his claim. The burden of proof is upon him to establish the various claims, let me repeat, by a fair preponderance of evidence; and by that term is meant such evidence as, when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury. It is not a technical term at all, but means simply that evidence which outweighs that which is offered to oppose it. It does not mean necessarily that a greater number of witnesses shall be produced on the one side or the other, but that on the whole evidence the jury believe the greater probability of the truth to be on the side of the party having the affirmative of the issue, and in this case the affirmative of the issue is with the plaintiff.

"The legal claims are so thoroughly and completely covered by these requests which have been handed up that it will not be necessary for me to indulge at length in any general charge at all. There is nothing that I can say that would be anything more than a repetition of the language that is contained in these requests; and such of them as I read you, gentlemen, will be considered as good law and the charge of the court, and those that I omit will not have any bearing on the case at all, even if you did hear them read by counsel.

"On the part of the plaintiff I charge you, first, if the jury find from the evidence in this case that at the time of the commencement of this suit the plaintiff, Thomas Neely, was in the open and peaceable possession of the milling property mentioned in the declaration in this case, under a land contract for the purchase of the same from the Wilsons, and that they had, previous to the commencement of this suit, sold, assigned, and transferred to the plaintiff all their right, title, and interest in and to any and all of their claim for damages against the defendant, then such facts would constitute the plaintiff a sufficient owner of the said milling property to commence and maintain this suit.

"*Second.* If the jury find from the evidence in this case that at the time of the commencement of this suit, and for fifteen years and more prior thereto, there had been kept

up and maintained a water power and a dam at a certain height on the property described in the declaration, by the plaintiff or the parties from whom he claims, then the plaintiff would have the right at this time to keep up and maintain the said dam at said height, and would be the owner thereof, the same as though he had a deed or deeds of the same.

"*Third.* If the jury find from the evidence in this case that said dam so maintained backed the waters of Paint creek over and upon the lands of the defendant, or the persons from whom it claims, for fifteen years or more prior to July 16, 1902, then the defendant would have no right to fill up the pond or reservoir so formed, so as to diminish or destroy the capacity thereof, to the injury of the plaintiff. Now, gentlemen, the latter part of this request contains some language that perhaps ought not to be there as a part of the request itself. It does not refer to the merits of this case particularly, but refers to the question of the extent of the dam, and whether or not there should be any deduction from the fact that it is the claim that a part of this waterway and dam extends over onto the premises of the defendant. The charge that will govern the merits of the case is not contained in the latter part of this request, but will be given you later.

"The fourth and fifth requests contain what I give you, or that will govern the plaintiff's case, and what will enable him to recover, if he recovers at all, and those requests are as follows (and I might say that any language that may have been contained in the latter part of the request just read that is in contradiction to this is put there by a mere inadvertence, and will not govern you):

"If the jury find from the evidence in this case that the defendant, the Detroit Sugar Company, its agents or servants, during the campaigns (so called) of said company from November 1, 1899, to July 16, 1902, have deposited into Paint creek, and from thence into the pond, race, flume, and water wheel, of the water power and mill of the plaintiff, such quantities of beets, tops of beets, beet roots, lime mud, lime, sand, and dirt, and other refuse from its sugar plant, as to materially and unreasonably lessen, diminish, injure, and damage such pond, race, and mill property, then such use and such acts of the defendant with the said waters of Paint creek would be an unreasonable use thereof, and would render it liable in this action to the plaintiff for the damages it has occasioned him, if any.

"The court instructs the jury that the plaintiff, Thomas Neely, at the time of the commencement of this suit, and from November 1, 1899, was entitled to the use of the old pond (so called) and his race in the same manner as before November 1, 1899, and was entitled thereto free from any material amount of refuse and pollution therein, except the amount that would naturally come therein; and if the defendant, its agents or servants, during said time, in the conduct of business, so used the waters of Paint creek as to deposit therein at or near its sugar plant, and the flow of said creek carried into the old pond and race of the plaintiff, such quantities of beets, tops of beets, beet roots, lime mud, sand, and dirt, and other refuse, as to materially and unreasonably lessen and diminish the quantity of water therein, and thereby injure, lessen, diminish, and damage the capacity, power, and operation of plaintiff's flour and feed mill, then such acts of depositing into and such user of said stream by the defendant was and would be an unreasonable use and user thereof, and would render it liable in this action to the plaintiff for the damages it has occasioned him, if any.

"I charge you further, that, in estimating the damage of the plaintiff, the jury are not to consider the question of whether the defendant company are making money or not, or the result upon the company—whether they will remove their plant, or not, if a judgment is rendered against them. I have already indicated to you, in accordance with the statement of counsel, that that question has no place whatever in the case.

"On the part of the defendant I give you a portion of the requests. The first eight requests, relating to the various technical questions, to my mind do not affect the real merits of this controversy, and so they are for that reason refused.

"I give you the requests as follows, beginning with the ninth: That the defendant, as a riparian proprietor upon Paint creek, has an equal right with all other riparian proprietors on said stream in the use of the waters thereof, and such right of the defendant may operate to qualify the rights of all such other riparian proprietors on said stream. And by 'riparian proprietors,' gentlemen, is meant other owners of property along the stream which require the use of the waters thereof. A fair participation in and a reasonable use by each riparian proprietor on the said Paint creek of the waters thereof is what the law seeks to protect, and an injury that is incidental to a

reasonable enjoyment by one of such riparian proprietors of the right common to all cannot be complained of, or made the foundation of recovery.

"The question of what is a reasonable use of Paint creek by the defendant is one which is to be determined by the jury; and, as between the plaintiff and the defendant, the jury, in determining that question, are to consider the character of the stream, the necessities and character of the defendant's business and situation, and also the necessity, character, and situation of the plaintiff's business, and must endeavor so to decide the case as to protect the rights of both parties.

"It is for the jury to determine whether the drainage of the defendant's sugar factory and the defendant's lime pond into Paint creek, in the manner in which the evidence shows that it was done, was a reasonable use of the said creek by the defendant; and in determining that question the jury are to consider the circumstances of the case, including the size and character of the stream, the nature and importance of such drainage to the defendant, together with the inconvenience and injury to which the plaintiff was thereby subjected. In determining the reasonable use made of Paint creek, the jury must take into consideration the fact that the plaintiff did not require in his business the use of pure or clear water, but used the water only for the purpose of a motive power.

"In one of the plaintiff's requests, counsel used the word 'pollute,' but I do not understand that by the use of that word plaintiff's counsel meant to maintain that the mere roiling up of the water, if no sediment were deposited, would be any injury to the plaintiff. Any discoloration of the water, where it is used solely for motive power, would be of no importance to the case at all.

"That any use which the defendant may make of Paint creek is to be regarded as reasonable if such use imposes upon the plaintiff only a burden against which the plaintiff can protect himself by a reasonable effort, and at a reasonable expense, and by the exercise of reasonable care. That, in the use of a water power such as the evidence shows was possessed and operated by the plaintiff, prudence required that he should protect his water wheels and gates immediately connected with the water wheels, by a suitable rack, against substances floating in the creek. The evidence shows that a rack is not suitable if the openings between the slats exceed one inch.

I give you that as a good law, gentlemen, unless— Yes; I give it to you as good law, as applicable to this case, or in similar cases, unless the circumstances were such that a rack of that width slats—openings in the slats—would retard unreasonably the flow of water.

"The evidence shows that the Detroit Sugar Company during a campaign at its factory takes from Paint creek about three million gallons of water per day. That is such a quantity of water that it must be all substantially returned to Paint creek above the plaintiff's dam. It is therefore impracticable for the defendant to discharge the water which must be delivered from the defendant's factory through a sewer below the plaintiff's dam.

"I give you that request, gentlemen, provided you find that, in order to carry refuse below the plaintiff's dam, it would be necessary to use any material share of this large volume of water. That request is presented here, gentlemen, because of the evidence introduced on the part of the plaintiff tending to show that it was practicable to construct a sewer from the company's plant to a point lower down in Paint creek than the plaintiff's property. If any appreciable, material amount of water were diverted from Paint creek at the sugar company's plant, and not returned thereto, then, if it did in fact diminish the plaintiff's water power, or lessen it, he would have a right of action for that reason. And this request is meant to enlighten you on that particular subject—whether it is practicable to construct a sewer as was claimed.

"Now, gentlemen, that constitutes all the requests I care to give you, except those relating to the question of damages. And this part of my charge you will consider carefully before you consider the question of damages at all, in order to determine whether or not, under the charge of the court, and the evidence as presented, there is any liability at all on the part of the defendant to the plaintiff.

"If you shall conclude that the plaintiff has established a liability of the defendant, by a fair preponderance of evidence, to pay damages, then you will consider the question of damages, and on that subject I give you the requests of the plaintiff as follows: That, if the jury determine that damages should be assessed in favor of the plaintiff, the damage will be as follows, to wit:

"The reasonable cost and expenses on July 16, 1902, at the time this suit was commenced, of cleaning out and removing the lime deposit and other refuse, if any,

that came from the sugar company's plant into the old pond and the mill race of the plaintiff in this suit; also such sum or sums of money as you shall find, from the evidence in this case, the fair rental value of the mill property of the plaintiff from November 1, 1899, to July 16, 1902, was diminished or lessened by the wrongful acts of the defendant company.

"The plaintiff is under no obligation to provide a dumping ground for the refuse now in this pond and race without any compensation therefor, and if the jury believe that the only practicable, available dumping ground for such refuse is on the land of the plaintiff, then, if the jury find that the placing of such refuse on plaintiff's land is any injury or damage thereto, such damages ought to be allowed him as will compensate him for such injury.

"In arriving at the amount of damages in this case, the jury ought not to consider the question whether the defendant would be more likely to pay a judgment if rendered for a smaller amount than for a larger amount, rather than appeal the case to the Supreme Court, as the question of appeal ought not to be considered by the jury in making up their verdict of damages. And it ought not to be considered at any stage of the case.

"On the part of the defendant, as having a bearing on the same question—upon the question of damages—I give you requests as follows:

"The plaintiff cannot recover for any damages sustained by him by reason of beets or other substances which escaped into Paint creek from the defendant's premises, and which passed into the flume between the penstock and the water wheels of the plaintiff, and into said water wheels, before he had placed in the raceway a suitable rack, if such rack would have prevented the passage of such beets and substances into said flume and said water wheels.

"Now, I was asked orally by counsel for plaintiff to modify that or add to it by saying that he could recover nothing for the obstruction to his wheel by beets for a reasonable time, and I am willing to add those words, gentlemen; but I feel obliged to say to you, in that connection, that it does seem to me that a man who was skilled in the operation of the mill, and was familiar with the flowage of water that constitutes mill power, would have known very quickly after he discovered that beets were in his wheel that a rack was essential in order to keep them away, so that if one day if he knew beets were

going in there, to my mind, would give him notice—any brief time. Perhaps one day might be a little too short a time, but, if he knew that they were passing in and obstructing it, it would, to my mind, oblige him to erect a suitable rack to stop their passage into the wheel. Now, that request has no bearing whatever upon the question of whether the beets were brought down there which obstructed the flow of water at the rack itself. That refers only to the passage of beets into the wheel from the fact that no rack was there.

"I charge you further on the question of damages, for the defendant, as follows: That the plaintiff cannot recover any damages sustained by him resulting, directly or indirectly, from beets or other substances which escaped into the waters of Paint creek from the premises of defendant, and which passed into the water wheels of the plaintiff, or the gates immediately connected therewith, and which would not have passed into such water wheels and gates if the plaintiff's race had been provided with a suitable rack. That is practically a repetition of the other request. The plaintiff cannot recover damages for the deposit of any material outside of his raceway and pond as they existed prior to the commencement of this suit, viz., July 16, 1902.

"The evidence shows that the freshet of July 3, 1902, carried away all of the sediment from the channel— Notice the language, gentlemen: From the channel of Paint creek above his pond as it existed immediately prior to July 3, 1902. Therefore the plaintiff cannot recover any damages based upon the cost of removing such deposit. Now, that request as originally drawn, gentlemen, read that he could not recover anything because the evidence shows that all the deposit was carried away from the pond as well; but I modified it, gentlemen, so as to make it read 'channel,' instead of 'pond,' to that portion of Paint creek above the dam, because there is a dispute in the evidence on that between the witnesses as to whether the freshet did carry away the sediment from the pond itself. One witness, or perhaps more, on the part of the defendant, claimed that the freshet carried out all the sediment above the dam, which would include not only the channel of the stream itself, but the pond or reservoir, while Mr. Neely himself, and perhaps others on his side (I have forgotten whether there was any more or not), said that it did not remove any sediment, except from the channel

itself, leaving the sides and main body of the pond with the sediment remaining; and the modification of that request, gentlemen, is made because of the dispute in the evidence. If you should find from the evidence that the freshet did actually remove all the sediment at that time, not only from the channel of the creek, but also from the pond, so that it was all removed above the dam of the plaintiff, then the request would be good law, because it would be an absurdity to allow him for wheeling out per cubic yards that sediment and refuse, if in truth and in fact it was all washed out on July 3, 1902, and carried out of the pond by the freshet.

"This case has taken a long time to try, and it is regarded as important by the parties to this case. I have already said to you, and I repeat it to you in conclusion, that you ought not to consider the question of whether Mr. Neely is a poor man and needy; that you ought not to render him a verdict because you think he is needy, or, if you do, it ought not to be a dollar larger on that account. His claim includes, by assignment, something more than his own contract interest. It includes the injury, if any, to the owners of the property, namely, Wilson Bros. So that, while Mr. Neely is nominally the plaintiff, yet in truth and in fact the Wilsons and Mr. Neely are joint plaintiffs, so far as the jury are to consider the case.

"On the other hand, you ought not to render a verdict against the defendant simply because you think it is a large corporation, with a large plant, and that because you might think on that account it is well able to pay; and, while I give you that, I just as cheerfully say to you that the statement of Mr. Holman's as to whether or not the company had made money has no business in this case. Even if it had, and the evidence disclosed that they were not making money, still that ought not to influence your verdict at all, any more than it ought to influence your verdict that Mr. Neely is a poor man.

"I have said to you that you ought not to render a verdict for Mr. Neely, and, if you do, for any large amount, because he is poor; and the same argument and reason would apply to the company if Mr. Holman's statement should happen to be true—of its losing money. It would not render the defendant any less liable to Mr. Neely, nor any less under obligation on their part to recompense him for the injury, if he did receive an injury, because the company are not making money or are poor.

"In other words, gentlemen, you ought to discard from the case all those statements of counsel that might, perhaps, result in influencing you, or possibly might have been designed to influence you, in the case, and consider only the evidence in the case, and the law as given to you by the court, and render such a verdict, if you can, as shall represent your best collective judgment, and as shall hereafter satisfy your individual consciences as jurors, no matter what the verdict may be. If you find a verdict for the plaintiff, you will simply announce that you find for the plaintiff, and name the damages in a gross sum. If the verdict is for the defendant, you will simply announce, through your foreman, no cause of action or not guilty."

Counsel discusses the assignments of error under six heads:

1. Measure of damages.
2. The relative rights of the plaintiff and defendant as riparian proprietors.
3. The admission of oral proof of the sale of lands.
4. The right to recover for damages to the fee.
5. The identity of the lands.
6. The right of the jury to consider remarks of counsel.

We will consider them in the inverse order:

(6) This is based on the following portion of the charge:

"In other words, gentlemen, you ought to discard from the case all those statements of counsel that might, perhaps, result in influencing you, or possibly might have been designed to influence you, in the case."

Counsel says:

"We submit that that was error. Counsel for the parties have the right by fair argument to influence the minds of the jury, and the jury should consider such arguments. Such arguments consist in part of statements of fact, and in part of inferences drawn from them. If a statement of fact is made by counsel which is warranted by the evidence, or if a statement is made by counsel which is a fair inference from the matter in evidence, the jury should consider it. They are not bound by it, but they should consider it. The untruthful or unwarranted statements of counsel are, of course, to be disregarded by the jury. But this does not mean that all statements of counsel are to be disregarded by the jury."

If what counsel has quoted from the charge is read in connection with what precedes and follows it, we think it was entirely unobjectionable.

(5) It is claimed the proofs do not show injury was done to the lands described in the declaration. An examination of the record discloses there was testimony bearing upon that subject.

(4) It is urged that, under the record as made, plaintiff was not entitled to damages to the fee of the land. The record discloses that plaintiff was in possession under a land contract from the Wilsons, who, the testimony tends to show, more than 30 years ago obtained deeds to the property, and who, with plaintiff, had been in continuous possession. It also shows that the Wilsons had assigned to the plaintiff any cause of action they had before the suit was brought. We do not think this assignment of error was well taken.

(3) The defendant produced Samuel Barnes as a witness, and, in answer to a question put by its counsel, stated he at one time owned the mill property. On the cross-examination he stated he sold to the Wilsons. We do not think this assignment of error is well taken.

(2) The relative rights of the plaintiff and defendant as riparian proprietors:

Counsel says:

"We submit that there are many inconveniences and damages which the upper riparian proprietor may inflict on the lower riparian proprietor for which the lower riparian proprietor cannot recover. He can recover only for the damages resulting from the 'unreasonable' use of the stream by the upper proprietor."

He complains of the following in the charge:

"If the jury find from the evidence in this case that the defendant, the Detroit Sugar Company, its agents or servants, during the campaigns (so called) of said company from November 1, 1899, to July 16, 1902, have deposited into Paint creek, and from thence into the pond, race, flume, and water wheel of the water power and mill of the

plaintiff, such quantities of beets, tops of beets, beet roots, lime mud, lime, sand, and dirt, and other refuse from its sugar plant, as to materially and unreasonably lessen, diminish, injure, and damage such pond, race, and mill property, then such user and such acts of the defendant with the said waters of Paint creek would be an unreasonable use thereof, and would render it liable in this action to the plaintiff for the damages it has occasioned him, if any,"—

And says:

"The evil of that request lies in the last two lines above quoted, viz., 'and would render it liable in this action to the plaintiff for the damages it has occasioned him, if any.' Not 'for the damages it has occasioned him, resulting from unreasonable acts.' No; the clause is not so limited. The language is 'the damage it has occasioned him.' That is equivalent to saying 'all the damage it has occasioned him,' whether resulting from 'unreasonable' acts or any other acts, 'reasonable or otherwise.' "

We think counsel drew a conclusion from this portion of the charge which the jury would not, especially when taken in connection with the rest of the charge.

(1) Measure of damage: Counsel says:

"We submit that the true measure of plaintiff's damages was the depreciation in rental value for such time only as elapsed after the deposit began, down to the time when, by the exercise of due diligence, the plaintiff could have removed the same, and that such loss in rental value can be recovered only for the time during which the deposits in the race and pond of the plaintiff, brought about by the acts of the defendant, actually affected or impaired the usefulness of the plaintiff's mill and property."

Counsel for the plaintiff say:

"We respectfully submit that if there is anything in the point that it was the duty of the plaintiff to have cleared out this deposit in the pond and race soon after the end of each campaign of the company—a proposition which we do not believe the law warrants or contemplates —then it was the duty of the defendant to have raised the question in the court below, which was not done either at the time the evidence was introduced, or in any of the requests presented by the defendant."

Counsel for defendant says:

"The question was raised on the trial in various ways, and was the subject-matter of several assignments of error."

The most marked instance of where counsel says the question was raised is as follows:

"*Q.* Now, Doctor, are you acquainted with the fair rental value of this mill and mill property before the month of July, 1902? *A.* What is the question?

"*Q.* I asked you whether or not you were acquainted with the fair rental value of this mill July, 1902? *A.* Yes, I was acquainted with its value and rental purposes.

"*Q.* And what would you say for three years previous to July, 1902, would be a fair rental value of this property?

"*Counsel for defendant:* We object to that.

"*The Court:* Same objection to the other witness, I suppose.

"*Counsel for defendant:* Same objection as to the other testimony. The question should be confined to the rental value during the time that the mill has been shown to have been idle here, and we object to this as incompetent and immaterial.

"*The Court:* Same ruling. (To which said ruling counsel for defendant did then and there except.)

"*Q.* (Question repeated.) *A.* Without any obstructions to the race?

"*Counsel for defendant:* Same objection.

"*A.* That is, when it is clear?

"*Q.* Yes.

"*Counsel for defendant:* Same objection.

"*The Court:* Take it.

"*A.* It ought to be five or six hundred dollars.

It will be observed this objection did not suggest to the court or to counsel that it was claimed the plaintiff, as soon as practicable, must remove the deposit, and, as he had not done so, he could not recover.

Our attention has not been called to a case where the courts have said that where, at yearly intervals, large deposits are unlawfully made in a mill pond and race, each spring thereafter the mill owner must proceed to remove

them, and, if he did not, could not recover damages. The question might be pertinent, Where would he put the deposits? He could not carry them back from whence they came. Must he take them out of the pond and race and put them upon arable land? Suppose the pond, race, and buildings substantially cover the mill property; What then will he do with them? As the record is made, however, we do not deem it necessary to determine these questions. The court met the issue fairly as it was presented to him. He gave the substance of nearly all of the requests of the defendant bearing upon the question of damages. His charge was a fair, full, and impartial statement of the law as applicable to the case as presented. See the following cases: *Dumont* v. *Kellogg*, 29 Mich. 420; *Thunder Bay River Booming Co.* v. *Speechly*, 31 Mich. 336; *Buchanan* v. *Log Running Co.*, 48 Mich. 367; *Woodin* v. *Wentworth*, 57 Mich. 278; *Wooden* v. *Manufacturing Co.*, 106 Mich. 412; *Stock* v. *Township of Jefferson*, 114 Mich. 357; *People* v. *Hulbert*, 131 Mich. 156, and the many cases cited therein.

Judgment is affirmed.

The other Justices concurred.

PLATZ *v.* ENGLEHARDT.

1. TAXATION—TAX SALES—PREMATURE DECREE.
   A decree for the sale of land for taxes, rendered before the expiration of the five days' notice provided by the statute (1 Comp. Laws, § 3889), is premature, and therefore void.

2. SAME—ABANDONED LANDS—TITLE OF STATE.
   The State gets no title to lands deeded by the auditor general to the State as abandoned lands, under section 127 of the general tax law of 1893 (Act No. 206) and Act No. 154 of the Public Acts of 1895, as limited by 1 Comp. Laws, § 3949, where the tax sales on which the proceeding is based are void.

3. EJECTMENT—CLAIM FOR IMPROVEMENTS—ELECTION BY OWNER—APPLICATION TO TAX HOMESTEAD LANDS.

A defendant in ejectment, holding under a State homestead certificate, who makes a claim for his improvements and has their value determined, cannot, after plaintiff elects to take the value of the land, first claim on appeal that the statute (3 Comp. Laws, §§ 10995-10997) allowing plaintiffs in ejectment to so elect does not apply to controversies arising over State tax lands. Act No. 206, Pub. Acts 1893.

Error to Presque Isle; Emerick, J. Submitted November 17, 1904. (Docket No. 196.) Decided December 14, 1904.

Ejectment by Henry Platz against Arthur Englehardt and Jessie Englehardt. There was judgment for plaintiff on a verdict directed by the court, and defendants bring error. Affirmed.

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

Henry K. Gustin and *Dayton W. Closser*, for appellee.

HOOKER, J. The plaintiff brought ejectment to recover the possession of certain premises, which he claims to own in fee simple through one or more quitclaim deeds from the grantees of the owner of the original title under a United States patent. The defendants who were in possession at the time that the action was begun occupied under a certificate issued by the commissioner of the State land office to him as a homesteader, under the provisions of the State tax homestead law. They filed a plea of the general issue, and gave notice of a claim for improvements, whereupon counsel for the plaintiff made a request for a verdict or finding as to what the value of the premises would have been had no improvements been made under the statute permitting it in certain cases. A verdict was directed for the plaintiff, and the jury found the

increased value by reason of defendants' improvements to be $250, and the value of the land, had no improvements been made, to be $300, whereupon the plaintiff recorded his election to abandon the premises to the defendants at the value fixed by the verdict, and judgment was entered for him accordingly for $300 and costs, which judgment was declared to be a lien upon the premises. The defendants have appealed.

The record shows that to establish his case plaintiff introduced: (1) A Federal patent to Peter Livingston, dated July 27, 1885. (2) A quitclaim deed from Peter Livingston to Augusta Larke, dated December 23, 1889. (3) A quitclaim deed from Augusta Larke to the plaintiff, dated June 17, 1902. (4) Oral testimony of the plaintiff that he owned the land; that it was, in his opinion, worth $200; that he knew that defendants Englehardt were living upon the land, and had done so since May 16, 1902; that he had several times conversed with Englehardt, and knew that he held it as a homestead; and also that when he bought the land from Augusta Larke he knew that Englehardt then held it under a homestead certificate. This was all of the plaintiff's proof in making his case.

The defendants then introduced a deed issued by the auditor general, dated September 19, 1896, under the provisions of section 127 of Act No. 206, Pub. Acts 1893, and Act No. 154, Pub. Acts 1895, conveying the premises to the State. Also a tax homestead certificate issued by the commissioner of the State land office to the defendant, authorizing him to enter upon and improve said land, and agreeing to deed the same to him if he should live upon and improve the same as required by law for the period of five years. Also petitions filed by the plaintiff in the original proceedings of the auditor general affecting the lands to set aside the sales and decrees under which the lands were held by the State, and the proceedings taken by the auditor general in deeding them to the State. These petitions were filed February 10, 1903, and attacked the decrees and sales, for the years from 1884 to 1893 in-

clusive. Also the sworn answer of the auditor general and land commissioner, and a record of the proceedings whereby it appeared that "in the above-entitled cause, by consent of parties made in open court, all of said causes are discontinued, without costs." This was a voluntary discontinuance by the plaintiff before hearing of his petitions, and was consented to by the defendant. Evidence was also given of the nature and value of defendants' improvements.

On rebuttal it was admitted that the decrees and sales were void as to all taxes except those for 1892 and 1893. As to these it was shown that the court convened October 8, 1894, and adjourned sine die October 12, 1894. The date set for hearing the auditor general's petition was October 8th, and the decree was made and filed October 12th. The date of hearing in 1895 was October 15th, and the decree was entered October 18th, on which day the court adjourned sine die.

Counsel for the defendants asked the court to charge:

1. That the plaintiff had not made a prima facie case, in that he had offered no testimony tending to show that the lands had not been abandoned by the owner.
2. That the lands had been abandoned by the owner; and that, having been so abandoned, and so found by the examiner, and deeded to the State as such, plaintiff could not now claim any title to them.

The questions before us are:

1. Can title to land pass to the State through abandonment by the owner?
2. Upon whom is the burden of proof as to such abandonment?
3. Has the statute permitting a plaintiff to elect to take a judgment for the value of land to which he may be entitled application to tax homestead lands?

The statute in question is found first in the general tax law of 1893 (section 127, Act No. 206, Pub. Acts 1893), under the head of "Inspection and Disposition of State Tax Lands." 1 Comp. Laws, § 3949, limits the applica-

tion of its provision to lands which (1) have been bid off to the State for a consecutive period of three years, without application made to redeem or purchase the same; (2) have been the subject of a request from the board of the township where situate to be deeded to the State by the auditor general; (3) ascertained by examination and reported to be either barren, swamp, or worthless, and abandoned by the owner. The same section contains the following provision:

"Failure to pay the taxes or to redeem or purchase any lands sold for taxes and bid to the State for more than three consecutive years, as aforesaid, shall be in all cases where such lands are not actually occupied, prima facie evidence that such lands are abandoned by the owner."

All of these things appear in this case. The lands have been bid off for the requisite period, and at the time of the conveyance no application to redeem or purchase had been made. The township board had made the requisite request, and the statutory examination had been made, and the report required had been duly filed showing the lands to be within the statute. This authorized the conveyance to the State as between the departments, and put the lands into the class provided for by the statute, but it did not operate to divest the owner's title. We must hold upon this record that all of the tax sales were void, and conveyed no title to the State,[1] and that, this being so, defendants' claim must stand upon the proposition that the State acquired title through the owner's abandonment of the premises.

We have no occasion to inquire whether it is within the power of the legislature to provide that lands abandoned by the owner shall escheat, or what shall be prima facie or conclusive evidence of abandonment, for we are not convinced that this statute was so intended. The design appears to have been to subject portions of the State's domain to the purpose contemplated, not lands which the

[1] See *Bending* v. *Auditor General*, 137 Mich. 500.—REPORTER.

State did not own; and there is nothing justifying an inference that it sought to adopt a new policy as to divestiture of the titles of private persons to that end. We infer from section 3949, 1 Comp. Laws, that it was not the policy of the legislature to subject all State tax lands to this disposition, and it carefully limited them to barren, swamp, or worthless lands. Again, it sought to exclude from the lists lands upon which there was reason to hope that taxes might be paid, or the lands purchased. Hence the inquiry as to abandonment and the provision as to prima facie evidence, which last cannot be received as sufficient evidence to support a State deed, and a title claimed under it, where the title of the State under the tax proceedings, upon which the whole fabric rests, is shown to be without substance. It follows that the court did not err in sustaining the plaintiff's title.

The defendants saw fit to make a claim for improvements, whereupon the plaintiff asked a determination of the value, both of which were found by the jury, and he thereupon elected to take the value, and for this sum the court entered judgment. Section 104 of the tax law (Pub. Acts 1893, Act No. 206) contains provisions allowing purchasers of tax lands to recover for improvements, and gives a lien on the land for them. This may reasonably be held to include homestead purchases. It may be contended that this section gives to defendants holding under tax sales the right to recover for improvements without being subjected to the obligation of taking the land and paying its value, if plaintiff so elect, under 3 Comp. Laws, §§ 10995, 10996, and 10997. In the present case the notice was filed under the latter sections (which apply to all actions of ejectment), as appears from the notice itself. Both parties so treated it, and we do not discover that any question was raised against the application of the general statute at any stage of the trial. Having seen fit to invoke it, the defendants cannot now attack the judgment under it. As to the impropriety of adjudging a lien against the State, it is sufficient to say that the only lien

that the judgment creates is a lien upon the interest of those who are bound by the judgment as parties or privies.

The judgment is affirmed.

The other Justices concurred.

BOARD OF SUPERVISORS OF ALCONA COUNTY v. AUDITOR GENERAL.

1. TAXATION—STATE TAX LANDS—TITLE OF STATE—DETERMINATION OF AUDITOR GENERAL.

   It is the existence of the state of facts enumerated by section 127 of the general tax law as amended by Act No. 107, Pub. Acts 1899, which vests title to such lands in the State, and not the determination thereof by the auditor general.

2. SAME—APPOINTMENT OF EXAMINER.

   That the auditor general did not previously make a formal determination regarding the list of lands submitted to the examiner appointed under section 127 of the generel tax law before his appointment is immaterial, he having been furnished with a list showing that the auditor general selected the lands to be considered.

3. SAME—RECORD OF DETERMINATION.

   Keeping the record of the determination of the auditor general and land commissioner as to what lands examined under section 127 of the general tax law come within the provisions of that section on the folios or sheets used by the examiner is a sufficient compliance with the direction of the statute that such determination be recorded in a book.

4. SAME—SUFFICIENCY OF DETERMINATION.

   A clerical error, by which the determination of the auditor general and land commissioner, made under section 127 of the general tax law, fails to show certain facts required by the statute, and which are admittedly matter of record, may be disregarded.

5. SAME—EXAMINATION—BAD FAITH OF EXAMINER.

   The finding of the auditor general and land commissioner, based

on the report of the examiner under section 127 of the general tax law, forecloses inquiry into whether the examiner faithfully performed his duties as to all of the land.

6. SAME—INTERVENTION BY COUNTY.

Whether a county has any interest in the nature of a vested right as against the State to compel State officers to conform to the strict letter of the statute in their disposition of State tax lands within the limits of the county, quære?

7. SAME—MANDAMUS.

Where all the conditions necessary to action by the auditor general and land commissioner, under section 127 of the general tax law, are present, save, perhaps, the one relating to the pendency of suits, and the answer of the officers to the petition for mandamus signifies an intention not to include lands as to which there are pending suits, if there be any, mandamus will not issue to restrain their action under the statute.

Mandamus by the board of supervisors of Alcona county to restrain Perry F. Powers, auditor general, and Edwin A. Wildey, commissioner of State land office, from placing certain land on the homestead list. Submitted November 17, 1904. (Docket No. 197.) Writ denied December 14, 1904.

John H. Killmaster (*H. K. Gustin* and *De Vere Hall*, of counsel), for relator.

Charles A. Blair, Attorney General (*Charles W. McGill* and *E. Stenberg*, of counsel), for respondents.

HOOKER, J. The board of supervisors of Alcona county filed the petition in this case, asking a mandamus to restrain the auditor general and commissioner of the State land office from conveying 60,000 acres of land in that county under the provisions of the State tax homestead law, and to treat it as subject to purchase under the general rule applicable to such lands. A deed to the State of a portion of these lands had been made by the auditor general, and the petition alleges an intention to convey the remainder.

This action was taken under the following provisions of

the general tax law as amended by Act No. 107, Pub. Acts 1899:

"SEC. 127. Lands delinquent for taxes for any five years, where said lands have been sold and bid off to the State, for the taxes of one or more of the said years, and then so held, and no application having been made to pay, purchase, or redeem the said lands for said taxes, and no action pending to set aside such taxes or to remove the cloud occasioned thereby, shall, within the meaning of this act, be deemed abandoned lands, unless such lands are actually occupied by the person having the record title thereto. Any lands delinquent for taxes for a period of five or more years, and said lands having been sold and bid in by the State and held by the State for the taxes of any of said years, and no application having been made to pay, redeem, or purchase the same, and no suit pending to set aside said taxes or remove the cloud from the title occasioned thereby, shall be subject to the provisions of this section. Whenever it shall appear by the records in the auditor general's office that any lands are delinquent for taxes for five years or more and that said lands have been bid off to the State one or more times by reason of such delinquent taxes, and that the time of redemption of such sale or sales has expired, and that no application has been made to pay, to redeem or purchase the same, and it shall appear that no action is pending in the circuit court of the county where said lands are situated to set aside the taxes or remove the cloud on the title occasioned thereby, the title to the State shall be deemed absolute in and to said lands; and it shall be the duty of the auditor general and the commissioner of the State land office to cause an examination of such lands to be made as soon as practicable, to ascertain their value and if abandoned. Upon the examiner filing a certificate as to said examination and the occupancy of said premises, and the certificate of the county clerk of the county where said lands are situated, in the office of the auditor general, showing that no suit is pending in said county to set aside any of said taxes or remove the cloud occasioned thereby, the auditor general and the commissioner of the State land office shall determine what lands so examined come within the provisions of this section, and record their determination in a book to be kept in the office of the auditor general for that purpose. The finding and determination of the auditor

general and the commissioner of the State land office shall show:

"*First.* A description of said lands.

"*Second.* The years for which they have been returned delinquent for taxes.

"*Third.* The time or times bid off to the State, and the taxes for which said bid was made.

"*Fourth.* Whether said lands are occupied or abandoned.

"*Fifth.* Whether or not any suit is pending in the county where said lands are situated to set aside the taxes, or any of them, or to remove the cloud occasioned thereby.

"The determination of the auditor general and commissioner of the State land office in that regard shall be deemed to be conclusive as to the facts therein stated, unless suit is instituted to vacate the same within six months, as hereinafter provided. Within ninety days after such determination the auditor general shall make a transfer by deed of all lands so determined by the auditor general and said commissioner of the State land office to come within the provisions of this section to the State of Michigan as to an individual, as provided in section seventy-two of this act so far as said section is applicable. Said deed or deeds shall be delivered to the commissioner of the State land office, who, after having said deed or deeds recorded in the register of deeds' office, of the county where the lands are situated, shall file the same in his office. Upon the execution and delivery of said deed or deeds to the commissioner of the State land office, said commissioner shall hold said lands as State lands, subject to the provisions hereinafter contained. And no suit shall be instituted to vacate, set aside, or annul the said determination of the said auditor general and the commissioner of the State land office made as aforesaid unless instituted within six months after the determination aforesaid. Any person desiring to file a bill or institute a suit to vacate the findings of the auditor general and commissioner of the State land office, as provided in this section, shall first pay to the auditor general all delinquent taxes returned to the auditor general on the lands in question, together with all interests, costs, and charges, and shall purchase and pay for all bids and titles held by the State to such lands by paying therefor the annual bid by the State and all interest and legal charges thereon, as provided in section eighty-four of this act. The money so received by the

auditor general shall be paid into the general fund of the State, and in case the determination of the auditor general and commissioner of the State land office should be set aside and held for naught, and the taxes, or any portion thereof, shall be adjudged invalid for any of the reasons set forth in section seventy-six of this act, then in such case the auditor general shall return to the person entitled thereto such taxes, or any portion thereof, as shall be so adjudged invalid for the reasons aforesaid, and in case the title is held valid the money so received shall be divided between the State, county, and township pro rata according to the taxes paid, the same as in other cases. Any suit instituted for the purpose of setting aside the determination aforesaid may be commenced in the circuit court of the county of Ingham. It is hereby made the duty of the county clerks of the several counties of this State, on inquiries by the auditor general, to furnish to said auditor general a certificate showing whether or not any such suit is pending in the circuit court of the counties, as above referred to, relating to any lands described and referred to in the inquiry of the auditor general."

"SEC. 130. All taxes charged against such lands in the office of the auditor general at the time they are deeded to the State shall be canceled, but no part of such taxes due to the township or county shall be charged to the State, but the State, county, and township respectively shall bear the share of loss on such taxes that properly belongs to each."

Section 131 provides that all such lands shall be held by the commissioner, subject to entry as homestead lands, unless withheld and reserved for sale in a manner pointed out therein.

Acting under the provisions mentioned, the auditor general and commissioner selected one Chapin to examine the lands in question, which he did, availing himself of the services and knowledge of one Mr. Chappel, who was county surveyor of Alcona county at the time. They furnished Chapin with a list of the lands, and with blanks with ruled spaces for tabulating the descriptions and notes of the facts required to appear in the examiner's reports; and on August 13, 1902, Chapin made the report following, which was in writing, and appears on one or more of the sheets or folios mentioned. It is as follows:

"LANSING, MICH., Aug. 13, 1902.

"I hereby certify that I have examined the lands described in the within statement and that the facts stated therein as to the occupancy or abandonment of said lands and as to their value and all other facts stated therein as to the character of said lands and the improvements or timber thereon are true of my own knowledge. I further certify that the within statement as to the title to said lands is made from the best information I could procure from the occupants (where said lands were occupied) or from inquiries in the vicinity.

"C. T. CHAPIN,
"Examiner."

Thereupon these folios were sent to the county clerk of Alcona county, who appended his certificate as follows, viz.:

"HARRISVILLE, MICH., Sept. 17, 1902.

"I, George Rutson, county clerk of the county of Alcona, hereby certify that I have examined the record and files in my office and find that no action is pending to set aside any taxes against any of the land described herein or to remove the cloud occasioned by any of said taxes or by any sale therefor.

"In testimony whereof, I have hereunto affixed my signature and the seal of the circuit court for said county.

"GEORGE RUTSON,
"County Clerk of Alcona County."

The auditor general indorsed a certificate of which the following is a copy:

"STATE OF MICHIGAN.
"AUDITOR GENERAL'S DEPARTMENT.
"LANSING, Sept. 23, 1902.

"I hereby certify that the lands herein described are delinquent for taxes for five or more years, as appears by the within statement, and that said lands have been sold and bid off to the State for the taxes of one or more of the said years, as appears by said statement, and are now so held, and that no application has been made to pay said taxes or to purchase or redeem said lands from sale for said taxes. I further certify that the time of redemption

from the sale or sales shown in the within statement has expired as to all such sales except such sales as were made for the taxes of ——— in the year 19—.

"PERRY F. POWERS,
"Auditor General."

On September 23, 1902, the auditor general and land commissioner appended the following determination, viz.:

"STATE OF MICHIGAN.
"LANSING, Sept. 23, 1902.

"We hereby certify that we have caused an examination to be made of the within described lands by C. T. Chapin, to ascertain their value and if abandoned, and that said examiner has filed in the office of the auditor general a certificate as to said examination and the occupancy of said premises, and the certificate of the county clerk of the county where said lands were situated, showing that no suit is pending in said county to set aside any of said taxes or remove the cloud occasioned thereby.

"We further certify that having examined and duly considered the report of said examiner, the certificate of said county clerk, and the records of the auditor general's department, we have determined that said lands herein described come within the provisions of section 127 of Act 206 of the Public Acts of 1893, as amended by Act 107 of the Public Acts of 1899.

"We hereby find and determine that the descriptions of land included in this determination (being the descriptions entered on the preceding pages of this sheet) the years for which said lands have been returned delinquent for taxes, the time or times that said lands were bid off to the State and the taxes for which said bid or bids was or were made, the facts as to whether said lands are occupied or abandoned and whether or not any suit is pending in the county where said lands are situated to set aside the taxes or any of them or to remove the cloud occasioned thereby, are as appear in the statement to which this certificate is affixed.

"PERRY F. POWERS,
"Auditor General.
"EDWIN A. WILDEY,
"Commissioner of State Land Office."

And later the following formal order of withdrawal of the land was made:

"LANSING, MICHIGAN, January 19, 1903.

"By virtue of the authority conferred upon us by Act No. 141 of the Public Acts of Michigan for the year 1901, we do hereby withdraw from homestead entry the foregoing list of lands recently deeded to the State of Michigan by the auditor general under the provisions of Act No. 206 of the Public Acts of Michigan for the year 1893, and acts amendatory thereto.

"PERRY F. POWERS,
"Auditor General.
"EDWIN A. WILDEY,
"Commissioner of the State Land Office."

The relator's petition was verified on March 4, 1903, and subsequently filed in this court. An issue was framed upon certain questions of fact, reserving the question of materiality. The issue was sent to the circuit court for the county of Ingham, and is returned to us with a stipulation as to some of the questions and findings by the circuit judge upon others.

The relator has discussed the case under the following four heads:

"1. The determination of the auditor general made on the 23d day of September, 1902, being Exhibit E of the petition, does not show that no actions were pending in the circuit court to set aside the taxes, or remove the cloud on the title occasioned thereby. Does not show that the lands are delinquent for five or more years, or that they had been bid off to the State one or more times by reason of such delinquent taxes.

"2. The determination of the auditor general and commissioner of land office, made on the 23d day of September, 1903, being Exhibit F of the petition, does not show the years for which the lands were returned delinquent for taxes, or the time or times bid off to the State, or the taxes for which such bid or bids were made.

"3. The determination of the auditor general and commissioner of land office, last above, was not reported in a book kept in the office of the former for that purpose, within the contemplation of said section 127.

"4. The examination made by Examiner Chapin was before any action was taken looking to the transfer of said lands from the State tax to the homestead tax list, and his

certificate, made on the 13th day of August, 1902 (being Exhibit D of the petition), refers to conditions of a time other than required by said section 127."

Relator's counsel take the position that the first, and a jurisdictional act, is a determination by the auditor general, of the list of lands to be submitted to himself and the land commissioner, which determination, it is said, must be in writing, and show the following facts to be of record in the auditor general's office: (*a*) The descriptions; (*b*) delinquency for five years; (*c*) bid in by State and held for the taxes of one or more of said years; (*d*) that no application has been made to redeem or purchase them; (*e*) that no suit is pending, etc.

As appears from the foregoing quotation of said section 127, lands possessing the aforesaid requisites are made subject to the provisions of said section, which provides further that, whenever the first four of these appear from the records of the auditor general's office (the other requirement is that *if it shall appear* that no action is pending, etc.), the title of the State *to the land shall be deemed absolute.* The section is silent as to any determination in writing of these facts by the auditor general. Manifestly he must, in a sense, determine them when the list is made. Said determination is not essential to make the title absolute in the State. If the statute makes any change in the title, it is by operation of law. At one stage of the proceedings the auditor general did make a certificate of these facts, and we understand that there is no dispute over the existence of these records in the auditor general's office at the time these proceedings were begun, unless it be with relation to the pendency of suits, which, in our view of the case, could not conclusively appear there, as such proceedings are subject to discontinuance at any moment, even if reported to the auditor general. This disposes of the first question raised.

Our conclusion as to the first proposition practically determines the fourth, the point to which seems to be that the appointment of an examiner was not authorized, be-

cause of the omission of the auditor general to previously make a formal determination regarding the list submitted to the examiner. The examiner was appointed by the two officers, and by them furnished with a list of the lands, showing that the auditor general had selected the lands to be considered, which, in the nature of things, must have been so.

The third relates to the record of determination in a book. Whatever final determination of facts the law requires is recorded only in the folios. Of this it is sufficient to say that the finding of the circuit judge shows that upon the return of the sheets (folios) the auditor general and commissioner signed the certificates (of determination) on the outside sheet of the roll of lands, and such outside sheet was in all respects treated as the cover to said roll, and said certificate was intended to and did relate to all of the lands described therein. We think that, when this was filed in the office of the auditor general, it was a substantial compliance with the requirement.

The second point relates to the determination. It will be seen that the statute provides that such determination shall show certain facts under five heads. Of these, all but the second and third are clearly included. The second calls for a statement of the years for which the respective lands have been returned delinquent. The third calls for the time or times the land has been bid off to the State, and the taxes for which the bid was made. The record shows a proper certificate in form, and it would be a complete compliance had the folios contained these facts. The certificate of the auditor general does show that the lands were delinquent for more than five years, and that the lands had been bid off by the State for taxes of one or more of said years; that they were so held, and no application to purchase or redeem had been made. Apparently it was expected that the folio would contain the specific information which was admittedly matter of record. This was evidently a clerical omission, and one which could have had no effect upon the determination, and may prop-

erly be disregarded, even if we may not say that the entire requirement is directory, which we do not decide.

Counsel discuss another question; e. g., that the examiner did not faithfully perform his duties as to some of the land; (2) that suits were actually pending as to some parcels. A somewhat full consideration was given this statute in the case of *Semer* v. *Auditor General*, 133 Mich. 569, where it was held that the finding of facts by the commissioner was final, and the same rule should be applied here.

Again, it must be assumed that these lands belonged to the State, and no one seems to question it. The county intervenes upon the assumption that it has some interest in the nature of vested rights as against the State, temporary at least, under existing laws, and may therefore resort to legal proceedings to compel the State officers to conform to the strict requirements of the law in their disposition of its land. The county is no more than an agency of the State government, and it may be open to serious question whether it has any duty of supervision of State affairs, except as specially conferred; but, however that may be, the record in this case fails to show that it, as a county, has a strict legal right to the relief it asks, which justice requires should be vindicated.

It is clear that in all particulars save one, perhaps, the conditions exist which the statute makes necessary to the setting aside of these State lands for future private sale at such prices as the auditor general and commissioner fix, when it is deemed best to again place them upon the market. The only exception is the lands open to the question of pendency of suits. As to these, the answer signifies an intention not to include such lands, if there be any, and action is therefore unnecessary, if it be competent, so far as such lands are concerned. That being true, we think the writ should not issue, and it will be denied.

The other Justices concurred.

MILLER *v.* SADOWSKY.

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1. ASSAULT AND BATTERY—DAMAGES—INSTRUCTIONS.

In an action for an assault and battery, prosecuted by the administratrix of plaintiff, after his death, a statement by the court in his charge that plaintiff claimed that she was entitled to recover damages for the death of her husband was not erroneous, where there was nothing in that portion of the charge which informed the jury what damages should be recovered, and that question was covered by a subsequent portion of the charge.

2. SAME — COMPUTATION OF DAMAGES — PRESENT WORTH OF WAGES.

In an action for an assault and battery, an instruction that plaintiff is entitled to recover as damages whatever he might have lost in wages by the injury is erroneous, since the damages should be limited to the present worth of his wages.

3. SAME—ASSAULT COMMITTED IN RECLAIMING PROPERTY — FORCE JUSTIFIED.

In an action for an assault and battery in attempting to take from plaintiff a piece of board belonging to defendant that plaintiff was carrying away, an instruction that the jury should determine whether defendant used more than sufficient force for the purpose of reclaiming his property was sufficiently liberal to defendant; there being no merit in an invocation of the rule that one may use such force as seems to him necessary to repel an assault.

Error to Wayne; Frazer, J. Submitted November 18, 1904. (Docket No. 116.) Decided December 14, 1904.

Trespass vi et armis by Paul Miller against John Sadowsky. There was judgment for plaintiff, and defendant brings error. Reversed.

William Van Dyke, for appellant.

Adam E. Bloom, for appellee.

CARPENTER, J. Paul Miller commenced this suit in his lifetime to recover damages for injuries resulting from an assault and battery alleged to have been committed by defendant. The evidence indicates that, when Miller was passing by defendant's place of business, he picked up and started to carry away a piece of board belonging to defendant. It is claimed by plaintiff's witnesses and denied by defendant that defendant thereupon struck plaintiff and seriously injured him. After suit was commenced, plaintiff died, and his widow, as administratrix, was substituted as plaintiff, and prosecuted the suit in his stead.

In charging the jury, the court said:

"The plaintiff in this suit sues the defendant, claiming that she is entitled to recover damages for the death of her husband."

It is urged that this was error, because plaintiff is not suing for damages for the death of her husband, but is suing as administratrix to recover the damages which he could have recovered had he lived. This point is without merit. There is nothing in this portion of the charge which informs the jury what damages shall be recovered. That was covered by a subsequent portion of the charge, and the question of its correctness will receive our attention later.

On the question of damages the court charged:

"If this man was working for a living and getting wages, he would be entitled to receive from your hands whatever you thought he was able to earn during the time that a man of his age would probably live. * * * You take the pain and suffering that this man endured up to the time of his death, and whatever he may have lost in wages by injury, that you should find to be permanent, from the time he was injured up to the time he would probably have died in the ordinary natural course of events; taking into consideration the man's age, the probability of disease, and all that kind of thing."

This language authorizes the jury to give as damages all the wages that deceased might have earned during his

lifetime. This is not correct. As the wages are to be earned in the future, and the damages are payable at once, the jury should have been instructed to allow only *the present worth of the wages.* See *Balch* v. *Railroad Co.*, 67 Mich. 394. While we have no doubt that the trial judge would have cured this error, had his attention been called to it by counsel, the statute which permits the defeated party to assign error to the charge without exception compels us to reverse the judgment.

In charging the jury, the court said:

"The only question for you to determine is whether this man did or did not use more than sufficient force for the purpose of reclaiming his property."

In support of his claim that this language was erroneous, appellant's counsel invokes the rule that one may use such force as seems to him necessary to repel an assault. See *Pond* v. *People*, 8 Mich. 150; *Patten* v. *People*, 18 Mich. 314. That rule has no application, for the reason that defendant was not seeking to repel an assault. He was only seeking to reclaim his property. And in such a case the rule laid down by the learned trial judge was sufficiently liberal. See Pollock on Torts (Webb's Am. Ed.), pp. 203, 210; Cooley on Torts, p. 50.

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

The other Justices concurred.

GROVER *v.* BISHOP.

MORTGAGE FORECLOSURE — DEFICIENCY JUDGMENT — LIABILITY OF SUBSEQUENT GRANTEE — SUFFICIENCY OF EVIDENCE.

On a bill to foreclose a mortgage against the mortgagor and his subsequent grantee, evidence examined and *held* insufficient to show that the grantee assumed and agreed to pay the mortgage debt, so as to entitle the mortgagee to a decree for deficiency against the grantee.

Appeal from Oakland; Smith, J. Submitted November 18, 1904. (Docket No. 113.) Decided December 14, 1904.

Bill by Melita C. Grover against Frank P. Bishop and others for the foreclosure of certain mortgages. From a decree for complainant but denying a personal deficiency decree against defendant Bishop, complainant appeals. Affirmed.

This is a suit in chancery to foreclose two mortgages given by defendants Miller to complainant. The only question in the case is whether complainant is entitled to a personal decree for the deficiency against the defendant Bishop. The amounts due upon the mortgages exceed by considerable the value of the land. The Millers were evidently insolvent. On August, 1898, the Millers executed to complainant a quitclaim deed of the land covered by the mortgages, with the agreement that the deed should not be recorded for several months, and that the Millers could redeem at any time before it was recorded. Defendant Bishop knew of this deed, and of the condition under which it was made. Unless redeemed, the understanding was that complainant should take the land and discharge the debt.

The Millers also had a contract for the purchase of other

lands, which were not worth the amounts due upon the contracts. They had some personal property, which was also mortgaged, but which did not exceed in value the amount secured thereby. They also owned a small unincumbered piece of land, worth about $500, and a small amount of unincumbered personal property. On August 10th the Millers executed to Bishop a quitclaim deed of all these lands, and a bill of sale of the personal property. The Millers had abandoned any idea of redeeming, and therefore sold the land to Mr. Bishop. Soon thereafter complainant filed this bill of foreclosure, and prayed for a decree against Bishop for any deficiency that should occur upon the sale. The court held that Bishop was not liable, and refused a decree against him for the deficiency.

George O. Kinsman and *William T. Hosner*, for complainant.

Geer, Williams & Halpin (*T. C. Taylor*, of counsel), for defendant Bishop.

GRANT, J. (*after stating the facts*). Complainant claims that there was a parol agreement between the defendants Miller and Bishop that he (Bishop) should pay complainant the amount due upon her mortgages, and that that agreement, under *Crawford* v. *Edwards*, 33 Mich. 359; *Higman* v. *Stewart*, 38 Mich. 522; *Winans* v. *Wilkie*, 41 Mich. 264, and other cases, entitled her to a decree for a deficiency against Bishop.

The principal question is one of fact: Did Bishop make such an agreement with the Millers? No witness for the complainant testifies that Mr. Bishop said he would pay these mortgages, but only that he said he would settle with complainant. Bishop denies any such contract. There certainly was no reason why he should agree to pay. If we take into account the value of all the property transferred to Bishop by the Millers, we do not think it equal to the amount of the liens thereon. The evident arrangement was that Bishop should purchase the equity of

redemption, and, if he could make a satisfactory compromise with complainant, so as to justify him in redeeming, he might do so. Under the situation as it then was, complainant had agreed, in consideration of the deed, to take the lands and discharge the debt, if paid within a certain time. We think that the complainant failed to prove any contract on the part of Bishop to pay the mortgages in consideration of the transfer of the deeds to him. This conclusion renders it unnecessary to determine other questions that are raised.

Decree affirmed, with costs.

The other Justices concurred.

TURNER v. BRADFIELD.[1]

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY—EVIDENCE—SUFFICIENCY.

On a bill for specific performance of an alleged agreement by defendant's decedent to convey land to plaintiff if he and his wife would live with decedent and attend to her business, evidence examined and *held* sufficient to sustain a finding establishing the agreement alleged.

Appeal from Kent; Perkins, J. Submitted October 19, 1904. (Docket No. 55.) Decided December 14, 1904.

Bill by Charles W. Turner against Thomas D. Bradfield and John E. Botsford, executors of the last will and testament of Sarah C. Turner, deceased, and others, for the specific performance of a land contract. From a decree for complainant, defendants appeal. Affirmed.

The complainant by this suit seeks the specific performance of a land contract alleged to have been made

[1]Rehearing denied May 12, 1905.

with his aunt Sarah C. Turner, now deceased. Defendant Salem T. Turner was the husband of Sarah. Defendants Burr and McKown are the nieces of said Sarah, and legatees under her will. Mrs. Turner died December 16, 1901. She had been married three times, but had no children. She married her cousin, defendant Salem, when she was 80 years of age and he was 70. Their marriage evidently was one of business rather than of sentiment. Mrs. Turner had a number of houses in the city of Grand Rapids to rent and look after. She was a shrewd, careful business woman; and, while she was in good health for a woman of her age, she undoubtedly realized that she needed some one to look after her business. Soon after the marriage she and her husband had trouble. She alleged that he was insane, and he was so adjudged, and sent to the asylum for a short time. On his discharge from the asylum he returned to Grand Rapids, but did not live with his wife. After their marriage he took charge to a considerable extent of her business affairs, until he was sent to the asylum. She desired to make arrangements with some one to live with and take care of her, and manage her affairs. Complainant, the son of her brother, was then living in Equality, Ill. She made a proposition to a man named Parker similar to that now claimed by the complainant, but he refused. Her niece also lived with her for a while, and left. Correspondence passed between complainant and Mrs. Turner, in pursuance of which he came to Grand Rapids. He alleges that a contract was made by which it was agreed that he should live with, care for, and help her in her business affairs as long as she lived, and that in consideration thereof she should deed to him the house and lot where Mrs. Turner then lived, and where it was contemplated that the three should live together. Subsequently, and for reasons unnecessary to state, the house and lot now in controversy were substituted for those originally agreed upon. Complainant was then a single man, but was about to be married, and it was a part of the agreement

that he should bring his wife with him, and the two live with and take care of Mrs. Turner. The bill is long, and sets forth minutely the alleged circumstances of the complainant and Mrs. Turner, and the details of the arrangement, and what was done in pursuance thereof. Answers and replications were duly filed, the case heard upon pleadings and proofs taken in open court, and a decree entered for the complainant.

Charles Chandler (*Francis A. Stace*, of counsel), for complainant.

Frank L. Carpenter, for defendants Burr and McKown.

Burlingame, Belden & Orton, for defendant Salem T. Turner.

GRANT, J. (*after stating the facts*). It is established by the evidence and conceded by defendants that the complainant and his wife did, under some agreement, live with Mrs. Turner from November, 1900, until her death, as above stated. The questions are those of fact. The record is replete with evidence of an agreement on the part of Mrs. Turner to deed complainant the land in consideration for the services of himself and wife in caring for her and attending to her business affairs. Whatever the agreement was, it is fully established that he carried it out. She lived in contentment and happiness with the complainant and his wife, and she so expressed herself to her neighbors and friends and in letters. In one letter, written in February, 1901, to a friend, she referred to Mr. Turner's dissatisfaction if she should deed the property to her nephew, meaning the property first agreed upon. Dr. Bradfield, her neighbor, friend, and one of her executors, and a witness for defendants, testified that Mrs. Turner frequently spoke to him about a deed to complainant, and on only one occasion spoke of any conditions. To others she stated that she had made a deed. When she was

taken ill, she sent for a scrivener to draw a deed. The deed was drawn. After it was drawn she told the scrivener that she wanted to leave it with her papers, so that complainant would get it when she died. Upon being informed that delivery was necessary, and it being suggested that she deliver it in escrow to some third party, she said she would wait until a Mr. Botsford came, and would consult with him about it. She soon after became unconscious, and died without delivering the deed.

Counsel for defendants rely mainly upon a contract dated May 22, 1901, and to continue for one year, between Mrs. Turner and the complainant, in which it was agreed that complainant and his wife should make their homes with Mrs. Turner, and he should collect the rents, use the same in making repairs, expenses of household, etc. Complainant drew this contract, and, at his own suggestion, made a duplicate. Both were retained by Mrs. Turner. The terms of this contract are inconsistent with those now claimed by complainant. There is testimony to show, which the court below evidently believed, that this contract was executed for a particular purpose, and not to interfere in any way with the other contract. The attorney who drew it so testified. Defendant Salem had then returned from the asylum, and was making trouble for his wife. He desired to collect the rents and have a hand in her business affairs. There is testimony to show that this contract was made so that Mrs. Turner might show it to her husband, and relieve her from his annoyances by informing him that she had arrangements made with complainant. The conduct of Mrs. Turner, and the statements she made after this alleged contract, as well as before, are not consistent with the claim now made that this contract of May 22d represented the actual arrangement between the parties. It was perfectly legitimate for them to execute that contract to show to Mr. Turner, without in any manner changing the other. The court found that that was its purpose, and we think the evidence is sufficient to sustain the finding.

As above stated, the questions are those purely of fact, namely: (1) Was a contract made between complainant and Mrs. Turner for the conveyance of this land to him? And (2) was that contract carried out by him? The case is similar to *Lamb* v. *Hinman*, 46 Mich. 112.

The briefs cover 202 pages, taken up almost entirely with analyzing the testimony of the witnesses, and attempting upon the one side to show their discrepancies and unreliability, and upon the other to reconcile and explain them. To make a statement of the testimony of the witnesses, and the conclusions to be drawn therefrom, would make this opinion long and tedious, without benefit to any one but the parties interested. It is sufficient to say that we entirely agree with the conclusion reached by the court below.

The decree is affirmed, with costs.

The other Justices concurred.

SMITH v. TOWNSHIP OF EATON.

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1. SURFACE WATERS—DIVERSION BY HIGHWAY COMMISSIONERS.
   Township highway officers have no right to divert the natural course of surface water so as to impose upon the land of one person the servitude which naturally belongs upon the land of another.

2. SAME—INJUNCTION.
   Where township highway officers wrongfully diverted surface water onto plaintiff's land on July 20th, it was no defense to a bill for injunction brought September 29th that defendants did not intend to leave the water on plaintiff's land, but to carry it farther along into a public drain, as complainant could not be expected to delay longer.

3. SAME.
   A landowner is entitled to an injunction to restrain township officers from diverting the natural course of surface waters so as to cast them upon his land to his injury.

Appeal from Eaton; Smith, J. Submitted October 20, 1904. (Docket No. 69.) Decided December 14, 1904.

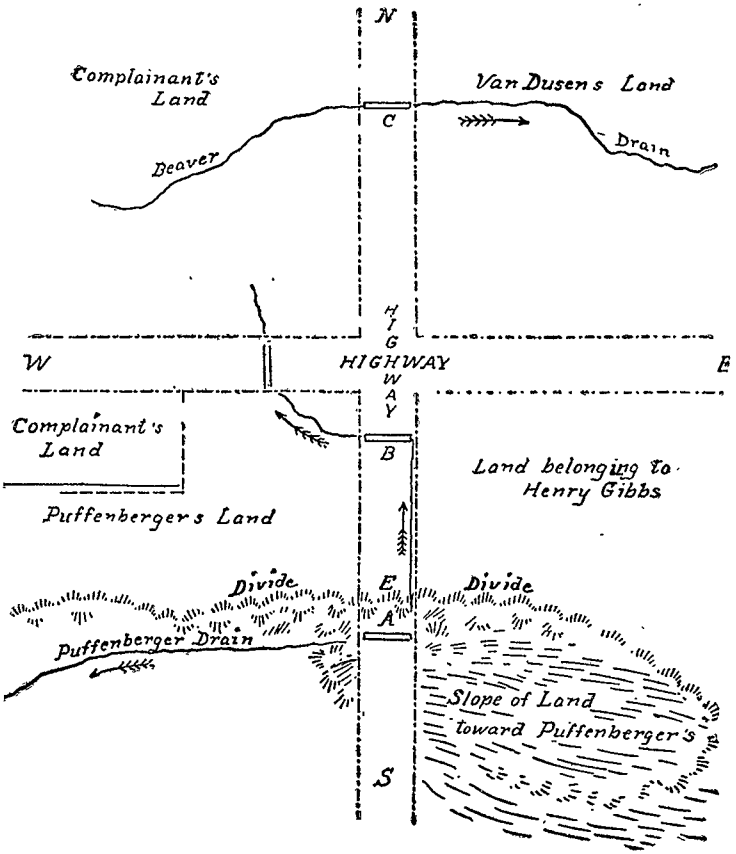
Bill by Edgar M. Smith against the township of Eaton and others to restrain the casting of drainage water upon complainant's land. From a decree for complainant, defendants appeal. Modified and affirmed.

Garry C. Fox and *J. M. C. Smith*, for complainant.

J. M. & J. L. Powers (*Frank A. Dean*, of counsel), for defendants.

CARPENTER, J. Complainant and defendant Puffenberger are adjacent owners of land in Eaton county. Complainant's land lies to the north of Puffenberger's land, said tracts being separated by an east and west highway. Lying east of Puffenberger's land, and separated therefrom by a north and south highway, is a tract of land belonging to one Gibbs. The natural slope of this last tract is towards the west, and therefore all the surface water from said Gibbs' land is carried down onto the highway, and formerly, through a sluice under the north and south highway, upon and over Puffenberger's land. Lying to the north of this sluice, and between it and complainant's land, is a natural rise in the surface. This rise extends across the north and south highway, and thereby confines the surface water from Gibbs' land to the highway and Puffenberger's land. Said sluice across the highway became closed, and quantities of water accumulated along the highway, and flowed across it and onto Puffenberger's land. The township officers, defendants herein, in order to relieve this condition, turnpiked said north and south highway, and made a ditch along the east side of said turnpike. By means of this ditch said water passed through the divide; it then passed through a sluice under said highway, across the northeast corner of Puffenberger's land, and, through another sluice under the east and west highway (as more clearly shown by the accom-

panying diagram which is substantially accurate), it flowed onto complainant's land.



After complainant had suffered from this nuisance from July 20 to September 29, 1902, he filled said ditch, and commenced this suit, seeking to enjoin the diversion of said water from Gibbs' land onto his own. From a decree for complainant, defendants appeal to this court.

The principal question in controversy is whether, for the purpose of improving a highway, public authorities have a right to divert the natural course of surface water so as to

impose upon the land of one person the servitude which naturally belongs upon the land of another. This question is answered in the negative by our own decisions. See *Cubit* v. *O'Dett*, 51 Mich. 347; *Breen* v. *Hyde*, 130 Mich. 2.

It is contended that it was defendants' plan and purpose not to leave this water on complainant's land, but to carry it farther along into a public sewer called "Beaver Dam Drain." If that was their purpose, the record shows no sufficient excuse for so long a delay—from July 20 to September 29, 1902—in executing it. As the learned trial judge said, "The complainant was as patient as could have been expected, and waited as long for them to proceed with the contemplated highway improvements as in reason could have been asked."

It is also urged that the water which was cast and which would have been cast upon complainant's land was so inconsiderable in quantity that he was not entitled to an injunction. We think otherwise. We think the water was sufficient in quantity to occasion serious injury, and that complainant was entitled to an injunction. See *Bruggink* v. *Thomas*, 125 Mich. 9; *Davis* v. *Township of Frankenlust*, 118 Mich. 494.

It is also urged that the decree appealed from is so broad that defendants are enjoined from making certain proper highway improvements, though the same will not have the effect of casting water upon complainant's land. It is doubtful if the decree is susceptible of this construction. If it is, it goes too far, and farther than the parties contemplated or the trial court intended. To avoid all possibility of misunderstanding, we will, in affirming the decree, so modify it that it will not be open to the objection in question.

As so modified, the decree will be affirmed, with costs of this court.

The other Justices concurred.

PIEHL v. PIEHL.

1. TRIAL—RECALLING WITNESS—DISCRETION OF COURT.
   Allowing a witness to be recalled to explain his former testimony is within the discretion of the court.
2. SAME—QUESTION FOR JURY—EXPLANATION BY WITNESS.
   Where a witness, on being recalled, testifies in direct conflict with his previous testimony, the reasonableness of his explanation is for the jury.
3. NOVATION—WHAT CONSTITUTES.
   The requisites of a novation are a valid prior obligation to be displaced, the consent of all parties to the substitution, a sufficient consideration, the extinction of the old obligation, and the creation of a valid new one.
4. SAME.
   Where the original debtor, after agreeing with a third party to pay the debt, dies before the creditor is informed of the arrangement, there is no novation.
5. SAME—EVIDENCE.
   Where suit is brought by one brother against another for a debt owing plaintiff by their father, on the theory of a novation, evidence that defendant promised his father to give his brother and sister each the amount sued for is immaterial.

Error to Cheboygan; Shepherd, J. Submitted November 30, 1904. (Docket No. 296.) Decided December 14, 1904.

Assumpsit by Frederick Piehl against Daniel Piehl for money had and received. There was judgment for plaintiff, and defendant brings error. Reversed.

Plaintiff and defendant are brothers. Their father, Frederick Piehl, Sr., lived in Canada, where he died in April, 1900. He had three sons and one daughter. In 1895 he transferred to the defendant all his property, except some money, on condition that he take care of him the rest of his life. The property was worth about $1,500.

The validity of the contract with his father is not assailed, and it appears conceded that he performed it. It was claimed by Catherine, the daughter, that, in consideration of the transfer, defendant agreed to pay her $400 upon her father's death. For this she brought suit and obtained a judgment, which was reversed by this court. *Ebel* v. *Piehl*, 134 Mich. 64. The declaration is upon the common counts in assumpsit. A bill of particulars was demanded and furnished, as follows:

"Amount due from Frederick Piehl, Sr., to Frederick Piehl, Jr., for cash loaned by said Frederick Piehl, Jr., to Frederick, Sr., at various times from 1877 to 1886, which said indebtedness Daniel Piehl assumed at the time he received an assignment of Frederick Piehl's property in 1896, and then and there promised and agreed to pay said amount to Frederick Piehl, Jr., upon the death of Frederick Piehl, Sr.—$400.00."

The plea was the general issue, with notice of set-off. The declaration is based upon the doctrine of a novation. The case was tried upon that theory, and the court submitted it to the jury upon that theory, stating that it was essential for the jury to find:

1. That the father, Frederick Piehl, Sr., was indebted to Frederick Piehl, Jr., in the sum of $400.
2. That the father turned his property over to defendant with the distinct promise on his part that he would pay his brother that $400.
3. That plaintiff assented to that agreement, discharged his father, and looked to defendant for payment.
4. That defendant promised the plaintiff to pay the $400.

The jury rendered a verdict for the plaintiff.

Frost & Sprague, for appellant.

M. F. Guinon, for appellee.

GRANT, J. (*after stating the facts*). 1. It is urged that there is no evidence of an indebtedness from Mr. Piehl, Sr., to the plaintiff. When the plaintiff rested his

case there was no such evidence. One Julia Mosser was called by the plaintiff to sustain his case, and she testified on direct examination as follows:

"*Q.* Was there anything said by the old gentleman at that time that they were making that agreement why he should pay Fred that $400? *A.* No.

"*Q.* Didn't give any reasons? *A.* No."

After plaintiff had rested, defendant moved to strike out plaintiff's testimony, and to direct a verdict for defendant. One of the reasons was that no original indebtedness had been proved. This question was argued just before a recess of the court. Upon the reassembling of the court, plaintiff recalled Julia Mosser, and she testified as follows:

"I did not understand the questions asked me as to the reason for grandfather directing Dan Piehl to pay Fred Piehl $400, and I desire to change my testimony.

"*Q.* Will you state to the jury what your grandfather said as to the reason of having Dan pay Fred the $400? *A.* Well, he said he owed it to Fred, and Uncle Dan was to pay it."

On cross-examination she testified:

"I have talked with the attorney since I gave my testimony this morning. They explained my testimony to me —what they wanted, and what it meant. I do not know what I did not understand, and cannot remember any more. All I know is that he got the money, and he was to pay Uncle Fred and Aunt Kate. He owed Uncle Fred $400, and Uncle Dan was to pay that after his death. I cannot remember the conversation when Uncle Dan was there; it is too long ago."

The recall of this witness was in the discretion of the circuit judge. Whether her explanation was reasonable was a question for the jury. It is true that the testimony upon her second examination is in direct conflict with that given on her first. While it may be difficult to understand how she could have misunderstood the question and answer given by her on her first examination, yet such matters are for the jury. The only control the trial court

has over them is by motion to set aside the verdict, if, in its judgment, it is against the weight of the evidence.

2. The meritorious question is, Was there evidence of a contract of novation? The court correctly instructed the jury upon the requisites of such a contract, to wit, a valid prior obligation to be displaced, the consent of all parties to the substitution, a sufficient consideration, the extinction of the old obligation, and the creation of a valid new one. 21 Am. & Eng. Enc. Law (2d Ed.), p. 663; *Dean* v. *Ellis*, 108 Mich. 240; *Fuller & Rice Lumber & Manfg. Co.* v. *Houseman*, 117 Mich. 553; *Cornwell* v. *Megins*, 39 Minn. 407. Plaintiff was not present when the contract between defendant and his father was made. He was in Michigan. He could not discharge his father and agree to the substitution of the defendant as his debtor until he had knowledge of such agreement. There is no evidence that he knew of such agreement until after his father's death; there could therefore be no novation, neither was there one according to his own version of his conversation with defendant after his father's death. He testified that he attended the funeral; that on his return he went to defendant's house "to ask him if my father had left anything for me. I had looked over in Canada, and I could not find anything. * * * I came here as a brother, and asked you simply if father has left anything for me or not." Nowhere in his testimony does he intimate that he stated to defendant, or even hinted at, such a contract as the one upon which he now relies. The sister, Mrs. Ebel, testified to the same effect as she did in *Ebel* v. *Piehl*, supra, namely, that her father said to defendant:

"When I am dead I want you to give sister Kate $400, and your oldest brother (plaintiff) $400. I told you that when you got the money."

There is nothing in this or any other of her testimony to indicate that her father owed plaintiff, and that defendant agreed to pay it. The father, one of the parties to the claimed tripartite agreement, died before plaintiff knew,

or at least had assented to, the contract. He had not notified either his father or the defendant that he discharged the one and accepted the other. He could not consummate the agreement after his father's death. The court should, upon this record, have directed a verdict for the defendant.

3. In the event of a new trial it is proper to say that all testimony that the defendant promised to give his sister $400, or any other of his father's children $400, is immaterial, and should be excluded.

Judgment reversed, and new trial ordered.

The other Justices concurred.

McKERNAN v. DETROIT CITIZENS' STREET-RAILWAY CO.

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1. STREET RAILWAYS — CITY FIREMEN — PERSONAL INJURIES — ACTIONS — PLEADING — AMENDMENT.

In an action by a fireman against a street-railway company for injuries resulting from collision with a street car passing an engine house as plaintiff emerged therefrom, riding on the rear of a fire engine, it was claimed that the declaration would not support a recovery based upon negligence of the motorman at any time before he had actual knowledge that the engine was coming out of the engine house. Defendant had verdict, and on error it insisted that the verdict settled that there was no negligence after the discovery of plaintiff's exit, and that therefore the questions raised by appellant as to imputed negligence, etc., were immaterial. *Held*, that, as the evidence covering plaintiff's whole case was received without objection as to the pleadings, the court on error could not assume that an amendment would have been refused, and would consider the whole case.

2. SAME — PASSING ENGINE HOUSE — RULES — CONSTRUCTION.

In an action by a fireman against a street-railway company for injuries resulting from collision with a street car passing an engine house as plaintiff emerged therefrom, riding on

the rear of a fire engine, a rule of the railway company requiring that cars, when passing engine houses, must not go faster than four miles an hour, should not be construed as applying only to the space directly in front of an engine house, and to impose on the motorman no obligation to approach the engine house at a reduced rate.

3. SAME—RULE—DUTY IMPOSED.

The existence of this rule would not add to the railway's obligations to the public, so as to make its violation negligence per se, but was evidence bearing on the question whether a faster rate was in accordance with careful management, and if plaintiff had knowledge of it, it might have a bearing on the question of his contributory negligence.

4. IMPUTED NEGLIGENCE—FELLOW-SERVANTS—CITY FIREMEN.

The negligence of the driver of a fire engine was not imputable to the engineer, who, in the performance of his duty, was riding on the rear end of the engine when it collided with a street car.

Error to Wayne; Rohnert, J. Submitted June 9, 1904. (Docket No. 5.) Decided December 22, 1904.

Case by John McKernan against the Detroit Citizens' Street-Railway Company for personal injuries. There was judgment for defendant, and plaintiff brings error. Reversed.

Orla B. Taylor, for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

MONTGOMERY, J. This is an action to recover for injuries sustained by the alleged negligence of the defendant. The case was submitted to the jury, resulting in a verdict for defendant. The testimony on the part of the plaintiff tended to show the following facts: At the time of the accident the defendant was operating a single-track railway upon Congress street, in the city of Detroit. Electric cars were operated in an easterly direction over this track. Fire engine house No. 19 is located on the north side of Congress street, between Chene street, on the

west, and Joseph Campau avenue, on the east. The distance from Chene street to Joseph Campau avenue is 881 feet. The engine house is 686 feet east of Chene street. The block being a very long one, there is a trolley station 271 feet west of the west lot line of the engine house. The engine-house lot is 55 feet in width, the building extending from the east line of the lot to within 13 feet of the west lot line. There are two 10-foot doorways, through which the engine and hose cart gain entrance to the street. These doors are separated by a space of 5 feet. Each doorway has two doors, which swing outward, and when opened can be seen from the corner of Chene street. At the time of the accident the hose cart came out of the west door, and the engine out of the east door. Congress street is 60 feet in width. The paved portion of the street is 30½ feet in width, the car track is 4 feet and 7 inches wide, and the distance from the track to the curb line is 12 feet and 10 inches. The engine house is 31 feet from the curb line, and there is a brick-paved runway, with a fall of a little over 2 feet, leading down to the street. The fire engine weighed 9,600 pounds. It was about 12 feet long from the front end of the suction pipes to the back end. The suction pipes stick out about 2 feet behind the rear wheels. Three horses were used to draw the engine. In order to handle it as it emerged from the engine house, it was necessary to take a course in a southwesterly direction to the southerly side of the car track, gradually turning to the west.

The plaintiff at the time of the accident was the engineer of the fire engine. As such, it was his duty, when the engine left the house, to take his position at the rear end of the engine, between the suction pipes. He had nothing whatever to do with the management of the horses.

The accident occurred on September 25, 1900, at about 11:30 in the forenoon. It was a warm, clear day. The car was proceeding in an easterly direction at a speed which is variously estimated from 8 to 15 miles an hour. Just after the car passed the trolley station, the hose cart

emerged from the west door of the engine house. Capt. Ortwine and the driver, Kemberling, were upon the seat of the hose cart. The bell was rung before starting and while leaving the engine house. The ringing continued until the hose cart was clear out into the street. Kemberling turned westerly and proceeded about 50 or 60 feet in the car track, when Ortwine called his attention to the fact that the approaching car had not stopped in the usual manner. He then turned to the left, out of the track, and the back end of the hose cart, as it swung out of the track, cleared the car by about 2 feet. The car was about 100 feet from the hose cart when Kemberling turned off the track. Thus the car passed the hose cart about 100 feet westerly of the engine house lot line, or about 113 feet from the house itself.

Just as the hose cart passed the car, the engine came out of the house. Lieut. Murphy and Schneider, the driver, were seated upon the engine seat. Plaintiff was standing upon the rear of the engine, between the suction pipes. After clearing the doors of the house, Schneider drove in a southwesterly direction across the car track. The engine was nearly across the track, when the car struck the right hind wheel with great violence. The engine, weighing nearly 5 tons, was tipped over, the tire of the wheel, 2 inches wide and seven-eighths of an inch thick, was cut in two, and plaintiff was severely injured. The collision occurred practically on the line of intersection of the west lot line with the car track. The motorman was an experienced man, and was entirely familiar with the location of the engine house. He heard the alarm, and he saw the horses just as they were coming out of the house. He states that the track was slippery and wet. There was evidence, however, that it was a warm, clear day, and that the track was dry.

Evidence of experts was given as to the distance within which a car could be stopped when going at various rates of speed. Witness Smith testified that a car going at the rate of 10 miles an hour could be stopped in 80 feet, and

at 7 miles an hour in 50 feet, and at lesser rates in a correspondingly less distance. Witness Haire fixed the distance at 100 feet and 60 feet, at the rates of 10 and 7 miles, respectively. Cole, the motorman, says that his schedule time was 12 miles an hour, and that when the car was in proper shape he could make stops in a car length—about 30 feet.

A rule of the company reads as follows:

"Motormen, when passing schools at the time of commencement or the letting out of same, or when passing by engine houses, must not go faster than four miles an hour."

The circuit judge submitted to the jury the question of defendant's negligence, but held that the defendant's rule cut no figure in the case. The circuit judge also held that the negligence of the driver of the fire engine should be imputed to the plaintiff, and that:

"The negligence of the fire people [evidently meaning the driver] in not looking and listening before they came out of the engine house relieved the company from liability for any negligence on the part of the motorman in violating any rule which required him to keep his car in check in approaching an engine house, up to the moment when the motorman had knowledge that the apparatus was coming out of the house."

It was strenuously insisted on the argument in this court that the form of the plaintiff's declaration was such as to preclude a recovery based upon negligence of the motorman at any time before he had actual knowledge that the engine was coming out of the engine house, and that the jury must have found, under the court's instruction, that there was no negligence on the part of the motorman after discovering the fire engine, and that therefore the questions discussed by appellant became immaterial. It is not altogether clear that the jury would understand from the charge that the question of the motoman's negligence was the only one left for consideration; but, however this may be, the record shows that the plaintiff's whole case was covered by the testimony, and it does not

appear that any question was made as to the sufficiency of the pleading to cover the case made. We cannot assume that, had such a point been made, the circuit judge would have refused an amendment. See *Ross* v. *Township of Ionia*, 104 Mich. 320; *Findlay* v. *Railway*, 106 Mich. 700; *Garn* v. *Lockard*, 108 Mich. 196; *Thomas* v. *Railroad Co.*, 114 Mich. 59; *Robinson* v. *Railway Co.*, 103 Mich. 607.

The circuit judge apparently construed the rule above quoted as imposing no obligation upon the motorman to *approach* the engine house at a reduced rate of speed, but was of the opinion that the four-mile limit was fixed for the period of time when the car was actually passing the forty-two feet in front of the engine house. We think such a construction renders the rule wholly ineffectual to accomplish any good. As pointed out by plaintiff's counsel, if the west line of this engine house had been reached by the car with no apparatus coming out of the house, the safety of all concerned would have been best assured by the car being speedily removed from in front of the engine house. The real purpose of this rule was evidently to challenge the attention of defendant's employés to the necessity of *approaching* the engine house with the car under control, and fixing a speed of four miles an hour as a safe limit.

The existence of this rule did not add to the defendant's obligations to the public, as shown by the opinion of Mr. Justice HOOKER, filed herewith. If, however, knowledge of this rule was possessed by the plaintiff, this might have a distinct bearing upon the question of his contributory negligence.

Was the negligence of the driver of this engine imputable to the plaintiff, in such sense as that, if the driver was guilty of contributory negligence, recovery by the plaintiff is precluded? We think not. Whatever may be the rule as to joint undertakers where one may be said to be the agent of the other, or between employer and employé, where one is clearly the agent of another, or between a driver and a mere volunteer, in which case, per-

haps, an implied agency may be said to exist, we are unable to see why, in a case like the present, where two fellow-servants having duties to perform, the one wholly distinct from the other, are severally engaged in the performance of such duties, the negligence of one should be imputed to the other. The cases are numerous in which the courts have refused to apply the doctrine of imputed negligence in such cases.

A case in point is *Bailey* v. *Jourdan*, 18 App. Div. 387. In that case two policemen were sent out in an ambulance to secure a prisoner. One drove the wagon. The other (the plaintiff) was inside the ambulance. A collision occurred, to which the negligence of the driver contributed. It was held that, as the plaintiff had nothing to do with the driving, but as this was a separate and independent duty, to which his fellow policeman was assigned, the negligence of the latter could not be imputed to him.

Cray v. *Railroad Co.*, 23 Blatchf. 263, is an instructive case. In that case the question presented was whether the negligence of a locomotive engineer was to be imputed to a fireman on his engine, as contributory negligence, in an action brought against a stranger road for injuries sustained by the fireman in a collision. It was held that the negligence of the engineer was not so imputable to the fireman. It was said that, although the plaintiff was a fellow-servant of the engineer, he was a subordinate, and had no control over the movements of the locomotive. Upon the facts found, he was no more accountable for the misconduct of the engineer than a passenger would be.

The same rule was conversely applied when it was sought to impute to the plaintiff, an engineer, the negligence of his fireman, who was a fellow-servant. *Chicago, etc., R. Co.* v. *Chambers*, 68 Fed. 148. See, also, *Hobson* v. *Milk Co.*, 25 App. Div. 111, and *Seaman* v. *Koehler*, 122 N. Y. 646. And speaking generally, the rule is that, when one is injured by the negligence of a third person concurring with that of a fellow-servant, the contribu-

tory negligence of the latter constitutes no defense. 1 Thompson on Negligence, § 505. There are cases holding that, where two are engaged in a joint enterprise, the one is the agent of the other, in such sense that the negligence of either will be imputed to the other. *Cass* v. *Railroad Co.*, 20 App. Div. 594; *Yahn* v. *City of Ottumwa*, 60 Iowa, 429; *Omaha, etc., R. Co.* v. *Talbot*, 48 Neb. 627. These cases rest upon the ground of agency, and do not at all militate against the doctrine stated above. Our own case of *Mullen* v. *City of Owosso*, 100 Mich. 103, applied the doctrine of imputed negligence to one sui juris who voluntarily becomes a passenger with another in a vehicle driven by that other. That case has support in adjudicated cases. *Brickell* v. *Railroad Co.*, 120 N. Y. 290. But that case does not go so far as to impute the negligence of one fellow-servant to another.

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

The other Justices concurred.

HOOKER, J. (*concurring*). The plaintiff was injured while riding upon a fire wagon or truck as it emerged from an engine house, being struck by a street car as it was crossing the track. Counsel for the plaintiff were allowed to prove that the defendant had directed its employés to reduce the speed of cars to four miles an hour when passing schoolhouses and fire-engine stations. This took the form of a printed regulation which was distributed among such employés as had the control or driving of cars.

Two claims might be made for this evidence: (1) That a failure to observe the rule was per se negligence; (2) that it was evidence bearing upon the question of whether a faster rate was in accordance with good railroading.

We consider it unnecessary to cite authorities to prove that a railroad company may lawfully make rules and regulations, and, were the question before us, we might perhaps say as much in regard to its obligations to conduct its business under such rules and regulations as

would be required to relieve it from the dangers incident to looseness of management and method; and we have little doubt that a failure to provide rules necessary to the ordinary safety of good railroading might constitute actionable negligence, if followed by disaster and injury, in favor of patrons, if not of employés. But the law recognizes the right of the railroads to make rules for their own convenience and benefit, and the courts would be likely to uphold as reasonable a rule, made out of abundant caution, having for its object the reduction of danger to a point far below that attained by ordinarily prudent management, which is the common test prescribed by law. And it would be unfortunate if such a practice were to be penalized by permitting the fact of extraordinary care to increase the responsibility imposed by law, the natural if not inevitable consequence of which would be to induce reluctance to adopt new measures and regulations. There are many rules made by railroads, and they are subject to greater or less changes from time to time. We have said more than once that courts and juries cannot be allowed to make rules and regulations and prescribe methods for railroad management. They may determine whether certain conduct is negligent or not, but the test is not, or should not be, their abstract notions of railroading, but, rather, the condition of the science and practice of good railroading. Experience may demonstrate that rules designed to facilitate the business or to diminish danger are disappointing and unwise, for unforeseen reasons, and in such cases, as the object of the departure from ordinary practice may not give immunity, neither should the departure make a new and arbitrary standard of care, from which the railroad cannot safely depart. It is a significant fact that it has been seldom claimed that the omission to follow a rule made by the company constitutes negligence. But one case has been called to our attention—i. e., *Dublin, etc., R. Co.* v. *Slattery*, L. R. 3 App. Cas. 1163—where it has been held that it was evidence of neg-

ligence. The question received no discussion, except the following brief mention:

"The only negligence alleged against the appellants was that the express train from Dublin did not whistle before or as it passed through the station, and it was suggested that, had it whistled, it would have acted as a caution to Slattery, and he would not have attempted to cross the line, and, further, that, as a person accustomed to the ways of the station, he would expect that a train passing through without stopping would give notice, by a whistle, of its approach. As to the necessity for whistling, Rossiter, the engine driver, called for the appellants, stated that it was his duty, with express trains, to whistle passing every station; and although it would, as it seems to me, be difficult to lay down an abstract rule as to the necessity of whistling, it may be taken that the orders given to the engine drivers showed that the appellants considered whistling, under the circumstances, to be a reasonable and proper precaution, and it might have been, and I think it was, right to tell the jurors that, if they found this precaution neglected on this occasion, they might consider it to be evidence of negligence on the part of the appellants."

In a country like our own, where the law compels engineers to sound the whistle at all rural crossings, there is no diversity of opinion upon a failure to give the alarm. We would perhaps feel the same regarding an omission to follow a practice so uniform as to be generally known, and expected by the public, though not a statutory duty; and the question of negligence would not depend upon the existence of the rule, so much as upon the practice, and the right of the public or the person injured to expect its observance. The regulation might constitute some evidence tending to show this, and that it was negligence in the particular case to omit to follow it; but we can think neither that the failure to observe this rule, in and of itself alone, is per se negligence, nor that it necessarily proves a practice, though it was perhaps admissible in that case in connection with other proof upon that subject. That is all that can be said to have been decided by the case cited. While the foregoing is the extent to which

the above-mentioned rule should be carried, there are doubtless many regulations of which even that could not be said. All of the details of railroad management (i. e., the running of trains) are worked out under rules, the disregard of which at times may be unavoidable. An absence of elasticity in their observance might mean disaster and death, and it would be the height of injustice to say that evidence of such disregard is evidence, per se or prima facie, of negligence; and, manifestly, of the many rules which have no direct bearing upon the question of safety, yet which may be in a way connected with the circumstances of a disaster, neither ought to be said.

Allusion has been made to the infrequency of adjudications upon this question. Proof of rules has often been introduced to prove contributory negligence through disobedience of them by employés. Manifestly such cases have no bearing upon a case like the present. There are a few, however, where attempts have been made to predicate negligence to third persons upon them. Eliminating such of these as involve a mutual knowlege of, and right to rely upon, the observance of a known and settled practice, thereby differing from the record before us, and such as are based upon the duty of a master to promulgate rules necessary for the protection of his servant, we have few left. All that we have found were considered in the case of *Fonda* v. *Railway Co.*, 71 Minn. 448, where Mitchell, J., speaking for a unanimous bench, said:

"Its rules [are] intended only for the guidance of its own employés in the operation of its cars. We think this was error. There was no evidence that the plaintiff had any knowledge of the existence of these rules, or of any custom, based upon them, as to the manner of operating cars; hence his conduct could not have been in any way affected or influenced by them. It is not claimed that these rules require or permit anything that is inconsistent with reasonable care. The theory upon which they were offered was that they tended to show what duty the defendant owed to the public in the operation of its cars, and hence that a violation of any of them, being a breach of

such duty, constituted actionable negligence, or at least was evidence of it. Private rules of a master regulating the conduct of his servants in the management of his own business, although designed for the protection of others, stand on an entirely different footing from statutes and municipal ordinances designed for the protection of the public. The latter, as far as they go, fix the standard of duty towards those whom they were intended to protect, and a violation of them is negligence in law or per se. But a person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either statutory or common. Such rules may require more or they may require less than the law requires; and, whether a certain course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party. Under some circumstances, such rules may become an important factor in the application of legal principles to the conduct of a person—as, for example, where the rule was known to him, and he governed, or had a right to govern, his conduct accordingly. Such was the case of *Smithson* v. *Railway Co.*, 71 Minn. 216. In that case the rule was known to, and obligatory upon, both the party injured and the party guilty of the alleged negligent act. Each was bound to know that the other might and could regulate his own conduct on the assumption that he would obey the rule. Some of the cases cited by counsel come within this class, and hence have no application here. Others were cases of servants against their masters, in which the gist of the action was the failure of the master to perform his absolute duty to his servants to make and promulgate rules which, if observed, would give reasonable protection to his employés. These cases are equally inapplicable. Some are cases of municipal ordinances, which, for reasons already given, are not in point. There are a few cases which support plaintiff's contention, but in none of them is the question considered or discussed at any length, and in some of them no reason whatever is given for the decision. The only reason assigned in any of them why such evidence is admissible is that it is in the nature of an admission by the party promulgating the rule that reasonable care required the exercise of all the precautions therein prescribed. *Georgia Railroad* v. *Williams*, 74 Ga. 723; *Lake Shore, etc., R. Co.* v. *Ward*, 135 Ill. 511.

The fallaciousness and unfairness of any such doctrine ought to be apparent on a moment's reflection. The effect of it is that, the more cautious and careful a man is in the adoption of rules in the management of his business in order to protect others, the worse he is off, and the higher the degree of care he is bound to exercise. A person may, out of abundant caution, adopt rules requiring of his employés a much higher degree of care than the law imposes. This is a practice that ought to be encouraged, and not discouraged. But if the adoption of such a course is to be used against him as an admission, he would naturally find it to his interest not to adopt any rules at all. To treat the adoption of such rules as an admission against the party would involve the same principle as treating repairs or improvements made after an accident as an admission of prior defects—a doctrine long since repudiated by this court, and now repudiated by most of the courts of the country. *Morse* v. *Railway Co.*, 30 Minn. 465. If we could hold, as a matter of law, that these rules required nothing more than was required in the exercise of reasonable care, their admission would be error without prejudice, but an examination of them satisfies us that we cannot so hold."

Among the cases relied upon to support the plaintiff's contention in the Minnesota case is *Maxwell* v. *Eason*, 1 Stew. 514. An action was brought against a ginner of cotton to recover for cotton lost by fire. The case recognized the rule that the test of negligence was the usual custom of ginners as to carrying fire, and it was said that the defendant's custom was admissible, also, if conformable to the general usage. Manifestly this must be the limitation, or extraordinary and commendable caution will establish a rule of greater diligence for the prudent than the law does for the ordinary person. We are impressed by the reasoning of Mr. Justice Mitchell, and the soundness of the rule enunciated by him. It should not be held that, where the ordinances of a city authorize a speed of 20 miles an hour, a rule of the company requiring caution by its motormen, through a direction to slow down to 4 miles an hour in front of schoolhouses, thereby establishes that rate as the maximum limit of reasonably safe railroading.

Were it to do so, there would be much force in the possible claim that such a regulation should be extended to other places where children may be in the habit of congregating or may happen to be gathered together, and that a failure to so extend it is negligence. It does not follow from a contrary rule that a motorman may go recklessly or negligently through or past all places at the maximum speed. The law regulates this by rules which do not depend upon the existence or nonexistence of corporate regulations. It neither permits corporations to legislate away their responsibilities by rules, nor imposes discriminating liabilities upon them by reason of their efforts to lessen public danger.

I concur in the reversal of this judgment upon the ground that the negligence of the driver was not imputable to the plaintiff.

The other Justices concurred.

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BUXTON *v.* AINSWORTH.

1. HIGHWAYS AND STREETS—LAW OF THE ROAD—MEETING OF VEHICLES—DUTY TO TURN OUT.

   One driving on a highway need not turn to the right, so that all of his vehicle is to the right of the center, if he turns far enough so that a passing vehicle, without turning at all, may pass safely.

2. SAME—COLLISION—GROSS NEGLIGENCE.

   Testimony that defendant drove rapidly on a highway at night, without looking for vehicles approaching from the opposite direction, and by the exercise of ordinary care could have seen plaintiff's vehicle with which he collided, justifies submission of the issue of gross negligence.

3. NEGLIGENCE—GROSS—INSTRUCTIONS—DEFINITION OF TERMS.

   Where the questions of willfulness, wantonness, and recklessness are submitted, those terms should be defined, so as to prevent their being understood as mere words of emphasis, and

therefore as referring to the doctrine of comparative negligence, which does not obtain in this State.

4. SAME—DISCOVERED PERIL.

In order to entitle plaintiff to recover, despite his own negligence, on the ground of the gross negligence of defendant, the latter must have discovered plaintiff's negligence, or neglected the most ordinary precaution in failing to do so.

5. DAMAGES—PERSONAL INJURIES—CARE AND NURSING—PROOF OF VALUE.

Permitting recovery for care and nursing, without evidence of their value, is error.

Error to Ionia; Smith (Stearns F.), J., presiding. Submitted July 7, 1904. (Docket No. 41.) Decided December 22, 1904.

Case by James Buxton against Thomas Ainsworth for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

R. A. Hawley, for appellant.

William H. Howard, *Charles L. Wilson*, and *Morse & Locke*, for appellee.

MONTGOMERY, J. Plaintiff recovered a verdict and judgment of $1,000 for damages incurred in a collision between vehicles severally driven by plaintiff and defendant. The collision took place on the 8th of November, 1901, at a point about two miles north of the village of Lake Odessa. The plaintiff and his wife were returning from Ionia to their home, at Lake Odessa, in a single covered buggy. The defendant was driving north from Lake Odessa toward his home in the country. He was driving a single buggy. The testimony was conflicting as to whether it was dark or otherwise at the time of the collision. The defendant's testimony tended to show that it was quite dark. The plaintiff and his wife, on the other hand, testify that they were able to see the defendant approaching when at least 17 rods away. The collision occurred about

53 feet south of a small culvert or bridge. Plaintiff testified that he saw the defendant approaching while he (plantiff) was driving across the bridge. The bridge was 14 or 16 feet wide, and its approach from the south widened out about equally in each direction, and the wrought portion of the road was, at the point of collision, about 20 feet in width. This road had been newly graveled, and there was testimony tending to show that the gravel had been left as dumped from the wagon. The plaintiff testified:

"It looked as though the gravel had been dumped a load in a place; just the bigness of a wagon dropping a load, I should think. * * * The graveled part of the way had not been worked down any by travel."

We do not overlook the defendant's contention that the testimony fails to show that the gravel was left heaped up, and the criticism of the charge of the court submitting that question to the jury, but we think the testimony above quoted was clearly open to the construction that the gravel had not been leveled. The testimony shows that the travel was, after the gravel had been put on and up to the time of the collision, confined almost exclusively to a track on the easterly side of the wrought portion of the road, although there were wagon tracks upon the graveled portion, showing some travel thereon.

The plaintiff testified that on seeing the defendant coming he turned out to the right to get out of the track; that the defendant turned to *his* left, and to plaintiff's right. Plaintiff then proceeds:

"When he turned out, I saw he was going to catch my horse, and I swung it back to the left just enough so he missed my horse. As he came up, coming up such a rapid speed, it frightened my horse going on the wrong side, and she made a terrible spring, and the wheels came right together, locked right in together like that. My front wheel went right over his front axle, dropped right in there. When they came together, it came so solid, my horse stripped right loose from the buggy, broke the whiffletree twice in two in the center and one end. It stripped the harness

right off, and all that was left on the horse was just the bridle and the lines, and took me right out over the dashboard, and I landed out just beyond the thills, maybe ten or twelve feet from the buggy, and the horse dragged me as much as two or three rods. I stopped the horse by happening to pull on one line more than I did on the other, and wheeled her right around, and so I kept my horse. I was driving my horse on the walk, and when my horse sprang it moved the buggy back to the southeast."

Defendant testified that it was very dark; that he was trotting his horse probably five or six miles an hour; that he never saw the plaintiff until the buggies were right together; that before he struck the plaintiff's buggy his (defendant's) horse turned a little to the west; that this was a voluntary movement of the horse, and was not guided by defendant. Defendant further testifies that he was not looking for Mr. Buxton, or anybody else, on the highway.

The plaintiff's testimony tended to show that defendant was intoxicated at the time.

The circuit judge charged the jury as follows:

"I charge you, according to the law, that it is the duty of persons meeting each other upon any road or highway, while traveling with any vehicle, to seasonably drive to the right of the middle of that portion of the road which is wrought or worked for travel, and that if such person fails so to do he is presumably guilty of negligence."

The court also gave plaintiff's request, as follows:

"If the jury believe the story of the plaintiff and his wife as to the manner of the collision—that they had turned out to the right on the west side of the road before defendant met them, leaving sufficient space for him to safely pass them by keeping in the traveled track he was driving in, then there was no fault or negligence on the plaintiff's part; and if you find that the defendant was negligent in turning suddenly to the left in front of the plaintiff, then the plaintiff is entitled to recover such damages as he has suffered, or may suffer hereafter, from the fact of such collision."

It is contended that these two instructions are at vari-

ance. We do not think so. As an abstract proposition, the driver of a vehicle about to meet another team is presumptively at fault if he fails to turn to the right of the center of the wrought portion of the highway; but if the presumption that he is thus at fault is overcome by the evidence of circumstances, or if it appears that the fault, if found, did not essentially contribute to the injury, the fact that he may have been in a sense out of place does not place him beyond the protection of the law. *Spofford* v. *Harlow*, 3 Allen, 176. If, although some portion of the plaintiff's carriage was to the left of the center portion of the traveled way, the presence of the carriage at that point in no way interfered with the passage by defendant pursuing precisely the course he was in, it is difficult to see how the fault of plaintiff in any legal way contributed to the injury so that recovery is to be denied him for an act of defendant negligent in itself. The case of *Quinn* v. *O'Keeffe*, 9 App. Div. 68, 70, is quite in point. See, also, 18 Am. & Eng. Enc. Law (2d Ed.), p. 579.

The circuit judge submitted the case to the jury on the additional theory that, even though plaintiff was negligent, "yet, if the defendant's conduct was wanton and willful or reckless," the plaintiff might recover. This instruction is attacked by the defendant's counsel on two grounds: *First*, that there was no testimony in the case which justified the court in submitting to the jury the question of defendant's gross negligence at all; and, *second*, that gross negligence was not properly defined.

We are of the opinion that there was testimony which authorized the submission of the question to the jury. The jury might have found that the defendant approached the plaintiff at a rapid gait, without looking for him, or for any other person, in the highway, and that by the exercise of most ordinary care he would have known of the plaintiff's danger. If the jury had so found, the case would have fallen within the designation of gross negligence as defined by this court. *Richter* v. *Harper*, 95 Mich. 225; *Labarge* v. *Railroad Co.*, 134 Mich. 139.

But there is much force in the contention that the instruction laid down no rule for the guidance of the jury. The language of the charge left it open to the jury to find the defendant's conduct wanton, willful, or reckless according to standards wholly undefined, and the instruction failed to direct the attention of the jury to the important element of so-called gross negligence; i. e., that before gross negligence can be made out which warrants recovery notwithstanding the precedent contributory negligence of the plaintiff, the negligence of the latter must have been discovered, or the defendant must have neglected the most ordinary precaution in failing to discover it. As the charge was given to the jury, the terms "wanton," "willful," and "reckless" may have been considered as words of emphasis, and, so understood, defined the doctrine of comparative negligence, which does not obtain in this State. *Richter* v. *Harper*, supra.

The court permitted recovery for care and nursing, in the absence of any basis furnished by proof of value. This was error, under *Williams* v. *Village of Petoskey*, 108 Mich. 260.

The other questions presented are not likely to arise on a new trial.

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

The other Justices concurred.

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WALKER *v.* CITY OF DETROIT.

TAX SALE—PUBLICATION OF NOTICE—HOLIDAYS.

Under charter of Detroit, 1893, § 170, providing that the tax roll shall be delivered July 1st, and that "forthwith" six days' notice by publication in the official daily paper shall be given, which shall be a demand for payment, a publication on each of the first seven days of the month, except July 4th, is sufficient.

Appeal from Wayne; Rohnert, J. Submitted October 7, 1904. (Docket No. 42.) Decided December 22, 1904.

Bill by Bryant Walker, trustee, against the city of Detroit and another to cancel certain tax sales. From the decree rendered, complainant appeals. Affirmed.

Walker & Spalding, for complainant.

Timothy E. Tarsney (*John W. McGrath*, of counsel), for defendants.

MONTGOMERY, J. The complainant filed a bill and supplemental bill to cancel sales for city taxes of the years 1892, 1893, 1895, 1896, and 1898 to 1901, inclusive, and the tax of 1892 as well; also to cancel a special paving assessment made in 1889. The grounds are that the paving assessment was cut off by complainant's having acquired title on sales for State and county taxes of 1890 and 1892; also that there is no certificate attached to the paving assessment roll showing that it was prepared and the property assessed in accordance with charter and ordinance provisions, and that the State and county title of 1892 cuts off the city tax for the same year; defective publication of the July notice constituting the legal demand by the receiver of taxes for the payment of taxes—applying to the taxes of all years but 1893; defective publication of the

January notice of the augmented taxes—applying to the taxes of the years 1893, 1895, and 1900.

The decree canceled the taxes of 1892 and 1899 upon condition of the payment of the face of the original tax, canceled the taxes of 1895 and 1900 on condition of the payment of the face of the original tax plus 6 per cent., and dismissed the bill as to all other taxes and the paving assessment.

The complainant acquired title to the property in January, 1896, by quitclaim deed given in lieu of foreclosure. He holds this title in trust for Susan A. Lowe, who, in March, 1893, took a mortgage upon the property. In October, 1896, the complainant got by mesne conveyance title for the State and county taxes of 1890, and in December, 1902, a title for the State and county taxes of 1892. These titles he likewise holds for Mrs. Lowe. It was not disputed that the State and county tax title would ordinarily cut off the title under the previous paving assessment sale, but it was claimed by the defendant and held by the court that, as the complainant holds these titles in trust for the mortgagee, and as the time for redemption on the tax sale for 1890 did not expire until after the taking of the mortgage, and the time of redemption on the tax sale for 1892 did not expire until after the complainant himself took title to the property, neither can be set up against the paving assessment title. Complainant appealed from the decree.

Obviously, the complainant must, in order to obtain the full relief prayed, be able not only to establish that the sale for taxes of 1892 and the paving taxes were cut off by the sale of the land for State and county taxes for the years 1890 and 1892, but also to show that the tax titles which he holds for these years have not been in turn substantially cut off by the sale of the land to the city for taxes of subsequent years.

The complainant's bill proceeds upon the theory that the sales to the city were rendered invalid by defective notices. If they were in fact valid, it would seem that the com-

plainant was granted greater relief in the court below than he was entitled to. We do not understand that either under the theory of the bill or in fact or law the complainant has an absolute right to be invested with the title which the city holds under its purchase, and at the same time to ask that the unpaid taxes on these lands for previous years be declared invalid.

Under the charter two notices are required to be published by the receiver of taxes—the July and January notices, so called. The January notice was admittedly sufficient except as to the sales for taxes of 1893, 1895, and 1900. The objection to the July notice is more general, and applies to all the years except 1893, and a similar criticism is made as to the publication in each year.

The charter of Detroit of 1893 (section 170) provides that the rolls shall be delivered to the receiver of taxes July 1st, and "the receiver of taxes shall forthwith, upon the reception of said tax rolls, give six days' notice by publication in the official daily paper published in said city, and by posting the same in at least six public places in each ward, which notice shall be a sufficient demand for the payment of all taxes on said rolls."

The question presented is whether a publication beginning on July 1st and continued for six days, but omitted on the 4th, is sufficient; in other words, whether a publication for six days out of the first seven of the month answers the requirements of this statute. We think it does. The term "forthwith" does not in all cases mean "instanter," but may and often does have a relative meaning, and may mean "all reasonable celerity," or "all reasonable dispatch," "with reasonable and proper diligence." 13 Am. & Eng. Enc. Law (2d. Ed.), p. 1157 et seq. And what is a reasonable time depends on the circumstances of each case. *Anderson* v. *Goff*, 72 Cal. 73. We do not think that the decision to omit the publication on a legal holiday ought to be regarded as such a delay as to avoid this notice. It is to be noted that the statute does not in terms provide that the six publications shall be on

consecutive days. And while, in ordinary practice, the publications would naturally occur on successive days, yet, if they do in any case occur so promptly that they may be said to have taken place with all reasonable promptness, this is sufficient. It follows that the complainant has no reason to complain of the decree below.

The decree is affirmed, with costs.

The other Justices concurred.

LOWE v. CITY OF DETROIT.

TAXATION—LEVY—VALIDITY—DETROIT CHARTER—CONSTRUCTION.

Failure of the board of assessors of Detroit to sign the tax roll before transmission to the council renders void the levy made thereon. Charter 1893, §§ 167, 168.

Appeal from Wayne; Rohnert, J. Submitted October 7, 1904. (Docket No. 43.) Decided December 22, 1904.

Bill by Susan A. Lowe against the city of Detroit and another to cancel certain tax sales. From the decree rendered, complainant appeals. Reversed in part.

Walker & Spalding, for complainant.

Timothy E. Tarsney (*John W. McGrath*, of counsel), for defendants.

GRANT, J. This bill is filed to set aside certain tax sales for the years 1890, 1895, and 1900 on account of defective notices under charter provisions, and to cancel a tax of 1897 for the reason that the assessors did not sign the tax roll before transmission to the council. No other questions are raised. The objections to the notices are the same as those in *Walker* v. *City of Detroit*, ante, 538, and

are determined by the opinion in that case. The tax roll for 1897 was not signed when presented to the council, but was signed after the approval of the council, and before its delivery to the receiver of taxes.

The charter (Detroit Charter 1893, p. 95, § 167) requires the board of assessors, after completing the roll, to sign it on or before the third Tuesday in April of each year, and return the same to the board of aldermen. Upon its receipt by the board of aldermen that body and the board of councilmen are required to meet and sit together as a board of review, hear appeals, etc. Id. § 168. The board of review had nothing before them to act upon except an unsigned paper. It was not a tax roll until signed. *Thompson* v. *City of Detroit*, 114 Mich. 502.

The decree as to this tax must therefore be reversed, and decree entered for complainant.

The other Justices concurred.

EMERY *v.* IONIA CIRCUIT JUDGE.

MANDAMUS — JUDICIAL DISCRETION — DISSOLVING INJUNCTION — DRAIN COMMISSIONER.

Where a temporary injunction is granted on a bill alleging that complainant is owner in fee of certain land upon which the drain commissioner is about to cast large quantities of water to its injury, and a motion to dissolve, on the ground that complainant is not the owner of the fee, is denied after a showing that he, in fact, holds under a land contract, the decision of the circuit judge will not be controlled by mandamus.

Mandamus by Fred Emery and Marvin E. Kenyon, drain commissioner of Ionia county, to compel Frank D. M. Davis, circuit judge of Ionia county, to dissolve a

temporary injunction. Submitted November 15, 1904. (Calendar No. 20,788.) Writ denied December 22, 1904.

Nichol & Locke, for relators.

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

MOORE, C. J. Roswell C. Chickering filed a bill in chancery, alleging, in substance, stated briefly, that he was the owner in fee of certain real estate; that Marvin E. Kenyon, as drain commissioner, and Fred Emery, as contractor, by means of a drain were about to bring to his premises a large quantity of water without making any adequate facilities for carrying it away, thereby flooding arable land, and that he would suffer irreparable wrong if they were permitted to do so, and praying for an injunction. A preliminary injunction was granted by Judge Davis.

Defendants answered the bill, denying its allegations, and moved to dissolve the injunction (we quote from the motion) "for the reason that the court in allowing said restraining order or injunction was misled by the bill of complaint in said cause, and induced to grant the same contrary to law, said bill setting forth upon its face that the above-named complainant was the owner in fee simple of the lands described in the bill of complaint, whereas in truth and in fact said complainant was not the owner in fee of the said land."

This was the only reason assigned. Affidavits and counter affidavits were filed, from which it was fairly established that complainant was in possession, not as the owner in fee, but under a land contract he had from the owner in fee. Judge Davis was of the opinion that complainant had interests in the land which entitled him to the protection of a court in chancery, if upon the final hearing he should establish the allegations of his bill of complaint, and overruled the motion to dissolve the injunction. Mandamus is now sought to compel him to dissolve the injunction. We have examined with care all of the files and the

briefs of counsel, and think a showing is not made which would justify us in overruling the action of the circuit judge.

The application for the writ is denied.

The other Justices concurred.

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KENYON *v.* BOARD OF SUPERVISORS OF IONIA COUNTY.

1. MANDAMUS—REVIEW—CONCLUSIVENESS OF ANSWER.
   On certiorari to review the refusal of a circuit judge to issue a writ of mandamus, the application for which was heard on petition and answer, the answer must be taken as true for the purpose of the case.

2. DRAINS—CONSTRUCTION—USE OF SEWER PIPE.
   The drain law (2 Comp. Laws, § 4338) authorizes the use of sewer pipe in the construction of drains when necessary.

3. SAME — COMMISSIONER — LETTING CONTRACTS — DUTY WHERE SEWER PIPE IS USED.
   Where sewer pipe is to be used in the construction of a county drain, bids should be received for furnishing it. Act No. 272, Pub. Acts 1899, chap. 4, § 3.

4. SAME — DEFECTIVE PROCEEDINGS — REMEDY OF SUPERVISORS — REFUSAL TO SPREAD TAX.
   Where the proceedings of the drain commissioner are defective in matters that do not occur until more than 10 days after his final determination, the board of supervisors may refuse to spread the tax, the remedy by certiorari provided by Act No. 272, Pub. Acts 1899, chap. 5, § 3, not being applicable to such a case. 1 Comp. Laws, § 3860; 2 Comp. Laws, § 4356.

Certiorari to Ionia; Davis, J. Submitted November 15, 1904. (Calendar No. 20,789.) Decided December 22, 1904.

Mandamus by Marvin E. Kenyon, drain commissioner

of Ionia county, and Fred Emery to compel the board of supervisors of Ionia county to order a drain tax to be spread upon the rolls of certain townships. To review an order denying the writ, relators bring certiorari. Affirmed.

Nichol & Locke, for relators.

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

MOORE, C. J. This is certiorari to compel Judge Davis to issue a writ of mandamus, directed to the board of supervisors of Ionia county, directing them to order a certain drain tax spread upon the tax rolls of the townships affected by the drain. A petition was filed in the court below, an order to show cause was issued, an answer was filed in behalf of the board of supervisors, a hearing was had, and the application for a writ of mandamus was denied. Afterwards the case of *Horn* v. *Board of Sup'rs of Livingston Co.*, 135 Mich. 553, was decided. An application was then made to Judge Davis, asking for a rehearing of the motion referred to. After argument this application was denied, and the cause was brought to this court by writ of certiorari. The parties stipulated to waive any irregularity with reference to the last hearing before Judge Davis, which did not relate to the merits of the controversy.

The answer of the board of supervisors, which must be taken as true for the purpose of this case (see *City of Benton Harbor* v. *Railway Co.*, 102 Mich. 386; *Keeler* v. *Deo*, 117 Mich. 1), in substance states: That the original application presented to the county drain commissioner did not ask for the use of drain tiles or sewer pipe in the construction of the drain. That the first order of determination omitted any reference to the use of tiles or sewer pipe in its construction. That on the 13th of July, 1903, a notice was issued of the letting of said drain, and that bids would be received therefor on the 31st of July, 1903, and that the assessment for bene-

fits would be subject for review. That in said notice no mention was made of the use of tiles or sewer pipe in the construction of said drain. That on the 30th of July the drain commissioner divided said drain into four sections for the purpose of letting the work, and on the 31st of July the drain commissioner let the contract for the construction of the first three of the said sections to Fred Emery (one of the parties to this litigation) for the sum of $624; stating verbally at the time that tiles or sewer pipe would not be used in the construction of these sections of the drain, but that they would be used in the construction of section 4. The bid and contract included the digging of the drain, the hauling of sewer pipe from the railroad station to the place where the same were to be used in the drain, and placing the sewer pipe in the drain. He also stated orally that he would supply the requisite amount of sewer pipe needed in the drain, and thereupon the job of constructing section 4 and hauling the sewer pipe was let to the said Fred Emery for the sum of $910. That no offer was made to receive bids for furnishing the sewer pipe, and that no bids were ever received by the drain commissioner to furnish them. The answer states that said drain commissioner unlawfully assumed the right to supply the sewer pipe without receiving bids at a public bidding, allowing competition therefor. That on the 10th of August, 1903, the drain commissioner computed the entire cost of the drain, and included therein, for the construction of sections 1, 2, and 3, the sum of $624; the amount of the contract for the construction of section 4, $910; and 4,000 feet 12-inch sewer pipe for section 4, $1,000. That on the 31st of July, 1903, the commissioner determined that 35 per cent. of the cost of said drain should be borne by the township of Orleans, and a like amount by the township of Otisco, and the balance between the several parcels of land benefited thereby. That on the 10th of August, 1903, he apportioned 41 per cent. of the cost of said drain to the township of Orleans, and 59 per cent. to the township of Otisco. That on the same

day he issued his several drain assessment rolls, and included therein the sum of $1,000 for supplying the sewer pipe to be used in the construction of section 4 of the drain. The answer alleges that said sum assessed is unauthorized by law, and is illegal and void, for the reason that in the various proceedings no notice was given that sewer pipe would be used in the construction of said drain until the day of the letting thereof, and because said drain commissioner did not receive bids for furnishing the sewer pipe needed in said drain, and because he intended and expected to pay for the same out of the $1,000 included in said assessment. The answer also alleges that said sum of $1,000 is excessive, and that the sewer pipe could have been readily obtained for the sum of $925, if bids had been asked therefor. The statute undoubtedly authorizes the use of sewer pipe in the construction of these drains when necessary. 2 Comp. Laws, § 4338.

Act No. 272, Pub. Acts 1899, chap. 4, § 3, provides:

"The county drain commissioner shall thereupon proceed to receive bids and let contracts for the construction of the sections, and make contracts with the lowest responsible bidder, giving adequate security for the performance of the work."

We think a fair construction of the provisions of the statute to which we have referred indicates the purpose of the legislature to require bids for the furnishing of material where the situation is like that disclosed by the answer filed by the board of supervisors. See 20 Am. & Eng. Enc. Law (2d Ed.), pp. 1165, 1166. See, also, *City of Detroit* v. *Wayne Circuit Judge*, 79 Mich. 384.

We then come to the question, Did the board of supervisors have the right to refuse to spread this tax? It is claimed by the relators that, under the case of *Horn* v. *Board of Sup'rs of Livingston Co.*, 135 Mich. 553, even though the proceedings were defective, the board of supervisors was not authorized to pass upon the irregularity of the proceedings and refuse to put the tax upon the rolls. In answer to that contention, counsel for respondent say that

while, by the act of 1899 (Act No. 272, chap. 5, § 3), the proceedings, if defective, shall be subject to review upon certiorari, this remedy is confined to defects which existed at the time of the final order of determination of the drain commissioner establishing said drain, as provided in section 1, chap. 4, in said act. It is contended that the acts which make the proceeding fatally defective did not occur until after more than 10 days had elapsed after the final order of determination was made by the drain commissioner, and that the remedy allowed by the act of 1899 could not apply under these circumstances, for the reason that the law does not require an impossibility. We think this position is well taken—that the relators would be without relief if relegated to that remedy, and that section 3860, 1 Comp. Laws, and section 4356, 2 Comp. Laws, apply to this situation. See *Zink* v. *Board of Sup'rs of Monroe Co.*, 68 Mich. 283; *Tinsman* v. *Board of Sup'rs of Monroe Co.*, 90 Mich. 382; *Smith* v. *Board of Sup'rs of Livingston Co.*, 115 Mich. 202. It is proper to add that no work had been done to construct said drain at the time this proceeding was commenced.

The order of the circuit court denying the writ of mandamus is affirmed.

The other Justices concurred.

HEENAN *v.* FOREST CITY PAINT & VARNISH CO.

1. APPEAL AND ERROR—FAILURE TO EXCEPT—ESTOPPEL TO ALLEGE ERROR.

Defendant cannot object to the setting aside of a default entered for failure of plaintiff to file a bill of particulars, where the record does not show an exception to the ruling, and the order setting aside the default was acted on by defendant in amending his plea.

2. CHATTEL MORTGAGES—TROVER BY MORTGAGEE—EVIDENCE.
In trover by a chattel mortgagee against a creditor of the mortgagor to recover a part of the mortgaged property, which he had replevied, a draft which furnished the consideration for the mortgage was admissible in evidence.

3. SAVING QUESTIONS FOR REVIEW—FAILURE TO EXCEPT.
Rulings to which no exceptions are taken cannot be reviewed on error.

4. WITNESSES—REFRESHING RECOLLECTION—MEMORANDUM.
A witness may use a memorandum in his own handwriting to refresh his recollection.

5. HARMLESS ERROR—EVIDENCE—DIRECTED VERDICT.
Errors in admitting evidence are immaterial in a case where a verdict was properly directed for the appellee.

6. CHATTEL MORTGAGES — FAILURE TO FILE — VALIDITY AS TO THIRD PERSONS.
An unfiled bona fide chattel mortgage is valid as to a creditor whose claim accrued prior to its execution.

7. SAME—VALIDITY—FRAUD OF MORTGAGOR.
A bona fide chattel mortgage for value on goods previously obtained by the mortgagor by fraud, which is filed before the seller of the goods has taken any steps to recover them, is entitled to precedence over the claim of the seller.

Error to Macomb; Tucker, J. Submitted November 16, 1904. (Docket No. 91.) Decided December 22, 1904.

Trover by John Heenan against the Forest City Paint & Varnish Company and Clarence Dryer. There was judgment for plaintiff on a verdict directed by the court, and defendants bring error. Affirmed.

Martin Crocker, for appellants.

Byron R. Erskine, for appellee.

MONTGOMERY, J. The facts in this case, so far as material for an understanding of the points involved, are as follows: Frank E. Horning, a young man of 26 years, was engaged in the retail hardware business at the village of Lenox. He desired to enlarge his business, and in-

duced his father, James L. Horning, to put up a brick store building in said village for that purpose. James L. Horning had no connection with the business of his son, but was engaged in the manufacture of bale wire in a small way in the same village. The father purchased some lots for the proposed building, taking the title in the name of himself and the son as tenants in common, and the erection of the store was commenced. It became necessary to negotiate a loan for building purposes, and application for the same was made to plaintiff, who resides at Dryden, Mich., and conducts a private banking business at that place, and who was acquainted with James L. Horning; having had business relations with him for a number of years. On May 6, 1901, plaintiff loaned them $2,000; taking a mortgage on the real estate. The money for this loan was not paid over at once, but credit was given on the books of the bank, and it was checked out as the building progressed. November 4, 1901, James L. and Frank E. Horning went to Dryden to negotiate a further loan of $1,000 upon the building; requiring an additional sum for building purposes. This loan was also arranged with plaintiff, but, as the wives of the proposed mortgagors were not present, it was arranged that Mr. McCluskey, plaintiff's bookkeeper and cashier, should shortly come to Lenox and perfect the loan. At the same time Frank E. requested a loan to himself of $1,000 upon his stock of merchandise in the store. He had made overdrafts at Mr. Acker's bank at Richmond—the Richmond Bank—and was anxious that these overdrafts be taken care of, to prevent his checks from going to protest. Frank E. was little known to plaintiff, and, on James L. indorsing the chattel-mortgage note, the loan was made. The chattel mortgage and note were prepared by Mr. McCluskey, and then and there executed. Upon the execution of the chattel mortgage and a note, a draft of $900 was given Frank E. Horning. The remaining $100 was not paid in money. The fact that the $900 was paid is not disputed.

On November 11, 1901, Mr. McCluskey, as per arrangement, went to Lenox, and made the $1,000 real-estate mortgage on the store building. The consideration for this mortgage was a note of $500 that had been previously given, the accrued interest, a draft of $460.68, and a charge of $25 as bonus. These real-estate mortgages and the chattel mortgage are entirely distinct transactions, and have no connection with each other. The money thus obtained by Frank E. Horning was all used in his business, but evidently afforded him but temporary relief. On November 7, 1901, he gave a bill of sale of his stock to his father, who was a large creditor, and who thereupon took possession, and endeavored to save something out of the business by compromising with creditors. Shortly after obtaining possession, James L. wrote a letter to plaintiff, informing him of the bill of sale; and Mr. McCluskey came to Lenox on December 18, 1901, and had James L. and Frank's wife sign the chattel mortgage, and filed it in the proper townships. This mortgage had not been filed before, as plaintiff testified, simply through inadvertence; he being not at all uneasy about the security. The goods had all been sold and delivered before the chattel mortgage was executed, and no credit was extended by defendant or any one else while unfiled.

In December, 1901, Mr. Adams, representing the defendant company, came to Lenox in reference to this claim, and endeavored to get James L. Horning to return the goods. The latter stated that he had no right to do so, inasmuch as Mr. Heenan had a chattel mortgage on all the goods. The defendant then claimed the goods were obtained by false representations, and proceeded to replevy the goods, but did not tender back the money received as part of the purchase money therefor. After the goods were removed from the store, plaintiff made a demand for the same, and, upon the demand being refused, brought trover for their value and recovered judgment; the trial judge directing the jury to return a verdict for

the value of the goods at wholesale, adding the cost of the cartage.

Some testimony was given below tending to show misrepresentations on the part of Frank E. Horning at the time of the purchase of the goods. There is no evidence that plaintiff knew anything of the alleged fraud. Besides plaintiff's positive evidence to that effect, and that he had never before heard of the defendant company, it was made to appear by defendant's evidence that he could not have known of any such claim, because it was not made until December, 1901. Mr. Adams, defendant's agent, testified that he had exclusive charge of this matter; that after the sale he was not at Lenox again until he heard of the bill of sale to James L. Horning; that it was not until December 13th, when he came to Lenox, that the defendant first discovered the falsity of the alleged misrepresentations; and that no claim of fraud was made until December 18, 1901, defendant company up to that time believing the statements to be true.

There are 29 assignments of error, but, as these are grouped by the counsel for appellant, we need not discuss the assignments in detail.

The first point discussed is that arising over the ruling of the court in setting aside plaintiff's default, which defendant had entered because of plaintiff's failure to furnish a bill of particulars. The answer to this contention is that not only does the record fail to show an exception to the ruling, but the inference is a fair one that defendant was content with the order made, and acted upon it in amending his own plea, which was apparently all that defendant asked as a condition to the vacation of the default.

It is next argued that error was committed in admitting in evidence the draft which furnished the consideration of the chattel mortgage. The testimony was plainly competent, but here, again, the record fails to show any exception to the ruling.

Error is assigned upon the ruling of the court admitting

in evidence an affidavit of renewal of the chattel mortgage. It is clear that this ruling did not damage defendant's case, if the court was right in its main ruling; but this point is open to the same answer as that given to the preceding one—no exception appears to have been taken to the ruling.

The next ruling to which an exception was taken was one permitting a witness to use a memorandum in his own handwriting for the purpose of refreshing his recollection. This ruling was right.

None of the other minor assignments merit discussion. Many of them are not based on proper exceptions, and, when exceptions are taken, the questions relate to rulings which became immaterial if the court was justified in directing a verdict.

We think the ruling directing a verdict was clearly right. The mortgage was given for a valuable consideration. There was no notice to or knowledge possessed by plaintiff of any fraud committed by Horning. Before any action was taken by defendants to reclaim the goods, their agent had notice of the mortgage which was filed at about that time. No credit was extended, nor was any action of defendant taken, on the strength of the absence of the mortgage from record. The mortgage was therefore good as against defendant. *First Nat. Bank* v. *Guntermann*, 94 Mich. 125. That the plaintiff was entitled to priority over defendant—the plaintiff being a bona fide mortgagee, and defendant having, by means of the purchaser's fraud, been induced to invest the latter with indicia of ownership—see *Zucker* v. *Karpeles*, 88 Mich. 430; *Hoffman* v. *Railway Co.*, 125 Mich. 201–205.

The judgment is affirmed.

The other Justices concurred.

CAVANAUGH *v.* ROBINSON.

1. ATTORNEY AND CLIENT—CONTINGENT FEE—CONTRACT—CONSTRUCTION.

   A contract by an attorney to procure payment of a legacy to the heirs for a contingent fee based on a percentage of the amount collected contemplates that the attorney shall perform whatever services may be necessary, including services in the taking of an appeal rendered necessary by an erroneous decision of the trial court.

2. SAME—QUANTUM MERUIT.

   Where an attorney contracted with the agent of certain heirs to get the assets of the estate paid over to them for a contingent fee of 25 per cent. of the amount collected, and to pay to the agent one-third of such contingent fee, the fact that the agent declined to furnish a bond on an appeal, rendered necessary by an erroneous decision of the trial court, was not a breach of the contract entitling the attorney to recover on a quantum meruit, merely because he successfully prosecuted an appeal not expressly provided for in the contract, without assistance from the heirs or their agent, and was enabled thereby to make the collection.

Error to Kalamazoo; Adams, J. Submitted November 16, 1904. (Docket No. 96.) Decided December 22, 1904.

Assumpsit by Thomas J. Cavanaugh against Ellen Robinson and others for services rendered. There was judgment for plaintiff for less than the amount claimed, and he brings error. Affirmed.

Alfred J. Mills, for appellant.

Howard & Howard, for appellees.

MONTGOMERY, J. The controversy in this suit is over attorney's fees claimed by the plaintiff in a suit for the construction of the will of Jane Korth, wherein the defendants in this suit were complainants and Mary Finch

was defendant. (*Robinson* v. *Finch*, 116 Mich. 180). The defendants herein are residents of Ireland. J. H. Hubbell & Co., of New York City, acted as their agents in the litigation in regard to the will, and are still acting as their agents in this matter. J. H. Hubbell & Co., acting as agents as aforesaid, first wrote to James E. Chandler, then an attorney at Paw Paw, Mich., in regard to the will controversy. Mr. Chandler was at that time a partner of Judge Heckert, and Judge Heckert was then the probate judge of Van Buren county, and Mr. Chandler, for that reason, not caring to act in the case, recommended to Hubbell & Co. that they employ the plaintiff in this case, Thomas J. Cavanaugh, who was then, and still is, a practicing attorney at Paw Paw.

The arrangement between Hubbell & Co. and said Cavanaugh was all by correspondence, and we insert the letters that we deem to be material to an understanding of the issue involved. The first is as follows:

"NEW YORK CITY, Feb. 17, 1896.

"THOMAS J. CAVANAUGH, Esq.,
"First National Bank Building,
"Paw Paw, Michigan.

"*Dear Sir:* In further acknowledgment of your report of December 7th, which we communicated to our correspondent in Ireland, we regret that he has advised us that his clients are not in a position to advance the necessary funds to contest the claim of the Weldens to the assets of the estate. As we judge from your report that it will be necessary to file a bill in chancery to get a construction placed upon the will, we should like to have you advise us if you would undertake the necessary legal work on a contingent fee. Our clients are too poor to pay any court costs, or any fee for services, unless chances of success warrant you in undertaking to prosecute their interests, your fee to be wholly contingent upon your succeeding. We wish you would advise us what would be your charge in case you could get the assets paid over to the heirs of Thomas Robinson. * * *

"We shall be pleased to hear from you at your earliest convenience.

"Yours truly,
"J. H. HUBBELL & Co."

The material portion of Mr. Cavanaugh's reply to this letter reads as follows:

"PAW PAW, 2—19—1896.

"J. H. HUBBELL & Co.,
"309 Broadway, New York.

"*Dear Sirs:* Replying to your favor of the 17th inst., will say that * * * we would be willing to undertake the collection of these legacies upon a contingent fee, provided clients will forward the amount of actual costs, that is the court costs, etc. It would be necessary that $10 be advanced towards the costs, upon receipt of which we will prepare a bill and have a construction placed upon the will. Should it turn out that we were unsuccessful, clients would have to pay taxable costs, which would amount to about $40. Should our fees be contingent as indicated above, we should expect to charge clients 25 per cent. of amount collected, one-third to go to you and two-thirds to be retained by ourselves. If this matter is to be contested it ought to be attended to at once. It will take some little time to prepare a bill and some further time to have it signed by some one of the legatees. * * *

"Very truly yours,
"T. J. CAVANAUGH."

Hubbell & Co.'s reply reads as follows:

"NEW YORK CITY, March 2nd, 1896.

"THOS. J. CAVANAUGH, Esq.,
"First National Bank Building,
"Paw Paw, Mich.

"*Dear Sir:* We are in receipt of your letter of the 19th ult. inclosing us a copy of the will of Jane Korth, deceased, for which we thank you.

"As we wrote you on February 17th, our clients are not in a position to advance the amount necessary to enable us to file a bill in your chancery court to get a construction upon the will, and before rendering ourselves liable for so large a sum as $40, we shall much appreciate your giving us as fully as you can the different points, both pro and con, upon which the judge would be called to pass. If you will be good enough to itemize the statements on a separate sheet, we shall be glad to submit them to one of our correspondents at Detroit or Grand Rapids and request him to favor us with his views, and should his findings be favorable, we will advance you the neces-

sary court costs to file a bill in the chancery court, asking for a construction upon the clause of the will.

"We shall be pleased if you will let us have a statement of the different points at issue at the very earliest date possible.

"Yours truly,
"J. H. HUBBELL & Co."

Hubbell & Co. later wrote to Cavanaugh a letter as follows:

"NEW YORK CITY, July 14, 1896.
"THOMAS J. CAVANAUGH, Esq.,
"Paw Paw, Mich.

"*Dear Sir:* We have delayed answering your communication in regard to proceedings in the above matter, until we could hear from the legal representatives in Ireland. We obtained an opinion from a well-known lawyer in Detroit in regard to the position claimed by you, and he is of the opinion that your views are correct.

"We have, therefore, decided to advance such taxable costs, amounting to not more than $40, as may be necessary to prosecute the suit, upon the terms mentioned in your favor of February 19th.

"Please, therefore, proceed at once and advise us when you desire us to remit the costs in the case.

"Yours truly,
"J. H. HUBBELL & Co."

Cavanaugh's reply is as follows:

"PAW PAW, 7—31—1896.
"J. H. HUBBELL & Co.,
"New York City.

"*Dear Sirs:* In re Jane Korth estate. We will prepare bill and file just as soon as we can reach the matter, which will be in a short time now.

"Very truly yours,
"T. J. CAVANAUGH."

In pursuance of the contract made in these letters, the plaintiff prepared and filed a bill in the circuit court for the county of Van Buren for the construction of the will of Jane Korth. This case went to final hearing, and the case was dismissed by Judge Buck, who was then presiding judge for that circuit. Mr. Cavanaugh's letter an-

nouncing the result of the suit in the circuit court is as follows:

"PAW PAW, 3—23—1897.

"J. H. HUBBELL & Co.,

"309 Broadway, New York.

"*Dear Sirs:* In re Jane Korth estate. Yesterday morning the court handed down a verbal opinion in the Robinson-Finch case, holding that a decree should be entered for the defendants, dismissing our petition. We still think we are right in the premises, and are willing to take our chances and to perform the labor of taking this case to the Supreme Court contingently, provided, of course, that petitioners will pay actual costs. A further bond will have to be filed if it is taken to the Supreme Court. Kindly let us hear from you as to what you want done in the matter, and greatly oblige,

"Very truly yours,

"T. J. CAVANAUGH."

Hubbell & Co.'s letter in reply is as follows:

"NEW YORK CITY, March 25, 1897.

"THOS. J. CAVANAUGH, Esq.,

"First National Bank Building,

"Paw Paw, Mich.

"*Dear Sir:* We are in receipt of your favor of March 23rd and contents noted. Please inform us what the actual costs are thus far and the amount of the bond necessary to be filed to take the case to the Supreme Court, and also the proper costs of the appeal for printing, etc.

"Please send us the name of the trial judge, also in what court the trial took place and please send us a copy of your and also your opponent's brief used on the trial. We may wish to submit them to counsel.

"Yours truly,

"J. H. HUBBELL & Co."

Later Hubbell & Co. wrote as follows:

"NEW YORK CITY, April 29, 1897.

"THOMAS J. CAVANAUGH, Esq.,

"Paw Paw, Mich.

"*Dear Sir:* After due reflection we have determined that the amount involved does not warrant us in giving a bond for costs. Our counsel advises us, that if Thomas

Welden is still living, construction of the will is of trifling importance and it may not be worth while to appeal, but if he is dead and the property is worth it, he would appeal.

"J. H. HUBBELL & Co."

Hubbell & Co., at the commencement of the litigation in the circuit court, advanced $15 on the costs. The costs in the circuit court amounted to $47.35, and on May 27th Hubbell & Co. remitted the balance of $32.35. Mr. Cavanaugh, without any further or different arrangement, proceeded himself to appeal the case to this court, and this court decided the case in his favor. *Robinson* v. *Finch*, 116 Mich. 180. He announced the result of the decision of this court to Hubbell & Co. by letter on the 21st day of May, 1898.

Hubbell & Co.'s reply to this letter reads as follows:

"NEW YORK CITY, May 23, 1898.

"THOS. J. CAVANAUGH, Esq.,

"Paw Paw, Mich.

"*Dear Sir:* We are in receipt of your favor of the 21st inst., inclosing opinion in the case of Robinson vs. Finch, for which we thank you. We heartily congratulate you upon having the courage of your convictions in carrying this case up on appeal.

"Yours truly,

"J. H. HUBBELL & Co."

After the decision of this court in the will case, Hubbell & Co. furnished Mr. Cavanaugh powers of attorney from the defendants, and Mr. Cavanaugh thereupon proceeded under partition proceedings to have the property involved in the will sold. The property sold for $1,255. Mr. Cavanaugh then sent to Hubbell & Co. a bill for his services and disbursements. This bill was not limited in its charges for services to the 25 per cent. agreed upon, but was made up of per diem charges for trial of the case at the circuit and in the Supreme Court. A controversy arose between the plaintiff and Hubbell & Co. over this bill, and by an arrangement between them this suit was instituted for the purpose of having the rights of the parties settled, Mr. Cavanaugh in the meantime depositing

with the First National Bank of Paw Paw the amount in controversy.

On the trial the plaintiff recovered two-thirds of 25 per cent. of the amount realized, and in addition all disbursements made by him, less $47.37, paid to him by Hubbell & Co. Plaintiff brings error.

The sole question is whether the recovery was properly limited to the two-thirds of 25 per cent., or whether, on the other hand, the plaintiff is entitled to recover on a quantum meruit. The contention is that, fairly construed, the correspondence makes a contract to carry the case to completion in the circuit court for 25 per cent. of the amount recovered and an allowance of not to exceed $40 for costs; that the necessity for an appeal was not considered; and that, as the plaintiff did in fact render services which proved valuable to the defendants, they are bound to pay for them.

There is an appearance of abstract justice in the plaintiff's position. He has rendered very valuable services for his clients, and will probably be somewhat inadequately paid if the judgment below stands. Nevertheless, we must be able to find some authority in the contract before we can enlarge the agreed compensation. It will be noted that the letter of Hubbell & Co. of February 17th asks plaintiff to state what his charge would be "in case you get the assets paid over to the heirs of Thomas Robinson." In answer the plaintiff states the figure at 25 per cent. of the amount collected. It is probably true that neither party understood that it would be necessary to appeal the case to the Supreme Court, but their contract was broad enough to include all work essential to secure the fund to the heirs of Thomas Robinson.

It is suggested that the relations of the parties were changed by the refusal of Hubbell & Co. to put up a bond on appeal. This view is fallacious for two reasons: The original contract contemplating that the plaintiff should perform whatever services were necessary to secure the payment of the legacy to the heirs of Thomas Robinson,

and containing no provision that Hubbell & Co. should bind themselves for any amount in excess of $40, they committed no breach of contract when they declined to furnish a bond on appeal. Secondly, if the view were to be accepted that such refusal amounted to a discharge of complainant, and that the original contract only contemplated a trial at the circuit, and did not contemplate at all the contingency of an appeal, we are wholly unable to find any authority for taking such appeal at the charge of the defendants. It happened that the appeal turned out greatly to their advantage. This alone is not enough to entitle the plaintiff to compensation. There must have been an employment.

We think the court below rightly held that what the plaintiff did was in performance of his special contract, and that the appeal was taken in furtherance of his own interests.

The judgment is affirmed.

The other Justices concurred.

HOPKINS v. CROSSLEY.

1. APPEAL—FINAL ORDER—TIME TO PROSECUTE.

An order allowing compensation to counsel for complainant in a suit relating to the distribution of a fund belonging to a corporation duly dissolved, entered before a final decree of distribution, on proof by affidavit of the services rendered and their value, but not made on an issue joined or heard on pleadings and proofs, is a final order, necessitating the taking of an appeal therefrom within 40 days, under the express provisions of Act No. 243, Pub. Acts 1899, § 144.

2. ESCHEATS—CLAIM BY STATE.

An escheat can be asserted only by the State.

3. CORPORATIONS—DISSOLUTION—DISPOSITION OF FUNDS—FAILURE OF TRUST—ESCHEAT.

The fund remaining in the hands of the Old Volunteer Fire Department of Detroit, on failure of the trust attempted to be created on dissolution of the corporation, did not escheat to the State, but should be divided among the persons recognized as members at the time of the dissolution, and the personal representatives of such deceased members.

Appeal from Wayne; Hosmer, J. Submitted November 16, 1904. (Docket No. 90.) Decided December 22, 1904.

Bill by Robert Hopkins and others against Luke Crossley and others to set aside a trust. On a settlement of the decree, defendants appeal. Reversed.

John J. Speed, for complainants.

Fred A. Baker, for defendants.

HOOKER, J. A perusal of the case of *Hopkins* v. *Crossley*, 132 Mich. 612, will make intelligible the facts upon which the present proceeding rests. A decree was entered in conformity to that opinion, and the cause was remanded to the circuit court for the county of Wayne, where an investigation was made of the claims of persons asserting interests in the fund which was the subject of the litigation.

On February 1, 1904, after the hearing, but before final decree upon the merits, that court made an order allowing compensation from the fund to counsel for the complainants for their services, and directing the trustees to pay the same to counsel. On March 15, 1904, a final decree was made upon the merits of the cause, adjudging that the fund had escheated to the State, and ordering the trustees to pay over to the State the remainder, after deducting allowances therein mentioned. It directed service of the brief upon the attorney general, in case of appeal, which we understand to have been done.

On March 16, 1904, counsel for the trustees filed and served a claim of appeal from the final decree and said order, each being specifically and separately mentioned. The appeal was perfected and entered, and the cause is now before us for consideration upon the final decree, and a motion to dismiss the appeal from the order, which motion was seasonably made, the hearing thereof having been continued to the hearing of the principal controversy.

The statute provides:

"SEC. 144. In all cases disposed of upon pleadings and proofs such appeal shall be claimed by a written claim delivered or transmitted to the register of the court, where such decree or order was entered, within forty days from the settlement of the case on such appeal as provided by law, and in all other cases within forty days from the entry of such decree or final order which said register shall make entry thereof." Act No. 243, Pub. Acts 1899.

It is claimed that, while no testimony was taken at the hearing on the petition of counsel for the allowance for compensation, the facts on which the allowance was made were shown on the hearing of the cause before Judge Hosmer, and that testimony was not settled until April 4, 1904, and it is said that the record covers both phases of the case, and the appeals could be taken within 40 days from either the order making the allowance or the decree of distribution. The order was made upon proof, by affidavit, of the services rendered, and their value. It was not made upon an issue joined, or heard upon pleadings and proofs. It was a final order, and should have been appealed from within 40 days. It follows that the appeal should be dismissed so far as it applies to such order.

By reference to our former opinion (132 Mich. 612), it will appear that the "Old Volunteer Fire Department of Detroit" was incorporated by special act of the legislature (Laws 1840, Act No. 14). Section 6 of the act, as amended in 1869 (3 Laws 1869, Act No. 440), provided the uses to which its fund should be devoted. In the opinion of the learned circuit judge, this corporation was

a public corporation and a public charity, and upon its dissolution its remaining property escheated to the State. He expressed the opinion that, if it were a private instead of a public charity, the result would be the same.

We may observe, in this connection, that an escheat must usually be asserted by the State. No one else can do so. In this case no one has asserted it. On the contrary, the attorney general, though notified of the decree and of this appeal, has not thought advisable to make any claim to this fund on behalf of the State.

Had this fund been donated to the corporation charged with the uses mentioned in section 6 of the act, it could have been sustained as a private charity, for the main, if not exclusive, purpose was to relieve persons interested in the fund, and in such cases the courts do not hold a public charity to have been created. Thus, in *Swift's Ex'rs* v. *Benefit Society*, 73 Pa. St. 362, it was held that "a beneficial society whose benefits and benevolence are confined exclusively to its contributing members is not a charitable use." Two years later (1875) this subject was considered by the supreme court of Massachusetts. *Old South Society* v. *Crocker*, 119 Mass. 1, 22. There a trust was declared, the beneficiaries of which were the grantees themselves, with such as they should associate to themselves, "their heirs and successors." It was said these last words "indicated that the grantor contemplated a permanence of association of the cestuis que trust, and intended to convey the fee in the land." This conveyance was for the purpose of maintaining public worship by a proposed religious society, and yet the court held it not to be a public charity, and, as we have seen, said that the fee was conveyed. See, also, *Attorney General* v. *Federal St. Meetinghouse*, 3 Gray, 50; *Saltonstall* v. *Sanders*, 11 Allen, 464; *Attorney General* v. *Trinity Church*, 9 Allen, 422; *Wells* v. *Heath*, 10 Gray, 17.

In *City of Bangor* v. *Rising Virtue Lodge*, 73 Me. 428, it was held that "the distinctive characteristics of a public charity are that its funds are derived from gifts

and devises, and not from fees, dues, and assessments, and that it is not confined to privileged individuals, but is open to the indefinite public." See, also, other cases cited by counsel, as follows: *Kent* v. *Dunham*, 142 Mass. 216; *Newcomb* v. *Boston Protective Dept.*, 151 Mass. 215. The corporation was held to be a private corporation, and not public, and that it was not a public charity.

In the present instance the fund was derived from members mainly. Whatever its source, it became the property of this corporation. Before its dissolution, it attempted to dispose of it to certain charitable uses, but failed, whereby the legal title remained in the trustees. No one claims that the trustees should hold for their own benefit. Had not the corporation been dissolved, we cannot doubt that it could recover the fund, and devote it to its own purposes, as provided in section 6 of its own organic act. But it was dissolved, and the attempt of its surviving members to reclaim the fund (to which the trustee has no just claim) is met by denial upon the ground that they have no claim upon it, for the reason that it had escheated to the State.

An escheat must rest upon the fact that, the trust failing, there is no one lawfully entitled to the fund. It is true that the corporation no longer exists, but its members and their representatives remain. The doctrine that upon the dissolution of a corporation its real estate reverts, and its personal property goes to the crown, is a hard doctrine that courts of equity have power to relieve against, and we think that such a rule is not generally applied in this country to corporations in which the members had a pecuniary interest. See *Tinkham* v. *Borst*, 31 Barb. 411; *Bacon* v. *Robertson*, 18 How. 480; *Broughton* v. *Pensacola*, 93 U. S. 269; *Towar* v. *Hale*, 46 Barb. 361; 10 Cyc. 1327; 9 Am. & Eng. Enc. Law (2d Ed.), p. 608.

Our examination of the authorities leads us to the opinion that the doctrine of the common law, odious at home, and reluctantly followed in this country, in some instances had a doubtful origin, and, as said in 2 Kent's Commentar-

ies, 307, note *b*, should be considered obsolete. It is a new question in this State, and we feel justified in denying its application here. Statutes implying legislative disapproval of it, and providing against its consequences by authorizing the winding up of the affairs of defendant corporations, were early passed, and are of wide application. We feel justified in saying, therefore, that the fund in the hands of the trustees remained in equity the property of the corporation, and upon its dissolution its existing members succeeded to its rights. They and their representatives are entitled to have this fund divided between them. The persons entitled to share in this fund are those recognized as members at the time of dissolution who are now living, and the personal representatives of such members as have since died; in other words, those of the 116 members who participated in the division in 1887 who now survive, and the personal representatives of those said 116 who have deceased since the dissolution of the corporation.

We think that the trustees should be allowed a reasonable sum for their services since November 10, 1903. They should also be allowed their reasonable disbursements in relation to the administration of the trust, and a reasonable allowance should be made to them for the payment of their counsel, taking into consideration such sums as have been already paid.

The decree is reversed, a decree for complainants entered, and cause remanded, with direction to the circuit court to make distribution in accordance with the opinion. The costs of the appeal will be paid from the fund.

The other Justices concurred.

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O'NEILL *v.* JAMES.

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1. NEGLIGENCE — PERSONAL INJURY — SALE OF EXPLOSIVE SUBSTANCE—QUESTION FOR JURY.

   Where, in an action for a personal injury caused by the explosion of a bottle of champagne cider manufactured by defendant, the testimony for plaintiff tended to show that the explosion could not have occurred if the bottle had been charged in the usual way, and the testimony for defendant that it was so charged and that the explosion might have been otherwise caused, the issue of defendant's negligence was for the jury.

2. SAME—LIABILITY TO THIRD PERSONS—KNOWLEDGE OF DANGER —NECESSITY.

   Where no contractual relations exist between the seller of an article of commerce, harmless in itself, and one who is injured thereby, as in the case of a manufacturer of champagne cider and a bartender who is injured by an explosion of an overcharged bottle thereof, there must be knowledge on the part of the seller of the danger, before he can be held liable.

Error to Houghton; Streeter, J. Submitted November 17, 1904. (Docket No. 104.) Decided December 22, 1904.

Case by Andrew R. O'Neill against Joseph James for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Gray, Haire & Stone, for appellant.

P. H. O'Brien and *W. A. Burritt*, for appellee.

MOORE, C. J. This is an action brought against the defendant to recover damages for the loss of an eye, which the plaintiff claims was caused by the negligence of the defendant. At the time of the injury the plaintiff was in the employ of his brother, in the capacity of bartender.

The defendant was a bottler of champagne cider, and had been for 20 years prior to the injury. The liquid was charged with carbonic acid gas. Some time prior to February 28, 1902, the defendant sold a quantity of champagne cider to the plaintiff's employer, and the cider, when delivered, was put in the ice box. On the 28th day of February, 1902, the plaintiff took a bottle of said cider out of the ice box, and claims that while holding it in his hand, and before any force was applied to it, the bottle exploded, and was blown into a large number of fragments, and a piece of the glass from the bottle struck plaintiff in his eye and destroyed it. The plaintiff recovered a substantial judgment. The defendant has brought the case here by writ of error.

At the conclusion of plaintiff's proofs, and also when the testimony was all in, defendant asked the judge to direct a verdict. This the judge declined to do. A motion was then made for a new trial. In denying that motion, the trial judge states the theory of the parties substantially as follows:

"The pleadings which made the case, which was left to the jury, asserted on the part of the plaintiff that the defendant negligently had sent out an article, in itself dangerous, in place of one in itself safe; that the article furnished by the defendant was a dangerous explosive. The defendant in the case attempted to show that champagne cider—the liquid furnished by the defendant—was a non-intoxicating, harmless drink. The plaintiff made no attempt to show that any deleterious or poisonous substance was put into the liquid, so as to render it at all harmful as a drink; but the plaintiff introduced testimony which he claims tended to establish that the champagne cider sent out by the defendant had become a dangerous explosive, and that it had so become through the negligence of the defendant. The questions to be determined on this motion are whether there was evidence to sustain the case made by the pleadings on the part of the plaintiff, sufficient to cause the case to be submitted to the jury, and, if there was, whether the verdict of the jury is against the clear weight and preponderance of the evidence. Before the plaintiff rested, he introduced testimony to show that he

had sustained an injury by the explosion of a bottle of champagne cider which was manufactured and furnished by the defendant. There was also testimony on the part of experts, without objection on the part of the defendant, that champagne cider, manufactured in the usual way, with the ordinary pressure, was safe. There was also testimony that, if the pressure was increased beyond a certain limit, then the article became dangerous, and dangerous because of the likelihood of an explosion. The experts also testified that an explosion would not occur, under the circumstances as detailed in this case, unless the bottle had been overcharged, and would be likely to occur, had the bottle been overcharged. * * *

"The defendant introduced testimony to show that he had been engaged in the manufacture of champagne cider for a long term of years; that he had never known a bottle to explode under similar circumstances to those testified to on the part of the plaintiff; that the gas with which the water used in making the champagne cider was charged was explosive. The defendant testified that he had never charged champagne cider at a pressure greater than sixty pounds for commercial purposes. His bottler (the one who charged the bottle which caused the injury to O'Neill) had been in his employ some ten years, engaged in the same work. The testimony on the part of the defendant and the testimony on the part of the plaintiff tended to show that the apparatus used by the defendant was the ordinary equipment of such establishments. The defendant urged that the testimony was uncontradicted that no champagne cider was ever bottled by him for sale at a pressure higher than sixty pounds to the square inch, and that there was no evidence whatever of any negligence on the part of the defendant. While the testimony of the defendant and of his bottler was positive that no champagne cider had ever been bottled for sale at a higher pressure, if there were other testimony in the case from which a jury might reasonably infer that this pressure had been exceeded, the question became one which ought to be submitted to the jury for its decision. Opposed to this testimony was the testimony of the experts, in which they maintained that the explosion could have occurred for no reason other than an overcharge."

It was the claim of defendant the explosion, instead of

being caused by an overcharge, might have been caused as follows:

1. The contact of the human hand with the cold bottle taken from the ice box, upon a small area of the cold glass, would have caused a sudden expansion of the small area of the glass, and a consequent cracking of the bottle.
2. The warm air of the room might have caused the same result, independent of the hand.
3. The pressure brought to bear upon the bottle by inserting its neck into the socket of the corkscrew, or by striking the bottle on the corkscrew.
4. Perchance a cracked bottle from some other cause.
5. A bottle inherently weak by reason of varying thickness of glass, or the like.

We think, with reference to the question of negligence, the court was right in holding that, in view of the testimony upon this branch of the case, the issue should be submitted to the jury. See *Merryman* v. *Hall*, 136 Mich. 296; *Schoepper* v. *Chemical Co.*, 113 Mich. 585.

There is, however, a much more serious question in the case. The testimony on both sides is that champagne cider, bottled in such bottles as were used by defendant, at a pressure of 60 pounds or under, is a harmless ordinary article of commerce, usually kept for sale where soft drinks are sold. The record also discloses that defendant did not himself charge the bottle which did the mischief. There is nothing to indicate he ever saw it. The testimony of the bottler is that it was charged in the usual way, and sent out in the usual course of trade, and that he had no knowledge that it was improperly charged. Indeed, his testimony is that it was not improperly charged. There is no testimony tending to establish that defendant had any knowledge that the bottle was overcharged when it left his place of business, or from which an inference could be properly drawn that he had such knowledge. Under this state of facts, counsel for defendant claim:

"The point we raise is that where one is engaged in the manufacturing and selling of an article of commerce harmless in itself, as the proofs show that champagne

cider is, when manufactured and bottled in the ordinary manner, he cannot be held liable to a third person, who stood in no privity of contract with him, because perchance one bottle did, for some reason, burst, in the absence of proof of knowledge of vendor of the defect."

In reply to this claim, counsel for plaintiff say:

"The defendant contends that the plaintiff cannot recover because there was no contractual relation between the parties. It seems to us that it is a sufficient answer to this contention to say that if the defendant knowingly or negligently sent out an article which was of itself a dangerous explosive, and it exploded in the hands of the plaintiff, and injured him, without fault on his part, the defendant is liable, whether there was any contractual relation between the parties or not. If the defendant knew the bottle to be a dangerous explosive, or by proper care on his part could have known it, he is liable. The duty of the defendant was not a duty which he owed to the purchaser only, but which he owed to every person in whose hands the article might pass—a duty which he owed the public."

Plaintiff cites a number of cases in support of his proposition, the first of which is *Weiser* v. *Holzman*, 33 Wash. 87. This case arose on demurrer, and we quote from it at length:

"The next question is, Does the complaint state facts sufficient to constitute a cause of action? Stripped of its verbiage, the complaint alleges that the respondents manufactured, sold, and delivered to one Pratt, under the name of 'champagne cider,' a dangerous explosive, knowing it to be such, without warning Pratt of its dangerous character, or placing on the bottle containing the substance anything to indicate that it was a dangerous explosive, and that the appellant, while in the employ of Pratt, and engaged in his duties as such employé, and without fault or negligence on his part, was injured by an explosion of the substance. Paragraph 5 of the complaint was as follows:

"'That the injuries to said plaintiff were caused by the willful negligence, carelessness, and want of proper care on the part of the defendants, D. Holzman & Co., by reason of said defendant willful-

ly, carelessly, and negligently, and for want of ordinary care in the manufacturing, bottling, preparing, and selling of said champagne cider, in this: That the said defendants failed to manufacture, bottle, and prepare the said champagne cider in the proper degree of temperature; failed to properly charge the said champagne cider with the proper amount of carbonic acid gas and other substances used in the manufacturing and bottling of the same; failed to properly test said bottle as to its strength and endurance to hold said champagne cider; failed to properly label said bottle as to its being an explosive and dangerous substance; failed to explain to the said M. L. Pratt, or said plaintiff, or any one else, of the danger in handling and using said bottle of champagne cider, and the cause for and probability of its exploding and injuring those who came in contact with the same.'

"The prayer was for damages in the sum of $10,000. The record does not advise us as to the ground upon which the trial judge sustained the demurrer, but the respondents urge against its sufficiency two principal contentions, the first of which is that the allegations of negligence are so indefinite as to be meaningless, and the second that there is no causal connection between the negligence alleged (conceding the allegations sufficient) and the injury complained of. The argument that the allegations of negligence are so indefinite as to be meaningless is based upon recitals in the paragraph above quoted. It seems to us, however, that the complaint states a cause of action without that paragraph, and hence it is not very material to inquire just how definite this particular one should have been made; but, conceding it otherwise, we do not think the allegations susceptible to a general demurrer. Clearly, the acts recited therein, when taken with the other acts recited in the complaint, constitute actionable negligence; and, if more particularity of statement was desired and could be required, the remedy was by a motion to make more definite and certain, not by a general demurrer.

"The second objection seems to us to be equally without merit. One who sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, an explosive, or the like, knowing it to be such, without notice to the purchaser that it is intrinsically dangerous, is responsible to any person who is, without fault on his part, injured thereby. The rule does not rest upon any principle of contract or contractual relation existing between the person delivering the article and the person injured, for there is no contract or contractual relation

between them. It rests on the principle that the original act of delivering the article is wrongful, and that every one is responsible for the natural consequences of his wrongful acts. The rule that liability exists in such cases is abundantly supported by authority. In *Thomas* v. *Winchester*, 6 N. Y. 397, it was held that a manufacturer of drugs, who had sold a druggist extract of belladonna under the label 'Extract of Dandelion' was liable to a person injured thereby, who had procured it of the druggist on a physician's prescription calling for extract of dandelion; it appearing that neither the druggist, nor the person taking it, knew that it was other than it was labeled. In *Norton* v. *Sewall*, 106 Mass. 143, it was held that an apothecary who had negligently sold a deadly poison for a harmless medicine called for was liable for the death of the purchaser's servant, to whom it was administered, at the suit of the servant's administrator.

"In *Wellington* v. *Downer Kerosene Oil Co.*, 104 Mass. 64, the principle governing the liability was stated in the following language:

"'It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault.'

"So in *Lewis* v. *Terry*, 111 Cal. 39, it was said:

"'We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. * * * But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts.'

"See, also, 1 Shearman & Redfield on Negligence (5th Ed.), § 117; *Blood Balm Co.* v. *Cooper*, 83 Ga. 457;

Schubert v. *J. R. Clark Co.*, 49 Minn. 331; *Bishop* v. *Weber*, 139 Mass. 411; *Elkins* v. *McKean*, 79 Pa. St. 493; 12 Am. & Eng. Enc. Law (2d Ed.), p. 508, subd. 6."

It will be observed that, where no contractual relations exist, the doctrine is recognized that there must be knowledge of the dangerous character of the thing sold, before defendant can be held liable, and this doctrine is recognized in all the cases to which our attention has been called. Counsel for defendant cite many cases in their brief in support of their contention. We deem it necessary only to cite *Guinea* v. *Campbell*, 22 Quebec Official Law Rep. 257, and *Glaser* v. *Seitz*, 71 N. Y. Supp. 942. We quote from the last-named case:

"Siphons of seltzer water, like the one that exploded, are in common use, and have been manufactured and sold in this city and elsewhere for many years. They are certainly in as common use as steam boilers and gas, and an explosion of a steam boiler or of gas does not necessarily create an inference of negligence sufficient to fix liability on the defendant. The plaintiff, even in such cases, must go further, and prove affirmatively the existence of some defect in construction or condition of the thing which contains the gas or steam, of which the defendant was cognizant, or which he ought to have known by the exercise of proper care in the premises. There is no evidence in this case that the bottle, which was not manufactured, but filled, by the defendant, was not properly constructed, or that it was constructed differently from bottles in which seltzer water is usually sold. Nor is there any evidence that the manner of putting the water in was different from the method in common use, or that the character of the liquid was different from that usually put into such bottles. Gunpowder, dynamite, turpentine, gas, fireworks, and many other explosives are used in the community as merchandise necessary in proper places and for certain purposes; and no one can contend that the sale of these commodities constitutes negligence on the part of the vendor, when the articles are sold by their proper name, indicating their character. There are cases in the books where articles have been sold as apparently harmless, and have turned out to be dangerous and inflicted damage, and the vendor has in consequence been held liable. For

example, where naphtha, which is of an explosive character, was sold for oil, and injury resulted. There the defendant was held liable for the deceit. There is no pretense in this case that the siphon of the seltzer water sold was misnamed, or that any deceit was practiced on the plaintiff. Indeed, it was an ordinary, well-known article of merchandise, sold in large quantities every day. It is common knowledge that bottles containing seltzer or vichy water or champagne or ginger ale or cider will sometimes explode, and that barrels containing cider may explode. But it does not necessarily follow that the vendor of these commodities in such bottles or barrels is liable for the explosion, in the absence of misconduct on his part, which misconduct must be affirmatively proved. For want of such proof, the complaint must be dismissed. Complaint dismissed."

The plaintiff knew that champagne cider, as ordinarily manufactured and sold, was charged with a gas. As we have before stated, there is no proof from which the inference might be drawn that defendant had knowledge that the bottle was improperly charged. The proof offered on the part of plaintiff, as well as that offered on the part of defendant, is that the apparatus used by the employés was a proper one. Under the facts disclosed by the record, a verdict should have been directed in favor of defendant.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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R. K. CARTER & CO. *v.* WEBER.[1]

1. PLEADING — NOTICE OF SPECIAL DEFENSE — GENERAL ISSUE — EVIDENCE ADMISSIBLE.

   In an action on a written contract of employment, evidence that when the contract was entered into, both before and after defendant signed the same, plaintiff's vice-president informed defendant that, unless the latter made a saving of $5,000 under the contract, he would not be required to pay the consideration agreed on, was not admissible under a plea of the general issue, without notice either to prove that the execution of the contract was procured by fraud, or that it tended to show that after the contract was made it was so modified that defendant was released from his obligation. Circuit Court Rule 7 *b*.

2. SAME — APPEAL FROM JUSTICE'S COURT.

   Circuit Court Rule 7 *b* providing for notice of affirmative defense applies to suits originating in justice's court.

3. SAME — ESTOPPEL TO OBJECT.

   The fact that plaintiff, declaring on a written contract, proves without objection the conversation attendant upon its execution, does not entitle defendant, who has given no notice of special defense, to show his version of the conversation, avoiding and contradicting the contract, nor estop plaintiff from objecting that such evidence introduces an issue not pleaded.

4. EVIDENCE — PAROL — WRITTEN CONTRACT.

   A contract of employment, by which defendant agreed to pay plaintiff a salary of $25 per month for four months for keeping him posted on the state of the market and placing orders for goods to the best advantage, and, if the service was satisfactory, to continue the same for the balance of the year, purports to contain all the elements of the agreement, and hence parol evidence of a contemporaneous arrangement that, unless the contract operated as a saving to defendant of $5,000, he should not be bound, is inadmissible.

5. MASTER AND SERVANT — CONTRACT OF EMPLOYMENT — TRIAL — NOTICE TO DISCONTINUE.

   The service proving unsatisfactory, defendant was not obliged

[1] Rehearing denied January 30, 1905.

to notify plaintiff thereof at the end of the four months' period or be bound for the balance of the year.

6. SAME—EVIDENCE—INFERENCE.

Where, during the last three months of the four months such contract was in force, defendant neither obtained nor sought the benefit of the contract, plaintiff was bound to infer therefrom that the employment was unsatisfactory.

7. SAME—RECEIPT OF LETTERS.

Defendant's receipt and failure to answer written communications sent by plaintiff through the mails did not estop defendant from subsequently contending that the services were unsatisfactory, and hence that he was not bound for the additional term.

Error to Wayne; Donovan, J. Submitted November 17, 1904. (Docket No. 234.) Decided December 22, 1904.

Assumpsit by R. K. Carter & Company against Henry C. Weber on a contract of employment. There was judgment for defendant, and plaintiff brings error. Reversed.

Anderson & Rackham, for appellant.

O. E. Angstman, for appellee.

CARPENTER, J. Plaintiff is a corporation organized under the laws of New Jersey. Its business is to make purchases for dealers in hardware throughout the country. Defendant is a hardware dealer in the city of Detroit. May 28, 1901, defendant signed and gave plaintiff this written order, which was dated September 1, 1901:

"We will pay you a salary of $25 per month for four months from date for keeping us posted on market change, placing orders we send you to our best advantage; attending to all and any business we may intrust to you. If this trial is satisfactory, we will continue for the balance of the year to September 1, 1902. Your services to be free from May 28 to September 1."

June 1, 1901, plaintiff gave defendant written notice of the acceptance of this order, and from June 1, 1901, to September 1, 1902, defendant received special weekly letters from plaintiff, stating the condition of the market, its probable immediate future, and prices on different kinds of hardware. Plaintiff, besides sending said weekly letters, placed all the orders sent by defendant except one (and defendant never complained of its failure to place this one), answered all his communications, and held itself ready to attend to all business intrusted to it. After October 3, 1901, defendant did no business through plaintiff, and in no way communicated with plaintiff, and after that date he did not examine, or even open, the letters received from plaintiff. He was not satisfied with the services performed by plaintiff, but he never gave notice of this fact to plaintiff.

Plaintiff commenced this suit in justice's court to recover a year's salary at $25 per month and $5.88 for goods purchased for defendant. Defendant pleaded the general issue. The trial in that court resulted in a judgment for plaintiff for $305.88, the full amount of its claim. Defendant appealed to the circuit court, and the trial there resulted in a verdict and judgment for defendant.

It is to be inferred from the record that this verdict would not have been rendered had the trial judge not permitted defendant to show and the jury to consider, against plaintiff's objection, testimony showing what occurred between defendant and plaintiff's vice-president at the time the latter secured from the former the order heretofore set forth. This testimony tended to prove that at the time the order was taken, both before and after defendant signed the same, said vice-president informed defendant that, unless the latter made a saving of $5,000 under this contract, he would not be required to pay the $25 per month agreed therein.

It was insisted in the court below, and it is insisted in this court, that this testimony was inadmissible under the plea of the general issue. If the only grounds upon

which this testimony was admissible are (*a*) that it tended to prove that the execution of the contract was procured by fraud, and (*b*) that it tended to show that after the contract was made it was so modified that defendant was released from his obligation, the testimony was inadmissible under the general issue. See Cir. Ct. Rule 7, subd. *b*. This rule was applicable, though this suit was originally commenced in justice's court. See *Hubbard* v. *Freiberger*, 133 Mich. 139.

Defendant insists that, as plaintiff introduced on the trial a deposition in which said vice-president testified to said conversation—his testimony differing radically from that of defendant—plaintiff cannot now insist that when said testimony was contradicted it raised an issue not triable in this cause. It is true that a party has no right to retain an unfair advantage resulting from his introducing inadmissible testimony, and that, therefore, trial courts may, if justice requires, permit such testimony to be contradicted. While such a failure to observe the rules of law for the admission of testimony warrants punishment, that punishment should have some relation to the offense. Such misconduct does not make a party an outlaw. It may be said in general, and certainly in this case, that the principles of justice would be subverted, and a punishment inflicted out of all proportion to the offense, were we to hold that the admission of this improper testimony effected a radical change in the issue to be tried.

Defendant also insists that this testimony was admissible as tending to prove what the actual contract was, and he relies upon the cases of *Phelps* v. *Whitaker*, 37 Mich. 72; *Weiden* v. *Woodruff*, 38 Mich. 130; and *Walter A. Wood Mowing & Reaping Machine Co.* v. *Gaertner*, 55 Mich. 453. These cases and many similar cases are discussed and analyzed by Chief Justice MCGRATH in the case of *Cohen* v. *Jackoboice*, 101 Mich. 416–418. It will be seen by reading his opinion that the only one of these decisions which tends to support defendant's position is

Walter A. Wood Mowing & Reaping Machine Co. v. *Gaertner*, supra. That case is authority for the proposition that, when a written order does not purport to contain all the elements of the agreement, parol testimony is competent to prove the omitted portions. In the case at bar the order in question does purport to contain the elements of the agreement (see *Cohen* v. *Jackoboice*, supra), and therefore the case of *Walter A. Wood Mowing & Reaping Machine Co.* v. *Gaertner* is inapplicable. It may also be said that the parol testimony held competent in *Walter A. Wood Mowing & Reaping Machine Co.* v. *Gaertner* did not tend to contradict the terms of the writing. The testimony of defendant under consideration does tend to contradict it. It tends to prove that an obligation which the writing makes absolute was in fact conditional only. The elementary rule of evidence which forbids the introduction of parol testimony to contradict a written agreement is applicable, and excludes the testimony. See *Cohen* v. *Jackoboice*, supra. It follows from this reasoning that plaintiff was entitled to recover $100, viz., for four months' services at $25 each, as agreed in said order.

We think the plaintiff was also entitled to recover the item of $5.88 for money expended in the purchase of goods. Defendant admits that he received these goods, and says that he does not remember having paid for them. This is no proof of payment, even if payment could be proved under the general issue, as to which see Cir. Ct. Rule 7, subd. *b*.

Having determined that plaintiff has a right to recover $25 for each of the four months specified in the order, we come now to the question of its right to recover for the remaining eight months of said year. It will be remembered that defendant agreed, "if this trial [the four months' trial] was satisfactory, we will continue for the balance of the year." It is conceded by both parties that defendant had the right to determine whether the trial was satisfactory. But it is contended by plaintiff that it was defend-

ant's duty to notify it if he was not satisfied with said trial. I do not think it was defendant's duty to notify plaintiff that he did not intend to continue the contract. See *McCormick Harvesting Machine Co.* v. *Cochran*, 64 Mich. 636; *Osborn* v. *Rawson*, 47 Mich. 206; *Walter A. Wood Reaping & Mowing Machine Co.* v. *Smith*, 50 Mich. 565. Even if such a duty existed, plaintiff should have inferred defendant's dissatisfaction from his conduct. From October 3d to January 1st, while the contract was in full force, defendant, to plaintiff's knowledge, neither obtained nor sought the benefit of his contract. From this plaintiff should have inferred, and I think the correspondence indicates that it did infer, that defendant was dissatisfied.

Nor did defendant's receipt and failure to answer the written communications make him liable for the remainder of the year's salary on the principle of estoppel. Defendant did not voluntarily accept these communications. Plaintiff mailed them, and the postman delivered them. Defendant never replied to them, never used them, and never opened them. He simply preserved them. To make the principle of estoppel applicable, it must be held that from defendant's silence—from his failure to answer the communications—plaintiff had a right to infer, and did infer, his desire to continue the contract. Plaintiff had no right to draw any inference from defendant's silence, unless defendant was under an obligation, which the law will notice, to answer his communications. There is no such obligation. While politeness will ordinarily induce a man to answer letters, he has the legal right to ignore them, and to determine for himself whether he will answer them. Cases may arise in which this right is of great value, and the courts are not at liberty to destroy it. No inference may be drawn, therefore, merely because one does not return or answer a letter received by him. See *State Bank of St. Johns* v. *McCabe*, 135 Mich. 479; *Canadian Bank of Commerce* v. *Coumbe*, 47 Mich. 358.

It results from this opinion that the trial court erred in not directing a verdict for the plaintiff for $105.88.

Judgment is reversed, with costs, and a new trial ordered.

The other Justices concurred.

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SMITH *v.* AUDITOR GENERAL.

1. TAXATION — TAX SALES — SETTING ASIDE DECREE — INCLUDING EXEMPT PROPERTY.

That a railroad right of way across petitioner's lands was not excepted from the assessment, decree, and sale of the land for taxes, is not a jurisdictional defect entitling him to have the tax sale set aside. 1 Comp. Laws, § 3893.

2. SAME—NOTICE OF SALE—DEFECTS.

That part of the land in a township was described in the notice of sale for taxes under the proper township and range number, and the remainder, including petitioners' land, was listed as in the city, within the corporate limits of which it was in fact situated, is not a jurisdictional defect. 1 Comp. Laws, § 3893.

3. SAME—AMOUNT OF DECREE—INTEREST—ERROR.

That the original decree for the sale of lands for taxes was excessive, owing to an error in figuring interest, is a mere irregularity, for which the sale will not be set aside.

4. SAME—TITLE ACQUIRED BY PURCHASER.

Where proceedings for the sale of petitioners' lands for taxes included the right of way of a railroad crossing the land, which was exempt, the fact that the grantee of the State released such right of way to the railroad company did not prevent him from conveying to the petitioners, under section 141 of the tax law, all that he had received from the State, as he acquired no valuable interest in such right of way.

Appeal from Marquette; Stone, J. Submitted November 17, 1904. (Docket No. 176.) Decided December 22, 1904.

Petition by Samuel L. Smith and others against Perry F. Powers, auditor general, and Albert S. Heinemann to set aside certain tax sales. From a decree dismissing the petition, petitioners appeal. Affirmed.

M. J. Sherwood, for petitioners.

Charles A. Blair, Attorney General (*Charles W. McGill* and *George L. Hauser*, of counsel), for defendant auditor general.

George P. Brown, for defendant Heinemann.

CARPENTER, J. Petitioners are the owners of the northwest quarter of the southwest quarter of section 9, township 47 north, of range 26 west, in the county of Marquette. The taxes on said land not having been paid for the years 1896 and 1897, the auditor general included them in his petition in 1900, and they were sold in May of that year, and bought by the State. April 2, 1903, they were deeded by the State to respondent Heinemann. August 6, 1903, the petitioners filed this petition, praying that the decree made in 1900 for the sale of these lands be set aside. From a decree dismissing their petition, petitioners appeal to this court.

The grounds upon which we are asked to reverse the decree of the trial court and grant relief are three:

1. Running across petitioners' land was a right of way of a railroad. This right of way, which did not belong to petitioners, but to a railway company, was not excepted; and it is contended that, because this exempt property was included in the sale of petitioners' land, they have a right to have vacated the decree authorizing said sale. We have decided (see *Flint Land Co.* v. *Godkin*, 136 Mich. 668) that the irregularity in including the right of way in the description of petitioners' land would not open the decree to collateral attack. But petitioners insist that rule is not applicable. Here, by a petition in the case in which the

decree was rendered, they seek to have it set aside. In consequence of the following provision in section 70 of the tax law (1 Comp. Laws, § 3893), "*Provided, further*, that no sale shall be set aside after confirmation except in cases where the taxes were paid or the property was exempt from taxation," we have held that even the court which rendered the decree has no authority to set it aside, except for one of the above reasons, or for lack of jurisdiction. See *Spaulding* v. *O'Connor*, 119 Mich. 45; *Berkey* v. *Burchard*, 119 Mich. 101; *Brooks* v. *Auditor General*, 119 Mich. 329; *Shefferly* v. *Auditor General*, 120 Mich. 455; *Blondin* v. *Griffin*, 133 Mich. 647—as to the objection now under consideration. Petitioners had, therefore, no right to the relief sought, unless upon the ground that the property was exempt from taxation. Petitioners' property was not exempt from taxation. The fact that property which was exempt from taxation was described with petitioners' property may have increased their burden of taxation, but this was as to them no more than an irregularity—an irregularity which was cured by the decree, and which does not entitle them to the relief they seek.

2. That the published notice of hearing required by sections 61–63 of the tax law (1 Comp. Laws, §§ 3884–3886) was fatally defective: The facts upon which this complaint is grounded are these: Part of the land in township 47 north, of range 26 west, is situated within, and part without, the limits of the city of Negaunee. In his petition and published notice, the auditor general separated those descriptions which were within from those which were without the city. Under the head, "Township 47 North, of Range 26 West," he listed those descriptions which were outside the city of Negaunee. In a different part of his petition and notice, under the head, "City of Negaunee, Township 47 North, of Range 26 West," he listed those descriptions which were within the city. It must be inferred from the record that petitioners' agent looked only at the first list, and assumed therefrom that petitioner's land was not included in the peti-

tion. If it be assumed that their agent exercised due diligence, petitioners are not, as already shown in this opinion, entitled to relief, unless their taxes were paid, their land exempt from taxation, or there was a lack of jurisdiction to pronounce the decree. It is obvious that the objection under present consideration cannot be sustained unless we hold that the notice in question was so defective as to confer no jurisdiction upon the court. We cannot so hold. It should be presumed that, when the auditor general separately listed the property inside the municipality from that outside, he was adopting a practice which would enable property owners to more readily ascertain whether their property was included in the petition.

3. Complaint is made that, owing to an erroneous computation of interest, the original decree was excessive. If this computation was erroneous, which we doubt, it was nothing more than an irregularity, which, under the rule stated in this opinion, cannot be assailed by petitioners.

Petitioners complain that, in consequence of the release by Heinemann to the railroad company of the right of way heretofore referred to, the latter is not in a position to convey to petitioners, under section 141 of the tax law (1 Comp. Laws, § 3960) all that he received from the State. This contention is without merit. As the right of way was exempt, defendant Heinemann, by his deed from the State, acquired no valuable interest in the exempt right of way. Notwithstanding said release, he is in the position to convey everything of value conveyed by his deed.

The decree appealed from will therefore be affirmed, with costs.

The other Justices concurred.

KEHO *v.* AUDITOR GENERAL.

1. TAX SALES — VALIDITY — CONFIRMATION — JURISDICTIONAL DEFECTS.

To entitle the owner of land sold for taxes to relief after confirmation of the sale, he must show that the taxes have been paid, or that the land is exempt from taxation, or that the court lacked jurisdiction to make the decree.

2. SAME—ASSESSMENT—DESCRIPTION.

Where petitioners owned lots 4 and 5, and 6 inches of lot 6, the fact that the six-inch strip was omitted from the description in the tax roll did not deprive the court of jurisdiction in proceedings for the sale of the land, and was not ground for setting the sale aside after confirmation.

Appeal from Saginaw; Snow, J. Submitted November 15, 1904. (Docket No. 137.) Decided December 22, 1904.

Petition by James J. Keho and Frank Keho against Perry F. Powers, auditor general, and Ezekiel De Camp to set aside certain tax sales. From a decree for petitioners, defendant De Camp appeals. Reversed.

Nathan S. Wood, for petitioners.

Albert De Camp, for appellant.

CARPENTER, J. Since 1882 petitioners have owned lots 4 and 5, and the east 6 inches of lot 6, of P. C. Andres' subdivision of lots 1, 2, 3, 4, block 13, north of Cass street, in the city of Saginaw. This entire property is covered by one building owned by petitioners. In 1899 there was omitted from the description for the tax assessment said six-inch strip, the property being described as lots 4 and 5 of said subdivision. The taxes were not paid, and the lands were included in the proper petition of the auditor general, and in 1902 a decree was taken against them. They were sold on May 6th to the State. Subsequently

defendant De Camp purchased the State bid, and, after the time of redemption expired, received a tax deed. October 13, 1903, he served upon petitioners the statutory notice for reconveyance. (The time for this reconveyance was, by stipulation of the parties, extended to the final adjudication of this case.)

Petitioners then instituted this proceeding by filing a petition in the lower court, praying that the decree entered in 1902 be opened and vacated on the ground that their property had not been correctly described. A hearing was had, and a decree entered granting the prayer of said petition. From this decree defendants appeal to this court.

To entitle petitioners to relief, they must show that their tax has been paid, their land exempt from taxation, or that the court lacked jurisdiction to make the decree. See opinion in *Smith* v. *Auditor General*, ante, 582. As the tax in question was not paid, and as the property was not exempt from taxation, petitioners had no right to the decree appealed from, unless there was a total want of jurisdiction to make the original decree. That decree cannot, therefore, be sustained, unless the omission of the six-inch strip from the description on the assessment roll deprived the court of jurisdiction. It is obvious that it did not. The gravamen of petitioners' complaint is that their land was not properly assessed. We have held (*Muirhead* v. *Sands*, 111 Mich. 495):

"If the owner permits the case to proceed to a decree, * * * the question of whether it [the land] is *properly assessed*, and whether proper steps have been taken to charge the land after assessment, * * * become res adjudicata."

Petitioners call our attention to many authorities. We refrain from discussing them, because none of them hold or indicate that an irregularity like that under consideration is jurisdictional.

The decree for petitioners must be reversed, and their petition dismissed, with costs of both courts.

The other Justices concurred.

D. M. OSBORNE & CO. *v.* WATERLOO.

1. APPEAL AND ERROR—VERDICT—CONCLUSIVENESS.
The verdict, on conflicting evidence, of a properly instructed jury, is conclusive.

2. SAME—RIGHT TO ALLEGE ERROR.
Plaintiff in error cannot complain of a judgment in his favor, though it did not follow the verdict.

Error to St. Clair; Tappan, J. Submitted November 17, 1904. (Docket No. 70.) Decided December 22, 1904.

Assumpsit by D. M. Osborne & Company against Charles B. Waterloo for goods sold and delivered. There was judgment for plaintiff for less than the amount claimed and awarding costs to defendant, and plaintiff brings error. Affirmed.

James A. Muir, for appellant.

Phillips & Jenks, for appellee.

MONTGOMERY, J. The defendant was from January 1, 1900, to January 1, 1901, the plaintiff's transfer agent at Port Huron. His duties consisted of receiving and storing plaintiff's goods and transshipping as directed. He also made some purchases of plaintiff, and sold some goods on commission. On January 1, 1901, defendant owed plaintiff a balance of $167.15. A cash payment of $54.02 has been made since, and to recover the balance of $113.13 this action was brought.

On the trial defendant claimed to recover rent for the buildings in which the goods of plaintiff were stored at the rate of $2 per day for the period from January 1st, when his contract expired, until the date of removal. The plain-

tiff concedes that defendant was entitled to recover a reasonable rental, but insists that there was no binding contract to pay at the rate of $2 per day, which is claimed to be excessive. The defendant relies upon the case of *Thompson* v. *Sanborn*, 52 Mich. 141, holding that when one notified of the terms upon which premises may be occupied proceeds to occupy them a contract to meet the terms or pay the rent demanded is implied. The case was submitted to the jury on this theory.

The plaintiff's counsel insists that there was in this case no basis for the application of this doctrine, for the reason that notice of the defendant's demand was not brought home to the plaintiff. This question is determined by the authority or want of authority of plaintiff's agent, Julius Philip. Admittedly notice was given to him of the defendant's purpose. It is said, however, that while he was an agent of the company in the territory in question, having charge of sales agents, his duties did not include a supervision of the business of transfer agents, or authorize him to make contracts with them for storage.

We have examined the testimony of this witness with great care, and, without attempting to set out the same in detail, we feel bound to say that, taken as a whole, considering his own version as to his duties in looking after the interests of plaintiff in his territory, and communicating with the company facts affecting their interests coming to his knowledge, and his dealings with defendant in this particular matter, together with his conflicting statements as to when this particular fact of defendant's price for rental was communicated to the company, there was enough, at least, to carry the question to the jury, and that, so far from the court being in error in permitting the questions put to the witness to be answered, a searching cross-examination was fully justified.

It is further insisted that the defendant's successor as transfer agent, one Dawson, became responsible for the rent after January 11th, and that in no event should the defendant be allowed to offset more than $22 on this ac-

count. But we find that upon this point also the testimony was conflicting, and the question was fairly submitted to the jury.

After the verdict, which was for defendant, of no cause of action, the circuit judge discovered that he had committed error in an allowance of one small item, $11.63, and entered judgment for plaintiff for that sum, but with costs to defendant. Plaintiff contends that the judgment should have followed the verdict. It is conceded that, as the case originated in the justice's court, the costs were in the discretion of the trial judge, and certainly plaintiff is not in position to complain of a judgment in its favor.

Judgment affirmed.

The other Justices concurred.

CANTON *v.* GRINNELL.

1. APPEAL AND ERROR—THEORY BELOW.
   A cause will not be considered in this court on a theory not advanced below.

2. MASTER AND SERVANT—ASSAULT BY SERVANT—LIABILITY OF MASTER—INSTRUCTIONS.
   In an action for an assault committed by defendants' servants while removing a piano from plaintiff's residence at her husband's request, an instruction that defendants would only be liable for those acts which were committed by the servants in doing those things necessary in getting the piano sufficiently guarded defendants' rights.

3. CONDITIONAL SALES—HUSBAND AND WIFE—TITLE.
   Defendants sold a piano to plaintiff's husband under a conditional sale, reserving the title, but plaintiff testified that she owned the piano and made the payments thereon to defendants. At the husband's request defendants sent truckmen to

the residence to get the piano. There was no default in payments. *Held*, that the fact that the husband made the purchase, and that the agreement was signed by him, did not fix the title to the piano in him as against his wife.

Error to Wayne; Rohnert, J. Submitted November 17, 1904. (Docket No. 107.) Decided December 22, 1904.

Trespass vi et armis by Mary A. Canton against Ira L. Grinnell and Clayton A. Grinnell, copartners as Grinnell Bros. There was judgment for plaintiff, and defendants bring error. Affirmed.

William L. January (*T. E. Tarsney*, of counsel), for appellants.

Charles Kudner and *M. J. Lehmann* (*George Gartner*, of counsel), for appellee.

MONTGOMERY, J. The plaintiff brought an action to recover damages for an assault committed upon her by the defendants' servants while removing from the home occupied by herself and husband a piano which had been sold to plaintiff's husband on a contract retaining title in Grinnell Bros., and authorizing them to retake the piano whenever there was default in payment. The declaration averred that the piano was plaintiff's property, but no recovery for the value of the piano was sought. The court charged the jury that the piano must by them be considered as belonging to plaintiff's husband, unless they had reason to believe that it belonged to plaintiff, and this though it may in fact have been plaintiff's property as between herself and her husband. There was no claim that payments were in arrear. The defendants were taking the piano to their storeroom for storage at the request of W. L. Canton, plaintiff's husband. The plaintiff recovered a verdict and judgment of $300, and the defendants bring error.

The defendants' counsel in their brief state, "An important, and perhaps the most important, question to be considered is whether or not the relation of master and servant existed between the defendants, Grinnell Bros., and the truckmen at the time of the alleged assault;" and it is argued that the men in question were, under the proofs, temporarily in the employ of W. L. Canton and under his control, and that Grinnell Bros. were in no way responsible for their acts.

We have searched the record in vain to find where and in what manner this question was presented to the trial court. On the contrary, the defendants' requests throughout assumed that the truckmen were in defendants' employ. Under these circumstances we cannot be asked to consider the case on a theory not advanced below. It is, however, clear that the testimony was open to the inference that the truckmen were in the employ of and acting under directions of defendants. There was also testimony tending to show that the servants of defendants committed the assault while acting within the general lines of their employment. The jury were instructed that the defendants would be only liable for those acts which were committed by the two truckmen in doing those things necessary in getting the piano. This instruction sufficiently guarded defendants' rights. *Smith* v. *Webster*, 23 Mich. 298; *Fitzsimmons* v. *Railway Co.*, 98 Mich. 257, and cases cited; 20 Am. & Eng. Enc. Law (2d Ed.), p. 169.

Error is assigned upon the ruling submitting the question of the ownership of the piano to the jury. It appeared that the contract for purchase was made by W. L. Canton, and consists of an agreement, signed by him, to buy the piano on certain terms, the title still remaining in Grinnell Bros. It is clear that this did not irrevocably fix the title in Canton as between himself and wife. Her testimony is to the effect that she owned the piano, and that she made the payments to Grinnell Bros. If defendants had been proceeding under their contract on a default in payment, the question of ownership as between the plain-

tiff and her husband would have been immaterial; but this was disclaimed by defendants, who assert that they were acting for Mr. Canton. The circuit judge guarded this question when he said that defendants had the right to proceed upon the supposition that the piano belonged to Mr. Canton unless they had reason to believe that it belonged to the plaintiff. The ownership of the piano was only considered for its bearing upon the assault. No recovery was had or claimed for the value of the piano.

The other questions presented do not call for extended discussion. The case seems to have been carefully submitted to the jury, and a verdict reached which the circuit judge, on a motion for a new trial, refused to disturb. There was sufficient basis for this holding.

The judgment is affirmed.

The other Justices concurred.

HELPER v. MACKINNON MANUFACTURING CO.

138 593
150 2173

138 593
157 1215

1. EVIDENCE — WRITTEN CONTRACT — PAROL EVIDENCE — SALES CONTEMPORANEOUS AGREEMENT.

Where defendant contracted to purchase from plaintiff all the scrap material plaintiff should receive for the ensuing 60 days, at certain prices, evidence in an action on such contract that the real agreement between the parties was oral, and that it was agreed that the amount of iron to be furnished would not exceed the amount furnished the preceding 60 days, was inadmissible to vary the terms of the contract.

2. SAME—CIRCUMSTANCES OF PARTIES.

Evidence was admissible, however, to show the general character of the business of the parties, and to explain what was meant by "all the scrap material" plaintiff might receive.

3. SALES—CONTRACTS—RESCISSION—WAIVER.

Defendant, having agreed to purchase all the scrap iron plaintiff should receive for the ensuing 60 days, on discovering that plaintiff was purchasing iron from wholesalers to deliver to defendant, on account of a decline in price, refused to receive more iron; but later defendant notified plaintiff to begin delivering again, and, after plaintiff had delivered a further quantity, defendant again refused to receive more. *Held*, that defendant's notification to plaintiff to begin delivering again constituted only a waiver of its right to stand on its first refusal, and did not constitute a new contract, waiving plaintiffs' departure from the old.

Error to Bay; Shepard, J. Submitted November 18, 1904. (Docket No. 118.) Decided December 22, 1904.

Assumpsit by Harry Helper and Samuel Helper, copartners as Helper Brothers, against the MacKinnon Manufacturing Company for goods sold and delivered. There was judgment for plaintiffs, and defendant brings error. Reversed.

Simonson, Gillett & Clark, for appellant.

Edward E. Anneke and *Fred W. De Foe*, for appellees.

MONTGOMERY, J. Plaintiffs are dealers in scrap iron and metal. Defendant is in the machine shop and foundry business at Bay City. Suit was brought and judgment rendered on the theory that defendant had refused to accept about 70 tons of iron which it was bound to accept under the terms of a written contract between the parties. The contract reads as follows:

"BAY CITY, MICHIGAN, May 6, 1903.

"MACKINNON MANUFACTURING COMPANY,

"City.

"*Gentlemen:* We propose to furnish you all of the scrap material of the following grades which we may receive for the period of 60 days next ensuing from this date.

"No. 1 cast iron scrap at $18.00 per net ton.
"Stove plate at $14.00 per net ton.
"Yours truly,
"HELPER BROTHERS.
"Accepted.
"MACKINNON MANUFACTURING CO.,
"H. D. MACKINNON,
"Pres. and Genl. Mgr."

On the trial defendant offered to show that the real contract between the parties was verbal, and that the contract was struck off in a hurry to fix the price. Defendant also offered to show that at the time the contract was executed it was agreed that the amount of scrap iron to be furnished would not exceed the amount furnished the preceding 60 days. Both offers of testimony were properly excluded. The contract is plain and unambiguous in its terms, and is complete in itself, when the relations of the parties are understood; and to permit its terms to be disputed by showing that, instead of covering all the scrap iron plaintiffs should receive, the agreement was in fact for a limited amount, would do violence to settled rules. *Cohen* v. *Jackoboice*, 101 Mich. 409. Such testimony would tend to contradict the terms of a written instrument, and is not rendered competent by the fact that the written contract is general in its terms, if the terms employed are sufficient to create a contract susceptible of interpretation in itself. *Stange* v. *Wilson*, 17 Mich. 342; *Harrow Spring Co.* v. *Whipple Harrow Co.*, 90 Mich. 147.

While it was not competent to show that there was a contemporaneous parol agreement which varied the terms of the written contract, it was competent to show the general character and business of the parties, to enable the jury to learn what was meant by the expression "all of the scrap material of the following grades which we may receive for the period of 60 days." It is plainly evident from the writing itself that the contract was made with reference to the business in which plaintiffs were engaged, and that the undertaking of the defendant was to contract

for such scrap as would naturally and reasonably be accumulated in such business as it was then conducted. The circuit judge so construed the contract, in effect, but the defendant contends that the benefit of this ruling was withdrawn by the court's instruction on the subject of waiver. The question arose in this manner: The defendant offered testimony tending to show that, after the contract was made, there was a drop of something like $4 per ton in scrap; that thereupon the plaintiffs commenced to search out material in unusual quantities, to buy of wholesalers as they had not before been accustomed to, and thereby accumulated a much larger quantity than either party had any reason to anticipate at the time the contract was made. When defendant discovered these facts, as it claimed, it refused to accept any more iron. Later on, however, defendant's manager telephoned to the plaintiffs, saying, "Bring on your iron after dinner," or, as defendant's manager puts it, "I told them we were ready for iron; to begin delivery." After the plaintiffs had delivered a further quantity under this direction, the defendant again refused to receive any more.

The court instructed the jury, in substance, that if the direction to bring on the iron was made with knowledge of the sources from which plaintiffs had accumulated it, and of the quantity they then had on hand, this direction would constitute a waiver of the claimed departure of plaintiffs from the contract. We think this was error. The telephone message was not a new contract. As such, it would be void under the statute of frauds. There is present no element of estoppel. It is not a case where a party has been called upon to rescind a contract for fraud, and has, by his delay, or by treating the contract as binding, waived that right. The defendant's claim is that it has now accepted all the iron it was bound to take under the contract. If, after first stopping the delivery, there was doubt about this, and defendant saw fit to accept more,

the only thing it can be said to have waived (as there was no estoppel) is the right to stand on its first refusal.

For this error the judgment is reversed, and a new trial ordered.

The other Justices concurred.

In re CAMPBELL.

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141 1624
141 1625
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147 1131
f147 1478

1. CRIMINAL LAW—INDETERMINATE SENTENCES—FIXING MAXIMUM SENTENCE.

   Under the indeterminate sentence law of 1903 (Act No. 136), the court is not required to fix the maximum sentence where the statute fixes the maximum term of imprisonment for the crime at a certain number of years.

2. SAME—STATUTES—REPEAL.

   The determinate sentence law is repealed by the indeterminate sentence law of 1903 (Act No. 136), repealing in section 10 all acts and parts of acts inconsistent with it.

3. SAME—CONSTITUTIONAL LAW.

   The constitutional amendment (Pub. Acts 1903, p. 452) expressly authorizing the enactment of an indeterminate sentence law authorizes Act No. 136, § 1, providing for sentences fixing no maximum term of imprisonment.

Habeas corpus proceedings by Mary Campbell to obtain her release from imprisonment in the Detroit house of correction. Submitted December 14, 1904. (Calendar No. 20,827.) Petitioner remanded December 22, 1904.

John W. McGrath, for petitioner.

Charles A. Blair, Attorney General (*George S. Law*, of counsel), for respondent superintendent.

CARPENTER, J. January 5, 1904, petitioner was convicted of the crime of larceny in the circuit court for the county of Clinton. She was sentenced to confinement in the Detroit house of correction for a period "not less than one year." No maximum term of imprisonment was fixed by the court pronouncing sentence. The minimum term fixed by the court having expired if petitioner receives allowance for good time, she demands her release upon the ground that her further detention is illegal, because the court failed to fix any maximum term of imprisonment.

Petitioner's right to be discharged is based on the contention that it was the duty of the court, in sentencing her, to fix a maximum term for her imprisonment. The correctness of this contention depends upon the proper construction of section 1, Act No. 136 (the indeterminate sentence act) of the Public Acts of 1903, which reads as follows:

"Every sentence to the State prison at Jackson, to the Michigan reformatory at Ionia, to the State house of correction, and branch of the State prison in the Upper Peninsula, and to the Detroit house of correction, of any person hereafter convicted of a crime, except of a person sentenced for life, or a child under fifteen years of age, shall be an indeterminate sentence as hereinafter provided. The term of imprisonment of any person so convicted and sentenced shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced, and no prisoner shall be discharged until after he shall have served at least the minimum term as provided by law for the crime for which he was convicted: *Provided*, that in all cases where the maximum sentence, in the discretion of the court, may be for life or any number of years, the court imposing sentence shall fix the maximum sentence: *Provided, further*, that in all cases where no minimum sentence is fixed by law, the court imposing sentence shall fix such minimum, which minimum shall not be less than six months."

This statute imposes on the trial court the duty and gives it authority to fix the maximum sentence only "in all cases where the maximum sentence, in the discretion of the court, may be for life or any number of years."

Did this authorize or require the trial court to fix a maximum sentence for petitioner? The law in express terms fixed the maximum term of imprisonment for the crime (larceny) for which petitioner was convicted and sentenced at five years. See section 11553, 3 Comp. Laws. If the trial court can or should fix the maximum sentence in this case, he must fix it in every case where the law fixes a maximum term of imprisonment, and gives him discretion to lessen that term. In short, under that construction, it is the duty of the trial court to fix a maximum sentence in nearly every case in which he sentences a convict.

What is meant by "cases where the maximum sentence, in the discretion of the court, may be for life or any number of years?" Does it mean all cases where a court has authority to sentence for a less period of time than a definite number of years, which the statute in express terms says shall be the maximum? If it does, the proviso, which it may be presumed extends to only a part of the instances within the statute, embraces substantially all of them. If it does, the trial judge, by prescribing a very low maximum, may totally deprive the governor, pardon board, and board of control of the opportunity to exercise the discretion which the statute intended to give them. If it does, then the trial judge, in cases where he can fix the minimum—as in larceny—may, by increasing the minimum and reducing the maximum, make a determinate sentence, and thus frustrate the legislative purpose in enacting the indeterminate sentence law. If the legislature intended to require the judge to fix a maximum term of imprisonment in substantially all cases, it would not have said, as it did in section 6 of the act, that a prisoner violating the conditions of his parol shall "serve out the unexpired portion of his maximum possible imprisonment." In that case it would have been more appropriate and much easier to have said "maximum imprisonment."

Moreover, "cases where the maximum sentence, in the discretion of the court, may be for life or any number of

years," is not an appropriate description of a case in which the law fixes the maximum sentence at a definite number of years. In this latter case the maximum is fixed by law, and the court never had power to impose a life sentence, or any sentence in excess of five years. The language of the statute under consideration does describe with precision a class of cases where it may well be said that the statute has fixed no maximum, but has given a discretion to the court to determine whether that maximum shall be imprisonment for life or any term of years; as, for instance, murder of the second degree, which "shall be punished by imprisonment in the State prison for life or any term of years in the discretion of the court trying the same" (see section 11471, 3 Comp. Laws), and rape, which "shall be punished by imprisonment in the State prison for life or for any such period as the court in its discretion shall direct" (see section 11489, 3 Comp. Laws). In our judgment, the language now under consideration refers to cases of this character, and therefore it imposed no duty upon the trial judge and gave him no authority to fix a maximum term in sentencing petitioner.

It is also urged that the words "provided by law," in the following sentence found in said section, that "the term of imprisonment of any person so convicted and sentenced shall not exceed the maximum term provided by law for the crime for which the person was convicted and sentenced," means, not provided by statute law, but fixed in the sentence. Language substantially identical to this was contained in the indeterminate sentence law of 1889 (Pub. Acts 1889, Act No. 228), which this court held unconstitutional in *People* v. *Cummings*, 88 Mich. 249. The entire court (see opinion of court, page 253, opinion of Justice GRANT, page 264), while differing upon other questions, agreed that this language referred to the maximum fixed by the statute. It is true that section 1 of that act differs from section 1 of the act now under consideration in this: That section of the unconstitutional act did not contain the proviso requiring the court to fix a maxi-

mum sentence" in all cases where the maximum sentence, in the discretion of the court, may be for life or any number of years." This proviso, which points out certain instances in which the maximum must be fixed, makes it clear that in other cases it need not be fixed, and therefore strengthens the argument that "provided by law," in the sentence now under consideration means "provided by statute."

Petitioner insists that the presumption against repealing statutes by implication requires us to hold that, notwithstanding the enactment of the indeterminate sentence law, the old statute continued in force so far as to make it the duty of the circuit judge in sentencing petitioner to fix a maximum sentence. When the indeterminate sentence act was passed there was no law which made it the duty of a circuit judge to fix either a maximum or minimum sentence. It is true that the law then in force required him to fix a determinate sentence. If, therefore, there is any old law which, notwithstanding the enactment of the indeterminate sentence act, requires a circuit judge to fix a maximum term of imprisonment, it is the law which required him to fix a determinate sentence. The argument then under consideration is this: That, notwithstanding the passage of the indeterminate sentence law, the determinate sentence law is partly in force. It is a complete answer to this argument to say that that law is clearly in conflict with the provisions of the indeterminate sentence law, and section 10 of that law (Pub. Acts 1903, Act No. 136) provides that "all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

Petitioner also urges that, as thus construed, the indeterminate sentence law is unconstitutional, because the "imposition of a sentence is a judicial act, and the exercise of discretion relative to the term of imprisonment is a judicial function," which, under our Constitution, can be exercised only by certain specified courts. This argument assails the constitutionality of characteristic and essential features of the indeterminate sentence law. We must

hold that the constitutional amendment (see Pub. Acts 1903, p. 452) which gave the legislature express authority to enact such a law gave it authority to enact a law containing these features.

It results from these views that the writ must be dismissed, and the petitioner remanded.

The other Justices concurred.

COMPUTING SCALE CO. *v.* TRIPP.

1. JUSTICES OF THE PEACE—CERTIORARI—AFFIDAVIT FOR WRIT—EVIDENCE—RETURN—CONTRADICTION.

   A justice's return to a writ of certiorari to review a judgment recited that certain documents not contained in the affidavit for the writ were introduced before him; that no stenographer was present during the trial; that the justice did not write down all of the testimony, and was unable to state all that was given; and that, after considering the evidence, he rendered judgment for plaintiff, etc. *Held*, that, though such return did not in words contradict the affidavit for the writ, stating that it contained substantially all the testimony taken before the justice, it did show that material evidence was introduced before the justice which was not set out in the affidavit, and therefore an affirmance of the justice's judgment was proper.

2. SAME—REVIEW—REMEDY—APPEAL.

   Appeal, rather than certiorari, is the more appropriate remedy to review errors committed in justices' courts.

Error to Allegan; Padgham, J. Submitted December 7, 1904. (Docket No. 128.) Decided December 22, 1904.

Assumpsit in justice's court by the Computing Scale Company against Burrell Tripp for goods sold and delivered. Plaintiff recovered judgment, and defendant

brought certiorari to the circuit court. There was judgment at the circuit for plaintiff, and defendant brings error. Affirmed.

Pope & Cross, for appellant.

Lewis L. Thompson, for appellee.

MOORE, C. J. The plaintiff sued the defendant in justice's court to recover the price of some scales sold to him. The defendant claimed the sale was a conditional one, which he had a right to cancel, and did cancel. The case was tried before the justice of the peace, who rendered a judgment in favor of the plaintiff. The defendant, instead of appealing the case, removed it to the circuit court by writ of certiorari. The circuit judge was of the opinion that, as the return of the justice showed there was other evidence given on the trial besides that returned and set forth by the justice, there was no error in rendering the said judgment, and he affirmed it. The case is brought here by writ of error.

It is the claim of the defendant that, as the affidavit for the writ stated it contained substantially all the testimony taken before the justice, and that, as the return of the justice did not contradict it, the affidavit must be taken as true; citing *Wilson* v. *Township Board of Burr Oak*, 87 Mich. 240. The return of the justice shows that there were offered in evidence before him a bill of lading and a copy of a letter of acceptance with the order for the scales attached, and certain testimony of defendant, which was not contained in the affidavit. He also returned:

"No stenographer was present during the trial, and not all of the testimony was written down by me, the said justice of the peace. And I am unable to state all of the testimony that was given. That, after carefully considering the evidence, I rendered a judgment in favor of plaintiff. * * * That, if the conditions written on the back of the contract could be construed to defeat the plain terms

of the contract, still the contract was in force, the plaintiff nor its agent not having signed the conditions or agreement on back of contract; and I was not satisfied that the defendant put himself in a position to countermand his order."

It is true the return does not, in so many words, contradict the affidavit, but it does show that material evidence was introduced before the justice, which was not set out in the affidavit, and it is also a fair inference that other evidence was offered, which he could not return for the reason stated by him. We are not inclined to extend the rule stated in *Wilson* v. *Township Board of Burr Oak*, supra. It has been repeatedly held that appeal is the more appropriate remedy to review errors committed in justice's court. *Forbes Lithograph Co.* v. *Winter*, 107 Mich. 116, and the many cases therein cited. In that case one of the errors assigned was "that the docket of the justice shows that the plaintiff did not appear within one hour after the hour of return named in the summons." In disposing of this assignment, Justice MONTGOMERY, speaking for the court, said:

"An answer to the first point is that the docket entry is not returned, and the fact averred in the affidavit for certiorari is not made to appear."

We think the circuit judge made a right disposition of the case.

Judgment is affirmed.

The other Justices concurred.

138 605
144 47

KENT v. AUDITOR GENERAL.

TAXATION—MISAPPLICATION OF PAYMENT—SALE—CANCELLATION OF DEED.

Where a taxpayer sent the amount of taxes due on his lands to the township treasurer, who mistakenly applied the money in part to payment of taxes on other lands in which the taxpayer had no interest, leaving the taxes on a portion of his land unpaid, and such portion was sold therefor, the case does not fall within 1 Comp. Laws, § 3921, subd. 4, requiring the owner to pay the original taxes before he is entitled to cancellation of the tax deed, but the taxes are to be deemed paid, under subdivision 2 of said section.

Mandamus by Charles A. Kent and Bryant Walker, trustees of the estate of Frederick Buhl, deceased, to compel Perry F. Powers, auditor general, to cancel the sale of certain land for the taxes of 1897. Submitted December 6, 1904. (Calendar No. 20,766.) Writ granted December 22, 1904.

Walker & Spalding, for relators.

Charles A. Blair, Attorney General (*Charles W. McGill* and *George L. Hauser*, of counsel), for respondent.

MOORE, C. J. Frederick Buhl, at the time of his death, prior to the year 1897, was the owner of the S. ½ of the N. W. ¼ and the N. ½ of the S. W. ¼, section 1, town 14 N., range 1 W. Relators are the trustees of his estate; petitioner Walker being the successor of one Robert Hosie, a former trustee.

It appears from the petition filed in this cause that Robert Hosie, former trustee, during his lifetime, had principal charge of the above-described property, with respect

to the payment of taxes. December 3, 1897, Robert Hosie, as trustee, wrote to the township treasurer of Lee township, Midland county, requesting a statement of the amount required to pay the taxes for the year 1897 on said lands. As the result of such communication, the amount necessary to pay the taxes for the year 1897 was forwarded to that official, and a receipt subsequently returned to Mr. Hosie. Said receipt covers all of the descriptions referred to in the letter of Mr. Hosie, except the N. E. ¼ of the S. W. ¼. Instead of issuing a receipt upon that description, the treasurer included the N. W. ¼ of the N. W. ¼—land in which the estate had no interest—in place of the N. E. ¼ of the S. W. ¼. The taxes for the year 1897 on the N. E. ¼ of the S. W. ¼, section 1, town 14 N., range 1 W., not having been paid to the township treasurer for the year 1897, except in the manner stated above, that official returned the same to the county treasurer as provided by law, and the county treasurer returned the same as delinquent to the auditor general. The taxes for the year 1897 on the description in question remaining unpaid, except as before stated, the auditor general included said description in his petition for the sale of the taxes of 1897 and prior years at the annual tax sale held in May, 1900. The description was bid to the State for the taxes of 1897, and subsequently became State tax land; and under date of January 20, 1902, said description was purchased at the auditor general's department, as State tax land, by one William H. Graham, of the city of Lansing. Subsequent to the date of purchase, relators learned of such purchase, and applied to the auditor general for a cancellation of the sale made as aforesaid. The application of relators was refused. The relators ask for the writ of mandamus to compel the auditor general to cancel said sale.

It is the claim of the auditor general that the case comes under subdivision 4 of section 3921, 1 Comp. Laws, and that relators should pay the original tax before they are entitled to have the tax deed canceled, while it is the claim of

relators that when Hosie sent the amount of the tax to the township treasurer, instructing him that it was for the purpose of paying the tax, that even though the township treasurer did not so apply it, it in fact paid the tax and discharged the lien, and brings case under subdivision 2 of section 3921, 1 Comp. Laws. The attorney general says the question is a new one in this State. Counsel for relators contend the following authorities sustain their position: *Perret* v. *Borries*, 78 Miss. 934; *Meller* v. *Hodsdon*, 33 Minn. 366. We think they are right in that contention. See, also, *Bray & Choate Land Co.* v. *Newman*, 92 Wis. 271; *Lewis* v. *Monson*, 151 U. S. 545; *Hand* v. *Auditor General*, 112 Mich. 597; *Hough* v. *Auditor General*, 116 Mich. 663; *Carpenter* v. *Jones*, 117 Mich. 91.

Writ of mandamus will issue as prayed.

The other Justices concurred.

BARLOW *v.* RIKER.

1. JUSTICES OF THE PEACE — REPLEVIN — ADJOURNMENTS — JURISDICTION—NONSUIT—JUDGMENT.

   Where, in replevin before a justice, the parties fail to appear on the adjourned day, if the justice has no intimation that the parties have agreed on an adjournment, it is his duty to render a judgment of nonsuit, with a return of the property. Comp. Laws, §§ 836, 10679.

2. MANDAMUS—REVIEW—CONCLUSIVENESS OF SHOWING.

   Where no issue is joined on relator's showing for mandamus against a justice of the peace, the statements contained in his affidavit must be considered as true.

3. JUSTICES OF THE PEACE—ADJOURNMENTS—STIPULATIONS.

   Where a case pending in a justice's court was adjourned to a particular day, whereupon plaintiff procured defendant's con-

sent to a further adjournment, it was plaintiff's duty to appear before the justice and have the case adjourned.

4. SAME—JURISDICTION—NONAPPEARANCE OF PARTIES.

An action of replevin before a justice of the peace was adjourned to December 29, 1903. Thereafter, at the request of counsel for plaintiff, two oral agreements were made by counsel to adjourn the case—one to March 2, 1904, and the other indefinite. These were not brought to the justice's attention until June 27, 1904, when defendant's counsel presented a stipulation for the adjournment of the cause to July 22, 1904. *Held*, that the justice did not lose jurisdiction of the cause by reason of the nonappearance of the parties on December 29th.

5. SAME—REPLEVIN—JUDGMENT—ENTRY—MANDAMUS.

Where a justice's docket shows that he called a replevin case on the adjourned day, waited one hour, and that neither party appeared, there are facts shown which are the equivalent of the oral announcement of judgment of nonsuit and for return of the property as provided by Comp. Laws, §§ 836 and 10679, and defendant's demand that such judgment be formally entered should be complied with, and on refusal may be enforced by mandamus.

Certiorari to Barry; Smith, J. Submitted December 14, 1904. (Calendar No. 20,768.) Decided December 22, 1904.

Mandamus by Edwin Barlow to compel Marcus W. Riker, justice of the peace, to render a judgment of nonsuit in an action of replevin. There was an order denying the writ, and relator brings certiorari. Reversed.

Thomas & Pryor and *Thomas Sullivan*, for relator.

Colgrove & Potter, for respondent.

HOOKER, J. Triphena Goodenough replevied two cows in a suit commenced before a justice of the peace, by writ returnable October 27, 1903. Proceedings seem to have been regular up to December 7, 1903, when the case was adjourned to December 29, 1903, upon the filing of a written stipulation to that effect signed by Frod W. Walker,

attorney for the plaintiff, and by Charles H. Thomas and Thomas Sullivan, attorneys for the defendant. The docket entries and answer of the respondent show that these counsel had appeared upon the return and adjourned day, as such attorneys, and that neither had questioned the authority of the others to appear in such capacity. The affidavit filed with the application for mandamus shows, and we think it is not disputed, that, at the request of counsel for the plaintiff, two oral agreements were made by counsel to adjourn the case—one to March 2, 1904, and the other indefinite—to defer the trial until the plaintiff should recover from an illness. These were not brought to the attention of the justice until June 27, 1904, when defendant's counsel appeared and presented a written stipulation, signed by said counsel, consenting that said cause should be adjourned to said 22d day of July. On the last-mentioned day no one appeared for the plaintiff, and counsel asked a judgment of nonsuit and for the return of the property. This the justice refused upon the ground that he had lost jurisdiction to make such entry. His return shows that neither party appeared on December 29th, and his docket shows that he called the cause regularly on that day, and neither party appeared, although he held the case open for more than one hour. This entry is all that appears of that date. It was the last entry made. No pleadings were filed in the case. His answer shows that on July 22d he offered to enter judgment dismissing said suit as of December 29th, and that defendant's counsel objected to his doing so. On December 29th the justice had jurisdiction of the case, and, having called the case and no one appearing, if he had no intimation that the parties had agreed upon an adjournment, it was his duty to render a judgment of nonsuit, with a return of the property, under 1 Comp. Laws, § 836, which provides that judgment of nonsuit, with costs, shall be rendered against a plaintiff if he fail to appear within one hour after the time to which an adjournment shall be made, and section 10679, 3 Comp. Laws, which

provides, in substance, that if the property specified in the writ shall have been taken thereunder, and delivered to the plaintiff, and the defendant recover judgment by discontinuance or nonsuit, such judgment shall be that the defendant have return of the goods and chattels replevied, unless he shall elect to waive such return. The justice has no right to omit such judgment upon the theory that the omission of the parties to appear divested him of jurisdiction in the matter.

The answer of the justice does not contradict the showing made for a mandamus as to what occurred between December 29th and June 27th, and no issue was joined thereon; hence, under the rule, the statements contained in the affidavit must be taken as true, and we must understand that the plaintiff prevented defendant from asking a judgment on December 29th by previously asking the favor of, and agreeing upon, an adjournment. It was plaintiff's duty to appear and have the case adjourned on that day.

Again, before March 2d the parties agreed upon an adjournment, which was left indefinite as to time, but which was made definite on June 27th, when they stipulated in writing that the case should be adjourned to July 22d.

The justice did not lose jurisdiction by reason of the nonappearance of the parties on December 29th. If he lost jurisdiction then, it was by reason of his failure to render any judgment on that day. We should not say this if there is evidence which justifies the inference that a judgment was rendered.

If we indulge in the usual leniency of criticism which the law requires in regard to justices' proceedings and records, we may reasonably infer that when the justice had waited an hour, and neither party appeared, he knew that the plaintiff was not entitled to a judgment, and that his suit was at an end; that a judgment of nonsuit must follow, under 1 Comp. Laws, § 836; and that an order for the return of the property was unavoidable, under 3 Comp. Laws, § 10679.

Had the defendant appeared later in the day, and demanded, not the oral rendition of a formal judgment orally, but an entry of such, based on the claim that the facts shown in the record were equivalent to the announcement of such a judgment, we cannot doubt that he would have been entitled to it; and, had such an application been opposed by the plaintiff merely on the ground that the justice had omitted to orally announce, the formal though necessary consequence of the finding of facts entered in the docket, we would consider it a most technical claim. The record that he made shows a judicial determination at the proper time of facts which necessarily required a judgment of nonsuit and a return of the property, and left nothing to do but to enter the judgment in proper form at a convenient time.

Doubtless the justice should have put the judgment indicated in formal shape by entering the statement that the judgment was for nonsuit and a return of the property, but this being practically announced either orally, or by entering in the docket the facts which are equivalent to it, the formal entry might lawfully be made later (see Tiff. Justice's Guide, p. 470); and if he refused, an application for mandamus to compel it, made soon after, would have been granted. Under the circumstances of this case, we should not refuse it on the ground that he was not present, or that he did not move earlier.

We think that the order of the circuit judge should be reversed. The writ will issue.

The other Justices concurred.

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FISCHER *v.* UNION TRUST CO.

1. GIFTS—CONVEYANCES—DELIVERY.

   After a deed of gift was signed and acknowledged, the grantor made manual delivery of it to the grantee, who took it and handed it to her brother, evidently to be kept for her. He put it away without recording it. *Held*, that the delivery was complete.

2. SAME — AGREEMENT BY DONOR TO PAY MORTGAGE — ENFORCEMENT.

   Where the only consideration for a deed by a father to his daughter was love and affection, the daughter could not enforce a provision in the deed that the grantor would pay certain mortgages on the property conveyed when the same became due, and therefore his failure to do so, resulting in an enforcement of one of them by foreclosure, gave her no claim against the estate of her father based on the appropriation of her property to pay the mortgage.

Error to Wayne; Hosmer, J. Submitted June 9, 1904. (Docket No. 6.) Decided December 30, 1904.

Bertha Fischer presented a claim against the estate of William Fischer, Sr., deceased, for damages for an alleged breach of a covenant in a deed. The claim was allowed by the commissioners, and the Union Trust Company, administrator, appealed to the circuit court. There was judgment for claimant on a verdict directed by the court, and defendant brings error. Reversed.

On December 21, 1895, William Fischer, Sr., conveyed by warranty deed certain property in the city of Detroit to the claimant, Bertha Fischer, his daughter, who had been incompetent for a number of years, and so remains, and is at present at the retreat for the insane at Dearborn.

The deed was a warranty deed, in the usual form, with a covenant against all incumbrances, excepting two mortgages, which the grantor "agrees to pay when the same become due." The land described in the deed comprised the homestead where the father and daughter lived, and the adjoining lot, with the house thereon. Mr. Fischer, after signing and acknowledging it, handed it to claimant, saying, "Here is a deed of the Jefferson and Larned street property." He said it was a "nice Christmas present." She took it and read it. One of her brothers gave her a dollar, which she gave to her father, who took it. She then handed the deed to her brother Alexander, and asked him to take care of it. He put it in his safe, and did not record it until June 30, 1902, about a year after the grantor's death, and 6½ years after its date. The reason given by the son for not recording is that there were unpaid taxes, in consequence of which, under the statute, it could not be recorded.

After the delivery of the deed, both grantor and grantee continued to live together on part of the property so conveyed. Mr. Fischer continued until his death to manage and control it, and to receive the rents therefrom, just as he had done before the giving of the deed. During that time he took care of his daughter the same as before. At the time of the execution of the deed, the grantor was considered by his sons to be worth about $50,000. He had no debts except the two mortgages, one of $3,000 and the other of $5,000. If he was then worth that amount, the larger part of it was in some way disposed of in his lifetime. The $3,000 mortgage was foreclosed for nonpayment, and satisfied out of part of the property conveyed. The claim at bar is based upon this appropriation of her property to pay the mortgage.

Russel & Campbell, for appellant.

Alfred J. Ducharme (*John C. Donnelly*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). 1. The facts and circumstances of the delivery of the deed are not in dispute. Counsel differ only in the conclusion to be drawn from them. We think that the conceded facts show a delivery. After the deed was signed and acknowledged, the grantor made manual delivery of it to the grantee. She took it and handed it to her brother, evidently to be kept by him for her. The grantor reserved no control over it, and retained no right to withdraw or cancel it. He never attempted to. Under those circumstances the delivery was complete.

2. The meritorious question in the case is: Was the claimant in position to enforce the executory contract in the deed against her father while living, and to enforce it against his estate now that he is dead, or to recover damages at law for nonperformance? To say that the one dollar was the real, or such valuable consideration as would of itself sustain a deed of land worth several thousand dollars, is not in accord with reason or common sense. The passing of the dollar by the brother to his sister, and by her to her father, was treated rather as a joke than as any actual consideration. The real and only consideration for the deed and the agreement, therein contained, to pay the mortgages, was the grantor's love and affection for his unfortunate daughter, and his parental desire to provide for her support after he was dead. The consideration was meritorious, but is not sufficient to compel the performance of a purely executory contract. The deed was a gift, and the gift was consummated by its execution and delivery. The title to the land, subject to the mortgages, passed as against all except the grantor's creditors. The gift was expressly made subject to the mortgages, and coupled with it was a promise to pay them. This promise has no additional force because it is contained in the deed. It has no other or greater force than would a promise by him to pay mortgages upon her own land, or to pay her $8,000 in money, or his promise to her evidenced by a

promissory note for a like amount, and given for the same purpose and the same consideration.

"The doctrine of meritorious consideration originates in the distinction between the three classes of consideration on which promises may be based, viz., valuable consideration, the performance of a moral duty, and mere voluntary bounty. The first of these classes alone entitles the promisee to enforce his claim against an unwilling promisor; the third is for all legal purposes a mere nullity until actual performance of the promise.

"The second, or intermediate class, is termed the meritorious, and is confined to the three duties of charity, of payment of creditors, and of maintaining a wife and children; and under this last head are included provisions made for persons, not being children of the party promising, but in relation to whom he has manifested an intention to stand in loco parentis in reference to the parental duty of making provision for a child.

"Considerations of this imperfect class are not distinguished at law from mere voluntary bounty, but are to a modified extent recognized in equity. And the doctrine with respect to them is that, although a promise made without a valuable consideration cannot be enforced against the promisor, or against any one in whose favor he has altered his intention, yet if an intended gift on meritorious consideration be imperfectly executed, and if the intention remains unaltered at the death of the donor, there is an equity to enforce it, in favor of his intention, against persons claiming by operation of law without an equally meritorious claim." Adams on Equity (8th Ed.), 97.

This court held that a promissory note given by a father to his son, intended as his share of the estate, could not be enforced against the estate. *Conrad* v. *Manning's Estate*, 125 Mich. 77. The opinion in that case, written by my Brother MOORE, cites many authorities which need not be recited here. *Duvoll* v. *Wilson*, 9 Barb. 487, is exactly in point, both in the facts and conclusion reached.

"The consideration of natural love and affection is sufficient in a deed; but a mere executory contract, that requires a consideration, as a promissory note, cannot be supported on the consideration of blood or natural love and

affection—there must be something more, a valuable consideration, or it is not good and cannot be enforced at law, but may be broken at the will of the party." *Pennington* v. *Gittings*, 2 Gill & J. 208.

See, also, *West* v. *Cavins*, 74 Ind. 265; *Hadley* v. *Reed*, 12 N. Y. Supp. 163.

The learned counsel for the claimant cite numerous authorities, but we do not think them applicable to this case.

In *Ferguson's Appeal*, 117 Pa. St. 426, a father had deeded to his daughter a lot of land according to a plat which called for a street thereon. The rights of the grantee in the street were the subject of the suit. One of the defenses set up was, the conveyance was voluntary. To this contention the court replied that the conveyance was fully executed. That decision is based upon the obvious principle that, when a grant of land or gift of personalty is consummated by a deed of the land or delivery of the personalty, the grantee or promisee succeeds to all the rights in the property which the grantor or promisor had. Third parties, except creditors, cannot contest the consideration.

So, where the contract of conveyance is fully executed, the grantee may maintain a suit in equity to correct the description in the deed. *Hutsell* v. *Crewse*, 138 Mo. 1. In that case the father deeded to his minor child the land for the same purpose as did Mr. Fischer in this case. He had also deeded certain other lands to his other children. His wife died, after which he remarried. After his death, suit was brought against the widow and her children to reform the deed. The basis of the decision is that the contract was executed, the title had passed, and the land was susceptible of identification aliunde. *Pickett* v. *Garrard*, 131 N. C. 195; *Mason* v. *Moulden*, 58 Ind. 1; *Brown* v. *Whaley*, 58 Ohio St. 654; and *Ohmer* v. *Boyer*, 89 Ala. 273—are similar cases.

In *Lawrence* v. *McCalmont*, 2 How. 426, the consideration was the sum of $1 and the extension of credit, which was held sufficient to sustain a contract of guaranty for the payment of accounts.

In *Harvey* v. *Alexander*, 1 Rand. 233, the consideration was natural love and affection. Creditors attacked the conveyance on the ground of fraud. It was held that the deed was not per se voluntary. The question in the case was whether it was competent to show that full value was paid by the grantee. The holding of the case clearly is that love and affection would not be a sufficient consideration to sustain the deed.

In *Ross' Appeal*, 127 Pa. St. 10, a man gave a note of $5,000 to a trustee for his children named therein, due five years after date, with interest. It was sought to enforce the note after his death, and the transaction was sustained as an executory gift inter vivos. That is clearly in conflict with *Conrad* v. *Manning's Estate*, supra, unless it can be distinguished on the ground that in the *Ross Case* the payee was a trustee. *Conover* v. *Brown*, 49 N. J. Eq. 156, is in direct conflict with *Conrad* v. *Manning's Estate*, supra.

If claimant had no promise which she could specifically enforce against her father, or upon which she could base a claim for damages, it follows that she is not entitled to subrogation as against her father or his estate. A void promise cannot be made the basis of subrogation against an unwilling promisor. The same reason that is a bar to the one claim is also a bar to the other. However commendable was the promise of Mr. Fischer to give a larger share of his property to his unfortunate daughter than to his other children, it was a promise absolutely null and void until it became merged in his voluntary execution of it. His promise to pay was, for some unknown reason, left unexecuted. She paid no valuable consideration for the promise, and cannot, therefore, enforce it. It is, however, urged that Mr. Fischer's primary liability to pay the debt was unaffected by the deed of gift, and, as the subject of the gift has paid the debt, therefore claimant is entitled to subrogation. This claim cannot be maintained upon any other theory than that there was a valid gift of the entire land free from all incumbrances. If the prom-

ise made by Mr. Fischer to his daughter to pay these incumbrances had been omitted from the deed, clearly he would have been under no obligation as to her to pay them, although the mortgagee could enforce his (Fischer's) primary liability. In such case the gift would have been only that of the equity of redemption. She would not in that event, by paying the mortgage, have been in position to recover the amount from her father or from his estate, for she would have taken title subject to the mortgage.

It is urged that "the father is already obligated to pay the debt [the debt secured by the mortgage], so that the question is not whether he may agree to pay it, but it is whether he may make a gift of his property without affecting this already existing agreement to pay it." If this logic is sound, it must, in my judgment, follow that every grantee who buys land subject to a mortgage can buy up the note evidencing the debt and sue the mortgagor therefor. This, evidently, is not the law. When a grantee purchases subject to a mortgage which is expressly exempted from his covenant of warranty, his undertaking with his grantor is to pay the mortgage if he desires to save his land. The amount of the mortgage is deducted from the purchase price. When such grantee pays the mortgage, he pays only what he, as against his grantor, has assumed to pay. One by a deed of gift certainly can acquire no more than one acquires by deed of purchase. The conveyance subject to the mortgage entails upon both grantees the same obligation to pay the mortgage, so far as the grantor is concerned. No arrangement between the grantee and the grantor can, of course, change the liability of the grantor and mortgagor to the mortgagee. His already "existing agreement" remains the same in either case, and is always unaffected by any subsequent transfers of the land. But where he sells and conveys land by deed, subject to a mortgage, the primary obligation to pay the mortgage, as between the grantor and grantee, rests upon the grantee. If the mortgagee abandons his security and sues upon the note or obligation to which the

mortgage is collateral, and by his suit compels payment, such grantor (the mortgagor) is clearly entitled to recover from his grantee the amount thereof, and should be subrogated to the rights of the mortgagee against the land. Our attention has been called to no case where a mortgagee has pursued so extraordinary a course. The universal course in such cases has been to foreclose the mortgage, sell the land, and obtain a personal decree against the mortgagor for the deficiency.

If Mr. Fischer had voluntarily paid the mortgages, he would then simply have carried out his nonenforceable contract and have completed his gift, as, perhaps, he then intended to do. For some reason, perhaps a good one, he chose not to pay them. A void promise is no more effective than no promise, and the void promise in the deed had no more effect than if it had been omitted therefrom. If it is void for one purpose, it is void for all, and cannot be made available, either directly or indirectly. Only performance of the promise can be of any avail to the claimant.

A gift of personalty can be consummated only by an unconditional delivery of the thing. A gift of realty can be consummated only by the execution and delivery of a deed. If either is incumbered, the donor gives only what he had to give. He cannot give the interest of a third party in the property. However clear may be the intention of the donor to pay the incumbrances and thus give the entire property, he can accomplish this only by actually paying them. Neither his promise without a valuable consideration, nor his intention as evidenced by such promise, is of any avail to the donee.

Other interesting questions are raised, but they become immaterial in view of the conclusion we have reached.

Judgment is reversed, and new trial ordered.

The other Justices concurred.

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156 3239

PEOPLE *v.* JEWELL.

1. RECORDS—TAX STATEMENT—ABSTRACTION—CRIMINAL OFFENSE.
A tax statement, made under 1 Comp. Laws, § 3843, and delivered to the supervisor, is, though not sworn to, a public record under 3 Comp. Laws, § 11361, making it a criminal offense to carry away a public record.

2. SAME—PROVISIONAL STATEMENT—INTENT TO SUBSTITUTE.
A statement so prepared and delivered is a paper or record "belonging or appertaining to the office" of a township, within the meaning of section 11361, 3 Comp. Laws, although there was an intention to amend such statement by substituting another therefor, where no such amended or substituted statement was ever prepared.

3. SAME—CRIMINAL INTENT.
In order to constitute the offense of carrying away or destroying a public record denounced by 3 Comp. Laws, § 11361, the act must be accompanied by a criminal intent.

Exceptions before judgment from Livingston; Smith, J. Submitted June 17, 1904. (Docket No. 192.) Decided December 30, 1904.

Fobes C. Jewell was convicted of carrying away a public record. Reversed.

Person & Person, for appellant.

Edmund C. Shields, Prosecuting Attorney, for the people.

MONTGOMERY, J. The respondent was convicted of a violation of section 11361, 3 Comp. Laws, which contains the following provision:

"All books, papers, and records, belonging or in anywise appertaining to the offices of the several townships and school district officers of this State, are hereby declared to be public property, belonging to the people of the State of Michigan, to be used and preserved by and under the direction of said officers, and be by them preserved during their continuance in office; and any person or persons who shall willfully carry away, mutilate, or destroy any of such books, papers, records, or any part of the same * * * shall, on conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by fine not exceeding one thousand dollars, or imprisonment in the State prison not exceeding three years."

The testimony disclosed that in the spring of 1903 one G. A. Kirkland was the supervisor of the township of Iosco, Livingston county, and in his official capacity called upon the respondent for a statement of his taxable property. Such a statement was made out and signed by the respondent and left with the supervisor, who took it to his office. The respondent stated that in a certain contingency he might wish to make a change in the statement later. A few days later the respondent went to the office of the supervisor, the statement was produced, and an attempt made to make a new statement. This was, however, abandoned. The first statement disappeared during the conversation, and respondent, on being asked for it, declared that he must have torn it up and thrown it in the stove. A search of the stove being made disclosed that it was not there, and the inference which the jury drew, that the respondent took it away, was amply justified.

Two questions are discussed in the brief of respondent's counsel. It is contended, first, that the paper in question does not fall within the terms of the statute. So far as this question depends upon the fact that the statement was not sworn to, section 3843, 1 Comp. Laws, determines its character as a public document, as by the express terms of that statute the supervisor was required to retain the same in his office. It is said, however, that, as there was a declared

purpose to amend this statement or substitute another for it, this paper never became a part of the public record. We do not think any such inference is justified. What the effect of substituting another paper for the original may have been is not the question. The statement was signed and delivered to the supervisor, intended to be effective, at least until a substitute was prepared, and this was never done.

The second point relied upon is the failure of the circuit judge to give respondent's fourth request, as follows:

"If Jewell did carry away the paper it was not willful if Jewell thought he had a right to carry it away."

The court did charge the jury as follows:

"'Willfully' means designedly and intentionally. I don't think it would be necessary to establish the fact that he did it maliciously, or that his intention must have been to that wicked extent that would be involved in the crime of larceny; but he must have acted knowingly, and must have willfully intended to take that paper away from his office and keep it away from there to deprive the supervisor of that township, the officer, the supervisor, of the custody of that paper permanently. He must have intended to have done that before you can find him guilty; he must have had that intent; the defendant must have had that intent to remove that from that office, to carry it away without justification or excuse."

What we might conclude upon the merits of this question of good faith is unimportant here. The effect of this charge was to permit the jury to find a man guilty of a State prison offense in the absence of a criminal intent. We do not overlook a class of cases where the question of criminal intent is unimportant, such as cases arising under the game, fish, pure food, and liquor laws. Many such cases are found in our own and other reports. *People* v. *Waldvogel*, 49 Mich. 337; *People* v. *Blake*, 52 Mich. 566; *People* v. *Roby*, 52 Mich. 577; *People* v. *Neumann*, 85 Mich. 98; *People* v. *Potter*, 89 Mich. 353; *City of Grand Rapids* v. *Bateman*, 93 Mich. 135; *Wolcott* v.

Judge of Superior Court, 112 Mich. 311; *People* v. *Snowberger*, 113 Mich. 86; *People* v. *Bacon*, 117 Mich. 187.

These cases arise upon statutes, and while, in statutory as well as common-law crimes, the necessity of a criminal intent is ordinarily maintained, it is not beyond the power of the legislature to make an act criminal in the absence of such intent. See 12 Cyc. 148, citing *People* v. *Welch*, 71 Mich. 548, and other cases, to which may be added *Faulks* v. *People*, 39 Mich. 200.

The court in *People* v. *Roby*, 52 Mich. 577, asserts that "as a rule there can be no crime without a criminal intent," and perhaps implies that it becomes a question of legislative intent for the court to ascertain from the statute. See, also, *City of Grand Rapids* v. *Bateman*, 93 Mich., at page 138, where the following quotation from *People* v. *Roby*, supra, is found:

"Many statutes which are in the nature of police regulations impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."

Also, see cases cited in 12 Cyc. 148, 149, 151.

In our opinion there is nothing in this legislation to indicate an intent to punish an innocent, though intentional, taking away, and we regard the use of the term "willful" as "implying an evil intent without justifiable excuse." See cases cited in *Highway Com'rs of Eagle Township* v. *Ely*, 54 Mich., at page 180. The latter case, cited in support of this conviction, does not in our opinion justify it. The present case is more nearly like that of *State* v. *Preston*, 34 Wis. 675, which was distinguished from *Highway Com'rs of Eagle Township* v. *Ely* in the latter case.

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

The other Justices concurred.

138 624
143 13
d143 14

VAN DEN BOSCH *v.* BOUWMAN.

SALES—CONTRACT—CONSTRUCTION—RETAKING POSSESSION—BALANCE DUE:

A note given for the price of chattels gave the seller right to take possession at any time before or after maturity, and to resell the property, or retain the same without sale, and in such case the amount paid on the note was to be deemed "compensation only for use and wear and tear." *Held*, not a conditional sale, but that the seller might retake and sell, and, if the price obtained did not equal the amount due, he might collect the balance from the maker of the note.

Error to Ottawa; Padgham, J. Submitted October 5, 1904. (Docket No. 15.) Decided December 30, 1904.

Assumpsit by Peter Van Den Bosch against Tom Bouwman on a promissory note. There was judgment for plaintiff and defendant brings error. Affirmed.

Leonard Y. Devries (*Diekema & Kollen*, of counsel), for appellant.

Sooy & Heck, for appellee.

MONTGOMERY, J. Defendant, on receiving of plaintiff possession of the property described therein, executed and delivered to plaintiff the following note:

"$160.00.

"NOORDELOOS, OTTAWA CO., MICH., May 27, 1901.

"After date I promise to pay to Peter Van Den Bosch, or bearer, One Hundred Sixty Dollars, payable at the residence of Peter Van Den Bosch, Noordeloos, Mich., for value received, by monthly payments of $10.00 per month or more; said first payment to be made June 10th, A. D. 1901.

"The express condition of the sale and purchase of a sorrel horse, harness, and top buggy, for which this note is given, is such that the title, ownership, or possession does not pass from the said payee until this note and interest is paid in full and that the said payee has full power to declare this note due and take possession of said above-described property at any time he may deem himself insecure, even before the maturity of the note, and upon taking possession, either before or after the maturity of the note, said payee may sell the same either at public or private sale, without notice; or said payee may retain the same without sale, and in such case the amounts paid on this note shall be deemed to be compensation only for the use, wear and tear of said property.

[Signed] "TOM BOUWMAN."

After certain payments had been made, plaintiff took possession of the property, sold the same for a sum less than the amount remaining due, sued for the balance, and recovered. From this judgment defendant brings error.

The contention is that this was a conditional sale, and that, on the plaintiff reclaiming the property, the consideration for the defendant's engagement to pay ceased, and that under the holding in *Perkins* v. *Grobben*, 116 Mich. 172, and *McBryan* v. *Elevator Co.*, 130 Mich. 111, the vendor is not entitled to recover the contract price. The question is, What does the contract fairly import? Courts have no right to refine definitions in a manner to override the expressed intent of the parties. This contract gave the seller two options: (1) He could retake the property and treat the amount paid as payment for its use and "wear and tear." (2) He was authorized to seize and sell the same at public or private sale. He chose the latter. The question is upon whose account that sale was made under the terms of this contract. The purpose of the sale provided for by the contract is plain. It is to satisfy, so far as the amount realized will do so, the amount remaining unpaid. Can it be said that the intention of the parties as expressed was that whatever remained due should be paid by the maker of this note? We think this question should be answered in the affirmative. There is an

express promise to pay, and it is not abrogated nor satisfied by authority given to sell and apply the proceeds of the sale in part payment. There is no reason why contracts of this nature should not be construed and enforced according to the plainly expressed purpose of the parties. *Dewes Brewery Co.* v. *Merritt*, 82 Mich. 198; *Choate* v. *Stevens*, 116 Mich. 28.

The judgment is affirmed.

The other Justices concurred.

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133 626
j140 2326
j140 2331

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

1. APPEAL AND ERROR—QUESTIONS PRESENTED FOR REVIEW.
   A question not raised in the lower court and not referred to in any assignment of error is not presented by the record on a writ of error, and will not be considered, though argued in the brief.

2. CARRIERS — PERSONAL INJURIES — PASSENGER ON PLATFORM — CONTRIBUTORY NEGLIGENCE.
   Where all seats in a passenger train were occupied, and a passenger became faint because of the badly crowded condition and poor ventilation of the cars, and, as he could not get to a window to relieve his faintness, sought fresh air on the platform, he was not guilty of contributory negligence as a matter of law under 2 Comp. Laws, § 6303.[2] HOOKER and GRANT, JJ., dissenting.

3. SAME—PLEADING—CAUSE OF INJURY.
   A declaration in such a case, alleging that, while plaintiff was standing at the car door holding on to the hand railing, he be-

[1] Rehearing denied May 12, 1905.

[2] As to duty of carrier permitting cars to become overcrowded, including liability for injury to persons riding on platform, see note to *Lynn* v. *Southern Pac. Co.*, (Cal.) 24 L. R. A. 710.

came unconscious by reason of the foul air, and fell from said train while the same was running at a high rate of speed, and struck with great force on the ground, is a sufficient averment that the speed of the train caused him to fall therefrom.

Error to Lenawee; Chester, J. Submitted October 19, 1904. (Docket No. 51.) Decided December 30, 1904.

Case by Marion L. Morgan against the Lake Shore & Michigan Southern Railway Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Weaver, Morgan & Priddy, for appellant.

Bird & Sampson, for appellee.

MOORE, C. J. The plaintiff recovered a judgment for injuries received by him while a passenger on defendant's road. The case is brought here by writ of error.

There is scarcely any dispute about the facts. Plaintiff resides near Woodstock station on the Ypsilanti Branch of the Lake Shore & Michigan Southern Railway. The defendant advertised an excursion at reduced rates for the Hillsdale fair in 1901. On the last day of the fair, plaintiff purchased a round-trip ticket to Hillsdale and return, good for that day only. On the way to Hillsdale in the morning there were eleven coaches. On the return trip there were only five coaches in the train, and plaintiff claims that all the seats were occupied, and people were standing in the aisles and upon the platforms; that he made his way up onto the rear platform of the fourth car, and when the train started he stepped into the rear end of the coach, and found standing room near the door; that the car in which he stood was badly crowded, men were smoking in the car, and it was hot, the ventilation was poor, and by the time the train had proceeded three or four miles he felt sick, and thought he would faint, and,

not being able to get near a window, he opened the door, and stepped out on the platform. Thinking that riding backwards might increase his sickness, he stepped across on the opposite platform, and turned his back to the end of the car, leaned against it, and held onto the hand rail. He stood in this position for a few moments, when he lost consciousness, and rolled down the steps and off onto the ground. He also claims the train was running upwards of 40 miles an hour.

The only question involved here is whether the plaintiff, as a matter of law, under all the circumstances, was guilty of contributory negligence in going out upon the platform to relieve his sickness. The plaintiff claims he was not. The defendant insists he was, and that a verdict should have been directed in its favor.

Before discussing this question it is proper that we should say that we are not at liberty on this record to consider the questions of defendant's negligence, and of whether that negligence was the proximate cause of plaintiff's injury. These questions were not raised in the lower court. The question of defendant's negligence is not raised in this court. The question of that negligence being the proximate cause of plaintiff's injury is raised in this court only in this way:

"In no view of this case can it be said that any alleged act of the defendant was the proximate cause of the accident to the plaintiff. The sole cause of the accident to plaintiff was his own act in leaving a place of safety within the coach and assuming a perilous position on the outside."

We are referred to no assignment of error to which this argument is applicable, and diligent search on our part has enabled us to find none. We therefore conclude, as heretofore stated, that this question is not presented by the record. In deciding this case we therefore assume that while plaintiff was on the platform he was injured in consequence of defendant's negligence—negligence which was the proximate cause of his injury.

The question then presented for our determination is whether, under the circumstances, plaintiff was negligent in leaving the car and going on the platform, so as to bar his recovery for an injury there received as a direct consequence of defendant's negligence. It must be confessed there is a want of uniformity in the decisions as to whether a person should be chargeable, as a matter of law, with contributory negligence, in going out upon the platform when no seat was furnished him in the car.

The New York court has held that in going upon the platform, where the company failed to furnish a passenger a seat, he was not, as a matter of law, chargeable with contributory negligence. *Willis* v. *Railroad Co.*, 34 N. Y. 670.

The Wisconsin court has held that where a passenger voluntarily goes upon a platform, where no seat is furnished him, it is a question for the jury to say whether he was guilty of contributory negligence. *Ward* v. *Railway Co.*, 102 Wis. 215.

The Minnesota court has held—and this holding has been followed by several other States—that where a passenger voluntarily goes out upon the platform, where no seat is provided for him, but there is standing room in the car, he is guilty of contributory negligence as a matter of law. *Rolette* v. *Railway Co.*, 91 Minn. 16.

It is the claim of defendant that the last case mentioned is sustained by the great weight of authority, and should control; citing many cases, and especially *Cleveland, etc., R. Co.* v. *Moneyhun*, 146 Ind. 147, which it is claimed is a parallel case to the one at bar. While the case resembles this one in many respects, it may be distinguished in some important particulars. It appears from the opinion in *Cleveland, etc., R. Co.* v. *Moneyhun*, supra, that the record does not disclose what made the plaintiff sick. It also appears "he was not content to stop on the platform, but went upon the lower step, and stood there with his back towards the platform and his head leaning outward." The court was of the opinion that the facts disclosed a

clear case of contributory negligence, and so held. In our view of the case we do not need to decide which of these lines of cases is sustained by the weight of authority. All of them recognize the rule that, if the passenger is necessarily on the platform because of conditions created by the railway company, he is not precluded from recovering damages.

Section 6303, 2 Comp. Laws, reads:

"In case any passenger on any such road shall be killed or injured while on the platform of a car or while in or on any baggage or freight car in violation of the printed regulations of the company posted up at the time, in a conspicuous place inside its passenger cars then in the train, such company shall not be liable for the injury, if the injury be occasioned by the person being improperly on such platform, or within such baggage or freight car, or after having been notified by the conductor or any other person having charge of any train that such person is not in the proper place: *Provided*, said company at the time furnished room and seats inside its passenger cars sufficient for the proper accommodation of its passengers."

This statute clearly recognizes, by inference at least, that conditions may arise where one would be entitled to recover, even though he was riding upon the platform. There was testimony in the case from which the jury might find, not only that the cars were so crowded that all the seats were occupied, but from which they might easily draw the inference that the passenger became faint because of the conditions existing as the result of negligence on the part of the defendant, and, as he could not get to a window to relieve his faintness, he sought what is usually an effective remedy, fresh air, at the only place he could find it. We do not think that it can be said, as a matter of law, that this was contributory negligence.

It is said:

"It was error for the court to charge the jury where the court states, 'and you find that plaintiff was thrown off the platform onto the ground and injured by reason of such sickness so caused, and by reason of the speed of the

train—that is, the high rate of speed of the train over this track—or the tipping of the platform on a curve in the track, then plaintiff would be entitled to recover.' And we submit there was no testimony that would justify this charge as to the high rate of speed as affecting plaintiff's falling from the train. Nor is there any allegation in the declaration that the speed of the train was in any manner the cause of plaintiff falling from the train."

The question of the high rate of speed being negligence was not raised. We think there was testimony of the high rate of speed. We also think the following averment was sufficient:

"That while he was standing at said door, holding onto the hand railing on the end of the car, he became and was unconscious by reason of said foul and unwholesome air, and fell from said train while the same was running at a high rate of speed, and struck with great force on the ground."

Judgment is affirmed.

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

HOOKER, J. (*dissenting*). That one who disregards the rules of a railroad company so far as to voluntarily ride upon the platform of a passenger coach, in face of the well-known and generally recognized danger of so doing, assumes the attendant risks, is so well established by the authorities in this country that counsel do not appear to question the proposition. They say in their brief that "in the case at bar we are willing to admit that, if there was standing room in the car, plaintiff's standing upon the platform was prima facie negligence, and, if no circumstances had been shown which overcame that presumption, then a verdict should have been directed by the trial judge." They claim that the rule does not apply because the circumstances show that their client did not so ride, but was there from necessity.

Two reasons are given for his going into a place of dan-

ger: (1) He found no vacant seat in the car. (2) The air was warm and vitiated from the breathing of the passengers, and he felt faintness and suffocation.

The rule of law is succinctly stated in 2 Wood on Railroads, § 308, to the effect that railroads are liable when the injured passenger is *compelled* to ride upon the platform, but not where he is unnecessarily riding there. The cases there cited support the rule. 4 Elliott on Railroads, § 1630.

It has been suggested in our consideration of this case that section 6303 of our Compiled Laws is a complete answer to the defendant's claim that the plaintiff was negligent in riding on the platform. It reads as follows:

"(6303) SEC. 2. In case any passenger on any such road shall be killed or injured while on the platform of a car, or while in or on any baggage or freight car in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside its passenger cars then in the train, such company shall not be liable for the injury, if the injury be occasioned by the person being improperly on such platform or within such baggage or freight car, or after having been notified by the conductor or any other person having charge of any train, that such person is not in the proper place: *Provided*, said company at the time furnished room and seats inside its passenger cars sufficient for the proper accommodation of its passengers."

The case of *Willis* v. *Railroad Co.*, 34 N. Y. 675, is cited as an authority for a construction of this statute (which is similar to the New York statute), to the effect that under this statute, inasmuch as it provides that one injured while riding on a platform cannot recover, provided he could have found a seat in the car, the inverse of this must follow, i. e., that if he could not find a seat in the car he could go upon the platform at the risk of the company. We doubt if that case is authority for such a proposition, and, if it were, it should not, in our opinion, be followed. We have frequently shown the danger of extending statutes by indulging in such inferences, especi-

ally upon cases that have been discredited, as that case has. It cannot be said that we took that statute with the construction placed upon it by that case, for it was a part of our law long before that case was decided. See 1 Comp. Laws 1857, § 1988. Moreover, the concession quoted from plaintiff's brief, and the failure to make such claim, indicate that plaintiff's own counsel do not care to contend for such a construction. It is doubtful if the railroad laws of any State in the Union fail to contain a similar statute, and in few, if any, of them has it been permitted to affect the general rule as to contributory negligence above quoted.

Counsel's admission, then, relieves us from discussing the proposition that the failure to find a seat absolved the plaintiff from the ordinary consequences of voluntarily riding on the platform. That fact created no necessity for his doing so. We have nothing left to consider but the condition of the car.

It is not claimed that there was not standing room in the coach, and the evidence shows that the plaintiff had only a couple of miles or so to ride before the train would reach a station, at which the crowded condition would be measurably relieved, and he testified that he expected that he could then get a seat, when he entered the car and found all seats occupied. The plaintiff stood near a door, which was shut, according to his testimony. He did not make known his discomfort to the conductor who took up his ticket, nor to the passengers, some of whom were his acquaintances, and ask them to raise the windows. He did not open the door a few inches, and stand with his face to the opening, or throw the door wide open, and thus ventilate the car. He was acquainted with the road, had only six miles or thereabouts to go from Hillsdale to North Adams, had gone four miles, expected a seat when two miles more should have been traveled, but opened the door and went out. A fair statement is that he felt the need of better air, and that he went into a place of danger to get it, without any attempt to have the air in the car

changed, or to get relief in any other way, or to endure a few minutes longer, rather than to incur hazard to his life. Doubtless, circumstances might arise which would make it proper to leave a dangerous place for one less dangerous, but there is nothing to show that he was in danger of anything serious in the car, yet he jeopardized his life to escape a comparatively slight discomfort.

In *Quinn* v. *Railroad Co.*, 51 Ill. 495, the court said:

"This brief statement of the facts, about which there is no controversy, shows there is no ground whatever for maintaining this action. It was the negligence of the deceased, not that of the railway company, which caused his death. He was chargeable with extreme carelessness, and we cannot see on what grounds any material negligence can be attributed to the company. He had voluntarily taken a dangerous position which resulted in his death, and there is no reason why the company should be made to pay damages therefor. Admitting, however, as claimed by appellant's counsel, that the conductor should have advised the deceased to enter the car, at least while paying his fare, his failure to do so was as nothing when compared with the gross negligence of the deceased. The death of the unfortunate man can be attributed only to his own recklessness. It is urged, however, that this question should have been left to the jury. The practice adopted by the court cannot be safely followed in many cases. Whenever there is evidence tending to prove the issue, the plaintiff has a right to take the verdict of a jury. But if this had gone to the jury, and they had found for the plaintiff, the court should have set aside their verdict, or, if it had refused to do so, it would have been set aside by this court."

In *Camden, etc., R. Co.* v. *Hoosey*, 99 Pa. St. 492, the court said:

"Assuming for the present that the company was justly chargeable with negligence resulting in injury to the plaintiff, and that under the circumstances he was not guilty of contributory negligence in passing from car to car in search of a seat while the train was in rapid motion, can it be pretended that it would not be gross negligence in him to voluntarily take a position near the outer edge of the platform and remain there until, by an ordinary jolt

of the car, he lost his equilibrium and was thrown off? * * * He was not only in a position of known danger, but was there voluntarily and in disregard of the rules of the company. There is nothing in the testimony from which a jury would be justified in coming to any other conclusion."

In *Worthington* v. *Railroad Co.*, 64 Vt. 107, the court said:

"Negligence becomes a question of law when the facts or circumstances are so decisive one way or the other as to leave no reasonable doubt—no room for opposing inferences. It is, as a matter of law, prima facie negligence for a passenger to be riding on the platform or step of a rapidly moving steam car. The fact that all the seats in the car were occupied, and the aisles were so crowded that the position of plaintiff was one of discomfort to himself, and of evident discomfort and annoyance to others, does not excuse him for voluntarily occupying a position on the platform while the train was in motion. His claim is that the passage where he stood after giving up his seat was crowded, that most of those in the vicinity were ladies, that the swaying and jolting of the car was one of discomfort to himself and evident discomfort and annoyance to others, and that in consequence of this he concluded to go to the smoking car; that after taking his position on the platform or step he thought he would stay there a few minutes, and then go back into the car which he had left. Thus it appears that the plaintiff had standing room in the car, which he might have continued to occupy, but which he chose to leave in order to free himself from discomfort and annoyance, and that he remained on the platform or the step in order to obtain temporary relief from that discomfort, intending in a short time to resume his former position in the car, which he might have done. But passengers, especially on excursion trains, must expect more or less discomfort, and must endure it rather than assume positions of danger and hazard not provided for their occupancy, for the purpose of avoiding danger. Necessity alone can warrant the assumption of such positions."

The case of *Cleveland, etc., R. Co.* v. *Moneyhun*, 146 Ind. 147, is closely in point. It was held:

"A passenger [a minor 15 years old, and of average in-

telligence] is, as a matter of law, guilty of contributory negligence in going upon the lowest steps of the car to vomit while the train is in rapid motion, though there was only standing room in the car."

The plaintiff's intestate in that case became sick, so that he had to vomit, and went to the platform for that purpose.

In *Goodwin* v. *Railroad*, 84 Me. 211, the court said:

"The danger of standing on the narrow platform of a passenger car, while the car is moving with the usual speed of railroad trains, is most conspicuous. No prudent man, no man ordinarily mindful of his conduct and of matters about him, would occupy such a position. The greater the speed of the train, the more imminent the danger in such a place. Thoughtful people instinctively shudder when they see persons taking such risks. Curves are necessarily frequent on railroads in Maine, a fact well known to all, and a fact which makes the riding on the platform of a car most perilous. The knowingly incurring such an imminent, visible peril, the choosing to ride in such a conspicuously dangerous place, must be held by all reasonable people to be recklessness in a high degree. The danger, the chance of injury, is visibly imminent and great. No man of reason can fail to apprehend it. No prudent man would fail to avoid it. There seems to us no room for debate or question upon this proposition. * * *

"Viewing all the circumstances in every light suggested by the counsel, or imaginable by us, we see no escape from the conclusion that Goodwin's conduct was far below the standard of ordinary prudence, and that such lack of prudence directly caused his injury. Such being our opinion, we must for that reason render judgment accordingly, and set the verdict aside. We have examined every authority cited on both sides, but the above proposition seems to us so clear and simple, so consonant with reason, that we forbear to cite or explain other cases. The curious will find them cited and commented upon in the parallel case of *Worthington* v. *Railroad Co.*, 64 Vt. 107, published since the above opinion was written and concurred in."

The *Case of Worthington*, above cited, contains an elaborate discussion of the questions involved here. Con-

spicuous among them is the mooted question of taking a question of negligence away from the jury, and many cases are cited in support of that duty. We do not quote the case at length, for it can as well be read. The following, however, is so pertinent to the crucial point that we quote:

"But passengers, especially on excursion trains, must expect more or less discomfort, and must endure it, rather than assume positions of danger and hazard, not provided for their occupancy, for the purpose of avoiding it. Necessity alone can warrant the assumption of such positions. If they are assumed as matter of choice, and they contribute to injury, there can be no recovery. But what would constitute necessity in such cases it is not easy to say. It may, perhaps, be safely said, in a case like this, when nothing is said nor done by those in charge of the train to control nor influence the conduct of the passenger, that the attendant circumstances must be such as not to leave the passenger free to choose; such as to coerce his action and to compel him to assume the position as the best he could do at the time, acting as a careful and prudent man. The testimony in this case did not tend to show any such coercion of circumstances, any such compulsion; and therefore the case is that the plaintiff was riding as matter of choice, and not of necessity, in a dangerous place, not provided for the occupancy of passengers, which contributed to his injury; hence the court should have directed a verdict against him."

See, also, the recent case of *Rolette* v. *Railway Co.*, 91 Minn. 16. It was there said:

"It is undoubtedly the law, as settled in the best considered cases, that the mere fact that there are no seats in the cars does not justify a person in riding on the platform, for, so long as he can find standing room, by reasonable effort, on the inside of the cars, it is his duty to remain there; and also that, where it is unnecessary to stand or ride upon the platform, going there or standing there is such negligence as will prevent a recovery for personal injuries received; and, further, that while it is true that it was a duty incumbent upon the defendant to furnish a seat for the plaintiff, and not merely standing room in the aisle of the car, the mere fact that he was com-

pelled to accept standing room, especially on an excursion train, would not justify him in voluntarily leaving a place of safety, such as the inside of a coach, and going to one of peril—a platform, for instance. It is well known that passengers on excursion trains expect more or less discomfort and must endure it. They are carried at greatly reduced rates, and must anticipate crowded conditions of the coaches. If they assume dangerous places, it must be upon the ground of necessity alone. If such places are assumed as a matter of choice, and injury results, there can be no recovery."

The *Case of Willis*, 34 N. Y. 670, is referred to as follows:

"This case seems to have been tried, upon the part of the plaintiff's attorney, upon the theory supported by *Willis* v. *Railroad Co.*, 34 N. Y. 670, that the plaintiff was entitled to a seat, and, if none was furnished him, he was justified in going upon the platform. It is to be noticed that in the *Willis Case* the accident was caused by an obstruction upon the track, and that in several other cases cited by counsel the accident was caused either by a sudden lurch of the train or by a defective track; a crowded car having nothing to do with the resulting accident. Such cases are not in point, and we expressly decline to adopt the doctrine that, because a seat is not furnished a passenger, he may go into a place of well-known danger, and, if injured, recover damages. The best considered cases, in our judgment, are to the contrary. *Worthington* v. *Railway Co.*, 64 Vt. 107; *Camden, etc., R. Co.* v. *Hoosey*, 99 Pa. St. 492; *Fisher* v. *Railroad Co.*, 42 W. Va. 183; *Cleveland, etc., R. Co.* v. *Moneyhun*, 146 Ind. 147; *Louisville, etc., R. Co.* v. *Bisch*, 120 Ind. 549; 2 Wood on Railroads, § 308, and note; Beach, Contributory Negligence, § 149."

The case contains the following comment on the question of proximate cause which we have not felt called upon to decide:

"It seems to be well settled that, even though a passenger is compelled to stand upon the platform of a car by reason of his inability to find sitting or standing room inside, the mere fact that he is injured while so standing is not in itself a cause for action against a railway company,

for there must be some intervening act attributable to the latter and causing the injury, in order that the passenger can recover. If the accident is caused by the act of plaintiff himself, or by the act of another passenger, the act not being the natural consequence of the company's negligence, it is not liable."

The proposition that a man who experiences discomfort from the vitiated or overheated atmosphere of passenger trains may, because he feels nausea, go into a place of danger, against the rules of the company, and thereby make the company an insurer of his life, is so unjust that authorities ought not to be required to make it appear. That they are at variance therewith is, however, attested by the cases cited.

The judgment should be reversed, and no new trial ordered.

GRANT, J., concurred with HOOKER, J.

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WALKER v. CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS — IMPROVEMENTS — SEWERS — ASSESSMENT OF BENEFITS.
   Where the engineer's certificate shows that the assessment for sewer construction is in accordance with the resolution directing the assessment, and that the assessment is made in proportion to the benefits to the several lots described, and in accordance with the provisions of the ordinance in such case provided, the certificate is conclusive that the lots were assessed in proportion to the benefits received, as well as by area.

2. SAME — NOTICE OF CONSTRUCTION — SUFFICIENCY OF EVIDENCE.
   On a bill by a property owner to cancel a sewer assessment,

evidence considered, and *held* sufficient to show notice of ordering construction of the sewer and proof of service of such notice.

Appeal from Wayne; Rohnert, J. Submitted October 21, 1904. (Docket No. 74.) Decided December 30, 1904.

Bill by Bryant Walker, administrator de bonis non with the will annexed of the estate of Joseph A. Moross, deceased, against the city of Detroit and another to cancel and set aside a sewer assessment. From a decree dismissing the bill, complainant appeals. Affirmed.

Walker & Spalding, for complainant.

Timothy E. Tarsney (*John W. McGrath*, of counsel), for defendants.

MOORE, C. J. This suit was brought in March, 1898, to set aside and cancel a sewer assessment on certain lots situated in the block bounded by Woodward, Milwaukee, and Cass avenues and the Boulevard, in Detroit, made in 1894. The grounds were: (*a*) The assessment was levied on each lot in the proportion which its area bears to the total area of all lots assessed, and that, owing to the shape and situation of these lots and the uses to which they are or can be put, and the fact that one had sewer connection before, an assessment so levied is not in proportion to the benefits; (*b*) notice of ordering construction of the sewer was not served, and no sufficient proof of service is on file. The case was tried in open court. The bill of complaint was dismissed. The case is brought here by appeal.

A blue print is filed in the case, which shows the situation. The Moross homestead embraced the entire block bounded on one side by Woodward avenue, on another side by Grand Boulevard, on the third side by Cass avenue, and on the remaining side by Milwaukee avenue. In 1892 the administrator platted this block, leaving on the side next

the Boulevard a strip of land having a width of 61.27 feet, fronting on Woodward avenue, running through to Cass avenue, where it had a like frontage. On the Woodward-avenue side were 15 lots fronting thereon running back to an alley. On the Cass-avenue side there were a like number running to the alley. There was left fronting on Milwaukee avenue lot 16, which had 130 feet frontage thereon and ran back 223 feet. On the rear of the lot it had a frontage on the alley of 95 feet. The homestead was upon this lot. It was platted, with an alley on all sides of it except the Milwaukee side. It has 541.54 feet frontage on the alley. Lot 27 is immediately in the rear of lot 16. It has no frontage on a street, but has this alley on two sides of it. Prior to 1894 the administrator sold all of the lots in the block except lots 16 and 27. In 1894 a sewer was built the entire length of this alley, at a cost of $877, a portion of which was paid by the city, leaving $719.79 assessed to the property abutting against the alley, of which $18.75 was assessed to lot 27, and $216.03 was assessed against lot 16, and it is of these assessments complaint is made.

(a) It is claimed by counsel for complainant the assessment was in fact made according to area. It is argued (we quote from the brief):

"Our contention is not that a sewer assessment may not be laid in proportion to area, but that when so laid it must correspond substantially with the proportionate benefits; and that, where the charter and the resolution require the assessment to be made on the property benefited according to the benefit derived, and the ordinance requires it to be made in proportion to area, an assessment which corresponds exactly with the proportionate area of each lot is invalid, even though the assessor's certificate states that it is in proportion to benefits, the certificate also stating that it is made in accordance with the ordinance, and it appearing from the size, shape, and situation of the lot, its uses, present and prospective, and its existing sewer connection, that equal areas are not equally benefited"—citing *Warren* v. *City of Grand Haven*, 30 Mich. 24; *Thomas* v. *Gain*, 35 Mich. 155.

An examination of the cases cited will show they are not controlling in this case. A certificate was attached to the assessment roll made by the city engineer, which contained the following:

"TO THE HONORABLE THE COMMON COUNCIL:

"I hereby certify the above assessment to be correct, and made in accordance with the resolution of your honorable body, directing said assessment to be made upon the lands or lots comprising the taxing district in said resolution, and also herein above described. I further certify that the above assessment is made in proportion to the benefits derived by the several lots or parcels of land described herein, and in accordance with the provisions of the ordinance in such case made and provided."

A fair construction of this certificate is that the engineer assessed these lots in proportion to the benefits received, as well as by area, and his certificate must be regarded as conclusive.

(*b*) Was there want of notice and proof of service thereof? This claim rests upon the testimony of Mr. Walker, which is not very positive. He testified that he had "no recollection whatever of any notice relative to this sewer having been served upon me at the time this sewer started;" that among his papers in connection with this estate there was no notice or reference to any notice having been served upon him.

"*Q.* From this fact, and from the recollection which you have just stated here, what is your belief as to whether a notice was served upon you or not? *A.* My best knowledge would be that there was not."

On cross-examination he says that he is administrator and trustee of a number of estates, three or four, perhaps half a dozen.

"*Q.* Now, if you find in the public works office an affidavit which sets forth that there was served upon you a notice of the construction of this sewer, would you say that it never had been served? *A.* No.

"*Q.* Then it is simply a matter of remembrance? *A.* I have no recollection of it."

He also testified:

"I do not know when I first learned of this assessment, whether I knew it before the sewer was constructed, or before the sewer contractor came around, or not. The contractor has been in and out several times in the last three or four years. I cannot tell how soon after the sewer was constructed he came in, or whether it was a year or six months. I cannot place the time at all. * * * I do not make it a practice to keep notices of assessments served upon me in connection with different estates. I very seldom put them in the files of the estate, because we generally pay them."

It should be remembered this testimony was given nine years after the sewer was built. Mrs. Oakman, a married daughter of Joseph Moross, was living on lot 16 when the sewer was built, and testified that she remembered its construction. On the part of the city a paper was put in evidence entitled, "Proof of service of lateral sewer notice." It contains a description of the alley, a description of the several lots of land ultimately included in the assessment roll, the names of the owners, a statement of upon whom served, whether owner or administrator. On the back of the paper is an affidavit, the material part of which reads:

"L. H. Beck, Jr., being duly sworn, deposes and says that he served the foregoing notices (a copy of which is hereunto attached) as herein recorded, on the dates as set forth, upon the persons herein named, and in the manner stated.

"L. H. BECK, JR.,
"Service Clerk."

Indorsed on it is the following:

"Proof of service of notice for building lateral sewer in alley in block bounded by Cass, Woodward, Boulevard, and Milwaukee avenue."

And written thereon is the following: "File, Bryant Walker, Adms. of Moross Estate." The date of the alleged service is given, and was made three days after the

council ordered the sewer and fixed the assessment district. We think there was a failure on the part of the complainant to establish this branch of his case.

The decree is affirmed, with costs.

The other Justices concurred.

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A. L. LAKEY CO. *v.* CITY OF KALAMAZOO.

1. MUNICIPAL CORPORATIONS—OBSTRUCTING WATERCOURSE—LIABILITY.

Arcadia creek which runs through the city of Kalamazoo was obstructed by the contents of a warehouse erected over it at a point where the owner of the warehouse owned both banks and the bed of the stream. The city was not aware of the obstruction until the contents of the warehouse were removed, and it was able to reach the bed of the creek from the inside, when it cleaned the stream for sanitary purposes. The building did not interfere with the natural flow. The creek was not used for sewerage, and the city had no control over it except under its police power to clean the same, and under its charter to regulate, improve, alter, widen, or change its channel on making compensation for the property taken therefor. *Held,* that the city was not liable for the obstruction.

2. SAME—NATURAL ACCUMULATIONS.

A city is not liable for damages caused by obstructions in a creek flowing through it, not used as an outlet for its sewers, caused by accumulations washed into it from streets and buildings within the natural drainage area of the creek, and it is not its duty to keep the same at its natural depth and width.

Error to Kalamazoo; Adams, J. Submitted November 16, 1904. (Docket No. 97.) Decided December 30, 1904.

Case by the A. L. Lakey Company against the city of Kalamazoo for the flooding of plaintiff's premises. There was judgment for plaintiff, and defendant brings error. Reversed.

The appellant's statement of the case is not disputed, and we therefore adopt it. It is as follows:

This is an action for permitting Arcadia creek to overflow its banks and flood the plaintiff's cellar. Plaintiff had verdict and judgment for $1,760. Arcadia creek is a natural watercourse, draining a portion of the area of the defendant city. The city is situated in a valley. The creek has always carried off the rainfall within its natural area, and, as the community grew, streets were paved and laid out across the creek, and the gutters from the streets were connected with it. Later, as the city grew, underground waterways known as "storm sewers" were installed (which served substantially the same purpose as the old gutters) which were also connected with the creek, but no sewer or gutter connected with it drained any area except the natural watershed. The creek passes through a thickly settled business portion of the defendant city, and substantially all the large buildings of the city are within the drainage area of the creek. The territory occupied by these buildings has been gradually built up, and the water which falls upon the roofs of the buildings collects and is discharged in some instances into the sewers, but usually on the pavements, from whence by gutter or storm sewer it finds its way into the creek. On June 18 and July 2, 1902, heavy rains fell within the drainage area, and the creek overflowed its banks at or near the plaintiff's place of business, and the water ran into its cellar, whereby it claims damage.

The city, although it has never admitted that it was bound so to do, has, as a health measure, always cleaned the watercourses within the city, and very shortly before the 18th of June, 1902, the creek was thoroughly cleaned by the city employés, with the one exception that at the

building occupied by the Harrow Spring Company, which faces on Edwards street in said city, and which is but a few rods from plaintiff's place of business, the workmen were unable to reach the bed of the creek, because for a considerable distance there were private storage sheds built entirely over it. The sheds had been over the creek for a number of years, and entirely upon private property, and there was no method of cleaning it at this place unless the floor of the sheds was removed. Upon inspection, the city employés discovered that there were stored within the sheds harrow teeth and other iron material, and in such a manner that it was impossible for them to reach the bed of the creek. After the floods the Harrow Spring Company moved from their place of business, and then the floor of these sheds was taken up, and it was discovered that harrow teeth had fallen through the floor into the creek in such a manner as to catch debris and drift material, making a dam, which undoubtedly to some extent caused the flood.

The court instructed the jury that the city had the legal right to turn the surface waters of this watershed of the creek into the creek, and that it had turned no more of the surface water into it than it was justified in so doing. The court also instructed the jury that if they found that the city permitted the creek "to become and be so obstructed on the days in question, and that the obstruction caused the creek to overflow its banks and damage the plaintiff's property, then the plaintiff would be entitled to recover; provided you further find that the rain storms which happened on those days were such as might ordinarily have been expected to occur in this latitude, although happening at rare intervals." He further instructed them that if the rainfall was unprecedented, and would have caused the creek to overflow notwithstanding the obstructions, then the defendant was not liable. He also instructed them that it was the duty of the city to keep the creek reasonably clear and free from obstructions, and that it was responsible for the obstructions by the Harrow Spring Company.

Harry C. Howard (*William R. Fox*, of counsel), for appellant.

Osborn & Mills, for appellee.

GRANT, J. (*after stating the facts*). The overflow of the creek so as to flood the basement of plaintiff's building was caused either by a great rainfall, or by the obstruction of the Harrow Spring Company, or both combined. Of course, but for the heavy rains the overflow would not have occurred. It is very probable that but for the obstruction the water would have remained within the banks of the creek. The evidence is that no such flooding had before been known. Plaintiff's manager testified that it had occupied the building ever since it was built; that it had never had a flood to that extent before; that only once before had the water reached its basement, and that was about two years previous; that that overflow was caused by a blockade in the bed of the creek by a firm named Bush & Patterson, who were building a mill, and had lumber and brick piled across the creek. After the first flood plaintiff took no steps to remove its material from its basement, because, as its manager testified, "they did not think they would have another flood right on the heels of the first. We never had any damage before; it had never been flooded before; and, basing my judgment upon the line of my former experience, I certainly did not think it would happen so soon again."

The rule is conceded to be that a municipality is not responsible for damages caused by unexpected and unusual rainfalls, but only for those which experience has shown are liable to occur. *City of Coldwater* v. *Tucker*, 36 Mich. 474; *Seaman* v. *City of Marshall*, 116 Mich. 327.

It was not claimed by the defendant in the court below, and is not now claimed, that the court erred in leaving to the jury the question whether the rainfall was unprecedented, or one which might have been expected to occur, although happening at rare intervals.

Two questions are raised: *First.* Was the defendant liable for the obstruction of the creek by the Harrow Spring Company? The defendant did not cause the obstruction. It was not aware of it until after that company had removed the contents of its warehouse, built over the creek, and the defendant had been able to reach the bed of the creek from the inside, the only way it appears by which it could be reached and cleaned. The Harrow Spring Company owned both banks and the bed of the stream. So long as it did not interfere with the natural flow of the water, it had the right to erect buildings over it. The building itself did not interfere with the natural flow. The defendant had no control over the creek (except that inherent in municipal corporations under the police power) to cause it to be cleaned for the protection of the health of its inhabitants. Even under its charter it could only "regulate, improve, alter, widen, or change the channel of Arcadia brook, * * * on making compensation to persons whose property may be taken for such purposes." The fact that it had caused the stream to be cleaned for sanitary reasons did not make it the duty of the city to protect owners of land from the overflow of water naturally emptying into it. The creek had not been appropriated by the city for the purpose of sewerage. It was no more liable in damages to riparian owners for water running into it, under the circumstances of this case, than it would be for emptying its surface water into the Kalamazoo river, where its general sewerage is conducted. The riparian owners along such streams are entitled to use them for any legitimate purpose so long as they do not affect the rights of other riparian owners or cause a nuisance dangerous to the health of the inhabitants. *Knight* v. *Barr*, 130 Mich. 673. It follows that the instruction of the court that the defendant is liable for the obstruction of the Harrow Spring Company is erroneous. *Haynes* v. *Town of Burlington*, 38 Vt. 350; *Coonley* v. *City of Albany*, 132 N. Y. 145.

Second. Was the defendant liable for obstructions arising from the flow of water into the creek? While the instruction of the court is not very specific as to the character of the obstruction for which the defendant is liable, we infer from its general character, and from briefs of counsel, that it was held responsible for any obstructions caused by the accumulation of sand and mud in its bottom which the water from the streets and buildings washed into it, and that it was the duty of the city to keep the creek at its natural depth and width.

Arcadia creek is a natural watercourse. As the city grew, the watershed of the creek became covered with buildings. Parties who owned land on both sides of it erected buildings over it, as they had the legal right to do. Paved streets became necessary. The speedy discharge of the water from the buildings and streets into the creek was essential to the business, comfort, and health of the inhabitants of the city. The authorities are apparently unanimous in holding that under such circumstances the city had the legal right to construct pavements and storm sewers to speedily carry off the water into the creek through which it was emptied into the river of Kalamazoo, a short distance away. In this process some dirt and material, necessarily deposited upon the pavements, would be carried into the creek. Some of this dirt and material would perhaps settle in the bottom of the creek and lodge along its banks.

The cities and villages in this country are usually situated along the banks of rivers and small streams, into which the water falling upon their paved streets and buildings must be conducted. For the dirt and material thus carried into such streams, the municipalities are not liable to the riparian owners, or to others living in the vicinity. If any such owner is damaged thereby, it is damnum absque injuria. Neither does the law impose upon the municipality the duty to keep the bed of the stream at its original depth and width. As a measure of health, the municipality undoubtedly has the power to clean or cause to be cleaned the bed of the stream and thus accelerate the flow

of the water, but the municipality has no other control over it. It owns no land along the banks. The creek is not a trunk sewer owned by the municipality.

Under the facts of this case the defendant is not liable. Its nonliability is founded in sound reason, and is supported by the authorities. *Wilson* v. *City of Waterbury*, 73 Conn. 416; *Wheeler* v. *City of Worcester*, 10 Allen, 603; *Mayor, etc., of Cumberland* v. *Willison*, 50 Md. 138; *Fair* v. *City of Philadelphia*, 88 Pa. St. 309; *Kavanagh* v. *Brooklyn*, 38 Barb. 232; Gould on Waters, § 270.

The learned counsel for the plaintiff cite and rely upon *Ashley* v. *City of Port Huron*, 35 Mich. 296; *Rice* v. *City of Flint*, 67 Mich. 401; *Seaman* v. *City of Marshall*, 116 Mich. 327; *Manning* v. *City of Lowell*, 130 Mass. 21; *Brayton* v. *City of Fall River*, 113 Mass. 218; *O'Brien* v. *City of St. Paul*, 18 Minn. 176; *Clay* v. *City of St. Albans*, 43 W. Va. 539; *Noonan* v. *City of Albany*, 79 N. Y. 470; *Barton* v. *City of Syracuse*, 36 N. Y. 54; *Stanchfield* v. *City of Newton*, 142 Mass. 110; *Parker* v. *Nashua*, 59 N. H. 402; *Mayor, etc., of Waycross* v. *Houk*, 113 Ga. 963.

In *Ashley* v. *City of Port Huron* the city cut a sewer in such a manner as to cause a collection of large quantities of water upon the plaintiff's land which would not otherwise have flowed there.

In *Rice* v. *City of Flint* the city made a dam by raising the grade of the street, so that the water overflowed the plaintiff's premises.

In *Seaman* v. *City of Marshall* the city was held negligent in not providing reasonably efficient means to carry off the water which should reasonably have been expected to accumulate.

In *Manning* v. *City of Lowell* the territory which was drained of its surface water was very much greater than the extent of territory which would be thus naturally drained without the intervention of the artificial means

constructed by the city. In other words, the city took water which would not naturally flow upon defendant's land, and discharged it upon his land.

In *Brayton* v. *City of Fall River* the city drained by its system of sewers a territory of 60 or 75 acres, and emptied it into a creek, whereas only about 15 to 20 acres naturally drained into it.

In *O'Brien* v. *City of St. Paul* the area of the drainage through the sewer is not clearly shown. It is stated that by means of the sewer the city conducted to and emptied upon the plaintiff's premises a greater body of water than the natural flow of water through the watercourse—wore away the banks and soil to a much greater extent than would have been caused by any stream naturally flowing through said watercourse. If it is meant by this that a municipality cannot pave its streets and construct storm sewers so as to convey water more rapidly into the creek than it would naturally flow, it is against the clear weight of authority, and against the instruction of the court in this case.

In *Clay* v. *City of St. Albans* we gather from the statement of the case that the city, by its gutters and drains, collected surface water and cast it in a body onto plaintiff's land. It is not a case of draining into a creek or natural watercourse.

In *Noonan* v. *City of Albany* the water was collected from the lands and streets of a municipality into an artificial channel and discharged upon plaintiff's lands. The defendant in that case, by means of sewers and manner of grading, concentrated the surface water and sewage of a large territory and discharged it in one body into a ravine where a small rivulet formerly ran.

Barton v. *City of Syracuse* involves the duty of the municipality to keep its sewers in proper repair and prevent their becoming filled with dirt and rubbish, thus impeding the overflow of the water, and causing it to set back upon the lands of lot owners. *Stanchfield* v. *City of Newton* is a similar case.

In *Mayor, etc., of Waycross* v. *Houk* the plaintiff sought to enjoin defendant from continuing or from extending a main sewer so that the sewage would be discharged directly upon her land. The basis of the decree in that case was that the nuisance should be abated as dangerous to life and health.

In *Parker* v. *Nashua* the liability was based upon the negligent management of the municipality in not keeping a culvert free from obstructions.

We are of the opinion that those cases do not apply to this one.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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SPIER *v.* CITY OF KALAMAZOO.

1. SAVING QUESTION FOR REVIEW—INSTRUCTION—SUFFICIENCY.
   In an action against a city, a request by defendant for an instruction that, "in order for plaintiff to bring suit, it is incumbent on him to show that he has presented a claim to the city in accordance with the statutory requirements. He has offered in evidence a paper which he says is a claim, but in which he fixes no sum for his damages"—is not sufficient to raise the question that the claim was not presented within the time limited by the charter.

2. MUNICIPAL CORPORATIONS—ACTIONS—NOTICE OF CLAIM—SUFFICIENCY—WAIVER.
   Where a notice of claim for damages against a city was given, and was recognized and acted on by the city council without objection that it did not state the amount of damages claimed, such objection cannot be raised in an action on the claim.

3. SAME—CONTRACTS—ULTRA VIRES—ESTOPPEL.

Where a city, in consideration of its agreement to make certain street improvements, has obtained a deed of land from plaintiff for a street, and has drawn therefrom a large amount of materials for its streets, and plaintiff cannot be placed in statu quo, the fact that an insignificant part of the contract was void because ultra vires will not defeat the whole contract.

Error to Kalamazoo; Adams, J. Submitted November 16, 1904. (Docket No. 98.) Decided December 30, 1904.

Assumpsit by Samuel O. Spier against the city of Kalamazoo for breach of a contract to open and grade a street. There was judgment for plaintiff, and defendant brings error. Affirmed.

Harry C. Howard (*William R. Fox*, of counsel), for appellant.

A. M. & C. H. Stearns, for appellee.

MOORE, C. J. This is an action brought upon a contract which plaintiff claims the city made with him. He recovered a judgment. The case is here by writ of error.

It is the claim of plaintiff that the city desired to put a street through his property, and the street commissioner and aldermen composing the street and bridge committee entered into negotiations with him for that purpose; that he made them a proposition that if the city would open up a four-rod street from Davis street to Asylum avenue, and pave the gutters to the top of the hill, and put the street in good shape, he would give the city the right of way across his land. The north side of Wheaton avenue was to be the center of the street through his property, and, if they turned at Short street, it was to be a certain grade at the top of the hill; and, if they went straight

through, it was to be of another grade at that point, with a 10 per cent. grade in either event to Davis street. He also claims the street and bridge committee favored the opening of the street, and the street commissioner advised plaintiff that, in order to get the matter before the council, it would be necessary to have a petition for opening the street, and directed him to the chairman of the street and bridge committee, who was present when the proposition was made, and who prepared, or caused to be prepared, a petition for the opening of a four-rod street from Davis street to Asylum avenue, and which petition, the signatures to which were obtained by Mr. Spier under instruction of city officials, was presented to the council May 20, 1895, and referred to the committee on streets and bridges, and by the committee immediately reported back favorably, and the same was adopted by the unanimous vote of the council. He further claims the city took possession of the street, caused same to be surveyed by its engineer, the grade stakes set, and at once commenced hauling out material for filling other streets in the city, which has ever since been continued by the defendant. That the proposition was known not only to the members of the street and bridge committee, but was discussed in open council. That he afterwards made a deed to the city, and the city council ratified and confirmed the contract in October, 1897, when the deed for the street was accepted. He produced testimony tending to support this claim. The claim of the city will appear in the assignments of error which its attorneys discuss. The first group of assignments of error present the questions of whether (*a*) the claim was presented within the time limited by the charter. (*b*) Do the provisions of the charter cover claims of this character? (*c*) Was the claim which was presented sufficiently specific as to the details of the claim, and in its statement of the amount claimed?

We deem it necessary to discuss only "*a*" and "*b*." As to "*a*:" It is claimed by plaintiff that no contention

was made in the court below that the claim was not presented to the city in time, but, on the contrary, a defense was interposed inconsistent with such a claim. Counsel for defendant insist such a contention was made in the court below. All that was said upon that subject in the court below is as follows:

Ninth request: "In order for the plaintiff to bring suit, it is incumbent upon him that he show that he has presented a claim to the city of Kalamazoo in accordance with the statutory requirements. He has offered in evidence a paper which he says is a claim, but in which he fixes no sum for his damages. Therefore he is not entitled to recover, as it is a condition precedent to his beginning suit that he present a claim to the city council as above set forth."

Fourteenth request: "If you find that there was no time in which the alleged contract was to be performed, then you will be justified in finding that the city of Kalamazoo has not unnecessarily delayed the performance of its contract, as in such case it might perform the contract at any time; and, if you find that it was not reasonably possible to complete the street before the beginning of this suit, then your verdict should be for the defendant—no cause of action."

Fourteenth and one-half request: "If you find that it was impracticable to lay the stone gutters and gravel the street until the abutting property was brought to a point near the street grade, then, in that event, you would be justified in finding, and you should find, that there had been no unreasonable delay on the city's part, and your verdict should be for the defendant—no cause of action."

Additional request: "The court is requested to charge that any claim under the alleged contract is barred by the statutes of limitation, and therefore the plaintiff cannot recover."

It will be observed that the ninth request does challenge the attention of the court and counsel to the infirmity in the claim which was presented, and states the infirmity to be that no sum for his damages was fixed therein by plaintiff. When this was followed by requests 14 and 14½, it is very clear neither court nor counsel was advised that objection was made because the claim was not presented in time.

The additional request to charge is to be read in the light of the fact that the statute of limitations was pleaded as a defense, and it was the claim of defendant upon the trial that the contract was made in 1895, while the suit was not begun until June, 1903, and for that reason could not be enforced. When so read, we think it clear the additional request did not refer to the contention that the claim of plaintiff was not presented to the common council in time. Under these circumstances, we think the point cannot be urged here.

(*b*) Was the claim presented to the common council too indefinite? May 7, 1900, Mr. Spier sent to the common council a sworn claim against the city, in which he recited at length his relations with the city, and concluded with the following:

"That by reason of the failure of said city to perform its obligations and contracts in regard to the opening of said street for five years past, that he has been greatly damaged in not being able to put his lots upon the market and to sell them, and also by the unsightly condition in which said premises have been placed by the removal of the sand, gravel, and other materials taken from his said premises, and of which the city has had the benefit; and he therefore claims that said city is indebted to him in a large sum of money on account thereof, and prays that he may be reimbursed therefor," etc.

This claim was minuted on the records of the council meeting, and referred to the committee on claims. Mr. Spier was notified to appear before the committee, and was in attendance at the time and place mentioned, but nothing was done. In this case the notice was given. The council recognized it was received. A claim was made therein for damages. No suggestion was made that it ought to be for a stated amount. Had such a suggestion been made, it could easily have been remedied. The claim now made is technical. The principle involved had our attention in *Holtham* v. *City of Detroit*, 136 Mich.

17, and *Beattie* v. *City of Detroit*, 137 Mich. 319. We do not think this defense is well taken.

The next question calling for consideration is, Was the contract ultra vires, as claimed by defendant? This contention is based upon the claim that the contract created an indebtedness, and that the city had an indebtedness already to the limit of the amount it was allowed to create. This claim is disputed by the plaintiff. He also contends that, even though this claim was true in 1895, it should not control this case, in view of the results which have come to the city by the transaction. His claim is that the city has obtained a deed for a street which it retains; that it has caused to be drawn away a large amount of material for its streets, which it has not offered to return; that it has not placed plaintiff in statu quo, and the case is governed by *Coit* v. *City of Grand Rapids*, 115 Mich. 493. In this case there is a full discussion of the defense of ultra vires, with citation of many authorities. We think the case at bar comes within the *Coit Case*.

The other assignments of error have had our consideration, but we do not think it necessary to discuss them.

Judgment is affirmed.

The other Justices concurred.

TAYLOR *v.* TAYLOR'S ESTATE.

1. BILLS AND NOTES—EXECUTION—PROOF.

On the hearing of a claim against an estate on notes alleged to have been executed by the decedent and lost, testimony of a witness that she had been told by the decedent that the claimant held notes against him, and that she had seen the notes of which he spoke, and testimony by another witness that he had seen decedent's signature a number of times, and had seen the notes, and, in his judgment, the signature to the notes was that of decedent, was sufficient evidence of execution to go to the jury; and it was not error to refuse to direct a verdict for the estate.

2. SAME—CONSIDERATION—PRESUMPTIONS.

Where there was evidence that certain lost notes in suit were negotiable in form, it will be presumed that they were based on a consideration, though they did not contain the recital "for value received."

3. SAME—BURDEN OF PROOF.

Proof of the execution of promissory notes makes out a prima facie case, and, where there is no evidence of want of consideration, the burden of proving consideration is not imposed upon the plaintiff.

4. SAME—NOTES PAYABLE AT DEATH—CHARACTER AS BEQUEST.

Notes executed by a decedent and payable at his death are not in the nature of a bequest, and need not be executed with the formalities prescribed for wills,

5. SAME—PAYMENT—BURDEN OF PROOF.

The burden of proving payment of promissory notes rests on the party who claims to have made it, though that party is the estate of a decedent.

6. WITNESSES — DECEDENTS' ESTATES — CLAIMANTS — FACTS EQUALLY WITHIN KNOWLEDGE OF DECEDENT.

On the hearing of a claim against an estate on notes alleged to have been executed by the decedent, testimony by the claimant that she did not have the notes in her possession; that

they were lost while owned by her and in her possession; that she had made search therefor, the particularity of which she stated—was not a violation of 3 Comp. Laws, § 10212, forbidding claimant from testifying to facts equally within the knowledge of the deceased.

7. EXECUTORS AND ADMINISTRATORS — CLAIM AGAINST ESTATE — CHARACTER OF CLAIMANT—EVIDENCE.

On the hearing of a claim against an estate by the decedent's wife on notes alleged to have been executed by him, it was not error to exclude testimony that claimant had another husband living when she married decedent, and that she had been unchaste.

8. EXAMINATION OF WITNESSES—FURTHER DEVELOPMENT ON REDIRECT.

While claimant was testifying, counsel for the estate introduced a note other than those sued on, and proved by her that she had signed her husband's name thereto as maker. *Held*, that on redirect examination her counsel might show why, and the circumstances under which, she so signed said note, to rebut the inference that she had also signed her husband's name to the notes in suit.

9. SAME — COMPARISON OF HANDWRITINGS — DOCUMENTS NOT IN EVIDENCE.

On the hearing of a claim against the estate of a decedent on notes alleged to have been executed by him, a witness who had testified to the genuineness of decedent's signature to the notes was, on cross-examination, shown the signatures to certain documents not in evidence, purporting to be signed by decedent, and asked if such signatures were genuine *Held*, that he might decline to answer unless he was permitted to examine the documents.

10. EVIDENCE — UNIDENTIFIED DOCUMENTS — SIGNATURES — ADMISSIBILITY.

The signatures to unidentified documents not in evidence are properly rejected when offered in evidence for the purpose of comparison.

11. DEPOSITIONS—USE ON APPEAL.

A deposition, taken for use on a previous hearing before commissioners on claims, showing that the witness was over 80 years of age and unable to travel, is properly admitted on the trial in circuit court, under 3 Comp. Laws, § 10142, as it cannot be presumed that the cause for taking the deposition had been removed.

12. EXECUTORS AND ADMINISTRATORS — CLAIM AGAINST ESTATE — WIDOW—ESTOPPEL TO ASSERT.

A recital in a will by which testator disputes a claim of his wife against him does not preclude her enforcing her claim against his estate, though she accepts the provisions in the will for her support in lieu of dower.

13. EXAMINATION OF WITNESSES—BIAS—CROSS-EXAMINATION.

On the hearing of a claim by a widow against the estate of her deceased husband, on notes alleged to have been executed to her by him, her stepson having testified on direct examination for the estate that his relations to plaintiff were friendly, she was entitled on cross-examination to show his conduct toward her.

14. INSTRUCTIONS — CREDIBILITY OF WITNESSES — PREPONDERANCE OF EVIDENCE.

An instruction, which, construed with the remainder of the charge, told the jury that, after rejecting the testimony of witnesses discredited by them, their verdict should be for claimant, if there was more testimony—that is, a preponderance of testimony—tending to establish the validity of her claim, and, if there was not, their verdict should be for the estate, was correct.

Error to Muskegon; Russell, J. Submitted November 17, 1904. (Docket No. 105.) Decided December 30, 1904.

Elizabeth Taylor presented a claim against the estate of Amos R. Taylor, deceased, for the amount of certain promissory notes. The claim was disallowed by the commissioners. Claimant appealed to the circuit court, where she had judgment, and the estate brings error. Affirmed.

Elizabeth Taylor presented a claim against the estate of Amos R. Taylor, her deceased husband, for the amount of certain promissory notes claimed to have been executed by him in her favor, payable at his death, and which she claimed to have lost. Decedent's will, after leaving all

his property to the children of his first wife subject to claimant's support, contained the following recital:

"Having heard of some claim of my wife, Elizabeth, has against my estate, I wish to state the facts relating thereto for the purpose of preserving them. That the receipts she claims to have for money paid out and other claims were procured first by taking my mother, Mrs. Shannon, to take care of. We took her to our home and one Hamilton, whom she married after Shannon died, and there was about seven hundred dollars coming from the Shannon estate for the support of my mother. I furnished everything for her support, my wife doing the work with the other members of my family and she got this money and used it and took receipts for bills paid and claims it as her money and against me; and for the care of Hamilton for five years we were to receive ten dollars a month, and did, and this when paid was taken by her and bills paid and receipts taken by her as so much money paid out by her, making a claim of about fourteen hundred dollars. While I furnished everything for the care and support of these parties, and paid the funeral expenses of my mother, and all receipts were taken without my consent or knowledge, and as I believed, for the purpose of taking my estate from my children by my first wife after my death."

Walter I. Lillie (*Stephen H. Clink*, of counsel), for appellant.

Nims, Hoyt, Erwin, Sessions & Vanderwerp, for appellee.

CARPENTER, J. The claimant, Elizabeth Taylor, recovered in the court below on three promissory notes which it was claimed were executed by decedent and held by her.

It is contended that the court erred in not charging the jury to render a verdict in favor of the estate because (*a*) there was no evidence tending to prove the execution of the notes; and (*b*) there was no evidence of consideration.

(*a*) We think there was abundant evidence of the exe-

cution of the notes. Such evidence is furnished by the following testimony of Sarah Bradley:

"Mr. Taylor told me that Lib [claimant] had notes against him. * * *

"*Q.* What notes was he talking about at that time? *A.* Those three notes I seen the last time I saw them at Ferris Center."

Proof of execution may also be inferred from the testimony of Hon. George A. Farr, a witness for plaintiff. He testified that he had seen decedent's signature a number of times, and, in his judgment, the signature to those notes was his.

(*b*) We are bound, also, to say that there was evidence of consideration. It is true that the notes did not contain the recital "for value received;" but there is evidence that they were negotiable in form, and there is a presumption that such notes, though lacking the recital just mentioned, are based upon a consideration. See *Carnwright* v. *Gray*, 127 N. Y. 92; *Dean* v. *Carruth*, 108 Mass. 242.

As there was no evidence tending to prove want of consideration, the court did not err in refusing to charge that the jury must find not only that decedent signed the notes, but also that they must find "by a fair preponderance of the evidence in this cause" that they were based upon a valuable consideration. The proof of the execution of the notes made out a prima facie case, and it is only when there is evidence of want of consideration that there is imposed upon the plaintiff the burden of proving consideration by a preponderance of testimony. See *Manistee Nat. Bank* v. *Seymour*, 64 Mich. 73, 74; *Farnsworth* v. *Fraser*, 137 Mich. 296; *Rood* v. *Jones*, 1 Doug., at page 193; *Young* v. *Shepard's Estate*, 124 Mich. 552.

The trial court refused to charge the jury, as requested by the estate, that these notes were in the nature of a bequest, and that the burden of proving nonpayment rested upon claimant. The notes certainly were not in the nature of a bequest, and it is an elementary principle of law

—a principle which we must hold as applicable though an estate is party to a suit—that the burden of proving payment rests upon the party who claims to have made it. The court therefore properly permitted interest to be computed upon the assumption that payments had not been made.

Claimant was permitted to testify that she did not have the notes involved in suit; that they were lost while owned by her and in her possession; and she was also permitted to testify to the particularity of the search made to find them. It is contended that, in giving this testimony, claimant violated the statute (section 10212, 3 Comp. Laws) which forbade her testifying to facts equally within the knowledge of the deceased. In giving this testimony, claimant went no further than it was necessary for her to go to establish the loss of the notes. This she was compelled to do in order to furnish an excuse for not producing them. Appellant's contention that she thereby testified to the existence of notes executed by decedent will not bear anaylsis. From claimant's testimony that she still owned, could not find, and had lost the notes involved in the suit, no inference that those notes were executed by her husband—indeed, no inference of any fact known to deceased—could be legitimately drawn. The testimony was properly admitted. See *Choate* v. *Huff*, 4 Tex. App. Civ. Cas. 480.

It was not error for the trial court to exclude testimony tending to prove that claimant had another husband living when she married decedent, and that she had been unchaste. See *People* v. *Mills*, 94 Mich. 630; *Knickerbocker* v. *Worthing*, ante, 224.

While claimant was on the witness stand, counsel for the estate introduced a note—not one of those for which she recovered judgment—and proved by her that she herself signed her husband's name thereto as maker. Complaint is made because on redirect examination claimant's counsel was permitted to show why, and the circumstances under which, she signed said note. We think

this testimony was properly permitted. It was needed to rebut the inference—an inference suggested by counsel for the estate—that might otherwise be drawn that claimant had also signed her husband's name to the notes in suit.

On the cross-examination of a witness who had given testimony tending to prove the genuineness of decedent's signature to the notes in suit, counsel for the estate presented to him certain documents, not in evidence, purporting to be signed by deceased, and asked him if such signatures were genuine. The witness declined to answer unless he was permitted to examine the documents. Complaint is made because the trial court sustained his position. The decision of the trial court was correct. See *North American Fire-Ins. Co.* v. *Throop*, 22 Mich., at pages 160–162. The trial court very properly refused to permit counsel for the estate to introduce these signatures in evidence. As they had not been identified, they were clearly not admissible.

The court permitted claimant to use in testimony the deposition of Sarah Bradley, which had been taken for the hearing before the commissioners on claims. This deposition was taken under sections 10136–10143, 3 Comp. Laws.

Section 10142 reads:

"Depositions under this act may be read and considered in evidence at the trial or on any hearing, and on appeals and retrials of the same cause of action, but the court shall have power to regulate the use, to prevent abuses thereof, and may order the retaking of testimony, or the production of the witness, if within the jurisdiction, notwithstanding that his deposition has been taken."

The statute above quoted is sufficient authority for using the deposition on appeal. But it is claimed that there was no showing that the witness was then sick and unable to attend court. The record does not disclose that this objection was made in the trial court. Moreover, it appears from the deposition that the witness was over 80 years of age and unable to travel; and it cannot, therefore, be presumed, under the case of *Emlaw* v. *Emlaw*, 20 Mich. 11,

relied upon by appellant, that the cause for taking the deposition had been removed.

Appellant contends that the court erred in not admitting in evidence the files of the probate court showing the will and the administration of the estate. It is contended that by this it would have appeared that claimant accepted the provisions of the will, and that those provisions are inconsistent with her right to maintain this suit. It is a sufficient answer to this contention to say that, in our judgment, those provisions did not affect claimant's right to recover in this case.

Complaint is made because on the cross-examination of George Taylor, a witness for appellant, claimant's counsel was permitted to show his conduct toward claimant, his stepmother. We think that the door for the admission of this testimony was opened by appellant when, on direct examination, this witness testified that his relations to his stepmother were friendly.

In concluding his charge to the jury, the trial court said:

"It is for you to say * * * as to whether all of the witnesses that have been sworn here have told the truth. * * * If you find that they have not, of course you will reach a verdict from the evidence which under all the circumstances you think is true, when you have collected that evidence together—if there is more of it that satisfies you that the claim of the claimant is valid than there is on the other side, taking everything into consideration, you will find for the claimant; if there is not, you will find for the estate."

Appellant contends that, as all the testimony relating to the execution of the note and its consideration was produced by claimant, this charge was misleading, and, in effect, told the jury to render a verdict for the claimant. This argument has no foundation, if the language is, as it should be, properly construed. Construing it in connection with the remainder of the charge, as it certainly should be, the jury were told that, after rejecting the

testimony of witnesses discredited by them, their verdict should be for claimant, if there was "*more*" testimony—that is, a preponderance of testimony—tending to establish the validity of her claim; if there was not, their verdict should be for the estate. As thus construed, the charge was correct, and is not open to the objection urged by appellant.

We have examined appellant's other complaints, and, in our judgment, no other assignment of error demands discussion.

The judgment is affirmed, with costs.

The other Justices concurred.

CARSON, PIRIE, SCOTT & CO. *v.* FINCHER.

1. BILLS AND NOTES—CHECKS—PRESENTMENT—NEGLIGENCE—DEFENSES AS AGAINST DRAWER.

   Delay in presentment of a check for payment, and failure to give notice of dishonor, is no defense to the drawer, where the latter had no funds in the bank to meet the check, and had no expectation that it would be paid.

2. SAME—QUESTION FOR JURY.

   Where, in an action by the holder against the drawer of a dishonored check, there was evidence that the drawer at the time he uttered the check had a balance in the bank less than the amount of the check, and had notice that the bank was weak, and of the dishonor of other checks, but gave no intimation thereof to plaintiff, plaintiff was entitled to go to the jury on the question whether the drawer had funds, or an expectation that the check would be paid, when it was drawn, though plaintiff was guilty of negligence in presentment, etc.

Error to Oceana; Russell, J. Submitted November 17, 1904. (Docket No. 106.) Decided December 30, 1904.

Assumpsit by Carson, Pirie, Scott & Company against Francis W. Fincher and Charles Jensen, copartners as F. W. Fincher Company, to recover the amount of a protested check. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Reversed.

Hartwick & Skeels, for appellant.

Nims, Hoyt, Erwin, Sessions & Vanderwerp, for appellees.

HOOKER, J. The first trial of this cause was reviewed by us, and the opinion filed therein will be found in 129 Mich. 687, where a general outline of the case is stated. Upon a second trial the court directed a verdict for the defendants, and the plaintiff has appealed.

The judgment must be reversed if there was any question that should have been submitted to the jury. Our former decision sustained defendants' claim that a question of fact was raised as to whether defendants had funds in the bank, when the check was received by the bank, sufficient to pay this and all outstanding checks, and that defendants had a right to have that question submitted to the jury. It was also said in the opinion that if there were sufficient funds to defendants' credit at that time, and the bank had funds, and the check would have been paid had it been duly and properly presented over the counter, the defendants would have been discharged through the method of presentment; i. e., sending the check to the drawee by mail, with request to remit—in other words, making the drawee plaintiff's agent for collection.

In this case the evidence shows that the plaintiff did

not use diligence in presenting the check, inasmuch as it sent the same to the drawee, who did not pay it. It would follow that, in case of a loss by reason of the failure of the bank, such loss would fall upon the plaintiff, rather than the defendants, if they can be called innocent defendants. Authorities are numerous that delay in presentment and failure to give notice of dishonor cannot be successfully interposed as a defense in an action against the drawer, when it can be said that the drawer had no funds in bank, and had no expectation that the check could be paid.

It is contended in this cause that the defendants had issued checks to the full amount of their credits, and had not sufficient funds in bank to pay the check, and also for the reason that they had notice of the condition of the bank. Counsel claim that whereas it did not conclusively appear in that case that the bank had in its possession checks drawn by defendants and drafts sufficient to exhaust their balance, before they drew the check in question, on this trial there was such evidence, and again it is said that at the previous trial it did not appear that defendants had notice of the dishonoring of their checks before drawing the one in question, while upon the last trial that was shown by the introduction of a letter written to and received by defendants shortly before drawing the check in question, notifying them that their check had not been paid, and saying that, if their checks could not be paid more promptly, the writer could not accept them.

If the rule be as claimed, that want of notice is not a defense when the defendants knowingly overdrew and had no expectation of payment, as counsel apparently concede the rule to be, we think that plaintiff had a right to go to the jury upon that question. It is claimed that with a balance of less than the amount of the check in the bank, and with notice that the bank was weak, of which there was some evidence, and actual notice of the dishonor of its checks, defendants overdrew their account without intimation to the plaintiff of the dangers of the

situation. It does not necessarily follow that the check was drawn without an expectation of payment, but the evidence tending to show these things, and that in denial and explanation and an agreement to honor overdrafts, raise a question of fact.

We must therefore reverse the judgment. It is so ordered.

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

AUDITOR GENERAL *v.* CARPENTER.

1. TAXATION — TAX SALES — OBJECTIONS — STATE TAX HOMESTEAD LANDS.

   A landowner, contesting tax sale proceedings as the owner of the government title, cannot claim that, under sales of prior years, the land has become State tax homestead land, and that, therefore, the taxes in question should have been canceled.

2. SAME—LIEN—BAR.

   Where the auditor general in 1892 included certain lands in his petition to foreclose the lien for the taxes of 1889, and, on tardy objections being filed by the owner, the petition was dismissed as to those lands without prejudice, the State's lien under section 26 of the act of 1885 (Act No. 153) was not thereby barred.

3. SAME—FAILURE TO INCLUDE PRIOR TAXES.

   Failure of the auditor general to include certain lands in his petition for the foreclosure of tax liens thereon the succeeding year after a petition to foreclose had been dismissed without prejudice did not bar the lien.

4. SAME—LIEN—PROCEDURE TO ENFORCE—LACK.

   That there was a time during the existence of a tax lien that

no procedure was provided for its enforcement did not extinguish the lien.

Appeal from Osceola; McAlvay, J. Submitted November 17, 1904. (Docket No. 203.) Decided December 30, 1904.

Petition by Perry F. Powers, auditor general, for the sale of land delinquent for taxes: On objections filed by Eugene Carpenter. From a decree for petitioner, contestant appeals. Affirmed.

Charles A. Blair, Attorney General (*Charles W. McGill* and *George L. Hauser*, of counsel), for petitioner.

Eugene Carpenter, in pro. per.

MONTGOMERY, J. Under date of January 13, 1904, Perry F. Powers, auditor general of the State of Michigan, filed a petition in the circuit court for the county of Osceola, in chancery, pursuant to section 61 of the general tax law (being Act No. 206, Pub. Acts 1893, as amended by Act No. 225, Pub. Acts 1897), praying for a decree for the sale of the northwest quarter of the southeast quarter of section 14, town 18 north, range 10 west, for the taxes assessed thereon for the year 1889, which, including interest, collection fee, and charges, as shown by the tax record, amounted to $12.81, and also for the taxes of 1901, the total amount of which, including interest, collection fee, and charges, amounted to $7.02. Upon the filing of said petition an order was duly made fixing the time for hearing of said petition, which order was published as required by the general tax law. Prior to the hearing on said petition, Eugene Carpenter, claiming to be the owner of the original or government title to said land, appeared in said proceeding and filed certain objections to the granting of a decree for the sale of said land for the taxes so assessed, together with interest, collec-

tion fees, and charges. Upon the hearing in said court the various objections made were overruled, and a decree entered directing that this land be sold for the taxes of said years, together with the interest, collection fee, and charges, as hereinbefore indicated, at the next annual tax sale thereafter, to be held commencing on the 3d day of May, 1904. From this decree the contestant appealed to this court.

The contestant has furnished us with briefs to the extent of 120 pages, and it is fair to assume that all has been said in opposition to these taxes that the case warrants. We think the case may be decided with more regard for brevity.

As to the taxes of 1901, the contestant, while appearing to contest on the ground that he is the owner of the original government title, made the claim that the land had been sold by the State for taxes for prior years, and was held by the State as State tax lands; that it should have been deeded to the State by the auditor general, and placed in the class of homestead lands; and that, if this had been done, the taxes for subsequent years, including 1901, would have been canceled. It does not appear by evidence in the record that the land was held as State tax land. If it were, it can scarcely be regarded as the function of a delinquent whilom owner to direct the administrative arm of government in the management of its property.

As to the taxes of 1889: These were assessed under the tax law of 1885 (Act No. 153, Pub. Acts 1885). Section 26 of that act provides:

"The amounts assessed on any real property shall, on the first day of December, become a lien on such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof."

In 1892 the auditor general included these lands in his petition, and sought to foreclose for the taxes of 1889.

The present contestant filed tardy objections to the taxes, and, as the time was not sufficient for their consideration, the petition was dismissed without prejudice. The State's lien continued in force, under the above-quoted section 26 of the act of 1885. By an oversight these lands were not included in the petition of 1893. The lien, of course, continued to exist, however.

In 1893 the present tax law was passed, but at first contained no provision for foreclosure for liens prior to 1891. This omission was supplied by an amendment in 1899 by adding the present sections, 138 and 139 (Act No. 169, Pub. Acts 1899). The fact that there was a time during which machinery was not provided for enforcing the tax does not establish that the lien was extinguished. *Croskery* v. *Busch*, 116 Mich. 288. It will be seen that the lien of these taxes has never been discharged.

The only attempt to show any error in assessment was the introduction of some testimony tending to show that certain mortgages appearing to be in force were not assessed. But the testimony was too vague to impeach the official conduct of the assessors. It was not shown that the residence of the mortgagees would have rendered the mortgages subject to assessment in the county.

The constitutionality of the provisions of this tax law has been often affirmed, and we decline to reconsider the questions settled by our decisions.

The decree is affirmed.

The other Justices concurred.

CLARK v. WOLVERINE PORTLAND CEMENT CO.

1. MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE TO WORK—ASSUMPTION OF RISK.

   Where an employé is sent into a place provided by the master, where discovery of a defect is difficult, he has a right to assume, in the absence of any circumstances creating a doubt in his mind, that his safety has been reasonably provided for.

2. SAME—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

   In an action against a master for the death of a servant, alleged to have been caused by a loose plank in a walk alongside a coal conveyor which deceased was required to oil, evidence examined, and *held* to justify submission to the jury of the issue of defendant's negligence.

Error to Branch; Yaple, J. Submitted November 18, 1904. (Docket No. 111.) Decided December 30, 1904.

Case by Charles Clark, administrator of the estate of Thomas Russel, deceased, against the Wolverine Portland Cement Company, for the negligent killing of plaintiff's intestate. There was judgment for plaintiff, and defendant brings error. Affirmed.

H. H. Barlow and *B. E. Barlow*, for appellant.

Lockerby & Cowell, for appellee.

MONTGOMERY, J. The plaintiff recovered for an injury to his intestate causing death. The deceased, Thomas Russel, for whose estate this action is brought, was at the time of his death 27 years of age. He had been employed at the Quincy plant of the Wolverine Portland Cement Company for some three months prior to his death. For

some two weeks prior to his death he was employed as oiler of the coal conveyors at the Quincy plant aforesaid. His duty, among other things, required him to oil the conveyors two or three times in 12 hours. The conveyors consisted of a bottom and two sides (wood), in which framework there revolved an endless screw, by which means the coal was conveyed from the north to the south end of the conveyor. About every 12 feet along the conveyor there was an oil hole. The conveyor was situated some 20 feet above the floor of the factory, and ran from north to south. On the west side of the conveyor, and even with the bottom thereof, there was a plank walk 20 inches wide running parallel therewith. On the west side of said walk there was a partition extending nearly to the roof of the factory. The conveyor was divided into two sections, each section being about 150 feet in length. The north section was higher than the south section. Some 3 or 4 feet from where the two sections of the conveyor join, a steam pipe 5 inches in diameter passed through the partition and over the walk parallel with the south conveyor. Across this pipe was placed a plank. The level of this plank was lower than the walk along the north section of the conveyor, and higher than the walk along the south section. The plank was unfastened. At a point opposite this plank the conveyor required oiling from four to six times in 12 hours. The defendant company supplied its employés whose duty it was to oil the conveyor with torches.

On the morning of the 27th of December, 1902, the decedent came to the Quincy plant aforesaid, to enter on his regular employment. On arriving at the plant, he was told by Frank Boone that the screw conveyor at the point where the two conveyors joined needed oiling, and that he had better attend to it at once. The decedent started to oil the conveyor. Some 10 or 15 minutes later he was heard to call out, and Andrew Boyer, on going to the conveyor, found Mr. Russel caught in the conveyor at a point

opposite this loose plank. Shortly after Mr. Russel was found in the conveyor he stated to Mr. Boyer that he fell into the conveyor by reason of the tipping of the plank. Some 30 minutes after he was found by the said Andrew Boyer the decedent died as a result of his injuries there received.

The circuit judge took from the jury the question as to whether the open conveyor and the failure to light with other means than torches was open and apparent, and charged that these hazards were assumed by the decedent, Russel, but left to the jury the question as to whether the risk resulting from this loose plank was open and apparent and assumed by said Russel.

The only question argued in this court is whether the circuit judge should have directed a verdict for the defendant on the ground that the plaintiff assumed the risk of this loose plank. We think the question was for the jury, under proper instruction, and, as the instructions given are not complained of, no error is made to appear.

Recognizing fully the rule for which defendant contends that an employé assumes the obvious risk of his employment, and that the servant owes the duty of care to avoid injury and ascertain the conditions surrounding his work, we also understand that where an employé is, as in this case, sent into a place provided by the master, where discovery of such a defect as that here involved must be known to be difficult, he has a right to assume, in the absence of any circumstances creating a doubt in his mind, that his safety has been reasonably provided for. It is said that decedent could have discovered that this plank was loose by pushing it with his foot. But why push it with his foot? The plank appeared to have been placed there as a part of the walk. The testimony shows that at times in walking over the plank it would rock, but that at times it appeared solid. Until decedent knew or had reason to believe that defendant had been so reckless of the lives of its employés as to leave this plank unfastened,

he was not bound to assume that it had been so negligent. And whether, in his work there, he had discovered the fact, was a question for the jury.

Judgment affirmed.

The other Justices concurred.

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MICHIGAN SANITARIUM & BENEVOLENT ASS'N *v.* CITY OF BATTLE CREEK.

1. TAXATION—RECOVERY OF TAXES PAID—PLEADING.
   Illegal taxes paid under protest may be recovered as money had and received under the common counts.

2. SAME—PAYMENT BY CHECK.
   The fact that one paying his taxes under protest as illegal did so by giving a check for the amount, which was subsequently cashed, does not prevent his recovery of the taxes.

3. SAME—POSTPONEMENT OF COLLECTIONS.
   The fact that a taxpayer obtained a postponement of the time for the payment of his city taxes, until the warrant for the State, county, and school taxes was received, in order that they might all be paid together under protest, does not prevent his recovery of the same, the payment having been made under protest, and the agreement under which the postponement was obtained contemplating a payment under protest.

4. SAME—EXEMPT PROPERTY—SANITARIUM—USE OF FUNDS.
   On the question whether a sanitarium association, incorporated under chapter 224, 3 Comp. Laws, used all its funds exclusively "for the purposes thereof, as set forth in its articles," as provided by section 6, so as to render its property exempt from taxation, as provided by section 7, it sufficiently proved that it had not paid dividends, where it proved that none of its funds had gone to its members, except as it had paid wages or salaries.

5. SAME—USE OF FUNDS WITHIN STATE.
Purchasing supplies outside of the State is not a violation of section 6 of the sanitarium act, requiring an association, incorporated under that act, and exempting its property from taxation under section 7, to use its funds wholly within the State. Chap. 224, 3 Comp. Laws.

6. SAME—BURDEN OF PROOF—INSTRUCTION—HARMLESS ERROR.
On the question of whether the funds of plaintiff, a sanitarium association organized under chapter 224, 3 Comp. Laws, were used wholly within the State, as required by section 6, the error, if any, in charging the jury that the "burden of proving that the funds were used without the State rested on defendant," was harmless, where all the testimony on the subject showed that the funds were properly used.

7. APPEAL AND ERROR—QUESTIONS CONSIDERED—OBJECTIONS NOT RAISED BELOW—BRIEFS.
An objection not raised in the trial court, nor in appellant's original brief, but only in a supplemental brief, will not be considered in this court.

8. TAXATION—EXEMPT PROPERTY—CHARITIES—SANITARIUMS.
A sanitarium association, incorporated under chapter 224, 3 Comp. Laws, is sufficiently charitable in its character to entitle its property to exemption from taxation, under section 7 of that act, where the charges collected for services are not more than are required for its successful maintenance.

9. SAME—FUNDS AND PROPERTY EXEMPT.
Section 8294, 3 Comp. Laws, exempting from taxation the property of charitable hospitals or asylums established with trust funds, exempts from taxation not the original trust fund, but "the property on which such asylum or institution building stands * * * while occupied for the objects and purposes thereof," whether it is or is not a part of the original trust fund.

10. SAME—INCLUDING NONEXEMPT PROPERTY.
The owner of exempt property erroneously assessed for taxes does not lose the entire benefit of the exemption because some nonexempt property is included in the assessment.

11. SAME—USE OF EXEMPT PROPERTY.
A sanitarium association, incorporated under chapter 224, 3 Comp. Laws, is not required to use all of its funds "for the care and relief of indigent or other sick and infirm persons within this State," to exempt its property from taxation, under section 7 (3 Comp. Laws, § 8294), since such requirement

would prevent the association from using its funds for the proper maintenance of the institution.

12. SAME—ESTOPPEL TO CLAIM EXEMPTION.

A corporation whose property is exempt from taxation because of the character and purposes of the concern is not estopped from claiming the exemption by acts or declarations of the officers of another corporation to whose property the new corporation succeeded.

Error to Calhoun; Winsor, J. Submitted October 18, 1904. (Docket No. 49.) Decided December 30, 1904.

Assumpsit by the Michigan Sanitarium & Benevolent Association against the city of Battle Creek for taxes paid under protest. There was judgment for plaintiff, and defendant brings error. Affirmed.

O. S. Clark and *D. C. Salisbury*, for appellant.

Charles A. Blair, Attorney General (*Charles W. McGill*, of counsel), amicus curiæ.

Steven S. Hulbert (*A. J. Mills* and *Jesse Arthur*, of counsel), for appellee.

CARPENTER, J. Plaintiff brings this suit to recover from defendant city taxes for the year 1899 on its real estate, which it claims was exempt from taxation, and which it paid under protest. Plaintiff recovered a verdict and judgment in the court below, and defendant asks a reversal of that judgment on many grounds.

1. The declaration consists of the common counts and two special counts. Many of defendant's complaints are based upon the proposition that plaintiff's cause of action is not properly described in the special counts. We are spared the trouble of considering these complaints, because plaintiff had a right to recover for money had and received under the common counts. See 2 Cooley on Taxation (3d Ed.), p. 1508; *City of Grand Rapids* v. *Blakely*, 40 Mich. 367; *County of Garland* v. *Gaines*, 47 Ark. 558.

2. It is urged that plaintiff cannot maintain this suit, because it paid its taxes, not in money, but by a check, which was subsequently cashed by defendant. This case is very different from *Turnbull* v. *Township of Alpena*, 74 Mich. 627, relied upon by defendant. There it was held that a note payable in the future could not be regarded as payment. The distinction between such a note and a check payable and paid at once is obvious.

Defendant's treasurer, who made the collection, testified that the city taxes were not paid when due; that the payment was extended because plaintiff "asked me not to enforce collection of them until I got my warrant for the State, county, and school taxes, as they intended to pay them both at the same time." Upon this testimony defendant asked the court to charge:

"If * * * payment was postponed at the request of plaintiff * * * on the promise of the plaintiff that it would pay such taxes later, though under protest, then I instruct you the payment was voluntary, and the plaintiff cannot recover."

In support of its contention that error was committed by the trial court in refusing this request, defendant relies on *Gachet* v. *McCall*, 50 Ala. 307. In *Gachet* v. *McCall* it was held that if a taxpayer obtain an extension of time to pay his taxes under a promise to pay the same, a protest made at the time of payment will be ineffectual. The ground upon which this opinion rests is that the taxpayer was bound to pay in accordance with his agreement. If that principle is applied in the case at bar, it would not prevent recovery, because here the facts indicate, as shown by the request under consideration, that the agreement under which the postponement was obtained contemplated a payment of the taxes under protest.

3. Plaintiff became incorporated in July, 1898, under chapter 224 of the Compiled Laws of 1897. Section 1 of that chapter (section 8288, 3 Comp. Laws) provides that "in all cases where lands, or any other property, amounting in value to five thousand dollars or upwards, have been

or shall hereafter be given, granted, devised, or bequeathed to one or more trustees for the purpose of founding or endowing a hospital or other charitable asylum within this State, for the care or relief of indigent or other sick or infirm persons, * * * then the trustees in whom said lands and other property are for the time being vested, may become incorporated. * * *" Section 2 (section 8289, 3 Comp. Laws) specifies what the articles of incorporation shall contain, and requires, among other things, that "the objects of said corporation shall be stated with all convenient fullness and certainty."

Section 6 (section 8293, 3 Comp. Laws) provides:

"All the funds of said corporation shall be faithfully and exclusively used for the purposes thereof, as set forth in its articles, and the same shall be wholly used within this State. Said corporation may invest its funds by loan, on mortgage security, or by purchase of any city, county, State, or United States bonds, or by loan on pledge of the same: *Provided*, that no loan of such funds shall be made to any trustee, officer, or servant of such corporation."

Section 7 (section 8294, 3 Comp. Laws) provides:

"The property on which said asylum or institution building stands, together with said building, shall, while occupied for the objects and purposes thereof, be exempt from taxation."

The object of plaintiff's corporation, as set forth in its articles, is as follows:

"To found a hospital or charitable asylum within the State of Michigan for the care and relief of indigent or other sick or infirm persons, at which institution may be received also patients and patrons who are able to and do pay for the benefits there received, and which institution shall devote the funds and property acquired and received by it from time to time from all sources, exclusively to maintaining itself, improving its conditions and facilities, extending its benefits and usefulness and facilitating and promoting its purposes, by such sanitary, dietetic, hygienic and philanthropic reforms and efforts as are germane or auxiliary thereto; all of its said purposes being undenomi-

national, unsectarian, philanthropic, humanitarian, charitable, and benevolent, and in no manner, directly or indirectly, for private profit or dividend paying to any one."

The property upon which the taxes in question were paid was the property and sanitarium or hospital building situated thereon of plaintiff. And it claims that the same was exempt from taxation under section 8294, above set forth. This property was transferred to plaintiff after its incorporation. It had formerly been the property of another corporation called the "Health Reform Institute," and was called the "Battle Creek Sanitarium." Plaintiff took possession of this property July 6, 1898, and thereafter operated the same as a hospital or sanitarium.

Plaintiff's testimony shows that at this sanitarium it received and treated sick and infirm persons; that its total receipts from this sanitarium from July 6, 1898, to January 1, 1900, was $764,976.09; that its total disbursements during this same period were more than $20,000 in excess of its receipts; that during this time many patients had been treated free, and that many had paid less than the full price; that if these patients had paid full price, plaintiff's receipts would have been greater by the amount of $35,490.96; that none of plaintiff's funds had ever gone to any member of the association, except as it went to pay wages or salary; and that none of those funds had been used outside of the State except as they were used for the purpose of purchasing supplies.

Defendant contends that this evidence did not warrant a verdict in plaintiff's favor, because: (*a*) It does not appear that plaintiff did not pay dividends upon its stock; (*b*) it does not appear that plaintiff's funds are wholly used within the State, as required by section 8293, 3 Comp. Laws; and (*c*) that plaintiff is not using said alleged exempt property for the business and purposes specified in the act under which it is incorporated.

(*a*) Plaintiff sufficiently proved that it had not paid dividends when it proved that none of its funds had gone to its members except as it paid wages or salary.

(*b*) We sufficiently answer defendant's contention respecting the use of plaintiff's funds by saying that the only evidence contained in the record which touches this question shows that those funds were not used outside the State except for the purpose of purchasing supplies. Unless we hold that such a purchase of supplies is a use of the funds without the State prohibited by the statute (section 8293, 3 Comp. Laws)—and clearly we cannot so hold—we are bound to say that plaintiff proved that its funds were used within the State within the meaning of the statute. From this evidence no inference that the statute was violated could be drawn.

In this connection we consider the complaint of defendant that the court erred in charging the jury, in effect, that the burden of proving that the funds were used without the State, in violation of the statute, rested upon defendant and not upon plaintiff. Even if this charge was erroneous, as defendant contends—which we by no means affirm—we are bound to say that as all the testimony introduced upon the subject shows that the funds were properly used, the error, if error it was, was not prejudicial.

(*c*) The contention of defendant that plaintiff did not occupy this property for the business and purposes specified in the act under which it is incorporated is based upon the claim that the business there carried on by plaintiff was not the charitable business which the statute contemplated. Plaintiff used the property for a hospital in which it treated sick and infirm persons. Some of these persons were treated free, some at reduced rate, but apparently most of them paid a regular schedule of prices fixed by plaintiff's management. The total receipts were less than the total disbursements. How much of those total disbursements were used for improvements we are not informed. But as this was a matter defendant could have made clear had it chosen, we have no right to assume that any of these disbursements were illegitimate. At least, it may be inferred that the charges collected from patients were not larger than were necessary to the successful

maintenance of the institution. Nor is there any testimony from which it may be inferred that there was any unjust discrimination in making those charges. The point is made in appellant's supplemental brief that there is no definite showing of the necessities of the beneficiaries; that is, that those who received treatment free, or at reduced prices, were needy and deserving. The proposition upon which this objection is based is that plaintiff did not have full discretion to select these beneficiaries. If this proposition is sound—which we do not affirm—it is sufficient to say that we will not consider it, because it was not made in the trial court nor in appellant's original brief. It is obvious from this testimony that we cannot say that a verdict should have been directed in defendant's favor without holding that a hospital organized under the law in question cannot collect from patients treated by it sufficient funds for its proper maintenance. If we so hold, we declare that persons who dedicate a hospital to the public must pay taxes on that hospital unless they maintain the same from their private means. The act contains nothing to warrant such a holding. It expressly exempts from taxation "the property on which said asylum or said institution building stands * * * while occupied for the objects and purposes thereof;" that is, while occupied "for the care or relief of indigent or other sick or infirm persons." Such a corporation is sufficiently charitable to entitle it to the privileges of the act when the charges collected for services are not more than are needed for its successful maintenance. See *Philadelphia* v. *Pennsylvania Hospital for the Insane*, 154 Pa. St. 9; *Episcopal Academy* v. *Philadelphia*, 150 Pa. St. 565; *Cawse* v. *Nottingham Lunatic Hospital*, L. R. 26 Q. B. Div. 585; *St. Joseph's Hospital Ass'n* v. *Ashland County*, 96 Wis. 636; *County of Hennepin* v. *Brotherhood of Gethsemane*, 27 Minn. 460; *Linton* v. *Lucy Cobb Institute*, 117 Ga. 678; *Emerson* v. *Trustees of Milton Academy*, 185 Mass. 414; and *Yale University* v. *Town of New Haven*, 71 Conn. 316. It follows from

what we have said that in our judgment the court did not err in refusing to permit defendant to show the number of operations in plaintiff's sanitarium that were paid for; nor in refusing to permit defendant to inquire from plaintiff from what source it obtained the excess of its disbursements over receipts.

4. Complaint is made that defendant's right of cross-examining plaintiff's accountant was unduly restricted by the trial court. This accountant, who was familiar with the plaintiff's books of account, and to a large extent knew the facts respecting the entries therein made, produced plaintiff's books of account. These books were offered in evidence, and an opportunity given to defendant's counsel to examine them. No complaint is made that this opportunity was not sufficient. Instead of reading the items in said books of account into the record, said accountant testified generally as to what they showed. We must assume that defendant acquiesced in this course, for we do not discover that it made any objection, except in one instance, and in that instance the witness testified to the fact from his own knowledge. It is claimed that on the cross-examination of this witness defendant was improperly prevented from showing that the sanitarium was really conducted as a profit-making institution; that it obtained funds from conducting a business forbidden by the statute, and that it used its funds for endowing other institutions of a like character outside the State. We are bound to say that not one of these complaints is well grounded. It is true that the trial court refused to permit defendant to ascertain by the cross-examination of said accountant the number of free operations performed at the institution, and the source of the excess of disbursements over receipts, but the testimony sought to be elicited by these questions clearly would not—and it was not claimed on the trial that it would—prove or tend to prove that plaintiff was carrying on a profit-making business in violation of the statute. It is also true that defendant was not permitted to prove that plaintiff had a branch institution outside the State,

but it was permitted to inquire whether any funds were used for such an institution—and this was as far as a material inquiry would go—and to this question the witness answered that they were not. A diligent search of the record does not disclose that in any other particulars defendant's cross-examination of this witness was restricted.

5. In the brief filed in this case by the attorney general it is said that "it is not the purpose of the act to exempt from taxation the property of the corporation, although organized in the first instance for the purpose of administering such trust, where the administration of such trust is merely incidental to the business carried on, and the business actually carried on actually exceeds that necessary to the administration of the trust by thousands of dollars." By this we understand it to be asserted that because the plaintiff corporation was, as it should be under this act, organized by trustees, who in this case had a fund of only $7,000, the hospital of large value, subsequently acquired by the corporation, is not exempt. We cannot assent to this contention. Section 8294, the section upon which plaintiff's right to exemption depends, exempts from taxation, not the original trust fund, but "the property on which said asylum or said institution building stands * * * while occupied for the objects and purposes thereof." If said property is used for the business and purposes contemplated by the statute, a subject which we have already discussed, it is exempt, whether it was or was not a part of the original trust fund.

6. Included in the description of the exempt property was some property of inconsiderable value not exempt. The trial court charged that it was the duty of defendant to separately assess this property, and having failed to do so, it did not affect plaintiff's right to recover. Defendant contends that this was error. To adjudge this error we must hold that plaintiff lost the benefit of the entire exemption because a small portion of the property was not

exempt. We decided otherwise in *Grand Rapids, etc., R. Co.* v. *City of Grand Rapids*, 137 Mich. 587.

7. Defendant complains because the court did not charge "if the jury find that the plaintiff is using its funds or any part of the same for any other purposes than the care and relief of indigent or other sick and infirm persons within this State, then plaintiff cannot recover in this case." This request lays down a rule which is not required by the statute, and would, if applied in this case, prevent plaintiff using its funds for the proper maintenance of its institution. It was therefore properly refused.

Defendant also requested the court to charge "the only direct uses to which the plaintiff can put its property on which its buildings stand, and the only direct objects for which the same can be occupied, to exempt it from taxation, are the care and relief of indigent or other sick or infirm persons." Assuming that this request correctly states the law, defendant was not prejudiced by the refusal to give it, because all the testimony indicates that the property was used for the care and relief of sick and infirm persons.

8. Defendant claims that the court improperly refused to permit the introduction of testimony which would have proved that plaintiff was estopped from claiming this exemption. A portion of this testimony consisted in the acts and conduct of the officers of the Health Reform Institute, the corporation which owned the same property before the organization of plaintiff. This corporation, it seems, was not exempt, because, presumably, it was not organized under chapter 224 of the Compiled Laws of 1897. It is too clear for argument that the declarations, acts, and conduct of the officials of the old corporation could not estop the new.

It is urged that the court erred in not permitting defendant to prove that it built a fire station near plaintiff's property late in 1898, because one of plaintiff's officers in the latter part of the summer of 1898 made the statement that plaintiff was the third largest taxpayer in the city of Bat-

tle Creek. It is not claimed that this statement is in any respect untrue. (Indeed, presumably because plaintiff did not acquire the ownership of the property until July, 1898, it paid its taxes for that year.) But it is claimed that because of this statement defendant had a right to believe, and did believe, that plaintiff would continue to pay its taxes; that is, that it would waive its statutory exemption. It is a sufficient answer to this contention to say that from the statement made to it, which we must assume to be true, defendant could not infer that plaintiff would continue in the future to be a large taxpayer. Neither is it shown that the officer who made said statement had authority to speak for the plaintiff corporation.

Defendant complains of no other error which in our judgment demands discussion, and as plaintiff has waived its request that the court review the decision of the trial court which denied its right to be exempt from taxation on its personal property, the judgment of the court below will be affirmed, without costs.

MOORE, C. J., and MONTGOMERY and HOOKER, JJ., concurred. GRANT, J., took no part in the decision.

INDEX.

ABANDONMENT.

Tax lands, see TAXATION (13).

ABATEMENT AND REVIVAL—See DAMAGES (1); PLEADING (2).

ACCOUNT—See PARTNERSHIP (1); TRIAL (1).

ACTION.

1. Where a defendant in justice's court interposes an indivisible cause of action for $150 as a set-off, then withdraws $50 of it, and has judgment for the $100, he is barred, on the principle against splitting causes of action, from suing for the remaining $50, though the justice, under 2 Comp. Laws, § 2741, could not render judgment for more than $100. *Andreas* v. *School Dist. No. 4, Fractional, of Leavitt Tp.*, 54.
2. That the defendant was not the only defendant in the action, and the claim interposed was a debt due him alone, is immaterial, the action being on a contract against him and others as his sureties, in which case he was the real defendant, authorized by the statute (1 Comp. Laws, § 776, subd. 11) to interpose such a set-off. *Id.*
3. That the claim on which defendant was sued was for unliquidated damages, so that under section 776, subd. 5, he had no right to interpose the set-off, is immaterial, he having successfully interposed it. *Id.*

ADJOINING LANDOWNERS—See INJUNCTION (5).

ADJOURNMENTS—See JUSTICES OF THE PEACE (4–7).

ADOPTION.

A written contract to adopt complainant was not signed by her foster mother, and deceased, her foster father, never took any steps to adopt her. Complainant knew, when a mere child, that she was not the daughter of her foster parents, and certain conveyances by way of gift were made to her by her foster parents in the name of her natural father. The contract on its face authorized complainant's foster parents to make her their heir, but contained no covenant binding them so to do. *Held*, that complainant was not entitled to recover the property of her foster parents as their heir. *Bowins* v. *English*, 178.

ADULTERY—See HUSBAND AND WIFE (10–14).

ADVERSE POSSESSION.

The use of a strip of railroad right of way for a railroad scale by an abutting mill owner is not adverse and hostile to the railroad company, though exclusive, where the railroad company builds and maintains a switch over the scale, has exclusive possession of the key to the switch, and receives and delivers cars over the switch for the mutual benefit of the parties. *Michigan Milling Co.* v. *Ann Arbor R. Co.*, 216.

AGENCY—See PRINCIPAL AND AGENT.

ALIENATION OF AFFECTIONS — See HUSBAND AND WIFE (10, 11).

AMENDMENTS—See FRAUD (2); MECHANICS' LIENS; PLEADING (1).

Garnishment affidavit on appeal, see GARNISHMENT (2)

Sheriff's return, see SHERIFFS AND CONSTABLES.

APPEAL AND ERROR.

1. A verdict and judgment founded on sufficient evidence will not be set aside. *Mulvey* v. *Stevenson*, 63.

2. Where an objection was made when the trial commenced that there was a variance between plaintiff's pleadings and proof, in that she described her cause of action as arising out of certain notes, whereas her evidence was on the theory of an open account, and to meet the objection plaintiff was permitted to amend her bill of particulars, after which the objection was not urged, and the verdict was in defendant's favor, he is estopped, on error, to assert that the assumption that there was no variance, on which the trial proceeded, was unfounded. *Linsell* v. *Linsell*, 65.

3. Defendants in error will be held to have waived any failure to give them proper notice of the proceedings in error, where the case is heard without objection, and the record is prima facie sufficient to present the proceedings below. *Hirsh* v. *Fisher*, 95.

4. By pleading to a declaration in justice's court, without objecting to its lack of formality, defendant waives the right to assign error on the introduction of evidence under it. *Fowles* v. *Rupert*, 150.

5. Where there is evidence to support the findings of fact of the trial judge, the evidence will not be reviewed. *Wm. Barie Dry-Goods Co.* v. *Casler*, 172.

6. An order of the probate court to produce for examination certain books and papers, to be used in a pending controversy over the removal of an executor and the settlement of his account, is not appealable to the circuit court under 1 Comp. Laws, § 669. *Erwin* v. *Ottawa Circuit Judge*, 271.

7. Reversal will be granted only on some ground urged in appellant's original brief. *South Arm Lumber Co.* v. *Silverthorne*, 465.

APPEAL AND ERROR—Continued.

8. Alleged errors in the rulings admitting testimony will not be considered where, in any view that may be taken of the case, a verdict should have been directed for defendant in error. *Shook* v. *Marion Manfg. Co.*, 467.

9. Defendant cannot object to the setting aside of a default entered for failure of plaintiff to file a bill of particulars, where the record does not show an exception to the ruling, and the order setting aside the default was acted on by defendant in amending his plea. *Heenan* v. *Forest City Paint & Varnish Co.*, 548.

10. Errors in admitting evidence are immaterial in a case where a verdict was properly directed for the appellee. *Id.* 549.

11. An order allowing compensation to counsel for complainant in a suit relating to the distribution of a fund belonging to a corporation duly dissolved, entered before a final decree of distribution, on proof by affidavit of the services rendered and their value, but not made on an issue joined or heard on pleadings and proofs, is a final order, necessitating the taking of an appeal therefrom within 40 days, under the express provisions of Act No. 243, Pub. Acts 1899, § 144. *Hopkins* v. *Crossley*, 561.

12. The verdict, on conflicting evidence, of a properly instructed jury, is conclusive. *D. M. Osborne & Co.* v. *Waterloo*, 588.

13. Plaintiff in error cannot complain of a judgment in his favor, though it did not follow the verdict. *Id.*

14. A cause will not be considered in this court on a theory not advanced below. *Canton* v. *Grinnell*, 590.

15. A question not raised in the lower court and not referred to in any assignment of error is not presented by the record on a writ of error, and will not be considered, though argued in the brief. *Morgan* v. *Lake Shore, etc., R. Co.*, 626.

16. An objection not raised in the trial court, nor in appellant's original brief, but only in a supplemental brief, will not be considered in this court. *Michigan Sanitarium & Benevolent Ass'n* v. *City of Battle Creek*, 677

See MORTGAGES (4).

APPEARANCE—See PLEADING (2).

By attorney in justice's court, see ATTORNEY AND CLIENT (1).

APPRENTICES.

1. An apprentice is not guilty of willful disobedience, or such refusal to work, as justifies the master in discharging him, or imposing a penalty, where, on the foreman asking him to work extra hours at night, he told him that he did not want to work, because it was cold, on account of which his feet were troubling him, and that he should take the work to some one nearer a stove, and the foreman said nothing further, but got another man to do the work. *Bradley* v. *Perkins*, 356.

APPRENTICES—Continued.

2. Where a contract of apprenticeship authorizes the master, in case of breach, merely to discharge the apprentice, and not to impose a penalty, the statement of the master to him that he could leave, or continue to work on an agreement to remain 30 days above the time provided in the contract, amounts to a discharge, which, not being warranted, justifies him in leaving, and suing for what is otherwise due under the contract on wrongful discharge. *Id.* 357.

3. The provision in a contract of apprenticeship that if, for any acts of disobedience of the apprentice, the master shall deem it best to discharge him, half the apprentice reserve fund shall be forfeited to the master, does not give the master authority to determine what constitutes an act of disobedience, but merely to discharge in case of such an act. *Id.*

ARGUMENT OF COUNSEL—See TRIAL (4, 9, 10).

ARREST.

On capias, see BAIL.

ASSAULT AND BATTERY.

1. In an action for an assault and battery, prosecuted by the administratrix of plaintiff, after his death, a statement by the court in his charge that plaintiff claimed that she was entitled to recover damages for the death of her husband was not erroneous, where there was nothing in that portion of the charge which informed the jury what damages should be recovered, and that question was covered by a subsequent portion of the charge. *Miller* v. *Sadowsky*, 502.

2. In an action for an assault and battery, an instruction that plaintiff is entitled to recover as damages whatever he might have lost in wages by the injury is erroneous, since the damages should be limited to the present worth of his wages. *Id.*

3. In an action for an assault and battery in attempting to take from plaintiff a piece of board belonging to defendant that plaintiff was carrying away, an instruction that the jury should determine whether defendant used more than sufficient force for the purpose of reclaiming his property was sufficiently liberal to defendant; there being no merit in an invocation of the rule that one may use such force as seems to him necessary to repel an assault. *Id.*

ASSIGNMENTS—See PATENTS.

ASSUMPSIT—See TAXATION (34).

ASYLUMS—See TAXATION (41).

ATTACHMENT—See GARNISHMENT (1).

ATTORNEY AND CLIENT.

1. Proof of authority of an attorney to appear for plaintiff in justice's court is unnecessary, under section 762, 1 Comp. Laws, unless demanded, where joint debtors are sued, and one of them, with his attorney, remains in the court-room throughout the trial, without objecting to the appearance of the attorney for plaintiff. *Hirsh* v. *Fisher*, 96.

2. A contract by an attorney to procure payment of a legacy to the heirs for a contingent fee based on a percentage of the amount collected contemplates that the attorney shall perform whatever services may be necessary, including services in the taking of an appeal rendered necessary by an erroneous decision of the trial court. *Cavanaugh* v. *Robinson*, 554.

3. Where an attorney contracted with the agent of certain heirs to get the assets of the estate paid over to them for a contingent fee of 25 per cent. of the amount collected, and to pay to the agent one-third of such contingent fee, the fact that the agent declined to furnish a bond on an appeal, rendered necessary by an erroneous decision of the trial court, was not a breach of the contract entitling the attorney to recover on a quantum meruit, merely because he successfully prosecuted an appeal not expressly provided for in the contract, without assistance from the heirs or their agent, and was enabled thereby to make the collection. *Id.*

See WITNESSES (13).

BAIL.

1. 3 Comp. Laws, § 10032 does not entitle a defendant arrested on a capias to be released from custody merely upon the justification of his sureties by affidavit without perfecting the bail according to the rules of court. *Ludwick* v. *Kent Circuit Judge*, 106.

2. Where sureties of a defendant arrested on a capias justified by affidavit, the fact that the court had not, prior thereto, made any rule as to the perfection of special bail, did not entitle defendant to be discharged, under section 10032, 3 Comp. Laws, inasmuch as such a rule might be enacted before the expiration of the time limited for the taking of exceptions to bail, and also because the subsequent action of the court, in requiring the sureties to come in and justify, in effect established a rule that the approval by the court of the sureties was necessary to the perfection of the bail. *Id.*

BAILMENTS.

In an action of trover against a bank for the loss of valuables left for safe keeping by a depositor, who also rented a safety deposit box, evidence examined and *held* that the bank was a gratuitous bailee and that no such negligence on its part was shown as to require submission of the case to the jury. *Gerrish* v. *Muskegon Savings Bank*, 46.

BANKS AND BANKING.

Negligence as depositary, see BAILMENTS.

BENEFICIAL ASSOCIATIONS.

1. Where, at the hearing of his claim before the tribunal of a beneficial association, the beneficiary objects to the introduction of certain evidence, and his objection is overruled, he cannot be held to have waived his objection on appeal by not appearing, where he is told that appearance is unnecessary and that his claim will be properly presented and considered in his absence. *Dick* v. *Supreme Body of the International Congress*, 372.

2. The validity of a decision of the tribunal of a beneficial association is not lessened by the circumstance that technical rules for the admission of evidence were disregarded. Within the limits of common fairness such tribunals may prescribe their own rules of evidence. *Id.* 373.

3. Section 10181, 3 Comp. Laws, forbidding the disclosure by physicians of information acquired in attending patients, applies as well to hearings before the tribunals of beneficial associations as to proceedings in the courts of the State. *Id.*

4. The decision of the supreme tribunal of a beneficial association, on appeal by a beneficiary, is not conclusive, though so provided by its by-laws, where the tribunal receives and acts upon the testimony of a physician admitted in violation of § 10181, 3 Comp. Laws. *Id.*

5. The conclusiveness of an adjudication of the supreme tribunal of a beneficial association as to liability on a membership certificate may be questioned, not only in equity but in a court of law, when set up as a defense to an action on the certificate. *Id.*

BILLS AND NOTES.

1. Where, at the time an order for school supplies, in form a promissory note, was signed by school officers, it had attached to it a memorandum stating that the matter might be left to a vote of the district at the annual meeting, which was taken off before the order was transferred, there was a material alteration which avoided the instrument. *First National Bank of Cassopolis* v. *Carter*, 421.

2. On the hearing of a claim against an estate on notes alleged to have been executed by the decedent and lost, testimony of a witness that she had been told by the decedent that the claimant held notes against him, and that she had seen the notes of which he spoke, and testimony by another witness that he had seen decedent's signature a number of times, and had seen the notes, and, in his judgment, the signature to the notes was that of decedent, was sufficient evidence of execution to go to the jury; and it was not error to refuse to direct a verdict for the estate. *Taylor* v. *Taylor's Estate*, 658.

3. Where there was evidence that certain lost notes in suit were negotiable in form, it will be presumed that they were based on a consideration, though they did not contain the recital "for value received." *Id.*

4. Proof of the execution of promissory notes makes out a prima

BILLS AND NOTES—Continued.

facie case, and, where there is no evidence of want of consideration, the burden of proving consideration is not imposed upon the plaintiff. *Id.*

5. The burden of proving payment of promissory notes rests on the party who claims to have made it, though that party is the estate of a decedent. *Id.*

6. Delay in presentment of a check for payment, and failure to give notice of dishonor, is no defense to the drawer, where the latter had no funds in the bank to meet the check, and had no expectation that it would be paid. *Carson, Pirie, Scott & Co.* v. *Fincher*, 666.

7. Where, in an action by the holder against the drawer of a dishonored check, there was evidence that the drawer at the time he uttered the check had a balance in the bank less than the amount of the check, and had notice that the bank was weak, and of the dishonor of other checks, but gave no intimation thereof to plaintiff, plaintiff was entitled to go to the jury on the question whether the drawer had funds, or an expectation that the check would be paid, when it was drawn, though plaintiff was guilty of negligence in presentment, etc. *Id.*

Note payable at death, see WILLS (4).

BONDS—See INJUNCTION (1, 2).

BRIBERY.

Where a proposition to let a contract for waterworks was one which might come before a city council for official action, the fact that the council had no authority to make the contract did not prevent the receipt of money by a councilman to influence his action on the same from constituting a violation of 3 Comp. Laws, § 11312. *People* v. *Ellen*, 34.

BUILDING AND LOAN ASSOCIATIONS.

1. In a suit against a building and loan association for an accounting and a discharge of mortgages executed by complainant, which had been foreclosed, and to set aside sales made thereunder, on the ground that the mortgages were usurious, evidence examined, and *held* to show that there was no competitive bidding at the time the loans were made, as required by law. *Stoddard* v. *Saginaw Building & Loan Ass'n*, 73.

2. Where there was evidence that the secretary of a building association made persistent efforts to induce an owner of land to borrow money of the association on the ground that he could borrow the money at less than the rate of interest he was then paying, and furnished him with advertising matter stating that a borrower could pay his loan by paying only 56 per cent. of the amount borrowed, and complainant testified that the secretary stated that it would be economy to borrow from the association, it cannot be urged that this was mere opinion, and not a representation by which the borrower should not have been misled. *Id.*

CANCELLATION OF INSTRUMENTS.

Where, on a bill to annul certain deeds on the ground of undue influence, failure to understand them, and lack of delivery, complainant's testimony is freer from bitterness than that of defendant's brothers and sisters, and the circumstances shown lead to its credit, a decree for complainant will be affirmed, though defendant and two other witnesses testify to delivery of the deeds, and complainant fails to show ignorance of their purport. *Douglass* v. *Longcor*, 69.

See CONTRACTS (2); DEEDS (3).

CAPIAS—See BAIL.

CARRIERS.

1. The consignor is the agent of the consignee in the shipment of the goods and whatever contract he makes with the carrier is binding on the consignee. *Frohlich* v. *Pennsylvania Co.*, 116.

2. Where a glass manufacturer was accustomed to load such cars as were suited to his needs from among those which came to him loaded with materials, and he selected one which was defective, and injury to a shipment followed, the carrier was not liable on the ground of furnishing an unsuitable car. *Id.*

3. A passenger in a state of beastly intoxication is not chargeable with contributory negligence in going on the platform of a moving train so as to bar recovery for injuries received from a fall from the train. *Fox* v. *Michigan Cent. R. Co.*, 433.

4. In an action against a railroad company for injuries to an intoxicated passenger, caused by his falling or being thrown from the platform of a train while in motion, evidence examined and *held* to justify a refusal to direct a verdict for defendant. *Id.*

5. Where all seats in a passenger train were occupied, and a passenger became faint because of the badly crowded condition and poor ventilation of the cars, and, as he could not get to a window to relieve his faintness, sought fresh air on the platform, from which he fell and was injured, he was not guilty of contributory negligence, as a matter of law, under 2 Comp. Laws, § 6303. *Morgan* v. *Lake Shore, etc., R. Co.*, 626.

6. A declaration in such a case, alleging that, while plaintiff was standing at the car door holding on to the hand railing, he became unconscious by reason of the foul air, and fell from said train while the same was running at a high rate of speed, and struck with great force on the ground, is a sufficient averment that the speed of the train caused him to fall therefrom. *Id.*

CERTIORARI.

On certiorari to a circuit court commissioner to review summary proceedings, his findings of fact on conflicting evidence are conclusive. *Meeske* v. *Miller*, 87.

See CONTEMPT; JUSTICES OF THE PEACE (2, 3); MANDAMUS (8); NEW TRIAL.

CHAMPERTY—See JUDGES.

CHARITIES—See TAXATION (40, 41).

Cy pres, see WILLS (1).

CHATTEL MORTGAGES.

1. In trover by a chattel mortgagee against a creditor of the mortgagor to recover a part of the mortgaged property, which he had replevied, a draft which furnished the consideration for the mortgage was admissible in evidence. *Heenan* v. *Forest City Paint & Varnish Co.*, 549.

2. An unfiled bona fide chattel mortgage is valid as to a creditor whose claim accrued prior to its execution. *Id.*

3. A bona fide chattel mortgage for value on goods previously obtained by the mortgagor by fraud, which is filed before the seller of the goods has taken any steps to recover them, is entitled to precedence over the claim of the seller. *Id.*

COMPARATIVE NEGLIGENCE—See NEGLIGENCE (5).

CONDITIONAL SALES—See INJUNCTION (1); SALES (3, 5).

CONSPIRACY—See HUSBAND AND WIFE (8).

CONSTITUTIONAL LAW—See CRIMINAL LAW (7); ELECTIONS; PARTNERSHIP (2); SEARCHES AND SEIZURES; WITNESSES (6–8).

CONTEMPT.

Mandamus or certiorari will not be granted to review the ruling on a motion to quash contempt proceedings prior to the final determination thereof. *Toepel* v. *Wayne Circuit Judge*, 302.

CONTRACTS.

1. Where defendant railroad company verbally agreed to construct a side track alongside plaintiff's building if he would move it to land owned by him near defendant's track, and repair and remodel it so as to make it suitable for a warehouse, and he did so, the expense incurred by plaintiff was a sufficient consideration to sustain the contract, though plaintiff, at the time defendant's promise was made, did not agree to remove and remodel the building. *Thomas* v. *South Haven, etc., R. Co.*, 50.

2. On a bill to cancel a contract by which a board of trade agreed to extend certain favors to defendants to induce them to locate their factory in complainant's city, evidence examined, and *held* that the purpose of defendants to remove only a portion of their works was not in view of the parties at the time of making the contract, and that it should be canceled. *Board of Trade of Grand Haven* v. *De Bruyn*, 187.

See FACTORS (1-3); PATENTS (1); SALES (4).

Contemporaneous parol agreement, see EVIDENCE (9).

Parol evidence to vary, see EVIDENCE (8–10).

Ultra vires, see MUNICIPAL CORPORATIONS (10).

CONTRIBUTORY NEGLIGENCE—See CARRIERS (3, 5); NEGLIGENCE (6); RAILROADS (1); STREET RAILROADS (4).

CONVERSION—See LANDLORD AND TENANT (4); TAXATION (3).

CONVICTS—See MONEY RECEIVED.

CORPORATIONS.

1. 2 Comp. Laws, § 7057, creating a liability on the part of stockholders of a corporation from which the capital stock has been withdrawn, authorizes suit by a creditor of the corporation against a holder of preferred stock. *American Steel & Wire Co.* v. *Eddy*, 403.

2. Under such statute the good faith of the corporation and its stockholders in paying and receiving dividends which in fact impair its capital stock is immaterial. *Id.*

3. On the issue of whether the capital stock was in fact impaired by the payment of dividends, the fact that the corporation held a guaranty that certain assets purchased by it should net a certain amount on a date subsequent to the payment of the dividends is not controlling, but the guaranty is merely a fact to be considered with other facts, such as the solvency of the guarantors, etc., in determining whether the capital was impaired. *Id.*

4. One who subscribed to and accepted preferred stock, acted as a director, and participated in the management of the affairs of the company and the declaration of dividends, and to whom the dividend complained of as an impairment of the corporation's assets was paid, must be deemed a stockholder, although he used the money of his sister in payment for the stock, and merely loaned it to the company; receiving the dividend as interest for his sister, and paying it to her. *Id.*

5. In an action for trespass for ejecting plaintiff from a stockholders' meeting, where there was evidence that the stock under which plaintiff claimed rights was issued to him in compliance with an order of the circuit court, proof of an attempt at cancellation by the company was immaterial until something had been shown militating against the validity of the stock. *Noller* v. *Wright*, 416.

6. The secretary of the corporation having testified that in issuing notices of the meeting to stockholders he was governed by the records as they appeared on the books, the notice to plaintiff to attend the meeting was admissible. *Id.*

7. Evidence tending to show the value of the stock was properly rejected, its value being immaterial. *Id.*

8. Officers of a corporation cannot justify a trespass in ejecting a stockholder from a meeting on the ground that the stock had not been properly transferred to him on the books of the company, where he had done everything required of him to procure the transfer, and he had been adjudicated the owner of the stock. *Id.*

9. Where plaintiff was not denied the right to attend a stock-

CORPORATIONS—Continued.

holders' meeting on the ground that his proxies were irregular, it was no defense to an action for assault in ejecting him therefrom that defendants had no information as to the validity of his proxies. *Id.*

10. The fund remaining in the hands of the Old Volunteer Fire Department of Detroit, on failure of the trust attempted to be created on dissolution of the corporation, did not escheat to the State, but should be divided among the persons recognized as members at the time of the dissolution, and the personal representatives of such deceased members. *Hopkins* v. *Crossley*, 562.

See PATENTS (2); SEARCHES AND SEIZURES; WITNESSES (6,7).

Cumulative voting of stock, see PARTNERSHIP (2).

COSTS.

Failure of a nonresident plaintiff to file security for costs in a suit begun before a justice of the peace will not require reversal of a judgment for plaintiff where no proper demand was made and security was furnished in circuit court pending certiorari. *Hirsh* v. *Fisher*, 95.

COUNTIES—See TAXATION (19).

COURTS.

A suit in chancery to foreclose a land contract, on which less than $100 remains unpaid, involves a controversy concerning property within the statute (1 Comp. Laws, § 435), providing that circuit courts in chancery shall dismiss every suit concerning property, with certain exceptions, where the matter in dispute shall not exceed $100. *Sands & Maxwell Lumber Co.* v. *Gay*, 82.

See BAIL.

Comity, see EXECUTORS AND ADMINISTRATORS (6).

CRIMINAL CONVERSATION—See HUSBAND AND WIFE (10, 11).

CRIMINAL LAW.

1. Under the indeterminate sentence law of 1903 (Act No. 136), a sentence for "the maximum and minimum period of five years" is for a definite period, and improper. *In re Cummins*, 39.

2. A definite sentence for five years for an offense for which no minimum punishment is provided is not void under the statute, but should be treated as an indeterminate sentence for the maximum period of five years and the minimum period of one year as provided by section 2 of the act. *Id.*

3. Sections 11785 and 11786 of the Compiled Laws, providing for additional punishment of habitual criminals, are not repealed by section 2112 pertaining to an allowance of good time for good behavior in prison. *In re Butler*, 453.

4. Though a convict previously convicted cannot be sub-

CRIMINAL LAW—Continued.

jected to the increased penalty provided by 3 Comp. Laws, §§ 11785, 11786, unless he is sentenced to imprisonment for at least a year for the offense committed, without reference to the increased penalty, where a criminal has been twice convicted, and is sentenced on a third conviction to imprisonment for 20 years for larceny, it will be presumed that he was given the maximum punishment of 5 years' imprisonment for the larceny, and that the remainder of the sentence was therefore properly imposed, under section 11786. *Id.*

5. Under the indeterminate sentence law of 1903 (Act No. 136), the court is not required to fix the maximum sentence where the statute fixes the maximum term of imprisonment for the crime at a certain number of years. *In re Campbell*, 597.

6. The determinate sentence law is repealed by the indeterminate sentence law of 1903 (Act No. 136), repealing in section 10 all acts and parts of acts inconsistent with it. *Id.*

7. The constitutional amendment (Pub. Acts 1903, p. 452) expressly authorizing the enactment of an indeterminate sentence law authorizes Act No. 136, § 1, providing for sentences fixing no maximum term of imprisonment. *Id.*

Carrying away public record, see RECORDS (1-3).

Evidence at former trial, see RAPE.

CROPS—See LANDLORD AND TENANT (2-4).

DAMAGES.

1. Under section 10117, 3 Comp. Laws, providing that actions for negligent injury to persons shall survive, in an action by an administrator for injuries to his decedent, who died a few hours after the injury, plaintiff may recover the amount decedent would have earned during the period he would probably have lived, without any deduction for what it would probably have cost him for food, clothing, and other personal expenditures. *Olivier* v. *Houghton County Street-Railway Co.*, 242.

2. In an action for personal injuries by an administrator, under the survival act (3 Comp. Laws, § 10117), evidence that decedent left a family is immaterial, but its admission is harmless, where plaintiff disclaimed any recovery on such evidence, and the court so instructed the jury. *Id.*

3. Permitting recovery for care and nursing, without evidence of their value, is error. *Buxton* v. *Ainsworth*, 533.

See ACTION (3); ASSAULT AND BATTERY (1, 2).

In crim. con., see HUSBAND AND WIFE (9).

DEATH—See DAMAGES (1, 2).

DEEDS.

1. Where a father conveyed land to his son on condition that the latter should support him during the remainder of his life, and the father subsequently left the son's residence after a

DEEDS—Continued.

quarrel which the father provoked, he is only entitled to recover from the son for reasonable expenditures made for his support and a reasonable provision for the future. *Woolcott* v. *Woolcott*, 176.

2. Where a deed is delivered by the grantor to a third person, there is no presumption that such delivery is for the use of the grantee. *Thomas* v. *Sullivan*, 265.

3. On a bill to cancel a deed delivered to a third person, evidence considered, and *held* not to show a delivery for the use of the grantee. *Id.* 266.

4. A deed to a remarried widow, her husband, and her heirs, both she and her husband at the time having children by former marriages, cannot be construed to vest the entire estate in the husband and wife as tenants by the entirety. *Fullagar* v. *Stockdale*, 363.

5. A deed may be construed by considering its language, the surrounding circumstances, and the situation of the parties. *Id.*

6. Where the father of a remarried widow granted land to her husband, herself, and "her heirs," and to the heirs and assigns of "the party of the second part," and both she and her husband at the time had children by former marriages, the word "heirs" must be construed to mean "children," and the deed to convey to her and her husband as one grantee, and to her two children, each an undivided one-third of the land. *Id.*

7. A conveyance by one of the children, during the life of his mother, of his interest to his stepfather, vested in the stepfather an undivided one-third of the land. *Id.*

8. After a conveyance to a remarried widow, her husband, and her children by her first husband, one of the children conveyed his interest in the land to his stepfather. *Held*, that the failure of the other child to question the mother's right to live on the property during her lifetime did not constitute such a practical construction of the deed between the parties as conveying the entire estate to the husband and wife as tenants by the entirety as to authorize that child to claim the interest of her brother through a deed executed by him to her after his mother's death. *Id.*

See EVIDENCE (1).

Cancellation, see CANCELLATION OF INSTRUMENTS.

Conditional delivery, see EQUITY; ESCROWS.

Controlling by parol, see HUSBAND AND WIFE (4).

Delivery, see GIFTS (1).

Prima facie evidence of title, see TAXATION (1, 4).

Tax deeds, see TAXATION.

DEPOSITIONS.

A deposition, taken for use on a previous hearing before commissioners on claims, showing that the witness was over 80 years of age and unable to travel, is properly admitted on the trial in circuit court, under 3 Comp. Laws, § 10142, as it cannot be presumed that the cause for taking the deposition had been removed. *Taylor* v. *Taylor's Estate*, 659.

DETROIT CHARTER—See NEGLIGENCE (3).

DISCOVERY.

Where suit is brought to recover the price paid a limited partnership for an option to purchase its plant, on the ground that the president and secretary thereof had no authority to make the contract, plaintiffs are not entitled to an order directing the firm to permit an inspection of its articles, by-laws, and records before trial, so as to enable plaintiffs to prove what authority its president and secretary possessed; such records being obtainable at the trial under a subpœna duces tecum. *Ashley* v. *Calhoun Circuit Judge*, 44.

See APPEAL AND ERROR (6).

DISMISSAL AND NONSUIT.

1. An order striking a stipulation to discontinue without costs from the files, on the ground that it was obtained by deception, unless within 30 days plaintiff pays the costs therein or discontinues a subsequent suit for the same cause of action, does not involve the question whether the settlement of the cause of action was fraudulent, but merely requires plaintiff to proceed with his cause or pay the costs, and mandamus will not be granted to vacate it. *Thompson* v. *Bay Circuit Judge*, 81.

2. The circuit court on motion and proper showing may set aside a discontinuance fraudulently obtained. *Id.*

See JUSTICES OF THE PEACE (4, 6, 7).

DIVORCE—See HUSBAND AND WIFE (10, 11).

Bill of review, see REVIEW (2, 3).

DRAINS.

1. The drain law (2 Comp. Laws, § 4338) authorizes the use of sewer pipe in the construction of drains when necessary. *Kenyon* v. *Board of Sup'rs of Ionia Co.*, 544.

2. Where sewer pipe is to be used in the construction of a county drain, bids should be received for furnishing it. Act No. 272, Pub. Acts 1899, chap. 4, § 3. *Id.*

3. Where the proceedings of the drain commissioner are defective in matters that do not occur until more than 10 days after his final determination, the board of supervisors may refuse to spread the tax, the remedy by certiorari provided by Act No. 272, Pub. Acts 1899, chap. 5, § 3, not being applicable to such a case. 1 Comp. Laws, § 3860; 2 Comp. Laws, § 4356. *Id.*

See MANDAMUS (7); TAXATION (9).

EJECTMENT.

1. The defense of equitable title is not available in ejectment. *Rausch* v. *Briefer*, 284.

2. Defendant in ejectment cannot claim a right of possession under a life lease, where his plea and evidence are that he repudiated it, claiming the agreement was for a deed, returned it, and never recognized its validity during his occupation. *Id.*

3. A defendant in ejectment, holding under a State homestead certificate, who makes a claim for his improvements and has their value determined, cannot, after plaintiff elects to take the value of the land, first claim on appeal that the statute (3 Comp. Laws, §§ 10995-10997) allowing plaintiffs in ejectment to so elect does not apply to controversies arising over State tax lands. Act No. 206, Pub. Acts 1893. *Platz* v. *Englehardt*, 486.

ELECTION OF REMEDIES—See MORTGAGES (2).

ELECTIONS.

The Kent county primary election law (Act No. 326, Local Acts 1903), which requires in section 3 that, before the name of any candidate shall be placed on the ballot at a primary election, such candidate shall on oath declare his purpose to become such, violates section 1 of article 18 of the Constitution prescribing the oath which shall be required of public officers, and providing that no other oath shall be required as a qualification for any office, since thereby voters are precluded from choosing as a candidate one who declines to himself seek the office. *Dapper* v. *Smith*, 104.

ELEVATORS—See NEGLIGENCE (2).

EMINENT DOMAIN.

On review of proceedings to condemn land for a street across a railroad right of way, the fact that no allowance was made for keeping the crossing in repair will not be considered, in the absence of an exception to the verdict on that ground. *Village of Royal Oak* v. *Detroit, etc., R. Co.*, 294.

ENTIRETIES.

Tenancy, see HUSBAND AND WIFE (3, 4).

EQUITY.

A bill to quiet title and to secure a judicial determination of the effect of a deed, alleging that the deed was deposited with a certain person, who was directed not to deliver the same until after the grantor's death, and then to deliver it to the grantee and to no other person, and that the parties both planned that if the grantor survived the property should belong absolutely to the grantor, sufficiently alleges that the deed was deposited with the direction that it was to be de-

EQUITY—Continued.

livered to the grantee only in case he survived the grantor, and at her death. *Skinner* v. *Kelley*, 134.

See JUDGMENTS (2); LANDLORD AND TENANT (6); PARTNERSHIP (1).

Adequate remedy at law, see INJUNCTION (3).

ESCHEATS.

An escheat can be asserted only by the State. *Hopkins* v. *Crossley*, 561.

ESCROWS.

In a suit to quiet title and to obtain a judicial determination of the effect of a deed deposited in escrow, evidence *held* to show that the grantor never authorized the delivery of the deed, except on condition and in case the grantee should survive her. *Skinner* v. *Kelley*, 135.

See EQUITY.

ESTATES.

The rule in Shelley's Case has been abrogated in this State by the statute, 3 Comp. Laws, § 8810. *Fullagar* v. *Stockdale*, 363.

ESTATES OF DECEDENTS—See EXECUTORS AND ADMINISTRATORS; WILLS.

ESTATES TAIL.

1. An estate tail general is one limited to a man and the heirs of his body without any further specification. *Rhodes* v. *Bouldry*, 144.

2. A devise of lands "not only to [the devisee] but to the heirs of his body" creates an estate tail general, and under the laws of this State creates a fee. 3 Comp. Laws, § 8785. *Id.*

ESTOPPEL—See EJECTMENT (2); EXECUTORS AND ADMINISTRATORS (8); MORTGAGES (2); MUNICIPAL CORPORATIONS (10); SPECIFIC PERFORMANCE (2); TAXATION (6, 44).

To allege error, see APPEAL AND ERROR (2).

EVIDENCE.

1. On the issue whether defendant owned land on January 15th, plaintiff having shown a deed from the record owner to defendant's brother, dated December 24th, and recorded July 5th, it is proper to show that defendant was entitled to a deed December 24th, on which day one was tendered him and refused, and that subsequently, shortly before it was recorded, the name of the grantee was changed, and the deed delivered to defendant's brother, he having taken an assignment of defendant's rights. *Musselman Grocer Co.* v. *Casler*, 24.

2. An affidavit served with a justice's summons to the effect that defendants were justly indebted to the plaintiffs in a certain

EVIDENCE—Continued.

sum, as a balance due for goods sold and delivered, is admissible in evidence, though it does not state that affiant is agent, attorney, or bookkeeper for plaintiffs. *Hirsh* v. *Fisher*, 95.

3. In a suit in justice's court against partners, only one of whom was served with process, to recover an alleged balance due on account for goods sold and delivered, oral testimony that the defendant who was served bargained for the goods, that they were accepted and used by defendants, and were not paid for, is admissible. *Id.*

4. In a suit to enforce specific performance of a written contract, by which it was claimed complainant was made the heir of deceased, which writing was clear and unambiguous, statements made by deceased and his first wife as to their feelings toward complainant and her relation toward them were incompetent. *Bowins* v. *English*, 178.

5. A question to a medical witness *held* improper as invading the province of the jury, but cured by the answer. *Noller* v. *Wright*, 416.

6. Where, to contradict plaintiff, the court reporter is sworn, and testifies as to plaintiff's answers to two questions on a former trial, using an abstract from his notes to refresh his recollection, it is not competent for plaintiff to then read to the jury the entire abstract of his testimony on the former trial. *Culver* v. *South Haven, etc., R. Co.*, 443.

7. Where, in an action for damages to a mill pond and race, defendant's witness stated that he at one time owned the mill property, a statement elicited on cross-examination that he had sold to a certain party, under whom plaintiff claimed, was not objectionable as an admission of oral proof of sale. *Neely* v. *Detroit Sugar Co.*, 469.

8. A contract of employment, by which defendant agreed to pay plaintiff a salary of $25 per month for four months for keeping him posted on the state of the market and placing orders for goods to the best advantage, and, if the service was satisfactory, to continue the same for the balance of the year, purports to contain all the elements of the agreement, and hence parol evidence of a contemporaneous arrangement that, unless the contract operated as a saving to defendant of $5,000, he should not be bound, is inadmissible. *R. K. Carter & Co.* v. *Weber*, 576.

9. Where defendant contracted to purchase from plaintiff all the scrap material plaintiff should receive for the ensuing 60 days, at certain prices, evidence in an action on such contract that the real agreement between the parties was oral, and that it was agreed that the amount of iron to be furnished would not exceed the amount furnished the preceding 60 days, was inadmissible to vary the terms of the contract. *Helper* v. *MacKinnon Manfg. Co.*, 593.

10. Evidence was admissible, however, to show the general character of the business of the parties, and to explain what was meant by "all the scrap material" plaintiff might receive. *Id.*

EVIDENCE—Continued.

11. The signatures to unidentified documents not in evidence are properly rejected when offered in evidence for the purpose of comparison. *Taylor* v. *Taylor's Estate*, 659.

See BENEFICIAL ASSOCIATIONS (1, 2); DAMAGES (2); FRAUD (1); HUSBAND AND WIFE (5-9); PARENT AND CHILD (1, 2).

Changing effect of deed by parol, see HUSBAND AND WIFE (4).

Identification of trustee by parol, see WILLS (2).

Oral evidence to vary writing, see FACTORS (3).

Prior accidents, see STREET RAILROADS (5).

EXECUTORS AND ADMINISTRATORS.

1. The order of the probate court allowing an administrator's first account, if not appealed from, is conclusive upon him, so that the second account should begin with the balance due on the first. *Nowland* v. *Rice's Estate*, 146.

2. Disputed questions of fact on appeal from the probate court must, if either party so asks, be tried by jury. *Id.*

3. On the hearing of an account in probate court, the propriety of charges and investments by a guardian, and his compensation, and the allowance to administrators for services, rest with the probate judge or the circuit judge on appeal. *Id.*

4. The findings on the hearing of an administrator's account should state what items are allowed, and what rejected. *Id.* 147.

5. Settlement with the heirs does not relieve an administrator from his duty to file an account and obtain a settlement with the probate court. The settlement only affects the matter of distribution. *Id.*

6. The fact that a foreign executor, appointed executor to administer property located in this State, as authorized by the statute (3 Comp. Laws, § 9284), is thereafter removed by the court of his domicile, does not require his removal as executor here, as a matter of law. *American Missionary Ass'n* v. *Hall*, 247.

7. On the hearing of a claim against an estate by the decedent's wife on notes alleged to have been executed by him, it was not error to exclude testimony that claimant had another husband living when she married decedent, and that she had been unchaste. *Taylor* v. *Taylor's Estate*, 659.

8. A recital in a will by which testator disputes a claim of his wife against him does not preclude her enforcing her claim against his estate, though she accepts the provisions in the will for her support in lieu of dower. *Id.* 660.

See APPEAL AND ERROR (6); MANDAMUS (4).

EXEMPTIONS.

From taxation, see TAXATION.

EXTRADITION.

The court cannot, on habeas corpus to inquire into the detention of one held on a warrant of rendition in extradition proceedings, inquire into the question of petitioner's guilt for the purpose of determining the question of flight, and the fact that the papers only show his presence in the demanding State shortly before the commission of the crime, and not at the time or since, is not controlling. *In re Palmer*, 36.

FACTORS.

1. A season contract of agency in writing for the sale of threshing machinery, which by its terms ends September 30th of the season, and provides that no commissions shall be paid for the sale of secondhand machinery once before sold by the agent, has no reference to commissions for the second sale of machines which had once been sold by the agent before the date of the contract. *Shook* v. *Marion Manfg. Co.*, 467.

2. A similar contract for a prior year in existence when the machinery was first sold would not deprive the agent of his commission for its subsequent sale after that contract had expired. *Id.*

3. A provision in such written contract forbidding its change unless approved in writing by the principal does not invalidate an oral agreement for commissions on sales not within its terms. *Id.*

FINDINGS—See TRIAL.

Conclusiveness, see APPEAL AND ERROR (5); CERTIORARI (1).

FORECLOSURE.

Land contract, see COURTS.

FRAUD.

1. In an action commenced by capias to recover a debt alleged to have been fraudulently contracted, the admission of evidence that defendant ineffectually offered to settle is error. *Musselman Grocer Co.* v. *Casler*, 25.

2. In an action commenced by capias to recover a debt claimed to have been fraudulently contracted, plaintiff alleged that defendant made false representations as to his financial condition for the purpose of obtaining credit. On trial, plaintiff sought leave to amend so as to allege that, after the making of the original representations, defendant's financial condition changed so that he was not entitled to credit, and that defendant's failure to notify plaintiff of this change was fraudulent. *Held*, that leave to amend was properly denied, the proposed amendment changing the cause of action. *Id.*

See BUILDING AND LOAN ASSOCIATIONS (2).

FRAUDS, STATUTE OF.

1. An agreement to lay a side track by plaintiff's building, if plaintiff would repair and remodel the building, and move it

FRAUDS, STATUTE OF—Continued.

to a certain point, may be performed within a year, and hence is not within the statute of frauds. (3 Comp. Laws, § 9515.) *Thomas* v. *South Haven, etc., R. Co.*, 50.

2. The statute of frauds has no application to a case where an employé, working for a stated salary and expenses, procured board on the credit of his employer, and it was understood by all parties that the employer was responsible for the board. *Stevenson* v. *Sterling*, 300.

FRAUDULENT CONVEYANCES.

The conveyance by a debtor of his interest in a decedent's estate, to pay an antecedent debt created by the debtor and his wife, who already had a homestead, for the purpose of purchasing property, the title to which was not taken in the debtor alone, but was taken in the name of himself and wife as tenants by the entirety, was fraudulent as against other creditors of the debtor. *Caswell* v. *Pilkinton*, 138.

GARNISHMENT.

1. A debt impounded by garnishment proceedings instituted simultaneously with a short summons followed by an alias summons and attachment, as provided by sections 717 and 990, 1 Comp. Laws, is released by return of the attachment not personally served, section 745 having no application to such a case. *Adams* v. *Osborne*, 161.

2. An affidavit for garnishment describing the suit to which it is ancillary as pending when in fact it has ripened into judgment, cannot be amended on appeal to the circuit court to conform to the fact, as the garnishee has a right to rely upon the accuracy of the statements in the affidavit. *Heller* v. *People's Savings Bank*, 192.

GIFTS.

1. After a deed of gift was signed and acknowledged, the grantor made manual delivery of it to the grantee, who took it and handed it to her brother, evidently to be kept for her. He put it away without recording it. *Held*, that the delivery was complete. *Fischer* v. *Union Trust Co.*, 312.

2. Where the only consideration for a deed by a father to his daughter was love and affection, the daughter could not enforce a provision in the deed that the grantor would pay certain mortgages on the property conveyed when the same became due, and therefore his failure to do so, resulting in an enforcement of one of them by foreclosure, gave her no claim against the estate of her father based on the appropriation of her property to pay the mortgage. *Id.*

GUARDIAN AND WARD.

1. Equity will relieve an insane defendant from the consequences of the neglect of her guardian ad litem appointed on complainant's nomination. *Frieseke* v. *Frieseke*, 458.

2. A near relative or close friend of an insane defendant should be appointed guardian ad litem, rather than some person nominated by complainant. *Id.*

HABEAS CORPUS.

Where a criminal has been properly convicted, but irregularly sentenced, the irregularity cannot be reviewed by habeas corpus, since the writ cannot be substituted for a writ of error. *In re Butler*, 453.

See EXTRADITION.

HIGHWAYS AND STREETS.

1. Evidence examined in an action against a city for injuries received from a fall on a defective sidewalk, and *held* to make a case for the jury, it being claimed that plaintiff was negligent in attempting to pass over the walk in question with knowledge of its defective condition. *Barnes* v. *City of West Bay City*, 93.

2. One driving on a highway need not turn to the right, so that all of his vehicle is to the right of the center, if he turns far enough so that a passing vehicle, without turning at all, may pass safely. *Buxton* v. *Ainsworth*, 532.

3. Testimony that defendant drove rapidly on a highway at night, without looking for vehicles approaching from the opposite direction, and by the exercise of ordinary care could have seen plaintiff's vehicle with which he collided, justifies submission of the issue of gross negligence. *Id.*

HOMESTEAD.

A widow, having only married children, and no means with which to build a house, or prospect of any, cannot claim homestead rights in a vacant lot which she has owned for 3½ years, and occupied only by making garden thereon. *Ware* v. *Hall*, 70.

See EJECTMENT (3).

State tax homestead lands, see TAXATION (30).

HUSBAND AND WIFE.

1. One who lends money to a married woman individually to build a house on a lot, knowing that her money bought the lot, and supposing the title to be in her, has a right to assume that he is lending the money for her separate estate, and she cannot defend suit to recover the money on the ground that it was not for her separate estate because the lot had been deeded to her and her husband. *June* v. *Labadie*, 52.

2. Where buildings are erected on the land of a married woman, with her knowledge and consent, out of materials selected by her, she is liable for the value of the materials furnished, though the business was conducted mainly by her husband, and the furnisher supposed he was furnishing her husband and that the title to the land was in him, and no misrepresentations were made. *Popp* v. *Connery*, 84.

3. A wife has no right to a share of the crops grown on land owned by her and her husband as tenants by the entirety, since at common law the exclusive control of such property

HUSBAND AND WIFE—Continued.

was in the husband, and our married women's act (3 Comp. Laws, § 8690) is not applicable to such estates. *Morrill* v. *Morrill*, 112.

4. A verbal agreement between husband and wife that she shall have an equal share in the profits of land owned by them in entirety is void as an attempt to control the deed by parol. *Id.*

5. Evidence that plaintiff's wife had been criminally intimate with other men before she met defendant, does not warrant an inference that plaintiff connived at defendant's acts where no knowledge on his part of such prior misconduct is shown. *Smith* v. *Hockenberry*, 129.

6. That a witness relied upon to show an adulterous act was plaintiff's guest at the time he discovered defendant and plaintiff's wife in a compromising situation, does not warrant the inference that plaintiff knew and consented to the improper relation. *Id.*

7. The fact that when plaintiff was informed of the improper relation between his wife and defendant "he did not make much of a reply," and continued to live with her, was not evidence that he consented to such relation. By continuing to live with her after knowledge of her infidelity, plaintiff condoned her offense, but not the offense of her paramour. *Id.*

8. Testimony of witnesses that plaintiff's wife had stated that plaintiff "knew of her criminal relations with other men, and did not object; that she had a network around defendant; and that she had taken good care, and had good witnesses," were admissible only on the ground that plaintiff and his wife were co-conspirators, and not as evidence that a conspiracy existed, or of plaintiff's connivance. *Id.* 130.

9. Defendant, on the question of damages, may show the prior, but not the subsequent, unchastity of plaintiff's wife. *Id.*

10. Where defendant husband, in a bill for divorce on the ground of cruelty, makes a bona fide defense, but does not in terms charge his wife with adultery, his failure to do so will not bar him from maintaining a suit against a third person for alienation of affections and criminal conversation based on acts prior to the divorce suit. *Knickerbocker* v. *Worthing*, 224.

11. A decision of the Supreme Court reversing a decree denying divorce, and holding that the evidence showed complainant entitled to a divorce on the ground of extreme cruelty, is not a bar to an action subsequently brought, but tried before the decision was rendered, by defendant in the divorce suit, against a third person for the alienation of affections and criminal conversation, though adultery was in effect alleged as a defense in the divorce suit. *Id.*

12. In an action for the alienation of a wife's affections, where the charge limited the jury to the time fixed in the declaration, it was not error to refuse a request that, before plaintiff

HUSBAND AND WIFE—Continued.

could recover, the jury must be satisfied that defendant committed adultery with plaintiff's wife substantially at the time and place and under the circumstances alleged. *Id.* 225.

13. In an action for the alienation of a wife's affections, a charge that plaintiff must prove, first, an adulterous disposition on defendant's part towards plaintiff's wife; second, an adulterous disposition on her part towards defendant; and, third, an opportunity for the gratification of this adulterous disposition, *held* properly refused, as ignoring testimony almost directly proving adulterous intercourse, and as calculated to lead the jury to understand that the various elements must be established by distinct and segregated testimony. *Id.*

14. In an action for the alienation of a wife's affections, a charge that mere opportunity to commit adultery is not sufficient to establish the offense; that there must be evidence of such facts, circumstances, times, and places of association as to naturally lead a man of ordinary care and prudence to the conclusion that the parties were having illicit sexual intercourse, *held* to sufficiently embrace the element of disposition to commit adultery. *Id.*

15. In an action for the alienation of a wife's affections, where evidence of defendant's previous good character is erroneously admitted, defendant is not entitled to a charge giving him the benefit thereof. *Id.*

See FRAUDULENT CONVEYANCES; SALES (3).

IMPUTED NEGLIGENCE—See NEGLIGENCE (1, 4).

INDETERMINATE SENTENCES—See CRIMINAL LAW (1, 2, 5-7).

INJUNCTION.

1. Where replevin has been brought to recover machinery sold to the builder of a mill, title to remain in the seller until he is fully paid, an injunction staying removal of the machinery until the rights of a mortgagee of the land can be adjudicated, does not stay the action at law so as to require a bond under section 502, 1 Comp. Laws. *American Foundry & Machinery Co.* v. *Charlevoix Circuit Judge*, 167.

2. Where, in such a case, no injury would be done to the machinery by permitting it to remain in the mill until the determination of the questions involved, and irreparable injury would result to the mortgagee by its removal, and the mortgagee, under the allegations of his bill, is under no obligation to pay the debt, or, if he were, should be permitted to make payment and avoid the destruction of his security, no bond should be required. *Id.*

3. Where complainant claimed he had a valid and enforceable contract with a city for lighting its streets at the time the city repudiated the same and accepted the bid of another, complainant was not entitled to restrain the city from entering into a new contract with such other therefor, since, so far as the remedy by injunction was concerned, the rights of

INJUNCTION—Continued.

the public were paramount to those of an individual contractor, and complainant had an adequate remedy at law. *Riker* v. *Oakland Circuit Judge*, 181.

4. The coming in of a sworn answer fully meeting the allegations of the bill does not deprive the court of all discretion to refuse dissolution of a preliminary injunction. *Chicago, etc., R. Co.* v. *Kalamazoo Circuit Judge*, 246.

5. Injunction will not lie at the suit of an adjoining landowner to restrain the owner of an hotel building from constructing a passageway 14 feet above an alley, and to secure the removal of existing passageways connecting the defendant's building, on the ground that by means of fans in the window of the hotel kitchen, opposite complainant's building, disagreeable odors are forced into the alley and into the rooms of complainant, where it appears that irreparable damage to defendant's property would result, even though the passageways may, to some degree, tend to retain in the alley the odors which are emitted from the kitchen when the wind is in a certain direction. *Washington Lodge, No. 54, I. O. O. F.* v. *Frelinghuysen*, 350.

6. Complainant's president, at the time of the contemplated erection of an hotel, expressed his approval of its erection. Twelve years after its erection, including certain passageways over an alley, complainant sued to secure their removal, and to enjoin the construction of another. The additional passageway would create no greater interference with light or circulation of the air than the old ones. A decree for complainant would ruin the defendant's property for hotel purposes. The defendant had obtained permission from the city for the construction of the passageways. *Held*, that laches barred relief if complainant was otherwise entitled to it. *Id.*

See MANDAMUS (7); WATERS AND WATERCOURSES (5, 6).

INSPECTION—See DISCOVERY.

INSTRUCTIONS TO JURIES—See TRIAL.

INTEREST.

Where there have been two changes in the statutory rate of interest during the time for which interest is to be calculated, an instruction to use the middle rate is harmless to defendant where the amount so found is less than it would be under a proper computation. *Hoffman* v. *H. M. Loud & Sons Lumber Co.*, 5.

INTOXICATING LIQUORS.

Section 5391, 2 Comp. Laws, prohibiting furnishing liquors to minors, has reference only to acts by persons engaged in the business of liquor selling, and not to mere acts of hospitality in their homes by persons not so engaged. *People* v. *Bird*, 31.

JOINT TENANCY.

Between husband and wife, see HUSBAND AND WIFE (3, 4).

JUDGES.

A circuit judge, who was a brother-in-law of plaintiff's counsel, who was conducting the case on a contingent basis, was not disqualified to try the case under 1 Comp. Laws, § 1109, where, in a recess prior to the trial, the contingent fee agreement was abrogated, and counsel in open court waived any lien he had or might have upon any judgment which plaintiff might obtain. *Knickerbocker* v. *Worthing*, 224.

JUDGMENTS.

1. A judgment in form on the merits cannot be falsified by evidence not of record, to the effect that plaintiff, against whom the judgment was rendered, was not present and introduced no witnesses at the trial; but relief from such a judgment can be obtained only by having the judgment entry corrected by the court which committed the error, or in a court having appellate jurisdiction. *Hatch* v. *Wayne Circuit Judge*, 184.

2. A judgment at law may be vacated by a court of equity in a proper case, but the exercise of such jurisdiction is rare, and is only exercised after it has been made clearly to appear that an injustice has been done. *Finn* v. *Adams*, 258.

3. Where defendant in ejectment files a bill to enjoin the suit at law on the ground of equitable title, and is defeated on the merits, he cannot again raise the question in the suit in ejectment. *Rausch* v. *Briefer*, 284.

See HUSBAND AND WIFE (10); MANDAMUS (5).

Full faith and credit, see EXECUTORS AND ADMINISTRATORS (6).

Parties concluded, see MORTGAGES (3).

Setting aside, see PARENT AND CHILD (4).

JURISDICTION.

Foreclosure of land contract, see COURTS.

Loss by adjournment, see JUSTICES OF THE PEACE (4, 6, 7).

JUSTICES OF THE PEACE.

1. Where a garnishee summons was issued simultaneously with the first summons in a suit in justice's court, and was duly served, but the officer was unable to obtain service of the original summons either personally, or by leaving it at defendant's last place of abode, the suit did not fail, but plaintiff was entitled to sustain it by suing out and serving an alias summons followed by an attachment as provided by § 717, 1 Comp. Laws. *Adams* v. *Osborne*, 161.

2. A justice's return to a writ of certiorari to review a judgment recited that certain documents not contained in the affidavit for the writ were introduced before him; that no stenographer was present during the trial; that the justice did not write down all of the testimony, and was unable to state all that was given; and that, after considering the evidence, he rendered judgment for plaintiff, etc. *Held*, that, though such

JUSTICES OF THE PEACE—Continued.

return did not in words contradict the affidavit for the writ, stating that it contained substantially all the testimony taken before the justice, it did show that material evidence was introduced before the justice which was not set out in the affidavit, and therefore an affirmance of the justice's judgment was proper. *Computing Scale Co.* v. *Tripp*, 602.

3. Appeal, rather than certiorari, is the more appropriate remedy to review errors committed in justices' courts. *Id.*

4. Where, in replevin before a justice, the parties fail to appear on the adjourned day, if the justice has no intimation that the parties have agreed on an adjournment, it is his duty to render a judgment of nonsuit, with a return of the property. Comp. Laws, §§ 836, 10679. *Barlow* v. *Riker*, 607.

5. Where a case pending in a justice's court was adjourned to a particular day, whereupon plaintiff procured defendant's consent to a further adjournment, it was plaintiff's duty to appear before the justice and have the case adjourned. *Id.*

6. An action of replevin before a justice of the peace was adjourned to December 29, 1903. Thereafter, at the request of counsel for plaintiff, two oral agreements were made by counsel to adjourn the case—one to March 2, 1904, and the other indefinite. These were not brought to the justice's attention until June 27, 1904, when defendant's counsel presented a stipulation for the adjournment of the cause to July 22, 1904. *Held*, that the justice did not lose jurisdiction of the cause by reason of the nonappearance of the parties on December 29th. *Id.* 608.

7. Where a justice's docket shows that he called a replevin case on the adjourned day, waited one hour, and that neither party appeared, there are facts shown which are the equivalent of the oral announcement of judgment of nonsuit and for return of the property as provided by Comp. Laws, §§ 836 and 10679, and defendant's demand that such judgment be formally entered should be complied with, and on refusal may be enforced by mandamus. *Id.*

See ACTION (1); COSTS; PLEADING (5).

Appearance by attorney, see ATTORNEY AND CLIENT (1).

Pleading, see APPEAL AND ERROR (4).

LACHES—See INJUNCTION (6).

LANDLORD AND TENANT.

1. In summary proceedings for the possession of leased premises, it appeared that after foreclosure of plaintiff's mortgage, defendant, the mortgagor, remained upon the land under an agreement to purchase and to pay rent, and that prior thereto a third person had bought a tax title, and defendant had also been paying rent to him. *Held* that the title to land was not in question so as to require dismissal of the proceedings, as defendant could not thus dispute his landlord's title. *Meeske* v. *Miller*, 87.

LANDLORD AND TENANT—Continued.

2. A cropper acquires only the right to make and harvest a crop and to enter for that purpose. *Stebbins* v. *Demorest*, 297.

3. After leasing premises, reserving the right to a cropper to enter to harvest a growing crop, the lessor has no right to permit the cropper to plow up the crop and sow another in its place, and if the cropper does so he is a trespasser. *Id.*

4. A crop made by a trespasser on leased land under authority of the lessor belongs to the lessee, and he may maintain trover against the cropper for its conversion. *Id.*

5. While a tenant is estopped to dispute his landlord's title as of the date of his lease, he may show that such title has been subsequently extinguished. *Sherman* v. *Fisher*, 391.

6. In summary proceedings defendant cannot set up his equitable title and have a deed executed by him declared a mortgage, that being a matter within the exclusive jurisdiction of equity. *Cottrell* v. *Moran*, 410.

LIBEL AND SLANDER.

One who circulates a libel may be guilty of the offense denounced by 3 Comp. Laws, § 11762, making it a misdemeanor to falsely charge another with the commission of a crime. *Mack* v. *Sharp*, 448.

LIMITATION OF ACTIONS.

A letter from a mortgagor accepting the mortgagee's proposition to settle on the basis of payment of a part of the debt secured by the mortgage is not such a recognition of the entire debt as to prevent the running of limitations against the same. *Carr* v. *Carr*, 397.

See MORTGAGES (4); MUNICIPAL CORPORATIONS (3).

MALICIOUS PROSECUTION.

In malicious prosecution, it may be shown that plaintiff was in fact guilty of the offense charged against him by defendant, notwithstanding his acquittal. *Mack* v. *Sharp*, 448.

MANDAMUS.

1. The fact that certain formalities were not observed in the presentation of an account to the common council of a village does not affect the claimant's right to mandamus, to compel the president to sign orders therefor, where he did not put his refusal to sign the orders on that ground. *Clapp* v. *Titus*, 41.

2. In a mandamus against a circuit judge, a motion to strike portions of his answer, on the ground that they relate to matter not within the knowledge of respondent, or based on the records and files in the cause, will be denied, the proper practice being to call the attention of the court on the hearing to such parts of the answer as are not entitled to consideration. *Erikson* v. *Alpena Circuit Judge*, 103.

MANDAMUS—Continued.

3. The plaintiff in a suit will not be awarded a mandamus to compel the court in which the suit was brought to proceed to trial, where it would be the court's duty upon such trial to direct a verdict for defendant. *Hatch* v. *Wayne Circuit Judge*, 184.

4. Mandamus will not lie to review the order of a probate judge refusing to remove an administrator. *American Missionary Ass'n* v. *Hall*, 247.

5. Where relator, though entitled to a judgment which would determine the particular suit, was not entitled on the record to a judgment finally determining the matters in controversy, which was the judgment denied, mandamus will not be granted to compel the entry of a judgment determining the suit, not shown to have been applied for. *Orsland* v. *Wayne Circuit Judge*, 395.

6. Mandamus will not be granted to compel a circuit judge to proceed with the trial of a chancery case while an action at law between the same parties, involving the same subject-matter, is pending on writ of error in the Supreme Court; his refusal to proceed under such circumstances not being an abuse of discretion. *Schmid* v. *Benzie Circuit Judge*, 452.

7. Where a temporary injunction is granted on a bill alleging that complainant is owner in fee of certain land upon which the drain commissioner is about to cast large quantities of water to its injury, and a motion to dissolve, on the ground that complainant is not the owner of the fee, is denied after a showing that he, in fact, holds under a land contract, the decision of the circuit judge will not be controlled by mandamus. *Emery* v. *Ionia Circuit Judge*, 542.

8. On certiorari to review the refusal of a circuit judge to issue a writ of mandamus, the application for which was heard on petition and answer, the answer must be taken as true for the purpose of the case. *Kenyon* v. *Board of Sup'rs of Ionia, Co.*, 544.

9. Where no issue is joined on relator's showing for mandamus against a justice of the peace, the statements contained in his affidavit must be considered as true. *Barlow* v. *Riker*, 607.

See CONTEMPT; JUSTICES OF THE PEACE (7); TAXATION (20).

To vacate order setting aside discontinuance, see DISMISSAL AND NONSUIT (1).

MARRIED WOMEN—See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. In an action for services, evidence examined, and *held* to authorize the submission of the question of plaintiff's employment by defendant to the jury. *Martin* v. *Milwaukee, etc., R. Co.*, 155.

MASTER AND SERVANT—Continued.

2. Where, in an action by a brakeman against a railroad company for personal injury, the declaration counts on a defect in the track, an instruction that permits recovery on the theory that a coupler was defective is erroneous, and is not cured by a subsequent one that plaintiff, to succeed, must make out a case as alleged in his declaration. *Culver* v. *South Haven, etc., R. Co.*, 443.

3. An instruction, in an action for injury to a brakeman, from his foot being caught between a bolt and a spike in the track, that it was defendant's duty to keep the space between the rails in a reasonably safe condition for the use of its employés, is erroneous; the company not being under the absolute duty to keep its tracks in a reasonably safe condition, but being required only to exercise reasonable watchfulness and care in inspecting its tracks and in keeping them in a reasonably safe condition. *Id.* 444.

4. Where a contract of employment contemplated a trial period of four months, and if the service proved satisfactory it was to continue for the balance of the year, and the service proved unsatisfactory, defendant was not obliged to notify plaintiff thereof at the end of the four months' period or be bound for the balance of the year. *R. K. Carter & Co.* v. *Weber*, 576.

5. Where, during the last three months of the four months such contract was in force, defendant neither obtained nor sought the benefit of the contract, plaintiff was bound to infer therefrom that the employment was unsatisfactory. *Id.* 577.

6. Defendant's receipt and failure to answer written communications sent by plaintiff through the mails did not estop defendant from subsequently contending that the services were unsatisfactory, and hence that he was not bound for the additional term. *Id.*

7. In an action for an assault committed by defendants' servants while removing a piano from plaintiff's residence at her husband's request, an instruction that defendants would only be liable for those acts which were committed by the servants in doing those things necessary in getting the piano sufficiently guarded defendants' rights. *Canton* v. *Grinnell*, 590.

8. Where an employé is sent into a place provided by the master, where discovery of a defect is difficult, he has a right to assume, in the absence of any circumstances creating a doubt in his mind, that his safety has been reasonably provided for. *Clark* v. *Wolverine Portland Cement Co.*, 673.

9. In an action against of a master for the death of a servant, alleged to have been caused by a loose plank in a walk alongside a coal conveyor which deceased was required to oil, evidence examined, and *held* to justify submission to the jury of the issue of defendant's negligence. *Id.*

See APPRENTICES.

MECHANICS' LIENS.

Relator contracted to erect a factory, and subcontracted part of the work. The subcontractor brought suit to enforce a

MECHANICS' LIENS—Continued.

mechanics' lien, alleging performance, and that a delay had been caused by relator and waived by it. Relator denied the waiver, alleging damages by the subcontractor's delay, which were recoverable by the owner against relator, and asking that the owner be required to pay relator the balance after paying the subcontractor's claim as established. *Held*, that relator was not a mere stakeholder, and was properly refused permission to amend by omitting the prayer for personal judgment against the owner because there were other matters of difference between him and the owner not ready for trial. *Kilby Manfg. Co.* v. *Menominee Circuit Judge*, 277.

MISCONDUCT OF COUNSEL—See TRIAL (4, 9, 10); WITNESSES (5).

MONEY RECEIVED.

Where, after complainant's incarceration for life, defendant collected a claim which had belonged to complainant prior to incarceration, which was paid to defendant as guardian of complainant's children in recognition of defendant's claim that the right to the money had passed to him as such guardian, complainant's remedy against his debtor not being thereby affected, he was not entitled to recover the money from defendant as money received to his use. *Finn* v. *Adams*, 258.

See TAXATION (34).

MORTGAGES.

1. Evidence examined and *held* that the dismissal on the merits of a bill to have a land contract declared a mortgage was proper. *Doudt* v. *Loveridge*, 295.

2. Where a mortgagee bid in the property at foreclosure sale at less than one-half its value, and sought to recover the deficiency by garnishment proceedings, but was unsuccessful, and the mortgagor then redeemed and immediately sold the property, the mortgagee could not assert, on suit to set aside the foreclosure sale, that it was invalid for irregularities, he having chosen his remedy, and not being in a position to say that he was ignorant of the law in not knowing that defendant had a right to redeem. *Mallar* v. *Mallarian*, 345.

3. The assignee of a junior mortgage is not bound by proceedings to foreclose the senior mortgage, to which he was not a party. *Sherman* v. *Fisher*, 391.

4. Where, in a suit to restrain the foreclosure of a mortgage, defendant answered by cross-bill for foreclosure, and the court found that limitations pleaded had not run against the mortgage, but granted a decree for only a small part of the alleged debt, from which complainant did not appeal, the decision of the issue of limitations is not reviewable on the defendant's appeal, but is not so conclusive as to require a decree for defendant for the full amount of the debt. *Carr* v. *Carr*, 396.

MORTGAGES—Continued.

5. On a bill to foreclose a mortgage against the mortgagor and his subsequent grantee, evidence examined and *held* insufficient to show that the grantee assumed and agreed to pay the mortgage debt, so as to entitle the mortgagee to a decree for deficiency against the grantee. *Grover* v. *Bishop*, 505.

See INJUNCTION (1, 2); SUBROGATION.

MUNICIPAL CORPORATIONS.

1. Under the general village law (1 Comp. Laws, chap. 87, § 2769, subd. 26), providing that the council shall have authority to provide for the care, custody, and preservation of the public property, where, as the result of a conflict between the president and the council, the president had suspended the marshal, and the council, through its committee on fire and water, employed the suspended marshal, and allowed his claim for services in attending to the fire apparatus of the village, mandamus lies to compel the president to sign the orders for the amount allowed by the council; it appearing that, by reason of a fire having occurred, the apparatus was in need of the services rendered by relator, and that, without an appointment by the council, there would have been no one to care for it. *Clapp* v. *Titus*, 41.

2. The notice of claim for negligent injury which the charter of Detroit (Act No. 463, Local Acts 1895, § 46), provides must be served upon the corporation counsel is not waived by consideration by the common council of claimant's claim though the assistant corporation counsel was present and made no objection. *Wilton* v. *City of Detroit*, 67.

3. Filing and service of a declaration as commencement of suit is not sufficient under the charter of Detroit (Act No. 463, Local Acts 1895, § 46), where the service is made upon the wrong officer and proper service is not had until the year has passed; 3 Comp. Laws, § 9985. The saving statute (3 Comp. Laws, § 9738) has no application to cases barred by the law of 1895. *Id.*

4. Under Jackson City Charter of 1903 (Act No. 523, Local Acts 1903, tit. 4, § 5), the term of office of the city attorney appointed May 18, 1903, expired on the first Monday in May, 1904, and he was not entitled to hold office under such appointment for two years. *Attorney General, ex rel. Reece*, v. *Shekell*, 287.

5. Where the engineer's certificate shows that the assessment for sewer construction is in accordance with the resolution directing the assessment, and that the assessment is made in proportion to the benefits to the several lots described, and in accordance with the provisions of the ordinance in such case provided, the certificate is conclusive that the lots were assessed in proportion to the benefits received, as well as by area. *Walker* v. *City of Detroit*, 639.

6. On a bill by a property owner to cancel a sewer assessment, evidence considered, and *held* sufficient to show notice of ordering construction of the sewer and proof of service of such notice. *Id.*

MUNICIPAL CORPORATIONS—Continued.

7. Arcadia creek which runs through the city of Kalamazoo was obstructed by the contents of a warehouse erected over it at a point where the owner of the warehouse owned both banks and the bed of the stream. The city was not aware of the obstruction until the contents of the warehouse were removed, and it was able to reach the bed of the creek from the inside, when it cleaned the stream for sanitary purposes. The building did not interfere with the natural flow. The creek was not used for sewerage, and the city had no control over it except under its police power to clean the same, and under its charter to regulate, improve, alter, widen, or change its channel on making compensation for the property taken therefor. *Held*, that the city was not liable for the obstruction. *A. L. Lakey Co.* v. *City of Kalamazoo*, 644.

8. A city is not liable for damages caused by obstructions in a creek flowing through it, not used as an outlet for its sewers, caused by accumulations washed into it from streets and buildings within the natural drainage area of the creek, and it is not its duty to keep the same at its natural depth and width. *Id.*

9. Where a notice of claim for damages against a city was given, and was recognized and acted on by the city council without objection that it did not state the amount of damages claimed, such objection cannot be raised in an action on the claim. *Spier* v. *City of Kalamazoo*, 652.

10. Where a city, in consideration of its agreement to make certain street improvements, has obtained a deed of land from plaintiff for a street, and has drawn therefrom a large amount of materials for its streets, and plaintiff cannot be placed in statu quo, the fact that an insignificant part of the contract was void because ultra vires will not defeat the whole contract. *Id.* 653.

See INJUNCTION (3).

Officers, matters officially cognizable, see BRIBERY.

MUTUAL BENEFIT SOCIETIES—See BENEFICIAL ASSOCIATIONS.

NEGLIGENCE.

1. The negligence of the driver of a vehicle is not imputable to an infant riding with him at his invitation so as to preclude recovery for her negligent killing by a railroad company at a crossing. *Hampel* v. *Detroit, etc., R. Co.*, 1.

2. The owner of a store building owes no common-law duty to a trespasser to maintain guards about an elevator shaft on his premises. *Flanagan* v. *Sanders*, 253.

3. Section 714 of the charter of Detroit of 1893, requiring that elevator shafts in stores or buildings in the city shall be provided with and protected by a substantial railing and sufficient automatic trapdoors, etc., does not impose a duty on the owners of store buildings in favor of trespassers, nor render them liable to trespassers for injuries proximately resulting from failure to provide elevator wells with automatic gates. *Id.*

NEGLIGENCE—Continued.

4. The negligence of the driver of a fire engine was not imputable to the engineer, who, in the performance of his duty, was riding on the rear end of the engine when it collided with a street car. *McKernan* v. *Detroit Citizens' Street-Railway Co.*, 520.

5. Where the questions of willfulness, wantonness, and recklessness are submitted, those terms should be defined, so as to prevent their being understood as mere words of emphasis, and therefore as referring to the doctrine of comparative negligence, which does not obtain in this State. *Buxton* v. *Ainsworth*, 532.

6. In order to entitle plaintiff to recover, despite his own negligence, on the ground of the gross negligence of defendant, the latter must have discovered plaintiff's negligence, or neglected the most ordinary precaution in failing to do so. *Id.* 533.

7. Where, in an action for a personal injury caused by the explosion of a bottle of champagne cider manufactured by defendant, the testimony for plaintiff tended to show that the explosion could not have occurred if the bottle had been charged in the usual way, and the testimony for defendant that it was so charged and that the explosion might have been otherwise caused, the issue of defendant's negligence was for the jury. *O'Neill* v. *James*, 567.

8. Where no contractual relations exist between the seller of an article of commerce, harmless in itself, and one who is injured thereby, as in the case of a manufacturer of champagne cider and a bartender who is injured by an explosion of an overcharged bottle thereof, there must be knowledge on the part of the seller of the danger, before he can be held liable. *Id.*

See BAILMENTS; CARRIERS; HIGHWAYS AND STREETS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS; STREET RAILROADS.

NEW TRIAL.

Circuit Court Rule 21 authorizes the circuit court to grant a rehearing on a certiorari to a justice of the peace. *Hirsh* v. *Fisher*, 95.

NOVATION.

1. The requisites of a novation are a valid prior obligation to be displaced, the consent of all parties to the substitution, a sufficient consideration, the extinction of the old obligation, and the creation of a valid new one. *Piehl* v. *Piehl*, 515.

2. Where the original debtor, after agreeing with a third party to pay the debt, dies before the creditor is informed of the arrangement, there is no novation. *Id.*

3. Where suit is brought by one brother against another for a debt owing plaintiff by their father, on the theory of a novation, evidence that defendant promised his father to give his brother and sister each the amount sued for is immaterial. *Id.*

NUISANCE—See INJUNCTION (5).

PARENT AND CHILD.

1. Where suit is brought against a father for the board of his son, the burden is on plaintiff to show, by a fair preponderance of the evidence, that at the time the son went to the plaintiff's to board, he was authorized to procure board upon his father's credit, and that the board was furnished relying upon the father as paymaster, and upon him alone. *McCrady* v. *Pratt*, 203.

2. In an action against a father for the board of the son, evidence examined and *held* that there was none on which to base a finding that the son had authority to bind his father for board after he reached the age of 21. *Id.* 204.

3. Where, as in this State, the statute (2 Comp. Laws, § 4495) imposes a legal duty upon a parent to support his minor children, a total abandonment of a child raises an implied agency on the child's part to bind the parent for necessaries. *Finn* v. *Adams*, 258.

4. On a bill to set aside a judgment and sale in attachment, founded on a claim for necessaries furnished the minor children of a life convict, evidence examined, and *held* that it would be inequitable to sustain the bill. *Id.*

PARTIES—See MORTGAGES (3).

PARTNERSHIP.

1. Where, on a bill for partnership accounting, the cause is referred to a commissioner to state the account, with directions to charge defendant with the amounts received by him from the sale of certain timber if it can be ascertained from defendant's books, and, if not, then with the market value, and to credit defendant with the original cost of the timber, the expense of manufacturing and selling the same, with interest on money advanced by defendant, defendant is chargeable with what he received at retail, and is not entitled to have the same charged at its wholesale market value. *Hughes* v. *Love*, 281.

2. The minority representation law (3 Comp. Laws, § 8553), securing to minority stockholders in corporations the power of electing a representative in boards of directors, and providing for cumulative voting of stock, is not applicable to an election of managers of a limited partnership association organized under 2 Comp. Laws, §§ 6079–6089, since by 2 Comp. Laws, §§ 6057, 6083, the authority of a manager to contract for the partnership is preserved to some extent in limited partnership associations; and the fact that by Const. art. 15, § 11, certain provisions thereof are made applicable alike to all associations having any of the powers of corporations, does not indicate that the word "corporation," in all legislation, is to be comprehensively construed. *Attorney General, ex rel. Potter*, v. *McVichie*, 387.

See EVIDENCE (3).

Service upon partners, see PROCESS (2).

PATENTS.

1. On a bill to compel the reassignment of certain patents for wall finish, the contract of assignment examined, and *held* to render defendant the absolute owner of the patents, and not to constitute a mere license for their use for five years, as alleged in the bill. *Church* v. *Anti-Kalsomine Co.*, 211.

2. The contract being plain and unambiguous, defendant's rights thereunder were not affected by a resolution passed by its directors at the expiration of the five-year period, declaring the contracts "and all things connected with and pertaining thereto terminated, and at an end." *Id.*

PAYMENT—See SUBROGATION.

Burden of proof, see BILLS AND NOTES (5).

PHYSICIANS AND SURGEONS.

The State veterinary board, organized under Act No. 191, Public Acts 1899, has no power to determine whether a college of "veterinary medicine and surgery," existing under 2 Comp. Laws, chap. 218, is a regular school or college, or to refuse a certificate to practice to a person holding a diploma from such college. *Wise* v. *State Veterinary Board*, 428.

See BENEFICIAL ASSOCIATIONS (3, 4).

PLEADING.

1. In a suit to recover the purchase price of certain capital stock which defendant agreed in writing to purchase before the corporation was organized, plaintiff declared for the price of 1,250 shares at $5,000, as set out in the contract. On the trial it appeared that the corporation, by agreement of all parties, was actually organized with one-fifth the number of shares originally contemplated, but with the same assets, and defendant received 250 of the shares. *Held*, that an amendment of the bill of particulars in accordance with the proof did not introduce a new cause of action and should have been allowed, under the statute of amendments. 3 Comp. Laws, § 10268. *Cleveland* v. *Rothschild*, 90.

2. Where joint debtors are sued before a justice of the peace on the theory of the existence of a partnership between them, a special appearance by the only defendant served to have the proceedings dismissed on the ground that he was not a copartner is not equivalent to a plea in abatement requiring replication and proof by plaintiff to meet it. *Hirsh* v. *Fisher*, 95.

3. The statute (1 Comp. Laws, § 826) creating a presumption of execution of a written instrument declared upon and filed with the justice, cannot be first availed of by plaintiff in the Supreme Court in a case where the pleadings were oral and plaintiff merely declared on all the common counts in assumpsit. *First National Bank of Cassopolis* v. *Carter*, 421.

4. In an action on a written contract of employment, evidence that when the contract was entered into, both before and after defendant signed the same, plaintiff's vice-president

PLEADING—Continued.

informed defendant that, unless the latter made a saving of $5,000 under the contract, he would not be required to pay the consideration agreed on, was not admissible under a plea of the general issue, without notice either to prove that the execution of the contract was procured by fraud, or that it tended to show that after the contract was made it was so modified that defendant was released from his obligation. Circuit Court Rule 7 *b*. *R. K. Carter & Co.* v. *Weber*, 576.

5. Circuit Court Rule 7 *b* providing for notice of affirmative defense applies to suits originating in justice's court. *Id.*

6. The fact that plaintiff, declaring on a written contract, proves without objection the conversation attendant upon its execution, does not entitle defendant, who has given no notice of special defense, to show his version of the conversation, avoiding and contradicting the contract, nor estop plaintiff from objecting that such evidence introduces an issue not pleaded. *Id.*

Declaration as commencement of suit, see MUNICIPAL CORPORATIONS (3); PROCESS.

PRESUMPTIONS—See DEEDS (2).

PRIMARY ELECTIONS—See ELECTIONS.

PRINCIPAL AND SURETY.

The acceptance from a principal of a promissory note for an existing account, payable at a time beyond which the account would be payable, is an extension of the time of payment which discharges the sureties on the account debt. *People, for Use of The C. H. Little Co.*, v. *Grant*, 60.

See ACTION (2).

PROBATE COURT—See APPEAL AND ERROR (6).

PROCESS.

1. Where suit is commenced by filing declaration and service of a copy thereof, indorsed with a copy of the rule to plead, as prescribed by the statute (3 Comp. Laws, § 9985), it is not necessary that the copy served bear an indorsement of filing by the clerk. *Michigan Buggy Co.* v. *Smallegan*, 79.

2. Where partners are sued before a justice of the peace, and only one is served with process, a judgment for plaintiff against all is not void merely because of want of service on the other defendants. 1 Comp. Laws, § 840. *Hirsh* v. *Fisher*, 95.

See JUSTICES OF THE PEACE.

Affidavit served with summons, see EVIDENCE (2).

Service of wrong officer, see MUNICIPAL CORPORATIONS (2, 3).

PROPERTY.

Building materials as realty, see VENDOR AND PURCHASER.

RAILROADS.

1. Evidence in an action against a railroad company for injuries arising from a crossing accident examined, and *held* that nothing was presented from which the company could be charged with such gross negligence as to make the negligence of the driver of the vehicle immaterial. *Hampel* v. *Detroit, etc., R. Co.*, 1.

2. In an action against a railroad company for killing horses on its track, the negligence alleged being failure to maintain the statutory fence, and it being alleged that the horses went upon the track at a point where such fence was required, proof that the horses got upon the track as alleged is necessary to plaintiff's case, and evidence on the part of defendant that they went there over proper cattle-guards is proper. *Clement* v. *Pere Marquette R. Co.*, 57.

3. The sufficiency of a cattle-guard in good repair, of a pattern approved by the commissioner of railroads, as provided by the statute (2 Comp. Laws, § 6294), is not to be questioned. *Id.*

See ADVERSE POSSESSION; CONTRACTS (1).

Imputed negligence, see NEGLIGENCE (1).

RAPE.

Where prosecutrix in rape is not constant in her accusation of respondent, her stepfather, and claims at the trial that her testimony at the examination was false, her deposition there taken is admissible only for the purpose of impeachment, and not as substantive evidence of respondent's guilt. *People* v. *Miner*, 290.

RECORDS.

1. A tax statement, made under 1 Comp. Laws, § 3843, and delivered to the supervisor, is, though not sworn to, a public record under 3 Comp. Laws, § 11361, making it a criminal offense to carry away a public record. *People* v. *Jewell*, 620.

2. A statement so prepared and delivered is a paper or record "belonging or appertaining to the office" of a township, within the meaning of section 11361, 3 Comp. Laws, although there was an intention to amend such statement by substituting another therefor, where no such amended or substituted statement was ever prepared. *Id.*

3. In order to constitute the offense of carrying away or destroying a public record denounced by 3 Comp. Laws, § 11361, the act must be accompanied by a criminal intent. *Id.*

Contradiction by parol, see EVIDENCE (1).

RELEASE.

Where plaintiff was injured while intoxicated by falling from a railroad train, and his wife thereafter sued to enforce her statutory right of action against the saloonkeepers, and their bondsmen, from whom plaintiff had obtained the liquor, which cause of action plaintiff and the wife thereafter re-

RELEASE—Continued.

leased, such release did not discharge any right of action plaintiff had against the railroad company for the injuries sustained. *Fox* v. *Michigan Cent. R. Co.*, 433.

REPLEVIN.

Where plaintiff in replevin claims railroad ties by virtue of a sale by a State trespass agent, the ties having been cut on State land, defendant, claiming under a sale by the trespasser, cannot question plaintiff's title. *Raber* v. *Hyde*, 101.

See INJUNCTION (1); JUSTICES OF THE PEACE (4, 6, 7).

RESCISSION OF CONTRACTS—See SALES (4).

REVIEW.

1. Where a petition to file a bill of review shows a decree authorizing a sale of petitioner's lands for nonpayment of taxes, which decree petitioner claims is invalid, and the answer, in effect, admits that there are no taxes against the land which have not been extinguished, and that there is no existing lien, petitioner should be allowed to file such bill to set aside the decree. *Rumsey* v. *Auditor General*, 456.

2. Where a decree of divorce against an insane defendant rests entirely upon testimony elicited by leading questions to which her guardian ad litem made no objection and the decree was not opposed though barely supported by the evidence considered in its most favorable light, an application by defendant's general guardian to file a bill of review should be granted. *Frieseke* v. *Frieseke*, 458.

3. The application should also be granted in such a case where it appears that through the guardian's neglect defendant's allowance for permanent alimony in lieu of dower was based on evidence disclosing only one-fifth the value of complainant's property. *Id.*

SAFETY DEPOSIT BOX—See BAILMENTS.

SALES.

1. Where goods are supplied to a contractor from time to time, as required on a contract to furnish on 30 days' time the material necessary to complete several contracts, the 30 days begin to run, not from the date of the last item, but from the date of each invoice. *People, for Use of The C. H. Little Co.*, v. *Grant*, 60.

2. Plaintiff sold defendant all the hay in certain stacks, to be baled before taken away, defendant to furnish baler and plaintiff to assist in baling and deliver the hay at the railroad. Defendant directed the baler which stacks to bale first, but the baler left the premises because plaintiff forbid his baling unless he baled certain other stacks first. *Held*, that the purchaser had the right to direct the order of baling, and plaintiff could not recover as for breach of contract. *Fowles* v. *Rupert*, 150.

SALES—Continued.

3. Defendants sold a piano to plaintiff's husband under a conditional sale, reserving the title, but plaintiff testified that she owned the piano and made the payments thereon to defendants. At the husband's request defendants sent truckmen to the residence to get the piano. There was no default in payments. *Held*, that the fact that the husband made the purchase, and that the agreement was signed by him, did not fix the title to the piano in him as against his wife. *Canton* v. *Grinnell*, 590.

4. Defendant, having agreed to purchase all the scrap iron plaintiff should receive for the ensuing 60 days, on discovering that plaintiff was purchasing iron from wholesalers to deliver to defendant, on account of a decline in price, refused to receive more iron; but later defendant notified plaintiff to begin delivering again, and, after plaintiff had delivered a further quantity, defendant again refused to receive more. *Held*, that defendant's notification to plaintiff to begin delivering again constituted only a waiver of its right to stand on its first refusal, and did not constitute a new contract, waiving plaintiffs' departure from the old. *Helpin* v. *MacKinnon Manfg. Co.*, 594.

5. A note given for the price of chattels gave the seller right to take possession at any time before or after maturity, and to resell the property, or retain the same without sale, and in such case the amount paid on the note was to be deemed "compensation only for use and wear and tear." *Held*, not a conditional sale, but that the seller might retake and sell, and, if the price obtained did not equal the amount due, he might collect the balance from the maker of the note. *Van Den Bosch* v. *Bouwman*, 624.

See EVIDENCE (9); FACTORS.

Conditional, see INJUNCTION (1, 2).

SAVING QUESTIONS FOR REVIEW.

1. Reversal will not be granted because an unresponsive answer to a proper question was objectionable as hearsay, no motion having been made to strike it out. *Hoffman* v. *H. M. Loud & Sons Lumber Co.*, 5.

2. Error assigned to the examination of a witness is unavailing where the record does not disclose that any objection was made to questions asked, or that any rulings were made with reference to which exceptions were taken. *Id.*

3. Rulings to which no exceptions are taken cannot be reviewed on error. *Heenan* v. *Forest City Paint & Varnish Co.*, 549.

4. In an action against a city, a request by defendant for an instruction that, "in order for plaintiff to bring suit, it is incumbent on him to show that he has presented a claim to the city in accordance with the statutory requirements. He has offered in evidence a paper which he says is a claim, but in which he fixes no sum for his damages"—is not sufficient to

SAVING QUESTIONS FOR REVIEW—Continued.

raise the question that the claim was not presented within the time limited by the charter. *Spier* v. *City of Kalamazoo*, 652.

See WATERS AND WATERCOURSES (3).

SEARCHES AND SEIZURES.

One cannot be compelled to produce his own books, or the books of another which are under his control, where their production would tend to criminate him, nor can his clerk be required to produce them; but when, as the agent of a corporation, he makes entries on the corporate books, and those books are in the actual and legal possession and control of another officer of the corporation, or of the corporation itself, such officer may be compelled to produce them, in a proper case, under a subpœna duces tecum, and such compulsion does not amount to an unjustifiable search and seizure, within the prohibition of the Constitution. *In re Moser*, 303.

SET-OFF AND COUNTERCLAIM—See ACTION.

SHELLEY'S CASE—See ESTATES.

SHERIFFS AND CONSTABLES.

An amendment to a sheriff's return as to a matter of fact must be made by the sheriff voluntarily, and cannot be compelled by the court. *Flynn* v. *Kalamazoo Circuit Judge*, 126.

SPECIFIC PERFORMANCE.

1. Specific performance is not a matter of right. *Cox* v. *Raider*, 249.

2. Where the contract purchaser of land, on inquiry, disclaims any interest in the land, and, in reliance thereon, a third person purchased it of the vendor as a part of a larger tract, which would be less valuable without the tract in question, specific performance is properly denied. *Id.*

3. On a bill for specific performance of an alleged agreement by defendant's decedent to convey land to plaintiff if he and his wife would live with decedent and attend to her business, evidence examined and *held* sufficient to sustain a finding establishing the agreement alleged. *Turner* v. *Bradfield*, 507.

STATE VETERINARY BOARD—See PHYSICIANS AND SURGEONS.

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

Repeals by implication are not favored, and, before it can be said that the legislature intended to make a radical departure from the settled policy of the State, such intention must be made to appear by language that is unambiguous, and not

STATUTES—Continued.

susceptible of two constructions. *Hoffman* v. *H. M. Loud & Sons Lumber Co.*, 5.

See CRIMINAL LAW (3); PARTNERSHIP (2).

Repeal, see CRIMINAL LAW (6).

STIPULATIONS.

Discontinuance, see DISMISSAL AND NONSUIT.

STREET RAILROADS.

1. In an action against a street-railroad company for negligently killing a cow on its tracks, instructions as to care required examined, and *held* not prejudicial to defendant. *Airikainen* v. *Houghton County Street-Railway Co.*, 195.

2. Evidence examined, and *held* to make a case for the jury. *Id.*

3. A street-railway motorman, approaching a vehicle from behind, and seeing other vehicles in a narrow space between the track and curb, and observing that the horse attached to the vehicle appears to be frightened, is bound to immediately bring his car under control, so far as it is possible for him to do so. *McVean* v. *Detroit United Ry. Co.*, 263.

4. Plaintiff, a girl 15 years of age, was riding with her sister in a buggy drawn by a horse ordinarily gentle, but which became frightened at the approach of a street car at a high rate of speed, causing dust and leaves to fly into the air. Plaintiff, who was obliged to act quickly, and not knowing the speed of the car or its exact distance from her, attempted to alight, to hold the horse by the head until the car passed, when the car struck her. *Held*, that plaintiff was not guilty of contributory negligence, as a matter of law. *Id.*

5. In an action against a street-railway company for injuries from the overturning of plaintiff's cutter in striking the rails of defendant's track, which were alleged to have been negligently left above the surface of the street, where the sole question was the condition of the street, and whether its condition was negligence, evidence of prior accidents of a similar character at the same place was inadmissible. *Gregory* v. *Detroit United Ry.*, 368.

6. Where none of the witnesses for the plaintiff who testified as to the condition of defendant's track where the accident occurred had made such an examination as entitled their testimony to much weight, but, on the contrary, eight for the defendant testified to a careful examination, and that it was in good condition—two of them being officers of the village in which the accident occurred—a verdict for plaintiff was contrary to the clear weight of the evidence. *Id.* 369.

7. In an action by a fireman against a street-railway company for injuries resulting from collision with a street car passing an engine house as plaintiff emerged therefrom, riding on the rear of a fire engine, it was claimed that the declaration

STREET RAILROADS—Continued.

would not support a recovery based upon negligence of the motorman at any time before he had actual knowledge that the engine was coming out of the engine house. Defendant had verdict, and on error it insisted that the verdict settled that there was no negligence after the discovery of plaintiff's exit, and that therefore the questions raised by appellant as to imputed negligence, etc., were immaterial. *Held*, that, as the evidence covering plaintiff's whole case was received without objection as to the pleadings, the court on error could not assume that an amendment would have been refused, and would consider the whole case. *McKernan* v. *Detroit Citizens' Street-Railway Co.*, 519.

8. In an action by a fireman against a street-railway company for injuries resulting from collision with a street car passing an engine house as plaintiff emerged therefrom, riding on the rear of a fire engine, a rule of the railway company requiring that cars, when passing engine houses, must not go faster than four miles an hour, should not be construed as applying only to the space directly in front of an engine house, and to impose on the motorman no obligation to approach the engine house at a reduced rate. *Id.*

9. The existence of this rule would not add to the railway's obligations to the public, so as to make its violation negligence per se, but was evidence bearing on the question whether a faster rate was in accordance with careful management, and if plaintiff had knowledge of it, it might have a bearing on the question of his contributory negligence. *Id.* 520.

STREETS—See HIGHWAYS AND STREETS.

SUBROGATION.

One who advances money on a mortgage to pay a prior mortgage on the same premises, and afterward learns that the mortgagor has no title because of an ad interim conveyance, will be subrogated to the rights of the prior mortgagee, though the property is a homestead. *Sproal* v. *Larsen*, 142.

SUMMARY PROCEEDINGS—See LANDLORD AND TENANT.

SUMMONS—See PROCESS.

SURETYSHIP—See PRINCIPAL AND SURETY.

SURVIVAL ACT—See DAMAGES (1, 2).

TAXATION.

1. The graduation act of 1881 (Pub. Acts 1881, No. 229), as amended in 1882 (Act No. 7), did not destroy the prima facie effect of tax deeds issued thereafter pursuant to sales made before the passage of such acts. *Hoffman* v. *H. M. Loud & Sons Lumber Co.*, 5.

2. Act No. 11, Pub. Acts 1882, did not have effect to repeal, as to titles theretofore obtained, the provision of the general tax

TAXATION—Continued.

law of 1869 (No. 169, § 164) relating to who might attack the validity of tax titles. *Id.*

3. In trover for the conversion of timber taken from land which the plaintiff claims through tax titles, a contention by defendant, that though under the statute he cannot attack the validity of plaintiff's title as to the land, he can as to the timber, is untenable. *Id.*

4. The tax legislation of 1881 and 1882 did not repeal the provisions of the previous tax laws making the auditor general's deeds to unredeemed tax lands prima facie proof of the regularity of the tax proceedings. *Id.* 6.

5. Under Detroit Charter of 1883 (Act No. 326, Local Acts 1883) providing in section 6 for publication of notice of the completion of the tax rolls, and in section 9 for publication of notice of their receipt by the receiver of taxes, the absence of proof on file that such notices were published is insufficient to create a presumption that they were not published as required by law, there being no provision of the charter requiring such proof to be filed. *Sherman* v. *Fisher*, 391.

6. Where the attorney of the purchaser of real estate on foreclosure of a first mortgage purchased certain tax leases with his own money after plaintiff's title had matured under foreclosure of a junior mortgage, and he testified that he did not know whether the price of such leases had been charged to his client, such facts were insufficient to justify a finding that the attorney purchased the leases for his client, so as to raise an estoppel as against plaintiff. *Id.*

7. Title under a city tax lease vests in the purchaser from the date of the lease. *Id.*

8. Where a purchaser of certain tax leases from a city obtained a lease or leases covering all of the years for which the land had been bid in by the city, all of the leases bearing the same date, it was no objection to the validity thereof that, inasmuch as the city had bid in the land, it was not authorized to tax it thereafter. *Id.*

9. The auditor general has authority to include delinquent drain taxes in his petition for sale of land for nonpayment of taxes. *Rumsey* v. *Griffin*, 413, 415.

10. The auditor general has power to set aside a sale of land for taxes because of a defect in publication of the notice thereof, and to resell the land. *Id.*

11. After confirmation of a sale of land for taxes, the sale and deeds issued thereunder can be set aside only on the grounds that the taxes were paid, that the land was exempt from taxation, or for want of jurisdiction to enter the decree. *Id.*

12. A decree for the sale of land for taxes, rendered before the expiration of the five days' notice provided by the statute (1 Comp. Laws, § 3889), is premature, and therefore void. *Platz* v. *Englehardt*, 485.

13. The State gets no title to lands deeded by the auditor general to

TAXATION—Continued.

the State as abandoned lands, under section 127 of the general tax law of 1893 (Act No. 206) and Act No. 154 of the Public Acts of 1895, as limited by 1 Comp. Laws, § 3949, where the tax sales on which the proceeding is based are void. *Id.*

14. It is the existence of the state of facts enumerated by section 127 of the general tax law as amended by Act No. 107, Pub. Acts 1899, which vests title to such lands in the State, and not the determination thereof by the auditor general. *Board of Sup'rs of Alcona Co.* v. *Auditor General,* 491.

15. That the auditor general did not previously make a formal determination regarding the list of lands submitted to the examiner appointed under section 127 of the generel tax law before his appointment is immaterial, he having been furnished with a list showing that the auditor general selected the lands to be considered. *Id.*

16. Keeping the record of the determination of the auditor general and land commissioner as to what lands examined under section 127 of the general tax law come within the provisions of that section on the folios or sheets used by the examiner is a sufficient compliance with the direction of the statute that such determination be recorded in a book. *Id.*

17. A clerical error, by which the determination of the auditor general and land commissioner, made under section 127 of the general tax law, fails to show certain facts required by the statute, and which are admittedly matter of record, may be disregarded. *Id.*

18. The finding of the auditor general and land commissioner, based on the report of the examiner under section 127 of the general tax law, forecloses inquiry into whether the examiner faithfully performed his duties as to all of the land. *Id.*

19. Whether a county has any interest in the nature of a vested right, as against the State, to compel State officers to conform to the strict letter of the statute in their disposition of State tax lands within the limits of the county, quære. *Id.* 492.

20. Where all the conditions necessary to action by the auditor general and land commissioner, under section 127 of the general tax law, are present, save, perhaps, the one relating to the pendency of suits, and the answer of the officers to the petition for mandamus signifies an intention not to include lands as to which there are pending suits, if there be any, mandamus will not issue to restrain their action under the statute. *Id.*

21. Under charter of Detroit, 1893, § 170, providing that the tax roll shall be delivered July 1st, and that "forthwith" six days' notice by publication in the official daily paper shall be given, which shall be a demand for payment, a publication on each of the first seven days of the month, except July 4th, is sufficient. *Walker* v. *City of Detroit,* 538.

22. Failure of the board of assessors of Detroit to sign the tax roll before transmission to the council renders void the levy made thereon. Charter 1893, §§ 167, 168. *Lowe* v. *City of Detroit,* 541.

TAXATION—Continued.

23. That a railroad right of way across petitioner's lands was not excepted from the assessment, decree, and sale of the land for taxes, is not a jurisdictional defect entitling him to have the tax sale set aside. 1 Comp. Laws, § 3893. *Smith* v. *Auditor General*, 582.

24. That part of the land in a township was described in the notice of sale for taxes under the proper township and range number, and the remainder, including petitioners' land, was listed as in the city, within the corporate limits of which it was in fact situated, is not a jurisdictional defect. 1 Comp. Laws, § 3893. *Id.*

25. That the original decree for the sale of lands for taxes was excessive, owing to an error in figuring interest, is a mere irregularity, for which the sale will not be set aside. *Id.*

26. Where proceedings for the sale of petitioners' lands for taxes included the right of way of a railroad crossing the land, which was exempt, the fact that the grantee of the State released such right of way to the railroad company did not prevent him from conveying to the petitioners, under section 141 of the tax law, all that he had received from the State, as he acquired no valuable interest in such right of way. *Id.*

27. To entitle the owner of land sold for taxes to relief after confirmation of the sale, he must show that the taxes have been paid, or that the land is exempt from taxation, or that the court lacked jurisdiction to make the decree. *Keho* v. *Auditor General*, 586.

28. Where petitioners owned lots 4 and 5, and 6 inches of lot 6, the fact that the six-inch strip was omitted from the description in the tax roll did not deprive the court of jurisdiction in proceedings for the sale of the land, and was not ground for setting the sale aside after confirmation. *Id.*

29. Where a taxpayer sent the amount of taxes due on his lands to the township treasurer, who mistakenly applied the money in part to payment of taxes on other lands in which the taxpayer had no interest, leaving the taxes on a portion of his land unpaid, and such portion was sold therefor, the case does not fall within 1 Comp. Laws, § 3921, subd. 4, requiring the owner to pay the original taxes before he is entitled to cancellation of the tax deed, but the taxes are to be deemed paid, under subdivision 2 of said section. *Kent* v. *Auditor General*, 605.

30. A landowner, contesting tax sale proceedings as the owner of the government title, cannot claim that, under sales of prior years, the land has become State tax homestead land, and that, therefore, the taxes in question should have been canceled. *Auditor General* v. *Carpenter*, 669.

31. Where the auditor general in 1892 included certain lands in his petition to foreclose the lien for the taxes of 1889, and, on tardy objections being filed by the owner, the petition was dismissed as to those lands without prejudice, the State's lien under section 26 of the act of 1885 (Act No. 153) was not thereby barred. *Id.*

TAXATION—Continued.

32. Failure of the auditor general to include certain lands in his petition for the foreclosure of tax liens thereon the succeeding year after a petition to foreclose had been dismissed without prejudice did not bar the lien. *Id.*

33. That there was a time during the existence of a tax lien that no procedure was provided for its enforcement did not extinguish the lien. *Id.*

34. Illegal taxes paid under protest may be recovered as money had and received under the common counts. *Michigan Sanitarium & Benevolent Ass'n* v. *City of Battle Creek*, 676.

35. The fact that one paying his taxes under protest as illegal did so by giving a check for the amount, which was subsequently cashed, does not prevent his recovery of the taxes. *Id.*

36. The fact that a taxpayer obtained a postponement of the time for the payment of his city taxes, until the warrant for the State, county, and school taxes was received, in order that they might all be paid together under protest, does not prevent his recovery of the same, the payment having been made under protest, and the agreement under which the postponement was obtained contemplating a payment under protest. *Id.*

37. On the question whether a sanitarium association, incorporated under chapter 224, 3 Comp. Laws, used all its funds exclusively "for the purposes thereof, as set forth in its articles," as provided by section 6, so as to render its property exempt from taxation, as provided by section 7, it sufficiently proved that it had not paid dividends, where it proved that none of its funds had gone to its members, except as it had paid wages or salaries. *Id.*

38. Purchasing supplies outside of the State is not a violation of section 6 of the sanitarium act, requiring an association, incorporated under that act, and exempting its property from taxation under section 7, to use its funds wholly within the State. Chap. 224, 3 Comp. Laws. *Id.* 677.

39. On the question of whether the funds of plaintiff, a sanitarium association organized under chapter 224, 3 Comp. Laws, were used wholly within the State, as required by section 6, the error, if any, in charging the jury that the "burden of proving that the funds were used without the State rested on defendant," was harmless, where all the testimony on the subject showed that the funds were properly used. *Id.*

40. A sanitarium association, incorporated under chapter 224, 3 Comp. Laws, is sufficiently charitable in its character to entitle its property to exemption from taxation, under section 7 of that act, where the charges collected for services are not more than are required for its successful maintenance. *Id.*

41. Section 8294, 3 Comp. Laws, exempting from taxation the property of charitable hospitals or asylums established with trust funds, exempts from taxation not the original trust fund, but "the property on which such asylum or institution building stands * * * while occupied for the objects

TAXATION—Continued.

and purposes thereof," whether it is or is not a part of the original trust fund. *Id.*

42. The owner of exempt property erroneously assessed for taxes does not lose the entire benefit of the exemption because some nonexempt property is included in the assessment. *Id.*

43. A sanitarium association, incorporated under chapter 224, 3 Comp. Laws, is not required to use all of its funds "for the care and relief of indigent or other sick and infirm persons within this State," to exempt its property from taxation, under section 7 (3 Comp. Laws, § 8294), since such requirement would prevent the association from using its funds for the proper maintenance of the institution. *Id.*

44. A corporation whose property is exempt from taxation because of the character and purposes of the concern is not estopped from claiming the exemption by acts or declarations of the officers of another corporation to whose property the new corporation succeeded. *Id.* 678.

Bill of review, see REVIEW.

Tax statement as public record, see RECORDS (1).

Title of trespasser on State tax lands, see TRESPASS.

TIME—See SALES (1).

TOWNSHIPS—See WATERS AND WATERCOURSES (4, 5).

TRESPASS.

A trespasser on State tax lands acquires no title to timber he cuts thereon and can transfer none. *Raber* v. *Hyde*, 101.

See NEGLIGENCE (2, 3).

TRIAL.

1. Where, in an action to recover an alleged balance due, defendant alone testifies to payment, and plaintiff testifies as to statements of defendant that he did not want anything for the rent of certain premises, which rent he claims constituted the payment, the testimony of plaintiff justifies the jury in discrediting defendant's testimony, and a charge compelling the jury to credit defendant's testimony is erroneous. *Linsell* v. *Linsell*, 64.

2. It is proper for findings of fact to show that plaintiff at the trial waived one of the alleged causes of action. *Wm. Barie Dry-Goods Co.* v. *Casler*, 172.

3. Where it appears on the trial of an action that a suit for the same cause of action has been determined by a judgment in favor of defendants, and plaintiff contends that the judgment presents no obstacle to his recovery, because he was not present when the case was disposed of, the judge should direct a verdict either for or against plaintiff, and has no right to refuse to proceed with the trial. *Hatch* v. *Wayne Circuit Judge*, 184.

TRIAL—Continued.

4. Where, in an action against a street-railroad company for negligence, it appeared that there were upwards of 50 passengers on the car at the time of the accident, and the company produced only the motorman and one passenger as witnesses, and counsel severely criticised one of plaintiff's witnesses, counsel's argument on failure of the company to bring in the conductor or other passengers, if unwarranted, is unprejudicial. *Airikainen* v. *Houghton County Street-Railway Co.*, 195.

5. Where, in a personal injury case the severity of plaintiff's injuries is contested, it is error for the court to charge that defendant does not dispute that plaintiff was injured as alleged, but bases his defense on his nonliability for the injury. *Butler* v. *Detroit, etc., Ry.*, 206.

6. The court should not intimate that "plaintiff could best describe his injuries." *Id.*

7. The jury should not be told that they must believe the theory of one party or the other "right through," where they might have found that the injury occurred as plaintiff claimed, but that its extent was trivial. *Id.*

8. It is error for the judge to refer to a previous trial of the same case, in which plaintiff had verdict, and state that for some unfortunate remark or ruling another judge thought the case better be tried again, and that he would like to get to the end of it and reach the just rights of the parties. *Id.* 207.

9. Reversal will not be granted for misconduct of counsel where counsel on both sides are equally guilty. *Culver* v. *South Haven, etc., R. Co.*, 443.

10. An instruction that the jury ought to discard all those statements of counsel that might perhaps result in influencing them, or possibly might have been designed to influence them, *held* not objectionable when considered with the rest of the charge. *Neely* v. *Detroit Sugar Co.*, 469.

11. Allowing a witness to be recalled to explain his former testimony is within the discretion of the court. *Piehl* v. *Piehl*, 515.

12. Where a witness, on being recalled, testifies in direct conflict with his previous testimony, the reasonableness of his explanation is for the jury. *Id.*

13. An instruction, which, construed with the remainder of the charge, told the jury that, after rejecting the testimony of witnesses discredited by them, their verdict should be for claimant, if there was more testimony—that is, a preponderance of testimony—tending to establish the validity of her claim, and, if there was not, their verdict should be for the estate, was correct. *Taylor* v. *Taylor's Estate*, 660.

By jury, see EXECUTORS AND ADMINISTRATORS (2).

TROVER—See LANDLORD AND TENANT (4); TAXATION (3).

TRUSTS.

Identification of trustee, see WILLS (2).

ULTRA VIRES—See MUNICIPAL CORPORATIONS (10).

VARIANCE—See APPEAL AND ERROR (2).

VENDOR AND PURCHASER.

Cut stone and structural iron belonging to the owner of a partially completed building, secured by him for use in the building, and lying on the lot on which the building stood and on an adjoining one, passed by the owner's warranty deed of the lot on which the building stood. *Byrne* v. *Werner*, 328.

Foreclosure of land contract, see COURTS.

VERDICT—See TRIAL.

Conclusiveness, see APPEAL AND ERROR (1, 12).

WAIVER.

Lack of formalities in order presented to president of council, see MANDAMUS (1).

Notice of claim for injury, see MUNICIPAL CORPORATIONS (2, 9).

Notice of proceedings in error, see APPEAL AND ERROR (3).

Rescission of contract, see SALES (4).

Sufficiency of pleading in justice's court, see APPEAL AND ERROR (4).

Use of improper evidence in hearing by beneficial association, see BENEFICIAL ASSOCIATIONS (1).

Variance, see APPEAL AND ERROR (2).

WATERS AND WATERCOURSES.

1. Where plaintiff was in possession under a land contract from W., who more than 30 years before had obtained deeds to the property, and who, with plaintiff, had been in continuous possession for that period, and who had assigned to plaintiff any cause of action he might have, plaintiff was entitled to any damages to the fee by reason of the obstruction of his mill pond and race thereon. *Neely* v. *Detroit Sugar Co.*, 469.

2. In an action for damages to plaintiff's mill pond and race by obstruction of the steam, an instruction that, if the plaintiff used the creek above the mill in a certain manner, then such user "would be an unreasonable use thereof, and would render it liable in this action to the plaintiff for the damages it has occasioned him, if any," was not, when read with the rest of the charge, subject to the objection that it permitted a recovery for "all the damages it has occasioned him," whether or not resulting from an unreasonable use. *Id.* 470.

3. In an action for damages to mill property by obstructing the creek by depositing refuse therein, in which it was claimed that the injury had continued for three or four years, a witness for plaintiff was asked if he was acquainted with the fair rental value prior to the time suit was instituted, and what that value was. Defendant objected that the question "should be confined to the rental value during the time that

WATERS AND WATERCOURSES—Continued.

the mill has been shown to have been idle, and this is incompetent and immaterial." *Held*, that this did not suggest that defendant was claiming that the plaintiff ought, as soon as practicable, to remove the deposit, and that the failure to do so affected the measure of recovery, and therefore the question could not be raised on appeal. *Id.*

4. Township highway officers have no right to divert the natural course of surface water so as to impose upon the land of one person the servitude which naturally belongs upon the land of another. *Smith* v. *Township of Eaton*, 511.

5. Where township highway officers wrongfully diverted surface water onto plaintiff's land on July 20th, it was no defense to a bill for injunction brought September 29th that defendants did not intend to leave the water on plaintiff's land, but to carry it farther along into a public drain, as complainant could not be expected to delay longer. *Id.*

6. A landowner is entitled to an injunction to restrain township officers from diverting the natural course of surface waters so as to cast them upon his land to his injury. *Id.*

Obstruction, see MUNICIPAL CORPORATIONS (7, 8).

WILLS.

1. Testatrix bequeathed the remainder of her estate to the "Universalist Japan Mission Fund," for the support of the "Universalist Mission in Japan," and it appeared that the testatrix was a Universalist in faith, and that the Universalist General Convention was the only organized corporation or society of the Universalist denomination having a mission in Japan, and a fund to support the same. *Held*, that the cy pres doctrine had no application to the bequest, since there was no doubt of testatrix's intention. *Cook* v. *Universalist General Convention*, 157.

2. Testatrix bequeathed the remainder of her estate to the "Universalist Japan Mission Fund," for the support of the "Universalist Mission in Japan." *Held*, that, for the purpose of identifying the trustee intended by testatrix to disburse the fund, parol evidence was admissible to show that testatrix was a Universalist in faith, and had contributed to such fund in her lifetime, and that the Universalist General Convention was the only society or corporation of the Universalist denomination having a mission in Japan, and a fund to support it. *Id.*

3. Where a will devises all testatrix's real property to her daughter, and bequeathed to her all her mortgages, notes, and other securities, "with the understanding that she shall pay" certain specific legacies out of her portion of the estate, the legacies are a charge upon the estate in general, including the real as well as the personal property. *In re Owen's Estate*, 293.

4. Notes executed by a decedent and payable at his death are not in the nature of a bequest, and need not be executed with the formalities prescribed for wills. *Taylor* v. *Taylor's Estate*, 658.

See ESTATES TAIL.

WITNESSES.

1. Where a matter is first brought out on cross-examination, it is proper, on redirect, to show a full explanation of the transaction, if relevant. *Musselman Grocer Co.* v. *Casler*, 24.

2. The error in overruling a proper question to a witness is cured by subsequently allowing a question calling for a similar answer to be put and answered. *Airikainen* v. *Houghton County Street-Railway Co.*, 194.

3. Asking an improper question cannot be regarded as prejudicial, where the court promptly sustained an objection to it and stated that it was improper, and objecting counsel made no request to charge in reference to it. *Id.*

4. Under section 10213, 3 Comp. Laws, a wife cannot testify, even by consent of the husband, in an action brought by the husband against a third person for alienation of the wife's affections, when another count of the declaration charges adultery, though the evidence purports to be restricted to the count charging alienation of affections. *Knickerbocker* v. *Worthing*, 224.

5. Asking a witness on cross-examination questions imputing to her a want of chastity, in the apparent belief that they are competent, is not such misconduct as to warrant reversal. *Id.*

6. The protection against self-incrimination afforded by the State and Federal Constitutions is personal to the witness, and cannot be used by him for the protection of others, no matter how closely associated they are with him. *In re Moser*, 302.

7. The witness himself is not the sole judge of whether his testimony will tend to incriminate himself, but he must answer a question put to him unless the answer may actually tend to criminate him. Where it is perfectly apparent that the answer cannot injure him the court should compel him to answer. *Id.* 303.

8. The president of a corporation, subpœnaed to testify before the grand jury, which was investigating charges of corruption against municipal officers in connection with a contract between the city and the corporation, could not refuse to produce the books of the corporation, by invoking the provisions of the State and Federal Constitutions protecting witnesses from self-incrimination, where he himself was not connected with the corporation at the time covered by the investigation, and was in no way connected with or interested in the contract under investigation, and had no personal knowledge of the entries which were being investigated, so that nothing contained in the books could in any way incriminate him. *Id.*

9. An instruction that if the jury believed that any witness for defendant testified under a fear of losing his employment, or a desire to avoid censure, or fear of offending, or a desire to please his employer, such fact might be considered in determining the weight to be given to his testimony, was erro-

WITNESSES—Continued.

neous, when not coupled with any caution that the jury would not be justified in drawing unfair inferences simply because the witnesses were employés, and there was nothing in the testimony itself or in the manner of the witnesses to justify the conclusion that the testimony was tainted in the manner suggested by the instruction. *Gregory* v. *Detroit United Ry.*, 369.

10. In a suit by the heirs of a mortgagor to restrain the foreclosure of the mortgage, defendant's testimony that he had received a payment within 15 years in a letter from the mortgagor, which he claimed had been destroyed, was inadmissible, since it related to a matter which, if true, was equally within the knowledge of the deceased mortgagor. *Carr* v. *Carr*, 397.

11. Where the wife of a mortgagee had never seen the mortgagor, and had never seen him write, she was not competent to testify that she saw and read a letter from such mortgagor to her husband, containing a draft for a payment on the mortgage. *Id.*

12. The exclusion of a question put to plaintiff, whether he had not had considerable litigation with the company was discretionary with the trial court. *Noller* v. *Wright*, 416.

13. It is not necessary that a fee be asked or accepted by an attorney, to entitle a client to protection under the rule against an attorney testifying to disclosures made by his client. *Mack* v. *Sharp*, 448.

14. A witness may use a memorandum in his own handwriting to refresh his recollection. *Heenan* v. *Forest City Paint & Varnish Co.*, 549.

15. On the hearing of a claim against an estate on notes alleged to have been executed by the decedent, testimony by the claimant that she did not have the notes in her possession; that they were lost while owned by her and in her possession; that she had made search therefor, the particularity of which she stated—was not a violation of 3 Comp. Laws, § 10212, forbidding claimant from testifying to facts equally within the knowledge of the deceased. *Taylor* v. *Taylor's Estate*, 658.

16. While claimant was testifying, counsel for the estate introduced a note other than those sued on, and proved by her that she had signed her husband's name thereto as maker. *Held*, that on redirect examination her counsel might show why, and the circumstances under which, she so signed said note, to rebut the inference that she also had signed her husband's name to the notes in suit. *Id.* 659.

17. On the hearing of a claim against the estate of a decedent on notes alleged to have been executed by him, a witness who had testified to the genuineness of decedent's signature to the notes was, on cross-examination, shown the signatures to certain documents not in evidence, purporting to be signed by decedent, and asked if such signatures were genuine. *Held*, that he might decline to answer unless he was permitted to examine the documents. *Id.*

WITNESSES—Continued.

18. On the hearing of a claim by a widow against the estate of her deceased husband, on notes alleged to have been executed to her by him, her stepson having testified on direct examination for the estate that his relations to plaintiff were friendly, she was entitled on cross-examination to show his conduct toward her. *Id.* 660.

See BENEFICIAL ASSOCIATIONS (3, 4).

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