15

MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

SEPTEMBER 25, TO DECEMBER 7, 1894.

WILLIAM D. FULLER,

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Rec. Oct. 23, 1895

CIRCUIT COURT RULE 85.

As amended July 13, 1895.

Whenever exceptions are taken on trial of a cause to any decision or ruling of the court, the party taking such exceptions shall prepare a brief statement of so many of the facts as may be necessary to show the grounds of such exceptions, and to enable the court above rightly to understand the same, together with all assignments of error thereon, and shall give notice to the opposite party when and where such exceptions will be settled by the circuit judge, which notice shall be for some day during the term at which the trial was had, unless the court or circuit judge shall otherwise order. The bill of exceptions shall contain such parts of the testimony only as are necessary to present the questions of law raised, and shall be in narrative form, unless the trial court shall determine it necessary to a full understanding of the questions that it be set out by questions and answers. (Ordered to take effect September 1, 1895.)

SUPREME COURT RULE 12.

As amended July 13, 1895.

The party suing out such writ of error shall have ten days after the return-day mentioned therein within which to assign errors. Every assignment of errors on such writ shall be special, and no judgment or proceedings shall be reversed or annulled for any other defect or error than such as shall be thus specially assigned. Copies of assignment of errors and of all pleadings which may be filed in the Supreme Court shall be served within the time limited for filing the same: *Provided*, That it shall not be necessary to file, serve, or give notice of assignments of error already provided for by Circuit Court Rule 85 as amended. (Ordered to take effect September 1, 1895.)

SUPREME COURT.*

JOHN W. McGRATH (CHIEF JUSTICE), ... DETROIT.
[Term expires Dec. 31, 1895.]

ASSOCIATE JUSTICES:

		TERM EXPIRES.
CHARLES D. LONG, . . .	FLINT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.
ROBERT M. MONTGOMERY,	GRAND RAPIDS, . .	Dec. 31, 1901.
FRANK A. HOOKER, . .	CHARLOTTE, . . .	Dec. 31, 1903.

COURT OFFICERS:

CHARLES C. HOPKINS, ..	CLERK, ...	LANSING.
MOSES R. TAYLOR, . .	CRIER, ...	LANSING.
FRED A. MAYNARD, . .	ATTORNEY GENERAL,	GRAND RAPIDS.

* The Court was composed of the above-named Justices during the period covered by this volume. At the time of their election their residences were as given, but pursuant to Act No. 182, Laws of 1893, they removed to Lansing.

CIRCUIT JUDGES.*

1.	VICTOR H. LANE,	ADRIAN.
2.	THOMAS O'HARA,	BERRIEN SPRINGS.
3.	GEORGE GARTNER, HENRY N. BREVOORT, CORNELIUS J. REILLY, GEORGE S. HOSMER, ROBERT E. FRAZER,	DETROIT.
4.	ERASTUS PECK,	JACKSON.
5.	CLEMENT SMITH,	HASTINGS.
6.	JOSEPH B. MOORE,	LAPEER.
7.	WILLIAM NEWTON,	FLINT.
8.	VERNON H. SMITH,	IONIA.
9.	GEORGE M. BUCK,	KALAMAZOO.
10.	CHAUNCEY H. GAGE, JOHN A. EDGET,	SAGINAW.
11.	JOSEPH H. STEERE,	SAULT STE. MARIE.
12.	WILLIAM D. WILLIAMS,	MARQUETTE.
13.	J. G. RAMSDELL,	TRAVERSE CITY.
14.	ALBERT DICKERMAN,	MUSKEGON.
15.	NOAH P. LOVERIDGE,	COLDWATER.
16.	ARTHUR L. CANFIELD,	MT. CLEMENS.
17.	WILLIAM E. GROVE, ALLEN C. ADSIT,	GRAND RAPIDS.
18.	GEORGE P. COBB,	BAY CITY.
19.	J. BYRON JUDKINS,	REED CITY.
20.	PHILIP PADGHAM,	ALLEGAN.
21.	HENRY HART,	MIDLAND CITY.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	WILLIAM H. SIMPSON,	AU SABLE.
24.	WATSON BEACH,	LEXINGTON.
25.	JOHN W. STONE,	MARQUETTE.
26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.	SHERMAN B. DABOLL,	ST. JOHNS.
30.	ROLLIN H. PERSON,	LANSING.
31.	S. W. VANCE,	PORT HURON.
32.	NORMAN W. HAIRE,	IRONWOOD.
33.	CHARLES J. PAILTHORP,	PETOSKEY.
34.	NELSON SHARPE,	WEST BRANCH.

*List covers those presiding in 1893 and previous years.

CIRCUIT JUDGES FOR 1895.

1.	VICTOR H. LANE,	ADRIAN.
2.	ORVILLE W. COOLIDGE,	NILES.
3.	ROBERT E. FRAZER, GEORGE S. HOSMER, WILLIAM L. CARPENTER, WILLARD M. LILLIBRIDGE, JOSEPH W. DONOVAN,	DETROIT.
4.	ERASTUS PECK,	JACKSON.
5.	CLEMENT SMITH,	HASTINGS.
6.	JOSEPH B. MOORE,	LAPEER.
7.	CHARLES H. WISNER,	FLINT.
8.	FRANK D. M. DAVIS,	IONIA.
9.	GEORGE M. BUCK,	KALAMAZOO.
10.	ROBERT B. McKNIGHT, EUGENE WILBER,	SAGINAW.
11.	JOSEPH H. STEERE,	SAULT STE. MARIE.
12.	JAY A. HUBBELL,	HOUGHTON.
13.	ROSCOE L. CORBETT,	TRAVERSE CITY.
14.	FRED J. RUSSELL,	HART.
15.	GEORGE L. YAPLE,	MENDON.
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17.	WILLIAM E. GROVE, ALLEN C. ADSIT,	GRAND RAPIDS.
18.	ANDREW C. MAXWELL,	BAY CITY.
19.	JAMES B. McMAHON,	LUDINGTON.
20.	PHILIP PADGHAM,	ALLEGAN.
21.	PETER F. DODDS,	MT. PLEASANT.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	WILLIAM H. SIMPSON,	AU SABLE.
24.	WATSON BEACH,	LEXINGTON.
25.	JOHN W. STONE,	MARQUETTE.
26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.	SHERMAN B. DABOLL,	ST. JOHNS.
30.	ROLLIN H. PERSON,	LANSING.
31.	SAMUEL W. VANCE,	PORT HURON.
32.	NORMAN W. HAIRE,	IRONWOOD.
33.	OSCAR ADAMS,	CHEBOYGAN.
34.	NELSON SHARPE,	WEST BRANCH.
35.	LUKE S. MONTAGUE,	HOWELL.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

F. H. CHAMBERS AND WILLIAM W. CHAPIN, JUDGES.

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KATE CONNOLLY v. KATE J. KEATING, FRANCIS P. KEATING, AND KATE J. KEATING, ADMINISTRATRIX OF THE ESTATE OF PETER KEATING, DECEASED.

Evidence—Matters within knowledge of deceased person—Resulting trust.

1. 3 How. Stat. § 7545, which prohibits the "opposite party," in a suit prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, from testifying at all to matters which, if true, must have been equally within the knowledge of the decedent, applies to a party who files a bill to declare the title to land conveyed to the decedent in his lifetime to be in the complainant.[1]
2. How. Stat. § 5569, which provides that when a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person making such payment, but the title shall vest in the grantee, must be understood as applicable only to those cases in which the deed has assumed the form it has by *consent* of the party furnishing the con-

[1] See *Penny v. Croul*, 87 Mich. 29, for a review of the cases construing this section of the statute; and for later decisions see *Ripley v. Seligman*, 88 Mich. 177; *Smith v. Smith Estate*, 91 Id. 7; *Letts v. Letts*, 91 Id. 596; *Lilley v. Insurance Co.*, 92 Id. 153; *Insurance Co. v. O'Brien*, 92 Id. 589; *Brennan v. Railroad Co.*, 93 Id. 156; *In re Dunlap Estate*, 94 Id. 11; *Fenton v. Miller*, 94 Id. 204; *Baumann v. Salt & Lumber Co.*, 94 Id. 365; also, for cases bearing upon the question of the *waiver* of the provisions of the statute, see *Michigan Savings Bank v. Butler Estate*, 98 Mich. 381, and note.

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sideration; citing *Fisher v. Fobes*, 22 Mich. 457; *McCreary v. McCreary*, 90 Id. 478.

Appeal from Hillsdale. (Lane, J.) Argued June 21, 1894. Decided September 25, 1894.

Bill to set aside a deed, and to declare the title to the lands conveyed thereby to be in complainant. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

Frankhauser Bros. and *F. H. Stone*, for complainant.

Guy M. Chester, for defendants.

LONG, J. This bill is filed for the purpose of setting aside a deed executed by Julian L. La Moore and Anna La Moore, his wife, to Peter Keating, deceased, and to declare the title to the premises described in said deed to be in the complainant.

The complainant's contention is that in November, 1887, she placed in the hands of Peter Keating the sum of $500, with which to purchase for her the lands described in the La Moore deed, and to have the title vest in herself, or in Peter Keating as trustee for her; that Keating took the money, made the purchase from La Moore, and took the title to himself absolutely, without her knowledge or consent, and against her express directions and requests; that, after the deed was executed, Mr. Keating put it upon record, and afterwards delivered it to her, since which time it has been in her possession, but that while Keating lived she never examined the deed to see its contents, because during all that time no question as to her title was raised; that after the deed was executed she made substantial improvements upon the property, rented it, and collected the rents, and exercised all the acts of ownership over it until the death of Keating, December

31, 1890, when for the first time she learned that the deed was taken in his name absolutely, and that his heirs and representatives, the defendants in this case, disputed her title thereto.

On the hearing in the court below there did not seem to be any dispute but that the complainant furnished the money with which Peter Keating purchased the premises in controversy, but the defense was that the complainant well knew that Peter Keating took the deed in his own name, and that the absolute title to the premises, during his lifetime, vested in him, and that the complainant had no right to relief, as she could not establish a trust in these lands by parol. The court below, after a hearing in open court, found that the complainant was entitled to the relief prayed, and decreed that the title should vest in her.

There are but two questions raised in this Court:

1. That, this suit being brought against the estate and the heirs of Peter Keating, now deceased, complainant could not testify to matters equally within the knowledge of the deceased.
2. That the grant being made to Peter Keating, and the title vesting in him absolutely, though payment therefor may have been made by complainant, under the statute a trust could not be shown by parol evidence.

The complainant was called as a witness, and testified in the case to many matters which could not have been within the knowledge of the deceased, and as to those matters her testimony may be considered. As to the matters which were equally within the knowledge of the deceased, the rule is too well settled to need the citation of authorities that her testimony cannot be considered in determining the question involved here.

Upon the second point, How. Stat. § 5569, provides:

"When a grant for a valuable consideration shall be made to one person, and the consideration therefor shall

be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

This section stands as section 7, chap. 214, entitled "Of Uses and Trusts."

By section 5571, being section 9 of that chapter, it is further provided:

"The preceding seventh section shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name without the knowledge or consent of the person paying the consideration, or when such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person."

In *Fisher v. Fobes*, 22 Mich. 458, Mr. Justice COOLEY, speaking of section 5569, says:

"This provision, however, must be understood as applicable only to those cases in which the deed has assumed the form it has by consent of the party furnishing the consideration. It has no application to a case where one has taken a deed in his own name in fraud of the rights of another, nor to a case where, though no fraud was designed, the conveyance has been made to some person other than the purchaser without his consent."

In *McCreary v. McCreary*, 90 Mich. 478, the same rule was laid down, *Fisher v. Fobes* being cited and approved.

It is therefore well settled in this State that if Peter Keating took the deed with the understanding with complainant either that it was to be executed to her, or to himself in trust for her, and then, without her knowledge or consent, and against her express directions and requests, took the deed in his own name, a court of equity will, upon proof of these facts, decree the title to be in the complainant.

We think that the testimony abundantly shows, without

considering the testimony of the complainant relating to facts which were equally within the knowledge of Keating, that the complainant never assented that he should take the absolute title to the premises, and that the court below was not in error in so finding.

The decree below will be affirmed.

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

REBECCA M. SMITH v. THE MICHIGAN STATE BANK OF EATON RAPIDS, MARY MILLER, EDWIN S. HARRIS, AND SAMUEL POLLOCK.

Execution sale—Redemption.

After the levy of an execution, the judgment debtor conveyed the land levied upon, and his wife, to whom the grantee executed mortgages upon the land to secure part of the purchase money, joined with her husband in a bond to the grantee conditioned for the payment of the judgment. More than a year but less than 15 months after the sale of the land on the execution, the obligors in the bond having failed to perform its conditions, the grantee raised upon her indorsed note the money necessary to redeem the land, and paid the same to the purchaser at the execution sale, who, in order to secure the indorser on said note, executed to him a quitclaim deed of the land. And it is held that the quitclaim deed conveyed only the rights of the purchaser under the sheriff's certificate of sale, and that the arrangement operated to protect the mortgage interest of the wife of the judgment debtor, and to give her the right to pay, prior to the execution of the sheriff's deed, the amount due on the certificate of sale, and thus discharge the obligation of her bond.

Appeal from Eaton. (Smith, J.) Argued June 6 and 7, 1894. Decided September 25, 1894.

Bill to redeem from an execution sale, and to declare the validity of certain mortgages. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

W. S. & J. M. Powers, for complainant.

John M. Corbin, for defendants.

LONG, J. The facts in this case are not in dispute. It appears that on March 17, 1891, Edward Smith, who is the husband of complainant, was the owner and in possession of certain premises in Eaton Rapids, this State. Prior to that date, Delilah Witt had recovered a judgment against him for the sum of $400 and upwards. An execution had been issued upon such judgment, and placed in the hands of defendant Pollock, who was the sheriff of Eaton county. A levy was made on the premises under such execution on March 20, 1891, and the premises sold July 8 thereafter, but the certificate of sale made by the sheriff was not actually delivered by him to the purchaser or filed in the office of the register of deeds of that county until July 15. Delilah Witt, the judgment creditor, became the purchaser of the premises at the sum of $427.65.

March 21, 1892, Edward Smith exchanged and conveyed the premises to the defendant Mary Miller. Smith received from Mrs. Miller in payment for the land a store building and stock of groceries in Nashville, this State, and two mortgages on the Eaton Rapids property, aggregating $1,750. These mortgages were executed by Mary Miller, and made payable to the complainant, Rebecca M. Smith. At the time of this trade the Eaton Rapids property was incumbered by a mortgage held by John M. Corbin, some tax liens, and the execution levy above mentioned; the whole amounting to about $900. When the property was exchanged, neither of the parties had ready money to pay

or satisfy the incumbrances on the Eaton Rapids property, so it was agreed that Smith and the complainant should give a bond, by the terms of which they were to pay and remove all the incumbrances on the Eaton Rapids property. To secure the payment of the incumbrances, the $1,750 was divided into two mortgages, one for $900 and one for $850, and it was stipulated in the $900 mortgage that it should be a first mortgage, and not be recorded, but deposited with bankers at Nashville until such incumbrances were removed. Efforts were made by Edward Smith to procure money to pay off the incumbrances, and, failing to do this, he attempted to get an extension of time, but this also failed; but on October 11, 1892, the complainant, having secured the money, filed with the register of deeds of Eaton county an affidavit, together with copies of her mortgages and notes, showing the true sum due upon her mortgages, as evidence of her liens upon the premises, and at the same time deposited with the register the amount due upon the Witt sale for principal, interest, and costs, amounting to $466, together with the amount due upon the mortgage held by Mr. Corbin. The amount has been accepted by Mr. Corbin, and that mortgage is out of the case. The tax liens were also paid and satisfied.

It further appears that on August 21, 1892, Delilah Witt executed and delivered to defendant Harris a conveyance in the form of a quitclaim deed, for the purpose of assigning her right under the execution purchase. On October 15, 1892, the complainant, after depositing the money in the register's office to meet the incumbrances, sent her attorney to see Mrs. Miller and Mr. Harris for the purpose of perfecting a redemption of the premises bid in under the execution sale. A tender was made of the full amount claimed, and interest and expenses, and Mr. Harris was asked to convey to Mrs. Miller the rights

which he had secured from Delilah Witt. They refused to take this money, referring complainant's attorney to Mr. Corbin, saying that he had done all the business, and that they knew but little about the transaction.

Complainant thereupon filed this bill for the purpose of determining the rights of the parties in the premises. Defendants contend that Harris became the absolute owner of the premises under his deed from Delilah Witt. Complainant claims that the circumstances under which the deed was given to Harris show that he took it merely as security for his indorsement of Mrs. Miller's note, and for the purpose of protecting Mrs. Miller in her interest in the premises.

It appears from the testimony that Mrs. Miller, finding that the complainant and her husband had taken no steps to pay off the claim under the execution, went to defendant Harris, and gave her individual note to him, signed by her husband as surety, for $455. Mr. Harris indorsed this note over to the bank, and the money was realized upon it by Mrs. Miller, and used by her in paying the Witt judgment, Mr. Harris taking this quitclaim deed from Mrs. Witt for the purpose of securing himself for his indorsement of Mrs. Miller's note. Mr. Harris testified that he was to hold this quitclaim as security for signing the note. Mrs. Miller still owes the bank the amount of money represented by the note.

It is therefore contended by complainant:

1. That the right of redemption as to her had not expired when she tendered the money, for the reason that the sheriff had not given a deed to Harris, or to any one else, and that the right to redeem remains until such deed is actually made, whether the time named in the statute has expired or not.

2. That when she deposited the money with the register of deeds, on October 11, 1892, and when she offered to Mrs. Miller and Mr. Harris, on October 15, 1892, to pay the amount of the execution sale and the note given at

the bank, and to reimburse and pay all that Mrs. Miller, Mr. Harris, and the bank had paid out, it was within the time of redemption, and it was the duty of Mr. Harris to accept the money, and discharge or cancel his claim under the sheriff's certificate of sale.

3. That defendant Mary Miller redeemed the premises by the payment of the money which she borrowed from the bank, and that the attempt now to hold the assignment of the sheriff's certificate as a purchase by Harris is a fraud upon complainant, and that Mary Miller is in collusion with Harris and the bank to relieve the land of complainant's mortgages.

4. That the broadest latitude which can be given to the transaction is that the sheriff's certificate was transferred to Harris as security for the money loaned to Mrs. Miller; and that, under the familiar principle that whenever property is transferred, no matter in what form or by what conveyance, as security for a debt, the transferee is merely a mortgagee, and has no other rights or remedies than the law accords to mortgagees, Harris acquired no title to the land, and his rights are those of a mortgagee.

The sale under the execution was made on July 8, 1891. The 15 months from that date would expire on October 8, 1892; and, if the defendants' contention be correct,—that the 15 months is to be computed from the date of sale,—no person could redeem after that time, and the money deposited in the office of the register of deeds by Mrs. Smith would not effect a redemption. But complainant contends that her right to redeem continued for the full period of 15 months from the time the certificate of sale was given to the purchaser under the execution sale and the depositing of the certificate in the office of the register of deeds. This certificate was given the purchaser on July 15, 1891, and deposited in the register's office the same day, so that the 15 months' time for redemption would not expire until October 16, 1892; and, if the complainant's contention be correct, the moneys were deposited by her in time.

But, however this may be, the arrangement made

between Mary Miller and Mr. Harris by which he purchased in the Witt bid can be construed only as amounting to a redemption of the premises. Mr. Harris testified that he took the deed from Mrs. Witt as security for his indorsement upon the note of Mrs. Miller. It is evident that Harris did not suppose he was acquiring the absolute title to the premises, but that, as he admits, he took the deed as security, and was to deed over to Mrs. Miller when the note was paid. If the deed to Harris was intended to be and was an absolute conveyance to him, it cut off, not only the Miller title, but also the complainant's mortgages. Mrs. Miller desires to have the conveyance treated as absolute for the purpose of cutting off these mortgages, and she and Harris refused the tender for the purpose of accomplishing that object; yet they claim, as between themselves, it is to be treated and held as a mere security. The arrangement sought to be carried out cannot deprive the complainant of her right to pay the debt and secure her mortgage rights in the premises. At the time the deed was made by Mrs. Witt to Harris no deed had been made by the sheriff on the execution sale. All Mrs. Witt held was the certificate of sale, and it was her right that Harris purchased and had assigned to him. Mrs. Miller held the title in fee, and had the right to redeem. She procured Harris to hold the bid under the deed to him, and with the understanding that it should operate as a redemption, so far as she was concerned. This arrangement must also be held to have protected the complainant's mortgage interest in the premises, and to give her the right to pay, at the time payment was tendered, the amount of the bid, as she and her husband had agreed to do, and thus discharge the obligation of the bond to remove this incumbrance. The case is very similar to *Banning v. Sabin,* 51 Minn. 129, and, under the facts

there stated, it was held that the transfer amounted to a redemption.

In this view of the case, it is quite unnecessary to decide whether the deposit made by complainant with the register of deeds was in time to redeem from the sale.

The decree of the court below will be affirmed.

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

JAMES T. BOND AND JOHN W. CLANCY v. KNUTE S. MARKSTRUM.

Judgment—Res judicata—Evidence—Burden of proof.

1. The record in a former suit between the same parties, which tends to show that any fact involved in the issue in the second suit was litigated and set at rest in the former suit, is competent evidence of that fact, although it may not be conclusive upon all of the questions involved in the second suit.
2. When an action is sought to be maintained or defended by showing a former adjudication of questions upon which it depends, it must appear that such questions were litigated as a matter of fact; that they were submitted to and decided by the court or jury; and that they were not collateral inquiries, but crucial questions in the other controversy.
3. Where the record does not contain the conclusive evidence as to such former adjudication, parol evidence is admissible to ascertain whether a given question was in issue, litigated, submitted, and decided, and possibly, in some cases, whether it was material; and in such event, under our system of pleading, the issue would not ordinarily be limited to the single question of such former adjudication, but the party would be at liberty to support his claim or defense by other evidence, which would be received subject to the effect that should be given to the evidence upon the question of such former adjudication.

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115 620
102 11
122 364
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126 564
102 11
134 1 38
102 11
143 1 53
102 11
155 1142

4. Where, in a suit upon a guaranty of rent, the defendant seeks to avoid liability by showing his release by the lessor, and the plaintiff introduces in evidence the record in a former suit brought by him against the defendant upon the same guaranty, in which he recovered a judgment for prior installments of rent, and it appears that the pleadings in said former suit were broad enough to cover said proposed defense, the burden of proof is upon the plaintiff to show that said defense was actually made and passed upon in the first suit.
5. The defendant should be allowed to introduce his evidence tending to show his release, and, if the jury find that that question was litigated and passed upon in the former suit, they should disregard such evidence.

Error to Gogebic. (Haire, J.) Argued May 1, 1894. Decided September 25, 1894.

Debt. Defendant brings error. Reversed. The facts are stated in the opinion.

Button & Norris, for appellant.

Charles E. Miller, for plaintiffs.

HOOKER J. An action was brought against the defendant, as guarantor of payment and performance under a lease, to recover for two months' rent of the premises. An action had previously been brought and recovery had by plaintiffs against the defendant upon this lease and assignment for earlier installments of rent. The judge admitted the record of the former proceedings, and instructed the jury that such proceedings conclusively established certain facts which entitled plaintiffs to recover the rent sued for, unless the defendant had proved to their satisfaction, by a preponderance of the evidence, that the plaintiffs accepted the property and assumed control after November 14, 1887 (the time of the commencement of the former action), by entering into possession themselves or by another to whom they had rented it. The defendant alleges error upon the introduction of the former record

and upon the charge, his claim being that such proceedings were not conclusive of the questions raised by him in this case.

As to the introduction of the former record, it is clear that if admissible for any purpose it was not error to admit it. The former action was between the same parties, and, if this record tended to show that any fact involved in this issue was litigated and set at rest in that case, it was proper evidence of such fact, though such record might not be conclusive upon all questions involved in the second case.

A reference to the pleadings in the first case shows that the plaintiffs sued as assignees of Sarah J. Ford of the lease in question; that the defendant was sued as guarantor; and that he was charged in the declaration with notice of the assignment. The plea of the general issue was filed after the case reached the circuit court. Accompanying it was a notice, which alleged a release by Sarah J. Ford of defendant from all liability upon the guaranty to pay rent. The notice alleged further that, about a month after the lease was made, Burton, the lessee, assigned the lease to one Hill, with the consent of Mrs. Ford, who accepted Hill as her lessee, and thereby released defendant from responsibility upon his guaranty. It stated further that on September 1, 1887, Hill having vacated the premises, Mrs. Ford leased to one Gus Markstrum, who occupied until January 1, 1888, paying the rent up to that date, which defendant claimed was equivalent to his release. Upon the issues thus raised, plaintiffs, upon a trial before a jury, recovered a verdict and judgment.

What questions were settled upon this trial between the parties? The record does not show what points were contested by the introduction of evidence, but it is patent that before the plaintiffs could recover they must have shown the execution of this instrument by the parties to

it, and its assignment to them by Mrs. Ford. Both of these were denied by the plea of the general issue. Being facts necessarily established upon a former trial, whether defendant offered evidence tending to disprove them or not, they were admissible. They were controverted by the plea, and it was shown that there was a trial and verdict, which necessarily involved these questions. The estoppel extends to all steps involved in the judgment as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. *Burlen v. Shannon,* 99 Mass. 200, 203; *Duncan v. Bancroft,* 110 Id. 267; *Dorris v. Erwin,* 101 Penn. St. 239; *Hayes v. Shattuck,* 21 Cal. 51; *Perkins v. Walker,* 19 Vt. 144; *Tuska v. O'Brien,* 68 N. Y. 446; *School-District v. Stocker,* 42 N. J. Law, 115. It was therefore proper to receive the record.

The court instructed the jury to render a verdict for the plaintiffs, unless they should find that there had been a surrender of the premises, after November 14, to the plaintiffs. To sustain the judgment it must therefore appear from the record that the evidence introduced established such liability, and, further, that no evidence tending to prove a valid defense was excluded against defendant's exception. The bill of exceptions shows that the plaintiffs produced evidence tending to show that they purchased the premises from Sarah J. Ford; that at the same time she assigned to them her title to the lease in controversy; that K. S. Markstrum had paid them four months' rent from October 1, leaving two months' rent due. The lease and guaranty and the assignment to plaintiffs were introduced. There was also testimony that

notice of this assignment was given to defendant. This, together with the files and records referred to, constituted the plaintiffs' case. At this point the evidence showed *prima facie* (1) that the lease and guaranty were executed; (2) the assignment to the plaintiffs; (3) that two months' rent was due, and unpaid. This evidence, standing alone, was sufficient to justify the instruction given, unless there was testimony given or offered tending to dispute it.

The lessee named in the writing was one Burton. By way of defense, counsel offered several writings in evidence, executed before November 14, viz.:

First. An assignment by Burton to Hill of all of his interest, etc., in said lease, dated June 16.

Second. A paper, signed by Sarah J. Ford, of which the following is a copy:

"BESSEMER, MICH., June 20, 1887.

"MR. FRED HILL:

"You are hereby notified that I have this day, for value received, assigned and transferred to Markstrum, Larsen & Co., $44 out of the rent due July 1, 1887, according to your lease of the Wisconsin House, bearing date June 16, 1887; and in consideration of the acceptance of this order by said Markstrum, L. & Co., I hereby release K. S. Markstrum from further responsibility as surety on John Burton's lease.

"SARAH J. FORD."

Third. A writing, dated June 26, signed by Sarah J. Ford, reading as follows, viz.:

"BESSEMER, MICH., June 26, 1887.

"For value received, I hereby assign and transfer to Markstrum, Larsen & Co. the rent due me from Fred Hill for the Wisconsin House for month of September, and said Markstrum, Larsen & Co. are given full power of attorney to collect said rent as per the conditions of the lease between me and said Fred Hill.

"SARAH J. FORD."

Fourth. An acceptance of the above, reading as follows, viz.:

"June 20, 1887. Accepted at a total of $119.19; payable, $44.19 on July 1, and $75.00 on August 1, 1887.

"FRED HILL."

These were offered upon the theory that they, or some of them, released defendant from any liability upon the

guaranty. They were excluded, upon the theory that the former judgment settled the fact that defendant was not released previous to the 14th day of November. Upon the same ground an offer to show by a witness that, at the time of the assignment of the lease from Burton to Hill, Mrs. Ford assented and formally released Burton, was denied.

It is plain that this testimony was admissible, unless the question of release was settled by the other trial, which depends upon the issues tried and decided thereon. A former adjudication of the right of action, where the court had jurisdiction of the subject-matter and of the parties, is unquestionably a bar to an action for the same debt or claim, and is conclusive where the same subject-matter is sought to be again litigated, no matter how, between the same parties. In such case it is no answer to say, "There were questions which were not raised or litigated." It is enough if they might have been raised and litigated. But it is a different matter when an action is sought to be maintained or defeated by showing a former adjudication of questions upon which it depends. In such case it must appear that such questions were litigated as a matter of fact; that they were submitted to and decided by the jury or court; and that they were not collateral inquiries, but were crucial questions in the other controversy. *Bendernagle v. Cocks,* 19 Wend. 207; *Badger v. Titcomb,* 15 Pick. 409; *Secor v. Sturgis,* 16 N. Y. 548; *Perkins v. Hart,* 11 Wheat. 251; *Sterner v. Gower,* 3 Watts & S. 136; *Wolf v. Welton,* 30 Penn. St. 202; *Hughes v. Alexander,* 5 Duer, 488. That an adjudication in favor of a claim will not be conclusive of the minor issues on which the right depends, unless it appears not only that they were submitted to the jury but that they were considered and passed upon by them, is supported by the following authorities: *Davidson v. Shipman,* 6 Ala. 27; *Chamberlain*

v. Gaillard, 26 Id. 504; *Tams v. Lewis,* 42 Penn. St. 402; *Packet Co. v. Sickles,* 24 How. 333; *Lawrence v. Hunt,* 10 Wend. 80; *Garrott v. Johnson,* 11 Gill & J. 173; *Cecil v. Cecil,* 19 Md. 72. The question may become one of law if the record contains the conclusive evidence of it, but it may happen that the record is not conclusive. In such cases, according to the great weight of authority, parol evidence is admissible to ascertain whether a given question was in issue, litigated, submitted, and decided, and possibly, in some cases, whether it was material. And in such event, under our system of pleading, the issue would not ordinarily be limited to the single question of former adjudication, but the party would be at liberty to support his claim or defense by other evidence, which would be received subject to the effect of the evidence upon the question of former adjudication. *Sawyer v. Woodbury,* 7 Gray, 499; *Jennison v. West Springfield,* 13 Id. 544; *Burlen v. Shannon,* 14 Id. 433; *Jackson v. Wood,* 3 Wend. 27. There are cases from which it would be inferred that when a party had made defense to an action all possible defenses would be cut off in a subsequent action where the same questions were raised, as in this case, where the defendant seeks to introduce a defense to an action upon a second installment of rent which he did not offer to the action upon a former installment. According to these cases he would be concluded. But this point was distinctly ruled in the case of *Jacobson v. Miller,* 41 Mich. 96, following the case of *Cromwell v. County of Sac,* 94 U. S. 351, 356. The latter case contains an exhaustive discussion of the question. Mr. Justice Field, in delivering the opinion, says:

"On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause because it might have been

determined in the first action. Various considerations other than the actual merits may govern a party in bringing forward grounds of recovery or defense in one action which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same transaction. A judgment by default only admits, for the purpose of the action, the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding."

He quotes the language of Mr. Justice Willes, as follows:

"It is quite right that a defendant should be estopped from setting up in the same action a defense which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity of setting it up in the first action. * * * I think we should do wrong to favor the introduction of this new device into the law."

Mr. Justice Byles said:

"It is plain that there is no authority for saying that the defendant is precluded from setting up this defense."

Mr. Justice Keating said:

"This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

These cases seem to vindicate the right of a defendant to allow judgment to go by default, or to make such

defense as he may choose. If he suffer judgment by default, he is not estopped, in a subsequent action for another demand, from making any defense; and in other cases he is estopped only to the extent of the defenses made to the first action.

It appearing that the pleadings in the former suit were broad enough to cover the defenses now sought to be raised, and that no evidence was offered tending to show whether they were litigated and decided or not, we may next inquire, upon whom is the burden of proof? Must the plaintiffs show that these defenses were actually made and passed upon, or will it be presumed that all questions that could be raised under the pleadings were decided? We think it was not for the defendant to prove the negative. The plaintiffs relied upon an estoppel, and it was incumbent upon them to show the facts necessary to constitute the estoppel. Wells, Res. Adj. § 215; *Lawrence v. Hunt*, 10 Wend. 85. Until they did so, the defense was good; and, if the existence of the estoppel was a question of fact for the jury, the defendant should have been allowed to introduce his evidence tending to show a release. If the jury found the estoppel, they would disregard the evidence of the release; but, as it could not be known in advance how they might find upon that question, the court should have admitted the testimony.

It follows that the judgment must be reversed, and a new trial ordered.

The other Justices concurred.

LOUIS J. LIESEMER v. JOHN BURG AND LULU A. LIESEMER.

Trust deed—Setting aside—Evidence.

1. It cannot be said that the omission of the grantor to require a bond from the trustee named in the deed of trust is an unusual omission, and it is optional with the grantor to require it or not.
2. The fact that the friendly relations existing between the grantor and trustee at the time of the execution of the deed have changed to those of unfriendliness will not, of itself, justify the annulling of the deed.
3. The sole question in this case is whether the complainant was or was not in such a state of mind when he signed the trust deed, which he seeks to set aside, as to understand fully the import and effect of the instrument. And it is held that there is not found in the record evidence to warrant the granting of the relief prayed.

Appeal from Washtenaw. (Kinne, J.) Submitted on briefs June 23, 1894. Decided September 25, 1894.

Bill to set aside a trust deed. Defendant Burg appeals. Decree reversed, and bill dismissed. The facts are stated in the opinion.

John F. Lawrence (*E. B. Norris,* of counsel), for complainant.

A. J. Sawyer (*F. E. Jones,* of counsel,) for appellant.

HOOKER, J. We concur in the statement of complainant's counsel that—

"The sole question in this case is, was Louis J. Liesemer in such a state of mind, at the time he signed the trust deed, as to fully understand the import and effect of the instrument which he executed?"

The complainant has for many years been the owner of a newspaper in the city of Ann Arbor, in the editing and managing of which his late wife, Emma Liesemer, took part. They had one child, a daughter of five or six years. The mother died on September 26, 1888, and at the time of her death was the owner of property to the amount of $2,200. She left no will. On September 28, 1888, being the day before the burial of his wife, complainant executed and delivered to John Burg, one of the defendants, an instrument in writing under seal, duly acknowledged, whereby he assigned to Burg his interest in the estate of his former wife, and a certain mortgage and accompanying note for $3,000. The writing provided that Burg and his successors, which successors might be appointed by the proper court upon Burg's request and application, should hold the property assigned, "upon trust and confidence, to keep said money safely invested for the benefit" of said daughter until she should become 20 years of age, at which time she should become entitled to it in her own right. It provided for its use for her necessities, and that in case of her death it should go to her issue, if she left any surviving; if not, it was to revert to the complainant. The trust was accepted by Burg in writing at the bottom of the assignment. The mortgage and note, and a formal assignment thereof, were delivered with the writing aforesaid to Burg. Subsequently complainant claims to have demanded the return of the property assigned, and finally, some two years later, filed this bill to set the assignment aside, asserting that it was obtained by undue influence, at a time when he was mentally unable to understand the force and effect of the writing. The daughter was made defendant, and answers by guardian *ad litem*. Her answer alleges that the assignment rests in and is founded upon no covenant by Burg to execute the provisions and directions of the trust, and that he has not bound himself to

do so, and that no precautions or safeguards were provided by the assignment. It further alleges, on information and belief, that Burg has not accounted to the circuit or probate court, and expresses fears that he will refuse to account to her, and deprive her of her rights under the same. She prays for an accounting and other relief. Otherwise she submits her rights and interests to the court.

Burg and complainant married sisters, were intimate friends as long as Mrs. Liesemer lived, and the former aided complainant in various ways, such as assisting him to increase the circulation of his paper and loaning money for him, and possibly in some other ways. The circuit judge granted the relief prayed, though he practically required the complainant to pay Burg for his services in holding and investing the fund, and for his just and reasonable expenses in the defense of the suit, by allowing them from the property. He expressed confidence in the integrity of purpose of defendant.

We think that the testimony does not warrant the conclusion that the complainant was incompetent to make this disposition of a portion of his property. Doubtless he was grieved over the loss of his wife, and it is quite probable that he experienced a very tender solicitude for the welfare of his motherless child. He testifies that defendant took advantage of the situation to further his own interests, but, in our opinion, the great preponderance of testimony tends to show that Burg did not suggest or insist upon the arrangement, and we find no reason for saying that he designed to convert the property to his own use. The fact that no bond was required is suggestive of danger of loss, but it cannot be said that this was an unusual omission, and it was optional with complainant to require it or not. Nor can the determination depend upon expediency. It may be unfortunate that the relations of the parties have changed, but that fact does not justify the annulling

of a contract. It may be unfortunate that Burg is to have the control of the child's patrimony, considering the strained relations between him and her father, but it cannot be said to be much worse than to deprive her of it altogether, which would be done by a decree for complainant. So far as can be discovered from the evidence, the existing unfriendliness is the result of this suit, which is based upon charges of a character that Mr. Burg cannot be blamed for denying, and controverting by any proof at hand. It would be profitless to enter upon a discussion of the evidence in detail upon the questions of fact. It is perhaps enough to say that we do not find in this record evidence to warrant granting the relief prayed.

The decree of the circuit court will be reversed, and one entered here dismissing said bill, with costs of both courts.

The other Justices concurred.

GUSTAVE A. WOLF, ADMINISTRATOR, ETC., v. THE DISTRICT GRAND LODGE No. 6, I. O. B. B.

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Mutual benefit associations—Conflicting provisions of charter—Beneficiaries—Estoppel—Statute of limitations.

1. When the constitution of a mutual benefit association contains two inconsistent provisions, that most favorable to the insured will be adopted.
2. No person not of the class for whose benefit a mutual benefit association is authorized can be a beneficiary; citing *Benefit Association v. Rolfe*, 76 Mich. 146.
3. Where the statute under which a mutual benefit association is organized, and its articles of incorporation, entitle its members to devise the death benefit fund to any person, although not

of any of the classes named as beneficiaries, a provision of the constitution of the association which attempts to restrict members in their choice of devisees cannot be sustained.

4. Where a member of a mutual benefit association fails to designate a beneficiary, and dies intestate, his heirs will take the death benefit, under the rule laid down in *Benefit Association v. Rolfe*, 76 Mich. 146.

5. Where a mutual benefit association, with full knowledge that a deceased member had misstated his age in his application for membership, bases its refusal to pay the death benefit *solely* upon the failure of the deceased to designate a beneficiary, the association is estopped, in a suit afterwards brought to recover said death benefit, from asserting such misstatement as to age as a defense; citing *Towle v. Insurance Co.*, 91 Mich. 219.

6. Plaintiff's intestate resided in Michigan at the time of his death, and was a member of a mutual benefit association. He left three heirs, one of whom was a resident of Germany, where she continued to reside until her death, which occurred some 10 years after that of the intestate. The remaining heirs were residents of Michigan and Ohio, respectively, and inherited the share of their co-heir in the death benefit, and subsequently assigned to plaintiff. And it is held that under How. Stat. § 8718,—which provides that if any person entitled to bring any of the actions mentioned in How. Stat. chap. 302, shall, at the time when the cause of action accrues, be absent from the United States and from the British Provinces of North America, such person may bring the action within the times in said chapter respectively limited after the disability shall be removed,—the statute of limitations did not begin to run until the death of said non-resident heir.

Error to Kent. (Grove, J.) Argued June 20, 1894. Decided September 25, 1894.

Assumpsit. Plaintiff brings error. Reversed, and judgment entered for plaintiff. The facts are stated in the opinion.

Walker & Wolf, for appellant.

Maurice M. Houseman, for defendant.

McGRATH, C. J. The Independent Order of B'nai

B'rith is a fraternal organization. Defendant is one of a number of subordinate organizations known as "district grand lodges," having authority to institute lodges, and exercising certain independent powers not in conflict with the laws promulgated by the parent organization. Each district grand lodge has jurisdiction over certain lodges in its district, and each district seems to have carried on, within itself, entirely independent of the parent organization and also of the other districts, a system of insurance on the assessment plan. Applications for membership in the order are made in writing to the local lodges, in which the applicant is required to state his age, residence, etc. Certain past officers of the local lodges become members of the district grand lodge of that district, with the right to sit and debate, but without the right to vote. Each lodge in the district elects a representative to its district grand lodge, and that body, so constituted, legislates for the district. In case of the death of a member of a lodge, that lodge reports such death to its district grand lodge, and the amount is assessed, upon a *per capita* basis, upon each lodge in the district in proportion to the endowment members in such lodge. The funds are forwarded to the district grand lodge, and paid by it. No certificates or policies are issued.

The defendant is incorporated under the statutes of Illinois relating to "corporations not for pecuniary profit." The act (Laws of 1874, p. 74) provides that—

"Associations and societies which are intended to benefit the widows, orphans, heirs, and devisees of deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies."

In *Rockhold v. Benevolent Soc.*, 129 Ill. 440, the Illinois court held that, while the language quoted from the act was "in form expository," yet the powers of the corpora-

tion were defined and determined thereby. The same court, in *Association v. Blue,* 120 Ill. 121, held, under a similar statute, that the language conferred the power on a member to name any stranger as a beneficiary.

The parent organization has a constitution, which is known as the "Constitution of the I. O. B. B." This constitution contains no reference whatever to the endowment feature. The articles of association of the defendant body were filed January 27, 1878, and are as follows:

"We, the undersigned, Charles Kozminski, Herman Felsenthal, Adolph Loeb, and Philip Stein, citizens of the United States, propose to form a corporation under an act of the general assembly of the state of Illinois entitled 'An act concerning corporations,' approved April 18, 1872, and that for the purpose of such organization we hereby state as follows, to wit:

"1. The name of such corporation is District Grand Lodge No. 6, I. O. B. B.

"2. The object for which it is formed is the practice of charity, and the promotion of humanity and enlightenment, in harmony with the constitution, laws, and tenets of the Independent Order of B'nai B'rith, the performance of all acts believed to accomplish these ends, and the securing to widows, orphans, heirs, and devisees of deceased members of said order in said district No. 6 an endowment in accordance with the laws of said grand lodge. Said corporation is not, and shall not be, for pecuniary profit.

"3. The management of the aforesaid district grand lodge shall be vested in 11 managers, who are to be elected annually.

"4. The following persons are hereby selected as the managers to control and manage said corporation for the first year of its corporate existence, viz.: Charles Kozminski, R. Reichman, D. M. Amberg, Philip Stein, B. H. Seligman, Adolph Loeb, E. Rubovits, S. Benjamin, David Adler, Samuel Glickauf, and John M. Levy.

"5. The location is in the city of Chicago, in the county of Cook, state of Illinois."

The defendant body has, however, what is termed a "Constitution," two sections of article 10 of which are as follows: Section 6 provides that—

"The widow of a member in good standing shall be endowed. If there be no widow, all his children shall be endowed. If there be no widow or such children, or parent or parents, then the endowment shall go to the reserve endowment fund, unless such member shall have formally designated a beneficiary or beneficiaries in a book to be kept for that purpose by the lodge, recording therein in his own handwriting, or causing the same to be done at his request, before two witnesses, the name of such beneficiary; but the testamentary disposition of the endowment, brought to the notice of the trustees, shall be respected and carried out by them, provided that such testamentary disposition be confined to the children, parents, brothers, or sisters of the deceased brother in good standing, or to the reserve endowment fund."

Section 9 provides that—

"Any applicant for membership above the age of 45 years, if elected a member, shall be excluded from the benefit of the endowment law, and be under no obligation to comply with its requirements: *Provided,* that this section shall not apply to applicants for membership by card."

A lodge of this order was instituted at Grand Rapids, June 6, 1875. The by-laws of the lodge contain no reference to a will book, nor to the age of applicants, except that candidates for membership must be 21 years of age, nor do they intimate who may or who may not be beneficiaries. Section 1 of article 9 provides that—

"The fees for candidates for membership shall be sixteen dollars, of which five dollars shall be paid on application, ten dollars for degrees, and *one dollar to be sent to D. G. L. for endowment fund.*"

While, under the constitution of the parent organization and that of the district grand lodge, two classes of members were possible, viz.: (1) Members having received degrees, and entitled to all rights and benefits except participation in the endowment fund; and (2) members entitled to all the rights and benefits of the first class, and also the right of participation in the endowment fund,—yet the

by-laws of the Grand Rapids lodge contemplated but one class, and that the latter.

Solomon Wolf, plaintiff's intestate, who resided at Saugatuck, made a written application to said lodge for membership July 11, 1875, was elected, received the degrees, and continued to be a member, paying dues and assessments as a benefit member, until his death, in July, 1880. He was never married, and died intestate, leaving no father or mother surviving him. He left a sister who at the time of his death resided in Germany, where she continued to reside until her death, in 1890; a brother, Jacob Wolf, who resided in Grand Rapids; and a sister who resided in Ohio. Plaintiff, a nephew, as administrator and as assignee, brings this suit to recover the death benefit. The defendant insists:

1. That the 10-years statute of limitations, which was pleaded, had run.
2. That decedent was 51 years of age when he became a member, and was therefore ineligible.
3. That decedent had made no designation in the will book, as provided in the constitution, and left no will.

As to the first point, one of the parties entitled to the fund resided in Germany when the cause of action accrued, and continued to reside there until she died, in 1890. Under How. Stat. § 8718, the statute did not begin to run until her death. At her death, her interest, under our statute of distributions, would go to her brother and sister, whom plaintiff represents.

Upon the second point, it is conceded that plaintiff's intestate was 51 years of age when he became a member. It appears that decedent and his brother, Jacob Wolf, were solicited to become charter members of the lodge. Jacob became a charter member, but Solomon made written application for membership a month later. His application was referred to a committee, who reported favorably,

and he was admitted. This application was not produced, or its absence accounted for. In its absence, it must be presumed that, in conformity with the requirements of the by-laws, it contained a statement of the age of the applicant, and that the age was therein correctly given. When decedent appeared for initiation on August 8, 1875, he was required to sign, and did sign, a "declaration," the material portion of which is as follows:

"On this 8th day of August, 1875, appeared Mr. Solomon Wolf for initiation in our Grand Rapids Lodge No. 238, I. O. B. B., and, having been instructed to make true answers to the questions which he would be asked, made the following declaration: My name is Solomon Wolf. I am 44 years old. I reside at Saugatuck. I am by occupation a merchant. I am not married. I am in good health. Am not aware of having any sickness or bodily infirmity. I have read the constitution of the I. O. B. B., and the by-laws of Grand Rapids Lodge No. 238, and am willing to obligate myself to observe the constitution, laws, and rules of the order faithfully."

The body of this declaration is written in English, and is in the handwriting of the secretary, and the testimony tends to show that decedent could neither read nor write the English language. The material out of which this lodge was constructed was collected by officers of the defendant body. It is conceded that such officers, so collecting the material for the lodge, held out to the persons applied to by them that the organization was a benefit organization, providing for $1,000 at the death of its members, and that age was no bar to admission in the organization of lodges; that both decedent and his brother were urged to join as charter members; that the requisite number for the formation of a lodge was 20; that but 17 had been secured when the lodge was instituted; that decedent was not named in the charter; that decedent's brother became a charter member; that he was 49 years of age at the time; that Jacob was told that his age was not a bar;

and that he gave his correct age at the time, but in the declaration which he signed his age was given at 44 years. The testimony tends to show that, at the institution of the lodge, the charter members were informed for the first time that the constitution excluded from participation in the endowment fund all above the age of 45 years, but that in the formation of lodges they did not observe this limitation; that the committee to whom decedent's application was referred called upon Jacob Wolf to make inquiry concerning the applicant, and Jacob informed the committee that Solomon was over age; that both Jacob and Solomon were well known, not only to the charter members of the lodge, but to the officers who instituted the lodge; and that the fact that decedent was upwards of 45 years of age was known to the charter members generally.

After the death of Solomon Wolf, the lodge at first ordered the assessment. They afterwards countermanded the order, and again directed the assessment to proceed; and the assessment was accordingly made and collected. The officers of the defendant body, before payment, made inquiry as to why the order for the assessment had been countermanded, and the reasons given were that the decedent had made no will or will-book designation, and a question had arisen as to the age of the applicant at the time of his admission. At the next session of the district grand lodge an investigation was instituted, and at the following session certain preambles and resolutions were adopted, reciting and resolving that—

"*Whereas,* it appears that on various occasions the officer instituting lodges has represented to certain applicants for membership (charter members) that their age was no bar to the benefits of the endowment law of this district, and that they were entitled to the rights and privileges thereof by virtue of their being charter members; and

"*Whereas,* under such representations, a number of

applicants who were above the age of 45 were so initiated and admitted as members; and

"*Whereas,* many of the members so admitted paid, and continue now to pay, the assessments levied under the endowment law; and

"*Whereas,* we believe that under these representations the members so initiated and paying have a full and just claim to the benefits of said endowment law:

"Therefore, be it resolved that Jacob Wolf, of Grand Rapids Lodge No. 238 [and 23 other members of lodges in the district], be, and are hereby, entitled to all rights, privileges, and benefits of article 10 of the constitution, known as the 'Endowment Law,' they having been above the age of 45 when initiated to the contrary notwithstanding; * * * and the grand secretary shall enroll their names upon his record of members entitled to the benefits of article 10 of the constitution of District Grand Lodge No. 6."

Prior to this action, the grand lodge had sent out a circular letter to each of the lodges in the district, asking what charter members had been admitted who were over the age of 45 years, and the circumstances under which admitted. Grand Rapids lodge reported as follows:

"The only case in our lodge coming within the terms of the letter is that of Brother J. Wolf. On investigation, we find the facts and circumstances surrounding the same to be as follows:

"Brother Wolf joined our lodge as a charter member, and did so join at the special instance and request of the grand lodge installing officers; that one of the inducements to join our lodge held out to Brother Wolf by the installing officers was the endowment benefit, which they assured him all charter members were entitled to; that, at the time of making his declaration, Brother Wolf truly and correctly stated his age to the two installing officers, but they stated it in his declaration to be 44 years; that Brother Wolf probably knew of their so stating it at the time, but it was so inserted by their directions; that Brother Wolf acted in entire good faith, sought to conceal nothing, and made no attempt to defraud the lodge or order; that Brother Wolf was at the time ignorant of the terms of our endowment law; that he had always been treated as an endowment member, and has always been in

good standing, and now insists that he should be acknowledged as an endowment member, and entitled to the endowment benefit."

At the same session of the district grand lodge at which this action was taken, that body declined to pay the death claim in the present case. The committee reported upon both matters as follows:

"In regard to the overaged charter members referred to in the president's message and the secretary's report, your committee, in consideration of the established fact that those members have joined the lodges under the representations of the installing grand lodge officers that they would be entitled to the benefits of the endowment, recommend that they should be entitled to all the rights, privileges, and benefits of article 10 of the constitution, known as the 'Endowment Law.'

"In the matter of the deceased Brother Solomon Wolf, of Grand Rapids Lodge No. 238, after whose death assessment was levied on the lodges, and which money is at present in the hands of the district grand lodge, *because there are no legal heirs to the same,* your committee recommends that it should be used as payment of the next assessment."

A substitute for the first paragraph of the report was adopted, and the recommendation contained in the second paragraph was concurred in by the district grand lodge.

While it is true that the question of decedent's age was discussed at length, yet the defendant body, after a full knowledge of all the facts, put the refusal to pay not upon that ground, but upon the ground that no beneficiary had been designated by plaintiff's intestate. Defendant is estopped from asserting any other defense after suit brought. *Towle v. Insurance Co.*, 91 Mich. 219.

Upon the third point raised, it appears by the journal of the proceedings of the defendant body that in 1875, at the time of the adoption of the constitution, and while it was under consideration, a motion was made to substi-

tute for section 2 of article 10, as reported by the committee on legislation, the following:

"The trustees shall pay to the widow, or, in absence thereof, to the legal representatives, of a deceased brother in good standing, the sum of $1,000. They shall assess this sum '*pro rata*' among all the members of the district who are amenable to the endowment act, as reported to the G. S. previously. Such *pro rata* assessment shall not be made in fractions of less than five cents, any excess over $1,000 to be paid into the reserve fund."

The motion prevailed, and the constitution, including said substitute, was adopted. The constitution, as afterwards printed in the proceedings by the secretary, does not contain the substitute. As the case was taken from the jury at the close of plaintiff's proofs, no explanation is made of the situation. If this substitute section is to be treated as a part of the constitution, there is an irreconcilable conflict between it and section 6 of the same article, as above given. The well-established rule is that, when the charter or by-laws of a mutual benefit society contain two inconsistent provisions, that most favorable to the insured will be adopted. Nibl. Mut. Ben. Soc. §§ 15, 172; *Insurance Co. v. Hazelett*, 105 Ind. 212; *Supreme Lodge v. Abbott*, 82 Id. 1; *First Nat. Bank v. Insurance Co.*, 95 U. S. 673; *Burkhard v. Insurance Co.*, 102 Penn. St. 262.

We do not think, however, that the provisions of section 6 of article 10 of the constitution can be sustained. In the first place, the section undertakes to restrict the member in his choice of a devisee. The statute under which defendant is organized, and its articles of incorporation, under the Illinois cases hereinbefore referred to, clearly entitle the member to devise the fund to any person, although not of any of the classes named. See, also, *Raub v. Association*, 3 Mackey, 68. In the next place, no

designation in the will book is necessary if the member leaves a widow or children, or parent or parents. In *Supreme Lodge v. Nairn*, 60 Mich. 44, a certificate or policy was issued, in which the beneficiary was expressly named, and the constitution provided how a change in that contract should be effected. Suppose, however, that in such a case the beneficiary had died before the insured, and the latter had neglected to make a new designation, would it be contended that the policy had lapsed, and that the heirs would not take? *Mich. Mut. Ben. Ass'n v. Rolfe*, 76 Mich. 146. In that case it was held that, there being no beneficiary named in the certificate *qualified to take*, and as the deceased had no family, the fund was payable to his heirs. In the present case it is not claimed that the endowment contract lapsed, but the constitution undertakes to name a beneficiary not a member of any class named in the statute or articles of association. In no sense can the association itself or the reserve fund be said to be a devisee. The relations between the insured and defendant respecting the endowment fund were purely contractual. The position of the defendant is that the heirs, although clearly within the terms of the statute, cannot take in the absence of a devise; but that it, although not within the contemplation of the statute, may take, by virtue of the contract and in the absence of a devise. This contention cannot be sustained. A devise is essential to support the claim of the society to the fund. It is well settled that no person not of the class for whose benefit the association is authorized can be a beneficiary. *Mich. Mut. Ben. Ass'n v. Rolfe, supra.* In *Dietrich v. Association*, 45 Wis. 79, an assignment of the insurance to the society, to secure an indebtedness to it, was held void. The court say:

"The action of the company in these respects was with-

out lawful authority, and in violation of its charter, which 'limits and restricts' its business to insurance of lives for the sole benefit of certain special classes of beneficiaries."

In the absence of a devise or designation, the heirs take, under the rule laid down in the Rolfe case.

The court erred in directing a verdict for defendant. Under the case as made, a verdict should have been directed for plaintiff. The judgment will therefore be reversed, and judgment entered here for plaintiff, with costs of both courts.

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

JENNIE BROWN v. EVALINE MCKIMMIE ET AL.

Landlord and tenant—Assault—Eviction.

1. Where, in an action of trespass for an alleged unlawful entry into leased premises by the wife and sons of the landlord, the question whether or not the oral lease under which the plaintiff's husband held had terminated at the time of the entry is submitted to the jury, their finding will not be disturbed on appeal.
2. Plaintiff and her husband were in possession of a house on the farm where the husband was at work, and, on the same day on which a notice to leave the premises was served on the husband, the wife and sons of the owner of the farm came to the house in the absence of plaintiff's husband, and, after informing her that she must move out at once, commenced taking the furniture out of the room where she was into an old kitchen, and told her to pack her clothes, shortly after which her husband came, and took her away. Plaintiff sued the wife and sons in trespass, claiming that she was driven from the house by the defendants, and that the time for which her husband had taken the premises had not expired. The

defense was that the hiring was only for one month, and that the time had expired. The court left this latter question of fact to the jury, and instructed them that, if they found that the hiring had not terminated at the time of defendants' entry, they should take into consideration what took place in the house on that day; that the mere entry into the house by the defendants, under the circumstances, would not give plaintiff a right of action, even if the lease had not terminated, and, if plaintiff recovered, it must be for an injury to herself; and that the jury, in order to find a verdict for the plaintiff, must find that the conduct of the defendants amounted to an eviction. And it is held that the charge properly stated the law.

Error to Wayne. (Carpenter, J.) Argued June 22, 1894. Decided September 25, 1894.

Trespass. Defendants bring error. Affirmed. The facts are stated in the opinion.

James H. Pound, for appellants.

George W. Coomer and *William F. Atkinson,* for plaintiff.

LONG, J. This cause was commenced in justice's court, where plaintiff had judgment. On appeal to the circuit, plaintiff again prevailed before a jury, who returned a verdict for $50.

The action is trespass, and on the trial it was claimed by the plaintiff that her husband hired out to J. A. McKimmie for two months, and went to work on February 8, 1892; that he and his wife, the plaintiff here, moved into a house on McKimmie's farm at that time, and remained there until March 9, when McKimmie served a notice on her husband to leave the premises; that on the same day the wife of McKimmie, and his sons, the defendants here, came to the house where plaintiff lived, in the absence of her husband, and told her she must move out, and at once commenced taking the furniture out of the room where she was into an old kitchen and told her to pack her clothes; that her husband came

shortly after, and took her away. Her claim is that she was driven from the house by the defendants, and that the time for which her husband had taken the premises had not expired. The defense was that the hiring was for only one month, and that the time had expired. The court directed the jury that if the hiring was for one month the plaintiff was not entitled to recover.

On the trial a receipt was produced, which had been given by plaintiff's husband, as follows:

"March 8, 1892.

"Received of J. A. McKimmie $22.50 for one month's pay. Payment in full up to date. Wages and time terminates to-day."

Plaintiff claimed that the words "terminates to-day" were not in the receipt when signed, and the jury so found.

The court directed the jury that if the hiring was for two months, and the agreement was afterwards made, as stated in the receipt, that the tenancy should cease in one month, that would end the case, and the plaintiff could not recover. If, however, the hiring had not terminated, then the jury should take into consideration what took place in the house that day; and they were directed that the mere entry into the house by the defendants, under the circumstances, would not give the plaintiff a right of action, even if the lease had not terminated, and, if she recovered, it must be for an injury to herself, and that it must be found that the conduct of the defendants amounted to an eviction in order to find a verdict for plaintiff. This charge properly stated the law.

There are many assignments of error, but, after a careful examination, we think none of them can be sustained. The defendants certainly cannot complain of the charge, and there was some testimony to sustain the charge.

Counsel for defendants, in his brief, discusses at some

length the right of defendants to enter and take possession of the premises, because the lease and the hiring of plaintiff's husband had terminated. This question was submitted to the jury, and settled by them. It was plaintiff's house, and it was invaded by the defendants without just right. She was permitted to recover for the wrong done her, and nothing more.

The judgment must be affirmed.

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

102 38
109 349

PUTNAM H. CHILD AND LETTIE CHILD v. JOSEPH EMERSON.

Slander—Parties—Misjoinder—Profit-sharing.

1. It is not uncommon to allow employés to participate in the profits of the business, but such method of determining their compensation does not entitle them to join with the employer in an action for an injury to the business.
2. A married woman purchased and established a milk and cream business, and constituted her husband her general agent and manager for a term of years, and agreed to pay him for his services $50 per month in advance, and five-eighths of the net profits of the business, to be calculated annually. And it is held that the husband had no property interests in the proceeds of the business, nor in the profits until an actual division of the same had been made, and that he was improperly joined with his wife in an action for slander of said business.

Error to Macomb. (Vance, J., presiding.) Argued June 23, 1894. Decided September 25, 1894.

Case. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

O. E. Angstman, for appellants.

Silas B. Spier and *Robert F. Eldredge,* for defendant.

McGRATH, C. J. Plaintiffs are husband and wife. In November, 1891, they entered into an agreement in writing, the material portions of which are as follows:

"*Whereas,* said party of the first part has this day purchased and established a certain milk and cream business at 804 Third avenue, Detroit, Michigan, hereafter to be known and styled the 'Edgewood Jersey Milk Company:'

"She does, for the consideration hereinafter set forth, appoint, make, and constitute said Putnam H. Child her general agent and manager in said business, for the term of five years from and including this date, hereby agreeing to pay said Putnam H. Child for his said services, well and truly to be performed, the full sum of $50 per month, in advance, also five-eighths of the net profits of said business, to be calculated annually. And said second party on his part agrees well and truly to perform said services as agent and general manager of said Edgewood Jersey Milk Company, and to accept said compensation as above set forth in full for the same."

This is an action for a slander of said plaintiffs in relation to said business. The trial court held that Putnam H. Child did not have such an interest in the business as entitled him to join with his wife in this action, and directed a verdict for defendant.

It is conceded that plaintiffs were not partners. The action is for slander of the business. The business is not the joint business of plaintiffs. It is that of Lettie Child. Putnam H. Child has no property interests in the proceeds of the business. Until the profits are ascertained, and an actual division is had, he has no property interest in them. He is simply an employé, the amount of whose compensation is determined by the amount of the profits. It is not uncommon to allow employés to participate in the profits, but such method of determining the compen-

sation does not entitle such employé to join with the proprietor in an action for an injury to the business.

In *Ashby v. Railroad Co.*, 5 Metc. 368, cited by plaintiffs, a petition was filed for damages alleged to have been sustained by reason of the laying out of a railroad over certain land, upon which petitioners had erected machinery at joint expense, and were carrying on business for their common benefit, although the fee of the land was in one of the petitioners. The court held that, under the statutes of that state, it was not necessary that the claimant should be the owner; that if petitioners were interested in one and the same estate, whether such interests were joint or several, it was within the spirit, if not within the express provision, of the statute, that they should join in one petition, and that the jury might apportion the damages.

In *White v. Bascom*, 28 Vt. 268, plaintiffs were jointly engaged in transporting merchandise upon a boat which was owned by one of them. The court found that the boat was clearly in the joint use of plaintiffs, and the earnings their joint property, and held that the fact of such joint use gave them a special interest or property therein, and conferred upon them the same right to sue a stranger to the title for an injury thereto as if they had obtained it from a third person.

In *Bond v. Pittard*, 3 Mees. & W. 357, A. and B. were held properly joined as plaintiffs, as the money, when recovered, would be joint property.

These cases do not support plaintiffs' contention.

The general rule is that two or more persons cannot join in an action for slander. At common law, the wife cannot sue alone in any case for a personal injury to herself. This is one of the exceptions to the rule. The only other exceptions are in cases of slander to business or

title, when the persons jointly interested in the business as partners, or the joint owners of the property the title of which is slandered, must join.

The judgment is affirmed.

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

HENRY W. RICKEL AND LOUIS HENZE v. JULIAN STRELINGER.

102 41
128 37

Attachment—Dissolution—Certiorari—Fraudulent conveyances.

1. The rulings of the circuit judge in regard to the admission of evidence, made on the trial of an appeal from an order dissolving an attachment, are not reviewable on *certiorari*.[1]
2. The giving of a chattel mortgage by an insolvent debtor to a trustee to secure *bona fide* debts is no evidence of an intent to defraud anybody, but is evidence of an attempt to secure the mortgagor's creditors.[2]
3. Evidence tending to show that a debtor, shortly prior to executing a chattel mortgage to a trustee to secure his creditors, stated to a member of a firm to which he was indebted that he had no debts aside from that of said firm and one other creditor, who was also secured by the mortgage, will not establish the fact that other claims secured by the mortgage, and which purport to have been incurred several months prior to the making of said statements, are not *bona fide*.

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[1] For cases bearing upon the question of the review by *certiorari* of proceedings for the dissolution of an attachment, see note to *Savings Bank v. Barnes*, 100 Mich. 5.

[2] For cases bearing upon the validity of mortgages given in trust to secure all or a portion of the mortgagor's creditors, see note to *Bank v. Bank*, 100 Mich. 487 (4).

Certiorari to Wayne. (Carpenter, J.) Argued June 23, 1894. Decided September 25, 1894.

Defendant brings *certiorari* to review proceedings resulting in the reinstating of an attachment which had been dissolved by a circuit court commissioner. Reversed, and order of dissolution sustained. The facts are stated in the opinion.

Harlow P. Davock, for petitioner.

William Look and *Edward Minock* (*Ira G. Humphrey*, of counsel), for plaintiffs.

LONG, J. On November 6, 1893, the defendant, doing business as a brewer in the city of Detroit, was indebted to the plaintiffs in the sum of $3,355.55. Being pressed by them for payment, he promised to give security for the debt. Instead of so doing, he gave a chattel mortgage on his personal property to James Holihan, as trustee for the creditors named in said mortgage, the plaintiff's claim being stated at $2,700. This chattel mortgage was filed in the city clerk's office on November 6, 1893. Plaintiffs had no knowledge of the giving of this mortgage until three days afterwards, when they caused a writ of attachment to be issued out of the circuit court for Wayne county, based upon an affidavit made by one of the plaintiffs, setting forth that the defendant had assigned and disposed of some of his property with intent to defraud his creditors, and that he was about to assign and dispose of his property with intent to defraud his creditors. On a petition made by the defendant before a circuit court commissioner the attachment was dissolved. Plaintiffs appealed from this order to the circuit court for the county of Wayne, where the case was tried before one of the judges without a jury, and the order of the com-

missioner overruled, and the attachment reinstated. The case comes to this Court by *certiorari*.

The reasons assigned in the affidavit for the writ of *certiorari* are:

1. That there is no evidence to support the finding that the plaintiffs had a good and legal cause for suing out the writ of attachment.
2. That there is no evidence to support the finding that the defendant had assigned and disposed of a portion of his property with intent to defraud his creditors, and that he was about to assign and dispose of his property with intent to defraud his creditors.

Some other errors are claimed in the affidavit relating to the admission of evidence, but it is well settled in this State that rulings in regard to the admission of evidence are not reviewable on *certiorari* in this class of cases. *Schall v. Bly*, 43 Mich. 401.

No findings of fact or law were made by the court below, but all of the testimony taken before the circuit court is returned here for review, and the only question which we can consider is whether there was evidence to support the plaintiffs' claim made in the affidavit that the defendant had disposed of his property with intent to defraud his creditors, or was about to dispose of his property with intent to defraud his creditors. Their claim is that certain facts were shown upon the hearing in the court below that warranted the court in reinstating the attachment. These facts are stated in counsels' brief to be that, before the mortgage was given, defendant had stated to plaintiffs that they were the only creditors of any importance; that he owned a brewery, and also some property on High street; that his debts to others were of little or no importance; that again he stated to plaintiffs that he owed only them and one Weidner, and that Weidner's bill was but $425. The chattel mortgage, however, covers a large amount which purports to have been incurred several months

prior to these conversations. It is claimed that plaintiffs relied upon these statements as to defendant's obligations. This being testified to by plaintiffs, it is claimed that the burden of proof was upon the defendant on the hearing to show that the claims secured by the chattel mortgage were *bona fide.* It is claimed as a further ground for sustaining the writ that the mortgage given, if valid, did not purport to secure the entire indebtedness of the plaintiffs, as, over and above the amount stated in the mortgage, defendant owed plaintiffs about $600.

We are of the opinion that there was no evidence to sustain the allegations in the affidavit. Plaintiffs are not claiming that the debt due them was fraudulently contracted, or that they relied upon defendant's statement, in giving him credit, that he was not indebted to other persons; but they rely upon the fact that he had disposed of his property, and was about to dispose of it, with intent to defraud his creditors. The only proof of this, as shown by this record, is the giving of this chattel mortgage. The giving of the mortgage is no evidence of intent to defraud anybody, but is evidence of an attempt to secure his creditors for their debts. *Iosco Co. Savings Bank v. Barnes,* 100 Mich. 1. The burden of proof was upon the plaintiffs to show the truth of the allegations in the affidavit for the writ of attachment, and the proof which they offered, tending to show the statements made by the defendant that he had no debts aside from what he owed plaintiffs and Weidner, would not establish the fact that the claims secured under the mortgage were not *bona fide.* Upon an examination of the whole record, we are satisfied that there was no evidence showing or tending to show that the allegations in the affidavit were true. The case falls so clearly within the rule laid down in *Iosco Co. Savings Bank v. Barnes, supra,* that it needs no further discussion.

The order of the circuit court reinstating the writ of attachment must be overruled, and the order of the circuit court commissioner dissolving the writ will be sustained. The defendant will recover costs of both courts.

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

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102 45
107 651

ALBERT H. PETRIE v. JOSEPH BADENOCH, JR., AND JOHN TORRENT.

[See 88 Mich. 43; 90 Id. 265; 95 Id. 439; 98 Id. 130; 100 Id. 117.]

Trust—Accounting—Parties—Res judicata—Equity jurisdiction.

Pending a suit against a trustee for an accounting, the trustee purchased at a discount a note given by the *cestui que trust* after the commencement of the suit, and placed it in the hands of a third person, who sued the *cestui que trust* thereon, and garnished the trustee, and recovered judgment for the face of the note, and interest. The *cestui que trust* filed a bill against the plaintiff and the trustee to have the note and judgment declared to be the property of the trustee, and compel him to satisfy the same out of the trust fund in his hands, at what he paid for the note, with interest. The defendants demurred generally to the bill. And, in affirming a decree overruling the demurrer, it is held:

a—That the general rule that a trustee cannot buy up a debt or an incumbrance for which the trust estate is liable for less than is actually due thereon, and make a profit to himself, but that such purchase inures for the benefit of the *cestui que trust*, is applicable to this case.

b—That the questions involved in this suit cannot be disposed of in the suit for an accounting, as the plaintiff in the suit upon the note is a necessary party in a proceeding to obtain the relief here prayed.

c—That the matters involved, to wit, the conduct of the trustee, and his dealings with the trust estate and in his relation as

trustee, are peculiarly within the jurisdiction of a court of equity, and were not determined by the suit upon the note.

Appeal from Muskegon. (Russell, J.) Argued June 23, 1894. Decided September 25, 1894.

Bill to compel a trustee to satisfy a judgment rendered on a note of the *cestui que trust* which the trustee purchased at a discount, and caused to be sued in the name of a third person, from the trust estate, at the sum paid for the note, and interest. Defendants appeal from an order overruling a general demurrer. Affirmed. The facts are stated in the opinion.

Bunker & Carpenter, for complainant.

Sessions & Bassett, for defendants.

McGRATH, C. J. This is a branch of the Petrie-Torrent litigation. 88 Mich. 43, 100 Id. 117.

Complainant's bill alleges that on October 4, 1890, Petrie gave to one Marshall, of Chicago, his note for $2,450; that about January 15, 1892, Torrent purchased the note from the payee through one Meglade, of Chicago, for $1,375; that Torrent then put the note in the hands of defendant Badenoch, in order that judgment might be had for the full value of the note; that Badenoch brought suit on the note, and garnished Torrent; that on January 19, 1893, Badenoch recovered judgment on the note in the circuit court for the county of Muskegon for $2,843.02; that Badenoch was not the owner of the note at the time suit thereon was brought, is not now the owner thereof, nor is he the owner of the judgment thereon, or any part thereof; that, at the time of the purchase of said note, Torrent was, and ever since has been, complainant's trustee, and at the time of the purchase of the note said Torrent had in his hands, as such trustee, upwards of

$85,000 of complainant's money; that the defendant Torrent purchased said note, and caused suit to be brought thereon in the name of Badenoch, for the purpose of taking an unfair, unauthorized, inequitable, and fraudulent advantage of Petrie, and of making a profit out of his fiduciary relation by buying said note at a discount, and by seeking by indirect means, fully set forth in the bill of complaint, to enforce a claim against Petrie, not at what he paid for said claim, but at the face value of the note; and that the defendant Badenoch was the plaintiff in said cause for no other purpose, and that said suit was prosecuted for no other purpose, than to give, by said indirect means, to the defendant Torrent, an unfair, unauthorized, inequitable, and fraudulent advantage of Petrie. The bill further alleges Petrie's willingness to pay to Torrent, and to allow in the accounting, whatever Torrent paid for the note, together with interest thereon from the time of its purchase.

Complainant prays that said note and judgment may be declared to be the property of Torrent, and that the bringing of said suit and the obtaining of judgment therein may be declared and decreed to be in fraud of the rights of the complainant, and that the defendant Torrent may be compelled to satisfy said note and judgment out of the moneys in his hands belonging to complainant, at what he paid for said note, together with interest thereon from the time of said payment, and that all proceedings in the suit at law and in the garnishment suit be permanently stayed. The bill filed by complainant against Torrent in the case reported as aforesaid, and the decree therein, are referred to and made a part of the bill in the present case.

Defendants demurred to the bill, the demurrers were overruled, and defendants appeal.

It is well settled that a trustee cannot use the trust property, nor his relation to it, for his own personal

advantage. He cannot buy up a debt or an incumbrance for which the trust estate is liable for less than is actually due thereon, and make a profit to himself, but such purchase inures for the benefit of the trust estate, and the *cestui que trust* shall have all the advantage of such purchase. Perry, Trusts, § 428; Lewin, Trusts, 276. He should take no advantage of his position to receive personal gain from the trust property, his duty being to protect it, and that, too, without having an adverse interest. *Parshall's Appeal,* 65 Penn. St. 233; *Sloo v. Law,* 3 Blatchf. 459. He cannot buy up debts against or incumbrances upon the estate at a discount, without accounting to the estate, or the party having the beneficial interest therein, for the full benefit. *King v. Cushman,* 41 Ill. 31; *Slade v. Van Vechten,* 11 Paige, 21; *Schoonmaker v. Van Wyck,* 31 Barb. 457; *Barksdale v. Finney,* 14 Grat. 338.

While conceding the rule, counsel for defendants would make its applicability depend upon the extent of the trust. It is, however, the particular estate which is held in trust that is here sought to be affected. The note was purchased and placed in the hands of a third person in order to reach by garnishment the money or estate held in trust, and offset the amount against a claim therefor. Is it not evident that the very relation which the rule says shall not be used for personal advantage inspired the purchase? The rule is based upon the obligation resting upon the trustee to protect the trust estate, and the possibility of adverse or conflicting interest. The only note in question was given pending a controversy, not yet ended, over this very trust fund, in which it is strenuously urged that large sums of money are being wrongfully withheld. It is by no means clear but that in such case the purchase should be treated as having been made with the trust funds. Procrastination may be made profitable if the obli-

gations of the *cestui que trust,* the issue of which may have been made necessary by the very delay or withholding, may be purchased at a large discount, and then offset at their face value against the sum due.

It is urged, however, that the question may be disposed of in the principal suit upon the accounting; but defendant Badenoch is a necessary party in a proceeding to obtain the relief here prayed.

It is also insisted that the matter involved in this suit has been determined by the suit at law, and is *res judicata;* but the defense here sought to be established was not available in the suit at law. The matters involved, to wit, the conduct of the trustee, and his dealings with the trust estate and in his relation as trustee, are peculiarly within the jurisdiction of a court of equity.

The decree overruling the demurrers is affirmed, with costs to complainant.

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

FRANK B. WILLIAMS v. THE BUCHANAN MANUFACTURING COMPANY, PRINCIPAL DEFENDANT, AND THE HARTFORD FIRE INSURANCE COMPANY, GARNISHEE DEFENDANT.

Fire insurance—Mortgage interest—Garnishment.

A manufacturing company mortgaged its property in trust for creditors, after which it suspended active operations, and the mortgagees took possession of the property. The property was destroyed by fire, and a compromise was effected between the

mortgagor and mortgagees and an insurance company, which had written policies on the property payable in case of loss to the mortgagees, by which the insurance company agreed to pay a certain percentage of the insurance. Before making such payment, the insurance company was garnished at the suit of one of the mortgagor's creditors. There was no evidence to authorize the jury to find that the compromise was fraudulent, and the evidence showed that the amount of the insurance, as agreed upon, would not satisfy the debts secured by the mortgage. And it is held that a verdict was properly directed in favor of the garnishee defendant.

Error to Berrien. (O'Hara, J.) Argued June 22, 1894. Decided September 25, 1894.

Garnishment proceedings. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

George S. Clapp, for appellant.

Edward Bacon, for garnishee defendant.

McGRATH, C. J. In June, 1888, the Buchanan Manufacturing Company executed two chattel mortgages,—one to Alfred F. Ross, cashier of the Farmers' & Manufacturers' Bank of Buchanan, in the sum of $28,686.77, to secure the payment to the bank aforesaid, and to other banks and individuals, of certain outstanding obligations. On the same day, the said company executed another chattel mortgage, to Minnie Weisgerber and Alfred F. Ross, cashier, etc., in the sum of $18,647.66, to secure Minnie Weisgerber upon $13,647.66 of its obligations, and the bank upon two notes of $2,500 each. On November 4 the works of the principal defendant were destroyed by fire, with the major portion of all stock and material on hand. At the time of the fire, said company held three insurance policies in the Hartford Fire Insurance Company, aggregating $3,375, and other policies in other companies, the entire insurance amounting in the aggregate to about $20,000. Four of the policies were payable, in case of loss, to the Farmers' &

Manufacturers' Bank. All the others, including those issued by the garnishee defendant, were payable to Minnie Weisgerber and the Farmers' & Manufacturers' Bank. It appears that, before the fire, the company had ceased to operate its works, and certain of the mortgagees had taken possession. The answer of the garnishee defendant sets up that by the giving of these mortgages, the cessation of the operation of the works, and the taking of possession thereof by the mortgagees, the policies had become forfeited. Proofs of loss were, however, furnished, and a conference was had in December, 1888, between the representatives of the various insurance companies and the mortgagees and the representative of the principal defendant, and at such conference a compromise was effected, and it was agreed that the companies should pay to the mortgagees 70 per cent. of the amount of the policies in full thereof. At the time that such compromise was agreed upon, certain proceedings in garnishment were pending; but for some reason they were afterwards dismissed, and the present writ of garnishment was issued on March 1, following, before, however, any moneys were paid over under that arrangement.

Upon the trial, the court below directed a verdict for defendant, and, we think, properly. There was no evidence that would have authorized the jury to find that the compromise effected between the principal defendant, the insurance companies, and the mortgagees was fraudulent. The insurance was payable to the mortgagees. There was abundant evidence that the amount of the insurance, as agreed upon, did not satisfy the indebtedness secured by the mortgages, and the record does not disclose any evidence tending to show that a surplus remained.

The judgment is affirmed.

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

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FRANCIS L. PECK AND EDWARD H. CUTLER v. THE GERMAN FIRE INSURANCE COMPANY.

Fire insurance—Action on policy—Limitation—Commencement of suit—Summons—Amendment.

1. Where a fire insurance policy provides that no suit or action thereon for the recovery of any claim shall be sustainable unless commenced within 12 months next after the fire, a suit cannot be maintained unless it is in fact commenced within the year specified in the policy; citing *Steele v. Insurance Co.*, 93 Mich. 81; *Law v. Association*, 94 Id. 266; *Lentz v. Insurance Co.*, 96 Id. 455.
2. The commencement of suit in the circuit court by summons consists of suing out the summons, and delivering or transmitting it to an officer of the proper county, with the *bona fide* intention of having it served.
3. A circuit court summons, issued on the day after the return-day of a former summons issued in the same case, which has not been returned, cannot be treated as an *alias;* citing *Johnson v. Mead*, 58 Mich. 71.
4. One day prior to the expiration of the year limited for bringing suit upon a fire insurance policy, a summons was issued from the circuit court, and sent by the clerk to the attorneys for the plaintiff, who, through an oversight, failed to transmit it to the sheriff of the proper county for service. And it is held that the right of action was not saved by the issuance, one day after the return-day of said writ, of a second summons, tested as of the day of issuance of the first summons, and its service upon the insurance company.
5. The fact that the first summons was not made returnable on the first Tuesday of any month, or on any day in term, is unimportant; and the clerk had no authority, on his own motion, to make so radical an amendment as was attempted by the issuance of the second summons.

Error to Wexford. (Aldrich, J.) Argued June 26, 1894. Decided September 25, 1894.

Assumpsit. Defendant brings error. Reversed, and no new trial granted. The facts are stated in the opinion.

Mark Norris, for appellant.

Dunham & Preston, for plaintiff.

MONTGOMERY, J. This is an action upon a fire insurance policy containing the following provision:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless commenced within 12 months next after the fire."

There is no testimony showing any waiver of this provision. On the contrary, the defendant promptly denied liability, and returned the proofs of loss immediately upon their being furnished. The suit cannot therefore be maintained unless it was in fact commenced within one year from the time of the fire. *Steele v. Insurance Co.,* 93 Mich. 81; *Lentz v. Insurance Co.,* 96 Id. 445; *Law v. Association,* 94 Id. 266.

The fire occurred May 26, 1892. On the 25th day of May, 1893, plaintiffs' attorneys telegraphed the clerk of the court to issue a summons, which he did, making the same returnable June 27, 1893. The summons was sent to the plaintiffs' attorneys on the same day. On the return-day of the writ the plaintiffs' attorneys wrote the following letter to the clerk:

"*Dear Sir:* Just at the time of the receipt of inclosed summons, I went to Lansing, afterwards to Chicago, then to Newaygo, then to Paw Paw, and by reason of these trips I forgot to send the summons to Lansing for service. I return them to you, and ask you to change the date, advancing the return-day 15 or 20 days in the future, and be sure to make it come within the rule, leaving the date of issue the same, as at present, or else make out an entirely new one of the same date; and be kind enough to enclose an additional copy, as one has to be sent to the insurance company and the other to the insurance commissioner."

The clerk thereupon, upon the receipt of this letter, made

out a new summons, dating it back to May 25, and making the return-day July 11. This writ was delivered to the sheriff July 3, and served July 5, 1893. The first summons was never delivered to the sheriff of the proper county. An attempt was made to excuse this by showing that it was sent to the sheriff of Ionia county instead, but the evidence does not show that this error was not discovered in time to have enabled the plaintiffs' attorney to correct the error, and the fair inference from the letter which he wrote to the clerk is that the failure to transmit the summons to the proper sheriff was an oversight.

The commencement of suit consists of suing out the summons, and delivering or transmitting it to an officer, with the *bona fide* intention of having it served. 13 Amer. & Eng. Enc. Law, 746; *Howell v. Shepard,* 48 Mich. 472; Ang. Lim. § 312; *Insurance Co. v. Schroeder,* 9 Ill. App. 472; *Hancock v. Ritchie,* 11 Ind. 48; *Ross v. Luther,* 4 Cow. 158. The plaintiffs sought to avoid the force of this rule by claiming that the 27th of June was neither the first Tuesday in any month nor any day in term, and hence not a return-day. It is difficult to see how this affects the plaintiffs' position. The second summons was not issued until June 28, 32 days after the term of limitation had expired. It cannot be treated as an *alias. Johnson v. Mead,* 58 Mich. 71. Nor are we aware of any authority for the clerk, on his own motion, to make so radical an amendment. The court itself would not have been authorized to make such an amendment on the strength of the letter of plaintiffs' attorney above quoted.

While the case may be one of some hardship, we think the settled rules of law require that the judgment be reversed, and no new trial ordered.

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

CLARENCE M. BURTON v. HENRY M. REYNOLDS, COUNTY CLERK OF WAYNE COUNTY.

Public records—County clerk—Examination of files—Compensation—Mandamus.

1. The files of courts of justice should not be open to the general public so as to permit a maker of abstracts of title to keep a clerk continuously in the office of the county clerk, occupying a place at the desk, carrying keys to all the file cases in said office, and removing and replacing files at will.
2. The rights of a maker of abstracts of title to access to the files and records of suits pertaining to real estate in the office of the county clerk, to enable him to make abstracts of the same to use in his business, do not depend upon the privileges which the clerk may choose to permit others to enjoy, but are measured by the law, and cannot be diminished for the benefit of others, nor can they be increased by reason of indulgence to others; and one whose business requires much examination has no greater rights than one whose interests require but little.
3. *Mandamus* will not lie to compel a county clerk who, for a compensation paid by relator's competitors, employs a clerk at his own expense to superintend their use of the files and records in the office for the purpose of making abstracts of title, to grant the same facilities to the relator without compensation, it appearing that the clerk is not legally bound to furnish such increased facilities, and that the furnishing of the same does not abridge the rights to which the relator is legally entitled.

Certiorari to Wayne. (Donovan, J.) Argued June 26, 1894. Decided September 25, 1894.

Relator applied to the circuit court for *mandamus* to compel the respondent to give him access to the files and records of all suits pertaining to real estate, to enable him to make abstracts of the same, to use in his business of making and selling abstracts of title. Relator brings

certiorari to review the order denying the writ. Affirmed. The facts are stated in the opinion.

Henry A. Chaney and *Hoyt Post,* for relator.

Jasper C. Gates, for respondent.

PER CURIAM. This cause comes to this Court by *certiorari* to the circuit court of Wayne county, where a *mandamus* was denied to the relator, who sought to compel the clerk of said county to give him access to the files and records of all suits pertaining to real estate, to enable the relator to make abstracts of the same, to use in his business of making and selling abstracts of title. The respondent denies relator's right to the privilege claimed, unless he shall pay the sum of $25 per month for each person employed by relator in making abstracts from such files.

It appears that relator has heretofore had access to the clerk's files, having been allowed to keep a clerk continuously in said office, who occupied a place at the desk, and who carried keys to all file cases, removing and replacing files at will. Respondent very properly put a stop to this. The files of courts of justice should not be open to the general public to any such extent as that mentioned, and the law does not compel it. If a clerk permits it, it is at his peril. Relator apparently does not contend for such privileges as these mentioned, unless it be in his claim that he should be entitled to the same privileges as are granted to two others who are engaged in similar business, and who enjoy privileges that relator asserts he is denied, though it does not very clearly appear what they are.

According to the return, the respondent proposes to require relator to receive files and records from an assistant of respondent, who shall supervise their use by relator.

He says that the clerical force provided is insufficient to permit him to attend to the wants of relator, who proposes to keep one or more clerks constantly employed in said office, and that he cannot give him the same facilities that he does the other persons mentioned unless he will contribute to the employment of such assistant, as they do. Just what those facilities are does not appear, and perhaps they are not important. Relator's rights under the law do not depend upon privileges which respondent may choose to permit some to enjoy. His rights are measured by the law, and cannot be diminished for the benefit of others, nor can they be increased by reason of indulgence to others; and we think that one whose business requires much examination of public records has no greater rights than one whose interests require little. The former cannot, and probably would not, attempt to monopolize the facilities furnished, to the exclusion of the latter. But, as already stated, the officer is under no obligation to provide additional accommodations, or to permit one to move in furniture and occupy permanently any portion of the office.

The clerk of Wayne county is a salaried officer. Counsel for relator argue that he is not entitled to fees. We are cited to no statute requiring him, at his own expense, to furnish clerical assistance, and we understand that it is provided by the public, and that he is allowed certain clerks. He cannot be expected to give his personal attendance to this relator day after day, nor can he be required to furnish a clerk who will. Relator must take his turn with others, receiving and using and returning files to the person who is detailed to wait upon the public, at and from the place provided for the public. The return denies a refusal of the files in any particular case, except as the relator requested them in connection with more than 20 other cases; and it further discloses that, since the issue of the alternative writ, he has given relator and his

assistants full and unrestrained access to any and all records, papers, and files, without let or hindrance.

Relator's brief states that the bone of contention is the sum of $25 per month which respondent demands for certain privileges which he is not otherwise disposed to furnish, and which the law does not compel. Counsel for relator say that he only wants the same privileges that his competitors are enjoying; *i. e.*, he wants them for nothing, while they pay for them. The return shows that, for a consideration, respondent is finding a way to help such competitors to what they want,—by employing a person at his own expense to superintend their use of the files. This does not abridge relator's facilities, so far as appears. On the contrary, it may tend to increase them, and we think that the respondent, by rendering such increased facilities, does not thereby enlarge relator's rights. The clerk is custodian of his office and its contents. He is responsible for its management and preservation. He probably exercises a large discretion in such management, and doubtless thereby accommodates the general public. The brief of relator's counsel gives prominence to the privileges accorded to others, and complains that he is to be charged fees for seeing papers which he has the right to examine; but it nowhere discusses the denial of relator's right to see files as the general public see them. In the principal brief it is said:

"Mr. Burton's request is only to be allowed the same latitude that is freely allowed to others."

And in the supplemental brief it is said:

"The essential point of our petition is that respondent, being a public officer, refuses us permission to make such examinations of public records in his office as he permits others to have, unless he will pay him for such permission."

In short, he wants exceptional facilities. His only

excuse for claiming them is that the clerk is willing to assume the risks and responsibility of furnishing them to others. He is not willing to take them upon the same terms, claiming that the money required is a fee, which the law denies the clerk the right to take. It is true that the clerk cannot charge fees for those things that a citizen has a right to demand, but we can only aid relator in obtaining the rights to which the general public are entitled, as was held in the case of *Day v. Button*, 96 Mich. 600.

The order of the circuit court will be affirmed.

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ROBERT THUNER v. CHARLES E. KANTER.

Real-estate broker—Commission—Procuring cause—Evidence.

1. Where, in a suit to recover a commission on a sale of real estate, neither the pleadings nor plaintiff's version of the contract of employment leave the case open for any claim under the *quantum meruit*, it is not error to exclude testimony as to expenditures made by the plaintiff in advertising.[1]
2. Where, in a suit to recover a commission on a sale of real estate, the pleadings limit the issue to the question whether the plaintiff did in fact procure a purchaser, either at the price stated in the declaration or at a price satisfactory to the defendant, and the undisputed testimony shows that plaintiff did not bring the purchaser and the defendant together, and that the purchaser was not a customer of plaintiff, and did not acquire his knowledge that the property was for sale from him, directly or indirectly, a verdict is properly directed in favor of the defendant.

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[1] See *Montross v. Eddy*, 94 Mich. 100; *McDonald v. Ortman*, 98 Id. 40.

Error to Wayne. (Reilly, J.) Submitted on briefs June 26, 1894. Decided September 25, 1894.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

William J. Gray, for appellant

Ed. E. Kane, for defendant.

MONTGOMERY, J. Plaintiff sued to recover a commission on a sale of real estate. The circuit judge directed a verdict for the defendant, and plaintiff brings error, alleging that the circuit judge committed error—First, in excluding testimony of plaintiff as to how much money he had expended in advertising the property; second, in admitting testimony of defendant that he had placed the property in the hands of other brokers; third, in directing a verdict for the defendant.

1. It was not error to exclude testimony as to expenditures made by plaintiff in advertising. Neither the pleadings, nor the plaintiff's version of the contract of employment, left the case open for any claim under the *quantum meruit.*

2. While we think the testimony of the defendant as to his having placed the property in the hands of other brokers immaterial, it is apparent that the error in the admission of such testimony resulted in no injury to the plaintiff, if the court was right in holding that there was no case made for the jury.

3. The only question which requires extended discussion is whether the circuit judge should have submitted the case to the jury.

The declaration contained three special counts. In the first it was alleged in substance that defendant employed plaintiff as broker to effect, on behalf of said defendant,

a sale of the premises in question, and agreed to pay to the plaintiff a commission of $1,000 in case he (the plaintiff) would, within a reasonable time, procure a purchaser at the price of $20,000; that the plaintiff agreed to use his best efforts to effect such a sale, and, with the knowledge of the defendant, negotiated with several parties in regard thereto; that within a reasonable time after the making of said contract, through the efforts of said plaintiff, said property was brought to the attention of Frank A. Osborn; that said Osborn and the defendant, being thus brought together through the plaintiff, negotiated with respect to said property, and that pending the negotiations said plaintiff notified defendant that said Osborn had been procured as a possible purchaser by said plaintiff, and that said Osborn was desirous of purchasing said premises, but was unwilling to pay so high a price as $20,000; that said defendant then, in willful disregard of plaintiff's rights in the premises, did agree to sell said premises to said Osborn at a price named which was less than $20,000, and that said Osborn agreed to purchase the same at such price. The plaintiff further averred that by reason of the premises, and the lowering of said price, under the circumstances, the defendant became indebted to the plaintiff in the sum of $1,000.

The second count averred that defendant employed plaintiff at the agreed price of $1,000 to furnish a purchaser at a price satisfactory to defendant, and alleged that the purchaser and defendant were brought together by plaintiff's efforts, and a sale at a price satisfactory to defendant was made, and claimed the agreed compensation.

The third count was the same in substance as the second, except that it averred that plaintiff's employment was at a reasonable commission.

There were appended the common counts, and a bill of

particulars was filed, which limited plaintiff's claim to one "for services in procuring a purchaser for stores No. 420 to 428, Michigan avenue, $1,000."

Under the state of the pleadings, we think the only question for trial was whether the plaintiff did in fact procure a purchaser, either at $20,000 or at a price satisfactory to the defendant. Each count avers that the purchaser was procured by the plaintiff, and there is no averment of any special damage for withdrawing the property from plaintiff's hands, except as it is averred that plaintiff produced Osborn as a purchaser, and that defendant availed himself of plaintiff's efforts. There is no averment in the first count of the declaration that the plaintiff was to have the exclusive sale of the property, and the plaintiff's own testimony shows that defendant was authorized to sell if he should himself get a purchaser for the property. This count alleges that defendant's wrong consisted in selling to a customer with whom plaintiff himself was at the time in negotiation. But this averment of the declaration is refuted by the undisputed testimony in the case. The plaintiff testified that defendant agreed to place the property in plaintiff's hands, fixed his price at $20,000, and agreed that if plaintiff succeeded in selling at $20,000 he was to have $1,000 commission for the sale; that defendant agreed to place the property in his hands exclusively and absolutely, with the reservation that, if he himself succeeded in finding a purchaser, he (defendant) would first notify plaintiff to bring in any customer that he had, before withdrawing the property. Plaintiff also testified that he agreed to use his best efforts; that he entered into negotiations with one Fyfe for a sale of the property, and that Fyfe, after considering the matter, declined to buy, but referred him to his partner, Mark B. Stevens, and introduced him to him as a possible purchaser; that Stevens looked into the matter, and stated

that if he bought he preferred to do so through his nephew, one George B. Stevens, who was in the real-estate business, and that he (plaintiff) finally agreed with Mark B. Stevens that in case he should become a purchaser he would divide commissions with George B. Stevens; that Mark B. Stevens never agreed to buy the property of him, but it was left in that way; that, a short time before the sale to Osborn was consummated, defendant told the plaintiff that George B. Stevens had brought Mr. Osborn to look at the property, and that he (plaintiff) then told the defendant that, if the property was sold to anybody connected with Mr. Stevens or with Mr. Fyfe (referring to Mark B. Stevens), he (the plaintiff) would claim his commission. The plaintiff also called the purchaser, Osborn, who testified that he purchased the property from defendant through George B. Stevens, paying $19,300; that he first learned of the property through Mark B. Stevens, but that his negotiations were with George B. Stevens; that he had no acquaintance with the plaintiff, and that he had never heard of him until after the purchase. Mark B. Stevens testified that he had, before the purchase by Osborn, given up the thought of purchasing the property, and communicated the fact to George B. Stevens, and it would seem that after this conclusion George B. Stevens negotiated the sale with Osborn. George B. Stevens, who was called for the defendant, testified that after the talk between Mark B. Stevens and plaintiff, and while Mark B. was still negotiating with a view of purchasing, he (George B. Stevens) went to see defendant, and the defendant distinctly refused to negotiate with him when he learned that his customer was Mark B. Stevens; that subsequently Mark B. Stevens said he should not buy, and told witness that possibly Osborn would take it; that thereafter he opened negotiations with Osborn, and the sale was finally effected.

We think the circuit judge was right in holding that the undisputed testimony showed that plaintiff did not bring Osborn and defendant together. Osborn did not acquire his knowledge that the property was for sale from the plaintiff, directly or indirectly; but it seems that Mark B. Stevens, having the interests of his nephew in view, suggested that he (the nephew) look up a customer, which he did. The defendant refused to sell either to Fyfe or Mark B. Stevens, except through the plaintiff, as he recognized the plaintiff's claim that he had negotiated with them. But no such claim was made as to Osborn. Confining our holding to the distinct question made by the pleadings and passed upon by the trial judge, namely, whether the plaintiff showed that Osborn, the purchaser, was a customer procured by him, we think the circuit judge's ruling in the negative was correct.

The judgment will be affirmed, with costs.

The other Justices concurred.

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DAVID ROBERTS v. THE CITY OF DETROIT.

Municipal corporations—Defective highways—Right of action—Husband and wife.

1. Municipal corporations, in Michigan, are liable for injuries resulting from their neglect to repair public highways only where made so by statute; citing *City of Detroit v. Blackeby*, 21 Mich. 84; *McCutcheon v. Village of Homer*, 43 Id. 483.

2. The right of action given by 3 How. Stat. § 1446c, for injuries sustained from defective highways, etc., is confined to cases of bodily injury, and the statute in terms limits the recovery of damages to the person so injured or disabled; but, in case of his death, the right of action survives, under 3 How. Stat. §

7397, to his administrator; citing *Racho v. City of Detroit*, 90 Mich. 92.

3. The words "other property," as used in 3 How. Stat. § 1446*d*, which provides that if any horse or other animal, or any cart, carriage, or vehicle or *other property*, shall receive injury or damage from defective highways, etc., the municipal corporation in fault shall pay the owner just damages, etc., being preceded by several words descriptive of particular kinds of property, are limited to things of a like kind.

4. Loss to a husband of the services of his wife, and money expended for surgical attendance and nursing, while she is suffering from injuries received by falling upon a defective sidewalk, do not constitute an injury to "other property," within the meaning of 3 How. Stat. § 1446*d*, and the husband has no right of action under said statute for the same.

5. 3 How. Stat. § 1446*e*, which makes it the duty of municipal corporations to keep in reasonable repair, so that they will be reasonably safe and convenient for public travel, all public highways, etc., that are within their jurisdiction and under their care and control and which are open to public travel, does not give a right of action to everybody because it imposes a public duty, but must be construed with 3 How. Stat. §§ 1446*c*, 1446*d*, which give certain rights of recovery for neglect to perform the duty thus imposed.

Error to Wayne. (Carpenter, J.) Argued June 26, 1894. Decided September 25, 1894.

Negligence case. Defendant brings error. Reversed, and no new trial granted. The facts are stated in the opinion.

John J. Speed, for appellant.

Thomas Hislop, for plaintiff.

HOOKER, J. Plaintiff recovered a judgment against the city of Detroit, based upon the loss of the services of his wife, who was injured by falling upon a defective sidewalk. Money paid for surgical attendance and nursing constituted a part of the damages recovered. The only

question presented for our consideration is whether he had a right of action.

Municipal corporations, in Michigan, are liable for injuries resulting from their neglect to repair public highways only where made so by statute. That there is no common-law liability was decided in the case of *City of Detroit v. Blackeby*, 21 Mich. 84, which was a crosswalk case. It was followed by *McCutcheon v. Village of Homer*, 43 Mich. 483. The earlier case contains an exhaustive discussion of the subject, holding that the duty of cities to repair highways is a public one, and that a private action does not lie for negligence in such cases. Subsequently a statutory liability was created, and it is under this statute that the plaintiff must recover, if at all.

The statute consists of several sections, viz., 3 How. Stat. §§ 1446*c*–1446*h*, inclusive. Section 1 (1446*c*) provides:

"That any person or persons sustaining bodily injury upon any of the public highways or streets in this State, by reason of neglect to keep such public highways or streets, and all bridges, sidewalks, crosswalks, and culverts on the same, in reasonable repair, and in condition reasonably safe and fit for travel, by the township, village, city, or corporation whose corporate authority extends over such public highway, street, bridge, sidewalk, crosswalk, or culvert, and whose duty it is to keep the same in reasonable repair, such township, village, city, or corporation shall be liable to and shall pay to the person or persons so injured or disabled just damages, to be recovered in an action of trespass on the case before any court of competent jurisdiction."

So far as this section is concerned, it limits the liability *to cases of bodily injury.*

The second section covers property interests. It is as follows:

"If any horse or other animal, or any cart, carriage, or

vehicle or other property, shall receive any injury or damage by reason of neglect by any township, village, city, or corporation to keep in repair any public highway, street, bridge, sidewalk, crosswalk, or culvert, the township, village, city, or corporation whose duty it is to keep such public highway, street, bridge, sidewalk, crosswalk, or culvert in repair shall be liable to and shall pay the owner thereof just damages, which may be recovered in an action of trespass on the case before any court of common [competent] jurisdiction."

The plaintiff's case does not fall within the first section (1) because he has no right to recover for the bodily injury—*i. e.*, pain and suffering, etc.—of another; (2) because the statute in terms limits the recovery to the person so injured or disabled. Under another statute the right of action has been held to extend to administrators of persons injured. *Racho v. City of Detroit*, 90 Mich. 92.

If plaintiff's case is covered by the second section, it must be because he is injured in his property. It is asserted that he is so injured, inasmuch as he has lost the services of his wife, and has been obliged to expend money for her recovery. We think that this position is not tenable. Services (which may or may not be rendered) can hardly be called present property, as was held in *Reed v. Belfast*, 20 Me. 246, where a father was denied relief upon a claim of loss of services of a minor son who had been injured upon a defective highway. Moreover, while this statute uses the word "property," it is preceded by several words descriptive of particular kinds of property, and the provision is thereby limited to things of a like kind. In the language of Chief Justice Shaw:

"Therefore, though the word 'property' is used, it follows words designating goods and chattels, and could not extend to mere rights." *Harwood v. City of Lowell*, 4 Cush. 310; *Chidsey v. Town of Canton*, 17 Conn. 475.

Counsel cites the following cases supporting this rule of

construction: *American Transportation Co. v. Moore,* 5 Mich. 368, 386; *McDade v. People,* 29 Id. 50; *Board of Education v. City of Detroit,* 30 Id. 505; *Brooks v. Cook,* 44 Id. 617; *Wood v. Railroad Co.,* 81 Id. 358, 362.

Our attention is called to the case of *Hunt v. Town of Winfield,* 36 Wis. 154, as an authority sustaining the plaintiff's position; but the Wisconsin statute is broader than that of Michigan, providing that if any *damage shall happen* to any person, his team, etc., such person may recover. It may therefore be distinguished from the statute of this State.

Counsel for the plaintiff makes the further point that section 1446*e* makes it the duty of cities to keep their streets in reasonable repair, so that they may be reasonably safe and fit for travel, etc., and argues that, the duty being imposed, the liability must follow; citing the case of *Borough of Nanticoke v. Warne,* 106 Penn. St. 373, in support of the proposition. The court in that case say:

"Whatever the law may be in other states, in Pennsylvania, townships and boroughs are bound to keep the roads and streets in repair, and are liable for injuries resulting solely from negligence in performing that duty. The liability is the consequence of the neglect of a statutory duty, and the right of a person does not depend on the construction of a statute providing who may recover, and for what, in case of injury from defect in the highway."

That case seems to recognize the fact that some states hold otherwise, and, as already seen, that is true of Michigan. See *City of Detroit v. Blackeby, supra,* which asserts the doctrine that the imposition of a public duty upon a municipal corporation does not create a private right of action for injuries sustained by an individual by reason of its non-performance.

Again, the statute under discussion gives certain rights of recovery, but only against corporations whose duty it is

to keep streets in repair. This appears from both sections 1446*c* and 1446*d*. The succeeding section prescribes the duty. As these sections must be construed together, and in the light of the previous decisions of the Court, it cannot be held that the effect of this statute was to give a right of action to everybody because it imposed a public duty. If such was the legislative intent, the first two sections were superfluous.

The judgment of the circuit court must be reversed. No new trial will be granted.

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

ABRAM BOLTON v. LAVINIA CALKINS.

102 69
145 368

Negligence—Fires—Question for jury.

On a calm morning in September, when there was a heavy dew on the ground, defendant's servant set fire to some grass, weeds, and brush, which he had cut the previous day, and piled in what is termed a "cathole" on defendant's land. There had been no rain for several weeks, and the surface of the cathole was dry, but it was very wet just beneath the surface. About three hours after the fire was set, and while defendant's servant was on the ground with a bucket of water to watch the fire, the wind began to blow violently, and what is termed a "whirlwind" took up some of the fire, and carried it over a furrow which defendant's servant had plowed around the cathole, and set the stubble on fire, and, despite his efforts and the efforts of others to whom he had given the alarm, the fire ran to plaintiff's land and damaged his timber. And it is held that the question of defendant's negligence in setting the fire was for the jury.[1]

[1]For cases involving the question of the negligent setting of fires, see *Richter v. Harper*, 95 Mich. 221, and note; *Needham v.*

Error to Lapeer. (Moore, J.) Submitted on briefs June 22, 1894. Decided September 25, 1894.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Geer & Williams, for appellant.

Stickney & Halpin, for defendant.

McGRATH, C. J. This suit is brought to recover damages alleged to have been caused by negligence in setting a fire on defendant's premises, and in negligently allowing said fire to escape to the premises of plaintiff.

The parties owned adjoining farms. There was what is termed a "cathole" upon defendant's land, the west side of which was some 23 rods east from plaintiff's line. There had been no rain for some weeks. The cathole was grown up with grass, weeds, and underbrush, and it contained a number of old logs. There was no water upon the surface, but it was very wet just beneath the surface; so much so that, when defendant's servant undertook to use a horse therein on the day previous to the fire, the horse got mired, and was extricated with difficulty. On the day before the fire was set,[1] one Seabury, defendant's servant, cut the grass, weeds, and brush, and placed the same in heaps, and plowed a furrow around the border of the cathole. At 8 o'clock on the following morning, during a calm, and while a heavy dew was on, the fire was ignited by Seabury, who had prepared himself with a bucket and water, and remained on the ground to watch it. At about 11 o'clock the wind began to blow violently, and what is termed a "whirl-

King, Id. 303; and for an exhaustive discussion of the question of liability for setting fires which spread to property of others, see note to *Brown v. Brooks*, 21 L. R. A. 255.

[1] The fire was set September 7, 1889.

wind" took up some of the fire, and carried it over the furrow some four rods beyond the edge of the cathole. Seabury attempted to fight it, and gave the alarm, but the fire ran through the stubble, and all efforts to arrest it proved futile. The jury found for defendant.

Plaintiff insists that the court should have instructed the jury that the setting of the fire, under the circumstances disclosed, was negligence; but we cannot concur in this view. In *Needham v. King*, 95 Mich. 303, 311, after a very full examination of the authorities, it is said that a party, having taken reasonable precaution to avoid the spread of fire, may, on a calm morning in a dry time, set fire to rubbish upon his premises; and if, during the necessary progress of the fire, a violent wind causes the fire to escape to his neighbor's premises, it cannot be said, as a matter of law, that he was negligent. As was further said in that case:

"The burning of a fallow and of brush, logs, and rubbish on the surface of one's own land is of frequent necessity in husbandry, and is a lawful act, unless the fire is set at an improper time, or is carelessly managed."

In determining whether or not the fire was set at an improper time regard must always be had to the character of the land, and the practical necessity for setting the fire at that particular time in order to accomplish the object in view. In the present case the land was swampy, and had evidently but recently reached a *status* when a fire could be made available. The case was, we think, one for the jury.

Error is assigned upon the admission of the answer to the following question put to defendant:

"At the time of the fire, did you have any intention of injuring Mr. Bolton by the fire?"

The declaration alleged that defendant had wrongfully, willfully, and negligently lighted the fire, and had wrong-

fully, willfully, and negligently allowed it to escape. The court, however, eliminated the question of intent from the case, by instructing the jury that the question of intent was not material, and, if the admission of the testimony was error, it was without prejudice.

The judgment is affirmed.

The other Justices concurred.

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JAMES A. BENAGE, ADMINISTRATOR, ETC., v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

[See *post*, 79.]

Injury to railroad employé—Contributory negligence.

1. A brakeman who rides in a standing position on the brake-beam of the tender of an ordinary road engine while backing across a river upon a trestle, at a rate of speed of from five to eight miles per hour, he having no place to hold onto except the draw-bar, against which he leans, and being in a position where he cannot see the engineer or fireman or be seen by either of them, is guilty of such negligence as will bar a recovery for injuries received by being struck by the end of a gate which had in some way become unfastened, and swung partly across the track, so as to come in contact with the rear end of the tender, and slide along, and crush the brakeman against the draw-bar.

2. The contention that the swinging in of the gate was not one of the dangers to be expected, and that the brakeman had the right to assume that the railroad company would discharge its duty, and not permit the gate to be unfastened or across the track at the time of the accident, as it was closed only at night and opened each morning, cannot be sustained, the brakeman being in a position where he could not escape injury if the tender backed into any other obstruction upon the track, and likely to be thrown off by any sudden starting of

the engine; nor will it do to say, under these circumstances, that, because it was the custom of others to ride in the same exposed place, therefore the brakeman was in the exercise of due care.

Error to St. Joseph. (Loveridge, J.) Argued June 7, 1894. Decided September 25, 1894.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the majority opinion.

R. R. Pealer, George E. Miller, and *Bishop E. Andrews,* for appellant.

C. E. Weaver (*George C. Greene* and *O. G. Getzen-Danner,* of counsel), for defendant.

LONG, J. Plaintiff's intestate, Jacob Gee, was a brakeman in the employ of the defendant company, which owned and operated a side track crossing the Kalamazoo river in the village of Otsego. This side track was placed across the river by the company for the purpose of running its cars from the main line to the Bardeen paper mill, to transfer from the mill its manufactured product. It was built upon a trestle, and in a circular form, until it reached the manufacturing plant. Across the river from the main line the Bardeen Paper Company had erected gates across the track, just at the edge of the river. One of these gates was hung on hinges so that, when unfastened, it would, of itself, swing across the track. The gates were so placed there with the consent of the defendant company. They were fastened to upright posts, which were fastened to bed-pieces extending partly under the track; and, as claimed by plaintiff, the posts and gates were so connected to the railroad track or the trestle that, by the jar of a train or engine crossing, the upper or right-hand gate would become unfastened, and swing across the track.

On July 18, 1892, an engine and a tender, connected,

were to be taken across from the main track to haul out some cars upon the other side. The engine was in the charge of the engineer and fireman. Plaintiff's intestate was a brakeman at work under the direction of the conductor of the train. As the engine and tender were about to be started across this trestle, backing up, the conductor of the train and Gee stepped upon the brake-beam, one each side of the draw-bar, to ride over, Gee intending to couple the engine to the cars which were to be hauled out. As the tender neared these gates, the one upon the side where Gee was riding, being unfastened, stood partly open, so that, as the rear end of the tender reached it, the end of the gate came in contact with the rear end of the tender, and, sliding along, crushed Gee against the draw-bar, and injured him so severely that he died from such injuries on the same day. This action is brought to recover damages for negligently causing Gee's death. On the trial the court directed a verdict in favor of the defendant company, on the ground that Gee was guilty of contributory negligence in riding on this brake-beam.

The case has been very fully and ably argued in this Court. Counsel for plaintiff contend that Mr. Gee's position on the brake-beam, though dangerous, yet was not the proximate cause of his injury and death, and therefore, if he came to his death through the negligence of the company, it cannot escape liability by saying the decedent was in a dangerous place; that the mere fact that he was in a position where he might be injured in some other way would not excuse the company from the consequences of its own neglect. It is contended that at least it was a question for the jury. It appeared from the testimony given on the trial that other employés of the defendant company had been for some considerable time accustomed to ride in this way on this and other

engines, and it is therefore claimed that Gee could not, as matter of law, be said to have been guilty of negligence in doing what was customary to be done there.

From a careful examination of the authorities, we are led to the conclusion that the court below was not in error, under the circumstances shown in this record, in the direction given to the jury. The engine and tender were similar to those used in the general business of the company over the line of its road. It was not a yard engine. It had no foot-board, like those at the rear end of tenders upon which so often employés ride back and forth to attend switches or to couple or uncouple cars. The brake-beam was about 7 inches in width at the center, and continued for 12 inches each way, when it tapered down to 3½ inches, and was only 5 feet 8 inches long. It was 29 inches from each end of this beam to the outside of the tender. The men standing on this beam had no place to hold on, except the projection of the draw-bar, against which they leaned. In this position they could not see the engineer or fireman, or be seen by them. The engine was running from five to eight miles an hour, according to the testimony. All the witnesses, without exception, pronounced it an unsafe place to ride. The rules of the company, with which the deceased must have been familiar, provide, among other things:

"It is made hereby the right and duty of every employé, under all circumstances, to take sufficient time before exposing himself to danger to make such examination as is here required, and refuse to obey any order which would imperil his life or limb."

From the testimony, therefore, which was substantially uncontradicted, it appears that this was a dangerous place in which to attempt to ride. With no place to hold by the hands, except the draw-bar, and standing upon this narrow and confined place, with nothing to alight upon

but an open trestle if he jumped, and out of the sight of the engineer and fireman, and presumably not within their hearing above the noise of the engine in motion, any person riding in this way would be perfectly helpless, should accident happen. Yet counsel contend that the swinging in of the gate was not one of the dangers to be expected, and that the deceased had the right to assume that the defendant would discharge its duty, and not permit the gate to be unfastened or across the track at that time, as it was closed only at night, and opened each morning. But the deceased was in a position where he could not escape injury if the tender backed into any other obstruction upon the track, or he was likely to be thrown off by any sudden starting or stopping of the engine. It will not do to say, under these circumstances, that, because it was the custom of others to ride there, therefore he was in the exercise of due care. It is apparent that the deceased must have known, as others did, that it was dangerous, and that he was willing, contrary to the rules of the company, to take his chances. It appeared from the testimony that he was not compelled to ride there. He could have gone into the cab of the engine, as brakemen were permitted to ride there, and thus have been in a safe place, compared to riding on the brake-beam.

The case falls within the rule laid down in *Glover v. Scotten*, 82 Mich. 369. There the deceased was riding on the cow-catcher, in a sitting position, and with his legs hanging over. It was said:

"The difference in danger between standing on a platform of a regular switch-engine, and sitting on a cow-catcher, with one's legs hanging over it, is apparent. In the one case the switchman is ready to jump upon the approach of danger; in the other, considerable time must elapse before he could recover his standing position upon the pilot beam, and put himself in readiness to avoid danger."

Here the deceased was utterly helpless. He could not

avoid danger by anything he could do. He could not jump, or protect himself at all, and this he must have known when he took his place there. It cannot be said that the position he was in was not the proximate cause of the injury. He was in the only place where he could have been injured by the gate, or any collision by the rear end of the tender, and a safe place had been provided. As was said in *Glover v. Scotten, supra,* "nor would the fact that switchmen were in the habit of riding upon the cow-catcher excuse the deceased, as between him and defendant."

We think the case conclusively shows that the deceased was guilty of contributory negligence, and there was no question in it for the determination of the jury.

The judgment must be affirmed.

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

MONTGOMERY, J. *(dissenting).* The facts are sufficiently set forth in the opinion of Mr. Justice LONG. I think the case should have been submitted to the jury. It was the duty of the defendant to provide a reasonably safe place for plaintiff's intestate to work, and it can hardly be contended that it conclusively appeared on the trial that defendant had performed this duty, in view of the fact that the motion of the train was sufficient to cause the gate to become unfastened, and swing around so as to come in contact with any person who happened to be riding on the rear of the train. Nor do I think that negligence of the plaintiff's intestate, which contributed to the injury, was conclusively shown. It would not have been negligent to ride upon the rear of the train. It is true it is said that the position which decedent occupied on the rear of the train was such as to render him subject to danger, but what danger? Obviously, the danger of being thrown from his post by the motion of the car.

But the injury to decedent did not result from this cause. Certainly the fact, if it is a fact, that he assumed such a risk as that of falling from the car, did not make him a legitimate mark for the trespass or negligence of others. I think the case falls within the principle of *Gray v. Scott*, 66 Penn. St. 345, in which case a car was negligently shoved over the end of a track, and killed a boy playing in the passage. The boy had been frequently warned not to play in the passage, on account of danger from trucks and wheel-barrows; but it was held that, as he had no reason to expect harm from the cars, from being in the passage, his failure to heed the warning was not negligence contributing to the injury. See, also, section 33 of Beach on Contributory Negligence, and cases cited. I do not think it can be said, as a matter of law, that one who is riding on the rear of a train moving backward is bound to anticipate obstructions on the track. This being so, it is immaterial whether his position subjected him to other dangers than that which occasioned the injury.

I do not attempt to distinguish *Glover v. Scotten*, 82 Mich. 369, for the reason that I regard the case as a departure from principle.

McGRATH, C. J., did not sit.

JAMES A. BENAGE, ADMINISTRATOR, ETC., v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

[See *ante*, 72.]

Contributory negligence.

This case is ruled by *Glover v. Scotten*, 82 Mich. 369, and there is nothing in the cases cited or arguments made on the rehearing to change the views expressed in the former majority opinion.

Rehearing, upon application of plaintiff, of case reported in 102 Mich. 72. Argued January 29, 1895. Former decision affirmed April 26, 1895. The facts are stated in the several opinions.

R. R. Pealer, George E. Miller, and *Bishop E. Andrews,* for appellant.

C. E. Weaver (George C. Greene and *O. G. Getzen-Danner,* of counsel), for defendant.

LONG, J. This case has been reargued, and the points raised fully and carefully reconsidered.

I am unable to find anything in the cases cited or the arguments made to change my views expressed in the former opinion. The case falls so clearly within *Glover v. Scotten,* 82 Mich. 369, that it must be ruled by it, and I am not prepared to overrule that case.

Judgment must be affirmed.

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

MCGRATH, C. J. (*dissenting*). Plaintiff's intestate was a brakeman upon one of defendant's way freight trains, running between Grand Rapids and White Pigeon. The

Bardeen Paper Company has two mills at Otsego, one lying between the main track and the river, and the other located on the other side of the river. A spur ran from defendant's main track to mill No. 1, and across the river, upon a trestle, to mill No. 2, the track being half circular in form. The train stopped at Otsego, left some cars at mill No. 1, and the engine, with tender attached, started in a westerly direction to back over the trestle to mill No. 2. The paper company had been allowed by defendant to erect a gate upon the trestlework about 100 feet from the easterly end thereof. The object of the gate was to prevent persons from crossing the trestle at night or on Sundays. It had been in place two or three months. At first, it seems to have been closed over the track each night, but for some time it had been closed from Saturday night to Monday morning only. When opened, the nose of the gate faced westerly, and it was supposed to be fastened with a hook to a post placed for that purpose. The engine was not a yard or switching engine, but was an ordinary freight engine, without foot-boards. As the engine started over the trestle, decedent and the conductor of the train, after attending to the switches, mounted the brake-beam in the rear of the tender, one on each side of the draw-bar. As they approached the gate, it seems to have been unfastened, and the vibrations of the trestlework, to which the gate was attached, caused it to swing to, the end of the gate striking the rear of the tender, grazing along the rear end of the tank, and crushing decedent between the end of the gate and the draw-bar. The testimony tended to show that the trestle was a rickety structure. Both parties saw the gate start, and signaled the engineer, who applied the brakes, and stopped the engine, but not in time to avoid the injury. The gate, when open, was but 39 inches from the rail, and the tender projected some distance

beyond the rail, so that the distance between the open gate and the tender was but slight.

The court below instructed the jury that decedent was guilty of contributory negligence, in that he chose a dangerous place to ride upon the engine, and directed a verdict for the defendant. In this I think the court erred. The proximate cause of the injury was the closing of the gate. The structure was there by and with the consent of the defendant. It was not a part of defendant's system. The gate was upon a spur track, which had been used by the company but occasionally in the course of a period of two or three months. In *Sweet v. Railroad Co.*, 87 Mich. 559, it was held that constructing and maintaining a side track so near to a building in the yards of the company as to endanger the lives of its employés while switching cars on said track was a violation of the duty of the company to provide a safe place for its employés to work in; and it was also held that, in the absence of testimony tending to show that one so injured had any reason to apprehend the existence of such special danger, it was a question for the jury, under all the testimony, to determine whether he knew or ought to have known of such danger.

There was no rule of the company prohibiting riding upon brake-beams. There was abundant testimony tending to show that it was customary upon such engines to ride upon the brake-beams, when engaged in like service. The conductor of the train was with the decedent upon the brake-beam when the accident occurred. The ordinary switch engine is provided with a foot-board, which occupies the same relative position which did this brake-beam, upon which it is expected and intended that switchmen shall ride in whatever direction the engine is moving. It is true that the foot-board in such case projects at each end beyond the track, but it also extends across the rear end

of the tender, and the same accident might have occurred had the decedent been riding upon the foot-board of a switch engine. At the point where the collision occurred, there was an open trestlework, and the track was some 12 feet above the water. In jumping from the car, the same danger would have confronted him in either case. It is urged that hand rails are provided upon yard engines; but the absence of them in the present case did not cause, contribute to, or aggravate the injury. The decedent was not knocked from the car or injured by a cause rendered concurrent by reason of his situation; indeed, he retained his place, and was taken therefrom after the collision. In *Preston v. Railway Co.*, 98 Mich. 128, we held that the failure to fasten the tank to the frame upon which it rested, so as to maintain its place in case of a collision, could not be regarded as negligence. In *Noble v. Railway Co.*, 98 Mich. 249, it was held that where a passenger attempts to escape from a street car, which has run off the track, and while alighting is injured, the fact that the passenger was riding upon the platform of the car at the time cannot be said to have been the proximate cause of the injury.

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

MONTGOMERY, J., concurred with MCGRATH, C. J.

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HATTIE M. CRAWFORD v. MEDAD VINTON.

Chattel mortgage—Condition—Recognizance—Notice.

The term "appear," as used in the condition to a chattel mortgage executed by a respondent in a criminal case to secure the mortgagees for becoming sureties for his appearance at a certain term of court to answer an information on file against him, and conditioned that, if the mortgagor shall "appear" at the next jury term of said court, then the mortgage shall be void, must be construed with reference to the obligation which the sureties have undertaken, and the appearance of the mortgagor at the term named will not void the mortgage, so far as notice to subsequent purchasers is concerned.

Error to Grand Traverse. (Ramsdell, J.) Submitted on briefs June 8, 1894. Decided September 25, 1894.

Trover. Defendant brings error. Reversed. The facts are stated in the opinion.

Umlor & Pulcipher, for appellant.

Totten & Phelps, for plaintiff.

MCGRATH, C. J. This is trover for a span of horses seized by defendant under a chattel mortgage given May 29, 1891, by one Blakely, of Traverse City, Grand Traverse county, to Lars Sogge and Rudolph Ruff. The condition of the mortgage was that "if the said Blakely shall appear at the next jury term of the circuit court in Leelanaw county, Mich., then this mortgage shall be void and of no effect." Indorsed upon the mortgage was the following:

"This mortgage is given and is for the express purpose to secure the above-named party on his becoming surety in the penal sum of $500 for his (George A. Blakely's) appear-

ance at the next term of court, in November, 1891, in and for the county of Leelanaw, Michigan."

The court found the following facts:

"That on the 29th day of May, 1891, George A. Blakely made a chattel mortgage on a span of gray geldings, the chattel mortgage being in favor of Lars Sogge and Rudolph Ruff, to secure them against loss that they might sustain by reason of their entering into a recognizance with George A. Blakely as principal, said recognizance requiring Mr. Blakely's appearance at the circuit court for the county of Leelanaw, at the then next November term of court, to answer to an information that might be on file against him at that term; that, after he gave the mortgage, Mr. Blakely removed from the township of Traverse City, where he resided and where the mortgage has been recorded, to the township of Helena, in Antrim county, and took with him the property in question; that he remained there for some time, and held the property there; that he placed a chattel mortgage upon it in favor of the Bellaire Bank, and subsequently sold the property to Bass and Dewey; that Bass and Dewey held possession of the property for some time, and then sold it to Mr. Edward Clark, of Kalkaska; that subsequently Mr. Clark sold the same property to the plaintiff in this case; that in March, 1893, the property was taken upon the chattel mortgage by the agent of the original mortgagees, and claimed as theirs; * * * that George A. Blakely appeared at the November term of the circuit court for the county of Leelanaw, in 1891, to answer to an information filed against him, in accordance with the requirements of the chattel mortgage; that, at the time of and during that session of court, Mr. Blakely and the mortgagees agreed that the mortgage should continue in force as long as the recognizance continued in force; that this agreement was not put in writing, nor was it attached to the mortgage, so that the record of the mortgage showed nothing of the agreement that had been entered into between the parties at that term of court; * * * that affidavits of renewal were filed each year before the expiration of the time; that the mortgage was not recorded or filed in the township of Helena, in Antrim county, or in any of the townships where the subsequent purchasers resided; * * * that this plaintiff was a subsequent purchaser in good faith, without notice of the oral agreement between Mr. Blakely and the mortgagees."

Upon these findings the court concluded:

"The condition in this mortgage was that Mr. Blakely should surrender himself for trial, or to answer to the information on file against him, and, if he so appeared, then the mortgage was to be null and void. This was notice to every one interested in the property, and as it appears, as a matter of fact, that this condition in the chattel mortgage was fulfilled on the part of Mr. Blakely, the chattel mortgage became null and void at that time, so far as any notice to any subsequent purchasers might affect it. That any agreement entered into between Mr. Blakely and the mortgagees orally at that time, unless that agreement was brought home, by actual notice, to subsequent purchasers, could not be inferred from the chattel mortgage itself, and therefore held as constructive notice of the interest that the mortgagees still held as between them and Mr. Blakely, and that consequently they lost their rights as to subsequent purchasers in good faith and without notice."

Conceding that the record of the chattel mortgage operated as constructive notice of such facts only as would have been learned from the record if examined, and that the rule that what is sufficient to put a purchaser upon inquiry is notice of whatever the inquiry would have disclosed applies to actual, not constructive, notice, we think the construction given to the condition of the chattel mortgage in the present case was too narrow. It is evident from the face of the mortgage that it was given to indemnify the mortgagees as sureties for the appearance of Blakely at the next jury term of the circuit court, and the court finds that such was its purpose. A recognizance is a debt of record entered into before some court, judge, or magistrate having authority to take the same. Its object is to secure the presence of the defendant to perform or suffer the judgment of the court. The sureties are regarded in law as the keepers of their principal, and a continuance of the cause would not operate as their discharge. An appearance is defined as "the formal proceeding

by which a defendant submits himself to the jurisdiction of the court;" "the prescribed mode of complying with the exigency of the process." The usual form of a recognizance is for defendant's appearance at, etc., and not departing without leave. The term "appear," in the condition, must be construed with reference to the obligation which the sureties had undertaken, as disclosed by the instrument. The findings fail to disclose when the plaintiff purchased the property. The fact that the mortgage was kept alive by renewals properly filed is found, and it does not appear that the plaintiff purchased the horses before the filing. The renewals were notice of a claim still existing under the mortgage.

The judgment is reversed, and a new trial awarded.

The other Justices concurred.

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EDWARD CORNING AND ANNA CORNING, EXECUTORS OF THE LAST WILL AND TESTAMENT OF WILLIAM CORNING, DECEASED, v. FRANK S. BURTON, MILON W. ELLSWORTH, FREEMAN B. DICKERSON, AND HARVEY G. MCQUEEN.

Equity practice—Subpoena—Return—Mortgage foreclosure—Deficiency—Assumption of mortgage.

1. The subpoena and underwriting provided for by Chancery Rule No. 122 may properly be treated as one instrument; and a return by an officer that he served a copy of the "within subpoena," which subpoena upon its face contains the underwriting, leaves no room to doubt that service was made of all that appears upon the face of the subpoena, and no more, and is sufficient.

2. A personal decree may be rendered in a foreclosure case against a grantee of the mortgagor, who has accepted a deed stating that it is subject to the mortgage, which the grantee assumes and agrees to pay.[1]

3. A grantee who is thus liable cannot escape liability by inserting in his deed of the mortgaged premises a like agreement by his grantee to pay the mortgage debt.

4. Doubtless equity would say that the second grantee was primarily liable, the first grantee next, and the mortgagor last; but all are liable.

Appeal from Midland. (Hart, J.) Argued June 27, 1894. Decided September 25, 1894.

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[1] LIABILITY OF GRANTEE OF MORTGAGED PREMISES TO PAY THE MORTGAGE.

For cases bearing upon the question of the liability of the grantee of mortgaged premises to pay the mortgage, see:

Action at Law for Deficiency.

Hicks v. McGarry, 38 Mich. 667, holding that the grantee is not liable to the mortgagee in an action at law for the balance of the mortgage debt remaining unpaid after the foreclosure of the mortgage, where the basis of liability is the agreement to pay contained in the deed.

Illustrative Cases.

1. *Comstock v. Smith*, 26 Mich. 306, where a married woman conveyed Canadian oil land subject to a purchase-money mortgage. The deed provided that the grantees should have quiet possession of the land, free from all incumbrances, except said mortgage, upon which there was due a specified sum, which was to be deducted from the consideration stated in the deed, and paid by the grantees to the mortgagee. The grantees failed to make such payment, and the grantor filed a claim against the estate of one of the grantees, based upon said provision in the deed. The estate objected to the allowance of the claim on the ground, among others, that the claimant being a married woman, and the land being in Canada, and her notes and mortgage having been made there, the same were not enforceable against her on account of her alleged disability, and that her immunity from legal liability, though of a personal nature, invalidated her claim against the estate. And it was held that the decedent and his estate were precluded from raising said objection.

2. *Crawford v. Edwards*, 33 Mich. 354, where the defendant accepted a deed stating that the same was made subject to a cer-

Bill to foreclose a mortgage. Complainants appeal from a decree denying their petition for execution for deficiency. Reversed, and decree entered in accordance with prayer of petition. The facts are stated in the opinion.

H. P. Smith (*Camp & Brooks* and *W. G. Gage*, of counsel), for complainants.

Brooke & Spalding, for defendant Dickerson, who alone resists the claim of complainants on appeal.

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tain mortgage, describing it, which the grantee assumed and agreed to pay as part of the consideration expressed in the deed. And it was held:

a—That the acceptance of such a deed binds the grantee as effectually as though it had been *inter partes*, and executed by both grantor and grantee; that the obligation of the grantee inures in equity to the benefit of the mortgagee, who may enforce it in a bill to foreclose his mortgage.

b—That the grantor is not discharged except at the option of the mortgagee, who may treat both the grantor and grantee as principal debtors to him, and have a personal decree against either or both.

c—That the grantee cannot avoid liability under his agreement because, on account of a defective description, he acquired no legal title under his deed, where he obtained possession thereunder of the premises intended to be conveyed, with the right by virtue thereof to have the mistake corrected, but, instead of availing himself of such right, permitted the premises to be fraudulently conveyed to a third person in order to cut off the mortgage.

3. *Miller v. Thompson*, 34 Mich. 10, where complainant filed a bill to foreclose two mortgages given to him by defendant's grantor. Defendant's deed was the usual warranty deed, with the following clause added at the conclusion: "Excepting, however, as against two certain mortgages held by Sidney D. Miller, of Detroit, amounting to $6,000 as of this date, which mortgages the party of the second part assumes and agrees to pay." The defendant denied the legal execution of the mortgages, and denied that so much was due upon the mortgages as was recited in the deed. He claimed, further, that the bill was fatally defective because the mortgagor was not made a party, and that complainant was not entitled to a personal decree against him because the facts made out no novation which would substitute him as the debtor in place of the mortgagor. And it was held:

HOOKER, J. On May 8, 1886, Burton and Ellsworth executed and delivered to Corning a promissory note for $3,200, and secured it by a mortgage upon real estate. In October, 1887, Burton deeded an undivided half of the premises to Dickerson, the deed stating that it was subject to a mortgage of $3,200 and accrued interest thereon, "one-half of which incumbrance and debt said second party [*i. e.*, Dickerson] assumes and agrees to pay." On November 10, 1887, Ellsworth deeded to Dickerson the other undivided half of the land, by a deed containing similar provisions. On July 25, 1888, said Dickerson conveyed the

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a—That the defendant was not in position to dispute either the legal execution of the mortgages, or the amount which his grantor by his deed admitted was at that date due and payable upon them; that defendant was allowed for said amount as a part of the purchase price which was to be paid by him, and the effect of the arrangement was that his grantor ordered it to be paid to the mortgagee; that, if the grantor had legal defenses to the mortgages, he waived them in this arrangement, and, if he directed more to be paid to the mortgagee than was actually due, that fact concerned no one but the mortgagee and himself.

b—That the mortgagor was a proper, but not a necessary, party defendant; that no relief was sought against him, nor could any decree be rendered that would injuriously affect his interests; that, while he might have deductions or claims that he would be entitled to have allowed to him if he were proceeded against on the mortgage debt, he could not complain if the mortgagee collected of defendant the sum that in the sale he had directed the latter to pay over to the mortgagee; that, if this overpaid the mortgage, the mortgagor might call upon the mortgagee to account, but the decree would protect the grantee, and that is all he could insist upon.

c—That it was not essential that there should have been a novation; that it was sufficient that the defendant, as between himself and his grantor, had agreed to pay the mortgage; that this agreement brought the case within the equity of the statute (How. Stat. § 6704), which provides that, "if the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person

premises to McQueen, a similar provision in the deed requiring him to pay the mortgage mentioned. Subsequently the executors of Corning filed the bill in this cause, and obtained a decree of foreclosure and sale upon bill taken as confessed for want of appearance, under which the premises were sold by the commissioner, and the usual proceedings followed. Burton, Ellsworth, Dickerson, and McQueen were made defendants by the bill. Under a petition for execution against them for a deficiency, Dickerson and McQueen answered, and were heard by counsel. From a denial of the prayer of this petition, complainants appeal.

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as the mortgagor, and may enforce such decree as in other cases."

4. *Taylor v. Whitmore*, 35 Mich. 97, where the owners of an undivided one-half of certain lands mortgaged the same for $1,350, after which they conveyed the lands by warranty deed for an expressed consideration of $2,400, and the grantee assumed and agreed to pay the mortgage as a part of said consideration. A bill was filed to foreclose the mortgage, to which the mortgagors and their grantee were made parties, and a decree was made in form against the entire premises, but no personal decree was made against the grantee. The grantee appealed, claiming that only the interest which he acquired under his first deed could be affected by the foreclosure proceedings, and that the remaining interests, which he afterwards acquired by quitclaim deeds from the owners, were exempt from the burden of the mortgage. And, in affirming the decree, it was held that, by accepting a deed from the mortgagors in which he assumed and agreed to pay the mortgage, the grantee took the land subject to the payment of said incumbrance, and also bound himself personally to pay the same; that it appeared from the evidence that he obtained conveyances from the owners of the remaining interests in the land because of the first conveyance, and the representations made by him or his agent on the strength of that conveyance, and that he only paid $7 for said latter deeds; that in an action, therefore, for breach of the covenants of warranty in the deed from the mortgagors, the amount he would be entitled to recover would be but small; and that there was nothing in that fact which would make it inequitable to hold the entire premises subject to the payment of the mortgage, as in form they were liable under the mortgage and in the first deed.

Three points are pressed by counsel for Dickerson, who alone resists here the claim of complainants:

"1. That the record, as it stood when the application for execution was argued and decided, showed that the court never got jurisdiction to make a personal decree against Dickerson.

"2. That the application for leave to file Murphy's second affidavit, showing service of a copy of the underwriting, being substantially an application to amend a return so as to show such jurisdiction, was improperly made after the decision of the case; that, whenever made, notice thereof should have been served on Dickerson personally; and that the order granting the petition was therefore made without jurisdiction, and was nugatory.

"3. That no execution for deficiency can issue against defendant Dickerson, because he was not a party to the

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5. *Higman v. Stewart*, 38 Mich. 513, 522, holding that the doctrine which makes a grantee responsible to a mortgagee in consequence of a provision in the grant that the grantee assumes the payment of the mortgage debt has been maintained in two forms:

a—Where a special agreement has been made between the seller of the equity of redemption and the purchaser that the mortgage debt shall be considered purchase money, but be left in the hands of the purchaser for the use of the mortgagee, and this, it has been said, affords a valid basis for a direct claim by the mortgagee against the purchaser thus holding the mortgage debt for his use; but this view, however, has been expressly overruled by courts of high authority, and upon the ground of want of privity on the part of the mortgagee.

b—Where the grantee, upon consideration, agrees with the grantor to pay his debt, whereby, as between them, the grantee becomes principal debtor and the grantor his surety, and, in accordance with the principle which in equity entitles the chief creditor to receive the benefit of a security held by a surety, the mortgagee creditor is entitled to the benefit of the agreement made by the purchaser of the equity of redemption. In this aspect the doctrine does not contemplate an obligation from the grantee to the mortgagee, but a promise from the grantee to the mortgagor, which may be caused to inure by an equitable subrogation to the mortgagee's benefit; and the court seem to have thought in *Burr v. Beers*, 24 N. Y. 178, that the mortgagor, as actual promissee, was an indispensable party for the purpose of subrogation.

6. *Winans v. Willkie*, 41 Mich. 264, holding:

mortgage, and had no contract relations with the mortgagee, and therefore could not be sued at law by the mortgagee to recover the deficiency."

An examination of the files shows that the original subpoena and underwriting were regular. The return of the officer shows that he "served the within subpoena * * * personally * * * by delivering to each of said defendants a true copy of the within subpoena, inscribed copy, * * * and * * * showed * * * the original subpoena, with the seal," etc. It is argued that this is not a sufficient return, and that it was necessary that the return show not only that the subpoena was served, but that the underwriting was also served. The case of

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a—That where the words inserted in the deed, and which are claimed to impose a legal obligation on the grantee to pay an existing mortgage, are of doubtful meaning or ambiguous, evidence showing the value of the premises, or the agreed consideration therefor, and whether a sufficient or any part of the same was retained by the grantee for the purpose of paying the mortgage indebtedness, is material as an aid in the construction thereof.

b—That a person may purchase and accept a conveyance of mortgaged premises *subject* to the incumbrances thereon, and incur thereby no personal responsibility; but where, however, he takes a conveyance assuming therein the incumbrances, he thereby becomes personally responsible for the debt, equally as though an express promise to pay were contained in the deed which he accepts, within the principles laid down in *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Id. 10.

c—That where mortgaged premises are sold, and the deed of conveyance contains a clause that the grantee assumes all indebtedness on the premises, and he afterwards takes an assignment of the mortgage to himself, the mortgage is thereby extinguished, and he cannot thereafter assign the same to a third party, and confer upon him any right to foreclose the same.

7. *Booth v. Insurance Co.*, 43 Mich. 299, where the assignee of insolvent debtors, who had accepted a deed of mortgaged premises subject to the payment of the mortgage, filed a bill to determine the amount of the mortgagee's claim against the assignors, so that the assignee might pay the mortgagee a dividend out of the funds in his hands. And, in affirming a decree dismissing the bill, it was held:

Turrill v. Walker, 4 Mich. 185, is cited in support of the proposition. That was an action which was attempted to be commenced by declaration and rule to plead. The return failed to show that any notice of the rule to plead was served. It was said that this was an irregularity. The case, however, did not go off on that point, and the Court intimated that the irregularity had been waived.

The cases are not parallel, however. In the commencement of actions at law by declaration the statute (How. Stat. § 7291) requires two things to be done, viz., file declaration and enter rule to plead. The declaration must be served, and so must a notice of the rule. But there is nowhere any implication that the rule or notice is a

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a—That the assignors incurred a liability only as purchasers of the mortgaged lands, subject to the payment by them of the mortgage; that they never assumed any obligation to the mortgagee, and, if their implied undertaking arising from the acceptance of their deeds was to be treated as a promise on their part to pay the mortgage, it was, nevertheless, a promise on which no suit by the mortgagee could be maintained, because it was a promise not made to the mortgagee, but to third persons.

b—That, in a suit to foreclose the mortgage, the party who is chargeable with an implied promise of this sort may be joined as a party defendant, and a decree obtained against him for any deficiency that may exist when the land is sold; that this is only by way of enforcing an equity by subrogation, and, if the party thus made liable is compelled to make payment, he is doubtless entitled to be subrogated to collateral securities, if any, which the mortgagee may have held.

c—That, in order to enable the mortgagee to enforce any such equity against the purchasers, it is necessary that the purchasers and the land mortgaged be within the same jurisdiction; that no personal decree can be made in one jurisdiction against parties not personally served or not submitting voluntarily by appearance; that there was therefore in this case, where the purchasers of the land resided in Michigan and the land was in Illinois, neither a direct liability on their part to the mortgagee, nor a contingent liability, except such as depended upon the voluntary action of the purchasers themselves.

8. *Canfield v. Shear*, 49 Mich. 313, where a purchaser bought mortgaged premises of the mortgagor, his deed being expressly

part of the declaration. The notice may be a different and separate paper. It is reasonable, therefore, to hold that its service be shown by the return. The form of chancery subpoenas is prescribed by this Court. By Rule 122 it provided for a change in the form of the subpoena as a means of preventing the misapprehension upon the part of defendants that a personal appearance was required upon the return-day under a pecuniary penalty. The rule provides that in lieu of the old form the new subpoena "shall contain a notice of the filing of the bill, and of the time when appearance may be entered on penalty of default," and adds that "there shall be underwritten a notice designating against what defendants a personal decree is asked." It continues, "Such subpoena shall be

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made subject to the mortgage, but not in terms obligating him to pay it. The grantee agreed to pay a specified sum for the land, and paid the same except the amount owing on the mortgage, which the mortgagee would not receive, and for this reason its payment was postponed until the mortgage fell due. Both the mortgagor and the agent of the grantee who negotiated the sale understood that the grantee was to make such payment. And it was held that the assumption of the mortgage debt by the grantee, as between himself and the mortgagor, was fully made out; and that to cast upon the mortgagor any deficiency that might exist after a sale would take from him a portion of the purchase price which the grantee agreed to.

9. *Gage v. Jenkinson*, 58 Mich. 169, holding that one who takes a deed of mortgaged land will be personally liable on the foreclosure of the mortgage if his deed expressly binds him to pay the mortgage; but a covenant to do so cannot be implied by either deed or mortgage.

10. *Shelden v. Estate of Warner*, 59 Mich. 444, 449, holding that it is only where a personal decree is sought against sureties, or other persons besides the mortgagor, that such decree must be based on some written obligation.

11. *Winsor v. Ludington*, 77 Mich. 215, holding that in order to authorize a decree for the payment of the deficiency on a foreclosure sale against a third party, under How. Stat. § 6704, the obligation or evidence of debt of such party must be one upon which he can be sued at law to recover the mortgage debt.

in substantial compliance with the form hereto appended." It requires all to be upon one page. The form appended is entitled "Form of Subpoena." This is followed by a form of subpoena proper and the underwriting. This may properly be treated as one instrument, as the Court evidently considered it. A return by an officer that he served a copy of the within subpoena, which subpoena upon its face contains the underwriting, leaves no room to doubt that service was made of all that appears upon its face, and no more. In *Vaughan v. Black*, 63 Mich. 216, the Court held that a failure to serve the notice invalidates a decree for deficiency, but it is not intimated that the officer must return specifically that he served the underwriting. We are of the opinion that the original return was sufficient, and it therefore becomes unnecessary to discuss the question of amendment.

We consider it unnecessary to discuss at length the proposition that a personal decree may be rendered in a foreclosure case against a grantee of the mortgagor, who has accepted a deed stating that it is subject to the mortgage, which the grantee assumes and agrees to pay. It is settled by repeated decisions in this State and in New York, from which state we borrowed the statute (How. Stat. § 6704) which authorizes it. Such decisions will be found collected in the note to section 6704. Just such a decree was rendered in this case by a court having full jurisdiction of the subject-matter and the parties, from which decree defendants did not choose to appeal.

But, if that decree should be thought not conclusive, we have no doubt of the defendant Dickerson's liability upon this record. It is claimed that by his deed to McQueen upon his undertaking to pay he was released from liability. But we think otherwise. When Dickerson bought the premises, a part of the consideration was his promise to pay this mortgage. His grantors had, and still have, a

right to require him to perform that promise, just as much as the mortgagee has the right to say that the mortgagors are still indebted to him, notwithstanding their sale of the land upon the promise that another would pay the debt. The sale to McQueen does not deprive any one not a party to it of rights then existing against Dickerson. Doubtless equity would say that McQueen was primarily liable, Dickerson next, and the mortgagors last; but all are liable. To hold otherwise would be to say that Dickerson could escape his personal liability, and compel the mortgagors to pay, by deeding to an impecunious person who should assume the debt.

The decree of the circuit court will be reversed, and one entered here in accordance with the prayer of the petition, with costs of both courts.

The other Justices concurred.

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EDWARD CORNING AND ANNA CORNING, EXECUTORS, ETC., v. FRANK S. BURTON ET AL.

[See *ante*, 86.]

Mortgage foreclosure—Execution for deficiency—Jurisdiction.

1. A petition for an execution for deficiency cannot be resisted on grounds inconsistent with the decree.
2. A subsequent purchaser of mortgaged premises, who in his deed had assumed and agreed to pay the mortgage, claimed the right on the hearing of a petition for an execution for deficiency to question the return of service of the original subpoena, he having denied in his answer to the petition that the subpoena was served upon him. And it is held that said defendant might have had the question of the validity of the decree determined by a proper motion before enrollment, or

upon bill of review after enrollment, in which case all persons interested should be made parties; but that such question was not open for hearing in said ancillary proceeding.

Rehearing, upon application of defendant Dickerson, of case reported in 102 Mich. 86. Submitted on briefs January 8, 1895. Former decision affirmed April 16, 1895. The facts are stated in the main opinion.

H. P. Smith (*Camp & Brooks* and *W. G. Gage*, of counsel), for complainants.

Brooke & Spalding, for defendant Dickerson.

HOOKER, J. Upon a rehearing of the above cause the defendant Dickerson claims the right to question the return of service of the original subpoena in the foreclosure case, having denied, by his answer, that any service was made upon him.

It has been indicated in several cases that the validity of the decree cannot be questioned in this proceeding. *Ransom v. Sutherland*, 46 Mich. 489; *Wallace v. Field*, 56 Id. 3; *Haldane v. Sweet*, 58 Id. 429. The defendant might have the question of the validity of the decree determined by a proper motion before enrollment, or upon bill of review after enrollment. In such case all interested should be made parties, and complete relief to all could be given. We think either would be a better practice than to open the question to an informal hearing in an ancillary proceeding, and therefore adhere to the doctrine stated in the cases cited, viz., that petition for execution for deficiency cannot be resisted on grounds inconsistent with the decree.

The other Justices concurred.

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ALVAH C. FILER v. WILLIAM H. SMITH.

[See 96 Mich. 347.]

False imprisonment—Arrest without warrant—Probable cause.

It was settled by the former decision:

a—That this case forms an exception to the general rule that what constitutes probable cause to justify an arrest without a warrant is a question of law to be determined by the court.

b—That when an officer, in making such an arrest, acts in good faith, and after such reasonable investigation as circumstances permit, he is not liable in damages, either actual or otherwise.

Error to Muskegon. (Dickerman, J.) Argued June 27, 1894. Decided September 25, 1894.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion, and in 96 Mich. 347.

L. King Soper (*Nelson DeLong,* of counsel), for appellant.

Chamberlain & Cross, for defendant.

GRANT, J. The facts in this record do not differ materially from those in the former record in 96 Mich. 347. The warrant for the arrest of Reynolds, for whom plaintiff was mistaken by defendant, was produced upon this trial; otherwise the record is substantially the same, and we refer to that case for a statement of the facts.

1. It was settled by the former decision that this case forms an exception to the general rule that what constitutes probable cause to justify an arrest without a warrant is a question of law to be determined by the court. It was also settled that when an officer, in making such

arrest, acts in good faith, and after such reasonable investigation as circumstances permit, he is not liable in damages, either actual or otherwise. This rule was recognized by both opinions. These questions have therefore become *stare decisis,* and are no longer open to discussion. The question was left to the jury by the court under proper and careful instructions as to the diligence and precaution to be exercised by the officer, and they have, by their verdict, established his justification.

2. Complaint is made of the admission of testimony from the reporter of the newspaper who gathered the facts and wrote the two articles for publication which were introduced in evidence. This testimony related to the sources of his information, part of which he obtained from the defendant and some from other parties, including the sheriff who had the warrant for the arrest of Reynolds. It was competent. These published articles are not given in full, but from the extracts which do appear it is evident that the information upon which they were based was obtained from the defendant, the plaintiff, and the sheriff of Isabella county, Mr. Kane, who had the warrant, and who went to the jail to see the man who had been arrested as Reynolds. The character of this testimony is illustrated by the following portion of one of the articles:

"The sheriff, as he looked at the prisoner through the bars, was positive that the Muskegon officer had the man wanted."

These articles, which were excluded on the first trial, were introduced by the plaintiff. Now, it is too clear to require argument that the defendant might show that this statement was based entirely upon information obtained from Sheriff Kane, and not from defendant.

We find no error, and the judgment is affirmed.

The other Justices concurred.

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GEORGE KRUSE v. GEORGE M. KINGSBURY ET AL.

Bond to the jail limits—Liability of sureties.

1. A jail-limits bond executed pursuant to the provisions of How. Stat. chap. 310, is given to the sheriff of the county in his official capacity, and stands as indemnity to his successor in office without any written assignment, and during its lifetime may be assigned by the sheriff in office to the party for whose benefit it was given, whenever a breach occurs.
2. A jail-limits bond is in effect a substitute for the custody of the sheriff; and, after admitting the prisoner to the liberty of the jail limits, the sheriff has no longer any power over him, either to restrain or discharge him.
3. Section 5 of chapter 310, How. Stat., authorizes a sheriff who shall have taken a jail-limits bond, upon discovering that any surety to such bond is insufficient, to commit the prisoner who executed the bond to close confinement in jail, until other good and sufficient sureties shall be offered. And it is held that whether the prisoner is or is not in actual confinement when the other sureties are obtained cannot affect the validity of the bond.
4. A judgment debtor, on being arrested on a body execution, gave a jail-limits bond. He was afterwards notified by the successor in office of the sheriff to whom the bond had been given that one of the sureties was insufficient, and that it would be necessary for him to procure a new bondsman. He thereupon took the bond, and secured the signature thereto of an additional surety, and returned the bond to the sheriff. And it is held that the contention that the additional surety did not sign the bond under such circumstances as to bind him is without force.

Error to Cass. (O'Hara, J.) Argued June 6, 1894. Decided September 25, 1894.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

Howell & Carr, for appellants.

Harsen D. Smith, for plaintiff.

LONG, J. This is an action on a bond to the jail limits.

In 1881 the plaintiff obtained a judgment of $1,000 against the defendant Edward R. Graham for assault and battery. Graham was arrested upon an execution against his body by Frank M. Sanders, then sheriff of Cass county, and, upon being taken into custody, obtained the liberty of the Cass county jail limits by giving the bond in question. The bond is given to Sanders, as "sheriff of the county of Cass," and provides that the penalty shall "be paid to the said sheriff, or his certain attorneys, administrators, executors, or assigns," and is upon the condition that said Graham "shall not at any time or in any manner escape or go without the jail limits of said county until legally discharged." Sanders' term as sheriff expired January 1, 1887, when he was succeeded by Jacob McIntosh, who took possession of the jail January 3, 1887. Sanders at that time turned over to him everything connected with the office except the jail records and the bond in question. A few days afterwards, McIntosh learned from the plaintiff that Sanders had the bond, and at the same time was informed as to its character. He at once saw Sanders, and requested the bond of him. Sanders promised to bring it on that same day, but neglected to do so. McIntosh finally, after waiting about three months, went to Sanders' house and procured the bond from his daughter, Sanders not being present. McIntosh put the bond in the safe at the jail office, and held it from that time as sheriff, and delivered it over to his successor at the close of his term of office. Some time after receiving the bond, McIntosh, upon inquiry, became satisfied that one surety on the bond was insufficient. He thereupon saw defendant Edward R. Graham, and notified him that it would be necessary for him to get a new bondsman, telling him that, unless he did so, he would have to lock

him up. Graham took the bond, and procured defendant Kingsbury's signature to it, and returned it to McIntosh the same day. At the close of his term of office, McIntosh delivered the bond to his successor, Mr. Reagan, who accepted it, and kept it in the safe at the jail until it was assigned to the plaintiff after breach by Graham's going out of Cass county, September 21, 1892. The bond was never transferred from one sheriff to another by any formal written assignment, nor was there any schedule or list of property or prisoners made out when the sheriff's office was turned over to successors in office.

It is claimed by the defendants that Sanders, the sheriff, who took the bond, had informed the principal in the bond (Edward R. Graham) that, upon the expiration of his term of office, he could go where he pleased, and that this permission had never been rescinded, and no notice had been given to any of the makers of the bond that either McIntosh or Reagan held the obligation, or claimed to have the prisoner in custody; that the prisoner had never been transferred to either McIntosh or Reagan in conformity with the provisions of the statute; and that neither of those sheriffs ever claimed to have the prisoner in custody, or in any manner concerned himself about his whereabouts, or considered himself in any way responsible for his keeping.

On the trial the court below directed a verdict in favor of the plaintiff.

The defendants claim:

1. That the title to the bond was never transferred, but still remains in Sanders.

2. That the prisoner was never in custody of either McIntosh or Reagan, and hence did not escape, as alleged.

3. That Sanders released him.

4. That the sureties were released by the neglect of the sheriffs.

5. That Kingsbury's signature was not made under such circumstances as to bind him.

Chapter 310, § 1, How. Stat., provides that persons in custody of the sheriff under certain process "shall be entitled to the liberty of the jail limits, which limits shall be co-extensive with the limits of such county, upon executing a bond to such sheriff and his assigns," etc. It is provided further, by sections 3 and 4 of that chapter, that "such bond shall be conditioned that the person so in custody of such sheriff shall not at any time, or in any manner, escape or go without the jail limits of the county until legally discharged;" and that "every such bond taken for the liberties of any jail shall be valid, and shall be held for the indemnity of the sheriff taking the same, and of the party at whose suit the prisoner executing such bond shall be confined." Sections 6 and 7 of the chapter provide for the surrender of the principal by the sureties in the bond to the keeper of the jail at any time before judgment rendered against them on such bond, and they are thereby exonerated from all subsequent liability on the bond. By section 16 it is provided that the bond, after breach, may be assigned by the sheriff taking the same, or his successor in office, or, in case of a vacancy in his office, by his under-sheriff, to the party at whose suit the prisoner is confined; and by section 18 it is provided that the acceptance of such assignment shall be a bar to any action by or on behalf of any party receiving such assignment, against the sheriff or other officer making the same, for any escape, etc.

It is claimed that the bond in question was intended solely for the protection of Mr. Sanders, and not for the protection of the sheriff of Cass county as an officer; that it belonged to Sanders personally, and not to the office, and was incapable of passing to his successor or protecting him. We are satisfied that the statute contemplates that such bond is given to the sheriff in his official capacity, and that it stands as indemnity to his successor in office

without any written assignment, and that during the lifetime of the bond it may be assigned by the sheriff in office to the party for whose benefit it is given, whenever a breach occurs. The phrase "the sheriff taking the same" means the sheriff of the county in which the bond is given, and necessarily includes the succeeding sheriffs of the county. The bond in question was correct in form, running to "F. M. Sanders, sheriff of the county of Cass;" was properly assigned; and the plaintiff, by such assignment, acquired the right to bring suit upon it. How. Stat. § 599, provides for the delivery over of such bond by the outgoing sheriff to his successor in office, and this bond was so delivered.

In *Wilcox v. Ismon*, 34 Mich. 268, the bond was given to the under-sheriff, and the claim was made that the bond was void for informality, and it was said:

"The bond to the sheriff's officer may well be treated as a bond to the sheriff himself. It is to the officer rather than to the individual."

In *Meredith v. Duval*, 1 Munf. 83, a bond was given to the jail limits under a statute which provided that persons in custody might give a bond to the sheriff, which might be assigned by him to the creditor. Action was brought by the assignee. The court said:

"The bond taken by the sheriff for keeping the rules is as much a muniment of safety in behalf of the creditor as the keys of the jail are in relation to a prisoner in close custody, and when legally taken, according to the provisions of the act, would seem to me as much to devolve on a succeeding sheriff at the expiration of the preceding sheriff's term of office as the keys themselves; and this, although the act of 1764, chap. 6, § 1, makes it the duty of the sheriff to assign over the bond *'by him'* taken. This word 'him' (which in this place is used in the general), is inadequate to exclude the succeeding sheriff from the power to assign the bond under the force of the foregoing principles."

The bond having been properly delivered over to Sheriff Reagan, the prisoner, in contemplation of law, was in his possession, and the going out of the jail limits was an escape from his custody which wrought a forfeiture of the bond. The jail-limits bond is in effect a substitute for the custody of the sheriff; and, after admitting the prisoner to the liberty of the jail limits, the sheriff has no longer any power over him, either to restrain or discharge him.

In *Cargill v. Taylor*, 10 Mass. 208, it was said:

"Bonds given to entitle a prisoner to the liberties of the prison-yard are, in effect, a substitute for the custody of the sheriff. After the enlargement of the prisoner, upon the acceptance or allowance of the bond, his restraint, the custody in which he remains, is altogether of a moral nature,—a sense of his liability and of the responsibility of his sureties in the penalty of the bond. The consent of the creditor is not implied in the transaction. * * * * * A bond regularly taken and allowed discharges the sheriff from any further responsibility for the prisoner's remaining within his custody. The restraint to which he is subject is indeed called the custody of the jailer; not, however, as expressing his power of control or a confinement within the walls of the prison, but the bounds and limits prescribed by law, in which he is kept by the penalty of the bond. The prisoner is to continue a true prisoner in the custody of the jailer, and within the limits of the said prison, until he shall be lawfully discharged, without committing any manner of escape."

In *Call v. Hagger*, 8 Mass. 429, the plaintiff brought suit upon a bond given for the jail limits. Hagger admitted that he had gone outside of the limits, but claimed in defense that he was instructed by the sheriff that he had a right to go. The court, in disposing of the point, say:

"It is agreed in this case that the debtor was out of his proper limits as a prisoner. The defense is that the sheriff deceived him by giving him improper instructions. This cannot avoid the effect of the bond, given voluntarily

by the obligors, and placing the debtor's conformity to its condition at his own peril."

See, also, *Burroughs v. Lowder*, 8 Mass. 373.

In *Lansing v. Fleet*, 2 Johns. Cas. 3, in referring to the plaintiff in execution cases where the sheriff has consented to an escape, Kent, J., says:

"The plaintiff shall never suffer for the sheriff's default. The law is active to help him, and accordingly gives him his election to charge the sheriff or to pursue the defendant," etc.

Benson, J., in the same case, says:

"The law, as collected from the authorities, appears to be that, as it relates to the plaintiff, there is no difference whether the escape is voluntary or tortious, and that he has the same remedies in the former as in the latter case."

In the case of *Meredith v. Duval, supra*, the court say:

"A prisoner who gives security for the prison bounds is from thenceforward no otherwise in the custody of the sheriff than as may be sufficient to protect the sheriff against any suit which the creditor may bring against him for not confining the debtor within the walls of the prison. * * * * * He is in the custody of the law, but the sheriff has no longer any power over him, either to restrain him or to discharge him."

In *Lyle v. Stephenson*, 6 Call, 54, the court say:

"After the sheriff has taken a prison-bounds bond from the debtor, * * * * the debtor is then in the custody of the law, and the sheriff has no power to authorize or prevent his escape."

The same rule is also held in *Codman v. Lowell*, 3 Me. 52, and *Palmer v. Sawtell*, 3 Id. 447.

The point sought to be made, that Kingsbury did not sign the bond under such circumstances as to bind him, has no force. Section 5 of the chapter authorizes the taking of additional security, and whether the prisoner was

in actual confinement or not at the time the new surety was secured cannot affect the validity of the bond.

The judgment must be affirmed.

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

TERRENCE MCGEE v. THE CONSOLIDATED STREET RAILWAY COMPANY.

Electric street railways—Negligence—Failure to have headlight—Injury to pedestrian—Contributory negligence.

1. Where the ordinance under which an electric street railway is operated only requires that the cars "after sunset shall be provided with colored signal lights in front and rear," the failure to have also a headlight or light attached to the dashboard of the car is not negligence *per se*.[1]
2. The rule that one must look and listen before crossing the tracks of a steam railway is equally applicable to an electric street railway.
3. Defendant operates an electric street railway in the city of Grand Rapids, and by ordinance is permitted to run its cars at a rate of speed not exceeding 15 miles per hour. Plaintiff, while attempting to cross defendant's double tracks on South Division street, in the dusk of a dark and wet November evening, was struck by a south-bound car which was running from 7 to 15 miles per hour, and injured. The car carried five electric lights inside, and the colored signal lights in front and rear required by the city ordinance. Plaintiff, after leaving the street curb, walked a distance of about 14 feet before reaching the track, and he testified that during this time he had his eyes upon a car coming from the south, and did not expect a car from the north, which he could have seen had he looked in that direction. Plaintiff had lived in the vicinity

[1] With this case as reported in 26 L. R. A. 300, there is a note on "Necessity of Headlights on Street Cars."

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120 402

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121 583
d121 584

102 107
123 695

102 107
128 374

102 107
s60NW 293
s47A&R 507
j131 [3]623

102 107
134 200

102 107
135 [2] 86

102 107
j145 [3] 16

102 107
j147 [3]215

of the accident for many years, and knew of the constant passage in both directions of defendant's cars. And it is held that plaintiff was bound to know that the crossing was a place of danger; that he was bound to look both ways before getting upon the track; that it will not do to say that he acted prudently and carefully in looking before getting off the curb, and was therefore not bound to look again because he saw no car coming from the north at that time; and that a verdict should have been directed for the defendant.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued June 20, 1894. Decided September 25, 1894.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

Kingsley v. Kleinhans, for appellant.

McGarry, McKnight & Judkins, for plaintiff.

LONG, J. Plaintiff brought suit to recover damages for the loss of a foot, claiming it was occasioned by the negligent act of the defendant street-railway company in running one of its electric cars over him. The accident occurred at the intersection of South Division street and Fifth avenue, in the city of Grand Rapids, while plaintiff was attempting to cross the company's tracks, in the dusk of a dark and wet evening, on November 26, 1892. The defendant has parallel double tracks on South Division street, which is flat and level where it crosses Fifth avenue at right angles. The company runs its south-bound trains over South Division street on the west track, while its north-bound trains use the east track. Plaintiff claims that about half past 5 o'clock on that evening, while he was crossing South Division street from the west along the north crosswalk on Fifth avenue, and at the west rail of the west track, he was run against by a motor car without a headlight, then going south at a high rate of speed, without sounding a gong or giving any note of

warning, and that the wheel of the car passed over his right ankle, necessitating amputation. The company claims that at the time of the accident it was only early twilight; that it was then operating its motor car with care; that the time for putting on a headlight, according to the custom of the company, had not yet arrived, but that the car was brilliantly illuminated on the inside by many electric lights, and that the gong was sounded at the crossing as usual. The defendant also claims that the plaintiff was wholly at fault in heedlessly walking in front of the visible and illuminated car; and that the motorman, although he saw the plaintiff, had no notice of his intention to pass within the lines of danger until he was so near the tracks that it was too late to stop the car before the accident occurred; that the car, however, was stopped in the shortest time and space possible after the first appearance of danger, and, although the rails were wet and slippery, still it came to a halt before the second wheel could pass over the plaintiff's leg.

The city ordinance requires that—

"The cars of said railway, after sunset, shall be provided with colored signal lights in front and in the rear."

It cannot be said that it was negligence *per se* not to have a headlight or light attached to the dashboard of the car, as the ordinance itself provides what kind of lights shall be carried,—that is, "colored signal lights in front and in the rear,"—and the testimony is uncontradicted that such lights were carried.

Plaintiff cites *Rascher v. Railway Co.*, 90 Mich. 413, on the proposition that it was negligence not to have a headlight. That case does not support that proposition. There the plaintiff was driving along a street-car track, after dark, towards a coming car, which was running at the rate of from 15 to 20 miles an hour, and which came

suddenly upon her. The car was not lighted inside or out. It was said by this Court that—

"It ought to be lighted in the night-time, so that its approach can be seen by other travelers; and between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision, or else give by some signal warning of its approach."

The car in the present case was running from 7 to 15 miles per hour, and under the ordinance it was permitted to run 15 miles per hour. The testimony is quite contradictory on the question whether the gong was sounded. The defendant contends that all the requirements of the city ordinance were complied with, not only in regard to lights, but also in the sounding of the warning signals, and the testimony tends strongly to show that these warnings were given.

The most important question in the case, however, relates to the care which the plaintiff exercised in attempting to make the crossing in front of the car. The plaintiff testified that when he neared the curb, and before stepping down into the street, he looked north and south along Division street; that he saw a car coming from the south, and it had a headlight; that it was then a block or a half a block away. He then testified as follows:

"*Q.* Now, what was the fact as to whether you looked north or not to see if there was any car in that direction?

"*A.* I did. I thought I was safe enough to cross. I didn't expect a car coming from the north.

"*Q.* Did you look to see whether there was any, or not?

"*A.* Yes, sir.

"*Q.* Did you see any?

"*A.* No, sir; I didn't observe any."

On cross-examination, he testified as follows:

"*Q.* Which way did you look first, to the north or south?

"*A.* Well, I was making my way home, of course, and I saw this car coming from the south with a headlight on.

"*Q.* Did you look at that first? Did you look at the car coming from the south, first?

"*A.* Yes, sir; because I saw that car visibly, you know.

"*Q.* Did you notice it the other way?

"*A.* I did look the other way, and, of course, I didn't notice anything, because, if I had, I would not be caught.

"*Q.* Where were you when you looked to the north?

"*A.* When I looked to the north?

"*Q.* Yes, sir.

"*A.* It was just when I was starting across.

"*Q.* Before you left Division street?

"*A.* Yes, sir; when I looked up.

"*Q.* Just as you were going to leave Division street, you looked to the north, and didn't see anything?

"*A.* Yes, sir.

"*Q.* Before that you had looked to the south?

"*A.* Yes, sir.

"*Q.* Did you continue straight across up to the time of the accident?

"*A.* Yes, sir.

"*Q.* Without looking either way?

"*A.* I know I thought there was no danger of this car coming from the south. It was far enough off so that I had time enough to cross.

"*Q.* Were the electric lights lighted at this time?

"*A.* Not that I know of.

"*Q.* You think not?

"*A.* I don't think they were.

"*Q.* When you left Division street, did you have to step down?

"*A.* After I left Division street?

"*Q.* When you stepped off of Division street, did you step down into the roadway?

"*A.* Yes, sir. I stepped off of the sidewalk, you know.

"*Q.* Was it before you took this step that you looked north and south?

"*A.* Yes, sir.

"*Q.* After you took that step, just describe what you did.

"*A.* Well, I had my eye upon the car coming from the south, and I was not paying much attention to the north, because I didn't expect any car coming from the north, really.

"*Q.* You walked straight that way, and kept your eye on the car from the south?

"*A.* Yes, sir. It was far enough so that I had plenty of time to cross.

"*Q.* Up to the time you were hit?

"*A.* Yes, sir."

Redirect examination:

"*Q.* About how far is this west track of the railroad company from the sidewalk?

"*A.* The west track?

"*Q.* The west track of the railroad company. You say you looked to the south and north as you started to go across. How far were you from that track? How many steps would you have to take to strike the track?

"*A.* Oh, it must probably be 12 or 15 feet.

"*Q.* As you started to go across, as you were walking, did you look both ways?

"*A.* Yes, sir; I did, sir."

It is therefore made certain by the plaintiff's own testimony that after he left the curb, some 15 feet away (by actual measurement 13 feet 10 inches), he did not look to the north. During that time he had his eyes upon the car coming from the south, and he says he did not expect a car from the north. This seems to account for his not having seen the car by which he was struck. Others saw it, and testified that it was lighted inside, and carried the lights required by the ordinance. If he had looked to the north before stepping upon the first rail, he could have seen this car. It was then almost upon him. The motorman saw him when some distance away, but supposed that he would stop.

While pedestrians have the right to be upon and travel along the public highway, yet they are bound to take notice of the dangers incident to the public travel thereon, and especially is this so where street cars are constantly passing and repassing, driven with electricity. The city authorities recognized the necessity of rapid transit, and

limited the cars upon that street to 15 miles per hour. These cars are heavy, laden with motors, and they cannot at once be stopped. They have no right to run down pedestrians, but those in charge have a right to suppose that pedestrians will not walk onto the track without looking to see if a car is coming. It is well known that these crossings are places of danger, and that cars do not stop at every crossing. Here the custom was to stop on the opposite crossing from where the plaintiff was. Plaintiff had lived in that vicinity for many years, and knew of the constant going and coming of these cars, and he was bound to know that the crossing was a place of danger. He was bound to look both ways before getting on the track. It will not do to say that he acted prudently and carefully in looking before getting off the curb, and was therefore not bound to look again because he saw no car coming from the north at that time. A car running 15 miles an hour would pass a great distance while a pedestrian was going 13 feet 10 inches. The plaintiff was bound to look before stepping upon the place of danger.

In *Gardner v. Railroad Co.*, 97 Mich. 240, it was held that a traveler was guilty of negligence in not looking in the proper direction for an approaching train, by which he was injured. It appeared in that case that when within 5 feet of the track, if he had looked, his view would have been unobstructed for 250 feet in the direction from which the train approached.

In *Haight v. Railroad Co.*, 7 Lans. 11, a woman on foot approached the defendant's tracks on Bridge street, in the village of Amsterdam. This street crossed three tracks at right angles. Her attention was fixed upon a train passing over the third track. She passed over the first track in the rear of some freight cars. Here she looked up the second track, but, on account of the freight

cars, could not see very far. Then, in passing over the seven feet between the first and second tracks she looked at the rear end of the train which had just passed over the third track, but did not look along the second track after she left the rails of the first, and, reaching the second, she was struck by a train on that track. It appeared that in the seven feet between the first and second tracks she could have seen the approaching train for several hundred feet. She did not once look down that track, but kept her eyes upon the train upon the third track. This was held to be contributory negligence as matter of law. The supreme court said:

"It is therefore quite plain that, if the plaintiff had looked in the right direction as she was about leaving the first track, she must have seen the approaching train. There was no obstruction in the way, and that she did not see or hear the train which was coming when she stepped on the track was owing to the fact that she did not look for it in the direction from whence it came. * * * She neglected to look in the right direction."

This case was cited with approval by the court of appeals in *Salter v. Railroad Co.*, 75 N. Y. 279.

It is said by counsel for plaintiff that, while this may be the rule in regard to steam railways, it cannot be applied to street railways. In *Carson v. Railway Co.*, 147 Penn. St. 219, it was held that failure to look for approaching cars on the part of one about to drive across the tracks of an electric street-railway company is such contributory negligence as will prevent his recovery for injuries received by colliding with a car. The court said:

"If, by looking, the plaintiff could have seen, and so avoided, an approaching train, and this appears from his own evidence, he may properly be nonsuited."

In *Ward v. Railway Co.*, 17 N. Y. Supp. 427, it appeared that plaintiff's intestate was fatally injured while

attempting to drive across a street-railway track. There was evidence that, at any time before reaching the track, deceased, by a glance, could have informed himself of the approach of the car, but that he drove onto the track without looking in either direction. It was held that he was guilty of contributory negligence.

In *Creamer v. Railway Co.*, 156 Mass. 320, the supreme court of that state held that where a person stepped from a horse car at the junction of two streets, and immediately started to cross the track of an electric road, without looking or listening, and was run over by an electric car running at the rate of 15 miles an hour, there could be no recovery, because the deceased was not exercising due care.

We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street-car track upon which the motive power is electricity or the cable. In this State it is well settled that persons passing over railroad crossings must exercise care. They must look and listen, and, under certain circumstances, must stop, before attempting the crossing. Electric street-car crossings are also places of danger. The cars are run at a great speed on this street in question. The city ordinance permits it, and the rule must be that, before going upon such tracks, every person is bound to look and listen. If the view is unobstructed, and the pedestrian takes this precaution, there is not much opportunity for him to be injured. It will not do to say that he has discharged his responsibility in case of an accident by looking when some feet away, for he may miscalculate the distance and the speed of the car. To avoid danger, he must look just before he enters upon the track. This was the rule laid down by this Court in *Houghton v. Railway Co.*, 99 Mich. 308. The uncontradicted evidence

shows that the car was lighted with five electric lights inside, and carried the signal lights required by the ordinance. Others saw these lights, and it does not seem to be disputed that, had the plaintiff looked just before going upon the track, he would have seen the car.

Defendant requested the court to charge the jury that under the evidence the plaintiff could not recover. This request should have been given upon the facts shown by this record.

The other questions do not become important.

Judgment is reversed, and a new trial ordered.

GRANT and HOOKER, JJ., concurred with LONG, J. MCGRATH, C. J., concurred in the result. MONTGOMERY, J., did not sit.

JACOB MAATTA v. AUGUST KIPPOLA.

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146 [1]338
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152 [2]385
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157 [2]169
157 [2]170

Homestead—Leased premises—Husband and wife.

1. A lessee of lands who erects a dwelling-house thereon, and actually occupies the lands, is entitled to a homestead exemption.
2. Where a tenant at will erects a house on the leased land, and with his wife occupies the same as a home, an assignment of his leasehold interest, made with the assent of the lessor, is ineffectual to convey the homestead rights thus acquired, if not signed by the wife.

Error to Houghton. (Hubbell, J.) Submitted on briefs June 26, 1894. Decided September 25, 1894.

Summary proceedings to recover the possession of land. Complainant brings error. Affirmed. The facts are stated in the opinion.

W. F. Riggs, for appellant.

A. T. Streeter, for defendant.

MONTGOMERY, J. This is a summary proceeding to recover possession of real estate. The facts were agreed to on the trial before a jury in the court below as follows:

For two years and upwards prior to December 21, 1891, the defendant was a tenant at will of the Hungarian Copper Company, and occupied the lands in question as such tenant at will, and at an annual rent of $100. During the time defendant so occupied said lands as tenant at will under the said Hungarian Copper Company, he, the defendant, built the house mentioned and described in the complaint, and from the time he so built said house he and his family have occupied said house as a home continuously until the present time, and he has had and has no other home or homestead. On the 21st day of December, 1891, defendant assigned his interest in said lands by an instrument in writing, which, after reciting a consideration of one dollar and other valuable consideration, proceeded:

"I hereby transfer, set over, and assign to Henry Keronen all my farming rights in and to the following described lands, including all dwellings, barns, and other buildings thereon, with the right to enter and occupy the same, including all agricultural improvements, leases, and agreements of what kind so ever" (describing the lands).

This was signed by the defendant, but not by his wife. The assignment was assented to by the landlord, and Henry Keronen paid to the landlord $220 of back rent, and thereupon Keronen moved upon the premises, and occupied said premises and a part of the dwelling mentioned in the complaint from December 21, 1891, until December 19, 1892, when he sold to complainant. This assignment was also in writing, approved by the agent of

the lessor, and since its date complainant has paid the ground rent.[1]

The contention of the defendant is stated in the bill of exceptions to have been that—

"The sale and assignment from the said defendant to said Henry Keronen was made without the consent and signature of the wife of said defendant, and that the said defendant and his wife had, at the time of said assignment to said Henry Keronen, homestead interests and rights in said house," "which," as is stated in the bill of exceptions, "is the only question of law involved in this suit."

The circuit judge held in accordance with the contention of defendant, and we think correctly. A lessee of lands who erects a dwelling-house thereon, and actually occupies the lands, is entitled to a homestead exemption. *Pelan v. De Bevard*, 13 Iowa, 53; *Conklin v. Foster*, 57 Ill. 104; *Johnson v. Richardson*, 33 Miss. 462; Thomp. Homest. § 176; Smyth, Homest. § 117. It is said in appellant's brief that—

"If the wife acquired homestead rights and interests in the premises by reason of her husband's occupancy as tenant at will, then these rights would be good against everybody, the Hungarian Copper Company not excepted. This would lead to a new and original way in acquiring real estate, hitherto unknown."

But the fact that the wife acquired homestead rights as against a creditor of or a purchaser from the husband does not impair the right of the landlord, under whom the husband held. The law only exempts the homestead from sale under execution, or from private sale without the concurrence of the wife, and does not divest the right

[1] The defendant, after assigning to Keronen, continued to reside in one portion of the house, and when Keronen, who is the father-in-law of defendant, removed from the premises, defendant took possession of the entire house, and refused to vacate, and this proceeding was instituted.

of the owner of the land, nor impair any remedy which the law gives him. *Buckingham v. Buckingham,* 81 Mich. 89.

Judgment is affirmed, with costs.

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

FRANK VEREYCKEN v. ANTOINETTE VANDENBROOKS.

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137 637

Contract—Reduction of interest—Consideration—Involuntary payment—Duress.

1. A writing signed by the payee in a note then past due, and bearing interest at 10 per cent., by which the payee agrees to let the maker "have all the money at 8 per cent.," may be well construed to be an open proposition to the maker to retain the money, at least until further demand, at the reduced rate of interest, and, when acted upon by the maker, the payee cannot be permitted to exact a greater rate.
2. Where, upon being served with a subpoena in a chancery foreclosure suit, the defendant mortgagor pays the amount demanded, under protest, there is not such duress of property as will make such payment involuntary, and enable him to recover an excess over the amount legally demandable, included in such payment.

Error to Bay. (Cobb, J.) Submitted on briefs June 27, 1894. Decided September 25, 1894.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

D. B. Richardson, for appellant.

Lee E. Joslyn, for plaintiff, contended:

1. If a mortgagee of land require that the mortgagor pay more

than is legally due for the purpose of preventing a foreclosure, it is such a compulsory payment as entitles the party who so pays to recover it back; citing 6 Amer. & Eng. Enc. Law, 84, 85; *McMurtrie v. Keenan*, 109 Mass. 185; *Bennett v. Healey*, 6 Minn. 240; *Freeman v. Etter*, 21 Id. 3; and an attorney fee paid under protest on redeeming from a statutory foreclosure, if illegally included in the amount for which the land was sold, may be recovered back; citing *Vosburgh v. Lay*, 45 Mich. 455; and a payment of money under legal process is not a voluntary payment; citing *McKee v. Campbell*, 27 Mich. 497; *Congdon v. Preston*, 49 Id. 204; *McCabe v. Shaver*, 69 Id. 25.

2. The agreement to reduce the rate of interest from 10 to 8 per cent. was founded upon a sufficient consideration, and was valid. If plaintiff was to get the money of some one else at 7 per cent., and defendant wanted her money to remain where it was, it was a sufficient consideration passing to defendant that her money should continue to draw interest, and the loan remain, and the money not to be idle, as it might be for some time if paid. This Court has held that a written agreement to pay a higher rate of interest than that expressed in the obligation, in consideration of forbearance, is valid between the parties to the original agreement and their representatives. On the same grounds an agreement in writing to reduce the rate of interest is binding; citing *Burchard v. Frazer*, 23 Mich. 240; *Smith v. Graham*, 34 Id. 302; *Tousey v. Moore*, 79 Id. 564.

MONTGOMERY, J. This is an action brought to recover an alleged overpayment of interest upon a real-estate mortgage and note.

April 14, 1879, plaintiff gave his promissory note to Antoinette VandenBrooks for $460, with interest at 10 per cent. per annum, due in three years from its date. The note remained unpaid. On the 2d of August, 1885, VandenBrooks gave the plaintiff a written agreement as follows:

"I, A. VandenBrooks, agree to let Frank Vereycken have all the money at 8 per cent.

"A. VANDENBROOKS."

The note remained unpaid until September 18, 1891, when proceedings were instituted in the circuit court, in

chancery, for the county of Bay, to foreclose the mortgage, and a subpoena was served on plaintiff. On the same day, the plaintiff paid the amount demanded, under protest, and brought this suit to recover the excess, which, if the agreement to reduce interest be valid, amounted to the sum recovered in the court below.

Two questions are presented by the record: *First*, whether the agreement to reduce the interest was based upon a sufficient consideration; and, *second*, whether the payment of the excess was, within the legal definition of the term, involuntary.

We think the written memorandum may be well construed to be an open proposition to plaintiff to retain the money, at least until further demand, at the rate of 8 per cent., and that, when acted upon, the mortgagee cannot be permitted to exact a greater rate of interest.

A question of more difficulty is whether the payment was an involuntary payment. The general rule is that, to constitute a payment involuntary, it must be made under such circumstances as precludes the exercise of the free will of the payor. There must be either duress of the person or the property. Some courts have held that there can be no duress of real property which remains in the possession of the payor, but most courts hold the contrary. *State v. Nelson*, 41 Minn. 25; *Pemberton v. Williams*, 87 Ill. 15; *White v. Heylman*, 34 Penn. St. 142; *Joannin v. Ogilvie*, 49 Minn. 564. So it has been held that if the mortgagee of land require that the mortgagor pay more than is legally due, for the purpose of preventing a foreclosure by advertisement, this is such a compulsory payment as entitles the party to sue and recover back the excess. But it is to be noted that in such a case the mortgagee, by his own act, unaided by any process of court, has it within his power to deprive the mortgagor of his title. Such was not the case here. All that

the defendant had done was to file a bill to obtain a decree of the court fixing the amount due. Before any decree could pass against the present plaintiff, he was entitled to his day in court. Under these circumstances, we think that there was no duress of property such as the law recognizes. See *Forbes v. Appleton*, 5 Cush. 115; *Benson v. Monroe*, 7 Id. 125; *Taylor v. Board of Health*, 31 Penn. St. 73; *Navigation Co. v. Tappan*, 16 Blatchf. 296; *Mariposa Co. v. Bowman*, Deady, 228.

It follows from these views that the judgment should be reversed, with costs.

The other Justices concurred.

JAMES C. DEYO v. GEORGE H. HAMMOND.

102 122
126 453

Contract—Sale—Condition.

Plaintiff sold and delivered to the defendant a mare, upon his agreement that if, upon a trial of speed to be made by an agreed driver within 90 days, the mare should trot to pole as fast as a mare owned by the defendant, he would pay an extra $100 for the mare. The defendant, through no fault of the plaintiff or the driver, failed to have the test of speed made. And it is held that, while the parties agreed to abide by the driver's decision as to the speed of the mare purchased of the plaintiff, yet such test was not a vital part of the contract, but only the means provided by the parties for ascertaining the speed of the mare; that the only condition upon which the payment of the $100 depended was that she could trot as fast as the one owned by the defendant; that this fact was made to appear by the undisputed evidence in the case; and that the defendant cannot avoid liability on the ground that, by reason of the sickness of one mare and the lameness of the other, he was prevented from making the agreed test

within the 90 days, he being the only person who had it within his power to have said test made.[1]

Error to Wayne. (Frazer, J.) Argued June 28, 1894. Decided September 25, 1894.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Fred H. Warren, for appellant.

John D. Conely, for plaintiff.

LONG, J. On January 25, 1888, the plaintiff, who resides at Jackson, this State, sold his mare, the "Shelby Maid," to defendant. The contract was made in Jackson, and the bargain, as claimed by the plaintiff, was that, after Hammond had driven the mare, he offered to give plaintiff his check for $800, and a further sum of $100 if she could go as fast as his (defendant's) mare; that Mr. Moran was to drive them, and make the test, when he had been notified by defendant that he was ready, which test was to be made within 90 days. The plaintiff further testified that Mr. Moran was to decide if plaintiff's mare could go as fast to pole as defendant's, and, if she could, then defendant was to pay plaintiff the extra $100.

The defendant testified that, after going to Jackson and driving the mare, he commenced figuring with Mr. Deyo about buying her. Concerning the terms of the bargain, defendant gave the following testimony:

"I offered Mr. Deyo $900 for the mare if she could go as fast as my bay mare. He says: 'She can go as fast. I will guarantee her to go as fast as your mare.' I said: 'Guaranties don't go. She has got to do it herself.' I says: 'I will give you $800, and take her down there,

[1] See notes to *Boettler v. Tendick,* 5 L. R. A. 270, and *Church v. Shanklin,* 17 Id. 207, for a discussion of contract provisions of this nature.

and if she will go as fast as the bay mare I will give you $900 for her,—an extra $100.' * * * He says, 'All right,' and we made the trade then and there. The mare, if she filled the bill, was to be $900; there is no question about that; but otherwise she was to be $800. * * * I was to pay an additional $100 if the gray mare could trot as fast as the bay mare to pole. The test was to be made within 90 days, by Mr. Moran. Mr. Moran was mutually agreed upon to make the test. It would make no difference to me who drove if this mare could trot as fast as mine."

This suit was brought to recover this $100 and interest, and upon the trial the jury returned a verdict in favor of the plaintiff.

It appears that plaintiff took the mare to Detroit and delivered her to defendant, but that Mr. Moran was never notified by either of the parties to make the test, and that the test was never made; the defendant claiming that it was impossible for him to make the test within 90 days for the reason that one mare was sick and the other lame. The plaintiff testified on the trial that the defendant was to notify Mr. Moran when he was ready to make the test, and within the 90 days; while the defendant testified that, though it was mutually agreed that Mr. Moran should make the test, nothing was said about his (the defendant's) notifying Mr. Moran. Defendant's contention here is that he is not liable to pay the additional $100, as by the terms of the contract the plaintiff agreed that the mare purchased should, within 90 days, in a trial of speed to be made by Mr. Moran, trot as fast to pole as defendant's bay mare; that it was impossible to make the said trial within the time fixed by the parties by their contract, by reason of circumstances over which defendant had no control, and for which he was not responsible; that a trial of speed by Mr. Moran, and a decision by him that plaintiff's mare was as fast to pole as defendant's, was a condition precedent to his liability to pay the $100, and, having

never been fulfilled, defendant is discharged from liability.

We think the contract cannot be construed in this way. Defendant, after the purchase, took the mare into his possession, and thereafter kept her. The test was to be made in Detroit. While the parties agreed to abide by Mr. Moran's decision as to the speed of the gray mare, yet the Moran test was not a vital part of the contract, but only the means provided by the parties for ascertaining the speed of the gray mare. The only condition upon which the payment of the $100 depended was that she could trot as fast as defendant's, for he said: "It would make no difference to me who drove if this mare could trot as fast as mine." The plaintiff introduced testimony to show that his mare was 8 or 10 seconds faster than defendant's, and this testimony was undisputed. Defendant was the only party who had it within his power to have the test made, and yet he seeks to set up in this case as a defense his failure to have it made, and thus avoid the payment of the $100.

The case is very similar in principle to *Potter v. Lee*, 94 Mich. 140. There it appeared that the plaintiffs sold a number of cheeses by sample. There was testimony showing a warranty as to the quality of the cheeses. The defendant, however, said to plaintiffs' agent:

> "You are a stranger to me, and I have seen only 10 boxes of these cheese, and I don't know what is in the car. If in the course of 10 days we find this cheese as you represent it, we will pay for them."

Within the 10 days some of defendant's customers rejected the cheeses, and refused to pay for them; but defendant continued to make sales for 26 days, and then notified the plaintiffs that the cheeses were not as represented, and refused to pay for them. It was said by this Court:

"It is therefore evident, even if a warranty was made

by Potter as to the quality of the cheese in the car, and not examined at the time by the defendant, that the defendant did not rely upon it, but preferred to make an examination for himself, and was to have the 10 days in which to do it. If he did not make such examination, it was his own fault."

So in the present case. The plaintiff offered to guarantee the speed of his mare. The defendant rejected the offered guaranty, saying that he preferred to make a test of the speed. That he did not do so was no fault of the plaintiff. There is no dispute about Mr. Moran's willingness to make the test. He testifies that the opportunity was never given him. We think, under the undisputed testimony in the case, the court would have been justified in directing a verdict in favor of the plaintiff. In view of this, the other questions raised become immaterial.

The judgment is affirmed.

The other Justices concurred.

WILLIAM H. MAYBURY, ADMINISTRATOR, ETC., v. MARY BERKERY.

Money had and received—Proceeds of insurance policies—Set-off—Evidence—Promissory notes—Account stated—Presumption—Burden of proof—Estoppel.

1. Where, in a suit by an administrator to recover moneys paid to the defendant upon policies of insurance held by defendant as security for loans made to the decedent (her son), the defendant seeks to set off a claim for the rent of a portion of a house which the decedent occupied in his lifetime,—the remainder being occupied by decedent's father up to the time of his death, and afterwards by the defendant,—it is competent

for the plaintiff, as tending to establish his claim that the occupancy of the house by the decedent was rent free, to show that the decedent had contributed largely to the construction of the house, and had, both before and after the death of his father, made expensive improvements and paid taxes upon the entire property, and that during the entire time of such occupancy the decedent paid no rent, nor was any claim for rent ever made upon him.

2. The defendant exhibited a paper purporting to be a statement of the account between the decedent and herself, showing loans made by her to him at various times up to and including December 20, 1890, and also one of $2,000 made December 16, 1891, and aggregating, with interest charges, $15,515. It further appeared that on December 23, 1891, the decedent executed a note for $10,000 to the defendant, payable six months after date. Plaintiff testified that when he called upon the defendant in August, 1892, to inquire relative to the policies of insurance and the indebtedness of decedent to her, he asked defendant for a statement of said indebtedness, and she said she did not think she could give it; that thereupon her son-in-law, who was present, stated that the defendant had a note for $10,000 against the decedent, and that that should be sufficient to show the indebtedness. It further appeared that no moneys were advanced to the decedent by the defendant after December 20, 1890, until December 26, 1891, and that there was no new consideration for the $10,000 note, except the $2,000 loaned December 26, 1891, if that was a part of the consideration; and it was not pretended that the note was solicited for any purpose which the defendant had in view, except as evidence of the indebtedness. And it is held that the note was *prima facie* evidence of an account stated between the parties; that the burden was upon the defendant to rebut the presumption; and that whether this presumption had been removed was, under the facts in this case, a question for the jury.

3. There was testimony tending to show that the $2,000 received by the decedent December 26, 1891, was used to pay a demand which existed prior to December 23, 1891, the date of the note; that decedent had been, prior to December 26, 1891, making efforts to raise the money from other sources to meet said demand; and that the only claim made by the defendant after the death of the decedent and prior to the trial was the amount of the note. The plaintiff contended that the note embraced the $2,000 received after its date. There was no evidence as to the date of the *delivery* of the note. And it is held that the note is presumed to have been executed and

delivered on the day of its date, but that such presumption is removable.

4. One of the policies was payable to the defendant, and the court refused to allow the jury to charge her with the proceeds of this policy; but the jury found, in answer to a special question, that the policy was held by the defendant as security simply. And it is held that, it having been agreed between the defendant and the decedent that the amount of said policy, when received, should be applied upon, and should *pro tanto* extinguish, decedent's indebtedness to defendant, which agreement was valid, the defendant cannot be heard to say that the proceeds of said policy are not applicable to the payment of the debts of the decedent, nor can she offset the portion of said indebtedness thus extinguished against the moneys received on the other policies.

Error to Wayne. (Hosmer, J.) Argued June 27, 1894. Decided September 25, 1894.

Assumpsit. Both parties bring error. Judgment modified by increasing the amount of the same, and as modified affirmed. The facts are stated in the opinion.

Maybury & Lucking (*John D. Conely*, of counsel), for plaintiff.

J. T. Keena, for defendant.

McGRATH, C. J. James S. Berkery died July 29, 1892, leaving a widow and children. This suit is against the mother of the decedent, and is based upon the claim that during his lifetime James S. Berkery had from time to time borrowed sums of money from his mother, and to secure the payment thereof his mother held at the time of his death three life insurance policies, one of $5,000 in the Michigan Mutual Life Insurance Company, one of $5,000 in the National Life Insurance Company, and one of $2,000 in the Catholic Mutual Benefit Association. The first two were payable to his mother in case she survived him, otherwise to his legal representatives. The Catholic

Mutual Benefit Association policy was payable to his mother. It is claimed that after the death of plaintiff's intestate the mother collected the amounts of the three policies, and that the amounts so collected were largely in excess of the indebtedness at the time of the death of James S. Berkery.

The administrator testified that in August, 1892, he and one Breen, son-in-law of the defendant, as special administrators of the estate of the decedent, called upon defendant to inquire relative to the policies and the indebtedness; that she stated that she held three policies, aggregating $12,000, as security for the payment of the indebtedness to her; that in response to the inquiry as to how much the indebtedness was she stated that she would be satisfied to take the $12,000 represented by the policies; that he then asked her for a statement of the indebtedness, but she stated that she did not think she could give it; that Mr. Breen spoke up, and said, "She has a note of James for $10,000, and that should be sufficient to show the indebtedness;" that no itemized statement had ever been given to witness as to the indebtedness, but in a few days afterwards Mr. Breen called upon him, and exhibited a note dated December 23, 1891, for $10,000, executed by decedent, and payable six months after date to defendant, with interest at 6 per cent. Plaintiff introduced the note, and then gave evidence of payment to defendant by check of $3,000 in February, 1892, and of $2,000 in June, 1892, and of the collection by defendant of the amount of the insurance policies, and rested. Defendant then introduced in evidence another note of $5,000, dated April 29, 1889, set up a claim of rent for the house occupied by decedent from the date of his marriage, June 28, 1887, to the date of his death, at the rate of $25 per month, and rested.

Plaintiff then gave evidence tending to show that the

note for $5,000 had not been before that time mentioned; that John Berkery, a son of the defendant, had, after the death of plaintiff's intestate, taken certain papers from a desk belonging to decedent, against the protest of the widow of decedent; that decedent lived in part of a double house, and defendant lived in the other part; that the land was owned by his father when the house was built, and before that time the father had given defendant a deed thereof, to take effect at the father's death; that decedent had in fact contributed largely to the construction of the house upon the premises, and had, both before and after his father's death, made expensive improvements and paid taxes and insurance upon the whole property; that from and after his marriage, and up to the time of his father's death, and afterwards, he had resided in the house, had paid no rent, and no claim therefor had ever been made; that these dealings had originated before his father's death, his father having executed a mortgage upon a farm which he then owned to the Detroit Savings Bank, as security for loans made by the son; that after his father's death, in April, 1889, two notes, amounting to $5,000, which were secured by said mortgage, were renewed, and said notes were paid July 11, 1890, out of the proceeds of the farm, the farm having been deeded to the mother, the deed to take effect at the death of the father.

The defendant then for the first time exhibited a paper purporting to be a statement of the account between the parties, alleging advances made to decedent during 1890, as follows: July 10, $700; July 10, $5,415.50; July 12, $1,000; September 10, $3,000; October 14, $200; November 15, $250; December 20, $1,500; and December 26, 1891, $2,000,—aggregating, with interest charges, $15,515; and crediting plaintiff with the sums theretofore shown by plaintiff to have been paid, to wit, February 1, 1892,

$3,000, and June 15, 1892, $2,000. Plaintiff then showed a further payment to defendant on November 21, 1890, of $2,000, for which no credit was given in the statement aforesaid.

Plaintiff's contention upon the trial was that the note for $10,000, dated December 23, 1891, embraced the entire indebtedness, including the $2,000 charged in the statement as received by decedent December 26, 1891, and that upon this note there had been paid the sum of $5,000, and claimed the difference between the balance and the sum of the insurance moneys collected.

The court refused to allow the jury to charge the defendant with the proceeds of the Catholic Mutual Benefit Association policy, but at plaintiff's suggestion the jury, upon a special question put, were allowed to find, and did find, that the Catholic Mutual Benefit Association policy was held by defendant as security simply.

The jury found a verdict upon plaintiff's theory for $5,119.20. Both parties bring error.

Plaintiff insists that he was entitled to a further credit upon the account for the avails of the Catholic Mutual Benefit Association policy. Defendant contends:

1. That the court erred in admitting the testimony showing that decedent paid part of the cost of the construction of the house in which decedent and defendant lived.

2. That there was no evidence from which the jury might infer that the $10,000 note of December 23, 1891, was a settlement of account between decedent and his mother, including the $2,000 paid decedent December 26, 1891.

3. That the court erred in submitting the special question relative to the Catholic Mutual Benefit Association policy.

1. The testimony as to decedent's participation in the construction of the house in which he lived was brought out by defendant's claim for rent. It was competent for plaintiff to show that decedent's occupancy of the house

was rent free, and to show all the circumstances bearing upon that question, the relation of the parties, the fact that no demand or claim had ever been made for rent, and a substantial consideration for that understanding and agreement.

2. Upon the second point made by defendant, it appeared that no moneys had been advanced by defendant after December 20, 1890, until December 26, 1891. There was no new consideration for the $10,000 note, except the $2,000, if that was a part of the consideration. There was no other advance made at or near the time of giving the note, and none had been made for a year before the note was given. It was not pretended that the note was solicited for any purpose which defendant had in view, except as evidence of the indebtedness. Clearly, under these circumstances, the note was *prima facie* evidence of an account stated between the parties, and the burden was upon defendant to rebut the presumption. Rice, Ev. 103; 1 Tayl. Ev. (Text-Book Ser.) § 124; *Lake v. Tysen*, 6 N. Y. 461; *Davis v. Gallagher*, 55 Hun, 593.

There was testimony tending to show that the $2,000 received by decedent December 26, 1891, was used to pay a demand which existed on December 23, and that decedent had been, prior to December 26, making efforts to raise the money from other sources to meet this payment. There was also evidence tending to show that the only claim made by defendant after the death of plaintiff's intestate, was the amount of the $10,000 note. Indeed, no claim was made to this sum until after the defendant had once rested after having set up the further claim upon the $5,000 note and the claim for rent. There was no evidence as to the date of the delivery of the note. The presumption undoubtedly is that it was executed and delivered on the day of its date, but that presumption was removable.

It is urged that there is no evidence that the note was

given in payment, and that the taking of a note or acceptance is not payment in the absence of an agreement that it shall be received in payment, and and that upon nonpayment the holder may sue upon the original cause of action, and this defendant attempted to do; and it is sought to demonstrate by statements made in behalf of defendant and used upon the trial that a sum in excess of the amount of the note was due at its date, and hence that the $2,000 paid over December 26 could not have been included in said note. The difficulty with the demonstration is that at the very outset of defendant's case, and before she undertook to make any proof of the original indebtedness, intending to swell the indebtedness to her, she set up a claim upon the $5,000 note, which it is here conceded was not an independent indebtedness, but was already embraced in the note for $10,000. She next presents a statement purporting to be a statement of debts and credits, in which the estate is credited with only such payments as, after much controversy, have been actually shown to have been made. Plaintiff, however, pending the trial, in consequence of a remark drawn out upon a rigid cross-examination, is enabled to discover another bank where defendant had made deposits, and trace through a witness from such bank a further payment to defendant, not credited in the statement, of the sum of $2,000. There was no testimony that no other payments had been made, and no credits were acknowledged until the payments had been ferreted out and proven by indisputable testimony in the shape of checks and New York drafts, indorsed by the defendant. In the absence of the note, the jury would not have been justified in giving to plaintiff credit for payments not proven to have been made; but with the note before them it was for them to say whether the presumption as to its having been given in settlement was removed.

3. In view of the conclusion which we have reached as to the Catholic Mutual Benefit Association policy, it is unnecessary to discuss defendant's third assignment. The jury have found that this policy was held by defendant as security for the payment of the indebtedness. This is not a controversy between the association and a creditor. The amount of the policy has been actually received by defendant, and she refuses to apply it. It was agreed between the parties that the amount of said policy, when received, should be applied upon, and should *pro tanto* extinguish, the indebtedness. That was a valid agreement. Plaintiff is not now seeking to recover the proceeds of that policy. He is simply insisting upon its application in accordance with the terms of the agreement, and that the indebtedness to that extent shall not be offset against other moneys which defendant has collected. Suppose the same agreement had been made with a stranger and creditor, and the association had paid over the proceeds of the policy, could such creditor be heard to say that the proceeds of the policy were not applicable to the payment of the debts of the decedent, and that he could sue and recover the debt? The insurance contract was with decedent. It was within his power to change the beneficiary at any time.

Plaintiff is entitled to an addition to the judgment of the sum of $2,000, with interest from the date of the collection of that sum from the association. With this modification the judgment is affirmed.

The other Justices concurred.

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105	85
102	135
107	429

THE PEOPLE v. GEORGE L. LAIRD.

Criminal law — Privileged communications — Evidence of good character — Instructions.

1. Where, in a prosecution for burglary, the defense is an alibi, and the officers who made the arrest explain their presence in the building by testifying that they expected it to be entered, it is not error to reject testimony, sought to be drawn out on their cross-examination, relative to the source from which they derived their information that a burglary was premeditated.
2. A case might arise where a person claiming to have been innocently at the place where the crime was committed, at the solicitation of a person suspected of being the informant, would be entitled to inquire whether such person was the informant.
3. Where, in a prosecution for burglary, the sole disputed question of fact is as to the presence of the respondent at the scene of the burglary, and there is positive evidence on both sides of the question, it is error to instruct the jury that, if they find that there is positive evidence that the respondent did commit the offense, they are to pay no attention to the evidence which he has introduced tending to show his previous good character, such evidence being entitled to consideration in determining the disputed question.[1]

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[1]GOOD CHARACTER AS A DEFENSE IN CRIMINAL CASES.

For cases bearing upon the question of proof of good character in criminal cases, and the effect that should be given to it by the jury, see:

General Rules Applicable to the Subject.

1. *People v. Garbutt*, 17 Mich. 9, 26, holding that good character is an important fact with every man, and never more so than when put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime; that there are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character; that the most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skillful web of suspicion and

Error to recorder's court of Detroit. (Chambers, J.) Argued June 28, 1894. Decided September 25, 1894.

Respondent was convicted of the crime of burglary, and sentenced to imprisonment in the State prison for seven years. Judgment reversed. The facts are stated in the opinion.

George Cox, for respondent.

A. A. Ellis, Attorney General, and *Allan H. Frazer*, Prosecuting Attorney, for the people.

McGRATH, C. J. Respondent was convicted of burglary. The police department, on the evening of December 15, 1893, received information that a burglary would probably be committed some time during the night, or early the following morning, at the residence of one Tan-

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falsehood which conspirators have been able to weave; that good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring conviction of innocence; that in every criminal trial it is a fact which the respondent is at liberty to put in evidence, and, being in, the jury have a right to give it such weight as they think it entitled to.

2. *People v. Mead*, 50 Mich. 228, 233, holding that a person on trial for crime is entitled in all cases to the benefit of testimony as to his good character; but, if the evidence of his guilt is convincing beyond a reasonable doubt, he should be convicted, notwithstanding his good reputation.

3. *People v. Evans*, 72 Mich. 367, holding that the failure of a respondent to offer affirmative evidence of his good character raises no legal inference that he is guilty of the offense charged, or that his character is bad, and it is the gravest error for the court to permit the prosecuting attorney to comment upon the absence of such testimony, which error is not cured by an instruction to the jury not to consider the argument.

4. *People v. Marks*, 90 Mich. 555, holding that where a respondent introduces evidence of his good character, which is not attempted to be rebutted by the prosecution, it is prejudicial error for the court to instruct the jury that, while the law permits him to make such proof, the people are prohibited from showing his bad character.

nenholtz. Acting on this information, six officers were sent by Capt. Bachman to Tannenholtz's place, with instructions, if a burglary was committed, to arrest the parties. The officers informed Tannenholtz, procured from him a key, and secreted themselves upon the premises. At a few minutes after 5 in the morning, the rear door was broken open, and the place entered. Just after the place was entered, several shots were exchanged, and the burglars ran. Respondent was recognized by one of the officers at the door, and by two other officers in the course of the chase which followed. The defense was an alibi. The officers, in explaining their presence in the saloon,[1] testified that they expected the place to be entered. On cross-examination, each officer was asked a number of questions

[1] The first story of the building was occupied as a saloon, and the second as a dwelling.

5. *People v. Mills*, 94 Mich. 630, holding that, where a respondent's general character is put in issue by the defense, comment upon that character is clearly proper.

6. *People v. Jassino*, 100 Mich. 536, holding that evidence of good character is admissible not only in a case where doubt otherwise exists, but may be offered for the purpose of creating a doubt.

Illustrative Cases.

1. *People v. Garbutt*, 17 Mich. 9, 26, where, in a prosecution for murder, evidence was adduced by the respondent to establish his uniform good character previous to the time of the alleged offense, and the court was requested to instruct the jury that they had a right to consider whether such evidence tended to rebut the presumption of malice. And it was held that the proposed instruction was correct in substance, and that the respondent was entitled to it without explanation or qualification; that the evidence could have no bearing whatever except upon the question of malicious intent; that to refuse the instruction, therefore, was equivalent to holding, or at least to leaving the jury to infer, that the evidence, which was lawfully put into the case, was immaterial after it was in.

2. *Campbell v. People*, 34 Mich. 351, where, in a prosecution for rape, the court instructed the jury that the respondent had offered evidence tending to show his good character; that it was not

relative to the source from which they derived their information that a burglary was premeditated, but the testimony was rejected.

The general rule is that persons engaged in the detection of crime are not bound to disclose the sources of the information which led to the apprehension of the prisoner. The reason for the rule is that such disclosure can be of no importance to the defense, and may be highly prejudicial to the public in the administration of justice by deterring persons from making similar disclosures. 1 Greenl. Ev. § 250; Best, Ev. (Chamberlayne's 1st ed.) § 578, note 1*a*; *Rex v. Akers*, 6 Esp. 125; *Hardy's Trial*, 24 Howell, St. Tr. 808; *U. S. v. Moses*, 4 Wash. C. C. 726; *Attorney General v. Briant*, 15 Mees. & W. 169; *State v. Soper*, 16 Me. 293; *Gray v. Pentland*, 2 Serg. & R. 23, 32; *Worthington v. Scribner*, 109 Mass. 487. In the last case cited, Gray, J., says:

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usual, perhaps, for good men to commit crime, but it was possible, and men who have stood high have been convicted; that the jury should consider the evidence with the rest, and give the prisoner all the benefit of it that they believed him entitled to. And it was held that the instruction was calculated to insure to the respondent the full benefit of his good reputation.

3. *Brownell v. People*, 38 Mich. 732, 736, holding, in a prosecution for murder, that it was entirely inadmissible, in answer to proof of the general good reputation of the respondent, to receive evidence of an alleged act of violence against another person than the deceased, at a former time and different place; that the respondent could not (be expected to) be prepared to meet any such testimony or explain it, and its introduction might seriously prejudice the jury.

4. *People v. Harrison*, 93 Mich. 594, where, in a prosecution for larceny, the circuit judge instructed the jury that a good character was of importance to a person charged with crime, and that the jury had the right to consider whether a person with a good character would be less liable to be guilty of crime than one of bad habits and character. And it was held that this is undoubtedly the true rule, and it is so beneficient in its character that it is entitled to the constant recognition of all courts when engaged in the trial of any person charged with the commission of a crime.

"It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty, without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice, therefore, will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

And our own Court, in *People v. Davis*, 52 Mich. 569, 573, recognize the rule. Chief Justice COOLEY in that case says:

"And we are not called upon in this case to consider

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5. *People v. Pyckett*, 99 Mich. 613, where, in a prosecution for arson, testimony was introduced as to the general good character of the respondent, the question put to the witnesses being, "Do you know what his reputation for good moral conduct is?" On cross-examination the witnesses were interrogated as to specific acts of the respondent which occurred prior to the fire. And it was held that such interrogation was proper.

6. *People v. Jassino*, 100 Mich. 536, where, in a prosecution for an assault with intent to do great bodily harm less than the crime of murder, the court instructed the jury that a man's good character is a valuable thing under all circumstances; that it is proper evidence to be considered by the jury in doubtful cases to determine whether or not a man having that good character would commit the offense charged; that it often avails, and should avail, to acquit a man under such circumstances; but that, when there is positive proof of the commission of an offense, good character cannot avail to overthrow the proof. And it was held that the instruction was erroneous, in that it deprived the respondent of the benefit of proof of good character if the jury should find positive evidence tending to show the commission of the offense.

whether there may not be cases in which the prosecuting attorney would be excused, in the interest of the State, from disclosing what had been told to him with a view to the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the State should be inviolably kept; and nothing we shall say in this case will be intended to lay down a rule except for the very case at bar and others standing upon the same facts."

The rule is broad enough to protect the information as well as the informant, at least so far as it is necessary to shield the informant. In the present case the question involved was the presence and identity of the respondent at the scene of the burglary, and the court permitted a disclosure of the information so far as it related to him. A case might arise where a person claiming to have been innocently at the place of the crime, at the solicitation of a person suspected of being the informant, would be entitled to inquire whether such person was the informant. *U. S. v. Moses, supra.* But no such case is here. The defense here was that respondent was not present.

Much is said in the respondent's brief about the methods of the police department. The police are dealing with dangerous characters. Burglary is a profession. Men known to be connected with the profession infest communities. They are desperate characters, and take life to facilitate escape. The duty of the police lies beyond the protection of the public from a particular offense. It will not do to lay down the rule that, if a burglary is suspected, it is the duty of police officers to prevent the commission of that particular offense, rather than lie in wait and secure the guilty parties. In such case the police do not encourage the commission of the crime, but simply apprehend parties bent upon the crime, who, in carrying out plans already formulated, rush into the arms of the officers. Even an informant accompanying his associates

does not necessarily encourage their purpose, and it is not proper that he should, but he simply acquiesces in a plan already formed. We find no error in the record in respect to these matters.

The conviction must, however, be set aside for other reasons. Several witnesses were called as to the previous good character of the respondent, and the people called no witnesses upon that subject. The court instructed the jury that—

"Good character is always admissible, gentlemen, in criminal cases, and may be always received by you, *but it is for you to say whether it will have any weight with you in coming to your verdict, or not.* The testimony of the defense may be introduced to show what the character of the defendant is; and if the testimony is incompatible with your judgment in regard to defendant's good character, if you think it is insufficient, *or if you think defendant is guilty without any testimony with reference to character,* it would be your duty to say so. The defendant might have a good character up to a certain time, and afterwards he might have committed a crime.

"If a crime was absolutely committed, and you are satisfied beyond a reasonable doubt, *then good character would be comparatively useless,* so far as you are concerned, because men sometimes have to have some commencement in crime, and a man might have a good reputation and good character most all of his life, and he may commit some crime; and it does not follow, because he has always had a good reputation, that, therefore, he is a good man. It is a question for you to say whether, *if there is any doubt in regard to the case,*—whether you believe that testimony, or *whether you will accept testimony to show that his character is good, when you have positive evidence that his character is not good,* and that is a question for you to say entirely.

"In regard to the man's reputation, you have heard the testimony introduced here of some of the witnesses that defendant had borne a good character up to the time of this offense; and it is a question for you to consider whether a man who has lived a good life and enjoyed a high reputation for 35 or 40 years,—whether he would be likely to commit the offense charged. If you believe he would, then, of course, character would be of no impor-

tance. If you believe that he did commit the offense, *and you find that there is positive evidence that he did commit it, of course you would pay no attention to the man's reputation.*"

This instruction was erroneous, in that it authorized the jury to disassociate the testimony as to good character from the other testimony in the case. The sole question was as to respondent's presence at the scene of the burglary. The evidence upon that question was conflicting. There was positive evidence that respondent was present, but there was also testimony, equally as positive, that he was not. The testimony as to good character supplemented the latter class of testimony, and was entitled to consideration in determining the disputed question. The court might as well have said:

"If you find positive evidence that respondent was present, then you may reject the testimony which tends to show that he was not."

The precise question was before this Court in *People v. Jassino*, 100 Mich. 536.

The judgment is reversed, and a new trial granted.

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

JOHN B. MCNAUGHTON v. CHARLES A. QUAY.

Slander—Evidence—Instructions—Justification.

1. Where in an action for slander consisting, as alleged, in charging the plaintiff with having committed the crimes of perjury and larceny, the defendant gives notice that under his plea of the general issue he will prove the truth of the charge as to the commission of the first-named crime, the court should ex-

clude, not only such circumstances as tend to prove the truth of the other accusation, but all the circumstances which would tend to cast suspicion upon the plaintiff as having been guilty of said offense.

2. Where the defendant in an action for slander consisting, as alleged, in charging the plaintiff with having committed the crime of perjury, proves the truth of the charge to the satisfaction of the jury, the plaintiff is not prejudiced by a statement in the charge that the defendant admits speaking the words charged in the declaration, it appearing that the words admitted by him to have been spoken were not actionable *per se*.

Error to Clinton. (Daboll, J.) Submitted on briefs June 28, 1894. Decided September 25, 1894.

Case for slander. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Lyon & Dooling, for appellant.

Fedewa & Merrill, for defendant.

LONG, J. The declaration in this cause was for slander, and alleged that defendant had accused the plaintiff of the crime of perjury in testifying as a witness in a cause tried in justice's court, and also that defendant had accused him of the crime of larceny, by reporting that he had stolen his (defendant's) honey. The plea was the general issue, with notice that defendant would prove on the trial the truth of the charge as to the commission of perjury. On the trial the defendant was sworn as a witness, and testified that he had accused the plaintiff of perjury, and produced some evidence tending to show the truth of the accusation. Defendant denied, however, that he had ever accused the plaintiff of the larceny. The jury rendered a verdict in favor of defendant.

The defendant was permitted, under plaintiff's objection, to testify that upon a certain evening, about three years

before, he had some honey stolen, and to detail the circumstances under which it was taken. This is assigned as error, and it is claimed that plaintiff's case was prejudiced by the admission of the testimony. The court was in error in admitting this testimony. The defendant, by his plea of the general issue to this charge in the declaration, would not have the right to prove the charge to be true. He in fact denied absolutely that he uttered the slander, and he did not have the right to offer evidence, the only purpose of which would be to prove the truth of the charge. In such cases the rule is settled that the court should exclude, not only such circumstances as tend to prove the truth of the charge, but all circumstances which would tend to cast suspicion upon the plaintiff as having been guilty of the offense. *Storey v. Early*, 86 Ill. 461.

Error is also assigned upon that part of the charge in which the court instructed the jury that the defendant admitted that he spoke the words attributed to him as to the charge of perjury, and further that, if they found by a preponderance of the evidence that plaintiff did commit perjury, then as to that issue they should find for defendant.

The declaration charged the defendant with having published and declared of and concerning the plaintiff the following slanderous and defamatory words: "McNaughton (this plaintiff meaning) went down there (to the office of Byron V. Soule, a justice of the peace in and for the county of Clinton, and in the village of Ovid, meaning) and swore to a God-damned lie, or I would have beaten her" (the defendant in that suit). And that at another time he used these words: "He did swear to a God-damned lie down at Ovid, and I won't deny I said so. I wouldn't have been beaten if it hadn't been for John" (meaning thereby, and intending to chage, that in a case tried before Byron V. Soule, a justice of the peace, and

in which one Jane Runciman was defendant and Charles A. Quay plaintiff, the said John B. McNaughton gave testimony material to the issue, and in so doing committed the crime of perjury). The testimony given by the plaintiff bore out the allegations in the declaration, one Clarence Kimball testifying that he had heard Quay say "he would have beat Jane Runciman, down at Ovid, if it hadn't been for John McNaughton. He said he swore to a God-damned lie." George W. Kimball testified to the same thing.

It is claimed that the defendant did not admit on the trial that he spoke the slanderous and defamatory words as they were set forth in the declaration, but that his only admission was that he told one Exelby that "he [McNaughton] falsified," and that he "told Clarence Kimball that McNaughton swore falsely at the trial at Ovid." This appears to be the only admission made by the defendant as to what he said of and concerning the plaintiff. It is therefore insisted that the court was in error in stating to the jury that the defendant admitted that he spoke the words attributed to him as to the charge of perjury, and that the plaintiff's case was prejudiced by this charge, for the reason that the evidence on the part of the defendant was not identical with the charge, in point of law, as the gist of the charge was, "I wouldn't have been beaten if it hadn't been for John," and that the defendant's admission as to what he said would not make the words actionable *per se*, while the words charged in the declaration are actionable *per se*. It is further claimed that inasmuch as the declaration sets out words which are actionable *per se*, and the plaintiff having proved that such words were uttered, the defendant cannot, under his plea of justification, claim that he has justified when he proves he has uttered words which are not actionable

per se, and which are not identical in point of law with the charge made in the declaration; and that under these circumstances the question whether the plaintiff did commit perjury should not have been submitted to the jury.

It is a little difficult to see how the plaintiff was injured by the charge as given, or what the real contention of counsel is. The declaration sets out words which are actionable *per se*. The charge made was one of perjury. The defendant, under his plea of the general issue, gave notice that, if the words were spoken as alleged in the declaration, they were true. The plaintiff proved that the words were spoken, and rested his case. The defendant then took the case, and showed substantially that, in the suit referred to, defendant sued Mrs. Runciman to recover the principal and interest of a promissory note given by Mrs. Runciman to him for the price of some sheep sold to her by defendant. Defendant contended that Mrs. Runciman agreed to pay interest on the note, and that the note was correct as written. She denied that she was to pay interest, and claimed that the interest clause in the note was forged. The plaintiff in this cause was called as a witness by Mrs. Runciman, and testified that, in a conversation had with Quay in relation to the sale of the sheep and the price to be paid therefor, Quay said to him, among other things, that—

"I don't know but what I have done just as well as if I had held onto them, for I have waited on her for the price without interest; but she takes care of the lambs, and the keep of the lambs is worth more to me than the interest on the price of the sheep."

On the trial of the present case, defendant offered testimony tending to show that the plaintiff did testify falsely before the justice in the Runciman suit. The court regarded the plea sufficient to admit this testimony,

and directed the jury that, if they believed that plaintiff did testify falsely on that trial, they should find upon that issue a verdict for the defendant. We see no error in this charge, and if the court, by some inadvertence, stated to the jury that the defendant admitted speaking the words charged in the declaration, it is not clear how the plaintiff was prejudiced. The defendant had proved the words, as laid in the declaration, true, to the satisfaction of the jury, as they found with him. Conceding, therefore, all that plaintiff's counsel claim, we see no prejudicial error in the charge.

Some other errors are claimed, which we do not deem of sufficient importance to discuss, as on another trial the rights of the parties will undoubtedly be fully protected.

For the error pointed out the judgment must be reversed, and a new trial ordered.

The other Justices concurred.

THE PEOPLE v. WILLIAM H. KINDRA.

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Criminal law—Indorsing names of witnesses on information—Res gestae—Liquor traffic—Trial—Argument of prosecutor.

1. Where, in a prosecution for keeping respondent's saloon open after hours, three witnesses testify in behalf of the people that, after the hour for closing, they, in company with three women, whose names are not indorsed on the information, went into a room back of the bar-room kept by the respondent, and there purchased lager beer of respondent's barkeeper, it is not error for the court to deny respondent's motion to place the names of the women upon the information, and produce them as witnesses for the people; it appearing that the prosecution has not failed to put all parts of the transaction before the jury by the testimony of the three men, and that the introduction

of the testimony of the women would be merely cumulative.[1]

2. After the respondent had rested, one of the women was found, and examined as a witness for the people. Her testimony corroborated that of the three men, but was taken under respondent's objection that it was more prejudicial to him than it would have been had it been taken earlier in the trial. And it is held that the time of calling the witness was within the discretion of the court, and, inasmuch as respondent was given the right to rebut the testimony, he cannot now complain.

3. After one of the witnesses for the people had been examined in chief, and cross-examined at some length, the court inquired of the prosecuting attorney if that was all of the witness, and that officer responded that he "was through with the witness some time ago," whereupon respondent's counsel stated that he desired to examine the witness. The court declined to wait for such examination, and dismissed the witness from the stand, and counsel for respondent took an exception to this proceeding, but did not advise the court what further questions he desired to ask of the witness. And it is held that, while the court should not have thus summarily dismissed the witness from the stand, yet it was the duty of the counsel for the respondent, under the circumstances, to state to the court some reason why he desired to examine the witness further; that no reason is here assigned, and the Court are unadvised as to whether the respondent's rights were prejudiced by the action taken; and that, under the circumstances, they are unable to say that there was any prejudice, as the facts brought out on the direct examination seem to have been fully covered by cross-examination.

4. Where, in a prosecution for keeping a saloon open after hours, the respondent was called as a witness in his own behalf, and testified that he had once been convicted of a like offense, his case cannot be said to have been prejudiced by the remark of the prosecuting attorney, in his closing argument to the jury, that the case followed another case, in which the respondent pleaded guilty.[2]

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[1] See, as to indorsement of names of witnesses on information, *People v. Machen*, 101 Mich. 401, and note; and as to duty of prosecuting attorney to produce the testimony of *res gestae* witnesses, *People v. Germaine*, Id. 488, and note.

[2] The prosecuting attorney states in his brief that "the language used was not apparently strictly borne out by the record, but evidently referred to the statement of the respondent that he had been convicted for keeping open after hours;" and adds that "it

Exceptions before judgment from the superior court of Grand Rapids. (Burlingame, J.) Argued June 29, 1894. Decided September 25, 1894.

Respondent was convicted of keeping his saloon open after hours. Conviction affirmed. The facts are stated in the opinion.

Griffin, McDonald & La Grou, for respondent.

A. A. Ellis, Attorney General, and *Alfred Wolcott,* Prosecuting Attorney, for the people.

LONG, J. The respondent was arrested and tried before the superior court of Grand Rapids for keeping his saloon open on the night of August 24, 1893. At the time in question, the respondent was running an hotel and saloon in the city of Grand Rapids; and, on the evening of that day, a dance was in progress in the hall upstairs, in the same building. The dance was concluded about 11 o'clock. On the part of the prosecution, it is claimed that, after the dance, the witnesses Stoutjesdyk, Price, and Rittenberg, together with Lou Thayer and her sister and one May Wyman and several others, came down from the dance hall, and got some beer in a small room back of the main bar-room, which beer was paid for by Stoutjesdyk.

The people, after swearing the witnesses Stoutjesdyk, Price, and Rittenberg, rested their case. These witnesses had testified that, after 11 o'clock, they, in company with these women, went into the room back of the bar-room, kept by respondent, and there purchased lager of respondent's barkeeper. The names of the women were not placed on the information. Respondent thereupon insisted

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would not have been improper to comment on this testimony as affecting the credibility of the witness, and as to that it would make very little difference whether it was a conviction or a plea of guilty."

upon their being produced as witnesses by the people, and that their names be placed upon the information. The court declined to order the people to place their names upon the information, but had subpoenas issued for them. The witnesses not being found, after waiting two hours, the court directed the respondent to proceed with his defense. He did proceed, and examined eight witnesses, who all testified that the saloon was not open upon the night in question, and that no liquors were sold there that night after the hour of closing. After the defense rested, the witness May Wyman, who the defense had insisted should be produced by the people, was found, and called into court, and examined on the part of the people. Her testimony corroborated the people's witnesses, but was taken under respondent's objection, who now claims that her testimony was more prejudicial to him than it would have been had it been taken earlier in the trial.

We think the court was not in error in denying the motion to place the names of these witnesses upon the information. It is evident that the people had not failed to put all parts of the transaction before the jury by the testimony of the three witnesses called to sustain the prosecution; that the introduction of the testimony of the other witnesses would have been merely cumulative. It is true that the prosecutor in a criminal case is not at liberty, like the plaintiff in a civil case, to select out a part of an entire transaction which makes against the respondent, and then put the respondent to the proof of the other part, so long as it appears at all probable from the evidence that there may be any other part of the transaction undisclosed, especially if it appears to the court that the evidence of the other portion is attainable. If the facts stated by the witnesses who are called show *prima facie* or even probable reason for believing that there are other parts of the transaction to which they have not testified,

and which are likely to be known to other witnesses present at the transaction, then such other witnesses should be called by the prosecution, if attainable. *Hurd v. People,* 25 Mich. 415. But the rule laid down in such cases is really aimed at the suppression of evidence, and does not decide that in all cases all the witnesses to a transaction must necessarily be called by the prosecution. The justice of requiring this must depend upon circumstances, and it would seldom be as manifest in cases of mere misdemeanor as in cases of higher offenses, especially those accomplished by violence. But in this case there was no reason to suppose that the prosecution had failed to put all parts of the transaction in evidence before the jury, and the testimony of the others who were not called could only have been cumulative. This rule was laid down in *Bonker v. People,* 37 Mich. 4. In *People v. Quick,* 51 Mich. 547, it was held that the prosecution in a criminal case is not obliged to call all the witnesses named on the information.

But in the present case the good faith of this claim may well be questioned; for, when one of these witnesses was subsequently called, sworn, and examined by the people, the defense objected to the testimony (such testimony corroborating the people's case), for the reason that the witness was called at a later stage of the proceeding. The time of calling the witness was within the discretion of the trial court, and, inasmuch as respondent was given the right to rebut this testimony, we think he cannot now complain.

One of the witnesses for the people was called, examined in chief, and at some length cross-examined by respondent's counsel. The court then asked of the prosecution, "Is that all of this witness?" and the attorney for the prosecution responded, "I was through with the witness some time ago." Respondent's counsel then said, "I desire to examine this witness;" when the court stated,

"I cannot wait," and dismissed the witness from the stand, counsel for respondent taking an exception to this proceeding. It is not stated in this record what further examination the respondent desired to make of this witness, and the court below was not advised what further questions respondent desired to ask; but the whole matter was dropped, as appears by this record, by respondent's counsel's taking an exception. We think, if respondent desired further examination of the witness, he should then have stated to the court upon what subject he desired to examine him, for he had already cross-examined the witness at great length. While the court should not have summarily dismissed the witness from the stand, yet we think it was the duty of counsel, under the circumstances, to state to the court some reason why he desired to examine the witness further. No reason is assigned in this Court why further examination was desired, and we are left wholly in the dark as to whether respondent's rights were prejudiced by the action taken. Under the circumstances, we are unable to say that there was any prejudice, as the facts brought out on the direct examination seem to have been fully covered by cross-examination.

Complaint is made of the remarks of the prosecuting attorney during the trial. He stated, in the presence of the jury, in the closing argument:

"This case follows another case, in which respondent pleaded guilty."

We do not think this remark prejudiced respondent's case. He was called as a witness, and testified that he had once been convicted for keeping open after hours.

The conviction must be affirmed.

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

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CALISTA EDWARDS v. THE COMMON COUNCIL OF THE VILLAGE OF THREE RIVERS.

[See 96 Mich. 625.]

Pleading—Amendment—Damages—Municipal corporations—Defective sidewalk—Evidence—Hypothetical questions—Contributory negligence.

1. It is within the discretion of a circuit judge to permit the amendment of the declaration in a personal injury case by inserting therein, after the general description of the injuries alleged to have been sustained, an averment "that said injuries so received and sustained as aforesaid are permanent."

2. A declaration in a personal injury case which, after describing the manner in which the injuries complained of were received, alleges that plaintiff was greatly wrenched, bruised, sprained, and injured in her left foot, ankle, and limb, so that on account thereof her said left foot, ankle, and limb became and were, and ever since said date have been and continued to be, greatly swollen, sore, and lame, so much so that plaintiff has ever since said injury been hardly able to walk about the house, and is thereby disabled from carrying on her business, that of keeping a boarding-house, and that said injuries so received and sustained by her as aforesaid are permanent, is sufficiently specific to admit of proof of permanent injuries of the kind alleged.

3. It is not error to permit a witness in a personal injury case, whose attention has been called to the portion of the walk where the injury is claimed to have been received, to testify to the condition of the walk at that point, the evidence being competent as bearing upon the question of notice.

4. The introduction of testimony on the part of the defendant in a personal injury case tending to show that the plaintiff had for many years prior to the injury been lame, that her limbs had long troubled her, and that she had varicose veins, justifies the admission on behalf of the plaintiff of the testimony of acquaintances of the plaintiff tending to show an absence of such conditions; that plaintiff was healthy, and had been during the period covered by defendant's testimony; and that intimate acquaintances never had known that she was afflicted in the manner testified to.

5. A witness for the plaintiff was examined about a point in the walk 35 or 36 feet from a bridge, and testified concerning a hole in the walk at that point that he thought was 5 inches deep. The plaintiff identified the place of the accident as being near a telephone pole, which she located at a distance of from 34 to 35 feet from the bridge. The witness said nothing about a telephone pole in describing the place he saw. Expert witnesses were asked hypothetical questions, in which the hole was described as of the depth testified to by the witness. And it is held that the court properly allowed the questions to be answered, as it was for the jury to say whether or not the plaintiff was hurt in the place testified to by the witness.

6. A request to charge in a personal injury case, which goes to the extent of saying that if the plaintiff, at the time she stepped into the hole in the sidewalk upon which she was injured, was afflicted with *any* disease, it was necessary for her to use more caution in looking for holes in the walk than is required of ordinarily healthy persons, is properly refused.

Error to St. Joseph. (Loveridge, J.) Argued June 28, 1894. Decided September 25, 1894.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

H. O. Bliss and *Newton H. Barnard,* for appellant.

B. E. & L. F. Andrews and *O. F. Bean,* for plaintiff.

HOOKER, J. The defendant appeals from a judgment rendered against it in an action for an injury alleged to have been received by the plaintiff on the occasion of a fall upon a sidewalk.

Plaintiff's counsel sought to show that the injury alleged was permanent, and, being met by the objection that the declaration did not so allege, asked to amend the same by inserting in the first count the words, "And the plaintiff alleges that said injuries so received and sustained by her as aforesaid are permanent." The second count already contained the allegation "that said injury is likely to

prove permanent." It needs no citation of authorities to vindicate the power of the circuit judge to permit this amendment, or to support the proposition that the exercise of his discretion should not be interfered with unless abused. We think the amendment was a proper one.

It is contended, however, that the declaration as amended was not sufficiently definite to admit of proof that the injuries were permanent. The language of the first count is that plaintiff,—

"By stepping her left foot into the hole in said sidewalk where said plank or board was gone and out of said sidewalk as aforesaid, was greatly wrenched, bruised, sprained, and injured in her left foot, ankle, and limb, so that on account thereof her said left foot, ankle, and limb became and was, and ever since said date has been and continued to be, greatly swollen, sore, and lame, so much so that she, said plaintiff, has ever since said injury been hardly able to walk about the house."

The second count alleges that plaintiff—

"Stepped her left foot into a hole where said board or plank was so out of and gone from said sidewalk as aforesaid, and was thereby greatly wrenched, sprained, bruised, and injured in her said left foot, ankle, and limb, and by means whereof was greatly injured."

The cases of *Shadock v. Plank Road Co.*, 79 Mich. 11, and *Kalembach v. Railroad Co.*, 87 Id. 509, are cited in support of this contention, in which cases, it is said, the descriptions of the injuries are quite as specific as in the declaration before us. We consider them much less so, and think this declaration sufficiently specific to admit of proof of permanent injuries of the kind sought to be proved.

A Mr. Aspinwall, who lived in Three Rivers at the time of the accident, testified that three planks were broken, one of which was loose during July and August,[1] though he thought it was not out until the middle of August;

[1] The plaintiff was injured on the 21st day of August, 1890.

that he replaced it several times; that the sills were decayed, and one plank broken in two; that when walking across the walk great care was necessary if one stepped on one end or close to the sill. The last sentence was objected to, and taken under exception. The witness afterwards explained that there was danger of tipping the plank up and throwing it out. It has been repeatedly held that evidence of the condition of the walk in the vicinity of the place of the accident is admissible, as bearing upon the question of notice. See *Fuller v. City of Jackson*, 92 Mich. 197; *Corcoran v. City of Detroit*, 95 Id. 84; *O'Neil v. Village of West Branch*, 81 Id. 544; *Dotton v. Village of Albion*, 50 Id. 131. In *Campbell v. City of Kalamazoo*, 80 Id. 660, testimony nearly identical with that objected to was held proper.

Counsel for the defendant offered testimony tending to show that plaintiff had for many years been lame, that her limbs had long troubled her, that she had varicose veins, etc. This justified the admission of testimony of acquaintances tending to show an absence of such conditions, and that she was healthy, and had been during the period covered by defendant's testimony, and that intimate acquaintances never had known that she was so afflicted. We have examined this testimony, and think that the defendant has no ground for complaint in regard to it. It is more than negative testimony.

Expert witnesses were asked hypothetical questions, which described the hole as four or five inches deep. Counsel say in their brief that the testimony of the plaintiff would tend to show that the depth of the hole was just the thickness of the plank, and that the only other witness who testified about the depth was talking of a hole that he thought was five inches deep. It is argued that they must have been talking of different places, because "she identified the place as being near a telephone pole, but he

said nothing about a telephone pole in describing the place he saw." Mr. Edwards, plaintiff's husband, was being examined about a point in the walk 35 or 36 feet from a bridge, and the plaintiff had testified on cross-examination that the telephone pole was 34 or 35 feet from the bridge. Her testimony about the depth of the hole was as follows:

"*Q.* How deep was the hole?

"*A.* I cannot tell you.

"*Q.* About two inches?

"*A.* I think it was more than two inches.

"*Q.* Is it not a fact that the hole was just the depth of the thickness of the planks?

"*A.* I suppose so. I do not know. I could not say.

"*Q.* You would not say that it was any deeper than that?

"*A.* No, sir; I would not say either way."

The court properly allowed these questions to be answered, as it was for the jury to say whether or not she was hurt in the place testified to by Edwards. That theory being supported by testimony, the question was proper. *Fox v. Lead & Color Works*, 92 Mich. 243.

Error is assigned upon the refusal of the court to give the following request to charge:

"If the plaintiff, at the time the injury is claimed to have been received by her, was in a diseased condition, then she was required to use greater care and caution than an ordinarily well person would have been."

It is true that a blind man should not walk with the assurance of a robust youth in the full possession of all his faculties. A lame man might not be justified in going over obstacles where a sound man might venture, but there is no reason for a greater apprehension of defects which he has no reason to suppose exist. This request, as applied to this case, goes to the extent of saying that *any* disease makes it necessary for a man to use more caution in looking for holes in a walk than is required of ordinarily healthy persons. We think this rule has no such broad

application as that contended for. There must be some apparent relation between the disease or infirmity and the danger to be avoided. None is shown here which required the plaintiff to be more diligent in looking for holes in the walk than the ordinarily prudent person is expected to be.

A number of other questions are raised, but, after examining them, we think it unnecessary to refer to them further than to say that we find no error in them.

The judgment will be affirmed.

The other Justices concurred.

HIRAM W. SIBLEY AND ISAAC BEARINGER v. WILLIAM ROSS ET AL.

[See 88 Mich. 315.]

Mortgage—Waiver of lien—Removal of timber.

The question involved in this case is whether the evidence introduced on the trial would, if it had been submitted to the jury, have justified them in finding a waiver on the part of the defendants of their legal right to the possession of the timber from which the logs in dispute were cut, so as to entitle plaintiffs to the possession of said logs under the bill of sale given to them as security. And it is held that, in the light of the testimony, there could be no possible justification for such a finding, and that the trial judge properly so determined. An examination of the entire opinion and of the former decision is essential to a full understanding of the case,

Error to Wayne. (Hosmer, J.) Argued June 27, 1894. Decided September 25, 1894.

Replevin. Plaintiffs bring error. Affirmed. The facts are stated in the opinion, and in 88 Mich. 315.

Weadock & Purcell (*T. E. Tarsney* and *M. Brennan,* of counsel), for appellants.

Watts S. Humphrey (*John D. Conely,* of counsel), for defendants.

HOOKER, J. On August 4, 1886, one Gamble, who is plaintiffs' assignor, purchased of one Webber certain lands, upon a land contract, for the sum of $6,500. This contract provided that no timber or logs should be cut or removed from said land, without the written consent of Webber, until full payment should have been made.

On November 24, 1886, Gamble made an agreement in writing with James G. Ross, defendants' intestate, for the sale of all the pine timber upon certain other lands contiguous to those mentioned in the contract with Webber, for $30,000. This contract provided that—

"It is distinctly agreed that the ownership and possession of said lands and premises, and all the standing and other timber thereon, shall continue and remain in the party of the first part until the execution and delivery of the deed of conveyance aforesaid, and that the party of the second part shall not cut, or suffer to be cut, any timber upon said land, unless he shall have first made application in writing therefor to the said party of the first part, specifying in said application the amount of timber and particular description of land which the party of the second part desires to cut, and until the party of the first part shall have first given a written permission to the said party of the second part to cut the quantity of timber or the description of land so specified and applied for."

On December 30, 1889, Ross being dead, the defendants (with the exception of defendant Connolly), being his heirs, made a written contract with Gamble, whereby they consented:

"*That whereas,* James G. Ross, doing business in the name of Ross & Co., and from whom the parties of the first part acquire title to certain pine timber standing and growing upon certain land hereinafter mentioned, as the heirs and successors of the same said James G. Ross, has made a contract with the said Henry Gamble, party of the second part, for the sale of said pine timber growing and being upon certain lands of the Lake Superior Ship-Canal, Railroad & Iron Co., the pine timber on said lands having been purchased by said Ross & Co., which timber is upon the following described lands [here follows description];

"*And whereas,* the said party of the second part desires to manufacture the said pine timber growing and being upon the said lands, in wany board pine timber, for the Quebec market, and also into saw-logs; and *whereas,* said second party has not paid in full for the said timber, according to the conditions of the said prior contract made with the said Ross & Co., which contract was dated the 24th day of November, 1886; and *whereas,* there was due upon the said contract of November 24, 1886, to the said parties of the first part, as heirs of the said James G. Ross, deceased, the sum of $21,394.78 on the first day of November, 1889:

"It is hereby understood and agreed that the said parties of the first part consent to the said party of the second part manufacturing the said pine into said wany board pine timber and into saw-logs, according as the same will manufacture most advantageously into said wany board pine timber or saw-logs, the said timber to be manufactured during the winter of 1890, and prior to the first of May, 1890, by the said party of the second part; it being understood and agreed that the said parties of the first part will advance to the said party of the second part, as the work of manufacturing the said timber as aforesaid shall be carried on, four (4) cents per cubic foot, string measure, for all wany board pine timber so manufactured, when said timber shall be loaded upon the cars of the Duluth, South Shore & Atlantic Railway Co., and four (4) cents in addition when said timber shall land upon the banks of Waiska river or Waiska bay or upon the shore of Lake Superior, at such point or points as shall be agreed upon between the first and second parties, in Chippewa county, Michigan; it being further understood that the first parties shall advance to said second party the

amount of the freight to be paid upon the said wany board pine timber, for shipping the same to Quebec, Canada, where the said timber is to be taken for sale.

"It is further understood and agreed that, for all saw-logs manufactured from said timber, said party of the second part shall receive advances from said first parties, when the logs are loaded upon the cars, two dollars per thousand feet, board measure, and when banked upon the said Waiska river or Waiska bay or the shores of Lake Superior, at such points agreed upon between the said parties as above stated, said party of the second part shall receive from said first parties two dollars per thousand feet, board measure, in addition, by way of advances.

"And it is further understood and agreed that the parties of the first part shall sell the said wany board pine timber in the Quebec market, and out of the proceeds of said sale shall retain seven (7) per cent. interest per annum upon the moneys so advanced to said second party, and five (5) per cent. commission upon the amount of said wany board pine timber sold, for services in and about said business, and shall deduct the same from the said proceeds, as well as the expenses of James Connolly, agent of said first parties, in looking after the said lumbering business while it shall be carried on by the said second party; and there shall also be deducted from the amount received from the sale of the said wany board pine timber, as well as from the sale of the said saw-logs above mentioned, the amount due upon the said contract of November 24, 1886, to wit, the sum of $21,394.78, due November 1, 1889, together with interest that shall accrue under the provision of the said contract of November 24, 1886, up to the time of the final sale of the said timber and logs.

"It is further understood and agreed that all of the said wany board pine timber so manufactured shall be not less than nineteen (19) inches, string measure, average, and not less than twenty-four (24) feet, lineal measure, average, and as much larger and longer as possible, and the said timber shall be at least ninety-two (92) per cent. first quality, and eight (8) per cent. second class; the timber, when manufactured, to be measured and scaled in the woods, where manufactured, by a Quebec scaler, to be agreed upon between the parties; said scaler to be paid for his services by first and second parties, share and share alike.

"It is further understood and agreed that all of the said timber and logs so manufactured upon the said property shall be and remain the property of the said parties of the first part until all of said advances, interets, and commissions above mentioned, as well as the amount due for stumpage under the provisions of the contract of November 24, 1886, shall be fully paid. Said wany board pine timber, when manufactured, is to be marked diamond <R> on the sides, and logs are to be marked diamond <R> on the ends, by the said second party.

"It is further understood and agreed that all of the horses, harnesses, sleighs, and camp equipage and utensils are to be the property of the said first parties until said timber shall be paid for, that shall be used in the camps in manufacturing the said timber and logs upon the land in question.

"It is further understood and agreed that provided the said timber is not being cut by the said party of the second part in a workman-like manner, and in accordance with the provisions of this contract, the said parties of the first part shall have the right to take possession of the camps carrying on the work of manufacture of the said timber, without any notice to the said second party whatever, and carry forward the said work under their own directions, and at the expense of the said party of the second part, and shall account to the said second party for any profits that may arise after carrying out this contract herein contained, and after the deduction of the expenses in so carrying out the same caused by the failure of the said second party to execute the same according to agreement.

"It is further understood and agreed that the said second party shall give to said first parties an assignment of his contract which he holds from William L. Webber, of East Saginaw, Michigan, for the purchase of lands, or interest in lands, described as follows [here follows description], as collateral security to the said first parties that he execute and carry out the contract herein contained, and pay the balance due the said parties of the first part under the said contract of November 24, 1886, above referred to, made and executed with Ross & Co. as aforesaid.

"It is further understood and agreed that the said first parties shall render an account to said second party as to all sales made of the said timber and logs.

"It is further understood and agreed that whereas it is claimed by the said party of the second part that he has had negotiations for the sale of the said wany board pine timber to certain parties in Quebec, known as J. Burstall & Co., and has personally agreed with them for the sale of the same at certain prices, which prices have been agreed upon in writing, said first parties will allow the said parties referred to to have the first right of purchase of the said timber at the prices agreed upon with the said party of the second part, providing the timber shall be paid for immediately upon delivery at Quebec, in the spring or summer of 1890, but if not paid for immediately the parties of the first part will dispose of the same to other parties.

"It is further understood and agreed that the said parties of the first part shall dispose of the said saw-logs so manufactured, and out of the proceeds of the same shall deduct first the seven per cent. interest for advances, five per cent. for commission, and expenses of James Connolly in and about the business, and the moneys due under the said contract of November 24, 1886, as above referred to, so far as the same shall not have been previously paid by the said second party, or from the sale and proceeds of said wany board pine timber above referred to, until the said interest, advances, commissions, and former indebtedness, and amount due under said contract of November 24, 1886, shall be fully paid.

"And it is further understood and agreed that the said saw-logs shall be the property of the said first parties until all of the said interest, advances, commissions, and amounts due under said contract of November 24, 1886, shall be fully paid."

On June 6, 1890, Gamble executed and delivered the following writing:

"*Whereas,* William L. Webber, of East Saginaw, Michigan, and Henry Gamble, of the same place, made and entered into one certain land contract on the 4th day of August, 1886, by which said Webber agreed to sell, and the said Gamble agreed to buy, the following described land, viz. [here follows description of premises];

"*And whereas,* the said Gamble did on the 30th day of December, A. D. 1889, enter into one certain contract with William Ross, Frank Ross, John Theo. Ross, Frances Ella Ross, and Annie Ross, successors of James G. Ross,

as parties of the first part, by which the said Gamble agreed to assign said contract for the purchase of the above-described land, upon conditions therein contained, to said first parties in said contract last aforesaid;

"*And whereas,* there yet remains unpaid upon the purchase price of said land the sum of $3,600; and *whereas,* said first parties to said contract last above named have agreed to advance the said sum of $3,600 to pay said Webber said balance:

"Now, therefore, the said Henry Gamble, for a valuable consideration to him paid, and for the purposes stated in said contract of December 30, 1889, and to secure said Rosses for the amount advanced to pay the purchase price of said land, does hereby sell, assign, transfer, and set over said contract to the Rosses above named, and hereby authorizes said Webber to make, execute, and deliver to them the warranty deed of said land specified in said contract, to said first parties in said contract of December 30, 1889, for the purposes aforesaid."

Webber deeded to the Ross heirs the same day.

Inasmuch as Gamble had no right, under his contract with Webber, to cut or remove timber from the Webber tract until it should be fully paid for, he made the arrangement of June 6, whereby they (the Ross heirs) agreed to pay the remaining $3,600 to Webber, and take a deed of the premises from Webber. Gamble's version of that arrangement is that, in accordance with the contract of December 30, he had contracted with Burstall & Co., of Quebec, to deliver to them 100,000 feet of wany pine, and, finding that he would not be able to get it from the Ross lands, he had a talk with defendant Connolly, who was agent of the other defendants, wherein it was agreed that he (Gamble) should go to work and put in the board timber on the Burstall contract, and make an assignment of the Webber contract, so that defendants could have a deed from Webber; they agreeing to pay the $3,600 to Webber, thereby releasing the lands from the restriction upon cutting.

Gamble got out a quantity of logs, and had them rafted

to the mill of the John Spry Lumber Company. On July 17, 1890, he made a bill of sale of these logs, which are the logs in controversy, to the plaintiffs, as security for an advancement of $9,382.85. The lumber from these logs came to the possession of the defendants, from whom it was replevied by the plaintiffs. The circuit judge directed a verdict for the defendants, and the plaintiffs appeal.

Counsel for the plaintiffs contend that the evidence presented two questions which should have been submitted to the jury—

"1. If the Rosses had any lien on the Webber land, did they waive it, and permit Gamble to take the Webber logs for his own benefit?

"2. Whether or not the receipts given by Osgood in pursuance of the telegram of June 23 and the order of June 24 were procured by fraud."

Upon a review of a former trial of this cause, this Court construed the contracts referred to. See 88 Mich. 315. It was there held that—

"The several contracts and the deed must, therefore, be treated as a mortgage, under which the Rosses were secured for the advances made for the purchase of the Webber land, and the faithful performance of the contract of December 30, 1889. * * * The legal title was vested in the Rosses, subject to be defeated and vest in Gamble on the performance of the conditions. * * * The mere fact that the Rosses permitted Gamble to lumber the Webber land with their land would not be a waiver of their rights under this security, under the circumstances admitted upon this record by plaintiff Gamble."

The Court said further:

"Plaintiff [*i. e.*, Gamble] insists, however, and so testifies, that the defendants had nothing whatever to do with the lumbering of the Webber lands, made no advances upon those logs or lumber, and no agreement was ever made that they should do so. He also insists that he never knew the contents of the order given by him upon Osgood to hold the lumber subject to the order of the Rosses; that he signed the paper without knowing its con-

tents. Under the plaintiff's claim, it was a question of fact for the jury *whether defendants made advances upon the logs from the Webber lands.* It was also a question of fact whether the plaintiff knowingly signed the order to turn the lumber over to the Rosses which was manufactured from the Webber lands. * * * *If the defendants did make advances upon the lumbering of the Webber lands, and the plaintiff* [*i. e.*, Gamble] *so understood, and assented to it, and received the advances, it is very strong evidence that the defendants did not intend to release their security upon the Webber lands and the timber thereon, and that the plaintiff did not understand that the defendants intended so to do. These circumstances would show pretty clearly that the parties understood that the Webber lands were still held as security by the defendants.* If, on the other hand, the advances were not made on the Webber logs, and not so understood or intended, *it would be some evidence* that the defendants were permitting the plaintiff to handle the Webber timber as he saw fit, *and were taking their chances that he would apply the proceeds* to the payment of his indebtedness to them under the contract."

Counsel seem to argue that the former decision settles this case, *i. e.*, that it was for the jury to determine both of the questions which they claim to have been in dispute at the last trial. This is certainly true as to the question of waiver, if there is any evidence of waiver upon this record. It is not necessarily so as to the receipts and order. An explanation of these now becomes important. Osgood sawed the lumber under a written contract with Gamble, by which he agreed to deliver the lumber to Gamble, on the rail of vessels, when required. Connolly presented a receipt to Osgood, with the request that he sign it. Osgood objected and declined, but, Connolly insisting, he telegraphed to Gamble as follows:

"June 22, 1890.

"To HENRY GAMBLE,

"East Saginaw, Mich.:

"Connolly demands that I give Ross & Co. receipt for your raft, and hold lumber subject to their order. Wire me instructions. S. W. OSGOOD."

To this telegram, Gamble replied by wire as follows:

"June 23, 1890.

"To S. W. OSGOOD,

"Chippewa House:

"Yes, you can give Connolly receipt for my raft.

"H. GAMBLE."

Thereupon Osgood signed the following receipt:

"SAILORS' ENCAMPMENT, June 21, 1890.

"Received from John Ross & Co. raft of pine logs marked G. and H., which are to be manufactured into lumber as per contract with Henry Gamble, and will hold the lumber produced of said logs subject to the order of John Ross & Co., they guaranteeing payment of saw-bill on same, according to the terms of the contract.

"S. W. OSGOOD."

There were three rafts, and a similar receipt was given for each. They were dated June 21, August 20, and September 20, 1890, respectively. On June 24 Gamble signed the following order at the request of Mr. Connolly:

"BAY CITY, June 24, 1890.

"S. W. OSGOOD, Esq.,

"Sailors' Landing:

"*Dear Sir:* You will please hold, subject to order John Ross & Co., all the logs I have delivered and will deliver from Waiska Bay,—about 3,000,000 feet. I am going up to-morrow or next day, and will give you instructions how to cut them into lumber, which lumber you will also hold subject to their order.

"Yours truly,

"HENRY GAMBLE."

As to these four writings, plaintiffs claim that Gamble was unaware of their contents, and did not understand that they contained anything in the nature of an acknowledgment of a claim by defendants upon the lumber. Gamble says that he did not know from Osgood's dispatch "that it meant for them to get my logs," and that "I authorized Mr. Osgood to receipt for the raft because I wanted to hold him responsible for the logs after they were delivered

there." As to the order signed at Connolly's request, which he says is the only one of the papers that he saw, he testifies that he was in a hurry, and stopped to talk with him a minute; that Connolly said Osgood would not receipt, and that he ought to be responsible for the logs in case they got loose, to which Gamble replied, "Yes, he has got to receipt for the logs, because my contract with him is to receive them at the boom;" that Connolly said, "You had better give me some instructions to Osgood in regard to the sawing," and that he replied, "All right; you write it;" and that he did so, and Gamble signed it without reading it. It is therefore possible that Gamble did not know that he had given a written order to Connolly for the delivery of the lumber to the defendants He had, however, previously sent a telegram to Osgood which fully justified him in signing a receipt in the same language as that of the order; and there can be no claim that this was obtained by fraud, or through ignorance on the part of Gamble of its character. These papers, as stated by the Court upon the former hearing, unexplained, are "cogent evidence in support of the defendants' claim that they were not waiving any rights to this timber, and that Gamble was recognizing their right." If, however, they were given under a misapprehension on the part of Gamble, it would overcome the effect of such recognition, but it is not easy to see how it could tend in any way to show that the defendants were waiving any rights. By taking such papers, whether with the full knowledge and consent of Gamble, or by craftily misleading him, they signified no intention to waive anything. In short, the evidence of a waiver must be found elsewhere. The evidence was admissible to controvert the presumption arising from the giving of such receipts and order by Gamble, but the fact that Gamble did not know he had recognized defendants' right, which certainly existed if it had not been waived, is no

evidence at all that there had been such waiver by the defendants. So it becomes an unimportant question, hinging upon the other. If the court ought to have left the question of waiver to the jury, they might consider this testimony as tending to counteract the effect of the order and receipts offered by way of denial of the waiver. If the court should not have left the question of waiver to the jury, the evidence under discussion has no materiality.

It remains to ascertain whether there was evidence in the case that would have justified the jury in finding a waiver. This waiver that is claimed amounts in substance to this: That the defendants, with the legal right to the possession of all the timber upon the Webber lands, by their conduct, waived their right to claim it from Gamble or his assignees. The amount of timber involved was large. In December these defendants were making a contract in which they carefully preserved this right, and as late as June they took a deed of the premises for the same purpose. Plaintiffs claimed that this deed was taken to secure only $3,600, but upon its face it contains evidence that the contract of December 30 was in mind at this time. It was drawn by Gamble's counsel, by his direction, in the absence of Connolly. But the question depends upon what arrangements were made for the cutting of this Webber tract, and defendants must be content, for the present purpose, to take Gamble's testimony as true. If that fairly shows a waiver, the case should have gone to the jury. In looking for the specific evidence in support of this alleged waiver, we find it pointed out in plaintiff's supplemental brief. It is there said that defendant's security upon the Webber land *was not released* by the *assignment and deed* of the Webber contract and land, "but by their express agreement, by their chosen representative, nearly two months before the assignment of the Webber contract and deed were made." We are not cited

to the place in the record where any such agreement is found, but an examination of Gamble's testimony shows that, finding that he was going to be unable to get enough many board timber from the Ross lands to fill the Burstall contract, he proposed to Connolly to get it from the Webber tract. At this time he was in default upon that contract, and Webber had obtained a decree foreclosing it. Moreover, by the terms of the contract, he had no right to cut timber until Webber was fully paid. He says that he told Connolly he could get fifteen or eighteen thousand feet of board timber there, and that Connolly agreed to make advances upon it, the lumber to go on the Burstall contract. To do this, however, he got Connolly to agree to pay the $3,600 back to Webber as stated. He proceeded to cut timber, and a short time after he saw Connolly again, and said to him that he would like to put in the Webber timber. The timber was not yet delivered on the Burstall contract, but he could conveniently put in the Webber timber then, and at the same time some of the timber from the Ross land, near by. Witness continued as follows:

"He was willing I should put in the Webber timber, but he said that they could not advance me on the Webber timber, because they said what they wanted was to close up the land contract,—close up that deal.

"*Q.* You mean the Webber saw-logs?

"*A.* No, but the Ross land deal.

"*Q.* Let me understand. Was it what Mr. Connolly said, that they would not advance you any money to cut into saw-logs the timber on the Webber lands?

"*A.* Yes, sir; I would have to make my own arrangements; that they would not advance me any money on the Webber timber. Then I said, of course I would have to put in the Ross timber adjoining it, because if I left it there it would be in danger of fire, and he said, 'All right,' if I could put that in they would advance me on that, but they would not advance me on the Webber timber,—I would have to make my own arrangements about

that; and I told them I could do so. That was some time, I should say, along about the middle of April; perhaps the latter—sometime along the latter—part of April."

Here, then, is the agreement that constitutes the alleged waiver; and, of this, all that is of any particular force as a waiver is the consent that Gamble might cut the timber, and the volunteered statement by Connolly that defendants could not advance any money upon it, and that he (Gamble) would have to make his own arrangements about advances, which he told them he could do.

This testimony should be read in the light of his cross-examination. He admitted that he told Connolly that he wanted money enough on the Webber land to pay the balance, so that he might cut off the board timber to fill the Burstall contract, because the bottom had dropped out of board timber in Quebec, and he knew they could buy the board timber for 10 cents a foot less than they had agreed to pay him, and he was afraid that they would repudiate the contract. He asked these advances of Connolly for his own benefit. He continued as follows:

"*Q.* What did you agree to do in consideration of this $3,600 being advanced by Mr. Connolly?

"*A.* Agreed to cut off the board timber, and put it in. That was all,—about all the agreement there was about it. I agreed to give him an assignment of the property, and have the deed made out to them. I agreed to give them an assignment of the property, and have a deed made to Ross & Co. If they would pay up the $3,600, I would have the deed made out to them, to secure them, and put the title in Ross & Co.,—the title to this Webber land.

"*Q.* Did Mr. Connolly, for himself or for the Rosses, agree to do anything further for you than to put in the $3,600?

"*A.* No, sir; he did not.

"*Q.* Did they agree to release you in any way from any obligations you had made?

"*A.* I don't know of any. I don't think there was any conversation about any such thing.

"*Q.* What did Mr. Connolly say that he would have to do before making that advance?

"*A.* I don't know as he said he had to do anything. He said he would write to the Rosses, and get instructions from them, and the next time I met him he said they would pay the money.

"*Q.* Was that in February or March?

"*A.* No, I think that was—that would be later than—along the latter part of February to along in March some time. I would not be positive as to the time.

"*Q.* Where were you when you had this conversation with Mr. Connolly?

"*A.* I was on the train, on the cars going down to St. Ignace,—going from the junction to St. Ignace,—and he was on the train. I could not remember the conversation. I know he said they would advance the money, and that I could have the deed made out to the Rosses. There might have been something else said."

Being interrogated about the alleged waiver, he said:

"*A.* I could not give the date of the next conversation I had with him, but it was when I had made up mind to cut off the Webber timber, and spoke to him about it.

"*Q.* What do you mean by the Webber timber? The board timber?

"*A.* The logs. I think that was along the middle or latter part of April, if I recollect right. My impression is that it was in St. Ignace. I would not be positive of that. It might be at the Sherwood House. I don't recollect. I am not clear on that point. I do not remember who was present at that time. I told Mr. Connolly that I would like to put in the Webber timber logs,—to lumber the Webber lands into logs,—and he consented that I might.

"*Q.* Just what did you say to him?

"*A.* I could not state the conversation. As I remember it now, I told Mr. Connolly that I would like to lumber the Webber logs,—timber into logs,—as it was handy to the road, and that there was a good many bills back on the timber,—winter bills on the winter job,—and I owed considerable, and I would like to put myself in shape so I could pay it. He said that it was all right; that we could lumber it, but they could not advance me on the timber; I would have to make my own arrangements about it, on the Webber lands,—on the logs.

"*Q.* They could not advance you on the Webber logs?

"*A.* Yes, sir; he said I would have to make my own arrangements. I told him I could do so; that I would do so.

"*Q.* For the purpose of putting in the Webber logs, you would make your own arrangements and get your own advances?

"*A.* I then said to him that it would be necessary to cut the Ross timber that was mixed in with it, because it would not do to leave it; and he said he would advance me on the Ross timber sufficient to put it in, but he could not advance on the Webber, because he said what they wanted was to close up the land account. They did not want to enter into any further details."

He further testified as follows:

"*A.* After the land was paid for I had—so long as the deed remained in Mr. Webber I had no right to cut it.

"*Q.* When the deed went to the Rosses you had no right to cut it, except by an arrangement with the Rosses, did you?

"*A.* I understood— It was talked over, and they consented to it.

"*Q.* They consented to it under what provisions?

"*A.* There were no provisions about it, as I have stated. I stated all the conversation there was about it. They were to advance the $3,600 to Mr. Webber, and I was to go on and take off the board timber, and put it on that to fill the Burstall contract, which they would get the proceeds of, less the amount that it cost to put it in. That is about all the conversation there was. I could not detail the conversation. That is the substance of the conversation.

"*Q.* Then he was to make the advances to you for getting out this wany board timber?

"*A.* Mr. Connolly; yes, sir."

Gamble further admitted that he did draw on Connolly for every dollar that he used in manufacturing the Webber timber into logs, except five or six hundred dollars, and that these drafts were honored. This five hundred or six hundred dollars, he says, was money that Weller (a contractor) owed him for supplies, and he turned it.

He admits that he drew on Connolly to pay for the supplies. We have seen that upon a former trial it was contended that these advancements were not made for timber cut on the Webber lands, which was held to be an important point. Again, he admits that the logs from the two parcels were mixed up, together. Meantime he was writing Connolly frequently about money, and making statements of what he was doing, what logs were out, and the disposition he had made of them. He admitted receiving the telegram as follows:

"13th August, '90.

"To HENRY GAMBLE,

"Sault Ste. Marie, Mich.:

"Am informed that Bearinger is making advances on logs. Answer.

"J. CONNOLLY."

To this he sent the following answer:

"SAULT STE. MARIE, MICH., August 13, 1890.

"To J. CONNOLLY:

"Bearinger is not making advances on logs. Why not accept draft?

"H. GAMBLE."

As late as June 6, 1890, in the assignment from Gamble, made in the absence of Connolly, by Gamble's attorney and at Gamble's direction, the following clause was inserted:

"Now, therefore, the said Henry Gamble, for a valuable consideration to him paid, and for the purposes stated in said contract of December 30, 1889, and to secure said Rosses for the amount advanced to pay the purchase price of said land, does hereby sell, assign, transfer, and set over said contract."

It appears also from Gamble's cross-examination that he took an insurance policy upon the lumber, while at Spry's, payable to John Ross & Co. as their interest might appear, and drew on Connolly for the premium, which was paid.

In the light of all these circumstances, should Connolly's

alleged statement, "You will have to make your own arrangements about that," be construed into an agreement that Gamble might go on and lumber this land, using the timber to procure advances from other sources? In the first place, that language is as easily construed to have meant "You will have to make your own arrangements about getting money to get out the Webber timber" as about getting advances on the Webber timber. Or, if the latter construction is to be taken, it was as consistent with the meaning that he would have to arrange with the Ross heirs himself as that he was to be relieved from the burden of the restriction in his contracts,—a relief which it is very doubtful if Connolly had the power to grant him. It appears that, in one of these conversations, Connolly was promising Gamble to write for instructions, and it is quite reasonable to think that Gamble was given to understand that he would have to arrange for these advances with the heirs, in person. It is significant that Gamble did not attempt to get advances elsewhere, but actually did get them of Connolly. In the light of all this testimony, there could be no possible justification for a jury's finding the waiver claimed, and the judge properly so determined.

The judgment will be affirmed.

The other Justices concurred.

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MATHEW JENSEN v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Railroad companies—Accident at crossing—Evidence—Contributory negligence.

1. Where the jury, in a negligence case against a railroad company, find specially that but one of the required statutory signals was given before crossing a country highway, the negligence of the defendant is established.[1]

2. Where a witness, upon being asked on his cross-examination in regard to certain statements claimed to have been made by him at a given time and place contradictory of his testimony upon his direct examination, either denies making said statements or testifies that he does not remember making them, it is competent for the party so cross-examining, for the purpose of impeaching the witness, to introduce evidence tending to show that he made said statements.

3. Where a driver is unable to see an approaching train for a distance of 128½ feet from the crossing, it is contributory negligence for him to drive that distance, and attempt to cross the track, without stopping his team to listen.[2]

4. It is contrary to good sense and the best-considered authorities that one may walk a team over a hard road for a distance of 128½ feet, while he and his companion are engaged in conversation, upon the assumption that no train will appear while they are traversing that distance, or that, if a train does approach, they will hear the whistle or the bell. A traveler, under such circumstances, not only endangers his own life

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[1] 3 How. Stat. § 3375, provides that a bell of at least 30 pounds' weight, and a steam whistle, shall be placed on each locomotive engine; that said whistle shall be twice sharply sounded at least 40 rods before a crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, under a penalty of $100 for every neglect. This provision, in so far as it requires the sounding of the whistle, does not apply to street crossings within the limits of incorporated cities or villages, unless the giving of said signal is required by the proper municipal authorities.

[2] See note at the end of the opinion.

and property, but the lives and property of those on board the train, and he will not be permitted to say that, if the whistle had been sounded, he would have heard it, it being his duty to stop the noise he is making, within a reasonable distance from the railroad track, and listen.

Error to Washtenaw. (Kinne, J.) Argued April 10, 1894. Decided September 25, 1894.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

J. H. Aiken and *Thompson, Harriman & Thompson,* for appellant.

John F. Lawrence, for defendant.

GRANT, J. Plaintiff was injured while crossing the defendant's road over a public highway in the country, near the village of Chelsea. The railroad at this point runs east and west. Parallel with and adjoining it upon the north is a public highway, three rods wide. The accident happened in the highway running north and south at right angles with the highway above mentioned. The house of one Downer was situated to the north of the highway, and east of an extension of the east line of the north and south highway. The railroad had two tracks. The accident happened at 9 o'clock in the morning. Plaintiff had drawn a load of poultry to Downer's house with a team of two large horses and a lumber wagon. After unloading the poultry, Downer requested plaintiff to take a calf for him to the village. Plaintiff inquired if he would have to cross the railroad track, to which Downer replied that he would. The calf was in the field, and, while Downer went to get some bran for the purpose of catching the calf, plaintiff stood upon the ground by the side of his wagon, and testified that he then looked and

listened for a train. His testimony upon this point is as follows:

"The house was north of me, so I could not see the railroad. I could see east. I could not see the railroad track because of an orchard and big maple tree, and picket fence and ivy on it. * * * I stood by my wagon and looked, but I could not see anything on account of the orchard and maple trees and ivy."

Downer came with a pail of bran, and both got into the wagon, in which there was no seat. They stood up. Plaintiff drove, and Downer stood with one hand upon his shoulder. They were talking from that time until the accident occurred. Neither saw the train until the horses were close to the track. Downer, in the excitement, told plaintiff that the train was coming, and jumped from the rear of the wagon without injury. Plaintiff hurried his horses, and got them across the track, but the rear of the wagon was struck by the engine.

The distance from the point at which they started, to the railroad track, was 128½ feet, and the team walked the entire distance until the train was seen approaching. Plaintiff did not stop during that distance, but testified that he looked in both directions, and that he knew a train might be coming. The speed of the train was about 50 miles an hour. It is conceded by plaintiff's counsel that, when plaintiff entered the east and west highway from the north, he could have seen the track at a point about 80 rods east, and from that point for nearly a mile further east, from which direction the train was approaching. The distance from the north line of the railroad track to the north line of the right of way is 18 feet. There is a slight elevation extending back from the railroad, and from the track to the top of this elevation is 33 feet. There is no cut in the highway, but its bed is even with the surface of the ground. To the east of

the highway, and between it and the railroad right of way, were some bushes, which, it is claimed, obstructed the view. The train was 500 feet long. It was demonstrated by actual experiment that from the north side of the east and west highway, where plaintiff entered it, for a distance of 23 feet, the track was in plain sight for about a mile beyond these bushes, the eastern end of which was about halfway between the crossing and the whistle post.

The negligence alleged was the usual one in such cases,—failure to blow the whistle and ring the bell. The jury, in reply to special questions, found that the bell was rung, but that the whistle was not blown. The negligence of the defendant was, therefore, established. The jury found that the plaintiff was not entitled to recover, because of his own contributory negligence. The court instructed the jury that a failure either to blow the whistle or ring the bell was negligence. The charge of the court was very clear and explicit. Errors are alleged upon the admission of evidence and the charge of the court.

1. Downer was a witness for the plaintiff. When upon the stand he was asked in regard to certain statements claimed to have been made by him contradictory of his testimony upon the direct examination. These statements were either denied by him, or he testified that he did not remember them. The time and place of these conversations were fixed. The defendant introduced evidence tending to show that Downer had made such statements. One witness testified:

"I heard Mr. Downer say he never thought of the railroad at all. He said they were busy talking, and never thought about the railroad, and drove right on."

The precise claim of plaintiff's counsel is that these conversations were not a part of the *res gestae*, and were incompetent to charge the plaintiff with negligence. It is

a sufficient reply to this to say that they were neither offered nor received for that purpose, but for the purpose of impeaching the testimony of the witness Downer. For this they were competent.

2. The jury, under the plaintiff's own evidence, arrived at the correct conclusion. If it was a fact that the plaintiff, as he testified, could not see an approaching train for 128½ feet, it was clearly his duty to stop and listen. It is a settled rule that a railroad crossing is notice of danger, and that in the country it is lawful to run trains over these crossings at the highest rate of speed. It is contrary to good sense and the best-considered authorities that one may walk a team over a hard road, while he and his companion are engaged in conversation, upon the assumption that no train will approach while they are traversing that distance, or that, if it does approach, they will hear the whistle or the bell. *Brady v. Railroad Co.*, 81 Mich. 616; *Kwiotkowski v. Railway Co.*, 70 Id. 549; *Shufelt v. Railroad Co.*, 96 Id. 327; *Gardner v. Railroad Co.*, 97 Id. 244; *Railway Co. v. Stommel*, 126 Ind. 35; *Railroad Co. v. Beale*, 73 Penn. St. 504; *Chase v. Railroad Co.*, 78 Me. 353; *Flemming v. Railroad Co.*, 49 Cal. 253; *Henze v. Railway Co.*, 71 Mo. 636; *Pence v. Railway Co.*, 63 Iowa, 746; *Merkle v. Railroad Co.*, 49 N. J. Law, 473; *Railway Co. v. Adams*, 33 Kan. 427. A traveler, under such circumstances, not only endangers his own life and property, but the lives and property of those on board the train. He is not permitted to say that, if the whistle had been blown, he would have heard it. It is his duty to stop the noise he is making, within a reasonable distance from the track, and listen. Under the circumstances of the case, plaintiff's listening when 128½ feet distant was not the exercise of proper precaution, and he was guilty of contributory negligence in driving upon the track as he did. It was impossible for the jury to

reach any other conclusion than that very slight precaution on the part of the plaintiff would have avoided the accident. Plaintiff and Downer were so inattentive, or the horses and wagon were making so much noise, that they failed to hear the ringing of the bell. If they had stopped for a moment, when within 50 feet of the track, they would have heard the bell, and thus have received warning of the danger.

It is not necessary to consider the alleged errors in the charge of the court. Where, under the plaintiff's own case, the court should have directed a verdict, errors in the charge are immaterial.

The judgment must be affirmed.

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

RAILROAD CROSSINGS.

For cases bearing upon the duty of looking and listening, or stopping and listening, before crossing or attempting to cross a railroad track, see:

General Rules Applicable to the Subject.

1. *Railroad Co. v. Miller*, 25 Mich. 274, holding that a person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing as well as of sight—and, if either sense cannot be rendered available, the obligation to use the other is the stronger—to ascertain, before attempting to cross, whether a train is in dangerous proximity; and if he neglects to do this, but ventures blindly upon the track, without any effort to ascertain whether a train is approaching, it must be at his own risk. Such conduct is, of itself, negligence, and should be so pronounced by the courts as matter of law.

2. *Mynning v. Railroad Co.*, 64 Mich. 93, holding that the legal presumption is that a person killed at a railroad crossing did stop, and look and listen, before attempting to make the crossing, and said presumption will prevail in the absence of direct testimony on the subject; but where there is affirmative, direct, and creditable testimony to the contrary, the presumption is rebutted and displaced.

3. *Guggenheim v. Railway Co.*, 66 Mich. 150, holding that while it is the duty of a traveler before crossing a railroad track, under all circumstances, to look and listen for an approaching train, he is not bound to the same degree of care where no train is due, and he has no knowledge of its approach, as when these conditions confront him.

4. *Houghton v. Railway Co.*, 99 Mich. 308, holding that a traveler is never justified in assuming that he can surely drive a certain distance, and cross a railroad track, before a train can reach the crossing, unless it be shown that he has had an uninterrupted view of the track for so great a distance as to justify such assumption.

5. *McCullough v. Railway Co.*, 101 Mich. 234, holding that while it has been held in many cases that, before venturing upon a railroad track at a point where the view of an approaching train is cut off, the traveler should stop and listen, the doctrine has never been applied to a case where the driver is at a distance from the track at the time of the accident, and the injury results from his horse taking fright at the train, and running away.

Illustrative Cases.

1. *Railway Co. v. Miller*, 46 Mich. 532, where plaintiff, a farmer, aged 67 years, and somewhat deaf, was driving a spirited team of well-broken three-year-old colts, that had never seen or been near the cars, towards defendant's track, down a narrow road, which, as it approached the track, had been cut down, leaving quite high embankments, which prevented a view of the track in the direction from which the locomotive approached. Plaintiff, when about 16 rods from the track, stopped his team and listened, and, hearing nothing, drove on, and, when within about two rods of the track, he saw the locomotive approaching, about 12 rods distant. Fearing that he could not control his colts where they were, plaintiff whipped them up, and attempted to cross the track, and the rear of his buggy was struck by the locomotive. And it was held that the question whether plaintiff was guilty of contributory negligence was for the jury.

2. *Haas v. Railroad Co.*, 47 Mich. 401, where a team driven by plaintiff's decedent collided with one of defendant's regular passenger trains at a country highway crossing. Defendant's road and the highway were both below the general surface of the ground, and an approaching train could only be seen occasionally by one driving towards the crossing. Decedent was familiar with the crossing, but, except that he checked his team for a moment some four rods from the crossing, he did not observe any precaution. The engine whistle was duly sounded when the crossing was approached. And it was held that the decedent was chargeable with negligence directly contributing to the collision.

3. *Palmer v. Railroad Co.*, 56 Mich. 1, where plaintiff, on approaching a city street crossing on defendant's road, driving a spirited team, looked north upon the track, and saw an engine pass in that direction, and, as he drove on, he kept a sharp lookout for what might be coming from the south, not apprehending any immediate danger from the north, after seeing the engine pass. While thus looking south he heard no signal or train, but, just as his team was crossing the track, he heard a man halloo. As he turned to look north, the engine came backing down with great speed, and, before plaintiff could get across the track, the tender struck his load, threw him out, and greatly injured him. Some of the facts upon which it was claimed the contributory negligence of the plaintiff arose were disputed. And it was held that where, upon the undisputed testimony, it appears that the plaintiff exercised no care to avoid danger, the question then becomes one for the court; but that when the evidence shows or tends to show that the plaintiff was vigilant in his efforts in the right direction to avoid the danger, but they did not go to the extent, for any reason, of securing his escape, it is for the jury to say, under all the circumstances, whether he was negligent in not exercising more care, especially in a case where, if the defendant had performed its duty, the plaintiff would have been likely to have avoided the danger altogether.

4. *Staal v. Railroad Co.*, 57 Mich. 239, where plaintiff's decedent was killed in the day-time, while trying to drive across defendant's track at a city street crossing. And it was held that, in the absence of any knowledge as to what was in the mind of the decedent, he could not be conclusively found negligent, unless no sensible explanation of his conduct was reasonably possible; that he had a right to suppose that the defendant would not violate any legal duty, and would not fail to take reasonable measures to prevent mischief; that he could not be blamed for doing as seemed best under the circumstances, and it would not necessarily be reckless to go forward rapidly.

5. *Rhoades v. Railway Co.*, 58 Mich. 263, where plaintiff's decedent approached a country highway crossing on defendant's road at an acute angle, in a buggy drawn at an easy trot by a horse and a mule. A regular fast train, coming at the same time, and in full sight for a considerable distance if the decedent had turned his head, whistled sharply close by the crossing, and frightened the team so that it became unruly, and ran upon the track, and decedent was killed. Decedent knew the neighborhood, but was apparently ill, and drove absent-mindedly, without noticing the train until he was close to the crossing, though several of the witnesses saw the danger he was running into. And it was held that decedent was guilty of contributory negligence.

6. *Mynning v. Railroad Co.*, 64 Mich. 93, 100, where plaintiff's intestate, a man possessed of the ordinary faculties, and well acquainted with the crossing upon which he was killed, on a dark and stormy October evening walked at a rapid pace towards and upon defendant's spur track, without checking his speed, or stopping or looking or listening, or taking any precaution whatever to ascertain whether a train was about to pass. Others who were about to cross, whose opportunities for observation were no better than those of the decedent, saw and heard the train. The statutory signals were not given. And it was held that the decedent was guilty of such contributory negligence as to bar a recovery.

7. *Matta v. Railway Co*, 69 Mich. 109, 112, where plaintiff's intestate was killed while attempting to drive across defendant's track at a country highway crossing. The highway ran nearly north and south, and the railroad track crossed it diagonally, running north-east and south-west. About five rods north of the crossing, and on the east side of the highway, lying between the road and the railroad, was a cemetery, running about 35 rods along the highway. At its base at the north end, the cemetery was about 17 rods in width, and at the south end it came nearly to a point. It was filled quite thickly with oak grubs or young oak trees, most of them from 10 to 12 feet high, and bushy. The accident took place in the winter time, and some of the leaves had fallen from the trees. Decedent was going south at a pretty fair gait, driving one horse attached to a light wagon. His face was to the west, and his back to the approaching train, which was running at the rate of 45 miles an hour. The ground was frozen hard, and the train made but little noise in running. Decedent's head was down, and he did not look up while any one saw him until the feet of his horse were on the iron of the track. He looked up at the ringing of the bell at the cattle-guard, and whipped up his horse, but it was too late to avoid the collision. The decedent was familiar with the situation at the crossing, having passed over it almost daily. But for the trees in the cemetery, the train could have been seen plainly for a distance of 80 rods before reaching the crossing, and all of the witnesses to the accident but one testified that they could see it easily enough when it was passing behind the cemetery, the trees not being thick enough to obscure the view. And it was held that, under the decisions of the Court, the circuit judge was clearly authorized to instruct the jury to find for the defendant on the ground of the contributory negligence of the decedent.

8. *Kwiotkowski v. Railway Co.*, 70 Mich. 549, where plaintiff's decedent was killed by being struck by a locomotive as he was stepping upon defendant's track at a city street crossing. The

evening was dark and rainy. Decedent was seen to stop opposite an office, and apparently peer into the window. It was about 20 feet from the side of the office to the track, and about four feet from the window to the side of the office. As a person passed by the office, he could see down the railroad track about a block. A few steps more, and the track was in plain sight for a long distance. The train had a blazing head-light, which lighted the track for at least a block. The defendant's employés were negligent in running the train at a rate of speed greater than that allowed by the ordinance. And it was held that the plaintiff's intestate was negligent in not looking for the approach of the train; that, if he had looked, he would have seen it, as there was no obstruction in the way, and no other trains or any other thing to distract or confuse his vision; and the action of the court in directing a verdict for the defendant, upon the ground that the facts established showed contributory negligence on the part of the plaintiff's intestate, was sustained.

9. *Freeman v. Railway Co.*, 74 Mich. 86, where plaintiffs sued for the value of a horse and carriage destroyed by collision with an engine on defendant's track at a city street crossing. And it was held that the driver, who was familiar with the situation at said crossing, was guilty of contributory negligence, it appearing that, if he had looked up the railroad track at any time while passing over the 40 feet last traversed before driving upon the track, he must have seen the approaching train, and thus been enabled to avoid the collision.

10. *Underhill v. Railway Co.*, 81 Mich. 43, where plaintiff's decedent, while driving a horse and carriage across defendant's track, was struck by the engine of a passenger train, and instantly killed. Upon the case as the plaintiff left it at the close of his testimony, the jury might have inferred that the deceased approached the track with due care, and stopped and looked and listened at the proper distance from the track, and, hearing no signal of an approaching train, acted as a prudent person would in attempting to cross the track. The defendant showed by the undisputed testimony of the fireman that he saw the decedent approaching the track at a distance of about 50 feet from the track; that, by her actions, he thought she was trying to get across the track ahead of the train; that she was "slashing" the horse with the lines; that she did not seem to pay any attention to the train, which was then about 300 or 400 feet from the crossing. And it was held that this testimony bore directly upon the negligence of the deceased, and, being undisputed, showed that she was guilty of contributory negligence which precluded a recovery.

11. *Guta v. Railway Co.*, 81 Mich. 291, holding plaintiff to have been guilty of contributory negligence in attempting to cross de-

fendant's track without looking to see if a train was approaching, his opportunities for seeing the train being as good as those of witnesses who saw plaintiff drive upon the track, when the train was approaching, as if it were not coming.

12. *Brady v. Railroad Co.*, 81 Mich. 616, holding plaintiff to have been guilty of contributory negligence in attempting to cross defendant's track at a crossing so obstructed by intervening objects that he could not see a train approaching from one direction until he was within 20 or 25 feet of the crossing, and then only for a few rods up the track, without first stopping his team, and taking some precaution to see if a train, which he knew was about due, was approaching.

13. *Richmond v. Railway Co.*, 87 Mich. 374, where plaintiff's intestate, a street-car driver, was killed at a railroad crossing by a collision with nine detached freight cars, running at the rate of from 8 to 10 miles per hour, without any warning of their approach other than the noise made in running. The flagman was not at his usual post of duty, and gave no warning of danger until the horse was upon the crossing. After leaving another railroad crossing, about 185 feet from the one where the accident occurred, the driver could not have seen the approaching freight cars until within 20 feet of the crossing where he was killed, and he did not look in the direction from which the cars were approaching, after reaching said point, until his horse was upon the track. And it was held that the question of his negligence (that of the defendant being apparent) was for the jury, who were to determine whether, under the circumstances, the driver had the right to rely, and how far, upon the absence of the flagman from his post of duty, and the want of any signal of danger from him, as an assurance of safety; and, if they found that an ordinarily prudent man would have acted as the driver did, the plaintiff could recover.

14. *Grostick v. Railroad Co.*, 90 Mich. 594, where plaintiff brought an action for the alleged negligent killing of her husband, while attempting, in the day-time, to cross defendant's track with his team at a street running at right angles with said track. The deceased was a man 50 years of age, of good health, sound in mind and body, his hearing and sight not defective, and was thoroughly familiar with the crossing. When within 120 feet of the crossing, and until he reached it, the decedent had a clear view of the railroad track for a distance of 1,150 feet, in the direction from which the train was approaching. According to the testimony, he exercised no care whatever, but drove his team along without looking in that direction until he was struck and killed. And it was held that this was such carelessness as to bar a recovery.

15. *Thayer v. Railroad Co.*, 93 Mich. 150, where plaintiff's horse was frightened by three sharp whistles from a locomotive when within from 30 to 50 feet of defendant's tracks, on a narrow approach on a highway, and plaintiff was thrown out of her buggy down an embankment. The highway ran east and west, and crossed the tracks over a fill between two cuts, one about 20 rods south of the highway, and the other from 40 to 80 rods north, both cuts being deep enough to hide an approaching train. The grade from the crossing north to the cut rose about 18 feet, and between the cuts the grade was raised from 3 to 6 feet above the adjoining lands, and at the crossing the railroad track was about 6 feet above the former grade of the highway. The road was soft; the morning misty. When 40 rods from the crossing plaintiff stopped, looked, and listened, and spoke to her daughter, who was with her, about listening for trains. On approaching the crossing, she noticed children coming south upon the track, and, when she reached a point 150 feet from the crossing, she again stopped, looked, and listened, and then started up the approach. When within 30 feet of the tracks, her daughter told her that the children had left the track. She looked and saw the train, and then attempted to back away from it, and had backed about the length of the buggy, when the whistles were sounded, whereupon the horse, which was quiet and manageable until the whistles sounded, reared, and jumped down the embankment. And it was held that the question of plaintiff's negligence was properly submitted to the jury.

16. *Van Auken v. Railway Co.*, 96 Mich. 307, holding that whether or not a traveler who is injured upon a railroad crossing in the open country on a dark night, by a train running without a head-light, is guilty of contributory negligence in failing to stop his team before entering upon the track, in order to listen for an approaching train, is at least a question for the jury, his view of the track being unobstructed other than by the darkness.

17. *Shufelt v. Railroad Co.*, 96 Mich. 327, where plaintiff's wife was held to have been guilty of such negligence in failing to stop her team, and look and listen for an approaching train, before attempting to cross defendant's track, as to bar a recovery, it appearing that had she done so she could have seen the train when she was at a distance of from 18 to 20 feet from the crossing.

18. *Gardner v. Railroad Co.*, 97 Mich. 240, holding plaintiff to have been guilty of such negligence in not looking in the direction of the approaching train, by which he was injured, when within 5 feet of the railroad track, and when, if he had looked, his view would have been unobstructed for a distance of 250 feet, as to bar a recovery.

19. *McDuffie v. Railway Co.*, 98 Mich. 356, holding that a driver who stopped his team when within 12 feet of a railroad crossing, and at a point from which, had he looked, he could have seen an approaching engine but for the smoke and steam emitted by another engine standing on a side track near by, which obstructed his view, and who testifies that he looked and listened, and neither saw the approaching engine nor heard the ringing of its bell or sounding of its whistle, cannot be said, as matter of law, to have been guilty of contributory negligence in attempting to make the crossing.

20. *Houghton v. Railway Co.*, 99 Mich. 308, holding plaintiff to have been guilty of such negligence in failing to stop his team and listen for a fast train, which he knew was about due, while driving, after dark, a distance of 196 feet in approaching a railroad crossing, during which time his view of the track was obstructed, as to bar a recovery.

21. *McCullough v. Railway Co.*, 101 Mich. 234, where plaintiff was injured by being thrown from a cutter, in which she and her husband were riding, by reason of the horse taking fright at one of defendant's trains, and running away. The train was several hours late. The highway ran for about three-quarters of a mile nearly parallel with the railroad track, varying in distance therefrom from 35 to 200 feet, and finally crossed the track, near the place where the accident occurred, at an angle of about 45 degrees. All view of trains approaching the crossing from the opposite direction was cut off, until within 35 feet of the track, by a hill, around which the road passed on a sharp curve. Plaintiff's husband, who was driving, testified that he waited in a neighboring village for two hours to make sure that the train had passed, and on his way home was informed that it had passed, which information he believed to be true; that he was approaching the crossing, and, just as he reached the line of the right of way, the train came into view, distant less than 300 feet from the crossing, and that his horse turned about and ran away, upsetting the cutter, and injuring the plaintiff. Plaintiff and her husband both testified that they were listening, the horse having been brought to a walk, and that they heard no signals. And it was held that it was for the jury to say whether or not the plaintiff's husband was negligent in driving within 35 feet of the track without stopping to listen for a train.

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BENJAMIN F. SIMONS v. DAVID BURNHAM.

Libel—Words actionable per se—Innuendo—Inducement—Justification—Evidence—Error without prejudice—Damages.

1. Where, in an action for libel, the alleged libelous words, standing alone, are unambiguous, they must be construed in their ordinary sense, in the light of such allegations of the circumstances surrounding the transaction as the declaration sets forth.

2. A statement that a merchant has conveyed $10,000 worth of real estate to his wife for $5,000; that his other real estate is heavily mortgaged; and that he is heavily indebted to banks, upon which indebtedness he is paying a high rate of interest, giving the rates,—if it has no significance further than a *personal* one, is not libelous *per se*.

3. Such a statement, sent to firms from whom the merchant is in the habit of purchasing goods on credit, would necessarily cause a loss of credit, and, if false, is actionable *per se*.

4. The sense or meaning of such a statement, if true, is not changed into a charge of fraud by the facts that the person therein referred to is a merchant, in the habit of dealing upon credit with the firms to whom the statement is sent; that the person sending the statement intended to injure the credit of said merchant with said firms; and that he accomplished his purpose.

5. The question whether an intimation that a merchant is in failing circumstances or unworthy of credit is contained in the words, "In time of peace, prepare for war," used in connection with a true statement, sent to firms from whom the merchant is in the habit of purchasing goods on credit, that said merchant has conveyed certain real estate to a woman bearing the same surname for $5,000, is for the jury.

6. Where the defendant in a libel suit is entitled to an instruction that the alleged libelous words, as set forth in some of the counts of the declaration, are not susceptible of the construction alleged in the innuendo, but fails to ask that such instruction be given, except by a request which applies equally to all of the counts, and does not assign error upon language in the general charge upon the subject which made it possible for the jury to find the defendant guilty upon all of the counts,

and his counsel fails to make the point in his brief that the court erred in using such language, a general verdict of guilty, which is sustainable under the *good* counts, will not be set aside.

7. A letter sent by the defendant to one of the firms to whom the alleged libelous statement had been sent, dated about the time of the sending of the same, informing said firm that the firm of which the defendant was a member would withhold their patronage from any house or firm, etc., which might thereafter accept less than the full amount of their claim from any customer in the city where the plaintiff and defendant resided, except it should be from an assignee or a court of equity, and for liquidation, is admissible as tending to indicate malice, and show a motive for injuring the credit of the plaintiff.

8. Evidence offered by the defendant to show that the conveyance to plaintiff's wife was without consideration was excluded, the court holding that the truth of the alleged libel was not admissible, even in mitigation of damages, unless pleaded, and that, not being pleaded to the extent of a complete denial of the charge if interpreted in accordance with the innuendo, the plea was inadequate in case of such interpretation, and would not justify the admission of the proposed evidence. No effort was made to show that the alleged fact sought to be established by the rejected evidence was known to the defendant before sending the statement, nor was the court informed that it was so known. And it is held that such fact would be immaterial unless known to the defendant, and that, as the Court cannot say from the record that the evidence was material, familiar rules require that the judgment should not be reversed for its exclusion, though it might have been admissible had a proper foundation for it been laid.

9. The testimony of the plaintiff that he never heard of any report that he was heavily indebted at three or four banks at rates of interest of from 8 to 10 per cent. was offered to negative the statement that it was so reported. And it is held that there was nothing in the testimony tending to show that the plaintiff would have been likely to hear such report, if made; that the testimony was negative, and should not have been admitted; that the law presumed the charge false, and the burden was upon the defendant to show the truth of the statement as made; and that, as the record fails to show that the plaintiff was reported as stated, the testimony of the plaintiff was harmless, and its admission error without prejudice

10. Counsel for the defendant contended that the only damages

recoverable were special, and that the same had been neither alleged nor proved; but the court allowed the jury to bring in general damages, upon the theory that the words were actionable *per se*. And it is held that no error was committed in so doing.

Error to Ingham. (Person, J.) Argued June 29, 1894. Decided September 25, 1894.

Case for libel. Defendant brings error. Affirmed. The facts are stated in the opinion.

Thomas E. Barkworth and *Arthur D. Prosser*, for appellant.

Smith, Lee & Day, for plaintiff.

HOOKER, J. The parties to this action are rival merchants in the city of Lansing. It is alleged by the plaintiff that in October, 1889, the defendant sent to various firms in other cities, with whom the plaintiff had business relations, clippings from a Lansing paper, showing real-estate transfers, including between ink lines, placed there by himself, the following: "Benjamin F. Simons to Adeline A. Simons, lots 1, 2, and 3, block 150, Lansing, $5,000." This clipping was attached to a half sheet of paper, on which was written the following, viz. (after the above quotation from the clipping, the words, "his wife," and: "The real estate transferred and marked in slip is estimated to be worth at least $10,000; other real estate heavily mortgaged; reported to be heavily indebted to three or four banks, for borrowed money, at a high rate of interest, say 8 to 10 per cent. per annum, and payable every 60 days." In one instance it is claimed that to a clipping of the kind mentioned, inclosed by ink lines as aforesaid, the following pencil writing was appended, viz.: "In time of peace, prepare for war."

The declaration contained several counts charging that

communications similar to that first above described were sent to different persons, and one count upon the last-described writing; each count containing by way of inducement the statement that the plaintiff was a merchant, dependent for his living upon such business; that he had always conducted himself with fairness and punctuality towards his creditors, and until then had never been suspected of bankruptcy, insolvency, or any fraudulent intention, and had always been, and then was, in good circumstances, credit, and esteem; knowing which, the defendant, with the intention of injuring the plaintiff in his good business name and credit, and in his business, and to cause him to be reputed as worthy of no credit, and to injure him and his said credit with the several persons to whom said communications were sent, published the writings counted upon. By way of innuendo, each count alleged the following, in substance, viz.: "Thereby the said defendant, by the said clipping and writing, letter partly printed and partly written, as aforesaid, meaning and intending to charge and cause the said [person to whom the same was sent] to understand, believe, and be informed that the said plaintiff was fraudulently conveying his property to his wife, and was insolvent, and in failing circumstances, and unreliable, and unworthy of credit." The counts respectively allege special damage, by stating that the creditors of plaintiff and others, and especially those to whom the communications were sent (naming them), have refused to have further dealings with the plaintiff, or to give him further credit, and that he has, by reason thereof, been prevented from obtaining credit, and from replenishing his stock and maintaining his trade, which has suffered therefrom, to his loss of profits, and injury.

It is contended by the defendant's counsel that the words declared upon are not actionable *per se;* that they were declared upon without any inducement which would

make the innuendo applicable, and that the natural meaning of the words must therefore govern as to the sense in which they were published; but that, even if it were competent for the jury to ascribe a meaning different from the natural meaning of the words, it was unnecessary for a plea of justification to be broader than the charge in the declaration.

The words in the several counts, standing alone, are unambiguous, and must therefore be construed in their ordinary sense, in the light of such allegations of the circumstances surrounding the transaction as the declaration sets forth. Most of this language admits of but one meaning when so construed. It is that this plaintiff has conveyed $10,000 worth of real estate to his wife for $5,000; his other real estate is mortgaged; and that he is heavily indebted to banks, upon which indebtedness he is paying a high rate of interest mentioned. If this has no significance further than a personal one, it is not libelous *per se.* If, however, it can be said to apply to the business of the plaintiff, it may be.

The declaration, by way of inducement, states that plaintiff was in the habit of purchasing goods, with which to maintain his stock, of certain firms, naming them; that defendant, with the intention and for the purpose of injuring plaintiff's credit with said firms, and preventing his purchase of goods from them upon credit, made certain statements concerning his indebtedness, and incumbrances upon his property, and the transfer of property to his wife upon an ostensible consideration of one-half its value. The innuendo charges defendant with meaning that plaintiff was fraudulently disposing of his property, was in failing circumstances, and unworthy of credit. Counsel for defendant assert that this language is not libelous *per se,* and it is possible that, standing alone, it might not be, as in that

case it might have to be construed as written concerning the person merely; and there is nothing in the act of conveying property to a wife, with or without consideration, or in securing creditors, or borrowing money at a lawful rate of interest, that can be said to be reprehensible or disgraceful, or that necessarily tends to beget ridicule or contempt in the sense essential to a libel. But the declaration charges this publication in connection with other facts, which, if true, authorize the conclusion that it was made in connection with the business of the plaintiff. It has been held that it is not actionable to say of traders that they have executed a chattel mortgage. *Newbold v. Bradstreet,* 57 Md. 38. But those familiar with mercantile affairs, or the litigation which they beget, understand that the filing of mortgages, the conveyance of property to relatives, and carrying of large lines of credit at banks invariably provoke distrust and caution, and usually cause a loss of credit, and legal proceedings to collect accounts. So well understood is this that we feel justified in holding that a false statement of the kind set up in this declaration would necessarily cause a loss of credit, and therefore would be actionable *per se* when applied to one alleged to be a trader, in the habit of purchasing upon credit. A case very similar to this is *Newell v. How,* 31 Minn. 235, where the defendant reported of the plaintiff, to his correspondent, as follows:

"His assets, consisting of merchandise, show cases, tools, book-accounts, as per his own guess, is about $1,800. His indebtedness is, as far as I know, about the same amount. He may owe more. I speak of what I know. $1,300 is to merchants like you, and $500 a demand note. If any one of his creditors should crowd him, the demand would be pushed. We would advise a caution on your part in selling, and a prompt payment of matured indebtedness."

This was held libelous *per se,* within the rule that in

those callings in which, ordinarily, credit is essential to their successful prosecution, language which imputes to one in any such calling a want of credit or responsibility is actionable *per se*. *Read v. Hudson*, 1 Ld. Raym. 610; *Davis v. Lewis*, 7 Term R. 17; *Dobson v. Thornistone*, 3 Mod. 112; *Chapman v. Lamphire*, 3 Id. 155; *Sewall v. Catlin*, 3 Wend. 291; *Ostrom v. Calkins*, 5 Id. 263; *Mott v. Comstock*, 7 Cow. 654; *Lewis v. Hawley*, 2 Day, 495; *Whittington v. Gladwin*, 5 Barn. & C. 180; *Southam v. Allen*, T. Raym. 231; *Phillips v. Hoefer*, 1 Penn. St. 62.

But this is not the end of the question in this case. Plaintiff ascribed a certain meaning to the words used, beyond their ordinary import, which he sets forth in the innuendo, *i. e.*, substantially a design to defeat or defraud his creditors by conveying property to his wife, etc., and that he was unworthy of credit, and in failing circumstances. The words used are not in themselves ambiguous, and, unless they are to be taken in some other than their ordinary sense, they cannot legitimately be construed to express the meaning alleged in the innuendo. To ascertain this, we must examine the facts alleged in the declaration, and see if these words, read in the light of such facts, are susceptible of the construction claimed. These circumstances have been detailed as describing plaintiff's business and the fact of his dealing upon credit with the persons to whom the information was sent, to injure which, and to cause the repute and credit of plaintiff and his said business to be injured and degraded, the writing was published. The declaration also alleges that it had the intended effect. We can understand how words may be used and understood in a different, and even opposite, sense from what they naturally and ordinarily import, as where used ironically, or in the nature of slang, or as a quotation having a well understood significance, or where they are used in cipher; but in all such cases it is neces-

sary that the declaration should allege facts which, if proved, will enable a court to say that these words, interpreted in the light of them, may reasonably be held to bear the construction claimed, leaving to the jury the truth or falsity of the allegations upon which the alleged meaning depends, as well as the question of the meaning. It is not enough for the pleader to allege that the language meant a certain thing. The innuendo cannot enlarge the language complained of, except as it is supported by the inducement. It must be the circumstances surrounding the case, not the intention of the defendant, that modifies the language. A declaration that complained that a defendant had said of the plaintiff (a woman) that she was chaste, followed by an innuendo to the effect that he thereby meant that she was unchaste, would not warrant a court in leaving it to the jury to say what was meant. But if, by way of inducement, it was alleged that the parties were enemies, and that in a conversation in which the defendant was speaking in a derogatory manner of the plaintiff (giving his statements) he had said in an ironical manner and tone that she was chaste, following it with the innuendo, it would be competent for the court to leave the question to the jury whether the language used would not be so meant and understood,—*i. e.*, whether that would not be the common and ordinary understanding of the language when used in that way and under such circumstances. The innuendo would not, in such case, enlarge the words, or alter the sense in which they were used, except by reference to the inducement, which would support it, and which would be susceptible of proof and contradiction by evidence. An issue can never be raised upon the truth of an innuendo. *Fry v. Bennett,* 5 Sandf. 54; *Com. v. Snelling,* 15 Pick. 335; *Taylor v. Kneeland,* 1 Doug. 67.

So we return to the question, do the words, read in the

light of the alleged circumstances under which they were published, sustain the innuendo? For the purpose of this discussion we must assume the statements of the writing to be true as to the literal meaning of the words,—*i. e.*, that the plaintiff did make the conveyance, and was indebted and mortgaged, as therein stated. These things being true, can it be said that the sense or meaning of the statement is changed into a charge of fraud by the facts that the plaintiff was a merchant, who was in the habit of dealing upon credit with the persons to whom the writings were sent, that the defendant intended to injure his credit with such persons, and that it had that effect? To be consistent with what has been said of the effect of the acts alleged in the writing upon the mind of the average creditor, we must concede that the inference from such acts would probably be that the debtor was to a greater or less extent embarrassed, and perhaps that he was placing his property in the hands of his wife with fraudulent design, though the latter, at least, is not a necessary inference. There is nothing better settled in this State than the proposition that the truth of the publication is a complete defense to the action of libel. Here, then, the defendant has simply told the truth without comment of any kind. Shall we say that, because of the inferences which naturally follow, the meaning of the language should be extended to include the inferences? If so, it logically follows that the truth of the publication is not a complete defense in cases where inferences naturally follow the statement of certain facts. Would the character of the publication depend upon the expectation by defendant that the inference would be drawn? And would the failure of the person addressed to draw the inference relieve the defendant from liability? We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences (Townsh. Sland. & L. §

133), though we must recognize a distinction between inferences which are the natural result of implications contained in the language of the publication—which may, in a sense, render it ambiguous, and justify a construction at variance with the strict meaning of the words as ordinarily used—and inferences drawn only from the facts themselves. In the former case the action may lie,—not because of the inference, but by reason of the implication; in the latter it will not. Applying this rule to the case before us, we feel constrained to say that these words are not susceptible of the construction alleged in the innuendo.

From what has been said, the third count should be excepted. In that count the charge consisted of the real-estate transfer, followed by the words, "In time of peace, prepare for war." The statement of the paper was true as to the transfer. If the writing was libelous, it must be by reason of the use of the words, "In time of peace, prepare for war." The natural meaning of this will depend largely on the circumstances under which the words were written, and, unless we can say that they do not contain an intimation that the plaintiff was in failing circumstances or unworthy of credit, it was proper to leave this question to the jury. *Ewing v. Ainger*, 96 Mich. 587. It is patent that the marking and sending of the real-estate transfer to plaintiff's creditor may have been, and probably was, intended to apprise such creditor of the fact that his debtor had conveyed the property. The advice, in connection with it, may reasonably be thought to imply that the creditor had better look after his interests in that direction while it was yet a time when he might secure them; that delay in that particular case might be dangerous. If the jury so found, the words were actionable *per se*. If they could not so find, they were not actionable, being fully justified by the proof of the truth of the conveyance.

From what has been said, it is plain that the jury might have been directed that some of the counts did not contain language that could be construed in accordance with the innuendo. Such instruction was not asked, except as the request applied equally to the other count. Error might have been assigned upon the language of the charge upon this subject, inasmuch as the court expressed a different view to the jury from that contained herein, rendering it possible that they found defendant guilty upon all of the counts. But we find no assignment of error upon this language, nor is the point made in the brief of counsel that it was error. Inasmuch as there is one count which will sustain the verdict, we cannot reverse the cause upon the ground that the jury were allowed to find a verdict upon a declaration containing three bad ones.

Counsel for plaintiff offered in evidence a letter sent by defendant to one of the firms to whom the alleged libelous letter was sent. It is dated about the time that the publications were made, and was offered to show malice. It reads as follows:

"LANSING, MICH., October 17, 1889.

"Messrs. HILTON, HUGHES & DENNING,

"New York.

"*Dear Sirs:* We feel justified in stating our position regarding the settlement of insolvent accounts in our line of trade, viz., we will withhold our patronage from any house or firm, importer, jobber, or manufacturer who may hereafter accept less than the full amount of their claim from any customer in Lansing, except it be from an assignee or a court of equity, and for liquidation.

"Respectfully yours,

"BURNHAM & Co."

This was admissible under the rule that other publications may be shown to indicate malice. It tended to show a motive for injuring plaintiff's credit. *Fowler v. Gilbert*, 38 Mich. 292.

Several questions arise upon evidence offered in mitigation of damages. The plea was the general issue, accompanied by a notice that the several statements of fact were true. It did not go to the extent of justifying them in the sense of the innuendo; hence attempts to prove that the conveyance to the wife was without consideration by examination of the plaintiff were excluded, the court holding, in conformity to some of the authorities, that the truth is not admissible, even in mitigation of damages, unless pleaded, and that, not being pleaded to the extent of a complete denial of the charge if interpreted in accordance with the innuendo, the plea was inadequate in case of such interpretation, and would not justify the admission of the proof. In the case of *Huson v. Dale,* 19 Mich. 17, the late Mr. Justice CHRISTIANCY discussed this question, and, with the concurrence of the full bench, settled the law for this State, holding that anything tending to show an honest belief in the substance of the publication when made was admissible for the purpose of disproving malice and to mitigate damages, though it tended to prove the truth of the charge It would, however, be immaterial unless known to the defendant, as it could not have influenced his belief unless he knew of the fact. The same may be said of the questions pertaining to the value of the Williamston property, the effect of freighting business upon Lake Michigan, and overdue drafts at the bank. No effort appears to have been made to show that any of these matters came to the knowledge of the defendant before the publication, nor was the court informed that such was the fact. The court might have supposed that they were offered upon the theory that the actual condition of the plaintiff might have been such as to render the damage less serious than it would have been had he not actually been in embarrassed circumstances. Had he been informed that such evidence would show a reason for such belief by

the defendant, he might properly have asked for proof that defendant knew these facts at the time of the publication, before admitting the evidence offered. The following colloquy fails to indicate that this evidence was offered or rejected upon the understanding that it would justify or excuse defendant for a belief existing at the time of the publication:

"*Q.* What consideration did Mrs. Simons pay for the transfer of those lots? (Objected to as incompetent.)

"*The Court:* I will hear you on that, Mr. Kilbourne.

"*Mr. Cahill:* It seems to me that it is always competent to show, the deed being in evidence, the consideration of it. The amount stated in the deed, of course, is not conclusive upon anybody, not even the parties; certainly it is not conclusive on third parties. That is the ground.

"*The Court:* I will sustain the objection.

"*Mr. Cahill:* I don't understand. I understand the point made against it.

"*The Court:* The point made against it was that your notice is not notice of full justification. Furthermore, the notice was a notice that you would show that such deed was made. There isn't any notice nor claim that it was made fraudulently in your notice.

"*Mr. Cahill:* Then I understand the ruling of the court is upon the idea that the notice does not state that we will prove that the consideration was fraudulent in the deed?

"*The Court:* You don't make any claim of that outside, as I understand it. Furthermore, you claim to justify in the sense attributed in the innuendo to the words, of course. I don't see what use you could make of it if you had it in evidence,—what you are aiming at. I can't see what use you would make of the evidence if you had it under your notice.

"*Mr. Cahill:* We claim that we are entitled to just the exact facts in regard to the execution of that deed, and that we are not bound, under the declaration and pleadings in this case, to state in our notice and assume the burden of proving that this was a fraudulent deed. We don't know whether it was or not, but we think we are entitled to learn from this plaintiff what the fact was. Now, I think the position your honor has taken would be perhaps correct if we were attempting to show as a

part of our defense, and by other witnesses than the plaintiff, that there was no consideration for this deed, and that it was fraudulent. But when the plaintiff himself, whose general character, at least, is at stake, when he brings an action for libel, and is on the stand as a witness, and testifies that he made a deed to his wife for certain property, that we are entitled to ask him, as bearing upon the good faith upon which he seeks to recover damages in this suit, to state whether that deed was given in fact for such consideration as upon its face it purports to; and, if it goes no further to aid the defendant, it certainly mitigates the charge that can be made against him, and must mitigate the damages that can be recovered against him. (Objection sustained. Exception by Mr. Cahill.)"

Counsel did not say to the court that it was for such purpose, or that defendant had such knowledge, and he seems to have conceded that the ruling of the court would have been right had the question arisen upon an offer of proof by way of defense, but he claimed that it was wrong, inasmuch as the question arose upon cross-examination of the plaintiff. It is but fair to counsel to add that he does not claim here that defendant knew or understood that the facts sought to be elicited by these questions existed. So far as we have been able to learn, the record is silent upon the subject. As we cannot say from the record that this evidence was material, familiar rules require that the judgment should not be reversed for its exclusion, though it might have been admissible had a proper foundation for it been laid.

Error is assigned upon the admission of the testimony of the plaintiff that he never heard it reported that he was heavily indebted to three or four banks at rates of interest from 8 to 10 per cent. This was offered to negative the statement that it was so reported. There was nothing in the testimony tending to show that the plaintiff would have been likely to hear such reports, if any were made. Perhaps he would have been less likely to

hear them than most citizens of the place. The testimony was negative, and should not have been admitted. It did not furnish a presumption that such reports were not made, which was one of the issues in the case. But the law presumed the charge false, and the burden was upon the defendant to show the truth of the statement as made. *Edwards v. Chandler,* 14 Mich. 476. Our attention is not called to evidence which showed that the plaintiff was reported to be indebted to three or four banks at rates of interest from 8 to 10 per cent. Nor have we been able to find such. It appears that he paid 8 per cent. at one or more banks. Defendant's testimony on the subject is as follows:

"I heard that he was heavily indebted at the banks by several. One was Mr. Merrifield, and W. A. Parsons, my bookkeeper. Well, I can't call to mind any one else now. I think that Mr. Parsons told me that Mr. Simons had about $8,000 or $10,000 in notes at the banks. He is the one that was bookkeeper for Mr. Simons about a year ago. Mr. Merrifield said he was a heavy borrower. I should not think that a man like Vanderbilt, owing $10,000, would be heavily indebted; no, sir. Yes, I remember I asked Mr. Bradley, and he told me that Mr. Simons had a note there for $1,000. Well, I think I gathered from Mr. Bradley that Mr. Simons was a heavy borrower at the other banks. I understood the term 'heavy borrower.' I did not inquire at any other banks."

It stood, therefore, upon the presumption that the statement was false, and the testimony of the plaintiff was harmless.

But one question remains, and that relates to the subject of damages. Counsel for the defendant argue that the only damages recoverable were special, which they assert to have been neither alleged nor proved. The court allowed the jury to bring in general damages, upon the theory that the words were actionable *per se.* We think no error was committed in so doing.

It is claimed further that the court permitted the jury to "find any sum which, in their judgment, would compensate him for the natural or probable consequences of the defamatory words, including injury to the feelings of the plaintiff, and practically left it open to the jury to give such exemplary damages as their prejudices might incline them to." Reference to the charge shows that he instructed the jury as follows, viz.:

"'If the jury reach the question of damages, they are instructed that such damage can be given only by way of compensation to the plaintiff for injuries actually suffered by reason of the false publication made against him. The jury cannot lawfully give damages by way of punishing the defendant.'

"And that is true. Damages are not given in this State in civil actions on the theory of punishment, but they are given on the theory of compensation. When a matter is libelous upon its face, as the lawyers have expressed it here before you, and as they commonly speak of it, '*per se*,'—when that is the situation,—the law presumes there was damage. General damages are those which the law will presume to be natural or probable consequences of the defamatory words. They arise by inference of law, and need not be proved by the evidence. Even where no evidence is offered as to damages, the jury are not in duty bound to give nominal damages only; they may read the libel, and give such damages as will compensate the plaintiff for such defamation. That I understand to be the rule of law. Inasmuch as the law says that publication charging a man with insolvency must naturally affect his credit, therefore it must naturally cause him some damages, and the law implies and infers what the damages would be; that is, that there would be damage. Under such circumstances the jury must take into consideration the entire case as shown before them relating to the matter, and determine from their good judgment as to these general damages what would recompense the plaintiff for the natural consequences of the libel proven before them under the circumstances. That is the way the jury get at it. Not fanciful damages, not wild damages nor speculative damages, nor damages by way of revenge or punishment or anything of that kind, but the

jury should determine soberly and calmly what would be the compensation for the natural effect of the language used if it is libelous.

"Injuries to feelings of parties caused by the wrong (and injuries to feelings may be caused by a good many wrongs) that become actual damages, and the jury have a right, in a case where the publication is libelous on its face, in taking into consideration the general damages, which means such damages as generally, ordinarily, naturally flow from the cause shown in evidence,—the jury, I say, in taking into consideration such general damages, may also take into consideration whether the general, natural tendency would be an injury to the feelings in this case, and if they find that the natural consequences of any libel or slander proven before them—that is, that the general consequences—would be an injury to the feelings, they may take that into consideration, and allow such damages for it as in their judgment, under the circumstances, would be compensatory, not fanciful, damages, nor wild nor reckless damages.

"Outside of these matters, there are certain things which come up in cases which at times tend to increase the damages or tend to diminish the damages. Now, for instance, if an act is done which causes an injury, and it is done, we will say, negligently, but not with any actual intent to harm a man, the party who commits the act will not be liable. So a libel may be published without any intention to harm a man, and yet it would be a libel, because a libel is judged by its natural consequences. That is what makes the thing libel. If it was done without any actual ill will, any actual malevolence, the damages would not be as much as if it was done through a mean motive, an actual hatred, personal ill will, deliberate intent to maliciously injure another man. So the question of malice may always be taken into consideration in determining the amount of damages which should be awarded.

"On the other hand, some things may be taken into consideration in mitigating damages. If a party who published a libel actually in good faith, doing what he thought was right under the circumstances, acting honestly,—and a libel might be published in that way,—the jury should take that good faith into consideration in mitigating, lessening, or diminishing the damages that would be awarded, and in some case they might consider that such good faith should go far enough to reduce the damages to

a mere nominal sum. Evidence of both kinds has been offered in this case. The plaintiff has offered evidence in the case in the shape of other publications, in the character of this publication, has urged the matters to you, claiming that they show an actual malevolence, ill will, hatred, and desire to do a personal injury to the party libeled on the part of the defendant. If that is true, you have a right to take it into consideration in fixing the damages, if you get to damages, which you will award against him. On the other hand, the defendant has offered evidence here tending to show that he had no ill will; that it was not from hatred; that it was done in good faith, as he supposed his rights were. If it is true, you are to take that into consideration in mitigating and lessening damages; all this, of course, being important, if you should come to the question of damages,—a matter upon which I have no opinion."

We think this in accord with the law of this State.

The judgment of the circuit court will be affirmed.

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

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102 206
120 499

JAMES HOBAN v. JAMES F. CABLE.

102 206
125 441

102 206
153 338

Deed—Record—Evidence — Description of premises — Adverse possession—Ejectment—Pleading—Amendment of declaration.

1. The record of a deed purporting to have been executed and acknowledged in another state, and to have had attached thereto the certificate of the clerk of the proper county, under his hand and the seal of said county, certifying to the official character of the acknowledging officer, the genuineness of his signature, and the execution and acknowledgment of the instrument according to the laws of said state, but which record fails to show that any *seal* was attached to said certificate, is inadmissible in evidence; citing *Pope v. Cutler*, 34 Mich. 150.

2. Where a plaintiff in ejectment establishes a *prima facie* title through conveyances from parties claiming under a deed executed by the apparent owner of the land, who had been in possession for many years, and the title thus established is disputed in no way unless the defendant has acquired a title by adverse possession, the erroneous admission in evidence of the record of a deed purporting to have been executed to said apparent owner is error without prejudice.

3. A deed by which the grantor intended to convey the northerly 60 feet of a lot fronting on "Market street," so called, and having a depth of 158.96 feet north-westerly from said street, described the 60 feet as "beginning on Market street, between the lot hereby intended to be conveyed" and a lot northerly therefrom; thence north, 62 degrees and 15 minutes west, 158. 96 feet; thence south, 31 degrees west, 60 feet; thence south, 62 degrees and 15 minutes *west*, 158.96 feet, to Market street; thence along said street north, 27 degrees and 55 minutes east, to the place of beginning. And it is held that by excluding the course of the third boundary line as given, and extending said line in the most direct course to Market street, a line is secured not only answering to the other terms of the description, but one which, with its extension, incloses something, which is, by the terms of the deed, "a lot intended to be conveyed," and which, to answer the terms of the portion of the description relating to the starting point, must lie next to the adjoining lot referred to; that, to make this clearer, the deed states that from the terminus of said third boundary line the boundary shall extend along Market street to the place of beginning; that the intent of the grantor is clear, and the deed is not a nullity for want of a sufficient description.

4. A defendant in ejectment interposed the defense of adverse possession. In order to meet this, the plaintiff was allowed to prove by the grandfather of certain minor heirs who inherited the land, and through whom plaintiff claimed title, that the defendant's possession of the land was under an agreement made by him with the witness, who assumed to act for the minors, that defendant might occupy said land in consideration of his paying the taxes thereon. The testimony was objected to for want of proof of the authority of the grandfather to act for the minors. And it is held that, if the defendant in fact entered into the possession of the land under the agreement testified to, he did not enter in hostility to the minor heirs, and that for the purpose of establishing such fact the testimony was admissible.

5. Where, in his original declaration, a plaintiff in ejectment claims title to the entire premises described therein, and on

the trial the proofs disclose that as to a portion of the land he owns only an undivided interest, it is not error to permit an amendment of the declaration in conformity with said proofs.[1]

Error to Mackinac. (Pailthorp, J.) Argued June 26, 1894. Decided September 27, 1894.

Ejectment. Defendant brings error. Affirmed. The facts are stated in the opinion.

Mark Norris, for appellant.

Charles R. Brown & Son, for plaintiff.

MONTGOMERY, J. This is an action of ejectment. The trial was had before a jury, and a verdict rendered for the plaintiff. The defendant brings error. The assignments

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[1] CLAIM TO LAND BY PLAINTIFF IN EJECTMENT.

For cases involving the questions of the averment by a plaintiff in ejectment of the extent of his claim to the land, and the amendment of the declaration in that regard, see:

Averment of Extent of Claim.

Goodall v. Henkel, 60 Mich. 382, holding that a declaration in ejectment which fails to aver the nature and extent of plaintiff's claim to the land in dispute, as provided by How. Stat. § 7797, is fatally defective; and, while the objection should be raised by demurrer, the error is such as to demand an affirmance of a judgment rendered in favor of the defendant on other grounds.

Amendment of Declaration.

1. *Bringhurst v. Railroad Co.,* 78 Mich. 570, holding that where a plaintiff in ejectment establishes his title to only an undivided one-half of the land described and claimed in his declaration, and the defendant is in peaceable possession, and is not an intruder, judgment should be rendered accordingly, and the declaration may be amended to correspond with the right established at the trial.

2. *Ludeman v. Hirth,* 96 Mich. 17, holding that it is error to refuse to allow a plaintiff in ejectment to amend his declaration, after issue is joined on the merits, by setting forth the estate which he claims in the land.

of error are numerous, but have been carefully grouped by the appellant's counsel, so that the questions may be dealt with under a few heads. The diagram on the following page will furnish an aid to an understanding of the points involved.

The record contains the substance of all the testimony, from which it appears that plaintiff derived title from the heirs of Laurie McLeod, to whom a conveyance was made by Eliza R. McLeod in 1862, Eliza R. McLeod being then in possession, and the apparent owner. The defendant claims title by adverse possession, and also claims that by a subsequent conveyance to him by Eliza R. McLeod of lot No. 293 the title passed to him, and in this connection contends that the deed to Laurie McLeod contained no sufficient description of any property, and that the record of the deed was, therefore, no notice to him of any right in Laurie McLeod.

1. In the course of the trial the plaintiff introduced a purported record of a deed from one Charles C. Grove and wife to Eliza McLeod. The record of this deed was objected to on the ground that, although the deed purported to have been executed in New York, there was no seal attached to the certificate of the clerk of the court. The objection was a valid one, under the decision of this Court in *Pope v. Cutler,* 34 Mich. 150. But the error was not prejudicial. If the deeds in plaintiff's chain of title contained a sufficient description, he showed conveyances from one in possession for many years, and this was sufficient to establish a *prima facie* title, which is disputed in no way unless the defendant has acquired a title by adverse possession. *Gamble v. Horr,* 40 Mich. 561; *Bennett v. Horr,* 47 Id. 221; *VanDenBrooks v. Correon,* 48 Id. 283; *Covert v. Morrison,* 49 Id. 133; *Cook v. Bertram,* 86 Id. 356.

MILITARY RESERVATION, OR GOVERNMENT PASTURE.

Alex Laframbois Lot or Jail Lot.

173 78-100 ft.

Cable Lot. Lot No. 293.

158 96-100 ft.

e b

Hoban's Lot. 60 ft.

d a

Davenport Lot (now property of Patrick Durkin.)

261 4-10 ft. N. 27 deg. 55 min. E.

MARKET STREET.

CROSS STREET.

MAIN STREET.

2. As the deed to Laurie McLeod was first recorded, and as defendant claims it in fact read when executed, the description of the land was as follows:

"Beginning on Market street, between the lot hereby intended to be conveyed and a lot confirmed by the government of the United States to Ambrose R. Davenport; thence north, 62 degrees 15 minutes west, 158.96 feet; thence south, 31 degrees west, 60 feet; thence south, 62 degrees 15 minutes west, 158.96 feet, to Market street; thence along said street north, 27 degrees 55 minutes east, to the place of beginning."

Was this a sufficient description, or must the deed be treated as a nullity? The starting point is definite. The first line, to point b, is also certain, as is the line between points b and c. But, if the direction of the next line is followed as given in the instrument, the terminus is at e, and the line named in the succeeding portion of the description would end at f. But the course given after reaching point c is not the only means of identification adopted. That line is described as terminating at Market street. If we exclude the words indicative of the direction of the line, and carry the line in the most direct course to Market street, we have not only a line answering to the other terms of the deed, but one which, with its extension, incloses something, which is, by the terms of the deed, "a lot intended to be conveyed," and which, to answer the terms of the portion of the description relating to the starting point, must lie next to "a lot confirmed by the government of the United States to Ambrose R. Davenport." To make this clearer, the deed contains the statement that from the terminus of the third line named in the description the boundary shall extend along Market street to the place of beginning. We think the intent of the grantor is clear, and that the deed is not a nullity for want of a sufficient description. See *Anderson v. Baugh-*

man, 7 Mich. 69; *Cooper v. Bigly,* 13 Id. 463; *Dwight v. Tyler,* 49 Id. 614.

A number of defendant's points depend upon this, and it becomes unnecessary to treat in detail some of his assignments of error. The deed being valid to convey the land, the record was notice to subsequent purchasers.

3. One of the conveyances under which plaintiff claims contained a description as follows:

"A lot 60 feet wide on Market street and 128.90 feet deep, being the north end of lot 293 in the village of Mackinac."

This is claimed to be insufficient, but we think there is no mistaking the land intended to be conveyed.

4. As above stated, the defendant interposed the defense of adverse possession. In order to meet this, plaintiff was allowed to prove by one Ronald McLeod, in whose family one of the minor heirs of Laurie McLeod lived, that the defendant occupied the premises under an agreement made by him with said Ronald McLeod as an assumed representative of the minors, to the effect that defendant might occupy the land in question in consideration of his paying the taxes thereon. Complaint is made of this on the ground that Ronald McLeod was not shown to have had authority to act for the minors. But we think this fact immaterial. If the defendant in fact entered into the possession of the lands under such an arrangement as is claimed, he did not enter in hostility to the minor heirs, and for this purpose the testimony was admissible.

In the same connection it is urged that the agreement in question only covered the fenced portion of the premises, which was something less than the whole, another portion being used for a driveway. But while it is true that certain portions of the testimony might bear this construction, we think there is no mistaking the tenor of the

agreement, or that it related to the land deeded to Laurie McLeod. The defendant's denial did not relate to the question of quantity, but was absolute. His claim was that he had no notice of the conveyance to Laurie McLeod, and occupied the whole of the land in question in hostility to plaintiff's grantors, while plaintiff's theory was that he had notice of this adverse right, and occupied in subordination to their title. The two theories were fairly submitted to the jury.

5. The court permitted an amendment of the declaration on the trial, narrowing the plaintiff's claim.[1] This could not have prejudiced the defendant, and was proper. *Bringhurst v. Railroad Co.*, 78 Mich. 570, 572.

We think no error to the prejudice of defendant was committed.

The judgment will be affirmed, with costs, and the case remanded.

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

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[1] In the original declaration, plaintiff claimed title in fee to the entire premises described in the deed to Laurie McLeod. This description covered the northerly 60 feet of lot 293 (see diagram). The proof disclosed that the plaintiff was entitled to the entire of the easterly 128.90 feet of the description, and to an undivided two-thirds interest in the remainder, and an amendment of the declaration so as to conform to the proofs in this regard was allowed.

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110 616
102 214
f122 478
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f149 2176

ALEXANDER ZAGELMEYER v. THE CINCINNATI, SAGINAW & MACKINAW RAILROAD COMPANY.

Railroad companies—Failure to purchase ticket—Penalty—Maximum rate of fare—Eviction of passenger—Damages.

1. There is no valid objection to a railroad company's charging an increased sum for passage where fares are collected on the train, provided that the sum collected does not exceed the statutory rate; but the company cannot impose, as a penalty for not purchasing a ticket before entering the car, such a sum that the fare collected on the train, including such additional amount, shall exceed the maximum allowed by law.[1]
2. A railway passenger who either produces a ticket which, as between the conductor and himself, entitles him to passage, or stands ready to pay the fare legally demandable, can recover substantial damages for being evicted from the car on his refusal to pay an unauthorized demand.
3. 3 How Stat. § 3323, subd. 9, which authorizes railroad companies to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor, but provides that such compensation for transporting any passenger and his or her ordinary baggage, not exceeding a given weight, shall not exceed two, two and one-half, or three cents per mile, according to the gross earnings per mile of each road, will not permit a charge for a fraction of a mile, unless it is so large a fraction as to make the charge of one cent or more not in excess of the rate per mile fixed by the statute.

Error to Bay. (Cobb, J.) Argued June 26, 1894. Decided September 27, 1894.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

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[1]As to validity of extra charge for passenger fare when paid upon train, see note to *Phettiplace v. Railway Co.*, 20 L. R. A. 483.

Shepard & Lyon, for appellant.

Simonson, Gillett & Courtright, for plaintiff.

MONTGOMERY, J. This action is brought to recover damages for being forcibly ejected from defendant's car, while riding as a passenger.

The defendant had adopted a regulation requiring conductors to make an additional collection of 10 cents on all fares paid by passengers taking defendant's trains from regular ticket stations. A notice had been posted in defendant's cars, which read:

"Passengers will save 10 cents on each fare by purchasing tickets before entering the cars."

Plaintiff, without buying a ticket, boarded a car on defendant's train at North Saginaw, bound for Salzburg, as he testifies, or West Bay City, according to the testimony of the conductor. When the conductor asked him for his fare, plaintiff tendered him a 50-cent piece, and said he would pay him the legal and lawful rate, but would not pay an extra 10 cents because he had not purchased a ticket.[1] The conductor thereupon forcibly expelled him from the train. Plaintiff recovered judgment of $500, and defendant brings error.

1. Defendant contends that the requirement of passengers that they pay an additional sum of 10 cents for failure to purchase tickets where there are stations is a reasonable regulation, within the power of the company to make. Numerous cases have been cited by defendant's counsel in which it has been held that such a regulation, requiring the payment of a small sum in addition to the usual fare in case of failure to purchase a ticket, is a reasonable regulation, which the company has the right to

[1] The conductor demanded a fare of 40 cents; while the distance to be traveled was 13.05 miles as claimed by defendant, and 11.53 miles as claimed by plaintiff.

make. *Swan v. Railroad Co.*, 132 Mass. 116; *Du Laurans v. Railway Co.*, 15 Minn. 49; *Reese v. Railroad Co.*, 131 Penn. St. 422. Indeed, there can be little doubt as to the power of the railroad company to make such a discrimination between its passengers when acting under the common law, nor do we see any valid objection to a railroad company's charging an increased sum for passage where fares are collected on the train, provided that the sum collected does not exceed the statutory rate. But it is held, and we think properly, that the company cannot impose, as a penalty for not purchasing a ticket, such a sum that the fare collected on the train, including such additional amount, shall exceed the maximum allowed by law. *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Chase v. Railroad Co.*, 26 N. Y. 523.

2. But it is contended that inasmuch as the plaintiff might have paid his fare, and avoided being expelled from the car, he is entitled to recover no substantial damages. We are cited to various Michigan cases as sustaining this doctrine.[1] But all the cases cited are cases in which the plaintiff had no ticket which, as between himself and the conductor, entitled him to ride upon the car in question, and in which there was no tender of the legal fare made. We think the case of *Hufford v. Railroad Co.*, 53 Mich, 121, 64 Id. 631, fully recognizes the right of the plaintiff to recover substantial damages for being evicted from the car when he either produces a ticket, or stands ready to pay the legal fare. See, also, 19 Amer. & Eng. Enc. Law, 910, and cases cited.

It is suggested that there was testimony tending to show that plaintiff gave his destination as West Bay City, which is a small fraction over 13 miles, the distance being 13.05

[1] *Frederick v. Railroad Co.*, 37 Mich. 342; *Hufford v. Railroad Co.*, 53 Id. 118; *Heffron v. Railway Co.*, 92 Id. 406; *Mahoney v. Railway Co.*, 93 Id. 612; *Van Dusan v. Railway Co.*, 97 Id. 439.

miles, and that 40 cents was not in excess of the amount authorized by statute. The language of the statute is, "Such compensation for transporting any passenger * * shall not exceed the following prices," which is fixed by subsequent provision of the section at 3 cents a mile where the earnings of the road do not amount to $2,000 per mile. This language would apparently not permit a charge for a fraction of a mile, unless it was so large a fraction as to make the charge of 1 cent or more not in excess of 3 cents per mile. The statute formerly provided that the price of tickets might, for convenience in making change, be fixed at that multiple of 5 which was nearest the exact amount of fare. But the present statute (Act No. 202, Laws of 1889) contains no such provision.

The judgment will be affirmed, with costs.

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

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158 1255

THE DAVIS & RANKIN BUILDING & MANUFACTURING COMPANY v. L. C. MURRAY ET AL.

Contract—Stock subscription—Joint or several obligation—Mechanic's lien—Subrogation.

1. Complainant contracted with a number of persons to erect for them a butter and cheese factory. The price was to be $3,950, one-half payable when the factory should be completed, and one-half in three months after that date. The contractees agreed to make such payments, and as soon as the contract price should be subscribed, or in a reasonable time thereafter, to incorporate under the general laws of the State. The aggregate amount of stock was to be not less than $3,950, divided into shares of $100 each, to be issued to the sub-

scribers in proportion to their paid-up interest in the contract. It was further agreed that each stockholder should be liable only for the amount subscribed by him. The stock was all subscribed, the factory completed, and stock issued to the subscribers who had paid for the same, to the amount of $3,000. Complainant filed a bill against the corporation and the various subscribers to enforce a mechanic's lien upon the factory for the remaining $950. And it is held that the undertaking of the subscribers was several, and not joint, and that they are liable thereon only up to the amount of their several subscriptions.

2. The complainant would be entitled in equity, under such circumstances, to be subrogated to the rights of the non-paying subscribers to the stock to the amount remaining unpaid of the contract price.

Appeal from Ottawa. (Padgham, J.) Argued June 26, 1894. Decided September 27, 1894.

Bill to enforce a mechanic's lien. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

Elbridge F. Bacon (Farr & Soule, of counsel), for complainant.

Walter I. Lillie, for defendants.

MONTGOMERY, J. This is a bill filed against the Nunica Creamery Company and the various subscribers to its stock to enforce a mechanic's lien.

The complainant entered into a contract with the numerous subscribers in the vicinity of Nunica, by which the Davis & Rankin Building & Manufacturing Company, party of the first part, agreed with the subscribers, parties of the second part, to build a combined butter and cheese factory at or near Nunica, according to certain defined specifications. The contract contained further provisions as follows:

"The party of the second part hereby agrees to select and furnish suitable and reasonable level lands for said buildings. * * * * * * * * * *

"The Davis & Rankin Building & Manufacturing Company agrees to erect said butter and cheese factory as set forth by the above specifications for $3,950, payable when factory is completed, as follows: One-half when factory is completed; balance, one-half, in three months after factory is completed, with good notes. We, the subscribers hereto, agree to pay the above amount for said butter and cheese factory when completed; said buildings to be completed within 60 days or thereabout after the above amount ($3,950) is subscribed. Any portion of the amount subscribed not paid according to contract shall bear a legal rate of interest after due. As soon as the above amount ($3,950) is subscribed, or in a reasonable time thereafter, the said subscribers agree to incorporate under the laws of the State, as therein provided, fixing the aggregate amount of stock at not less than the amount subscribed, to be divided into shares of $100 each, said share or shares, as above stated, to be issued to the subscribers hereto in proportion to their paid-up interest herein; and it is herein agreed that each stockholder shall be liable only for the amount subscribed by him. All money that shall be paid in or collected upon this contract in excess of the contract price of the plant shall belong to the party of the second part."

The contract was signed by the complainant and by the individual subscribers to the stock. The building was completed, and stock issued to those who had paid, to the amount of $3,000; but the remaining $950 of the purchase price remained unpaid.

The question presented is whether the complainant is entitled to a lien for this sum upon the property, or whether it is bound to look to the individual subscribers.

In *Davis v. Belford*, 70 Mich. 120, this Court, in construing a somewhat similar contract, held the undertaking of the subscribers to be several, and not joint. We think the intent is even clearer in the present case. It is provided that there shall be an incorporation under the laws of the State, and stock issued to the amount paid, and it is in terms agreed that each stockholder shall be liable only to the amount subscribed by him. Certainly, with-

out doing violence to the language of the contract, it cannot be said that there was an intention that the individual subscribers should make themselves liable beyond the amount of their several stock subscriptions. It is somewhat ambiguous as to how the balance of the money shall be paid, but from the provision, which it was thought necessary to insert, that the money collected upon the contract in excess of the contract price should belong to the parties of the second part, it is a fair inference that it was intended that the collections should be made by the first party. Nor do we discover any intent to bind the corporation to be thereafter formed to the payment of the several sums. To do so would be to bind the individual interest in the corporation of each subscriber, and indirectly require a payment by him of an amount in excess of that which it is expressly stipulated shall be the total payment required of him. So far as the contract is in this respect ambiguous or uncertain, the dealings of the parties have placed a practical construction upon the contract in accordance with these views.

Without doubt, the complainant is entitled, in equity, to be subrogated to the rights of the non-paying subscribers to the stock to the amount remaining unpaid of the contract price; but this is not the remedy which it here asks.

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

McGrath, C. J., Grant and Hooker, JJ., concurred. Long, J., did not sit.

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d126	230
126	231

THE McKINNON MANUFACTURING COMPANY v. THE ALPENA FISH COMPANY, LIMITED.

Sale—Delay—Recoupment—Implied warranty.

1. In a suit brought by a contractor to recover the balance of the contract price due for an engine manufactured for the defendant for use on one of its fishing tugs, the defendant sought to recoup damages for the failure of the plaintiff to complete the engine within the time agreed upon in the contract, and introduced testimony tending to sustain its claim. The plaintiff's testimony tended to show that the defendant agreed to bring the tug from the yard where it was being built to plaintiff's dock in two weeks after the making of the contract, so that the engine could be placed in the tug, but that it was not so brought until more than three weeks had elapsed, and that plaintiff's work was thereby delayed. And it is held that the plaintiff had a right to have the jury pass upon the question of said alleged delay, and that, if they found that it was caused by the failure to bring the tug to plaintiff's dock within the time agreed upon, for such time the plaintiff was not to be charged with the delay, or damages in consequence of it.

2. Plaintiff further contended that the delay in completing the tug, if any, was occasioned by the builder of the tug, in not having his work done in time, and by another party, who did not complete the putting up of the smokestack in time. And it is held that the plaintiff could be held liable for its delay only, and not for the delay of the builder or the party who had contracted to put up the smokestack.

3. After the engine had been used for a time, the shaft was broken, and the defendant claimed to recoup damages for the expense of putting in a new shaft. Upon examination, the shaft put in by plaintiff was found to have one or more flaws in the material from which it was made. And it is held that the request of the plaintiff for an instruction that the plaintiff, in the absence of a warranty of the engine, could not be held responsible for the breaking of the shaft if the break was due to interior seams or defects, not known to the plaintiff, and which could not have been discovered by an examination of the shaft, should have been given.

4. Testimony was introduced tending to show that, after the plaintiff had commenced to build a pump in accordance with the contract, the engineer in charge of the tug, and who had been given authority by the defendant to oversee the work, and under whose directions the plaintiff had been directed to work, stated that he did not wish that kind of a pump, and the one in controversy was then made, under the orders and directions of said engineer. And it is held that the jury should have been instructed, as requested by the plaintiff, that, if they found the aforesaid facts, the defendant had no right to complain because the pump built differed from the one called for by the contract, and that the shipping of the pump back to the plaintiff would not entitle the defendant to make any claim therefor, if plaintiff declined to receive it.

Error to Bay. (Maxwell, J.) Argued June 27, 1894. Decided September 27, 1894.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

J. L. Stoddard, for appellant.

T. A. E. & J. C. Weadock, for defendant.

LONG, J. Plaintiff brought suit to recover the balance due upon the sale of a marine engine, which was built by it for defendant's fishing tug, under a written contract, for $1,000, and one throttle for the same, at $75. Five hundred dollars had been paid on the contract, leaving a balance of $575. Defendant pleaded the general issue, and gave notice of recoupment of damages on account of the improper construction of the engine in most of its parts, and for delay in not completing it within the time agreed upon. On the trial, plaintiff recovered the sum of $172, and now brings error.

Testimony was offered on the part of defendant tending to show the facts set up in the notice. Plaintiff, upon its part, introduced testimony tending to show that the engine was properly constructed and properly placed in the tug.

It was also contended by plaintiff that it was not liable for delay in building and placing the engine in the tug, but that the delay, if any, was occasioned by Davidson, the builder of the tug, in not having his work done within the time, and by Styninger, who did not complete the putting up of the smokestack in time; also, that the engine, while being built under contract, was in fact built and placed under the direction of defendant's engineer.

Upon the question of delay in completing the contract, the plaintiff requested the court to charge the jury:

"If you find that, when the contract was entered into, the defendant's manager, Mr. Alpern, promised the plaintiff that the tug would be brought over to plaintiff's dock at a certain time mentioned by him, so that the engine might be erected therein, and that the tug was not brought to plaintiff's dock at the time so specified, and that the plaintiff was thereby delayed in the work of constructing and placing the engine in the tug, and for that reason the engine was not completed until after the time mentioned in the contract, the plaintiff cannot be held liable for damages because of such delay.

"If Davidson and Styninger, or either of them, were not through with their work on the tug until the engine was ready to run, and they were not delayed in their work by the plaintiff, then the defendant has no ground for claiming damages from the plaintiff because the engine was not completed at the time required by the contract."

The contract was dated April 16, 1891, and under it the engine was to be completed and put in within five weeks from that date. Plaintiff gave testimony tending to show that the tug was to be brought around from Davidson's yard to plaintiff's dock in two weeks, so that the engine could be put in, but that it was not brought around there until more than three weeks had elapsed, and that the plaintiff's work was delayed by reason thereof; that, when brought over, it was not left long enough to place the engine in, but was taken back to Davidson's

yard to finish up the work there. Plaintiff's witness, Mr. McLane, was asked:

"State whether or not you were delayed in the final completion of the engine by the fact that the tug was not brought over in the two weeks mentioned by Alpern."

He was also asked:

"What effect had the delay in bringing the boat over there, and not leaving it there sufficiently long to enable you to get the engine aboard, upon the final completion of the work,—whether it delayed it or not?"

These questions were ruled out, though not objected to by defendant's counsel, and yet the court charged the jury upon that point:

"The contract provided that the Alpern people were to take the tug over to the dock, so as to receive the engine aboard the boat. That was done the same day it was launched, and was strictly on time on the part of Mr. Alpern; but when it was there, either by the consent of McKinnon,—it don't appear whether it was by his consent, or in opposition to his wishes,—it was taken immediately back to Davidson's, whose men were also at work putting on the upper works and finishing the tug; and all three of these parties, Mr. Styninger, Mr. McKinnon, and Mr. Davidson, were at work upon that tug at the same time. Now, I think perhaps there is a certain liability, joint as well as several. I think, if the three of them detained the tug 15 days, either one might be charged with it in this suit; but it don't appear here in evidence whether Styninger was on time in the performance of his work, or whether Davidson was, and it won't do to charge the whole of it to McKinnon, unless the proof is very satisfactory. There is evidence tending to show that he did not work a sufficient number of men on it for part of the time; but I submit that question wholly to you for your consideration, to fix the length of time and the measure of damages, and determine the amount of loss, if any there was, by not finishing the contract in time."

The court was in error in not permitting the witness McLane to answer, and in refusing these requests to charge. If it was understood that the tug was to be

brought to McKinnon's dock within two weeks from the date of the contract, then it must be presumed that the contract was made in view of that time; and, if the defendant's tug was not brought there within that time, certainly the plaintiff could not be charged with the delay during that time. The plaintiff had the right to have the jury pass upon that question as one of fact, and, if they found that the delay was caused by the failure to bring the tug to McKinnon's dock within the time agreed upon, they should have been instructed that for such time the plaintiff was not to be charged with the delay, or damages in consequence of it. There was no such thing as a joint liability in the delay. The plaintiff could be held liable for only its delay, and not for the delay of either Davidson or Styninger.

It appears that, after some use, the shaft was broken, and among other damages claimed was the expense of putting in a new one. The evidence showed that, upon examination, the shaft was found to have one or more flaws in the material from which it was made. It was contended on the trial by the defendant that the plaintiff was liable for this, and the question was submitted to the jury with other claims for defects. The plaintiff asked the court to charge the jury that—

"Plaintiff did not warrant or guarantee the engine, and in no event can the plaintiff be held responsible for the breaking of the shaft if the break was due to interior seams or defects, not known to the plaintiff, and which could not have been discovered by an examination of the shaft."

This request should have been given. The vendor who sells an article of his own manufacture is liable for any latent defects not disclosed to the purchaser, arising from the manner in which the article is manufactured; and, if he knowingly uses improper materials, he is liable for that

also, but not for any latent defects in the material, which he is not shown to have known, and which could not be ascertained by proper examination. *Hoe v. Sanborn,* 21 N. Y. 552; *Bragg v. Morrill,* 49 Vt. 45; 2 Suth. Dam. (1st ed.) 409. In *Bragg v. Morrill, supra,* a shaft was sold by a machinist to be used for a special and known purpose. It was purchased by the machinist, and then turned and prepared for the reception of pulleys. It afterwards broke, because of a defect unknown to both plaintiff and defendant, and the plaintiff sued for damages therefor. The court held the defendant not liable, and said:

"We think the result of the cases on implied warranty is that the vendor of an article for a particular purpose does not impliedly warrant it against latent defects unknown to him, and which have been produced through the unskillfulness of some previous manufacturer or owner, without his knowledge or fault, except in those cases where the sale of the article by him is, in and of itself, legally equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the claimed defects, as is the case in the sale of provisions for domestic use. On this ground, the defendant is not liable, on an implied warranty of the shaft, for the latent defects that caused it to break, and were wholly unknown to him, and were not produced through any fault or unskillfulness on his part, but wholly through the fault or unskillfulness of the manufacturer of the shaft from the raw material."

In the present case the plaintiff's testimony showed that the plaintiff commenced to build a pump in accordance with the contract, when Smith said that he did not want that kind, and the one in controversy was then made, under his orders and directions. Smith was the engineer of the tug, and was given authority by the defendant to oversee the work, and the plaintiff was directed to work under Smith's directions. The court was asked to charge the jury:

"If you find that the plaintiff began the construction

of the pump mentioned in the contract, and that the completion of such pump was then abandoned, and another pump built, in accordance with the directions given to the plaintiff by Smith, and that it was the duty of Smith to oversee the work on behalf of the defendant, then the defendant has no right to complain because the pump built differed from the one called for by the contract, and shipping the pump back to the plaintiff would not entitle the defendant to make any claim therefor, if the plaintiff declined to receive it."

This request should have been given.

For the errors pointed out, the judgment must be reversed, and a new trial ordered.

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

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102 227
s60NW 681
s47ASR 516
j190US 489

THE GRAND RAPIDS ICE & COAL COMPANY v. THE SOUTH GRAND RAPIDS ICE & COAL COMPANY.

Riparian rights—Navigable lake.

1. Unless the contrary appear, a grant of land bounded by a watercourse conveys riparian rights, and the title of the riparian owner extends to the middle line of the lake or stream.
2. A boundary line may be so described as to preclude the extension of the grant by construction to the center of the stream. When it is said that meanders have no significance as boundaries, what is meant is that they do not preclude such extension of the grant.
3. The shore proprietor takes by virtue of shore ownership. His interest in the bed of the stream he acquires as appurtenant to the grant, and the extent of that interest depends upon his frontage, and the form, length, and breadth of the body of water upon which he abuts; and the fact that a lake may be of such form as to render the designation in it of the bound-

aries of the several riparian owners somewhat difficult is not an objection to the application of the rule.

4. The rule laid down in *Clute v. Fisher*, 65 Mich. 48, that the owner of a fractional subdivision of land, made so by an inland lake, owns the soil under the water of said lake which would be included within the subdivision if its lines were fully extended, is inconsistent with the rule, repeatedly laid down in this State, that the shore proprietor owns to the thread or center of the stream, and with the rule announced in *Clark v. Campau*, 19 Mich. 328, and *Gas-Light Co. v. Industrial Works*, 28 Id. 182, that side lines are to be governed by the course of the stream, and the submerged land bounded by lines drawn at right angles with the central thread, rather than at right angles with the shore at the point of departure; and, while a correct result was reached in the Clute case, the reasons given are without support.

Error to Kent. (Grove, J.) Submitted on briefs June 8, 1894. Decided September 27, 1894.

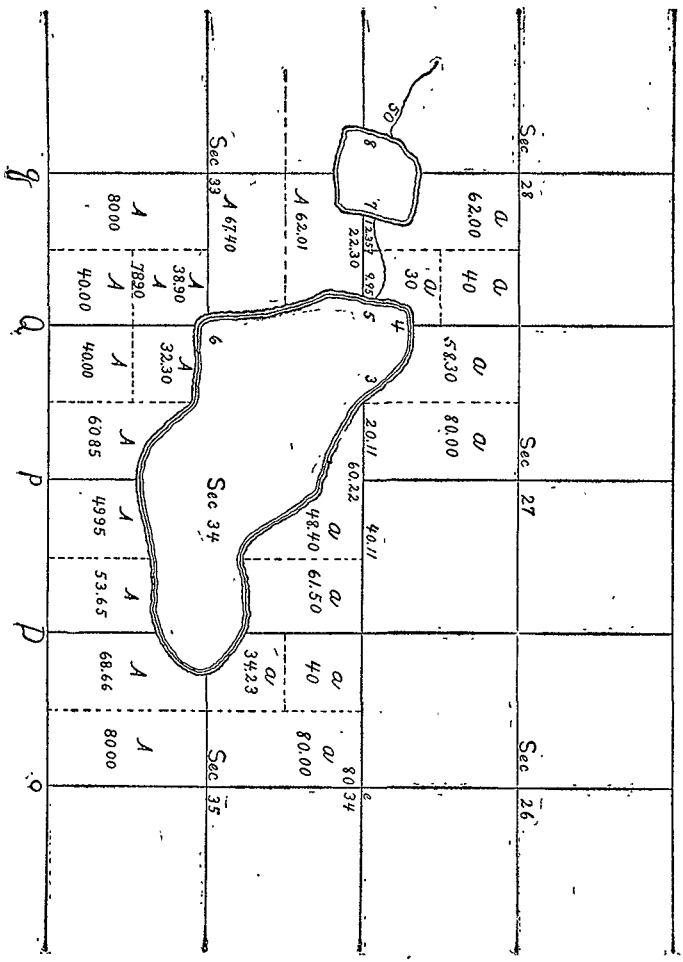
Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Taggart, Wolcott & Ganson, for appellant.

J. W. Champlin, for defendant.

McGRATH, C. J. This is a controversy over the right to cut ice in Reed's lake, plaintiff insisting upon ownership of the bed of the lake within the lines of the fractional subdivisions extended, and defendant insisting upon a division of the center line proportionate to the shore line, so as to give to each riparian owner an equitable share. The diagram on next page will best explain the situation.

By the meanders, the south shore line is 177.65 chains, and the north shore line is 117 chains. The center line of the lake is about 488 rods. The circuit judge finds that the plaintiff's lessors took all of the upland on the N. $\frac{1}{2}$ of section 34, under a government conveyance which


Sec 28
Sec 27
Sec 26
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Sec 34
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Sec 34
62.00
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48.40
61.50
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34.23
80.00
80
34
62.01
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38.90
78.20
40.00
32.30
60.85
49.95
53.65
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2.30
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described the land taken as "the north-east fraction of section 34, * * * containing one hundred and nine acres and ninety-hundredths of an acre, according to the official plat of the survey of said lands returned to the General Land-office by the Surveyor General." It is further found:

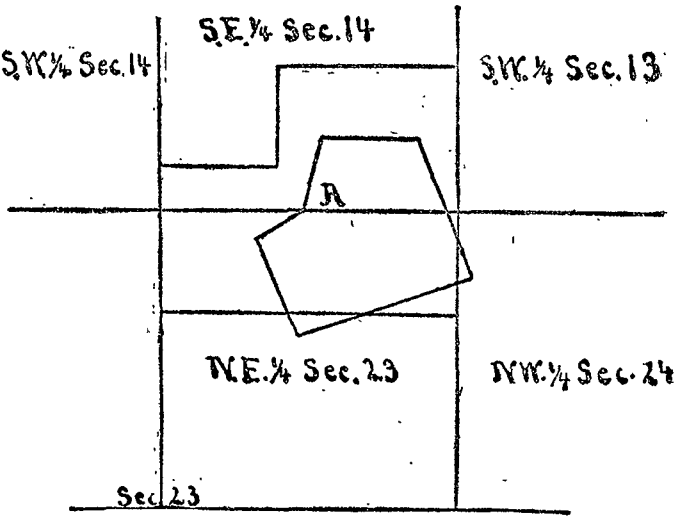
"That what is now known and called 'Reed's Lake' is a body of water lying in five different sections, and by the United States government survey was meandered, and the lands adjoining platted by the United States, and sold as fractions; * * * that the lake has an outlet which extends to Grand river, and is called 'Cold Brook;' that its greatest length of clear water, according to the United States plat, is 440 rods. On the east and west quarter line, if extended through the lake, it is 360 rods. If the quarter line north and south were extended through, the distance across the lake would be 192 rods. The distance across the water on the west section line of section 34 is 226 rods. The greatest width across the lake is 220 rods, and the least width is 96 rods. The waters of the lake cover over 370 acres of land. It is a pleasure resort, having four steamboats, drawing from two to four feet of water, and for carrying passengers during the summer months, and numerous smaller craft.

"The defendants are riparian owners of a piece of land situated on the south fraction of section 34, commencing at the section line between sections 33 and 34, extending eastwardly, and having a frontage on the margin of the lake of 313 feet, being a part of the south-west fractional quarter of section 34, town 7 north, of range 11 west, as described in the original purchase from the government in the same chain of title. They also had a verbal lease from the owners of the land, at the time of the cutting of the ice, lying next westerly from said section line, having a margin on the lake of 22 rods, and of the right to take ice in front thereof, so far as the same belonged to said riparian owners.

"The defendant, during the early part of the year 1893, entered upon the ice in front of the lands so leased and so owned by it, and cut and removed the ice in front of said lands, and between the shore and the middle of the lake, between lines which would be formed by running them at right angles from the center line of said lake to

the shore line, so that defendant would have the same proportionate share of the center line of the waters of the lake as they have of the whole shore line on the south side of said lake."

Plaintiff relies upon *Clute v. Fisher*, 65 Mich. 48. The following diagram will illustrate the situation in that case:



Clute owned the southern portion of the S. E. ¼ of 14, and the northern part of the N. E. ¼ of 23. The meander lines were almost wholly, and the water lines were wholly, within the subdivisions owned by Clute. The ice was cut at the point A. Defendant was not the owner of the N. W. ¼ of 24, nor of that portion of 23 adjoining Clute's land. No claim was made that an apportionment would give the right to cut the ice to some one other than Clute, but the sole contention was that the title to the bed of all the lands within the meandered lines was in the State. It was that question that the Court was dealing with. Mr. Justice MORSE in that case says:

"It has been held in this State that the soil under the water of the inland lakes in this State does not belong to the general government or to the State. * * * It has also been repeatedly decided in this State that private ownership of lands bounded on navigable fresh water is not restricted to the meander line. * * * We have also held, in accordance with the decisions of the Supreme Court of the United States, that the land described as the fraction of any subdivision—as, for instance, the south-east fractional quarter—cannot be extended beyond the lines of the said south-east quarter as they would run if extended,"—citing *Wilson v. Hoffman,* 54 Mich. 246; *Keyser v. Sutherland,* 59 Id. 455; *Brown's Lessee v. Clements,* 3 How. 665; *Palmer v. Dodd,* 64 Mich. 474.

In *Wilson v. Hoffman, supra,* 117.48 acres of the S. ½ of section 28 lay south of Black river. Plaintiff brought ejectment to recover seven acres lying on the extreme west point, and within the lines of the S. W. ¼ if the lines had been extended. The description in the patent to plaintiff's grantor was:

"The south-east fractional quarter of fractional section 28, * * * containing 117 and 48-100 acres, according to the official plat of the survey of the said lands returned to the General Land-office by the Surveyor General."

The map was not introduced. The Court held that all subdivisional lines of a section must be straight lines running from the proper corner in one exterior line to its corresponding corner in the opposite boundary of the section, and that the patent and deed thereunder, through which plaintiff claimed, did not embrace within their description the lands in controversy, since no part thereof was within the S. E. ¼ of the section. The case came up again, and is reported in 70 Mich. 552, and the Court there say:

"In granting patents for lands, it is usual for the government to add, immediately after the statement of the number of acres which the tract contains, if it be frac-

tional, these words: 'According to the official plat of the survey of said lands returned to the General Land-office by the Surveyor General.' Such language, when used, constitutes a part of the description of the premises conveyed, and limits the purchaser to the tract as marked upon the plat of the Surveyor General. This was so held in *Gazzam v. Lessee of Phillips*, 20 How. 372, which overruled the same case in 3 How. 650, under the title of *Brown's Lessee v. Clements*. This was the language used in the patent to Tingley."

The record then showed that the premises described in the declaration were embraced in what the government denominated the S. E. fractional ¼ of 28.

"It might, perhaps, have been more accurate," say the Court, "to describe it as that portion of section 28 lying south of Black river; but as the fraction contained less than 160 acres, and the law required it to be sold entire, the description contained in the patent, in connection with the official plat, was sufficient, and is quite a customary method of description in the General Land-office."

In *Keyser v. Sutherland*, 59 Mich. 455, a dispute arose respecting a strip of land on the west line of section 29, in the S. W. ¼ of the N. W. ¼ of that section, which extended around the west and south sides of the S. W. ¼ of the section. Defendant claimed title under a conveyance from the government describing his land as the south fraction of section 29. Plaintiff's patent called for a full subdivision, to wit, the S. W. ¼ of the N. W. ¼ of 29. *Brown's Lessee v. Clements*, *supra*, and *Wilson v. Hoffman*, 54 Mich. 246, are cited.

In *Palmer v. Dodd*, 64 Mich. 474, defendant was the owner in fee of the E. ½ of the N. W. fractional ¼ of section 23, described in the United States patent as containing 57 acres. Plaintiff was the owner in fee of the S. W. fractional ¼ of section 23. The section was made fractional by a lake and marsh, which was meandered by the United States survey. The trespass was committed

within the boundaries of the S. W. ¼, if the quarter lines should be extended. The lake, which was surrounded by the marsh, was mostly located upon the S. E. ¼ of the S. W. ¼ of the section. Defendant claimed to own to the center of the lake. The Court say:

"But no grantee by such patent, granting a legal subdivision of land, can derive title to land upon another legal subdivision. This we have decided in the cases of *Wilson v. Hoffman*, 54 Mich. 246, and *Keyser v. Sutherland*, 59 Id. 455, which were based upon the decision of the Supreme Court of the United States in *Brown's Lessee v. Clements*, 3 How. 650. The principles which govern the rights of riparian proprietors do not apply to defendant's grant. No part of the land granted to him in the description contained in his patent was bounded by a lake or other water. His grant extended no further south than the east and west quarter line of the section, and this line did not touch or intersect the shore of any lake. Indeed, the lake is nearly 40 rods south of this line."

In the Palmer case the Court recognized the principles which govern the rights of riparian owners, but held that they did not apply. The question before the Court in the other cases was the significance of meander lines. In none of them did the question arise as to the rights of shore owners as between themselves.

It was held in *Clute v. Fisher, supra*, that the rule that private ownership of lands bounded on navigable fresh water is not restricted to the meander line must also apply to the small inland lakes by analogy, whether they can strictly be termed "navigable" or not; and it was also conceded that in case of a body of water so large that the lines of the sections or subdivisions of sections held by the shore owners, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the center line of said lake. It would seem to follow that the extent of the qualified ownership in the bed of the river or lake must depend upon the shore ownership,

rather than upon the distance from the shore to the parallel subdivision line. The rule laid down in that case, that the owner of a fractional subdivision owns the soil which is included within the extended subdivision lines, is inconsistent with the rule, repeatedly laid down in this State, that the shore proprietor owns to the thread or center of the stream. It is also inconsistent with the rule laid down in *Clark v. Campau*, 19 Mich. 328, and *Bay City Gas-Light Co. v. Industrial Works*, 28 Id. 182, that side lines are to be governed by the course of the stream, and the submerged land bounded by lines drawn at right angles with the central thread, rather than at right angles with the shore at the point of departure. The application of the rule of the Clute case to the one before us would leave the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 34 without the lines of any subdivision, and would apportion that area upon the basis of imaginary subdivision lines, without reference to shore proprietorship. Again, the rule that a conveyance of a fractional subdivision actually conveys the entire subdivision is inconsistent with the rule laid down in *Au Gres Boom Co. v. Whitney*, 26 Mich. 42; *Dart v. Barbour*, 32 Id. 271; *Jones v. Pashby*, 62 Id. 614; *Hartford Iron Mining Co. v. Cambria Mining Co.*, 80 Id. 491. In each of these cases part of a parcel of land having a water frontage was conveyed, describing it as half of the lot or parcel, and it was insisted that the conveyance was of half of the water frontage; but the Court held that the words "half of the lot" meant half in quantity of the upland. A correct result was reached in the Clute case, but the reasons given are without support. That case and those upon which it relies were based upon *Brown's Lessee v. Clements*, 3 How. 665, which was expressly overruled in *Gazzam v. Lessee of Phillips*, 20 How. 372. See, also, *Hardin v. Jordan*, 140 U. S. 371. In any event, we think

that this case is governed by the rule laid down in *Jones v. Lee*, 77 Mich. 35.

Unless the contrary appear, a grant of land bounded by a water-course conveys riparian rights (*Richardson v. Prentiss*, 48 Mich. 88); and the title of the riparian owner extends to the middle line of the lake or stream of the inland waters (*Webber v. Boom Co.*, 62 Mich. 626, and cases cited at page 636). A boundary line may be so described as to preclude the extension of the grant by construction to the center of the stream. When it is said that meanders have no significance as boundaries, what is meant is that meanders do not preclude such extension of the grant.

In *Luce v. Carley*, 24 Wend. 451, among the courses in the description of the premises were those to a hemlock stake "standing on the east bank of the river; from thence down the river, as it winds and turns, 24 chains and 94 links, to a hard maple tree." The court say:

"It is never thought that monuments mentioned in such a deed as occupying the bank of the river are meant by the parties to stand on the precise water line. * * * They are used rather to fix the *termini* of the line which is described as following the sinuosities of the stream. * * * Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, * * * one-half the bed of the stream is included by construction of law." *Child v. Starr*, 4 Hill, 375; *Seneca Nation v. Knight*, 23 N. Y. 498; *Rix v. Johnson*, 5 N. H. 520; *Gouverneur v. Ice Co.*, 134 N. Y. 355.

The shore proprietor takes by virtue of shore ownership. His interest in the bed of the stream he acquires as appurtenant to the grant, and the extent of that interest depends upon his frontage, and the form, length, and breadth of the body of water upon which he abuts. That a lake may be of such form as to render the designation in it of the boundaries of the several riparian owners

somewhat difficult is not an objection to the application of the rule. Mr. Justice CAMPBELL says in *Lincoln v. Davis*, 53 Mich. 390:

"In carrying out lines of ownership in narrow streams, it is easy to find the general course of the stream, and to draw lines perpendicular to that course from the terminal shore lines. But on lakes all lines from the shore tend to converge in some central part of the lake; and, while irregularity of shape prevents drawing them to a common center, they must all, if protracted, cross each other in a perplexing way. The rule adopted in such waters, where the whole surface could be appropriated, has always been to divide the water area in proportion to the shore frontage, and never to attempt any division by lines run from the shore, except over such parts of the lake as are substantially adjacent to the shore. In some cases, by a fair partition, a shore owner would, by his extent of shore line, obtain a share beyond the center. But it seems impossible, if the whole water is to be regarded as divided up, to reach a division without some proceeding in the nature of a partition, which will fix the various possessions."

Again, in *Jones v. Lee, supra*, Mr. Justice CAMPBELL says:

"It appears clearly enough in the present case that while there is a considerable frontage facing north-west or south-east, the lake being longest in that direction, there must also be large end frontages, which look up or down the lake perpendicularly, or nearly so, to any line across from bank to bank, at most places along the shores. If this body of water were not navigable, and if all its waters could in any way be apportioned among the riparian proprietors for any lawful purpose, it is evident that it could not be done by reference to any *filum aquae* or middle thread, but must be done by some rule of proportion, which probably could only be got at by some partition proceeding, inasmuch as such waters are common for all ordinary uses."

In *Blodgett & Davis Lumber Co. v. Peters*, 87 Mich. 498, the question arose as to the proper apportionment between several shore owners in a cove on Green Bay.

In *Hardin v. Jordan,* 140 U. S. 402, the Court say:

"If there should arise any question between the plaintiff and other riparian owners of lands situated on the margin of the lake as to the convergence of the side lines of the plaintiff's land in the lake, it can be disposed of by the parties themselves, by a resort to equity or to such other form of procedure as may be proper."

See, also, *Gouverneur v. Ice Co., supra.*

In the present case it is practically conceded by plaintiff that, unless the rule contended for by it is applicable, the judgment below was correct.

The judgment is therefore affirmed.

The other Justices concurred.

JOHN HURST, PROSECUTING ATTORNEY OF CHIPPEWA COUNTY, v. FRANK R. WARNER.

Constitutional law—Delegation of legislative power—State Board of Health—Disinfection of baggage—Validity of rules.

1. Act No. 230, Laws of 1885, as amended by Act No. 47, Laws of 1893, entitled "An act to provide for the prevention of the introduction and spread of cholera and other dangerous, communicable diseases," and the effect of the provisions of which is to declare it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with the rules and regulations of the State Board of Health, made and established pursuant to said act, is not unconstitutional for the reason that it delegates to the State Board of Health legislative power, in contravention of section 1 of article 4 of the Constitution, which vests the legislative power in a Senate and House of Representatives.[1]

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[1] With this case in 26 L. R. A. 484, is an extensive note on quarantine regulations by health authorities.

2. By section 3 of the act, the State Board of Health is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances whenever it shall be shown to the satisfaction of the board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person, or property which has been exposed to cholera, diphtheria, or other dangerous, communicable disease, or when it shall be shown to the satisfaction of the board or inspector as aforesaid that any passenger, person, or property is being transported on such cars or other public or private conveyance from any locality within or without this State where any such dangerous, communicable disease exists, and where, under the circumstances shown to such board, such persons or property are likely to carry infection of such dangerous, communicable disease. And it is held that a rule which does not make it a prerequisite to the inspection authorized by section 3 that the baggage being transported come from a locality where such dangerous, communicable disease exists, as ascertained either by the board or inspector, is broader than the statute, and cannot be sustained.

3. The Court are not to be understood as intimating that it would not be competent for the Legislature to provide for the disinfection of all baggage, where, in the opinion of the State Board of Health, from the prevalence of a contagious disease, such precaution is necessary.

Certiorari to Chippewa. (Steere, J.) Argued June 28, 1894. Decided September 27, 1894.

Relator applied to the circuit court for a *mandamus* to compel respondent to issue a warrant for the arrest of a person charged with the violation of a rule adopted by the State Board of Health under Act No. 47, Laws of 1893, and brings *certiorari* to review an order denying the writ. Affirmed. The facts are stated in the opinion.

A. A. Ellis, Attorney General, for relator.

E. C. Chapin (*John D. Conely,* of counsel), for respondent.

MONTGOMERY, J. The relator, who is prosecuting attor-

ney for the county of Chippewa, on the 24th of November, 1893, presented to the respondent, who is a justice of the peace of said county, a complaint alleging that one Robert B. Finch was a station agent of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company at Sault Ste. Marie, and on the 23d of November, 1893, was in charge of a train belonging to said railway company; that on said train there was baggage, consisting of clothing, wearing apparel, etc., belonging to one Edmund Watelet, an immigrant, late of Havre, France, who was traveling through Michigan to Minneapolis, and whose baggage was liable to be disinfected by one Thomas N. Rogers, an inspector authorized by the Michigan State Board of Health to disinfect the baggage of all immigrants destined to pass into or through the State of Michigan; that said Finch was requested by said Rogers to detain said baggage for inspection and disinfection, and willfully refused so to do, and proceeded with said train and said baggage into and through Michigan, in violation of rule No. 2, framed and published by the Michigan State Board of Health under Act No. 230, Laws of 1885, as amended by Act No. 47, Laws of 1893, of this State. Upon the presentation of this complaint the respondent was requested by the relator to cause a warrant to be issued, based upon said complaint, but he declined to do so for the reason that Act No. 47, Laws of 1893, was unconstitutional and void, and for the further reason that, if said act was not void, rule No. 2, upon which the prosecution was based, was not authorized by said act, and that the Board of Health exceeded its authority in passing said rule. The relator then applied to the circuit court for a *mandamus*, which was refused, and a writ of *certiorari* has been issued to review the decision of the circuit judge. The two questions presented here are those which determined the action of the justice.

1. It is contended, and the circuit judge held, that the statute in question is unconstitutional for the reason that it delegates to the State Board of Health legislative power, in contravention of section 1 of article 4 of the Constitution, which provides that the "legislative power is vested in a Senate and House of Representatives." To determine the question involved, it is necessary to refer at some length to the provisions of the statute. Section 1 provides that—

"Whenever it shall be shown to the satisfaction of the State Board of Health that cholera, diphtheria, or other dangerous, communicable disease exists in any foreign country, neighboring state, or locality within this State, whereby the public health is imperiled, and it shall be further shown that immigrants, passengers, or other persons seeking to enter this State, or to travel from place to place within this State, are coming from any locality where such dangerous, communicable disease exists, and are likely to carry infection of such dangerous, communicable disease, the State Board of Health shall be authorized to establish a system of quarantine for the State of Michigan, or for any portion thereof."

Section 2 provides that—

"Such quarantine shall be for the purpose of preventing all immigrants, passengers, or other persons, under the circumstances mentioned in section one of this act, from entering the State, or from going from place to place within the State, who, in the opinion of the State Board of Health, or in the opinion of an inspector duly appointed by said board, are likely to carry infection of cholera, small-pox, diphtheria, or other dangerous, communicable disease; and for the detention of all such persons outside the borders of the State, or, if already within the State, at the places where they may be or at the place they have been exposed to or have contracted such dangerous, communicable disease, or at such suitable place as such board may provide, during the period of the incubation of such disease, or of its existence if already developed, and until, in the opinion of the State Board of Health, such persons are free from all danger of infection."

Section 3 provides that—

"The State Board of Health is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances whenever it shall be shown to the satisfaction of such board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person, or property which has been exposed to cholera, diphtheria, or other dangerous, communicable disease, or when it shall be shown to the satisfaction of such board or inspector as aforesaid that any passenger, person, or property is being transported on such railroad cars or other public or private conveyance from any locality within or without this State where any such dangerous, communicable disease exists, and where, under the circumstances shown to such board, such persons or property are likely to carry infection of such dangerous, communicable disease. In such case said board may, by its duly constituted inspectors, remove, isolate, place under the care of local boards of health, order to be returned to the places whence they came, or dispose of in any other manner it may consider proper, all railroad cars or other conveyances, all passengers in such railroad cars or other conveyances, when there is reason, as aforesaid, to believe such may have contracted or become infected with any dangerous, communicable disease, or have been exposed or infected by any such disease in a manner likely to render them bearers of infection. * * *"

Section 4 provides:

"All such persons, their baggage and other personal effects, and all such conveyances shall be disinfected under such rules and regulations as the State Board of Health may establish for the purpose of carrying into effect the provisions of this act, before such persons or baggage or conveyances shall be permitted to enter the State, or to proceed to their or its destination if already in the State."

Section 5 provides for the disinfection of goods, merchandise, conveyance, or other property which the State Board has reason to believe may carry the germs of cholera, or other dangerous, communicable disease, and authorizes the board, under the circumstances mentioned

in sections 2 and 3 of the act, to prohibit the entry of such goods, merchandise, or other property into the State, or their being moved, if within the State, until such disinfection shall be accomplished. Section 6 provides:

"It shall be the duty of the State Board of Health to frame and publish rules for the inspection, isolation, detention, and disinfection contemplated in this act. Whoever shall willfully violate the rules of the State Board of Health, made in pursuance of this act, or the order, by its duly appointed inspector, made in obedience to such rules, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to payment of a fine of $100 and costs of prosecution, or imprisonment in the county jail for a period not to exceed 90 days," etc.

As was said by Chief Justice Marshall in *Wayman v. Southard,*, 10 Wheat. 1:

"It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself. * * * The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law. But the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry."

In *Re Griner,* 16 Wis. 423, 433, Mr. Justice Cole, speaking for the court, and referring to the rule that the powers of the different departments are not to be confounded, or delegated by the one department to the other, said:

"Most of the propositions stated are recognized political maxims, under our form of government. It is only the conclusion or deduction from those propositions about which any doubt can exist. No one will seriously contend that Congress can delegate legislative power to the President. But a distinction must be made of 'those important subjects which must be entirely regulated by the

legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provision to fill up the detail.' It would seem that the power given to the President to make all rules and regulations to carry into effect the law for calling out the militia is of the latter character. Congress might have regulated by its legislation the whole details of the draft, if it had thought proper to do so. But having, in the most ample manner, clothed the President with power to call forth the militia, it further provided that he should make all proper rules and regulations for the enforcement of the draft, where state laws upon the subject were defective. * * * This no more partakes of legislative power than that discretionary authority intrusted to every department of the government in a variety of cases. This practice of giving discretionary power to other departments or agencies, who were intrusted with the duty of carrying into effect some general provisions of law, had its origin at the adoption of the Constitution, and in the action of the first Congress under it, as the federal legislation abundantly shows."

See, also, as bearing upon this question, *Field v. Clark,* 143 U. S. 649; *Locke's Appeal,* 72 Penn. St. 491; *Railroad Co. v. Smith,* 70 Ga. 694.

In the present case we think it can hardly be doubted, under the authorities cited, that the Legislature might have provided for the disinfection of the baggage and personal effects of travelers coming from infected ports, under the direction of an inspector of the board. To have made such a law effective, it would have been essential that the inspector should be given authority to act, and to make it a misdemeanor to refuse to recognize his authority. The present act does nothing more, except that it provides that such disinfection shall take place under general rules to be adopted by the State Board of Health. The rules relate to matter of detail. It is well known that there are different methods of disinfection. It was properly left to the board, by the Legislature, to determine as to these methods; and, instead of intrusting

it to the discretion of the individual inspector, it was prescribed that general rules should be adopted.

We are referred to the case of *Senate of Happy Home Clubs v. Board of Supervisors*, 99 Mich. 117, as authority for respondent's contention. The statute considered in that case bears no analogy to the statute under consideration. The power was there delegated to a private corporation to make rules governing the conduct of the accused, the observance of which rules should operate to acquit and discharge the accused. This did not leave a discretion in public officials as to the mere details of the operation of the law, but was an attempt to delegate power to a private corporation, which it was clearly beyond the authority of the Legislature to do.

Reliance seems to have been placed by the circuit judge upon the two cases of *Ex parte Cox*, 63 Cal. 21, and *Board of Harbor Commissioners v. Excelsior Redwood Co.*, 88 Id. 491. In the latter case an attempt was made to confer upon the board of harbor commissioners the power to prescribe rules and fix the penalty for their violation, which clearly distinguishes it from the present. In the case of *Ex parte Cox* the petitioner was convicted of a misdemeanor consisting of the violation of a rule and regulation of the board of state viticultural commissioners. The act of the legislature in question declared that the board should have power to declare and enforce rules and regulations in the nature of quarantine, to govern the manner of and restrain or prohibit the importation into the state of infected articles and empty fruit boxes, and declared that a willful violation of the quarantine regulations of the board should be a misdemeanor. The court say:

"The act before us does not say it shall be unlawful to import, distribute, or dispose of infected articles, but it attempts to confer upon the board the power to so declare."

We think our statute is distinguishable in principle from the one here dealt with. The effect of the provisions of our statute is to declare it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with the rules and regulations of the State Board of Health. The rules and regulations are limited to the purposes which are specifically described by the act. We think the statute is constitutional.

2. As above stated, by the act of 1893 it was not intended to confer upon the board any power beyond that of fixing the method to be adopted in carrying into effect the details of the isolation, inspection, disinfection, etc., provided for by the law itself. By the first section the board is authorized to establish a quarantine when it is shown to the satisfaction of the board that dangerous, communicable disease exists in any foreign country, neighboring state, or locality within this State, and when it is further shown that immigrants, passengers, or other persons seeking to enter this State, or to travel from place to place within this State, are coming from any locality where such dangerous, communicable disease exists. By section 3 it is provided that—

"The State Board of Health is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances whenever it shall be shown to the satisfaction of such board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person, or property which has been exposed to cholera, diphtheria, or other dangerous, communicable disease, or when it shall be shown to the satisfaction of such board or inspector as aforesaid that any passenger, person, or property is being transported on such railroad cars or other public or private conveyance from any locality within or without this State where any such dangerous, communicable disease exists, and where, under the circumstances shown to such board, such persons or property are

likely to carry infection of such dangerous, communicable disease."

A careful examination of the rules declared by the board, and particularly of the one alleged to have been violated, leads us to the conclusion that the board exceeded the authority conferred by the statute, by the promulgation of the rule in question. The rules recite the existence of communicable diseases in various foreign countries from which immigrants are coming to the United States in large numbers, and then proceed, by rule 2:

"Except as hereinafter specifically excepted, *all* baggage of *all* immigrants, and all containers of all such baggage, destined to pass into or through Michigan, must be detained until disinfected."

The exceptions mentioned are:

First. "Baggage bearing a certificate issued by an inspector authorized or accredited by the Michigan State Board of Health."

Second. Baggage contained in sealed cars, such seals not to be broken or the cars opened in the State of Michigan.

Third. "Hand baggage of immigrants used *en route*, and known to have crossed the ocean in ships uninfected with any dangerous, communicable disease, or bearing a certificate of disinfection, issued by an inspector authorized or accredited by the Michigan State Board of Health."

Under these rules the baggage of all immigrants was subject to disinfection, whether such immigrant came from a port or locality where any dangerous, communicable disease existed or not. Indeed, there was no allegation in the complaint that the baggage in question came from such locality. This is beyond the power of the board.

We do not intimate that it would not be competent for the Legislature to provide for the disinfection of all baggage, where, in the opinion of the State Board of Health, from the prevalence of a contagious disease, such precaution is necessary. But, instead of doing so, it is provided by section 3 that the board *is* authorized to establish gen-

eral rules, and, by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances whenever it shall be shown to the satisfaction of such board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person, or property which has been exposed, etc., or when it shall be shown to the satisfaction of such board or inspector as aforesaid that such passenger, person, or property is being transported from any locality where any such dangerous, communicable disease exists, and where such persons or property are likely to carry infection of such dangerous, communicable disease. The rule in question did not make it a prerequisite to the inspection that the baggage being transported come from a locality where such disease existed, as ascertained either by the board or inspector, and in this respect was broader than the statute, and cannot be sustained.

It follows that the justice was right in refusing to issue the warrant. We have, however, gone at length into the consideration of the provisions of the statute to show to what extent authority is conferred upon the board, as the question involved is one of great public importance.

The judgment will be affirmed.

The other Justices concurred.

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KATHERINE K. C. BARNES v. KATHLEEN M. MARSHALL ET AL.

Will—Construction—Vested estate—Remainder.

The question involved in this case is whether the will, to construe which the bill is filed, gives to the wife of the testator the property therein mentioned absolutely or for life. And it is

held that the wife did not take an absolute vested estate, but that it was the intention of the testator to place the funds in the hands of his executors, to be paid over to his wife from time to time, and at her death, if anything remained, such remainder to be divided among the other legatees as mentioned in the will.

Appeal from Grand Traverse. (Ramsdell, J.) Argued April 26, 1894. Decided September 27, 1894.

Bill to construe a will. Defendant Marshall appeals. Decree reversed, and one entered in this Court in accordance with the opinion. The facts are stated in the opinion.

Hatch & Wilson, for complainant.

Brennan, Donnelly & Van DeMark, for appellant.

LONG, J. The bill was filed in this cause to obtain a construction of the last will of Smith Barnes, deceased. The case was heard below upon bill and answer, and a decree entered there, finding that an absolute estate in all the legacies mentioned in the first paragraph of the will became immediately vested, on the death of the testator, in Katherine K. C. Barnes, widow of the deceased; that by the fifth paragraph an absolute estate in all the rest, residue, and remainder of the estate, except the legacy of $600, mentioned in the second paragraph, to Kathleen M. Marshall, and the legacies mentioned in the third paragraph, to the executors of said will, became vested immediately in Katherine K. C. Barnes, widow of said deceased; and that the widow is entitled to receive the estate so vested in her at once. From this decree Kathleen M. Marshall appeals. The following is a copy of the provisions of the will and codicil:

"*First.* I give and devise to my wife, Katherine Kip Clarke Barnes, and her heirs and assigns, all of lots numbered seven (7) and eight (8), of block numbered thirteen (13), in the village of Traverse City, according to the recorded plat thereof, in the

county and State aforesaid, being our home, known as 'Ingleside,' together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining; to have and to hold the premises above described to my said wife and to her heirs and assigns forever. I give and bequeath to my said wife all my furniture, clothing, jewelry, musical instruments, paintings, engravings, pictures, statuary, books, bedding, household goods, implements, and utensils of whatever name or kind, horses and carriages; also all life and accident insurance policies on my life, and all money which may be derived from the same. I also give and bequeath to my said wife the sum of $30,000, to be paid to her at the rate of $3,000 each year, reckoning from the time of my decease. I direct that all the above legacies and bequests to my said wife shall be paid in priority to all other legacies or bequests herein given.

"*Second.* After the foregoing legacies and bequests are paid, if there shall be anything left, I give and bequeath to Mrs. Sylvia Tapping, of Fowlerville, Michigan, the sum of $200, the same being for services rendered; to Kathleen M. Marshall, now of Traverse City, aforesaid, the sum of $600, as extra compensation for services rendered; and to Lucretia A. Gillett, of Saline, Washtenaw county, Michigan, the sum of $200. In case of the death of any of the legatees mentioned in this paragraph previous to the payment of the bequest or bequests herein given to such deceased legatee or legatees, then the said bequest or bequests to said legatee or legatees shall be inoperative and void, and shall revert to my estate.

"*Third.* I give and bequeath to each of the following named persons, as my executors, viz., Perry Hannah, Charles A. Crawford, and Reuben Hatch, the sum of $300.

"*Fourth.* It is my express desire that at my decease the affairs of my estate be so surrounded by bounds that my said wife shall receive the greatest possible benefit from my estate and the bequests herein given her. To that end I declare that she shall at once enter into possession of our home, 'Ingleside,' and all the property, goods, and effects mentioned in the first paragraph of this will, and at once obtain, on payment of the same by the insurance companies, the amount of my life and accident policies, thinking that will furnish sufficient ready money for her immediate needs. I direct that if the insurance money, or any portion thereof, should not be paid, or if anything more than the usual delay in the payment of the same should occur, the deficiency be made up and immediately paid to my said wife from the legacies hereinbefore given to her. To provide for the continued comfort of my wife, I desire that she shall receive such amounts yearly as she shall require for her comfort and convenience, and would pre-

fer that, after the fund first paid over shall have been exhausted, or nearly so, the remainder be paid to her in yearly installments of $1,500 or $2,000, and that the portion of her legacies remaining in the hands of my executors be invested in a perfectly safe manner, and at a fair rate of interest, keeping the same, so far as may be, intact against more pressing needs and increasing years.

"*Fifth.* All the rest, residue, and remainder of my estate, after the payment of the legacies hereinbefore mentioned, I give, devise, and bequeath to my said wife.

"*Sixth.* But in case of the decease of my said wife prior to the payment to her of all or any of the legacies herein bequeathed to her, I direct that the remainder of said legacies unpaid shall immediately, on the death of my said wife, revert to my estate, and be expended by my executors in the payment of other legacies, if the same shall not have been already paid; and that such remainder shall, in such case, be first applied in payment of legacies hereinbefore mentioned, which legacies shall then be paid in priority to all others herein given, if there shall be sufficient of said remainder left unpaid to my said wife to pay the same. If there shall not be sufficient left, then whatever there shall be shall be applied *pro rata* in payment of the legacies hereinbefore mentioned. If in case of the death of my said wife, as aforesaid, before the payment to her of all or any of her said legacies, after the payment of the legacies hereinbefore mentioned, there shall still be a surplus of said remainder of the legacies to my said wife unpaid, I give and bequeath the same, not exceeding $16,000, to the following persons, and in the following manner, namely: Three-eighths of said surplus to Miss Kathleen Marshall, of Traverse City, Michigan; three-eighths to my brother-in-law, Henry K. Clarke, of Ocoee, Orange county, Florida; and one-fourth to the Traverse City Ladies' Library Association, or its successor, as a library fund, to be known and designated by my name. If there shall be any of said surplus remaining over and above said $16,000, I give and bequeath one-eighth of the same to Allie Crawford, daughter of Charles A. Crawford, of Traverse City, one-fourth to said Kathleen M. Marshall, one-eighth to Mary E. Hooker, of Traverse City, aforesaid, one-fourth to said Dr. Henry K. Clarke, and one-fourth to the Traverse City Ladies' Library Association, or its successor.

"*Seventh.* I appoint my said wife, Katherine Kip Clarke Barnes, Perry Hannah, and Charles A. Crawford, all of Traverse City, aforesaid, and Reuben Hatch, of the city of Grand Rapids, in the county of Kent, and State aforesaid, executors of this, my last will, and instruct and empower them, as my executors, to dispose of my estate as directed to in my said will, and also to make sale of and convey by deed or other sufficient conveyance my real estate as well as personal property, as they shall deem it for the

best interests of my estate. Their attention is called to certain schedules of my property and life and accident insurance policies on my life, which will be found with this will, and which show a correct statement, as near as may be, of the value of my estate at the dates named in said schedule. In case of the death of one or more of my executors, I direct that the survivor or survivors have full authority to execute my said will, and do all things thereunder as though all my executors were living."

Codicil: "*Whereas*, by my said will, in the second paragraph thereof, I bequeathed to Mrs. Sylvia Tapping, of Fowlerville, Michigan, the sum of $200, and to Lucretia A. Gillett, of Saline, Washtenaw county, Michigan, the sum of $200, in the event of there being anything left of my estate after the payment of certain other legacies in my said will provided for: I now declare that it is my will that the aforesaid legacies to the said Mrs. Sylvia Tapping and Lucretia A. Gillett be revoked, and I do hereby revoke the same, and I direct that the money bequeathed to them in my said will as aforesaid be distributed in accordance with the remaining provisions of my said will, the same as though no such legacies had been mentioned in my said will."

The testator died on June 19, 1891, and thereafter the will was duly admitted to probate, and letters testamentary were issued to the complainant and Reuben Hatch. An inventory of the estate was made, from which the value was found to be upwards of $100,000. The complainant has received the real estate, goods, chattels, and insurance money mentioned in the first paragraph of the will, and two installments of $3,000 each of the $30,000 mentioned in the first paragraph. The construction given to the will by the court below is in accordance with the claim of the complainant.

Counsel for Kathleen M. Marshall contend that the remainder of the testator's estate over and above the absolute gifts to complainant was to be invested by the executors in good securities, and that a fund of $30,000 was to be created, from which complainant should be paid $3,000 each year, reckoning from the time of her husband's death; that, if complainant should die at any time during the 10 years immediately following her husband's

death, the balance of the $30,000 remaining in the hands of the executors should at once revert to the testator's estate, and be expended in the payment of other legacies; that, even if the entire gift of $30,000 became vested at the death of the testator, it is liable to become divested as to such portions as may remain in the hands of the executors at the time of complainant's death. Counsel for defendant further contend that as to the remainder of the estate it was the intent of the testator that, if his wife should live to exhaust the fund of $30,000, she should have out of the remainder such sums yearly as might be necessary for her support in the manner she had always lived, and no more; that nowhere in the will is the wife given unlimited power of disposition, which is usually attached to absolute gifts. The argument of counsel is that—

"This power, by the seventh paragraph, is lodged in the executors, who are authorized to sell his real estate and personal property as they shall deem for the best interests of his estate; and, by the language of the fourth paragraph, she is expressly limited to such sums yearly out of the remainder as she shall require for her comfort and convenience. How much of the remainder would be required for this purpose was a matter of conjecture. She might not require any of it. There was, in his mind, a possibility that she might require all of it. She might live many years, and the amount of this remainder, by depreciation in value, might decrease in the hands of his executors, so that the wife would, before her death, require all, or nearly all, of it. Having this in mind, he desired that the remainder should be held by the executors, and not divided among his other legatees until the possibility that his wife might require it had been removed by her death; and, after directing the manner in which the remainder should be paid to her, in order that there might be no doubt about his wishes to keep it intact against the possibility of its being required for her use, he adds the words of the gift of the fifth paragraph, but immediately qualifies the gift by the proviso at the beginning of the sixth paragraph, to the effect that if she shall die before

she has received all or any of her legacies, which presupposes that they shall be paid to her as he had already directed, then such remainder shall immediately revert to his estate to pay other legacies. He directs that from the remainder at the death of his wife, or the 'surplus,' as it is called in the will, a sum not exceeding $16,000 shall be divided among certain persons, whom he names,—three-eighths of it to appellant, and three-eighths to his wife's brother, Henry K. Clarke. The will then continues: 'If there shall be any of said surplus remaining over and above said $16,000, I give and bequeath one-eighth of the same to Allie Crawford, daughter of Charles A. Crawford, of Traverse City; one-fourth to said Kathleen M. Marshall,' etc. From this language the conclusion is irresistible that the testator anticipated that at the death of his wife there would be at least $16,000 of his estate unpaid to his wife by his executors, and he directs in positive terms how it shall be disposed of. This limitation in remainder shows that in the opinion of the testator he had not given an absolute estate, by the words of the fifth paragraph, to the wife, but that they were qualified by the direction immediately following in the sixth paragraph, that at her death the remainder unpaid to her should revert to his estate."

Counsel contend that by this construction only can all the clauses of the will be harmonized.

It is evident that by the construction contended for by counsel for complainant the later clauses of the will would have no force; and, indeed, it is claimed that, the gifts to complainant being absolute, the bequests over to the defendants are void for repugnancy. Many cases are cited by counsel for complainant to establish the proposition that these bequests are void for repugnancy to the prior absolute gift to the complainant. If the gifts to complainant are to be treated as absolute, there would be no escape from such conclusion; but we are not prepared so to hold, and we think the language used by the testator does not bring the case within the rule laid down in the cases cited. If the claim of counsel be correct, we must hold that the latter part of paragraph 4 and all of para-

graph 6 are meaningless words, and were used by the testator for no purpose whatever.

The general rule for the interpretation of wills is that it is the duty of courts to give full and complete effect to the testator's intention, and carry out such intention, if it be lawful. *Rock River Paper Mill Co. v. Fisk,* 47 Mich. 212; *Cummings v. Corey,* 58 Id. 494; *Eyer v. Beck,* 70 Id. 179. Courts are bound to carry out the real design of the testator as derived from a comparison of all the parts of the will, and the meaning of all words and phrases must, if possible, be harmonized. *Bailey v. Bailey,* 25 Mich. 185.

In *Hamlin v. Express Co.,* 107 Ill. 443, the rule is stated that "the latter part of the will is to be considered no less than the former part; and, to the extent there is repugnance, the language of the former part is to be read as modified by that of the latter part."

In *Smith v. Bell,* 6 Pet. 68, the will declared:

"I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind, and quality soever, after payment of my debts, legacies, and funeral expenses; which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely; the remainder of said estate after her decease to be for the use of the said Jesse Goodwin."

The court held that this was a bequest to the testator's wife for life, with remainder to Jesse Goodwin, the son. Chief Justice Marshall, in delivering the opinion, said:

"It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate absolutely to the wife, or which would more clearly express that intention. But the testator proceeds: 'The remainder of said estate after her decease to be for the use of the said Jesse Goodwin.' These words give the remainder of the estate after his wife's decease to the son with as much clearness as the preceding words

give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out, yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first so as to restrain the natural meaning of its words: either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life. The limitation in remainder shows that in the opinion of the testator the previous words had given only an estate for life. This was the sense in which he used them."

See, also, *Chase v. Ladd*, 153 Mass. 126; *Kent v. Morrison*, 153 Id. 137.

In *Cousino v. Cousino*, 86 Mich. 323, a bill was filed for the construction of a will. It appeared that the testator, after providing for the payment of his debts, bequeathed the residue of his estate, real and personal, to his wife; and the will recites: "After her death, or sooner if she chooses to, to be divided among my children or their heirs, share and share alike." Complainant (the widow) insisted that the absolute title to the property, both real and personal, was by the will vested in her. It was said by this Court:

"We think there can be no ambiguity as to the intent of the testator. The will conveyed only a life-estate to complainant. If he intended to devise the absolute title to complainant, the last clause of the above provision would be meaningless."

So it may be said of the will in the present case. If the testator intended to give to his wife the entire estate, except these small legacies, the entire sixth clause and the most of the fourth clause of the will would be entirely meaningless. It is apparent that the testator had in mind the comfort of his wife, and intended to make ample provision for her care and maintenance; but that he intended to give the estate to her absolutely cannot be gathered from reading the whole instrument. We are satisfied that the contention of counsel for defendant Kathleen M. Marshall is correct. By the first paragraph of the will the wife does take the property therein mentioned absolutely, except the fund of $30,000. This $30,000 was to be invested by the executors, and out of the fund she was to be paid $3,000 annually; but by the sixth clause it is evident that, should the wife die before the whole of this $30,000 was paid over, any balance remaining was to revert to the testator's estate; and also by the sixth clause it is provided that the remainder of the property unused at her death should, at her death, revert to his estate, and be disposed of in accordance with the sixth clause of the will. We are led to the conclusion that the wife did not take an absolute vested estate, but that it was the intent of the testator to place these funds in the hands of his executors, to be paid over to the wife from time to time, and at her death, if anything remained, such remainder to be divided among the other legatees, as in the will mentioned. This trust the executors must carry out under the direction of the probate court of Grand Traverse county. The trust is to keep the estate invested in good securities, and to pay the widow from time to time the amounts set apart for her, and such other sums as she shall require for her comfort and convenience, as the probate court may from time to time determine,

The decree of the court below must be overruled, and a decree entered here in accordance with this opinion. The defendant Kathleen M. Marshall will recover her costs of both courts. There seems to be no controversy but that she is entitled to the present payment of the legacy of $600.

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

MCGRATH, C. J. *(dissenting).* While I concede that the testator did not intend that the title to the $30,000 mentioned in the first paragraph of the will should immediately vest in his widow, but instead designed that the unexpended balance of such sum should be disposed of as directed in the sixth paragraph, I do not concur in the conclusion that the remainder, after setting apart the $30,000 and the payment of the legacies provided for in the second and third paragraphs, becomes, upon the death of complainant, subject to the provisions of paragraph 6. The instrument should receive such a construction as will give effect to each and all of its provisions. The fifth paragraph gives to the widow the residue remaining after the segregation of the $30,000 and the payment of the other legacies, and, it seems to me, contemplates the assignment of that residue to the widow. The instrument nowhere provides that such residue shall remain in the hands of the executors. The sixth paragraph applies to the unexpended balance of the $30,000. The language of that clause refers to the remainder of unpaid legacies, or to such legacies as shall not have been paid over. The latter part of clause 4 simply expresses a preference. The instrument contemplates a fund set apart for the use of the widow, which, in the event of her death, may not be exhausted. Concerning this fund, the testator was solic-

itous. He prefers it to the legacies to strangers, and intended that it should be set apart, subject to investment and control by the executors, and not to any contingencies that might attend its payment over to the widow. A provision for the payment to the widow of a fixed annuity, and such further sums as were necessary, during her natural life, and for distribution at her death of the residue, would have been very simple; but the conclusion arrived at by the majority gives that effect to the instrument, treats the setting apart of the $30,000 as without purpose, and eliminates from the instrument, and renders entirely superfluous, the fifth paragraph, which is clear and explicit.

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ALONZO B. BRAGDON, PROSECUTING ATTORNEY, EX REL. ELI LORANGER, v. ROBERT P. NAVARRE.

Elections—Ballots.

Voters finding a ticket upon the official ballot are not required to determine whether it is entitled to a place thereon, but may safely rely upon the action of the officers of the law, who they have a right to suppose have performed their duty.

Error to Monroe. (Kinne, J.) Submitted on briefs June 28, 1894. Decided September 27, 1894.

Quo warranto to test the title of respondent to the office of township treasurer of the township of Berlin. Respondent brings error from judgment of ouster. Judgment affirmed. The facts are sufficiently stated in the opinion.

Ira G. Humphrey and *John O. Zabel,* for appellant.

Charles A. Golden and *Edward R. Gilday,* for relator.

HOOKER, J. Upon an information in the nature of *quo warranto,* a judgment of ouster from the office of township treasurer was rendered by the circuit court against the defendant, who brings the case here for review.

Relator received a majority of the votes, but it is contended that he was not the nominee of any party, that the ticket was not properly certified and not entitled to a place upon the ballot, and that such tickets should not have been counted for relator.

The voter finding the ticket upon the ballot cannot be required to determine its regularity at his peril. This might involve a necessary knowledge of facts difficult to ascertain. He may safely rely upon the action of the officers of the law, who he has a right to suppose have done their duty.

The judgment will be affirmed.

The other Justices concurred.

OCTOBER TERM, 1894.

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107 645
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153 [3]589
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102 261
158 [1]151

HENRY P. BORGMAN ET AL. v. THE CITY OF DETROIT AND CHARLES K. TROMBLY, RECEIVER OF TAXES.

Eminent domain—Waiver of jury—Validity of assessment.

1. It is competent for the owners of land sought to be condemned for street purposes under 3 How. Stat. § 3064*a et seq.*, to waive their constitutional right to have the questions of necessity and compensation determined by a jury of freeholders.
2. The purpose of the trial provided for by 3 How. Stat. §§ 3064*g*–3064*k*, is to determine the questions of the public necessity for the improvement and for taking the property sought to be condemned, and the amount of compensation to be awarded therefor. In that proceeding there are two safeguards for the protection of the tax-payer, namely, his representation by the public authorities, and the provision that the judgment is to be entered, upon the verdict of the jury, by the court; and it is not contemplated that these questions shall be open to review in a tax proceeding.
3. One of the 12 jurors impaneled and sworn in a street-opening case failed to appear on the adjourned day, whereupon counsel representing the city and the owners of the property sought to be condemned stipulated to proceed with the 11 remaining jurors, who found that a public necessity existed for opening the street, and fixed the amount of compensation to be paid to the property-owners. A bill was filed by several tax-payers, whose lands had been assessed to pay the compensation awarded, to restrain the collection of the tax, their contention being that the condemnation proceedings were void because less than 12 jurors sat in the case, and determined the questions of public necessity and the amount of damages to be awarded. And it is held that the complainants were not prejudiced by the action complained of, and that it did not invalidate the tax levy.

Appeal from Wayne. (Hosmer, J.) Argued February 13, 1894. Decided October 16, 1894.

Bill to restrain the collection of taxes. Defendants appeal. Decree reversed. The facts are stated in the opinions.

Alfred Lucking, for complainants.

John B. Corliss and *Thomas T. Leete, Jr.*, for defendants.

MONTGOMERY, J. This is a bill filed by complainants to restrain the collection of a tax imposed by the common council of the city of Detroit for the opening of Noble street between Seventh and Eighth. The chief ground of contention, and the only one which we think calls for discussion, is that the proceedings taken to condemn the lands are void because less than 12 jurors sat in the case, and determined the questions of public necessity and the amount of damages.

The proceedings were had under Act No. 124, Laws of 1883, as amended. This act provides for the impaneling of a jury which shall be composed of 12 freeholders of the city, who are authorized to determine the two questions mentioned. Reliance is also placed upon section 15 of article 15 of the Constitution, which provides that—

"Private property shall not be taken for public improvements in cities and villages, without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders."

Twelve jurors were impaneled in the condemnation proceedings, the property-owners being represented, and one of the jurors failed to appear. Thereupon counsel representing the property-owners and the city stipulated to proceed with 11 jurors, who found that a public necessity existed

for opening the street, and fixed the amount of compensation to be paid the several owners.

We think the complainants were not prejudiced by this action, and that there has been a substantial compliance with the statute. The statute contemplates a determination by a jury under the direction of the court. There was undoubted jurisdiction in the court to proceed with the condemnation proceedings. That proceeding was for a determination of the questions of necessity and of compensation for the property; and these were simply questions between the city, on the one hand, and the owner of the property it was seeking to condemn, on the other. In that proceeding the city authorities stood, in a sense, as representatives of the tax-payer, and the tax-payer was in court by these representatives. There is no more reason to question the good faith of the authorities in waiving a juror than there would be to charge collusion in refusing to call all the witnesses accessible. The two parties who controlled the proceedings doubtless acted in perfect good faith; the city authorities in behalf of all the public interested, and the property-owners in their behalf. It was competent for the owners of the land to waive their constitutional right to a trial by jury. Cooley, Const. Lim. (6th ed.) 214. The judgment of the court followed the verdict of the jury, and was the final determination contemplated by the statute. Section 11 of the act provides:

"Motions for a new trial or to arrest the proceedings shall be made within two days after the rendition of the verdict, unless further time is allowed by the court; and if no such motion is made, or, being made, is overruled, the court shall enter an order or judgment confirming the verdict of the jury, and such judgment of confirmation, unless reversed by the Supreme Court, shall be final and conclusive as to all persons interested therein."

It would be exceedingly dangerous to allow that any stipulation in the case of these proceedings, by the authori-

ties, should avoid the whole subsequent tax levy. The rule is invoked that, to make a valid tax, every step provided by the statute must be strictly pursued. But the purpose of the trial is, as before pointed out, to determine the questions of necessity and of compensation to those interested, and in that proceeding there are two safeguards for the protection of the tax-payer: The one is the representation of the tax-payer by the public authorities, and another the provision that the judgment is to be entered, upon the verdict of the jury, by the court. It is not contemplated that this shall be open to future review in a tax proceeding. The subsequent proceedings are based upon the judgment of confirmation.

We think there was no jurisdictional infirmity in the proceedings to spread the tax, and the decree of the court below is reversed, with costs.

McGRATH, C. J., LONG and HOOKER, JJ., concurred with MONTGOMERY, J.

GRANT, J. (*dissenting*). Proceedings were taken by the common council of the defendant city to open Noble street between Seventh and Eighth streets, which resulted in the impaneling of 12 jurors September 28, 1891. The proceedings were then adjourned to November 5, at which time only 11 of said jurors appeared. Thereupon the counsel for the city, and for the property-owners whose property was sought to be condemned, stipulated to proceed with 11 jurors, who found that a public necessity existed for opening the street, and fixed the amount of compensation to be paid the several owners. Subsequently the common council established an assessment district, upon which they assessed the damages awarded by the jury. The defendants took proceedings to collect the tax, whereupon the complainants, property-owners within said district, filed this bill to restrain the collection thereof.

The principal ground upon which they seek relief, and the only one necessary to notice, is that the condemnation proceedings are void because less that 12 jurors sat in the case, and determined the questions of public necessity and the amount of damages. Complainants had no notice of the condemnation proceedings, and no knowledge thereof until they were notified to pay the several taxes assessed against them.

The proceedings were had under Act No. 124, Laws of 1883, as amended. The law provides for the impaneling of a jury which shall be composed of 12 freeholders of the municipality, who are authorized to determine the two questions mentioned.

The city of Detroit can obtain land for public streets in but two ways,—by dedication and by condemnation. The city must proceed in substantial compliance with the provisions of law, and, when want of jurisdiction appears upon the face of the proceedings, the tax assessed is void, and tax-payers may enjoin its collection, and thus prevent clouds upon their titles. If the city of Detroit, and those whose lands are sought to be taken, were the sole parties interested, they undoubtedly might waive a determination by 12 jurors. This power, however, might well be questioned, even if the tax were spread upon the city at large. If the power exists to waive one juror, it exists to waive any number. It is said that the law department of the city represents the tax-payers who must pay for improvements. This is undoubtedly so, but it does not follow that this department may use any other instruments than those provided by the law to impose taxation. The logical conclusion of this doctrine would be that a jury might be entirely dispensed with, and the question determined by the court. If the law provided for three commissioners, could the law department and the land-owners whose property is sought to be condemned stipulate to proceed

with one or two commissioners? Which does the law contemplate shall bind the tax-payers, the judgment of 12 men, or any less number which the immediate parties to the suit may agree upon? If they should stipulate for 24 jurors instead of 12, would this be binding? Any substantial departure from the methods provided by law for the imposition of taxes is, in my judgment, dangerous, and unsupported by authority. The power to take private property for public improvements in cities and villages without the consent of the owner is dependent upon the prior determination of the compensation therefor by a jury of freeholders. Const. art. 15, § 15. It is also provided in the Constitution that, when private property is taken for the use or benefit of the public, the necessity and compensation must be determined by a jury of 12 freeholders, or by a commission. Article 18, § 2. These two provisions must be construed together. The jury, therefore, must be the constitutional one, of 12. *Paul v. City of Detroit,* 32 Mich. 108. It has been held by this Court that the power to make local assessments must be strictly construed and followed, and that the mode described constitutes the measure of power. *Whitney v. Village of Hudson,* 69 Mich. 189; 2 Dill. Mun. Corp. (4th ed.), §§ 763, 811; Cooley, Tax'n (2d ed.), 609, 656, 659. The proceedings to condemn are the foundation for the tax. The reason for the adoption of these constitutional provisions is forcibly stated by Mr. Justice CAMPBELL in *Paul v. City of Detroit, supra,* at pages 113 and 114, where the authorities will be found cited.

The proceedings are void for the reason stated, and the decree of the court below should be affirmed, with costs.

ESSEY MAY MARTIN v. FRANCES V. D. COOK.

102 267
128 193
102 267
153 1 13

Deed—Construction—Reservations and exceptions.

1. A father conveyed certain mortgaged lands, and inserted in the deed a clause reserving unto himself and a daughter, naming her, a life lease of the land "for and during the life of each of them." After the death of the father, the mortgage was foreclosed by advertisement, and the daughter filed a claim under How. Stat. § 8510, to the surplus arising on the sale, or to the use of such surplus during her natural life. And it is held that the language used excepted from the grant the use and enjoyment of the land during the lives of both father and daughter, as effectually as though that reservation had been for a fixed term of years, extending beyond the life of the father, and that at the father's death the right to that use for the unexpired portion of the period descended to his heirs.
2. The following general propositions are summarized from the opinion of Chief Justice MCGRATH:

   a—A deed should be so construed as to give effect to the intent and design of the parties as manifested by the language used.

   b—The words "reserving" and "excepting" are often used indiscriminately, and whether a particular provision is an exception or a reservation does not depend upon the use of either term, but upon the nature and effect of the provision itself.

   c—From an examination of the cases cited in the opinion, and the decisions of the courts of this country, generally, upon the question here involved, it will be observed that, while the rule that a reservation in favor of a stranger to the instrument is invalid as a reservation has been adhered to, yet, in order to effectuate the intention of the grantor, such a reservation has uniformly been treated as excepting from the grant the thing reserved; and this holding has not been confined to cases where the reservation had been previously carved out.

Appeal from Livingston. (Person, J.) Argued April 4, 1894. Decided October 16, 1894.

Petition for the surplus arising on the foreclosure of a mortgage by advertisement, or for the use of the same

during the life of the petitioner. Defendant appeals. Decree reversed, and record remanded, with directions to enter an order in accordance with the opinion. The facts are stated in the opinion.

D. Shields and *John Cummiskey,* for petitioner.

W. P. Van Winkle, for defendant.

McGRATH, C. J. William H. Martin and wife executed a mortgage upon certain lands to one Rogers. Afterwards Martin (then a widower) conveyed the lands to one Harrington. The deed contained the following clause:

"Reserving unto the said William H. Martin and Essey May Martin a life lease of said above-described premises, for and during the life of each of them."

Essey May Martin is the daughter of the grantor. Harrington conveyed to C. H., and C. H. to defendant. The deed from C. H. to defendant contains a like clause, and a further clause excepting the mortgage from the warranty, the grantee assuming the same. William V. D. Cook, as assignee of the Rogers mortgage, foreclosed the same. A surplus was left after paying the mortgage, and Essey May Martin files her petition under How. Stat. § 8510, claiming an interest in said surplus. The court below held that she had an interest, and defined it, and defendant appeals.

It is insisted that the clause referred to cannot be held to be an exception, and that as a reservation it is void, because made in behalf of a stranger to the deed.

The well-established rule is that a deed should be so construed as to give effect to the intent and design of the parties as manifested by the language used. Shep. Touch. 86; *Bridger v. Pierson,* 45 N. Y. 601; *Iron Co. v. Reymert,* 45 Id. 703; *Mitcalfe v. Westaway,* 17 C. B. (N. S.) 658; *Richardson v. Palmer,* 38 N. H. 212; *Corning v.*

Nail Factory, 40 N. Y. 209; *Hall v. City of Ionia*, 38 Mich. 493; *Erickson v. Land & Iron Co.*, 50 Id. 604; *Bassett v. Budlong*, 77 Id. 338.

In *Mitcalfe v. Westaway* it is said:

"All contracts are to be so construed as to give effect to the intention of the parties, even though in some cases this occasions a departure from the strict literal sense of the words used."

In *Bridger v. Pierson*, B. had a right of way across A.'s land, and, in conveying to C., A. reserved the right of way to B. Held, that although, strictly, a reservation in a deed is ineffectual to create a right in any person not a party thereto, yet, there being in fact a right of way existing at the time of the grant, the clause must be construed as an exception from the property conveyed.

In *Iron Co. v. Reymert* the deed reserved to one Pratt (a stranger to the deed) "the right he has to the ore bed and the right of way to the West Point foundry as now used." The court say: "A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception."

In *Corning v. Nail Factory*, A. granted certain land to B., reserving one acre to C. Held, that as a reservation it would be void, it being in behalf of a stranger to the deed. It was therefore held to be an exception of the acre, although C. took nothing.

In *Richardson v. Palmer*, land was conveyed, "reserving to the public the use of the road through said farm; also reserving to the White Mountains Railroad the roadway for said road, as laid out by the railroad commissioners; and also reserving to myself the damages appraised for said railroad way by the commissioners." The court say:

"The result at which we arrive, therefore, upon a careful examination of the deed, and a deliberate consideration of all the circumstances under which it was executed, is

that the plaintiff must have intended to sell, and Streeter to purchase, the Guy Young farm, just as it was at the date of the conveyance, subject to the incumbrance of the public highway and of the White Mountains Railroad, as laid out through it, the plaintiff retaining his claim for the unpaid damages awarded for the laying out of the railroad; and that proper and apt words were used in the deed of conveyance to carry out that intention, without resorting to any doubtful construction, or giving to the grantee any advantage from the imperfection or uncertainty of the phraseology employed; the words expressing a reservation being made to operate, as only under the circumstances they can operate, as an exception to the general terms of the grant which precedes them."

In *Hall v. City of Ionia,* Mr. Justice CAMPBELL, speaking for the Court, says:

"It is manifest from the conveyances of Samuel Dexter that, if it is legally possible for him to secure and retain for himself the right to the water and the right to divert it into an artificial channel, he has done so. It is not at all important to find any technical name for his method, or to spend time in the legal etymology of 'exceptions' and 'reservations,' which terms have been used with some carelessness and confusion. The general, and, as we think, the correct, method of construing such provisions as those in question, is to give them the force which the deeds evidently intended they should have."

Again, in *Erickson v. Land & Iron Co.* it is said:

"The authorities are not as clear or as consistent as they might be, and it is evident many of the decisions are based somewhat on local peculiarities and statutes. With our simple allodial tenures, the rules cannot be precisely similar to those applicable in some of the English estates. Without considering these authorities at length on points which here are abstract, we need only remark, that, in the absence of legislative changes, we think the common-law rule rejecting reservations repugnant to the grant, and the rules determining what rights are personal and do not run with land, cannot be disregarded; while, on the other hand, the mere form of the deed, and the technical phrases as to exceptions and reservations, should not prevent any lawful provisions in a deed from being carried out according to its unambiguous intention."

In *Bassett v. Budlong,* Mr. Justice CHAMPLIN says:

"Every deed or contract in writing is supposed to express the intention of the parties executing it, and, when the object or purpose of such deed or contract is called in question in a court of justice, the first inquiry is, what is the intention of the parties, as expressed in the written instrument?"

In *Maynard v. Maynard,* 4 Edw. Ch. 711, the father deeded to his son, "excepting and reserving to my three daughters, H., E., and R., a right of living on the said before-mentioned premises, as heretofore, so long as they shall respectively remain single." Prior to the execution of the deed, the daughters lived with their father, and were supported with the rest of his family on the farm, and they so remained with the grantee until his death, and were still on the farm. The court gives to the terms "reservation" and "exception" their technical signification, and holds that the language used has no force or effect either as an exception or a reservation; nevertheless that—

"The revised statutes having abolished the common-law mode of conveyance by feoffment with livery of seisin, and converted deeds of bargain and sale and lease and release into grants, and at the same time abrogated the doctrine of implied covenants in conveyances of real estate, and abolished uses and trusts, except as therein expressly authorized, and then having declared that 'in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of, any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument and is consistent with the rules of law,' the only thing the court has to do is to ascertain the 'intent,' and, when that is done, to carry it into effect. * * * Looking into the deed in question, it is easy to perceive that the grantor, in making the conveyance of the farm to his son, not only intended to settle the property upon him by way of gift or advancement, but, at the same time, to make a provision out of it for his three daughters. The extent of

that provision is another question. But, whatever it may be, the court is bound to give effect to the clause of the deed in which it is contained, and to award to them the benefit of it according to the clear intention of the whole instrument; for, although the clause is not good as a technical exception or reservation, yet it is good as denoting an intention which is not inconsistent with the rules of law."

The words "reserving" and "excepting" are often used indiscriminately, and whether a particular provision is an exception or a reservation does not depend upon the use of either term, but upon the nature and effect of the provision itself. *Hurd v. Curtis,* 7 Metc. 94; *Stockwell v. Couillard,* 129 Mass. 231; *Kister v. Reeser,* 98 Penn. St. 1. In the last case cited, it is said:

"These terms are often used in the same sense, the technical distinction being disregarded. Though apt words of reservation be used, they will be construed as an exception if such was the design of the parties. Thus, when a deed in fee of land was made, the grantor 'saving and reserving, nevertheless, for his own use, the coal contained in the said piece or parcel,' * * * it was held that the saving clause operated as an exception of the coal;" citing *Whitaker v. Brown,* 46 Penn. St. 197.

From an examination of the cases cited, and the decisions of the courts of this country, generally, upon the question here involved, it will be observed that, while the rule that a reservation in favor of a stranger to the instrument is invalid as a reservation has been adhered to, yet, in order to effectuate the intention of the grantor, such a reservation has uniformly been treated as excepting from the grant the thing reserved. Nor has this holding been confined to cases where the reservation had been previously carved out. It has been repeatedly held that a conveyance of land, reserving or excepting the dower interest of a stranger to the deed, was a good exception. *Canedy v. Marcy,* 13 Gray, 373; *Meserve v. Meserve,* 19 N. H. 240;

Crosby v. Montgomery, 38 Vt. 238; *Swick v. Sears*, 1 Hill, 17.

It was held in *Marshall v. Trumbull*, 28 Conn. 183, that an interest retained by a grantor out of the body of the thing granted is rather an exception from the grant than a reservation.

In *Murphy v. Merritt*, 3 Jones (N. C.), 37, under a deed of gift of slaves, "reserving unto myself and to my wife, M., the use during the term of our natural lives," it was held that the ulterior donee was not entitled to the property until both these lives were extinct.

In *Logan v. Caldwell*, 23 Mo. 372, Logan conveyed a parcel of land to Caldwell in fee, with the following clause: "With this exception: that said John Logan reserves the use of said tract of land and farm thereon, or the rents and profits arising from it, during his life and the life of his wife." Logan's wife survived him. Held, that the language did not create any estate in the wife; that the entry of the defendant under the deed impliedly raised on his part a promise to pay for the use and occupation of the land; and that the promise was transmissible to Logan's personal representatives.

It will be observed, however, that in nearly all of the cases referred to the title of the party in whose favor the exception was made, or who claimed the excepted thing, did not depend upon the instrument containing the exception. In *Keeler v. Wood*, 30 Vt. 242, Elijah Wood died, intestate, seised of certain lands. Elmer R. Wood, a son, conveyed by warranty deed a portion to one Lawrence, whose wife was a daughter of Elijah Wood, with a reservation in favor of "our mother, Mary Wood." No controversy arose until after the death of Mary Wood, when, in a suit against the grantor upon the covenant of warranty, it was insisted that the reservation was of the fee,

but the court held that it was of but a life estate; so that the question here involved was not reached in that case.

The language here used must, we think, be treated as excepting from the grant the use and enjoyment of the land conveyed, during the lives of both father and daughter, as effectually as though that reservation had been for a fixed term of years, extending beyond the life of the father, and, at the death of the father, the right to that use for the unexpired portion of the period must be held to have descended to the heirs of William H. Martin. This construction gives to the grantee the estate which both parties to the instrument evidently intended that he should take.

It does not appear from the record that petitioner is the sole heir. The record will therefore be remanded, with directions to set aside the order heretofore entered, for the proper determination of that question, and the entry of an order, after such hearing, in accordance with this opinion. No costs will be allowed.

The other Justices concurred.

102 274
s60NW 684
133 621

ROBERT M. STEEL v. JOHN H. DEMAY ET AL.

Landlord and tenant—Sale of leased premises—Assignment of lease—Notice—Bona fide purchaser.

A lessor, prior to the lessees' taking possession of the leased premises, assigned and delivered the leases to a creditor as security for his claim. Neither the leases nor the assignment were ever recorded. After the tenants had entered into possession, the lessor conveyed the leased premises to his wife by warranty deed. In a suit brought by the assignee to enforce

his alleged equitable claim to the rent, the wife claimed to have purchased without notice of complainant's rights, while the complainant claimed that, the premises being in the possession of the lessees, and the leases in the custody of the complainant, it was the duty of the wife to make inquiry as to the terms of the leases, and as to the possession of the same, before purchasing, as the leases were the only evidence of the grantor's title to the rents reserved, and of his right to collect such rents, and that, in the absence of such inquiry, she was chargeable with notice of all the facts which she would have learned upon making the inquiry. And it is held that, while the possession of the lessees was notice of their rights, it was not notice that the title of the lessor had been incumbered by the assignment of the leases reserving rent to himself.

Appeal from Gratiot. (Daboll, J.) Argued April 11, 1894. Decided October 16, 1894.

Bill to determine the rights of complainant under an assignment of certain leases as security. Defendant Ella DeMay appeals. Decree reversed, and one entered in this Court in favor of appellant. The facts are stated in the opinion.

Stone & Salter, for complainant.

H. E. & E. L. Walbridge (*H. Walbridge*, of counsel), for appellant.

MONTGOMERY, J. The defendants John H. De May and Ella De May are husband and wife. In 1889, John H. built a brick block, consisting of two store buildings, in the village of Ithaca. He purchased of the complainant a strip of land 3½ feet wide, and one-half of a brick wall thereon, for the agreed price of $688. De May, having leased the stores to defendants Ludwig and Netzorg, gave his notes for the amount of the purchase price of the 3½ feet of ground, and assigned the leases to complainant as security. Neither the leases nor the assignment were

recorded in the office of the register of deeds. Defendant Ella De May purchased the buildings of her husband, and claims to have bought without notice of complainant's rights, and to have paid the purchase price of the property by assuming an incumbrance of $5,000, and discharging debts of her husband to the amount of $6,500, and some accumulations of interest. The contest is between complainant and Ella De May, Ludwig and Netzorg having been made parties in order that they may be protected in making the payments decreed by the court. The case presents two questions, one of law and one of fact.

1. It is contended by complainant that it was not necessary to the protection of his rights that the assignment of the leases be recorded; that, the premises being in the possession of the lessees, and the leases in the custody of the complainant, it was the duty of the defendant Ella De May to make inquiry as to the terms of the leases, and as to the possession of the instruments, before purchasing, as the leases were the only evidence of the grantor's title to the rents reserved, and of his right to collect such rents from the tenants in possession; and that, in the absence of such inquiry, she (Mrs. De May) would be chargeable with notice of all the facts which she would have learned upon making the inquiry. We think that, while such possession of the lessees would be notice of their rights, it would not be notice that the title of De May had been incumbered by the assignment of the leases reserving rent to himself.

2. The question of fact is somewhat difficult of solution. There are some circumstances tending to show that De May had a purpose of defeating his creditors in making a transfer to his wife, and that the alleged indebtedness from him to his wife was merely colorable. The defendant's theory is that when De May engaged in business he was assisted by Mrs. De May's father, on the understand-

ing that the title to the property should constantly remain in Mrs. De May, but that he subsequently induced her to deed certain property to him on the agreement that he would buy her a lot, and build a house thereon worth $2,800, and that he also induced her to make him an assignment of her interest in the drug firm of J. B. Crawford & Co., of which she was a member, upon his agreement to repay. All the direct testimony in the case tends to support this claim, and, upon a careful examination of the testimony, we do not find warrant for disregarding these proofs. Our conclusions cannot rest upon grounds of mere suspicion, but should be supported by testimony, which we fail to find supporting complainant's theory.

The decree of the court below will be reversed, and a decree entered in this Court in favor of the defendant Ella De May.

The other Justices concurred.

NOBLE BRADY v. THE DETROIT STEEL & SPRING COMPANY.

102 277
156 389

Nuisance—Discharge of fuel oil into public sewer.

1. The percolation of deleterious matter, from the premises of the party who suffers it, through the soil, upon the lands of an adjacent owner, to the injury of the latter, is an actionable nuisance.
2. Defendant kept upon its premises, for use, fuel oil. Plaintiff operated a bakery 500 feet distant, and sues for damages occasioned to his business by the leakage of the oil upon defendant's premises, its flow through the soil into a common sewer, the escape of the gases through a manhole in the immediate vicinity of the bakery, affecting the atmosphere in

the neighborhood, and through the sewer connections into and upon plaintiff's premises, injuring the products manufactured by him. The city ordinance prohibited the deposit of any refuse, drippings, or nauseous liquid or other substance from distributing pipes or gas conductors into any sewer. And it is held that, in view of the ordinance, it cannot be said that the sewer was constructed by the city to carry away the oil, or that such a use was invited, or was even permissive; that the nuisance which the ordinance aims to prevent does not depend upon the intent of the party causing it, and the fact that the deposit of the oil was negligent, or even accidental, did not make such use of the sewer lawful.

Error to Wayne. (Reilly, J.) Argued April 27, 1894. Decided October 16, 1894.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Wells, Angell, Boynton & McMillan, for appellant.

William Stacey, for plaintiff.

McGRATH, C. J. Defendant kept upon its premises, for use, fuel oil. Plaintiff operated a bakery some 500 feet distant, and sues for damages occasioned to his business by the leakage of the oil upon defendant's premises, its flow through the soil into a common sewer, the escape of the gases through a manhole in the immediate vicinity of plaintiff's bakery, affecting the atmosphere in the neighborhood, and through the sewer connections into and upon plaintiff's premises, injuring the products manufactured by plaintiff. The proofs clearly tended to show the presence of the fuel oil gases in the bread and other products of plaintiff's bakery, and the origin of the gases was traced through the sewer to the leakage upon defendant's premises, and the leakage was not denied.

The defendant contends that it is not liable to the plaintiff for the consequences of the accidental escape of the crude oil into the public sewer.

"1. That, unless prohibited by statute or ordinance, the discharge of noxious substances into public sewers is not unlawful.

"2. That no liability can arise out of the general duty of the defendant to so use its own property as not to do harm to others, for the reason that the communication between defendant's premises and plaintiff's premises was established by public authority, and became an independent acting agent, so that the injury was not the proximate result of defendant's acts or omissions."

The city ordinance on the subject is as follows:

"No distiller, dyer, machinist, manufacturer, or other person shall, himself or by another, discharge out of or from any stillhouse, dyehouse, workshop, factory, machine shop, dwelling-house, kitchen, or other building, any foul or nauseous liquid, water, or other substance into or upon any highway, street, lane, alley, public space or square, or into any adjacent lot or ground, or deposit or allow to be deposited any refuse, drippings, or nauseous liquid or other substance from distributing pipes or gas conductors into any sewer, receiving basin, gutter, or other place within the city, or force or discharge into any public or private sewer or drain any steam, vapor, or gas.

"No person or persons shall permit on his, her, or their premises within the boundaries of said city, or within one-half mile therefrom, of which he or she or they may be the occupant or occupants, agent or agents, having charge thereof, a soap or candle factory, or the exercise of any other unwholesome or offensive trade or calling, or suffer any building, sewer, or other thing whatsoever to remain on said premises until, in any manner, the same shall become offensive, hurtful, dangerous, or unwholesome to the neighborhood or travelers."

Whether the defendant would or would not be liable under this ordinance is not material. In view of the by-law, it cannot be said that the sewer was constructed by the city to carry away this substance, or that such a use was invited, or was even permissive. The nuisance which the ordinance aims to prevent does not depend upon the intent of the party causing it. The fact that the deposit was negligent, or even accidental, did not make the use of the

sewer as a conduit lawful. It is well settled that the percolation of deleterious matter, from the premises of the party who suffers it, through the soil, upon the lands of an adjacent owner, to the injury of the latter, is an actionable nuisance. *Upjohn v. Board of Health,* 46 Mich. 542; Wood, Nuis. (3d ed.) § 115; *Kinnaird v. Oil Co.,* 89 Ky. 468; *Hauck v. Pipe-Line Co.,* 153 Penn. St. 366. In the Upjohn case the township had extended a burial ground. The use was a necessary public use, and the exclusion of the corrupting influences was impracticable, but the general rule was recognized. Mr. Justice COOLEY in that case says:

"The liability does not depend upon negligence, but the reasonable precaution which the law requires is effectually to exclude the filth from the neighbor's land. *Ball v. Nye,* 99 Mass. 582; *Hodgkinson v. Ennor,* 4 Best & S. 229. But all the cases in which this doctrine has been applied were cases in which, consistent with the proper use of the premises, the exclusion was practicable."

See, also, *Cahill v. Eastman,* 18 Minn. 324.

In the present case it is not the contamination of water veins that is complained of, but the percolation through the soil, into the sewer, of a foreign fluid, the gases from which are pernicious, and the retention of which is practicable. The sewer must be regarded as a condition, rather than as a cause,—as much so as are the ordinary prevailing winds or currents of air, by means of which noxious odors are carried.

The judgment is affirmed.

The other Justices concurred.

102 281
106 53

REUBEN F. BENTON v. THE FARMERS' MUTUAL FIRE INSURANCE COMPANY OF KENT COUNTY.

102 281
e156 1549

Fire insurance—Location of property—Removal—"Contents" of building.

1. A farmers' mutual fire insurance company insured a farm barn and its contents, without specifically describing the contents. Over eight years after the issuance of the policy, which had been kept in full force, the insured erected a new barn on another part of the farm, in which he stored the hay and unthreshed wheat raised on the farm that year, as also a portion of his tools and farming implements. The company had no notice of the erection of the new barn, or of the removal of the property. The barn and its contents were destroyed by fire. And it is held that the company is not liable for the contents of the barn, the permanent storage of the property in another building than that named in the policy having withdrawn it from the protection of the policy; citing *Lyons v. Insurance Co.*, 14 R. I. 109; *English v. Insurance Co.*, 55 Mich. 273.[1]
2. The term "stack" has a well-defined meaning, and cannot be said to include unthreshed wheat in a mow in a barn.

Error to Kent. (Grove, J.) Argued June 20, 1894. Decided October 16, 1894.

Assumpsit. Defendant brings error. Reversed, and no new trial granted. The facts are stated in the opinion.

Myron H. Walker, for appellant.

Wesselius & Corbitt, for plaintiff.

MCGRATH, C. J. On the 4th of April, 1884, plaintiff made written application to defendant for insurance upon the following property, and in amounts named:

[1] For an exhaustive note on the location of movable property as affecting fire insurance thereon, see *Benton v. Insurance Co.*, 26 L. R. A. 237.

One dwelling-house	$275 00
Contents in same	300 00
One barn	175 00
Contents in same	300 00
One tool house	75 00
Contents in same	300 00
Stock on said farm, against lightning, in Kent county	175 00
Total	$1,600 00

—All situate on section 27, in the township of Bowne.

On the same day a policy was issued describing the property as:

One dwelling-house	$275 00
On contents in same	300 00
One barn	175 00
On contents in said barn	300 00
One tool house	75 00
On contents in tool house	300 00
On live stock, against lightning, in Kent county	175 00
Total	$1,600 00

On January 26, 1889, the defendant executed and delivered to said plaintiff, in pursuance of an application of the same date, a certain other contract of insurance, as follows, to wit:

On one frame granary	$100 00
On contents in said granary, or in stacks on farm	600 00
Total increase	$700 00

On April 4, 1884, when said policy was issued, there were a barn and a tool house on said premises, being the ones mentioned in and covered by the policy of insurance of that date; and on the 26th day of January, 1889, there was a frame granary on said premises, being the one mentioned in said contract of increase. But the plaintiff afterwards considered that said tool house and barn had become unfit or insufficient for his purposes, and in 1891 commenced the erection of a new and larger barn on another part of said farm, which he completed in July,

1892, and in which he stored his grain from the harvest of 1892, and the tools, or a part of the tools, he then had and used upon said farm; and the new barn and said grain and tools therein stored as aforesaid were the ones destroyed by the fire mentioned in said declaration, which occurred, as therein stated, the 28th day of July, 1892. The old barn and tool house and said granary then stood, and still stand, on said premises, and they had contents therein at the time of said fire. Plaintiff procured a policy of insurance on the new barn in the German Baptist Mutual Fire Insurance Company for the sum of $1,100, which sum was paid after said fire. Defendant had no notice of the transfer of the tools or the grain to said new barn, or of the erection of said barn; and the plaintiff had no insurance thereon, unless the insurance mentioned in the declaration, and as a part of defendant's policy of insurance, covered the same. Said barn and its contents were destroyed by fire, caused by lightning, at the date aforesaid.

Plaintiff's proofs of loss covered unthreshed wheat, hay, and tools and implements, all contained and stored in the new barn. Plaintiff insists that the terms "contents in barn" and "contents in tool house" covered the articles, wherever situate.

The old barn and old tool house were still in use. Plaintiff had obtained another policy, in another company, on the new barn. The policy in this case was not for any given term, but was to continue in force so long as plaintiff continued to pay his assessments and remained a member of the defendant company. The barn risk was a permanent one, but in respect of the contents of the barn and tool house the risk was not limited to the contents on hand at the date of the policy, but was what is termed a "shifting risk," and covered substituted property. The only language that can be looked to for a description of the property insured is that specifying its situation.

There is a class of cases which hold that the words "contained in" or "being in" or "stored in," when used in a policy which is not a shifting policy, but which, independently of such terms, sufficiently describes property the use of which necessitates its temporary absence from the building, are considered as further description merely, and as indicating its place of deposit when not temporarily absent in the ordinary course.

In *Everett v. Insurance Co.*, 21 Minn. 76, the property was described in the application as "stored in barn on," etc., and in the policy as a "threshing machine," reference being made to the application for a more particular description.

In *Holbrook v. Insurance Co.*, 25 Minn. 229, the property was described as "36 mules, all contained in," etc.

In *McCluer v. Insurance Co.*, 43 Iowa, 349, a phaeton was destroyed while in a carriage shop for repairs.

In *Haws v. Fire Association*, 114 Penn. St. 431, certain horses, "all contained in," etc., were insured under a policy containing a lightning clause. One of the horses was killed by lightning while at pasture in a field on plaintiff's farm. The court say:

"It is true, in an insurance upon such personal property as household goods or a stock of merchandise, the words 'contained in a' particular building would seem to imply that the property insured should remain in such building, and that, if removed therefrom, the policy would not cover it. But in such cases the contract contemplates that the property shall remain in the building, and there are obvious reasons why a change of location would affect the insurance. The very nature of such property implies permanency in its location. But it is not so with a man's horse. It is of no use to him if kept in a stable. We can understand that if, in a fire policy, hay, straw, or grain is insured in a barn, the insurance would cease if removed to some other building. Such would be the reasonable meaning of the contract of insurance, and what the parties probably contemplated when they made it.

But none of this reasoning applies to a lightning clause upon horses or other stock. The terms and conditions to which such an insurance is subject must be such as are reasonably applicable to such kinds of insurance upon this particular species of property, and such, therefore, as the parties may be presumed to have had in view when the contract was made."

In *Peterson v. Insurance Co.*, 24 Iowa, 494, the policy covered plaintiff's seven horses, situated on section 22, etc. While marketing his grain, plaintiff put up at an hotel, and placed his team in the hotel barn, and one of the horses was destroyed by fire.

In these cases the property was fully described without reference to the words describing its location, and, when destroyed, it was in a situation which from its very nature may well be deemed to have been within the contemplation of the parties at the inception of the policy. Lord Mansfield observed in *Pelly v. Governor, etc.*, 1 Burrow, 341, that the insurer, in estimating the price at which he is willing to indemnify the insured, must have under his consideration the nature of the business, and the usual course and manner of conducting it, and everything done in the usual course must have been foreseen and in contemplation at the time he engaged, and that he takes the risk upon the supposition that what is usual or necessary will be done.

The rule has been extended by some authorities to cases where the policy has described a class of property and the risk a shifting one. In *Longueville v. Assurance Co.*, 51 Iowa, 553, certain wearing apparel was burned while being worn.

In *Noyes v. Insurance Co.*, 64 Wis. 415, a dolman was burned while at a furrier's for repair.

In *De Graff v. Insurance Co.*, 38 Minn. 501, the policy covered "$3,000 on his wood barn; $2,500 on live stock therein." The policy contained a lightning clause. A few

weeks before the loss, plaintiff put one of the horses into a new barn, which had been built, where she remained until killed by lightning. The removal was alleged to have been but temporary. The court say:

"Words descriptive of location might, as to one class of property, or as to one kind of insurance, be treated as a statement of a fact relating to the risk, and as amounting to a stipulation or condition that the property should remain there; while as to another class of property, or as to the other kind of insurance, it might be construed as mere description for the purposes of identification. This action is to recover for the loss of live stock by lightning, and the language of the policy must therefore be construed as applied to insurance upon that particular species of property. The parties must be presumed to have known that danger from lightning exists almost wholly in the summer, when live stock is out in the fields. No man of common sense would take a policy of insurance against lightning which only covered his stock when in a particular barn. Such stock cannot well be, and is not usually, kept permanently in a building. The ordinary uses to which it is put forbid it; and the usual and proper treatment of it requires that it be turned out to pasture about one-half the year at least. According to the usual course of farming operations, it is not customary to treat an animal, even when housed, as attached to some particular building, as a part of its contents, but to change its place of stabling from time to time, as necessity or convenience may require. The parties must be presumed to have had all these facts in view when they made this contract. If appellant's contention be correct, this policy would not cover a loss occurring while the stock is out at pasture, during the summer, for that could hardly be called a 'temporary removal' from the barn for some temporary purpose incident to the ordinary use and enjoyment of the property. * * * Our conclusion is that the statement in the policy that the stock was in this barn is not a promissory stipulation on the part of the insured, or a condition of insurance on part of the insurer, that such location should remain unchanged, but as to that class of property, and as to that kind of insurance, at least, is mere matter of description for identification of the property insured, indicating that it was the stock which was usually kept in that barn at that time."

In *Insurance Co. v. Elliott,* 85 Va. 962, the policy covered "carriages, buggies, hacks, and harness" in a building occupied as a livery and sales stable, and certain of the vehicles were in a repair shop when destroyed. But see *Bradbury v. Insurance Co.,* 80 Me. 396.

In none of these cases, however, was the property described simply as contents of the building named, nor was the *situs* of the property (when not in use) permanently changed.

In *Wildey v. Insurance Co.,* 52 Mich. 446, the policy covered "personal farm property in buildings and on farm." The by-laws of the company did not allow it to insure village property that was within 100 feet of other buildings. A horse was destroyed by fire while in the barn of a village hotel that stood within 100 feet of other buildings. The Court in that case say that, where particular property is specified as covered by the risk, it may well be held covered though moved elsewhere, unless there are clear provisions to the contrary; but, where property is only insured as farm property, it may be so restricted as to raise very different presumptions. The defendant was, however, held not liable, on the ground that there could be no implied liability where an express undertaking was forbidden.

In *English v. Insurance Co.,* 55 Mich. 273, the policy insured household goods, furniture, clothing, etc., "all contained in his two-story frame dwelling-house and additions, occupied as a residence." A fire occurred, which rendered the house uninhabitable, and some of the household goods were removed to and stored in the barn. About a month afterwards the barn was burned, and it was held that there could be no recovery for the household goods destroyed in the barn.

In *Association v. Kryder,* 5 Ind. App. 430, the description was precisely like that in the present case. The

policy, however, contained a lightning clause. While approaching the barn with a load of wheat, two horses, which were usually kept in the barn, were killed by lightning. The court held that the language "contents therein" referred to the contents at the time of the loss of the barn, and that there could be no recovery. In that case, however, the property insured was animate property; there was a lightning clause in the policy; the insurance of that class of property was contemplated, and its use in the ordinary and usual course rendered temporary absence from the barn necessary; and it is unnecessary to follow the case.

The general rule is that place and location is of the essence of the risk. 1 Wood, Ins. § 47; 2 May, Ins. §§ 401*a*, 401*b*. No case has been called to our attention as coming within any of the exceptions to the rule where the property has been described as household goods or stores contained in a certain dwelling, or as a stock of goods in a certain store, or as farm products contained in a barn, or simply as the contents of a dwelling, store, or barn, where the property consisted of articles having a permanent location for use, sale, or consumption, and its ordinary use did not involve the necessity for temporary removal. Again, every case presented has been one where the property has been destroyed while in a situation incident to its use, enjoyment, or repair. Nor has a case been suggested or found where the property has been permanently removed from the abiding place named in the policy, stored or kept elsewhere, and destroyed while in such new place of deposit. In *Lyons v. Insurance Co.*, 14 R. I. 109, it was expressly held that a permanent removal of the property from the place where insured would withdraw it from the protection of the policy. To the same effect is *English v. Insurance Co.*, 55 Mich. 273.

This disposes of the plaintiff's claim for hay, tools, and implements.

Respecting the grain, the policy covers grain in the granary and in stacks. The term "stack" has a well-defined meaning, and cannot be said to include grain in a mow in a barn.

The judgment is therefore reversed, and a new trial denied.

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

ASA G. DAILEY v. THE PREFERRED MASONIC MUTUAL ACCIDENT ASSOCIATION OF AMERICA.

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117	476
102	289
s57NW	184
132	s700
102	289
f139	s356

Accident insurance—Conditions of policy—Waiver—Right of action.

1. Where the secretary of a mutual accident insurance company, after being informed by a solicitor that a prospective applicant is carrying other insurance which, with that he proposes to take out, will exceed the limit prescribed by the company, and that he has agreed with the solicitor to drop such prior insurance at its expiration, sends the solicitor to take the application, and he, in answer to a question in the application whether the applicant is carrying other insurance, writes in a negative answer, the knowledge of the secretary and the solicitor is that of the company, and it will be held to have waived the right to insist upon a forfeiture of the policy on account of the prior insurance.[1]

2. Where, in such a case, the secretary indorses an acceptance upon the application, and fills out the policy with intent to have it take immediate effect, and causes it to be mailed to the appli-

[1] For note on effect of agent's knowledge of falsity of statements in application for insurance, see *Clemans v. Supreme Assembly*, 16 L. R. A. 33.

cant as of force and effect at that time, the company cannot be heard to say that there was no delivery, though the policy did not reach its destination until after the death of the applicant.

3. Where an insurance policy expressly refers to the application, and makes it a part of the contract of insurance, the two instruments must be construed together, in determining what the real contract is; and if the policy, as delivered, contains provisions not in the application, and which are not accepted by the applicant, they may be treated as waived by the company, and as constituting no part of the insurance contract.

4. A railroad conductor, in his application for accident insurance, stated that his sole business was running passenger trains. The application was accepted by the company, and a certificate issued, containing a condition that attempting to enter or leave moving conveyances using steam, electricity, water, or compressed air as a motive power were hazards not contemplated or covered by the insurance, and that no sum would be paid for injuries or death in consequence of such exposure, or while the insured was thus exposed. The certificate expressly referred to the application, which contained no such restriction as to entering or leaving trains when in motion, and made it a part of the contract of insurance. The insured was killed while attempting to alight from a moving train, and before the certificate had reached him in due course of mail. And it is held that it is common knowledge that conductors of passenger trains on all railroads must not only enter their trains when in motion, but leave them before they come to a full stop; that this may be a dangerous practice, but it is among the risks which the passenger conductor assumes when he enters such employment; and that this knowledge is so general that the company, when it took and approved the application, must have had knowledge of it, and, in view of this, it cannot insist upon said restriction.

Error to Wayne. (Brevoort, J.) Argued October 27, 1893. Decided January 5, 1894.

Assumpsit. Defendant brings error. Reversed.[1] The facts are stated in the opinion.

[1] The case was reargued, and judgment of circuit court affirmed. See opinion on page 299.

Frank T. Lodge (*Edwin F. Conely*, of counsel), for appellant.

W. E. Baubie (*Russel & Campbell*, of counsel), for plaintiff.

LONG, J. This action is brought upon a benefit and indemnity certificate of $5,000, issued by the defendant upon the life of Arthur H. Dailey, a conductor on the Michigan Central Railroad, and a brother of the plaintiff, who was named as beneficiary therein. The maximum indemnity in case of injury was $25 per week. The cause was tried before a jury, resulting in a verdict and judgment for plaintiff for the amount of the policy and interest.

The record shows that the deceased made an application for the insurance in writing on January 16, 1891. It was filled out by Mr. McBride, a solicitor for the defendant, upon a blank form provided and furnished for that purpose. In answer to the question contained in the application: "Have you other accident insurance covering weekly indemnity? If so, give names of companies, and amount of weekly indemnity in each,"—McBride filled in the answer, "No." And in answer to the question: "Does the weekly indemnity you now carry, and the amount you hereby apply for, exceed your weekly salary, wages, or income? If so, how much? Answer fully,"—McBride filled in the answer, "No." The testimony tends to show that, at the time of signing the application, Dailey explained to McBride that he had other insurance, which, with that proposed to be taken in the defendant company, would make the weekly indemnity exceed his wages; that McBride induced him to agree to drop this other insurance when it should expire, upon the 1st of March following, and assured him that the statements in the application would make no difference as to the validity

of the insurance he would give him; and that he agreed also to give Dailey credit for the premium until February 1. Mr. McBride testified that Mr. Miller, the secretary of the company, was advised of the fact that Dailey had other insurance, and that he did not desire to pay until the end of the month. January 19, Mr. Miller, as secretary, indorsed an acceptance upon the application. January 24 a policy was filled out, and properly executed by the president and secretary, under the seal of the company, and mailed to Dailey. The same date, about two or three hours after the policy was mailed to him, Dailey was run over by his train, and injured, so that he died the following day. He never saw the policy, which was delivered at his residence in the regular course of mail. The premium required by the company was afterwards tendered and refused.

Mr. McBride testified on the trial that he informed Miller, the secretary, of all of the facts, and that Miller agreed to charge him with the premium, and issue the policy at once. McBride says:

"I had told Miller that Dailey was going to let his other insurance run out, and he had promised to let me write him up as soon as his other insurance ran out. Miller said: 'You get it as soon as you can. We want it. He may not see you when it runs out, and get another year's insurance in some other company.'"

Mr. Miller does not deny that he was informed of the other insurance, and of Dailey's wish not to pay the premium at once. He says, however, that he did not agree to issue the policy and give credit for the premium. He did fill out the policy, however, and dated it back to the date of the application, January 16, but claims that he instructed his cashier not to deliver it until March 1, when the premium would be collected.

1. The defense claims that the policy was not operative

at the time of Dailey's death, for the reason that it had not been delivered; that it was sent to applicant's house by mistake; that the advance premium had not been paid; and that it was agreed that it should not become operative until March 1, 1891.

The court instructed the jury substantially that if the policy was filled out by the secretary with intent to have it take immediate effect, he knowing of the other insurance and of the agreement to give credit for the premium, and it was mailed to the deceased with intent to have it take immediate effect, the plaintiff could recover; but, on the other hand, if the secretary indorsed it to take effect on the 1st of March, when the other policy expired, and the secretary did not agree to extend credit for the premium, and the policy was mailed to the deceased by mistake of the cashier, and against the instructions of the secretary, the plaintiff would not be entitled to recover. The court further charged the jury that if they believed that the statements as to the other insurance, contained in the application, were made under the direction of McBride after he had been fully informed of the facts, and that the answers were written in by McBride after being so informed, the defendant would be bound by the acts of McBride, as he was the agent of the company.

We think there was testimony in the case to sustain these instructions. McBride says he knew of the other insurance, and the amount of it, and when it would expire. He testifies that he advised the secretary of it, and in fact solicited the insurance under the advice of the secretary. If so, then, notwithstanding the answers in the application were not truthfully made, the company could not avoid the policy. The knowledge of McBride and the secretary was the knowledge of the company, and the company must be held to have waived the right to insist upon the other insurance as a forfeiture. Under such

circumstances it is not in a position to assert that the answers are untrue. *Pudritzky v. Lodge*, 76 Mich. 428.

The court was not in error in the charge as to the extension of time to pay the premium, and the delivery of the policy, to take immediate effect. If the secretary, knowing all the facts, filled out the policy with intent to have it take immediate effect, and caused it to be mailed to the deceased as of force and effect at that time, the company cannot now be heard to say that there was no delivery, though it did not reach its destination until after the death of the insured. If these facts were true, the beneficiary could have enforced a delivery of the policy if delivery had been refused. The contract was complete when the application was accepted and credit given for the premium. May, Ins. § 46.

It is contended that the court was in error in directing the jury that Mr. McBride was the agent of the company, and that the company would be bound by his acts in writing in the answers to the questions in the application. We think the court was not in error in this part of the charge. Mr. McBride was given authority to take the application, and it appears that he was sent by the secretary for the very purpose of obtaining the application, the secretary knowing at that time that Dailey had other insurance.

2. Another question in the case relates to a certain condition in the policy. The policy recites:

"The conditions under which this certificate is issued, and to which the insured, by his acceptance hereof, agrees, are as follows: * * * Standing or walking on the roadbed or bridge of any railway, or attempting to enter or leave moving conveyances using steam, electricity, water, or compressed air as a motive power, are hazards not contemplated or covered by this insurance, and no sum will be paid for injuries or death in consequence of such exposure, or while the insured is thus exposed."

The application upon which this policy was issued is set out in the record, and is entitled—

"Application for Membership in the Preferred Masonic Mutual Accident Association of America," and states:

"I hereby apply for membership in the above association, membership to be based upon the following statement of facts, which I hereby warrant to be true, and agree to accept certificate of membership subject to all its conditions and provisions."

The blank form of application is numbered with questions and answers, from 1 to 20 inclusive. No. 4 is as follows, in question and answer:

Q. "Place of business."

A. "M. C. Ry., Detroit, Mich."

No. 6. "Occupation."

A. "Passenger conductor M. C. Ry."

No. 7. "What are the duties required of you in these occupations? Answer fully."

A. "Running passenger trains."

No. 8. "Name and line of business of firm of which you are a member, or by whom you are employed."

A. "M. C. Ry. Co."

No. 15. "Have you in contemplation any special journey or hazardous undertaking, not stated in this application for indemnity?"

A. "No."

No. 16. "Are you aware that the benefits from this association will not extend to nor cover hernia, orchitis, nor to any bodily injury of which there shall be no external and visible mark, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to death or disability caused wholly or in part by bodily infirmities or disease, or by the taking of poison in any form or manner, or by any surgical operation or medical or mechanical treatment, nor to any cause except when the accidental injury shall be caused by external and accidental violence, and that these shall be the proximate and sole cause of disability or death?"

A. "Yes."

No. 17. "Are your habits of life correct and temperate, and do you understand that the certificate of insurance will not cover any injury which may happen to you either

while under the influence of intoxicating drinks, or in consequence of having been under the influence thereof?"

A. "Yes."

No. 18. "Are you aware that any misstatement or concealment of facts by you, or the omission or neglect to pay within 30 days from date of notice the quarter-annual fee, or any of the assessments made by the association upon you, will work a forfeiture of all the claims you or your heirs or legal representatives may have to any benefits arising from your connection with this association?"

A. "Yes."

"Applications for certificates are not binding until accepted by the secretary. No other person is authorized to bind the association.

[Signed] "A. H. DAILEY."

"Accepted January 19, 1891, 12 o'clock noon.

"A. C. M., Secretary.

"3-1-91."

Aside from the questions of other insurance, which have been before discussed, the foregoing contains substantially all there is in the application which Dailey signed.

It is contended that no recovery can be had under this policy, for the reason that the proofs show conclusively that Mr. Dailey came to his death while attempting to alight from his train when it was in motion, and that the direct cause of his injury and death, resulting therefrom, was in attempting to alight from his train while in motion. The declaration avers that,—

"At the time said injuries were incurred by said Arthur H. Dailey as aforesaid, he, said Arthur H. Dailey, was not attempting to enter or leave a moving conveyance, as defined by said policy."

It is contended by plaintiff:

1. That there was some evidence from which the jury might find that the deceased did not meet his death from attempting to leave the train while in motion.

2. That, under the application, the insured was entitled to have a policy issued to him which did not contain these restrictions.

3. That, under the application, it is fairly to be inferred

that an accident such as caused the death of Dailey was within the express risks against which it was assumed to insure.

4. That the restriction in the policy cuts out the probable accidental violence which, in the minds of both parties, Mr. Dailey, a railway passenger conductor, was insuring himself against; that the restriction would practically render the insurance nugatory and valueless; and that it must therefore be held inoperative so far as this insurance is concerned.

There can be no doubt about the correctness of plaintiff's position when we take into account the answers given to the questions in the application, and, had the action been brought upon the contract made by the acceptance of the application, no doubt could arise as to the plaintiff's right of recovery; but the declaration avers that the deceased did not come to his death by the attempt to leave the moving train. Failing to establish that fact, and it being shown by defendant that the proximate cause of the injury and death was the attempt to leave the train while in motion, it is now asserted that that was one of the very risks insured against, and plaintiff should be permitted to recover for that reason.

We think there was no evidence from which the jury would have been warranted in finding that Dailey came to his death by any other means than in an attempt to leave the train while in motion. We are also satisfied from the application and the information which that gave to the defendant company that accidents of this kind are of the risks intended to be insured against. The sole business of the deceased was in running passenger trains, and this was plainly stated in the application. It is common knowledge that conductors of passenger trains on all railroads must, in the very nature of their business, not only enter their trains when in motion, but leave them before they come to a full stop. It is common knowledge that conductors of passenger trains have full charge of their trains. They

give the signal to start, and, after the train starts, they get on board. At stations when the train pulls up, and before it stops, the conductor alights upon the platform. This may be a dangerous practice, but it is among the risks which the passenger conductor assumes when he enters upon such employment; and so general is this knowledge that the defendant company, when it took and approved the application, must have had knowledge of it. In view of this, the above restriction in the policy cannot be insisted upon by the defendant company, and, if the declaration had been based upon the contract actually made, the questions here raised by plaintiff might be of avail. As before stated, the contract was complete when the application was accepted and credit given by the secretary for the premium. The insurance which the parties agreed upon is substantially set out in the application, and the insured had no reason to believe from it that there was to be any such restriction as to entering or leaving moving trains as contained in this policy. He was entitled to have a policy issued to him in conformity to the application, and if the suit had been planted on the contract of insurance such as the minds of the parties met upon, and the other facts were as found by the jury, there could be no doubt about the right of recovery. If it was the intent of the parties that the policy should issue at once when the application was accepted, and the application was accepted to take effect as of January 19, so as to give the insured the same legal remedy which he would have had had the policy been delivered on that day, and that was the intent of the parties, the law will give effect to such intention. *Davenport v. Insurance Co.*, 17 Iowa, 276; *Perkins v. Insurance Co.*, 4 Cow. 645; *Tayloe v. Insurance Co.*, 9 How. 390.

But as the declaration counts on the policy as the contract between the parties, and negatives the restrictive

clause, and this not being proved, the action cannot, in its present form, be maintained, and the judgment of the court below must be reversed, and a new trial granted, with costs.

The other Justices concurred.

Upon application of plaintiff a rehearing was granted, and the case reargued May 2, 1894. Upon October 16, 1894, the following opinion was filed, affirming the judgment of the court below:

PER CURIAM. A rehearing was granted in this case on account of the doubt we entertained, when the motion for the rehearing was made, as to the correctness of the holding that the suit could not be maintained upon the policy of insurance, but should have been brought upon the contract effected by the application and the acceptance of the defendant indorsed thereon. This question was not fully presented upon the former argument, and we are satisfied now that that ruling was erroneous. The policy expressly referred to the application, and made it a part of the contract of insurance. In such cases the two instruments must be construed together, in determining what the real contract is. *Chrisman v. Insurance Co.*, 16 Oreg. 283; *Rogers v. Insurance Co.*, 72 Iowa, 448. When the policy, as delivered, contains provisions not in the application, and which are not accepted by the applicant, they may be treated as waived by the company, and constituting no part of the insurance contract. We held in the former opinion that the provision of the policy prohibiting the decedent from getting on and off a railroad train while in motion was inoperative, and did not affect the validity of the insurance. He had not accepted this provision, nor assented to it.

The former opinion upon this point is therefore overruled, and the judgment is now affirmed.

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MATILDA L. SPRINGER v. THE CITY OF DETROIT.

Municipal corporations — Defective sidewalks — Personal injury — Presentation of claim to council — Right of action.

Under the charter of the city of Detroit, which provides that the common council shall audit and allow all accounts chargeable against the city, but that no unliquidated account or claim or contract shall be received for audit or allowance unless it be verified by the affidavit of the person rendering it, and that it shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim against the city that it has never been presented to the common council for audit or allowance, or, if on contract, that it was presented without said affidavit and rejected for that reason, the presentation for audit and allowance of a claim for damages for injuries received by falling upon a defective sidewalk is a condition precedent to bringing suit to recover the same.[1]

[1] Section 7, chap. 5, Act No. 3, Laws of 1895 (taking effect February 19, 1895), entitled "An act to provide for the incorporation of villages within the State of Michigan, and defining their powers and duties," provides:

"The council shall audit and allow all accounts chargeable against the village, but no account or claim or contract shall be received for audit or allowance unless it shall be accompanied with a certificate of an officer of the corporation, or an affidavit of the person rendering it, to the effect that he verily believes that the services therein charged have been actually performed or the property delivered for the village; that the sums charged therefor are reasonable and just; and that, to the best of his knowledge and belief, no set-off exists, nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim. And every such account shall exhibit in detail all the items making up the amount claimed, and the true date of each. It shall be a sufficient defense in any court, to any action or pro-

Error to Wayne. (Brevoort, J.) Argued June 7, 1894. Decided October 16, 1894.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

John J. Speed, for appellant.

Edward S. Grece (*T. E. Tarsney,* of counsel), for plaintiff.

LONG, J. This action was brought to recover damages for an injury received by plaintiff by a fall upon a sidewalk, which it is claimed was not in a safe condition for travel. The declaration did not contain any allegation that the claim had been presented to the common council, and notice was attached to the plea that defendant would insist that the claim had never been presented for audit and allowance, as required by section 17, chap. 5, of the charter of the city of Detroit. At the opening of the trial in the court below, objection was made to the introduction of evidence in the case for that reason. This objection was overruled, and the testimony admitted. At the close of the trial, defendant's counsel requested the court to charge that, inasmuch as the claim had not been presented to the common council, verdict must be for defendant. This was refused. Plaintiff had verdict and judgment. The refusal of the court to give this request presents the only question for consideration.

The provisions of the charter referred to are as follows:

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ceeding for the collection of any demand or claim against the village, for personal injuries or otherwise, that it has never been presented, certified to or verified as aforesaid, to the council for allowance, or, if such claim is founded on contract, that the same was presented without the certificate or affidavit aforesaid, and rejected for that reason, or that the action or proceeding was brought before the council had a reasonable time to investigate and pass upon it."

"The common council shall audit and allow all accounts chargeable against the city, but no unliquidated account or claim or contract shall be received for audit or allowance unless it be accompanied with an affidavit of the person rendering it, to the effect that he verily believes that the services or property therein charged have been actually performed or delivered for the city; that the sums charged therefor are reasonable and just; and that, to the best of his knowledge and belief, no set-off exists, nor payment has been made on account thereof, except such as are included or referred to in such account or claim.

"It shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim against said city that it has never been presented to the common council for audit or allowance, or, if on contract, that it was presented without said affidavit and rejected for that reason, or that the action or proceeding was brought before the common council had a reasonable time to investigate and pass upon it."

Counsel for defendant claims that, under these provisions of the charter, no suit can be commenced or maintained against the city of Detroit, in this class of cases, until the claim shall have been presented to the common council, and it shall have had reasonable time to investigate and pass upon it. Our attention is called by counsel for defendant to the language of these provisions, and it is contended that there is a distinction between them and those of the charter of the city of Adrian, which were passed upon in *Lay v. City of Adrian*, 75 Mich. 438.

The Adrian charter is as follows:

"The council shall audit and allow all accounts chargeable against the city, but no account or claim or contract shall be received for audit or allowance unless it shall be accompanied with an affidavit of the person rendering it, to the effect that he verily believes that the services or property therein charged have been actually performed or delivered for the city; that the sums charged therefor are reasonable and just; and that, to the best of his knowledge and belief, no set-off exists, nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim. And every such

account shall exhibit in detail all the items making up the amount claimed, and the true date of each.

"It shall be a sufficient defense in any court, to any action or proceeding for the collection of any demand or claim against the city, that it has never been presented, verified as aforesaid, to the council for allowance, or that the claim was presented without the affidavit aforesaid, and rejected for that reason, or that the action or proceeding was brought before the council had a reasonable time to investigate and pass upon it." Local Acts of 1887, p. 158, § 112.

It is said in reference to this Adrian charter that, reading the last paragraph in connection with the first, it is apparent that the last clause made the omission to present claims a bar to suits only in cases where the claim was required to be verified by affidavit, as provided by the first clause, and that the second paragraph of the Detroit charter is much broader in its scope; that, by it, it is apparent that there was in the minds of the lawmakers a class of claims which were not embraced within the terms of the first paragraph, which was intended to relate only to unliquidated claims or contracts; that, by the second paragraph, all claims are barred unless first presented to the council, and claims on contracts are barred unless accompanied with the affidavit; that, by this paragraph, distinct, separate provisions, which are complete in themselves, are made, without reference to the first paragraph, except as to contracts requiring said affidavit, while in the Adrian charter the only claims barred are such as are required to be "verified as aforesaid."

The language of the Detroit charter is essentially different from that of the Adrian charter, passed upon in *Lay v. City of Adrian, supra.* The Detroit charter expressly refers to unliquidated claims; and while it provides, in the first paragraph of the section referred to, that no unliquidated account or claim or contract shall be received for audit or allowance unless it be accompanied with an

affidavit, and then proceeds to recite what the affidavit shall contain, the next paragraph expressly provides that it shall be a sufficient bar and answer to any action for the collection of any demand or claim that it has never been presented to the common council for audit or allowance, or, if on contract, that it was presented without said affidavit, and rejected for that reason. The last paragraph embraces claims to which the requirements of the affidavit recited in the first paragraph have no application. It is general, and includes *any claim or demand not presented to the council,* and, in addition, any claim upon contract *presented, but not accompanied with the affidavit* provided for in the first paragraph. In other words, it recognizes a class of claims which are not susceptible of verification in the manner prescribed, and requires all such claims to be presented, and then refers to claims growing out of contract, and requires that they be verified in the manner provided in the preceding paragraph. The second paragraph in the Adrian charter refers only to claims "verified as aforesaid;" and this Court, in the Lay case, held that a claim for injuries occasioned by a defective highway was not susceptible of verification according to the requirements of the first paragraph, and was therefore not within the contemplation of the section. In other words, the Court held that the requirements of the affidavit which should accompany any and all claims indicated the character of the claims to which the section applied.

City of Detroit v. Michigan Paving Co., 38 Mich. 358, was an action founded upon a tort, where plaintiff had waived the tort and brought *assumpsit;* and this Court has in that case, it seems to me, construed this section as embracing all classes of claims against the city. Chief Justice CAMPBELL there says:

"By section 25, chap. 4, of the city charter of Detroit [which is compiler's section 86 of the present charter, and

the one here involved], all claims against the city are required to be presented to the council for audit or allowance, *accompanied by affidavit in case of contract.*"

What is stated in that case as to the propriety of such a provision and the design of the statute is equally applicable to the present case.

In *O'Neil v. City of Detroit*, 50 Mich. 133, which was an action for injuries occasioned by a defective street, while it was held that this question had not been raised in the court below, the case of *City of Detroit v. Michigan Paving Co.* was cited. Similar provisions have been held to apply to claims for the refunding of illegal taxes. *Louden v. East Saginaw*, 41 Mich. 18; *Mead v. City of Lansing*, 56 Id. 601; *Crittenden v. City of Mt. Clemens*, 86 Id. 220; *Whitney v. City of Port Huron*, 88 Id. 268.

It seems to me, therefore, that our own Court has settled this question in favor of the contention made by defendant, and that the judgment should be reversed, and a new trial granted.

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

THE CITY BANK OF DOWAGIAC v. CAIPHAS DILL.

[See 84 Mich. 549.]

Bills and notes—Good-faith holder—Evidence—Burden of proof.

This case is held to have been fairly tried and submitted to the jury under the rules laid down in the former opinion, reported in 84 Mich. 549, and the judgment in favor of the plaintiff is affirmed.

Error to Cass. (O'Hara, J.) Argued June 23, 1894. Decided October 16, 1894.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion, and in 84 Mich. 549.

F. J. Atwell (*Spafford Tryon,* of counsel), for appellant.

Coy W. Hendryx and *Howard & Roos,* for plaintiff.

LONG, J. This case was in this Court at the January term of 1891, and was reversed and remanded for a new trial (84 Mich. 549), which has now been had, and in which plaintiff recovered. The facts are fully set out in the former opinion, in which it was held that the testimony of defendant, if believed, made a complete defense to the note, and threw the burden of proof upon the plaintiff to show that D. Lyle & Co. purchased it before maturity, for value, and without notice of the facts which constituted a defense as against the note in O'Brien's hands. On the present trial the court submitted that question of fact to the jury, and put the burden of proof upon the plaintiff, saying to them, in substance, that, unless they should find by a preponderance of evidence that this $80 due-bill was a part of the consideration of the $600 note given by O'Brien to Dill, the plaintiff could not recover. In other words, the court stated to the jury that, if O'Brien could not recover against Dill on this $80 due-bill, then the bank could not recover.

Several errors are assigned upon the admission of evidence and the charge; but, after a careful review of the case and the assignments made in the brief of counsel, we find no error of which the defendant can complain, and, as we think the case was fairly tried and submitted to the jury under the rules laid down in the former opinion, there is

no necessity for discussing the various assignments of error.

Judgment is affirmed.

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

EDWIN DAWE, ADMINISTRATOR OF THE ESTATE OF ANNA McINTOSH, DECEASED, v. THE FLINT & PERE MARQUETTE RAILROAD COMPANY.

Railroad companies—Accident at crossing—Open gates—Contributory negligence.

1. Plaintiff's intestate is held to have been guilty of such negligence, in walking a distance of 48 feet after passing an open railroad gate at a city street crossing, and before reaching the track, where she was struck by a passenger train, during which time she could have seen the train for a distance of 425 feet if she had looked in the direction from which it was coming, as to bar a recovery, unless it should be held that the fact that the gate was not let down excused her from exercising care in crossing the track.[1]
2. The rule established by *Richmond v. Railway Co.*, 87 Mich. 374, and *Evans v. Railroad Co.*, 88 Id. 442, that a party approaching a railroad track has a right to rely upon the absence of such warnings of danger as it is shown to be the custom of the railroad company to give, will not excuse the negligence of the decedent, who testified that she thought the gates did not fall for a yard engine, for, if she was looking for a yard engine, as she testified, she could as easily have seen the passenger train.

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[1] As to duty of looking and listening, or stopping and listening, before crossing or attempting to cross railroad tracks, see *Jensen v. Railroad Co.*, 102 Mich. 176, 181, and note.

Error to Saginaw. (Hart, J., presiding.) Argued June 28, 1894. Decided October 16, 1894.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinions.

E. L. Beach, for appellant.

Hanchett, Stark & Hanchett, for defendant.

MONTGOMERY, J. Plaintiff's intestate, Anna McIntosh, instituted this suit to recover for personal injuries. The circuit judge directed a verdict for the defendant. She has since deceased, and her administrator brings the case here for review.

Deceased testified that she was struck by an incoming train while crossing the railway track of defendant. The evidence shows that, traversing a distance of 48 feet before she reached the track in question, and after passing the gate, she could have seen the approaching train for a distance of 425 feet at least, had she looked.

The case is ruled by *Gardner v. Railroad Co.*, 97 Mich. 240, and the cases there cited, unless it shall be held that the fact that the gate was not let down excused the deceased from exercising care in crossing the track. The plaintiff relies upon the cases of *Richmond v. Railway Co.*, 87 Mich. 374, and *Evans v. Railroad Co.*, 88 Id. 442. The rule established by these cases is that a party approaching a railroad track has a right to rely upon the absence of such warnings of danger as it is shown to be the custom of the railroad company to give. But in the present case the deceased herself testified that she thought the gates did not fall for a yard engine. As the circuit judge very pertinently said:

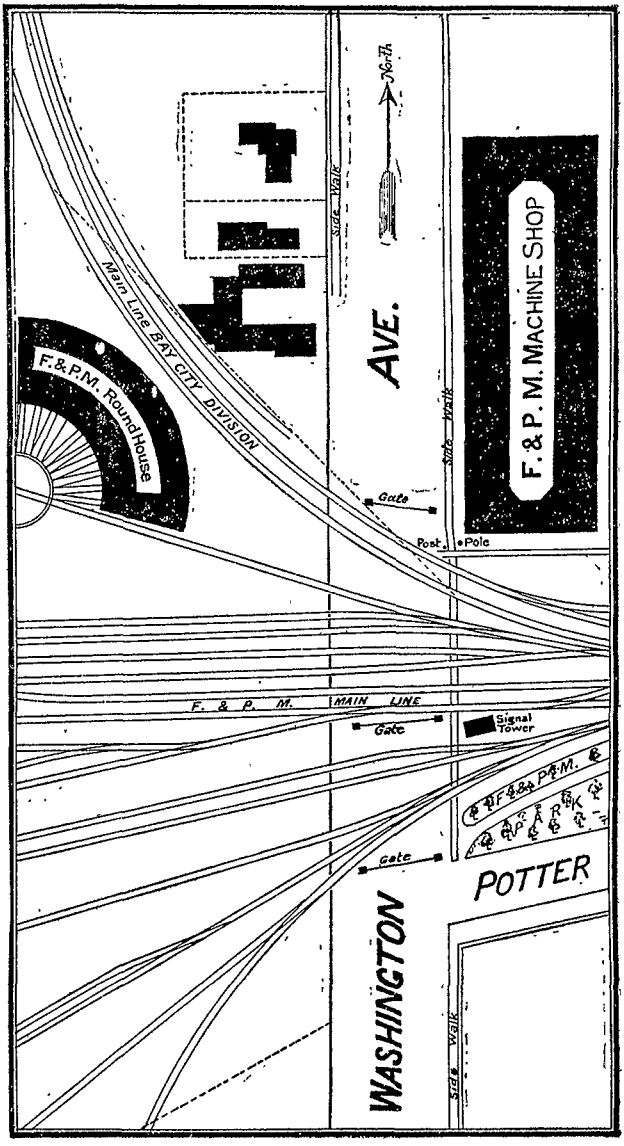
"If she was looking to see a yard engine, of course she could see a regular train as easily."

The judgment will be affirmed, with costs.

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

McGRATH, C. J. *(dissenting).* Plaintiff's intestate was struck by an incoming passenger train while crossing the railway tracks on Washington avenue, in the city of Saginaw, at about 20 minutes past 5 o'clock on the evening of December 17, 1891. The court directed a verdict for defendant, on the ground that plaintiff's intestate was guilty of contributory negligence. A sketch of the crossing will be found on the following page.

The testimony tended to show that Washington avenue is a leading thoroughfare. The deceased was walking south on the sidewalk, on the east side of the avenue, and was struck by a train going east on the "main line Bay City Division." There are three gates,—one about 60 feet north of the point where deceased was struck, one south of the Flint & Pere Marquette main line, and one near Potter street. These gates are raised and lowered from a tower some distance away. When down, they do not extend across the sidewalk. The south end of the machine shop is about 15 feet from the first track. The first building west of Washington avenue and north of the tracks is about 175 feet directly north from the place where deceased was struck, is 300 feet long, and 2 stories in height. The deceased testified that, just before she passed the railroad gates, she looked to see if they were down; that the gates were up; that when she got past the gates, so she could see the depot, she looked in that direction, and then looked the other way, to see if she could see a yard engine coming; that she knew that, if the gates were up, no train was coming, but she thought the gates did not fall for a yard engine; that she did not see or hear the train until it was within a few feet of her, when she was frightened,


F. & P. M. Round House
Main Line BAY CITY DIVISION
Side Walk
36-Ft.
AVE.
Side Walk
F. & P. M. MACHINE SHOP
Gate
Post
Pole
F. & P. M. MAIN LINE
Gate
Signal Tower
F. & P. M.
Gate
POTTER
WASHINGTON
Side Walk

and did not do anything. The engineer testified that he was on the lookout, but did not see deceased until he got within three feet of her, when he immediately applied the brakes, and stopped the train as soon as it could be stopped; that, coming around the curve, the reflection of the headlight was thrown to the south. A city ordinance prohibited the running of trains within the city limits at a rate of speed to exceed 6 miles per hour. While the engineer and fireman testify that the rate of speed was not to exceed 10 miles per hour, it appeared that the train did not stop until it had reached a point 200 feet east of Washington avenue; and one of defendant's witnesses testified that, if the train had been running but 8 or 10 miles per hour, the brakes would have brought it to a stop in 50 feet, and that, if it had been running 15 or 20 miles an hour, it would have come to a full stop in 100 feet. The fireman testified that the whistle was not blown after they left Kirk street, which was 1,500 feet away, and north of the place of collision.

While the facts in the present case differ in some particulars from those in *Richmond v. Railway Co.*, 87 Mich. 374, and *Evans v. Railroad Co.*, 88 Id. 442, I do not think that there is such a substantial difference as warrants the conclusion in the present case that the deceased was, as a matter of law, guilty of contributory negligence. I am not prepared to say arbitrarily that an ordinarily prudent person would not place some reliance upon the fact that the gates were open. Here, as in those cases, there was the open gate, and, in addition, the curve, the high speed of the train, the absence of warning signals, and evidence that some degree of care was exercised. As is said in a recent case in the federal court:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall

constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. * * * The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs." *Railway Co. v. Ives*, 144 U. S. 417.

The mere fact that deceased thought that the gates were not lowered for yard engines, which usually make the yard movements at a low rate of speed, and was on the lookout for the same, would not suggest the degree of care necessary to protect herself from an unexpected and greater danger.

The judgment should be reversed.

JAMES K. P. MCCLARY v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Implied contract—Services rendered.

Under the postal laws of the United States, each railroad company is bound to carry to and from the post-office all mails at terminal points of its road, while the government lets special contracts for such carriage to and from the stations along the line. At a city which was a terminus of two divisions of defendant's road, and also a station on its main line, plaintiff had a contract with the defendant for the carriage of the mail of one of its divisions, and a contract from the government for the carriage of the main-line mail. Supposing it to be his duty under his contract with the government to carry the mail of the other division, plaintiff continued to do so without charge,

until he learned of defendant's duty in the premises, when he declined further carriage of such mail. And it is held that, the defendant having permitted the performance of such services, and having had the benefit thereof, the law will presume that they were to be paid for, there being nothing in the relation of the parties that would repel the idea that payment was intended.

Error to Berrien. (O'Hara, J.) Argued June 22, 1894. Decided October 16, 1894.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Edwards & Stewart (*Ashley Pond* and *Henry Russel,* of counsel), for appellant.

George S. Clapp, for plaintiff.

LONG, J. Plaintiff sued to recover of defendant for services in carrying the Air Line mail, on its arrival at Niles over defendant's Air Line Division, from the depot of defendant to the post-office in the city. On the trial, plaintiff had verdict and judgment.

It is conceded that plaintiff had a contract with the government to carry the mails to and from the main line of defendant's road, and that under that contract he carried these mails from August, 1885, to the time of commencement of suit. It is also conceded that plaintiff carried between the defendant's depot and the post-office the mails that came and went over the South Bend Division of the defendant's road, and was paid therefor by defendant the sum of $5 per month. It is also conceded that plaintiff carried between the defendant's depot and the post-office all mails that came and went over the Air Line Division of defendant's road. Under the postal laws of the United States, each railroad company is bound to

carry to and from the post-office all mails at terminal points of its road, while the government lets special contracts for such carriage to and from the stations along the line. The plaintiff claims that, while he was carrying the mails from the main line, he was not aware that it was the duty of the defendant to carry the Air Line mail, but, supposing it his duty to carry it under his contract with the government, he continued to carry it without charge, until he ascertained that it was the defendant's duty to carry it, when he ceased to do so, and was subsequently paid by the defendant to carry it. There is but little dispute as to the facts.

The court was asked by defendant to charge the jury as follows:

"The fact that the plaintiff did not know that the defendant was obliged to deliver at the post-office in said city of Niles and carry all mail from the post-office in said city of Niles to its trains on the Air Line Division of its said road, and because of such lack of knowledge this plaintiff did carry the same between the trains and post-office, would not give the plaintiff a right of action against this defendant for such service.

"An action will not lie to recover payment for voluntary service, any more than to recover moneys voluntarily paid out for another's benefit.

"The proof in this case shows that no contract was ever made between the plaintiff and defendant to carry any mail at the city of Niles until December 29, 1891, and that the plaintiff, without consulting or advising with any authorized agent of the defendant, carried the said mail at the said city of Niles; and it was his duty to have advised some proper officer or agent of said defendant, in case the pay was not satisfactory to him, of such fact, and failing to do so, but receiving payment at $5 a month for carrying said mail, without reference to any particular mail, he is now prohibited from claiming any.

"The fact that the plaintiff in this case carried the mail to and from defendant's depot that came off of and went over its Air Line Division, under a mistaken idea,

or not knowing that the defendant was obliged to deliver it and take it from the post-office, would not of itself give the plaintiff the right to turn round and bring this action against the defendant.

"If the jury find that the plaintiff carried said mail from August 1, 1885, until January 1, 1892, or thereabouts, and had made no contract to carry the same, but did carry it without objection, and under the belief that it was part of his work in connection with the carrying of the other mail between the same points, for which he conceded he did get pay, and made no objection to it nor demand for payment all that time, he could not thereafter, upon learning that it was not part of his duty to carry said Air Line mail, turn round and recover, for receiving the same, from this defendant, and therefore your verdict should be for the defendant.

"The defendant pays its employés every month, and has pursued that system from August 1, 1885, until the commencement of this suit; and every employé, after receiving his pay, signs a receipt called the 'pay roll,' and such a receipt or pay roll this plaintiff signed, and drew his pay at $5 a month every month from said August 1 to January 1, 1892. Those pay rolls have been offered in evidence, and all read as follows: 'Sums due for all personal services during the month of September, 1885.' Up to September they are printed, and the month left blank, to be written in as occasion may require. At Niles station, upon every month's pay roll of defendant, as above described, during all of the period of time for which he brings suit and seeks to recover, appears the plaintiff's name receipting for all personal services and for carrying mail, without reference to any particular mail; and, as the plaintiff does not claim that there was any other or different kind of services rendered to defendant, he cannot recover in this case."

These requests were refused, and the court charged the jury:

"While one person cannot recover for services rendered for another without a request, express or implied, yet, if one voluntarily takes the benefit of another's labor, the law will presume that the laborer is to be paid for his work, unless the contrary is shown by the evidence. In this case, if it was understood between the plaintiff and the railroad company that he was to receive $5

monthly for his services, and that said amount was to be full payment of his services for carrying all the mail he did carry, he cannot recover, and your verdict should be in favor of the defendant."

The requests were properly refused, and the charge, under the circumstances, presented the only question of fact in the case for the consideration of the jury. Counsel for defendant cite cases from which they deduce the following principle: No promise to pay for services is implied where circumstances fail to indicate that they were rendered or received for compensation, but clearly repel the idea that payment was to be made or asked for. Undoubtedly, this is the correct rule. But in the present case the defendant had the benefit of the plaintiff's services. It permitted the services to be performed, and there is no such relation between the parties as would repel the idea that payment was intended. The company had the plaintiff's services, and the law will presume that the work was to be paid for.

The judgment is affirmed.

McGRATH, C. J., and HOOKER, J., concurred with LONG, J.

GRANT, J. *(dissenting)*. There is no dispute about the facts in this case. The question, therefore, becomes one of law. Was there an implied contract between the plaintiff and the defendant by which he rendered services for which the defendant is legally bound to pay? When this service was performed, it is clear that the plaintiff did not understand that he was entitled to any compensation therefor other than what he received, but that he understood that the compensation he received from the defendant covered all the mail service at Niles, except that on the Michigan Central main line, for which the government paid him. The plaintiff understood that the

contracts made with the defendant and with the government included the carriage of all the mails that arrived at Niles over the defendant's road. The defendant also understood that the services for which plaintiff was paid included the carrying of all the mails for it. The government did not pay the defendant any specific sum for the carrying of the mail which came over the Michigan Central Air Line from its depot to the post-office. It appears to have been included in the general contract with the defendant for carrying the mails, by which it was required to take the mails from, and deliver them into, all terminal post-offices. It appears now to be conceded that, as to the Air Line Branch, Niles was one of its *termini;* but whether it was so understood during the years for which the plaintiff now seeks to recover does not appear. Plaintiff received every month $5 for carrying the mails for the defendant at Niles, and signed the receipts therefor. How can there be any privity of contract where neither party understands a contract to exist? During the seven years for which the plaintiff now seeks to recover, he did not understand that he was rendering services for which he was not paid. Neither did the defendant. Under such circumstances, the law does not, in my judgment, imply a contract.

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

MONTGOMERY, J., did not sit.

THE PEOPLE v. DAVID W. TITMUS.

Criminal law—Perjury—Unauthorized oath.

Under How. Stat. § 9236, which provides that, "if any person of whom an oath shall be required by law shall willfully swear falsely in regard to any matter or thing respecting which such oath is authorized or required, such person shall be deemed guilty of perjury," a charge of perjury cannot be predicated upon the sworn statements of a person who was subpœnaed to appear before a justice of the peace to furnish testimony upon which to base a complaint for a violation of the liquor law, no complaint, oral or written, having been made to the justice, at the time said statements were made, of the commission of such offense.

Error to Livingston. (Person, J.) Submitted on briefs June 29, 1894. Decided October 16, 1894.

Respondent was convicted of perjury, and sentenced to imprisonment in the State House of Correction and Reformatory at Ionia for two years. Judgment reversed, and respondent discharged. The facts are stated in the opinion.

S. S. Abbott and *L. S. Montague,* for respondent.

A. A. Ellis, Attorney General, and *D. Shields,* Prosecuting Attorney, for the people.

MCGRATH, C. J. Respondent was convicted of perjury. It appears that on the 2d day of March, 1894, a subpœna was issued by a justice of the peace, commanding the respondent to appear before said justice forthwith, to testify "in an action now pending before me, and then and there to be tried, between the people of the State of Michigan, plaintiff, and James Hoag, defendant," etc. Respondent appeared, and was examined upon oath, and the charge is predicated upon the statements then and there made.

Upon the trial in the circuit, upon cross-examination, the justice testified as follows:

"Sheriff Chase came in, and requested me to subpœna Mr. Titmus to come before me and testify. He said he wanted to see if there was testimony enough to make complaint against the saloon-keepers. There was not then a complaint before me. A complaint had not been made before me for the arrest, or a complaint of the violation of the law by Mr. Hoag; that is, there had been no written complaint made at that time, and no complaint under oath, and there was yet no complaint of any violation of this liquor law, concerning these men, and there was no such complaint up to the time of the issuing of the subpoena and the time of taking the testimony, and there was no judicial inquiry or proceedings before me at the time I issued the subpoena, or at the time of taking the testimony. The complaint written against Mr. Hoag was made on the 5th day of March, three days after the taking of the testimony of respondent. Sheriff Chase made the complaint. I did not examine any other witnesses, or take any other testimony, except the foregoing.

"*The Court:* I wish you would ask if the sheriff had made any complaint not under oath. (To which the respondent, by his counsel, objected. The testimony was taken subject to the objection, and excepted to.)

"*A.* Yes. The sheriff came into my office before I issued the subpoena, and said the circuit judge had ordered him to get out a subpoena, and subpoena some witnesses, and see if he had sufficient cause to make complaint against Mr. Hoag and Mr. McDonough, I think, and any others; and he requested me to issue some subpoenas, and this is the one I have issued. The sheriff at that time claimed the offense to have been committed on the 1st day of January last, in the saloon of Benjamin Hoag, in Fowlerville, in this county; and he wanted to discover, also, if he could, whether there was any other offense committed on that day in the village of Fowlerville, in this county. The offense and offenses mentioned were for violation of the liquor law. It was a well-known fact that whisky had been sold upon that day, and from the trial of the case in the circuit court, that had just been determined before that (in which I was an attorney), of course he knew that I knew what he wanted, so he (sheriff) did not explain very much what he did want. The case I refer to is the

case of the People v. Bristol, William Brooks, and Fred Miller, tried here in this court-room before a jury. Before issuing a subpoena, some testimony had been given in that case about the saloon of Hoag having been opened on January 1."

Upon this testimony, it cannot be seriously insisted that a complaint was pending before the justice when the subpoena was issued, or when the testimony was taken upon which the charge is based. It is true that in answer to a question put by the court, as to whether the sheriff had made a complaint not under oath, an answer is given in the affirmative; but this is a legal conclusion, unsupported by the statement of facts. The justice proceeds at once to give just what the sheriff did say, viz., that he had been ordered to get out the subpoenas, "and see if he had sufficient cause to make complaint against *Mr. H. and Mr. McD., and any others.*"

The language of the statute defining the offense here charged is:

"If any person of whom an oath shall be required by law shall willfully swear falsely in regard to any matter or thing respecting which such oath is authorized or required, such person shall be deemed guilty of perjury." How. Stat. § 9236.

The information alleged that on the 2d day of March, 1894, at, etc., "complaint in due form of law * * * having then and there been made."

In *People v. Fox,* 25 Mich. 492, 496, Mr. Justice COOLEY, speaking for the Court, says:

"There must be an oath authorized by law, an issue or cause to which facts were material, and a false statement regarding such facts upon such issue or in such cause. Such would be the case at the common law, and, if it be claimed that this is statutory perjury, the information is not aided, for, by the statute, it must appear that the oath is one required or authorized by law. * * * Had the information alleged that the affidavit was used on the hearing of the motion, a different case would have been

presented, which might require consideration; but that was neither alleged, nor, consequently, could be proved. In fact, the record shows that it was not filed until the day after the motion was heard; but this, under this information, was immaterial."

See, also, *People v. Gaige*, 26 Mich. 30.

The judgment must be reversed, and the respondent discharged.

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

THE CITY OF GRAND RAPIDS v. EDWIN A. BURLINGAME, JUDGE OF THE SUPERIOR COURT OF GRAND RAPIDS.

102	321
108	518
102	321
135	1564

Constitutional law—Title of act—Mandamus—Default—Practice in Supreme Court.

1. The object of Act No. 358, Local Acts of 1891, entitled "An act to establish permanent dock, safety, sanitary, and building lines along the shores and margins and in the waters and on the bed of Grand river, within the corporate limits of the city of Grand Rapids, and to provide for the building and maintaining of suitable masonry walls along such lines, and to authorize the city of Grand Rapids to acquire private property for such public use," is to establish one line for all of the purposes named, and, considered in this light, the title fulfills the requirements of the Constitution.
2. Under Supreme Court Rule No. 63, which provides that "in proceedings for *mandamus*, where an order to show cause has been made, the respondent must answer fully every material allegation of the petition, and every material averment not so answered may be taken admitted by the respondent to be true as alleged, and, in case no answer is made and filed as required by such order, the Court, upon due proof of service of the order, will award a peremptory *mandamus* as prayed for,

or enforce obedience to the order by process for contempt," the failure of the judge of the superior court of Grand Rapids to answer an order to show cause why he should not be compelled to vacate an order by him made dismissing the petition of the city of Grand Rapids for the establishment of permanent dock, safety, sanitary, and building lines along the shores and margins and in the waters and on the bed of Grand river, as provided by Act No. 358, Local Acts of 1891, on the ground that said act is unconstitutional, amounts to an admission by the respondent and the contesting property-owners that all of the material averments of the petition for the writ are true, and a peremptory *mandamus* should issue as prayed.

3. The petition for *mandamus* gave said property-owners their day in court, and the order of the Supreme Court, overruling the order of the superior court, is conclusive and binding upon them as to all questions raised by their answers; but, inasmuch as it is possible that, since the original petition was filed, other parties may have acquired interests in the premises by transfer, mortgage, or otherwise, the relator should be allowed to amend said petition by making such persons, if any there are, parties.

Mandamus. Argued October 2, 1894. Granted October 16, 1894.

Relator applied for *mandamus* to compel respondent to set aside an order dismissing its petition for the establishment of permanent dock, safety, sanitary, and building lines along the shores of Grand river. The facts are stated in the opinion.

William Wisner Taylor (*Henry J. Felker,* of counsel), for relator.

GRANT, J. The title to Act No. 358, Local Acts of 1891, reads as follows:

"An act to establish permanent dock, safety, sanitary, and building lines along the shores and margins and in the waters and on the bed of Grand river, within the corporate limits of the city of Grand Rapids; and to provide for the building and maintaining of suitable masonry

walls along such lines; and to authorize the city of Grand Rapids to acquire private property for such public use."

The body of the act provides the method of procedure for the establishment of such lines, and the condemnation of property necessary for the purpose. Acting under this statute, the relator filed a petition in the superior court of Grand Rapids to secure the establishment of such lines on the east and west sides of Grand river. Certain parties defendant answered the petition, and attacked the constitutionality of the act upon various grounds. The respondent entered an order dismissing the petition, holding the act unconstitutional. The relator thereupon filed a petition for the writ of *mandamus* in this Court to compel the respondent to vacate said order of dismissal. An order to show cause was granted, and a copy of such order and of the petition was duly served upon the respondent. No answer has been filed, and none of the parties interested have appeared in this Court to contest the issuance of the writ.

Under Supreme Court Rule No. 63, all the material averments in the petition are admitted by the respondent and the parties interested to be true; and a peremptory *mandamus* should issue as prayed.

It is insisted, however, by counsel for the relator, that, inasmuch as this is a case of public importance, the determination ought not to rest upon a default order. The obvious reply to this is that constitutional questions ought not, as a rule, to be determined by courts upon *ex parte* arguments. This petition has given the defendants in that proceeding their day in court, and the order in this Court, overruling the order of the court below, is conclusive and binding upon them as to all questions raised by their answers.

There is, however, one question which we are requested to determine, which seems so clear that we feel justified

in acceding to the request of counsel. It is claimed that the title to the act contains more than one object, and is therefore multifarious. This appears to be based upon an erroneous construction of the title,—that it provides for different lines, for different purposes. We do not think it was intended to provide for the establishment of one line for docks, another for sanitary purposes, another for safety, and still another for building. The object was to establish one line for all these purposes. Considered in this light, the title fulfills the requirements of the Constitution.

The writ of *mandamus* will issue; and inasmuch as it is possible that, since the petition was filed, other parties may have acquired interests in the premises by transfer, mortgage, or otherwise, the relator will be allowed to amend its petition in the superior court, making such persons, if any there are, parties. The relator will recover costs.

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

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COIT & COMPANY v. ELI R. SUTTON.

Constitutional law—Taxation of corporations—Interstate commerce.

Act No. 79, Laws of 1893, which requires every foreign corporation or association permitted after the passage of said act to transact business in this State, which had not, prior to the passage of said act, filed or recorded its articles of association under the laws of this State, and been thereby authorized to do business therein, to pay a designated franchise fee, and voids all contracts made in this State after January 1, 1894,

by any foreign corporation not complying with said act, does not apply to foreign corporations whose business within this State consists merely of selling through itinerant agents, and delivering, commodities manufactured outside of this State.[1]

Error to Wayne. (Hosmer, J.) Submitted on briefs June 21, 1894. Decided October 16, 1894.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

R. B. Wilkinson, for appellant.

Bowen, Douglas & Whiting, for plaintiff.

HOOKER, J. The plaintiff, a corporation of the state of

[1] See *Moline Plow Co. v. State Treasurer,* 62 N. W. Rep. 1119 (— Mich. —), where the relator, an Illinois corporation, after the act of 1893 had taken effect, forwarded to the Secretary of State a copy of its articles of association, together with the franchise fee required by said act, which it paid under protest, and, upon the refusal of the State Treasurer to refund the money, applied for a *mandamus* to compel such action on his part, claiming to be doing business in this State through itinerant agents, whose duty it was to solicit orders and sell goods manufactured in Illinois, and that the act of 1893 is in conflict with the provision of the Constitution of the United States regulating interstate commerce, as held in the case of *Coit & Co. v. Sutton.* And it was held that the validity of the act of 1893 was not questioned in that case; that said act was held not to apply to the facts there stated; that the plaintiff there was simply selling goods within this State manufactured by a foreign corporation, and was not asking to have its articles of incorporation filed within this State; that in the case at bar the relator not only sold its products through itinerant agents, but came within this State, asking to have its articles of association filed here, and that it might be put on the same footing with our own home corporations; that the act of 1893 gives the foreign corporation the same privileges as domestic ones, but provides that it must comply with its provisions by paying the franchise fee which a domestic corporation must pay; that the relator had had its articles of incorporation filed here, had paid the franchise fee provided by the act, and was not entitled to have said moneys refunded.

Illinois, recovered a judgment in the Wayne county circuit court, from which the defendant appeals.

The findings of fact show that plaintiff was engaged in the business of shipping from Illinois goods manufactured in that state, to its customers in Michigan, on orders given it by mail, or taken by its agents in Michigan; that on January 23, 1894, the plaintiff, through its duly-authorized agent, entered into a written contract with the defendant, in the city of Detroit, Mich., for the sale to him of a quantity of white lead at a specified price, to be paid for upon delivery; that on January 27, 1894, delivery of the lead was tendered at Detroit; and that the defendant refused to receive the lead, claiming the contract to be void. At the time of making such tender the plaintiff had not filed articles of association in this State, and had not paid to the Secretary of State a franchise fee, as provided by Act No. 79, Laws of 1893.

Counsel for plaintiff seek to avoid the effect of said act, contending that it is in conflict with the provision of the Federal Constitution that "Congress shall have power to regulate commerce among the several states." Article 1, § 8. The defendant relies upon the familiar rule that states may impose conditions upon the right of foreign corporations to do business within their limits. This rule has been recognized by the federal courts where it does not conflict with the power of Congress to regulate commerce. *Paul v. Virginia,* 8 Wall. 168. But, where the effect is to restrain or obstruct commerce among the states, it cannot be applied; the federal decisions, for which we must look for a construction of the Constitution, holding that it is the right of persons residing in one state to contract and sell their commodities in another, unrestrained, except where restraint is justified under the police power, by states or by act of Congress, and that this right extends to corporations. *Paul v. Virginia,* 8 Wall. 168; *Brown v.*

Maryland, 12 Wheat. 419; *Welton v. Missouri,* 91 U. S. 275; *Pensacola Tel. Co. v. W. U. Tel. Co.,* 96 Id. 1; *Webber v. Virginia,* 103 Id. 344; *Manufacturing Co. v. Ferguson,* 113 Id. 727; *Mining & Milling Co. v. Pennsylvania,* 125 Id. 181; *Bowman v. Railway Co.,* 125 Id. 465; *Moran v. New Orleans,* 112 Id. 69; *Pickard v. Car Co.,* 117 Id. 34; *Robbins v. Taxing District,* 120 Id. 489; *Leloup v. Port of Mobile,* 127 Id. 640; *Fargo v. Michigan,* 121 Id. 230; *Steamship Co. v. Pennsylvania,* 122 Id. 326; *Car Co. v. Pennsylvania,* 141 Id. 18; *Brennan v. Titusville,* 153 Id. 289.

The law in question imposes a tax upon corporations for the privilege of doing business in Michigan. It is a tax upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which, if enforced, would embarrass plaintiff in its commerce with inhabitants of Michigan. It must therefore be held that the act in question does not apply to foreign corporations whose business within this State consists merely of selling through itinerant agents, and delivering, commodities manufactured outside of this State.

The judgment of the circuit court will be affirmed.

The other Justices concurred.

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CELIA NILES, ADMINISTRATRIX, ETC., v. JOSEPH H. STEERE, CIRCUIT JUDGE OF SCHOOLCRAFT COUNTY.

Constitutional law—Amendment of act—Title—Jury—Challenge to the array.

1. It was provided by Act No. 142, Laws of 1883, that certain county officers of each county in the Upper Peninsula should constitute a board to select a list of names of persons to serve as petit jurors in the circuit courts of said counties. The counties embraced in the eleventh judicial circuit (which included the county of Manitou) were excepted from the operation of said act. The act of 1883 was amended by Act No. 93, Laws of 1885, entitled "An act to amend section 1 of Act No. 142 of the Session Laws of 1883, being an act entitled 'An act to provide for selecting petit jurors in the Upper Peninsula,' so as to include the county of Manitou," by providing that said county officers "of each county in the Upper Peninsula, and of the county of Manitou," should constitute a board for the purpose of selecting such jury lists, thus eliminating the exception as to the counties embraced in the eleventh judicial circuit. And it is held that, had the clause "so as to include the county of Manitou" been omitted from the title to the act of 1885, there would be much force in the claim that the act is valid so far as it applies to that portion of the eleventh judicial circuit within the bounds of the Upper Peninsula proper, the title of the act of 1883 being broad enough to cover that portion of the State; that Manitou county is not a part of the Upper Peninsula, within the meaning of the act; that, by inserting the clause mentioned, an attempt was made to include territory not in the Upper Peninsula, and the plain inference is that this was the only object of the act; that said clause restricted the title, and precluded legislation embracing any other territory than the county of Manitou.

2. The list of names from which a petit jury was drawn was selected from the assessment rolls of 1892, instead of 1893, as required by the statute, and a challenge to the array was interposed on that ground. It appeared that a majority of the names selected were names of persons admittedly eligible. And it is held that that was sufficient; that if the others were not, and happened to be drawn, the result was that a suffi-

cient number of qualified jurors did not attend upon the court, and How. Stat. §§ 7575, 7576, 7578, and 7580, point out the procedure in cases where from any cause this happens.

Mandamus. Submitted October 2, 1894. Denied October 16, 1894.

Relator applied for *mandamus* to compel respondent to vacate an order sustaining a challenge to the jury array interposed in a cause pending before him. The facts are stated in the opinion.

J. F. Carey, for relator.

McMahon & Oren, for respondent.

HOOKER, J. Act No. 142, Laws of 1883, was entitled—

"An act to provide for selecting petit jurors in the Upper Peninsula."

The eleventh judicial circuit consisted of several counties of the Upper Peninsula, and the county of Manitou, which is comprised entirely of a number of islands in Lake Michigan. The first section of said act excepted the counties embraced in the eleventh circuit from the provisions of the act.

Act No. 93, Laws of 1885, was entitled—

"An act to amend section 1 of Act No. 142 of the Session Laws of 1883, being an act entitled 'An act to provide for selecting petit jurors in the Upper Peninsula,' so as to include the county of Manitou."

The act reads as follows:

"SECTION 1. That the county clerk, judge of probate, sheriff, and county treasurer of each county in the Upper Peninsula, and of the county of Manitou, are hereby constituted a board for the purpose of selecting a list of names of persons, annually, to act as petit jurors in the circuit courts in such counties."

Under the law of 1883, as thus amended, a jury was

drawn, and the respondent sustained a challenge to the array. The return shows that the respondent held the later act unconstitutional so far as it applied to the eleventh circuit, which included the county of Schoolcraft. It further appears from said return that "the list of names selected by the board from which the jurors in this panel were drawn had not been taken from the assessment rolls of 1893, as required by law, but that they had been largely taken from the tax rolls of the previous year, and that a large majority of the names so selected, and perhaps nearly all of them, were in fact upon the assessment rolls for the year 1893," but some of them were not upon said rolls. The respondent held that this was not a ground for challenge to the array, but was a cause for challenge of the several jurors whose names were not upon such rolls. Having refused to vacate his order sustaining the challenge to the array, relator asks a *mandamus* requiring it.

Had the clause "so as to include the county of Manitou" been omitted from the title of the act of 1885, there would be much force in the claim that the act is valid so far as it applies to that portion of the eleventh circuit within the bounds of the Upper Peninsula proper, the title of the earlier act being broad enough to cover that portion of the State. See cases cited by counsel: *Board of Supervisors v. Auditor General*, 65 Mich. 408; *Canal Street Gravel-Road Co. v. Paas*, 95 Id. 379. It becomes important to determine whether Manitou county can be considered a part of the Upper Peninsula.

Article 19 of the Constitution is entitled "Upper Peninsula." Section 1 provides that certain counties (indisputably upon the Upper Peninsula, naming them), "and the islands and territory thereunto attached, the islands of Lake Superior, Huron, and Michigan, and in Green Bay and the Straits of Mackinac and the River Ste. Marie, shall con-

stitute a separate judicial district." Section 4 provides that such judicial district shall be entitled to at least one Senator and three Representatives. No allusion is in terms made to the Upper Peninsula in this article except in sections 7 and 8, the former providing for the disposition of taxes paid into the treasury from mining corporations "in the Upper Peninsula." Section 8 provides for the change of location of the State prison "from Jackson to the Upper Peninsula." It will be seen that the Constitution does not say that these counties and islands shall constitute the Upper Peninsula, and it seems to distinguish the islands in the lakes from the islands *attached* to the counties named, which are upon the Upper Peninsula. The Legislature has almost uniformly attached the county of Manitou to the Lower Peninsula for various purposes; such as the election of Representatives in Congress and members of the Legislature. See Comp. Laws 1857, p. 95; Comp. Laws 1871, p. 102; How. Stat. p. 106,—as to Representative in Congress. For State Senator, see Comp. Laws 1871, p. 105; How. Stat. p. 108. For Representative in the Legislature, see Comp. Laws 1871, p. 106; How. Stat. p. 110. At one time it was attached to the Lower Peninsula for judicial purposes. See Comp. Laws 1871, § 4988. Section 26 of the schedule of the Constitution authorized the Legislature to abolish the judicial district created by article 19.

There seems no reason to call these islands constituting the county of Manitou a part of the Upper Peninsula, unless it be the fact that article 19 is entitled "Upper Peninsula." Most of the islands in that county were nearer the Lower than the Upper Peninsula. No reference is made to the Upper Peninsula in terms by article 19 in any section where this county is necessarily included; and we think section 1 indicates that it was not intended that the "islands in the lakes," as contradistinguished from the

"islands attached to said counties," should be included in the term "Upper Peninsula."

The Court held in the case of *Mays v. Commissioner*, 89 Mich. 460, that State land upon Bois Blanc Island was not subject to selection as land upon the Upper Peninsula in payment for the construction of a State road. Bois Blanc Island is one of the islands included in the judicial district formed by article 19 of the Constitution.

It is true that for most of the time that the State has existed the county of Manitou has been attached to the whole or some portion of the Upper Peninsula for judicial or other purposes, but as much may be said of some of the counties in the Lower Peninsula. Section 25 of the schedule of the Constitution attached all of the territory mentioned in article 19 to the third circuit for the election of Regents of the University. Section 29 of the schedule shows that the third circuit consisted of the county of Wayne. It would hardly be contended that counties in the Lower Peninsula would be held to be within an act whose title was similar to this merely because such counties were included in the judicial circuit, or congressional, senatorial, or representative district, with some county of the Upper Peninsula; and the impropriety of holding certain territory within the term "Upper Peninsula" for some purposes, and not for others, is apparent.

The confusion likely to arise from uncertainty in regard to the boundaries of the territory meant by the term "Upper Peninsula" would be greater than the inconvenience, if there be any, of having different methods of selecting jurors in the different counties of the eleventh circuit,—an inconvenience which the Legislature can easily remove. We think, therefore, that Manitou county is not a part of the Upper Peninsula, within the meaning of the law. By including the clause mentioned, an attempt was

made to include territory not a part of the Upper Peninsula, and the plain inference to be drawn from the title is that this was the only object of the bill. The eleventh circuit is not mentioned in the amendatory act, and it is brought within the former act by omitting the exception in such act. We think the clause mentioned restricted the title, and precluded legislation embracing any other territory than the county of Manitou.

This disposes of the case, but, as the other question appears to be of public importance, we consider it. We think the circuit judge was right in holding that a challenge to the array, upon the ground that the board used the assessment rolls of 1892, instead of 1893, in selecting the names from which jurors were to be drawn, could not be sustained. A majority of these were the names of persons admittedly eligible, and that is sufficient. If others were not, and happened to be drawn, the result was that a sufficient number of qualified jurors did not attend upon the court, and the law points out the procedure in cases where from any cause this happens. See How. Stat. §§ 7575, 7576, 7578, 7580. See, also, *Schlacker v. Mining Co.*, 89 Mich. 253, 261.

We think the views of the learned circuit judge upon both questions were correct, and his order will be affirmed.

The other Justices concurred.

Fannie Metzger v. The Manchester Fire Assurance Company.

Fire insurance—Conditions of policy—Legal representative—False swearing by agent—Evidence—Opinion as to value of goods.

1. The term "legal representative," as used in the clause in the Michigan standard fire insurance policy, "wherever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured," refers to those who succeed to the insured's legal rights, by reason of his death or the transfer of the policy.
2. An affidavit, made at the request of fire insurance adjusters, as to the correctness of the books of the insured and the amount of stock at the time of the fire, is not one upon which a prosecution for perjury can be based.
3. An agent of the insured, who had the entire management and control of the business, and who held a power of attorney from the insured authorizing him to settle for the loss, executed and delivered to the adjusters a false affidavit regarding the books of account which had been kept by him. And it is held that the insured, if not a party to the deceit, and acting in good faith, is not precluded from recovering upon the policy under a clause therein providing that the same shall be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, whether before or after loss.
4. A dry goods and clothing merchant testified, in a suit to recover for damage to insured property, that he had been in the store of the plaintiff a number of times, but could not say that he was there within a month before the fire, but had been within a year; that he thought he had noticed a stock which would amount to anywhere from $9,000 to $12,000; that in such estimate he did not confine himself to the year before the fire, and that all he knew was that he had a recollection of being in the store several times, when he saw a good-sized stock of goods there. And it is held that the witness did not show himself competent to testify as to the value of the insured property.

Error to Chippewa. (Steere, J.) Argued April 25, 1894. Decided October 16, 1894.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the majority opinion.

Mark Norris, for appellant.

Hurst & Sullivan and *Lawson C. Holden* (*L. E. Bradt,* of counsel), for plaintiff.

HOOKER, J. The defendant insured a stock of goods belonging to the plaintiff. Her business was managed by her husband, and she appears to have had little to do with it. He bought the goods and kept the books, and, in short, managed the business as he chose. He procured the insurance upon the stock. His authority was not in writing. The goods were injured by fire on January 13, 1892. The husband, Lewis L. Metzger, notified defendant's local agent of the fire a few days after it occurred, and adjusters of the defendant and other companies visited the place about a week later. They did not see the plaintiff. While there, the plaintiff executed a power of attorney to her husband, authorizing him to settle the loss. This was done at the suggestion of one or more of the adjusters, by whom the paper was drawn, that they would not settle with an agent unless his authority was in writing. An examination was made of the books kept by Lewis L. Metzger of the business; and he executed and swore to an affidavit, prepared by the adjusters, in which he stated that the books were correct, true, and accurate records of the transactions of the business, which was carried on under the name of the Giant Clothing Company, and showed the exact and actual transactions with the firms and individuals named therein, and that an inventory of February 1, 1891, shown to Vernor and Fletcher (two of the adjusters), was a true inventory of the goods on hand at that date, and that subsequent purchases and sales were truthfully entered in the books, and

added to said inventory. On March 9, 1892, the adjusters Vernor and Fletcher (the former representing defendant) sent notice to the plaintiff denying all liability under the policies upon the part of their respective companies, for two reasons: (1) Because of fraud; (2) because of attempted fraud.

In the investigation made by the adjusters, they discovered some entries on the books for which there were no bills, and this led to the discovery of alterations in the books, of which the following are specimens:

Bill.	Actual Amount.	Amount on Books.	Fraudulent Raise.
T. Shirt & Collar Co.	$4 50	$154 50	$150
Hart Bros.	9 00	109 00	100
K., N. & Fisher	81 00	581 00	500
Gallison, H. & Co.	1 50	101 50	100
J. Florsheim & Co.	76	150 76	150
L. B. Montague & Co.	Nothing	430 00	430

In the journal was an entry of $1,931.69, ostensibly representing the amount of merchandise purchased in April, 1891. It was originally posted in the ledger as $931.69,—at that time being so entered in the journal,—which was the correct amount. The journal was changed so that it read $1,931.69, and the item was again posted in the ledger as $1,931.69, and the footings changed to correspond. The books also showed false entries of payment of these fictitious accounts. Lewis Metzger admitted that he made all of these false entries, and makes the excuse that he had marked the goods at 10 per cent. above actual cost, and that he made these entries five months before the fire, to make the books compare with the amount of stock, if it should be inventoried according to the raised cost mark. He said that he was trying to sell out, and he did this so that a purchaser would think he had paid the amount marked. He claimed that he did not know of

these false entries at the time that he made the affidavit, having forgotten them; and the jury so found, in answer to special questions. On redirect examination he attempted to patch the matter up by saying that the 10 per cent. was for freight and drayage; that he made the affidavit before these alterations were called to his attention, and he believed it to be true when he made it. A computation will show that the six items mentioned, which he says were all of the raised accounts, were raised from $96.76 to $1,526.76,—a raise of more than 1,400 per cent., instead of 10. His affidavit was admittedly false, and it requires great credulity to believe that he did not know it when he made it.

Counsel for defendant asked the court to hold that this was conclusive evidence of attempted fraud, and to direct a verdict, upon the theory that the act of the agent is the act of the principal.

The policy was the Michigan standard, which provides:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss. * * * * *

"Wherever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured."

It is contended that the fraudulent intent upon the part of the husband binds the wife, and forfeits the policy, under the last clause; counsel asserting that the term "legal representative" should be construed to include any one who is authorized to act for the insured, while plaintiff's counsel contend that it refers to those who succeed to her legal rights, by reason of her death or the transfer

of the policy. We think it should receive the latter construction. This defense is not that the company was defrauded in the making of the contract. In such a case the fraud of the agent could be asserted as a defense against the principal, whether the policy so provided in express terms or not. But the contract was valid, and, for the purpose of determining this question, we must assume that plaintiff has suffered an honest loss, for which she had a legitimate claim. An effort is made to defeat this by showing an attempt by an agent to deceive the defendant into paying a sum greater than the loss. Forfeitures and penalties are not favored in the law, and the language should not be unnecessarily extended by construction. The provision for a forfeiture of rights under the policy is doubtless a wise one, to prevent deceit on the part of insured persons; but it does not seem to us necessary, where the insured acts in good faith, and is not a party to the deceit. The word "insured" is used many times in the policy. If the broad construction contended for is to be given, it would follow that the company would have the right to require statements to be made and sworn to, not only by the insured, but by his legal representative, stating the belief of such representative, his interest, etc. It would not only compel the insured to make double proofs, if technically construed, but would place him at the mercy of his agent. But the attempt, if made with the knowledge and complicity of the insured, would be as effective to defeat the policy as though it had been made by him alone. It follows that the good faith of the plaintiff was a proper subject for investigation.

Counsel for the plaintiff assailed the conduct of the adjusters in requiring a power of attorney, and, under the guise of an objection to its introduction, intimated that it was done "for the purpose of ruining her." The evi-

dence shows that the power of attorney was required by Fletcher before defendant's adjuster arrived, and it was no more than an ordinary and proper precaution to require written authority from the policy-holder before settling with an agent. An examination of the paper shows it to be an ordinary power of attorney. It confers no more power upon Lewis Metzger than the testimony shows that he had without it, nor any more than the safety of the defendant required that he should have. There was no evidence that the adjusters did more than to say they should require written authority from Mrs. Metzger to her husband before they would settle with him, after which they, or some one else, prepared it, and Metzger took it to his wife, who executed it. She testified that she did not see the adjusters. When it was offered in evidence, counsel said:

"We object to the admission of this purported power of attorney in evidence, on the ground that it is incompetent and immaterial."

There was no occasion to call it a "purported power of attorney," nor could there be any reason for saying that a power of attorney was incompetent or immaterial. Moreover, the subject was introduced by plaintiff's counsel upon direct examination, having proved by the witness Metzger that he had a power of attorney, signed by his wife, at which point the defendant's counsel asked that the power be introduced, and the objection was made. The language was uncalled for and prejudicial. Litigants have a right to have their cases tried upon the merits, and appeals to the prejudices of jurors, by unfounded charges of fraud and deceit, are unwarranted. Whatever may be said concerning the affidavit, there was no testimony tending to show that the power of attorney was intended to trap the plaintiff, or deprive her of any rights.

Nor are we prepared to concur with counsel in their attack upon the adjusters. They had every right to be-

lieve that Metzger was attempting a gross fraud upon the insurance companies, and it was their legal right to probe it to the bottom, and ascertain what there was of it, and the intent with which the representations were made. There was no occasion to talk of subornation of perjury, for the affidavit was one upon which a prosecution for perjury could not be based. If knowingly made, it was a simple lie, like any other, only more emphatic, because in writing, and verified by an oath, which should have had some moral restraint upon the affiant. Whatever may have been said about the impropriety of inducing persons to commit crime, we are not prepared to place on the same footing efforts to detect rascality and prevent fraud. Self-protection in business dealings would be a delusion if parties were to use the ordinary methods, at the hazard of legal censure, when dealing with persons who scruple at nothing. Crimes and frauds are not usually detected by informing the wrong-doer in advance that he is suspected. We think these adjusters had a right to suppose that this man would not swear to a statement if it was false, though he had taken the first step in deceit, and they certainly had the right to ascertain the value of the burned goods by any fair means.

The testimony of the witness Desenberg should not have been admitted. He testified that he had been in the store a number of times, but could not say that he was there within a month before the fire, but had been within a year, and he thought he had noticed a stock which would amount to anywhere from $9,000 to $12,000. He said that in this estimate he was not confining himself to the year alluded to, and that all he knew was that he had a recollection of being in the store several times, when he saw a good-sized stock of goods there. He did not show himself competent to testify upon the subject.

Other questions raised we think it unnecessary to discuss.

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

McGRATH, C. J., LONG and MONTGOMERY, JJ., concurred with HOOKER, J.

GRANT, J. I concur with my Brother HOOKER in the reversal of this case. I also concur with his statement that—

"Forfeitures and penalties are not favored in the law, and the language should not be unnecessarily extended by construction. The provision for a forfeiture of rights under the policy is doubtless a wise one, to prevent deceit on the part of insured persons; but it does not seem to us necessary, where the insured acts in good faith, and is not a party to the deceit."

Did the facts in this case make the plaintiff a party to the deceit? This, of course, depends upon the determination of the question whether the acts of her agent were in fact her acts. It will be conceded that if she made false and fraudulent representations the policy was rendered void. I cannot assent to the rule that, where one trusts the entire management of his business to an agent, the principal is not responsible for the fraudulent acts and representations of the agent in connection with the business. It is manifest from this record that the plaintiff knew nothing about the business. It was carried on in her name. Grant that it was carried on for her benefit, still she constituted her husband her sole agent to buy and sell, attend to the insurance, and exercise exclusive control and management of the entire business. When the adjusters came to adjust the loss, he appeared as her sole representative. The defendant desired that he should obtain from the plaintiff a written authority to act for her. She voluntarily executed a power of attorney giving him full authority in the premises. She should be held responsible

for his acts and conduct. Seldom do the records of insurance litigation exhibit a more deliberate and glaring attempt to defraud an insurance company. Such attempts should not be made successful, under the guise of agency, especially where there exists the intimate relation of husband and wife; the one claiming to be an innocent principal, and the other a confessedly dishonest agent.

The judgment should be reversed, and no new trial ordered.

EMERY J. VANCE ET AL. v. CHARLES H. WISNER, CIRCUIT JUDGE OF SHIAWASSEE COUNTY.

Receiver—Powers.

A village, claiming that a bonus by it paid to a manufacturing company was procured by fraud, filed a bill to set aside certain transfers of the property of such corporation, and to protect its rights therein. The court, pending a hearing, enjoined the officers of the company from interfering with its property, and appointed a receiver with general powers. And it is held that, while the injunction should be retained, the powers of the receiver should be limited to the protection of the property and the collection of debts.

Mandamus. Argued October 2, 1894. Granted in part October 30, 1894.

The village of Vernon entered into a contract whereby, to secure the location of a manufacturing enterprise, it advanced to the Partition Packing & Box Company the sum of $10,000, and procured for it a factory site. Subsequently, the trustees of the village filed a bill in the circuit court of Shiawassee county, in chancery, to set

aside said conveyance to the company and certain mortgages given by it upon its real and personal property, and to enforce the rights of the village therein, claiming that it was induced to enter into the contract and to make said advances through fraud and misrepresentation. Pending a hearing, the court issued an injunction restraining the officers and agents of the company from collecting, disposing of, or interfering with the property of the company, and appointed a receiver thereof, with authority to pay debts, collect claims, and continue the business generally. Relators, the defendants in said suit, apply for a *mandamus* to compel the court to vacate said orders.

Hatch & Cooley, for relators.

Albert L. Chandler, for respondent.

PER CURIAM. The appointment of the receiver will not be disturbed, but the order of appointment will be modified, limiting his power to the protection of the property and the collection of debts. The injunction will be retained.

BRUCE GOODFELLOW v. THE COMMON COUNCIL OF THE CITY OF DETROIT.

Municipal corporations—Removal of officers—Hearing—Dismissal of charges.

Under a city charter providing that the council should have power to remove certain officers for cause, a copy of the charges made, with notice of the time and place of hearing, being first served, the council, at the time assigned for hearing

charges preferred against an official, notwithstanding his protest, adjourned such hearing, upon the recommendation of the mayor, until after a certain report, regarding a matter not necessarily involved in such charges, should have been received. And it is held that such officer was entitled either to a hearing at that time, or to have a time assigned therefor; and that the indefinite action of the council must be regarded as equivalent to a dismissal of the charges.

Certiorari to Wayne. (Lillibridge, J.) Argued October 30, 1894. Judgment affirmed November 1, 1894.

Relator is a member of the board of fire commissioners of the city of Detroit, and the president thereof. The charter (§ 332, compilation of 1893) provides that any member of the board may be removed by the common council for sufficient cause, a copy of the charges preferred, with notice of the time and place of hearing the same, being first served on such member, and opportunity given him to make his defense. The mayor preferred charges of official misconduct against relator, in that he forcibly prevented an examination, by the mayor and his assistants, of the books and accounts of the commission, the charter (§ 353) providing that the same shall at all times be subject to the inspection of the mayor. At the time assigned for hearing, a message from the mayor was read before the council, stating that he had employed an expert accountant to make an examination of the accounts of the commission, and recommending that action upon the charges preferred against relator be postponed until after the report of said accountant should have been made. Upon motion, the recommendation of the mayor was concurred in, and the council refused to proceed with the hearing. Relator thereupon applied to the circuit court of Wayne county for *mandamus* to compel the council to proceed to the hearing upon such charges, or to dismiss the same. The application being denied, relator brings *certiorari*.

Fred C. Harvey (*F. A. Baker* and *George Gartner*, of counsel), for relator.

John J. Speed and *Charles D. Joslyn*, for respondent.

PER CURIAM. In this matter we deem it unnecessary to issue the *mandamus* as prayed. Relator was, without question, entitled either to a hearing upon the charges made at the time fixed, or to have a time fixed when such hearing should be had. We think that the indefinite action of the common council was equivalent to a dismissal of the charges then pending, and must be so regarded. No costs will be allowed.

DAVID B. KIRBY, ADMINISTRATOR, ETC., v. CHAUNCEY L. LADOW.

Attorney and client—Judgment—Lien—Discontinuance of cause in Supreme Court.

A party who has recovered a judgment in the court below cannot stipulate in the Supreme Court to dismiss the suit without the consent of his attorneys, if he is at the time indebted to them for services in the case, and a stipulation so entered will be set aside on their motion.

Motion to set aside stipulation dismissing suit. Argued October 30, 1894. Referred to court below November 1, 1894. Granted February 26, 1895.

Defendant recovered a judgment for costs against plaintiff in the circuit court for Calhoun county, and plaintiff removed the cause by writ of error to the Supreme Court. Before the cause was submitted, a stipulation was entered,

signed by defendant and by plaintiff's attorney, dismissing the suit without costs to either party. Defendant's attorneys, claiming a lien upon the judgment for their services, moved for an order setting aside the stipulation, upon the hearing of which defendant denied that he was indebted to said attorneys in any sum whatever.

Mains & Mains, for the motion.

L. B. Tompkins, contra.

PER CURIAM. This matter will be referred to the court below to determine, upon issues framed, whether appellee here is indebted to his attorneys, and, if so, in what amount, and report the result to this Court. In the meantime, the motion here will be held.

Subsequently the report of the circuit judge was filed, finding the defendant indebted to his attorneys, and on February 26, 1895, the motion was granted, and an order discontinuing the cause entered, subject, however, to the lien of said attorneys.

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JUDSON A. PECK ET AL. v. THE BOARD OF SUPERVISORS OF THE COUNTY OF BERRIEN.

Board of supervisors—Appointed member—Powers—Removal of county seat—Election—Ballots.

1. A township temporarily represented by an appointed supervisor has the same voice upon the board of supervisors that it had while represented by the supervisor elected to such office.

2. An appointment of a supervisor for the remainder of the term of his predecessor is a valid temporary appointment, though it may not prevent an election.

3. It was intended by the use of the word "elect," in How. Stat. § 489, which provides that, "whenever a county seat is proposed to be removed, the board of supervisors for such county shall have power, by a vote of two-thirds of all the members *elect*, to designate a place to which such proposed removal is to be made," to require the consent of two-thirds of a full board to such designation, and not to deprive townships, which should be represented by appointed supervisors, of a voice in the proceedings.

4. After a resolution designating a place for the removal of a county seat had been offered, an amendment was offered making such designation to depend upon the city so designated providing a perfect title to a good and sufficient site for the buildings, and depositing with the county treasurer a designated sum to be used in the erection of such buildings. The committee to whom the amendment was referred reported that the resolution as amended would be legal, but did not recommend the adoption of the amendment. The report was accepted and adopted. No vote was taken upon the amendment, but the original resolution was adopted. And it is held that the amendment was not a part of the original resolution as adopted, and that its omission from the notice of election is not a valid objection to the validity of the proceedings.

5. Resolutions of a board of supervisors relating to the method of submitting to the electors the question of the removal of the county seat, from their nature, must be acted upon before the question is submitted, and do not affect the question to be voted upon.

6. It is not a valid objection to the validity of proceedings for the removal of a county seat that the county board of election commissioners prepared the ballots, that they were on a separate piece of paper from the township tickets, and were deposited in a separate ballot-box.

Error to Berrien. (Coolidge, J.) Argued October 30, 1894. Decided November 2, 1894.

Certiorari to review proceedings for the removal of the county seat of Berrien county from Berrien Springs to St. Joseph. Defendant brings error. Reversed, and judgment

entered in this Court for defendant. The facts are stated in the opinion.

N. A. Hamilton, George S. Clapp, and *Lawrence C. Fyfe,* for appellant.

Edward Bacon, Spafford Tryon, and *Marshall Howell,* for petitioners.

HOOKER, J. The electors of Berrien county voted upon the proposition to remove the county seat from Berrien Springs to the city of St. Joseph, which vote was canvassed by the board of supervisors of said county, and the proposition declared carried. Upon *certiorari* to the board of supervisors, the proceedings were held to be void by the circuit court of Berrien county. The cause is here upon writ of error.

The proceedings are attacked:

1. Upon the alleged invalidity of the action of the board in submitting the proposition.
2. Upon alleged irregularities in the preparation and casting of the ballots and the counting of votes.
3. Upon questions relating to the canvass of the returns by the board of supervisors.

The resolution to submit the proposition received the votes of 18 out of 26 supervisors. Two of the 18 had not been elected, but were appointed to fill vacancies. It is contended that the votes of the two supervisors mentioned were unlawfully counted in favor of the proposition, inasmuch as they were not elected. How. Stat. § 489, is cited as authority for this contention. It is as follows:

"Whenever a county seat is proposed to be removed, the board of supervisors for such county shall have power, by a vote of two-thirds of all the members elect, to designate a place to which such proposed removal is to be made, and after a majority of the electors of such county voting thereon shall have voted in favor of the proposed location, as hereinafter provided, to make and establish such county seat."

Section 37, art. 4, of the Constitution, provides that—

"The Legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this Constitution."

How. Stat. § 729, provides for such appointment. We find no authority for the proposition that a township temporarily represented by an appointed supervisor has not the same voice upon the board that it had before the vacancy. The Constitution (article 4, § 37, cited above) contains no implication of the kind, and the statute referred to expressly provides that the appointee shall continue to discharge the duties of the office, etc. That the use of the term "elect," in section 489, has a purpose, is plain; but we think it more reasonable to believe that it was intended to require the consent of two-thirds of a full board, than that it was designed to deprive townships, which should be represented by appointive officers, of a voice in the proceedings. It was intended to preclude action by two-thirds of a quorum, or of a board whose numbers had been lessened by vacancies.

It is claimed that the appointments of the two supervisors were void because made for the remainder of the term, instead of until successors should be elected. We are not referred to the appointments of these officers, but we think such appointments as these are claimed to be would be valid temporary appointments, though they might not prevent an election.

The next question of importance refers to the proposition submitted. The board of supervisors being in session on January 5, 1894, the following resolution was offered:

"*Resolved,* that it is the sense of this board that the county seat of this county should be removed from its present location to the city of St. Joseph, and that this board does hereby designate the city of St. Joseph as the proper place to which the said county seat should be removed; and that

the question of the removal of said county seat to St. Joseph shall be, and is hereby, submitted to the electors of the said county of Berrien at the time of holding the next annual township election."

The following amendment was thereupon offered:

"That the city of St. Joseph provide a perfect title to a good and sufficient site for the buildings, and that they deposit $10,000 with the county treasurer, to be used in the erection of said buildings, on or before the 20th day of March, 1894."

A motion was made to "refer the amendment," which motion prevailed. The following is the report of the judiciary committee:

"*To the Board of Supervisors of Berrien County:*

"Gentlemen: Your committee on judiciary, to whom was referred the resolution of Supervisor Comings, of St. Joseph, for the removal of the county seat to St. Joseph, as amended by Supervisor Smith, of Galien, have had the same under consideration, and your committee would report that they have examined the statutes and the decisions of the Supreme Court upon this point, and that they are of the opinion that the submission to the people of the resolution, as amended, would be legal.

"Respectfully submitted,

"GEORGE W. ROUGH,

"W. H. BALL,

"A. J. EASTON,

"Committee."

The record proceeds:

"Mr. Tichenor moved that the report be accepted and adopted, which prevailed. * * * The question now being on the resolution offered by Mr. Comings, Mr. Comings demanded the ayes and nays. The ayes and nays being had, the resolution prevailed by the following two-thirds vote."

Upon January 6 the following resolution was adopted:

"*Whereas,* a resolution has been adopted by this board by a two-thirds vote thereof, proposing the removal of the county seat of this county, and designating the city of St.

Joseph as the place to which such removal is to be made: Therefore,—

"*Resolved,* that the proposition to remove said county seat to the said city be submitted to the electors of said county on the first Monday of April, 1894, which is the time of holding the next annual township meeting; and the county clerk shall prepare, and the sheriff shall cause to be published and posted, such notices of such election as are required by the statutes in such case made and provided;

"*Resolved,* further, that, in cities or wards where an election would not otherwise be held on said day, a special election shall be held on such day for the purpose aforesaid, in the same manner as at charter or ward elections, and the several clerks of the inspectors of election of such cities and wards shall give the like notice of such election as is by law required for special elections; and

"*Resolved,* further, that said county clerk shall prepare and cause to be distributed, for the use of the electors at the several polling places of the county on said day, a sufficient number of ballots, one-half of which shall have printed thereon, 'For the removal of the county seat,' and one-half of which shall have printed thereon, 'Against the removal of the county seat.'"

This action was followed by the following report of a committee:

"*To the Board of Supervisors of Berrien County, Mich.:*

"Messrs: Your committee to whom was delegated the authority to visit the city of St. Joseph, and view the site or several sites presented for the purpose of acceptance by the board of supervisors for county sites of county buildings, met at the city of St. Joseph on the 18th day of January, 1894, the committee being all present. They then, on said 18th day of January, proceeded to visit and view four sites presented; and your committee beg leave to report that they recommend for your acceptance the following described pieces or parcels of land, to wit: A piece or parcel of land described as follows, to wit: Bounded on the south by Ship street, on the north by Port street, on the east by Wayne street, on the west by Church street; also, a half block bounded north by Front street, on the south by Port street, on the east by Wayne street, and on the west by an alley, being one-half block of

lands, lots numbered 333, 334, 401, 402. All of which is hereby respectfully submitted.

"Dated at St. Joseph, Mich., January 18, 1894.

"J. V. PHILLIPS.
"W. RANDALL.
"C. C. BELL.
"S. H. MARTIN."

The record shows that the following proceedings were then had:

"Mr. Comings moved that the majority report [meaning the report aforesaid, dated January 18, 1894] be accepted and adopted, which prevailed. Mr. Phillips presented a bond from the city council of St. Joseph, signed by the mayor and clerk of said city, and the proceedings of the council relating thereto. Mr. Peck moved that the bond and papers relating to the proceedings of the council be referred to the judiciary committee. Mr. Peck demanded the ayes and nays. The ayes and nays being had, the motion was declared lost by the following vote."

The following election notice was published and posted:

"STATE OF MICHIGAN, } ss.
County of Berrien }

"*To the Electors of the County of Berrien, State of Michigan:*

"You are hereby notified that at the annual township election to be held in the several townships and city wards of said county on Monday, the 2d day of April, A. D. 1894, there will be submitted to the electors of said county a proposition for the removal of the county seat of said county from its present location, at the village of Berrien Springs, to the city of St. Joseph, in said county, in accordance with the following resolution passed by the board of supervisors of said county, by a vote of two-thirds of the supervisors elect, on Friday, January 5, A. D. 1894:

"'*Resolved,* That it is the sense of this board that the county seat of this county should be removed from its present location to the city of St. Joseph, and that this board does hereby designate the city of St. Joseph as the proper place to which such county seat shall be removed; and that the question of the removal of said county seat

to St. Joseph shall be, and is hereby, submitted to the electors of said county of Berrien at the time of holding the next annual township election.'

"In testimony whereof, I have hereunto set my hand and affixed the seal of the circuit court of said county this 6th day of February, A. D. 1894.

"FRED A. WOODRUFF,
[Seal.] "County Clerk."

It is claimed that this notice did not contain the proposition that was submitted by the board, in that the original resolution, *i. e.*, that of January 5, was conditioned upon a site being furnished by the city of St. Joseph, and, again, that the resolution of January 6 was contradicted by the resolution of Mr. Gard in relation to the ballots. It is also contended that the record shows that the place selected for the county seat was a piece of land consisting of certain designated lots in the city of St. Joseph, while the proposition voted upon was to remove the county seat to St. Joseph, or at most to the city of St. Joseph.

We consider these objections as overtechnical. It can hardly be said that the amendment of Mr. Smith was part of the resolution of January 5, as adopted. The amendment was referred to a committee, who reported that the resolution as amended would be legal; but the record does not show that the committee recommended the adoption of the amendment. Their report was accepted and adopted, but no vote appears to have been taken upon the amendment. The original resolution, however, was adopted.

The resolution that the clerk provide distinctive "yes" and "no" ballots, and the subsequent resolution of Mr. Gard,[1] were not designed to be submitted to the voters.

[1] Mr. Gard moved that the clerk be instructed to prepare the ballots for the election relating to the removal of the county seat in accordance with Act No. 190, Laws of 1891.

They related to the method of submission, and, from their nature, had to be acted upon before the submission, and did not affect the question to be voted upon.

As to the third contention, *i. e.*, that the proposition submitted was not sufficiently specific, we think it plain that the board never intended to deprive itself of the power to locate the county buildings. It left to the voters the question of removal to the city of St. Joseph, as clearly appears from the notice. It decided, in advance, to erect the buildings upon a site tendered by that city.

The record shows that the board were concerned about the nature of the ballots to be used. After obtaining the advice of the prosecuting attorney and Attorney General, they adopted a ballot in accordance with the advice received. The following is a copy of the ballot:

OFFICIAL BALLOT.

INSTRUCTIONS—If you desire to vote in favor of the removal of the county seat to St. Joseph, you will make a cross in the square opposite the word "Yes," which is printed below the words, "For the removal of the county seat to St. Joseph."

If you desire to vote against the removal of the county seat to St. Joseph, you will make a cross in the square opposite the word "No," which is printed below the words, "For the removal of the county seat to St. Joseph."

Before leaving the booth fold the ballot so that the initials may be seen on the outside.

FOR THE REMOVAL OF THE COUNTY SEAT TO ST. JOSEPH.

YES ☐

NO ☐

Printed by authority.

These ballots were separate from the ballots used for the election of officers. The objections made to them are:

1. That they were made by the board of election commissioners of the county.
2. That they were upon a separate piece of paper from that upon which the township tickets were printed.
3. That the two ballots were deposited in separate boxes.

It is contended that the county board of election commissioners can only act in cases of general elections, and that the defendant board erred in treating the spring election of 1894 as such. It is said that there can be but one ballot used at any election, and consequently that there can be but one box used. This seems to be based upon section 1 of Act No. 190, Laws of 1891, which section contains no mention of township officers, and Act No. 194, Laws of 1891, which provides for township boards of commissioners. The powers of county boards are not limited to providing ballots for elections where the officers named in section 1 of Act No. 190 are to be voted for. Section 9 of that act makes it their duty to provide ballots for "all proposed constitutional amendments or other questions to be submitted to the electors." Under article 20, § 1, of the Constitution, proposed amendments may be submitted at the spring election, although no officers, other than township officers, are to be voted for. It would seem to follow that there may be occasion for the action of county boards in cases not covered by said section 1. Cases of special elections for judges or county officers are apparently covered by section 1, calling for action by the board of county commissioners. It is apparent that in such cases, and at spring elections where a full State ticket is to be elected, there may be two ballots, or we must say that the township commissioners have no duties to perform. No express prohibition of a separate ballot for township officers appears in either statute, nor is there

any provision for informing the county commissioners of the township tickets, unless it be inferable from section 10. On the other hand, no provision seems to have been made for notice to township commissioners of the pendency of propositions such as the one in question. The law, in our judgment, contemplates that where State or county measures, or State or county officers to be elected by reason of a vacancy, are to be voted upon, the county commissioners may act, and in such case the ballot may be separate from the ballot containing the tickets for township officers, and separate ballot-boxes may be used, for the furnishing of which section 6 of Act No. 190 provides.

Again, it is urged that the ballots should have been separate, *i. e.*, some "for," and some "against," the proposition, as provided by How. Stat. § 491. The case of *Double v. McQueen*, 96 Mich. 39, justifies the counting of ballots prepared under Act No. 190, substantially like those in question.

This disposes of the important questions in the case. A number of questions are raised by the petition in this case, relating to the conduct of electors and inspectors of election, but we think it unnecessary to discuss them further than to say that the return shows that the inspectors caused returns of the canvass of votes in the various precincts to be made and forwarded to the county clerk, and that they were canvassed by the board of supervisors, and the result found by them was duly declared. We fail to find that in the record which would justify us in overturning their decision in the premises. See *Hipp v. Board of Supervisors*, 62 Mich. 456; *Double v. McQueen*, 96 Id. 39; *Pinkerton v. Staninger*, 101 Id. 273.

The judgment of the circuit court will be reversed, and one entered here for the defendant.

The other Justices concurred.

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s 113 559

JOHN M. FUCHS ET AL. v. HERMAN MEISEL ET AL.

Religious societies—Voluntary organization—Corporations—Use of church property—Division of congregation—Injunction—Pleading.

1. The bill in this case is held not to be multifarious.
2. How. Stat. § 4649, which provides that, "whenever any religious society or corporation shall have exercised the franchises and privileges of a corporation for the term of 10 successive years, the same shall be presumed to have been legally organized in pursuance of the laws of this State," creates only a presumption, and does not, in and of itself, change a voluntary organization, by lapse of time, into a corporation.[1]
3. A conveyance or bequest to a religious association, or to trustees for such association, necessarily implies a trust.
4. Where such a conveyance refers expressly or by implication to the constitution, by-laws, or other written documents of the organization, courts will look to the declarations thereof to ascertain the trust and the purpose for which the property was conveyed.
5. How. Stat. § 4639, which provides that "neither the canon law, nor the decrees, nor any decree or order of any ecclesiastical council or body, nor any custom or usage founded thereon, nor any custom or usage of any church, congregation, or religious society or religious order, shall hereafter be recognized or enforced in this State, so far as such law, usage, or custom shall relate to the acquisition, the tenure, or the control or disposition of any real estate, or any interest therein, or any use or trust connected or to be connected therewith," has never been construed so as to deprive those entitled to property rights, under the conclusive ecclesiastical order and decree, of a remedy which they otherwise have not.
6. While members of a church possess the right to withdraw from it, with or without reason, yet they cannot take with them,

[1] For cases involving the construction of certain provisions of Act No. 145, Laws of 1855, entitled "An act concerning churches and religious societies," etc., being, as amended, chapter 170, How. Stat., see *Wilson v. Livingstone*, 99 Mich. 594, and note; *Buettner v. Circuit Judge*, 100 Id. 179.

for their own purposes, or transfer to any other religious body, the property dedicated to and conveyed for the worship of God under the discipline of the religious association to which said church (a voluntary association) belongs; nor can they prevent the use of such property by those who choose to remain in the church, and who represent the regular church organization.

Appeal from Bay. (Maxwell, J.) Argued June 19, 1894. Decided November 7, 1894.

Bill for injunction. Complainants appeal from decree sustaining demurrer. Decree reversed, and record remanded for further proceedings. The facts are stated in the opinion.

T. A. E. & J. C. Weadock and *Judd, Ritchie & Esher*, for complainants.

Pratt, Van Kleeck & Gilbert, for defendants.

GRANT, J. The bill in this case contains, in substance, the following averments:

The Evangelical Association of North America is a religious denomination organized about 1800, under the "connectional" or "associated" form of church government, founded upon that of the Methodist Episcopal Church, and having a system of graded executive, legislative, and judicial ecclesiastical bodies and officers, and a code of rules known as the "Discipline." The territory covered by said denomination is divided into "Annual Conference Districts," in each of which is held a yearly meeting of the preachers of the denomination located within such district. Every preacher who holds a pastorate within the district must attend every session of his conference. For certain purposes of local administration, each annual conference exercises jurisdiction over all its own members, and over the congregations within its limits. By the general conference, held every four years,

bishops are elected for a term of four years. It is the special duty of a bishop to preside over the annual conferences, and, with the aid of the presiding elders thereof, to appoint at the conference session the preachers to their respective pastoral charges for the ensuing year, "the same being the only recognized method of appointing ministers in use in said denomination since its origin. Neither the lay members of the several congregations, nor the trustees thereof, according to the discipline of said denomination, have any voice or vote in the selection of their pastors, nor any power to reject a pastor who has been appointed in the manner aforesaid."

The Michigan annual conference of this denomination has been in existence over 16 years, and has always embraced within its limits all the preachers, members, and congregations of the denomination in Bay county, Mich. Each annual conference elects presiding elders, for service within its own bounds, and for terms of office not exceeding four years. Each year the conference assigns to each presiding elder a certain district within its territory for supervision. Under the discipline, a presiding elder is required to superintend the spiritual and temporal affairs of the denomination within his district, to enforce all disciplinary provisions, to hold services, and otherwise to officiate in the various houses of worship in his district, and once in every three months to call and preside over a quarterly conference, held in the house of worship of each pastoral charge. In this denomination a pastor's appointment over any particular charge lasts for one year only, though he may be reappointed at annual conference, but not more than three times in succession. A presiding elder's appointment over any particular district in like manner is good for only one year, though he may be reappointed over the same district four times in succession. Under the discipline and usages of the denomination, each

pastor and presiding elder is entitled, by virtue of his office, to certain emoluments derived from collections taken up among the members of their charges. Every pastor who is a married man is entitled to occupy the parsonage belonging to his congregation. "Stewards" are appointed in each charge, to collect funds to pay the pastor's salary, and to procure a dwelling place for him, if a married man. Under the discipline, each quarterly conference has to provide for the support of the pastor and presiding elder, and every member must contribute to their support according to his means, under penalty of trial under the church rules. The discipline also provides that each annual conference shall provide for the yearly salary of its preachers. In 1886 the Michigan conference enacted that each presiding elder should be entitled to a yearly salary of at least $500, and each pastor of the rank of elder should receive the same amount.

The discipline provides "that, when any trustee of a church of this denomination withdraws from the denomination, he shall cease to be trustee," and also that, "when any land is conveyed for the use of any congregation of said denomination, said land shall be kept in trust, to be kept, used, and maintained as a place of divine worship by the ministers and membership of the Evangelical Association of North America, with power to dispose of and convey the same, subject to the discipline, usages, and ministerial appointments of said church or association, as from time to time authorized and declared by the general conference thereof, or by the particular annual conference within whose bounds the said premises are located." In like manner with regard to parsonages, the discipline provides "that, if any land is conveyed to said denomination or any of its congregations for the erection of a dwelling-house for the use of preachers, the said land must be held in trust, to be kept, used,

and maintained as a place of residence for the preachers of the denomination who may from time to time be duly stationed in said place, with power to dispose of and to convey the same, subject to the discipline and usages of said denomination."

In the year 1878 there was organized, "as a voluntary association," by and among members of the denomination in and about Bay City, under the supervision of a preacher of said denomination, a congregation thereof under the name of "Zion's Church of the Evangelical Association of North America in Bay City, County of Bay, State of Michigan." Until the acts of the defendants herein complained of, said congregation, without dissent, always acted as, and claimed to be, a part of said denomination, and subject to its rules and usages, and to the jurisdiction of the general conference of the denomination and of the Michigan annual conference; and, in particular, said congregation always accepted as their pastor and presiding elder only such persons as had been appointed thereto according to the discipline and usages of said denomination.

"With a single exception, the said Zion's society, in each and every year after its organization, in 1878, up to the spring of 1891, solicited and received from the said Michigan annual conference an appropriation or contribution of money, for the purpose of maintaining the said society, and paying its current expenses as a society belonging to said denomination. At times such yearly appropriations amounted to $500."

In 1878, with money contributed for the purpose by members of the denomination within the bounds of the Michigan conference, and by the members of said conference, there was purchased, and in part paid for, a lot of ground in Bay City (describing the same); and, with funds derived from the same sources, said society thereupon erected upon said lot a building, which was used for a

house of worship, according to the rules and discipline of said Evangelical Association. In November, 1882, the owner of said lot conveyed the same in fee to "Zion's Church of the Evangelical Association of North America in Bay City, County of Bay, State of Michigan." The deed contains the following clause:

"This deed being made pursuant to a contract for the sale of said premises made by Jennie F. Paine to August Meisel, Frederic Koch, and August Kosky, bearing date the said 8th day of June, 1878, which contract has been assigned by said Meisel, Koch, and Kosky to the trustees of said party of the second part hereto, and said premises having been conveyed subject to said contract by said Jennie F. Paine to James T. Lawson, by said Lawson conveyed to Hiram A. Jones, and by said Jones conveyed to John W. Forsyth, above named."

Afterwards, in 1889, with funds contributed by members of the denomination both in said Zion's society and elsewhere within the bounds of the Michigan conference, and collected by preachers of said conference from persons not members, upon the representation that such contributions were to be used to erect a church of said denomination, there was erected by said society on lot 7 a new house of worship for use according to the usages and discipline of said denomination, and not otherwise. In laying the corner stone of said new edifice, the pastor in charge (being a person appointed thereto from the Michigan conference), in the presence of said congregation, and with its consent, used the forms prescribed in said discipline. These forms require the officiating clergyman to declare that "we lay this corner stone as the foundation of a house to be dedicated to the service of the Most High, according to the order and rules and for the use of the Evangelical Association." Afterwards, when completed, said edifice was dedicated under the discipline by a bishop of said denomination. The disciplinary form required the bishop to de-

clare that "we now declare, designate, and consecrate this house as the [name of the church] of the Evangelical Association of [name of place]," for divine worship and the observance of "devotional services, rules, and customs adopted and practiced in public worship by the Evangelical Association."

In November, 1884, with funds subscribed by members of the Evangelical Association, and solicited by the pastor in charge (appointed from the Michigan conference), there was purchased by the said Zion's society another lot (number 6) in Bay City. Such lot was conveyed by the owner to "the Zion Church of the Evangelical Association of North America in Bay City, County of Bay, State of Michigan." In the early spring of 1889, said Zion's congregation solicited and received from said Michigan annual conference $500, to be used in part payment for a parsonage to be erected on said lot 6. With the money so donated, and with other funds contributed by the members of the denomination, there was erected on said lot a parsonage "for the use, as a dwelling-house, of the preacher who should be duly appointed at the Michigan annual conference as the pastor of said congregation under the discipline."

Until 1893 no person had ever been admitted to membership in said congregation except such as were members of the denomination; and no one had acted as trustee or officer of the congregation except persons who had been admitted to the denomination and into said congregation according to the rules of the denomination.

At a regular session of said Michigan conference, in April, 1890, the complainant Rev. George A. Hettler was elected presiding elder for the ensuing four years; and at a session of said conference in April, 1893, the district which includes said Bay City charge was assigned to said Hettler for the ensuing year. Said Hettler is a duly-

ordained elder of the denomination, and a member of said conference, and was such prior to 1890. The complainant Rev. John M. Fuchs is a duly-ordained elder of the denomination, and a member of said Michigan conference. At the session of said conference held in April, 1893, he was appointed by the presiding bishop, with the aid of the presiding elders of said conference, pastor of said Zion's Church. Said complainant is a married man. Since their appointment, as aforesaid, said Hettler and Fuchs have endeavored to enter said church, and officiate therein as presiding elder and pastor, respectively; and said Fuchs has demanded from defendants the possession and the right to occupy the said parsonage. But the defendants and their adherents in said congregation have excluded both of said complainants from the church and said Fuchs from the parsonage, and have denied their official authority, and threaten to continue so to do, and to exclude them "from the enjoyment of any perquisites or emoluments belonging to the office of presiding elder and pastor, respectively, of said charge;" but they recognize the defendant Schneider as their lawful pastor, and they admit him into said church as pastor, and permit him to receive the collections taken up for the pastor's salary, and have admitted him into the occupancy of the parsonage; and they threaten to continue thus to support said Schneider in the possession of said office, and the use of said church and parsonage.

"In March, 1893, the defendants (save and except Schneider) and their adherents in the said congregation formally resolved and declared that they would no longer submit to the authority or the rules of the officers of the constituted tribunals of the said Evangelical Association, but that they would separate from and be independent of the said Michigan annual conference in all respects, and they notified said conference of this resolution."

The complainants Hebinger and Fenske are now, and

for some years past have been, members of the denomination and of the said Zion's Church, and have attended worship at the latter, and have contributed to the support of said congregation. Said Hebinger has not attended services since the defendant Schneider has been acting as pastor, because he believed said Schneider not to be the lawful pastor. Besides the complainants, "there are a large number of the members of said congregation who dissent from such unlawful acts and proceedings, and who still adhere to the said Evangelical Association and its rules, and still recognize and submit to the authority of the complainants Hettler and Fuchs, respectively, as their presiding elder and duly-appointed pastor, and who desire the said church edifice and parsonage to be used by said Hettler and Fuchs as by the discipline required and permitted, as aforesaid."

The defendant Schneider now holds, and refuses to surrender, the books and papers pertaining to the affairs of the congregation, which, under the discipline and usages of the denomination, rightfully belong to the custody of the lawful pastor; such as the registers of marriages, births, deaths, etc., the membership lists, and the financial accounts of the congregation. Since April, 1893, the stewards of the congregation have collected funds applicable, under the usages of the denomination, to the payment of the pastor's salary. Part of said funds have been paid over to defendant Schneider. Defendants and their adherents threaten to continue to take up such collections, and pay them to said Schneider, to the extent of at least $600 per annum; and they pretend that they have hired the services of said Schneider, for a year or more, as pastor.

In excuse of these unlawful acts, defendants and their adherents pretend that the said Michigan conference of 1893 was not a lawful conference of the Evangelical

Association, and that, therefore, complainant Hettler's appointment over the presiding elder's district, and the complainant Fuchs' appointment as pastor, were not valid. In this regard complainants say that said Michigan conference of 1893 was composed of the preachers within the district theretofore duly fixed by general conference, and duly qualified under the discipline to be members of said body, and that the time and place at which it was convened had been duly fixed the preceding year by the presiding bishop, and a majority vote of said conference duly convened. The bishop presiding when complainant Fuchs was appointed pastor had been elected as bishop by a general conference of the denomination held in October, 1891, at Indianapolis. The bill then sets forth facts to show the regularity and validity of said Indianapolis body as a general conference of this church.

Prior to assuming the office of pastor of Zion's Church, defendant Schneider had withdrawn from the Michigan conference and from the Evangelical Association.

Complainants file their bill on behalf of the members of the denomination and of the Michigan conference, "and especially on behalf of the members of said Zion's Church congregation at Bay City who still adhere to the said Evangelical Association." The defendants (except Schneider) are the trustees of said Zion's Church, "and, as such, have the actual possession of the said church edifice and parsonage, and are exercising control thereover."

The relief prayed is as follows: That defendants be restrained from interfering in any way with the complainant Hettler in the discharge of his duties as presiding elder of said congregation, and in taking up collections from said congregation for his salary; from withholding from said Hettler funds heretofore collected from said congregation as and for the salary of the presiding elder; from preventing Hettler from entering the church,

and officiating therein as presiding elder, and from holding his quarterly conferences therein; from interfering with complainant Fuchs in the discharge of his duties as pastor; from preventing his entrance into the church, and from interfering with his collection of contributions for his salary; from withholding from said Fuchs funds already collected as and for the pastor's salary; from excluding Fuchs from the parsonage; from withholding from said Fuchs the said records, registers, etc., pertaining to the congregation, and lawfully belonging to the custody of the pastor; that defendant Schneider be restrained from acting as pastor of said congregation, from officiating in and about said church edifice as pastor, and from taking up collections from said congregation for pastor's salary; that the defendants account for moneys heretofore collected by them (as and for pastor's and presiding elder's salary) from said congregation, and be decreed to pay over the amount, when ascertained, to the complainants; that the rights of the respective parties be ascertained and decreed.

A demurrer was interposed, stating the following reasons:

1. That the bill covered "distinct matters and causes, in several whereof the complainants are not in any manner in common or jointly interested or concerned."
2. That the bill is multifarious.
3. That the bill states no cause for relief of any kind.

The demurrer was sustained.

1. We see no force in the contention that the bill sets forth no grievance common to all the complainants, and seeks no common relief. The complainants are interested in the same subject-matter, and all claim one common right to use the church, although in different ways. Fuchs, as pastor, and Hettler, as presiding elder, are entitled to the use of it for the purpose of conducting divine worship. Fuchs is entitled to the use of the parsonage in connection with the church, and the other

complainants are entitled to the use of the church for the purpose of worship according to its discipline and usages. We therefore think the bill is not multifarious.

2. While the bill alleges that Zion's Church at Bay City is not a corporation, but a voluntary association, it is nevertheless insisted that it is a corporation, because the bill shows that it has exercised the franchises and privileges of a corporation for a term of more than 10 successive years; that it has bought and held real estate in its corporate name, has erected a church and parsonage, and that all its temporal affairs are controlled by a board of trustees. It is therefore argued that its rights must be controlled by the same rules that apply to religious societies duly incorporated. In support of this, section 4649 of Howell's Statutes is cited. This section provides that—

"Whenever any religious society or corporation shall have exercised the franchises and privileges of a corporation for the term of 10 successive years, the same shall be presumed to have been legally organized in pursuance of the laws of this State."

This statute creates only a presumption. It does not of itself change a voluntary organization, by lapse of time, into a corporation. It was held in *Smith v. Bonhoof*, 2 Mich. 128, that, under this statute, "no church can become incorporated, provided the powers conferred by the statute upon the corporators are, by the constitution, laws, or usages of the church, lodged in another body." See, also, *Allen v. Duffie*, 43 Mich. 3; *Methodist Church v. Clark*, 41 Id. 730. The allegation, therefore, that the church is a voluntary association, must be assumed as true.

3. It is next argued that no trust is created by the conveyance in favor of the Evangelical Association of North America; that, therefore, the legal title is in the local church; and that the Evangelical Association of North

America obtained no right to the church property or its use, under the statute abolishing uses and trusts. The complete answer to this argument is that the general association is not a complainant in this case, nor is it seeking to enforce any title to or claim over the property. The complainants claim the right to its use under the discipline and usages. A conveyance or bequest to a religious association, or to trustees for that association, necessarily implies a trust. The deed in this case shows that the contract was made to certain persons as trustees for the church, and that the deed was made pursuant to that contract. We would naturally look to the written declarations in the constitution, by-laws, and written documents of the organization to ascertain the trust and the purpose for which the property was conveyed. If the deed refers expressly or by implication to such writings, courts will look there for the declaration of the trust. It is by no means clear that these defendants, who are now the trustees, are in position to set up the statute of frauds. Neither the grantor nor any other person claiming under him is setting up this claim. Both parties claim under the same conveyance. In *Lynd v. Menzies*, 33 N. J. Law, 166, it is said:

"The imperfection relied on was the absence of an incorporation. But the want of this quality does not at all affect the rights and duties of pastor and people towards each other. The effect of becoming incorporated is to facilitate the acquisition and transfer of property, and to enable the congregation to be represented in the convention of the diocese. But by the canonical law of this denomination of Christians, it is not necessary, in order to constitute a church, that the congregation should take the form of an incorporated body. Indeed, the very law of this state which provides for the incorporation of this class of churches presupposes and requires that there shall be, antecedent to the inception of proceedings, 'a congregation of the Protestant Episcopal Church in this state, duly organized according to the constitution and usages of said

church.' In the case now before us, it plainly appears that this church was constituted in conformity to the ecclesiastical law and usages applicable to it, and the consequence is that the plaintiff, by his official connection with it, acquired all the customary powers and privileges pertaining to the rectorship."

In any view of the case, the allegations of the bill are sufficient to require an answer and proofs.

4. The principal and important question in the case is whether the trustees and the members of this local church at Bay City can, by a majority vote, withdraw its connection with the general body, take the church property with them, set aside the itinerant plan, and deprive their regularly appointed ministers of its use. In this determination the allegations of the bill alone can be considered. *Ex parte* affidavits, which were used upon the hearing for a preliminary injunction, cannot be considered in the nature of an answer, and must be entirely excluded from this discussion.

It is insisted that under How. Stat. § 4639, the violation of church discipline and church law is to be corrected by ecclesiastical tribunals, and that the State courts have no jurisdiction. Courts, of course, will not set aside the decrees and orders of ecclesiastical courts involving the construction of their own articles of faith or discipline. But this statute has never been so construed as to deprive those entitled to property rights, under the conclusive ecclesiastical order and decree, of a remedy which they otherwise have not. *Buettner v. Circuit Judge*, 100 Mich 179, does not aid the defendants, for it was there said that "both parties must first exhaust the remedies afforded by the ecclesiastical body before the courts will consider the questions involved." See, also, *Smith v. Bonhoof*, 2 Mich. 115, where is found an able discussion of this provision of the statute. Nor is this case ruled by that of *Wilson v.*

Livingstone, 99 Mich. 594. In that case the church was a corporation organized under the statutes of this State, and the difference between such a corporation and the case of a voluntary society was expressly recognized. It was there stated that "the obligations and rights of the members of a voluntary society are to be measured by their articles of association or constitution."

In the present case the bill recognizes the defendant trustees as the lawful trustees, in charge and in possession of the church property. No attempt is made to deprive them of its control or possession when used in a legitimate manner. The only purpose is to compel them to permit the use of the church and parsonage according to the discipline, rules, usages, and polity of the church. It is immaterial in whom the legal title stands. One party may hold the title, and another be entitled to the use and possession of the property; or, as in this case, both may be entitled to its joint use and possession. It may be admitted for the purposes of this hearing that the title is in the local society or its board of trustees. The question is not, as in many of the cases cited in the briefs of counsel, in whom is the title to the property? but, in whom is the right to its use for religious worship both as pastor and layman? The bill sets forth fully the history, the discipline, and polity of the church, the title of complainants Hettler and Fuchs to the offices which they hold, and the right to the use of the church property to which said officers are entitled. The question presented relates exclusively to property rights, over which the proper courts have almost universally exercised jurisdiction. If the defendants' position be the true one, it follows that they are in no manner bound to the faith and tenets of this church, and that they may withdraw, and take the property to any other denomination of Christians.

The plan of the Evangelical Association is identical

with that of the Methodist Episcopal Church. The itineracy of its clergy is one of its chief distinctive and fundamental principles. The church at Bay City entered into the voluntary association with full knowledge of its discipline, rules, and usages, and agreed to be bound thereby. Its property was not purchased with funds raised entirely by its own members, but in part by members of the Michigan conference and others, for the purpose of erecting a church of said denomination. The building was consecrated in accordance with its discipline, and for many years, and until after the schism in the church, the local body at Bay City accepted the pastor and elder appointed by the proper authorities. The churches of this body, when they entered it, voluntarily surrendered the right to choose their own pastor, and agreed to accept the pastor appointed by the bishop with the aid of the presiding elders.

Many authorities might be cited sustaining the rights of complainants, but we shall refer to but few. They may be found in the briefs of counsel.[1] This religious body is nearly identical in its discipline with that of the Methodist Episcopal Church. In each the itineracy of the clergy is one of the articles of its discipline. The right of the trustees of a local church of that denomination to close its doors against a pastor appointed by the bishop was passed upon in *Whitecar v. Michenor*, 37 N. J. Eq. 6, a case identical in its facts with the present one. The trustees in that case closed the building against the duly-appointed pastor,

[1] Counsel cited: *Bear v. Heasley*, 98 Mich. 279; *McGinnis v. Watson*, 41 Penn. St. 9; *Sutter v. Trustees*, 42 Id. 503; *Winebrenner v. Colder*, 43 Id. 244; *Schnorr's Appeal*, 67 Id. 138; *Roshi's Appeal*, 69 Id. 462; *Schlichter v. Keiter*, 156 Id. 119; *Jones v. Wadsworth*, 11 Phila. 227; *Church v. Wood*, 5 Ohio, 283; *Harrison v. Hoyle*, 24 Ohio St. 254; *Watson v. Jones*, 13 Wall. 679; *People v. Steele*, 2 Barb. 397; *Den v. Pilling*, 24 N. J. Law, 653; *Gibson v. Armstrong*, 7 B. Mon. 491; *Curd v. Wallace*, 7 Dana, 190; *Ferraria v. Vasconcelles*, 23 Ill. 456.

on the ground that it was not for the interest of the church that he should be its pastor, and that he was appointed against the wishes of the majority of its members. The court say:

"It is not claimed that there is any warrant in the discipline of the church for the action of the trustees, nor that the discipline provides that the wishes of the majority of the members shall determine whether the preacher appointed to the charge shall act as such or not. If the church belongs to the Methodist Episcopal connection, as it is admitted it does, there is no warrant of law, discipline, or usage for the acts of the defendants. What is known as the itineracy of the preachers and the absolute power of the bishops over the appointments of the preachers to the churches is part of the discipline."

An injunction was issued in that case to prevent the trustees from closing the church building against the regularly appointed pastor. In a foot-note to that case are collated many authorities bearing upon the question, as well as upon the jurisdiction of a court of equity to grant an injunction.

Counsel for defendants, in their brief, admit that the local church at Bay City adheres to the faith of the Evangelical Association, and they say that the church services and Sunday school are conducted in the same manner and in the same faith as before, and that it withdrew in order to keep away from the factions of the association. The reasons for such action are stated in the brief. In the freedom of conscience and the right to worship allowed in this country, the defendants and the members of this church undoubtedly possessed the right to withdraw from it, with or without reason. But they could not take with them, for their own purposes, or transfer to any other religious body, the property dedicated to and conveyed for the worship of God under the discipline of this religious association; nor could they prevent its use by those who chose to remain in the church, and who represent the

regular church organization. If complainants maintain the allegations of their bill,—that they represent the regularly organized body of the church, and are its regular appointees,—they are entitled to the relief prayed.

The decree of the court below is reversed, and the case remanded for further proceedings, with costs of both courts.

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

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THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY v. THE CITY OF GRAND RAPIDS ET AL.

Railroad companies—Exemption from taxation—Local improvements—Collection of assessment.

1. The exemption from taxation granted to the Michigan Southern Railroad Company under its special charter does not apply to lines organized under the general railroad law of the State, and thereafter leased and operated by said railroad company.
2. The contention that the words "in lieu of all other taxes," as used in How. Stat. § 3360, which provides that the specific tax paid by a railroad company organized under the general railroad law shall be in lieu of all other taxes upon the property of such company, etc., preclude the levying by a city of special assessments for local improvements, cannot be sustained.
3. Terminal property of a railroad company, consisting of a freight house and a portion of its road-bed and right of way, cannot be sold, under the provisions of a city charter, for non-payment of assessments thereon for local improvements.
4. The validity of an assessment for benefits upon a portion of the right of way and road-bed of complainant's road, including a freight-house on said right of way, occasioned by the paving of the street upon which said assessed property abuts, is sustained. The sale of said property to satisfy said assessment is

set aside, but without prejudice to the right of the defendant city to proceed to the enforcement of the assessment in such mode as it may deem best.

Appeal from the superior court of Grand Rapids. (Burlingame, J.) Argued June 23, 1894. Decided November 7, 1894.

Bill to vacate an assessment for local improvements, to enjoin the execution of a deed on a sale of the property to satisfy the assessment, and to restrain any further sales. Complainant appeals from decree sustaining demurrer. Decree reversed, and one entered in this Court in accordance with the opinion. The facts are stated in the opinion.

C. E. Weaver and *FitzGerald & Barry* (*Francis A. Stace,* of counsel), for complainant.

William Wisner Taylor, for defendants.

LONG, J. On April 24, 1891, the common council of the city of Grand Rapids determined, by resolution, to pave a part of West Bridge street, including the part which passes the complainant's railroad and freight house. The pavement was constructed, and on January 11, 1892, the common council designated the district benefited, which included the north 100 feet of complainant's premises, and assessed complainant for benefits therefor the sum of $846.50, the premises being valued at $1,500. From this assessment complainant appealed to the common council, on the ground that its lands were not liable to assessment for such improvements. This claim was denied by the common council, and the assessment roll was confirmed on March 21, 1892. The assessment was to be paid in five annual installments. The first was not paid, and the land was sold by the city marshal for the amount of the same and costs of sale, on November 4, 1892. The second in-

stallment not being paid, it was returned by the treasurer to the city clerk. The city charter provides (title 6, §§ 33, 41) for the execution of a deed by the mayor at the expiration of one year from the date of sale. This bill was filed September 29, 1893, for the purpose of vacating the assessment as illegal, on the ground that the complainant is not liable to assessment for this municipal street improvement, and that its premises are not benefited or susceptible of benefit thereby, and to enjoin the mayor from executing a deed on the sale for the first installment, and the marshal from selling on the second. The defendants demurred generally to the bill. The court sustained the demurrer, and dismissed the bill.

The contentions of the complainant are:

1. That, under the special acts of the Legislature by which it is incorporated, it cannot be assessed or taxed for municipal street improvements.
2. That, under the general railroad law, it cannot be so assessed or taxed.
3. That the charter of the city of Grand Rapids does not authorize the assessment of such tax on the lands of complainant used and operated in the exercise of its franchises.
4. That the lands of complainant so used are not susceptible of benefit from a street improvement, and for that reason cannot be assessed.

The Michigan Southern Railroad Company was originally organized under a special charter. Laws of 1846, p. 170, Act No. 113. By its charter it is provided:

"The said company shall pay to the State an annual tax of one-half of one per cent. upon the capital stock paid in, including the $500,000 of purchase money paid or to be paid to the State, until the first day of February, 1851, and thereafter an annual tax of three-fourths of one per cent. upon its capital stock paid in, including the $500,000 of purchase money aforesaid, and also upon all loans made to said company for the purpose of constructing said railroad, or purchasing, constructing, chartering, or hiring of steamboats authorized by this act to be held by

said company, which tax shall be paid in the last week in January in each year to the State Treasurer; and the property and effects of said company, whether real, personal, or mixed, shall, in consideration thereof, be exempt from all and every other tax, charge, and exaction by virtue of any laws of this State now or hereafter to be in force, except penalties by this act imposed."

Afterwards, in the year 1855, an act was passed by the Legislature to authorize the Michigan Southern Railroad Company to consolidate with the Northern Indiana Railroad Company. Laws of 1855, p. 300, Act No. 138. This act contains the following provision:

"The said corporation so to be organized by virtue of this act shall continue subject to the same rate of tax as though such consolidation should not take place, and the amount of its capital and loans hereafter upon which such taxation shall be paid shall be such portion of the whole of its capital and loans as is actually employed in the State of Michigan,"

It is contended that the words "tax, charge, and exaction," employed in the statute, cover every kind of assessment which can be made under the taxing power of the State, and that, under this special act by which complainant was incorporated, it cannot be assessed or taxed for municipal street improvements.

The act of 1846, for the organization of the Michigan Southern Railroad Company, also provided for the sale of the Southern Railroad, and for the right of the newly-organized company to purchase it. The new company was authorized to build a road from the city of Monroe, passing through Petersburg, Adrian, Hillsdale, thence to Coldwater, and thence to Lake Michigan, on the line theretofore established as the line of the Southern Railroad by the State, or anywhere further southward than said line; and also from the junction of the Tecumseh branch with the Southern Railroad, to pass through the villages of Tecumseh and Clinton, to the village of Manchester, in

the county of Washtenaw. The Michigan Southern Railroad was to construct and put in operation its road from Hillsdale to Coldwater within four years, and from Coldwater to the St. Joseph river within eight years, and from the St. Joseph river to Niles within twelve years, and within three years put in operation the Tecumseh Branch to the village of Jackson, along the line of railroads formerly authorized to be constructed by the Jacksonburg & Palmyra Railroad Company. The act further provided that the line of railroad thus completed should constitute a continuous line of railroad from the waters of Lake Erie, in the city of Monroe, to Lake Michigan. The scope of the act, therefore, was to build a line of railroad across the State from east to west, through the several places named, and to complete the branch from Tecumseh to Jackson. It was this company, organized to construct and operate this road, to which the act of 1846 applies. The act of 1855 authorized the Michigan Southern Railroad Company to consolidate with the Northern Indiana Railroad Company, but in no manner changed the rate of taxation. *State Treasurer v. Auditor General,* 46 Mich. 224. Afterwards, the consolidated company organized under the name of the Lake Shore & Michigan Southern Railway Company. Thereafter the complainant company leased or otherwise acquired the control of the railroad extending from White Pigeon, St. Joseph county, to the city of Grand Rapids, and has since operated it in its own name. It was no part of its original line, and it is not disputed that the portion from Kalamazoo to Grand Rapids was originally known as the "Gardner Road," and was organized under the general law of this State.

Whatever the rights of the complainant company may be under the act of 1846 as to taxation, that act cannot be made applicable to this leased road, it being organized under the general railroad law. The exemption from taxation

under the act of 1846 was a special privilege granted to the Michigan Southern Railroad Company, and it cannot be extended to such lines as that company might thereafter lease and operate, which were organized under the general railroad law of the State. In fact, the rule seems to be much narrower than this; that is, that the exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to. In a note to Cooley on Taxation (2d ed. p. 212) it is said (quoting from *Railroad Co. v. Railroad Commissioners,* 112 U. S. 609):

"This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirement of the grants construed *strictis-simi juris.*"

In the case cited it appears that the railroad company exempt from taxation had attempted to transfer its franchises to another corporation, which therefore claimed the exemption, and filed its bill to restrain taxation. The bill was dismissed, the Court saying:

"The exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor."

No such intention can be found in the statute of 1846.

It is claimed, however, that, under the general railroad law of this State, this property cannot be made liable for local improvements of this character. It is provided by the general railroad law (How. Stat. § 3360) that a tax shall be paid by every company formed under its provisions to the State Treasurer, based upon a percentage of the gross income of the company, and that the tax so paid

"shall be in lieu of all other taxes upon the property of such companies, except such real estate as is owned and can be conveyed by such corporation under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road." It is contended that the words "in lieu of all other taxes" preclude the levying of such assessments for local improvements.

We are satisfied that this contention cannot be sustained. As said by Mr. Justice COOLEY:

"It is a very just rule that, when an exemption is found to exist, it shall not be enlarged by construction. On the contrary, it ought to receive a strict construction; for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that, unless the privilege is limited to the very terms of the statute, the favor would be extended beyond what was meant." Cooley, Tax'n (2d ed.), p. 205.

Speaking of local assessments, the learned author says, on page 207:

"The most striking illustration of the rule of strict construction of exemptions is seen in the case of special assessments for local improvements, such as the paving and repair of streets, etc. It is almost universally held that a general exemption from taxation will not extend to such assessments. In the leading case, the words of the exemption were that no church or place of public worship 'should be taxed by any law of this state.' Upon this the court remarked: 'The word "taxes" means burdens, charges, or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives of the word "talliage" (2 Inst. 232); and Lord Holt, in Carth. 438, gives the same definition, in substance, of the word "tax." The legislature intended by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister, not exceeding in value $1,500. But to pay for the opening of a street in the ratio of the benefit or advantage derived from it is no burden. It is no "talliage" or "tax," within the mean-

ing of the exemption, and has no claim upon the public benevolence.'"

Judge Dillon, in his work on Municipal Corporations (§ 777), speaking of the strictness with which these statutes are construed, says:

"Although an 'assessment' is in the nature of a tax, and is authorized by or is a branch of the taxing power, yet a general statute exempting certain property—as, for example, churches—from '*taxation* by any law of the state' does not exempt it from liability for a street assessment." *In re Nassau Street*, 11 Johns. 77.

It was held in *State v. City of Newark*, 27 N. J. Law, 185, that a railroad charter exempting the company, in consideration of the payment of a certain tax, from any "other or further tax or imposition" upon it, does not exempt it from liability for an assessment upon houses and lots owned by it, and benefited by the opening and widening of a street; but that the corporation cannot for such a purpose be assessed without reference to the special benefit conferred upon property owned by it, as such an assessment would be in fact a tax, from which it is exempt. See, also, *Railroad Co. v. City of New Britain*, 49 Conn. 40; *City of Ludlow v. Trustees*, 78 Ky. 357.

But Judge Dillon says (§ 778):

"Aside from the rule of strict construction which applies to exemptions from taxation, the cases cited in this and in the previous section will show that there is, in their ordinary use, a recognized *difference between the words 'tax' and 'assessment,'* and that the one does not always or usually include the other. Thus, a constitutional provision that 'taxation shall be equal and uniform throughout the state' does not apply to local assessments upon private property to pay for local improvements. So a provision of the constitution of a state which requires 'the rule of taxation to be uniform,' in connection with another provision that 'it shall be the duty of the legislature to provide for the organization of cities, and to restrict their power of taxation, *assessment*, etc., so as to prevent abuses in *assessments* and taxation,' is construed not to apply to special *assess-*

ments by municipal corporations, made by authority of the legislature, for local improvements,"—citing *Weeks v. City of Milwaukee*, 10 Wis. 242.

It is evident that the great weight of authority upholds the doctrine that assessments for local improvements are not within the general exemption from taxation. Under the general railroad law of this State, the taxes mentioned are such burdens, charges, or impositions as are put or set upon persons or property for public uses; and this law has no reference to special assessments for local improvements in the ratio of the benefit or advantage to be derived from them. It is apparent from the statements in the bill that certain benefits are derived to this property by the improvement made. The proportion of these benefits is determined by the local officers.

But a more serious question is raised by counsel for complainant. It is insisted that the mode of collection of the tax fixed by the charter cannot be adopted and carried out as against the complainant, a railroad corporation. The proceedings prescribed by the charter for the collection of the taxes are as follows: After the assessment roll has been made and confirmed by the common council, it shall be delivered by the city clerk to the treasurer of the city. Ninety days after the receipt of the assessment roll, the treasurer shall return it to the city clerk, with a list of the real estate on which the assessment has not been paid, stating the amount of the tax and collection fees on each parcel, and the names of the persons to whom assessed. Within 30 days after the return of such list, the clerk shall cause the list to be published in a newspaper, with a notice of sale. The marshal shall attend the sale, and act as auctioneer. If no person bids the amount of the assessment, the lands shall be struck off to the city of Grand Rapids. No bid for less than the assessment, fees, and expenses, with interest, shall be received; and the land

may be redeemed within one year on payment of the amount for which it was sold, with interest from date of sale at 25 per cent. If not redeemed, the mayor shall execute a deed to the purchaser. The city is empowered to hold, occupy, enjoy, use, possess, lease, incumber, and convey lands bid off to it at such sales as fully and completely as a natural person. At the time of this assessment, no other means were provided by the charter for the collection of such assessments. It is claimed by counsel that a railroad is an entirety, and cannot be cut up and taxed and sold for taxes in parcels; that such a proceeding would result in a destruction of the franchise, and destroy the availability of the road to the public, who are entitled to its benefits as a means of transportation.

In *City of Detroit v. Detroit City Railway Co.*, 76 Mich. 421, 427, it was said:

"But these tracks are only special adaptations, for a particular use, of the surface of public highways, and, under our laws concerning levy and sale on execution, each track would be sold as a whole to the bidder for the shortest term of years to collect tolls for the use of it. * * * The right to use the tracks is inseparable from the franchises, and, it not being taxable as land, it should properly be taxed as an entirety to the corporation."

In *Hackley v. Mack*, 60 Mich. 591, 604, it was said:

"We have no law that we have yet discovered, and certainly none has been pointed out to us, which authorizes the sheriff to levy upon the track or road-bed of a railway, even against the corporation. If any levy can be made upon the property of the company, aside from such goods and chattels as may be found and seized and taken into custody by the sheriff, it is only on the franchise of earning tolls, as provided by the corporation laws."

In *Applegate v. Ernst*, 3 Bush, 648, the court said:

"The railroad, from one end to the other, is an entirety, and as a whole only may be subject to taxation or coercive

sale. Fragmentary taxations or sales might be unjustly vexatious and injurious to the owners, pervert the destination of the road, *and disturb the public use and interest.* To avoid such evils and absurdities, the law treats a railroad and all its appurtenances as one entire thing, not legally subject to coercive severance or dislocation. In that consolidated character it must be taxed for state revenue, and cannot be a fit subject for local taxation by the separate counties through which it runs."

In the case of *Georgia v. Railroad Co.*, 3 Woods, 434, 438, Mr. Justice Bradley, speaking in reference to a tax levy made on the depots, freight houses, passenger houses, and offices of the company for taxes due the state, says:

"It cannot be supposed that the legislature, in authorizing its construction, and granting peculiar franchises for its operation and use, ever intended that execution creditors might levy upon parcels of it, and cut it up into sections, and destroy it as a great public thoroughfare. Such a supposition seems to us preposterous. Suppose a mile of the road should be levied on and sold, would the purchaser have a right to fence it in, and take up the rails and cross-ties, and plant it, and thereby destroy the railroad? Could this be done without contemning the power of the state by which it was created and made a public highway? We think not."

In *Porter v. Railroad Co.*, 76 Ill. 561, it was held that, if a railroad was to be assessed at all, it must be as an entirety.

These cases arose under a claimed power of taxation by the state or by counties, or attempted levies under executions, and not under local assessments; but the reasoning is equally applicable against sales for local assessments where the attempt is made to collect by sale of the road-bed, or, as in this case, the freight house, road-bed, and right of way.

It is said, however, that this was a terminal of the road, and the rights of the public could not be affected by the sale of such terminal. We cannot accede to this. The

sale of the freight houses and terminal of right of way and tracks might seriously affect the business of the company and the rights of the public. In *Railroad Co. v. Trustees*, 7 Hun, 652, an assessment was made upon a part of the road-bed of plaintiff for benefits in opening a street. Proceedings were had to set aside the assessment; and it was held that the defendant could not sell the entire road-bed, nor any lands necessarily used by plaintiff for the purpose of its franchise. The case was, however, ruled as coming within section 59, chap. 277, Laws of 1864, defining and limiting the powers of the trustees.

It is suggested, though not strenuously contended, by counsel for defendants, that though no sales may be made of the real estate assessed for the purpose of paying this tax, yet the assessment against the property is valid, and may now be collected from the personal property of the complainant, under and by virtue of the amendment to the city charter in 1893, contained in title 6, § 10, Act No. 418, Local Acts of 1893. That section provides:

"At the time of the delivery of the assessment roll to the city treasurer, the mayor shall attach his warrant thereto, commanding him to collect the assessment therein contained, together with the fees hereinbefore prescribed, within 90 days from the date thereof; and further commanding and authorizing said treasurer, when he may deem it necessary so to do, to levy and collect the same by distress and sale of any personal property upon such premises belonging to the premises chargeable to said assessment."

Just what personal property there may be "upon such premises belonging to the premises chargeable to said assessment" it is difficult to perceive; or just what this provision means is difficult of ascertainment. If there were a general clause in the charter authorizing the collection from the personal property of the corporation, we could see no difficulty in enforcing the collection, as we are of the

opinion that though the lands and premises assessed cannot be sold for the tax, for the reasons before stated, yet the assessment for the local improvement is valid. The only question in this case is the mode of collection. Whether there is any law under which the city can now proceed for the enforcement of the payment of the tax is doubtful. None has been pointed out, and it may need further legislation on the subject to enable the city to collect.

The decree of the court below must be reversed, and decree entered here in favor of complainant, setting aside the sale of the premises, and releasing the levies under the tax warrant as to the other years. The assessment for benefits will not be disturbed, but will stand as a valid and subsisting assessment upon the property for the improvement thus made. The relief granted is without prejudice to the defendant city to proceed to the enforcement of the assessment in such mode as it may deem best.

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

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THE CITY OF BENTON HARBOR v. THE ST. JOSEPH & BENTON HARBOR STREET RAILWAY COMPANY.

Mandamus—Impossibility of performance of duty—Street railways —Paving between rails and tracks.

1. Where in a *mandamus* case no issue is asked by the relator, the statement of facts contained in the answer must be taken as true.
2. *Mandamus* will not lie to compel a street-railway company to

comply with the provisions of an ordinance requiring it to pave the street between its rails and tracks where it appears from its answer that, owing to the financial straits in which it is placed, it is impossible for its officers to borrow or otherwise raise the money to pay for such paving.[1]

Mandamus. Argued October 23, 1894. Denied November 7, 1894.

Relator applied for *mandamus* to compel respondent to pave certain streets between its rails and tracks, etc. The facts are stated in the opinion.

Charles N. Sears (*Thomas O'Hara,* of counsel), for relator.

W. C. Hicks (*M. L. Howell,* of counsel), for respondent.

LONG, J. This is an application for *mandamus* to compel the respondent company to pave between its rails and tracks, and to pave 12 inches outside its tracks, within a certain district in the city of Benton Harbor.

The respondent corporation was organized under the laws of this State in 1881, and in that year obtained a franchise from the village of Benton Harbor (now a city), and operated a horse railroad up to the year 1892. On April 26, 1889, the common council of the village of Benton Harbor passed an ordinance authorizing a double track in certain portions of the village, and requiring the respondent company to plank, macadamize, or gravel the space between the tracks and between the rails of each track, and to place guard planks or macadam on the outside of the outer rail of each track 12 inches in width, and to keep the whole in good repair. This ordinance was accepted by the respondent company, and it claims that it was passed with the understanding that electric

[1] See *State v. Railway Co.*, 24 L. R. A. 564, and note, as to compelling the operation of a railroad by *mandamus.*

power might be used, but this fact does not appear in the ordinance. On June 5, 1891, the village of Benton Harbor became incorporated as a city, under that name. On December 12, 1891, the respondent company petitioned the city council to pass an ordinance authorizing and permitting it to substitute and use electricity as the motive power. The council, on that same evening, passed a resolution which provided that the company be granted a franchise to operate its present system by electricity, subject to the terms and conditions of an ordinance to be approved by the city council and accepted by the company. It is claimed that on December 14, two days afterwards, the respondent company accepted this resolution or ordinance. It is claimed by the respondent company that, in accepting this ordinance, it supposed the terms to be imposed contemplated the setting of poles, the stringing of wires, etc., and never supposed that they contemplated the paving of the streets between the tracks. On December 28, however, the council passed the ordinance, setting forth the terms and conditions upon which electricity might be used as a motive power; and, among the conditions, it was provided that the respondent should repair that portion of the streets and highways included between the rails, and not less than 12 inches outside thereof, and, wherever a double track should be used, that space lying between the tracks; and that, whenever any street in which tracks were laid should be paved by the city, the respondent company should pave its portion thereof as above described, with the same material, etc. On the day this ordinance was passed, the respondent company wrote the council as follows:

"Take notice that the St. Joseph & Benton Harbor Street Railway Company hereby repeats its acceptance of the ordinance granting to the street-railway company consent, permission, and authority to substitute and use elec-

tricity as a motive power upon its street railway in the city of Benton Harbor."

This was signed by the president of the company.

It is contended by the respondent in the present proceeding that this acceptance had relation only to the resolution of December 12, and was sent before the ordinance of December 28 was actually passed, and had no reference to the terms of that ordinance, requiring the paving to be done; and hence the respondent never accepted the terms of the ordinance, and cannot be compelled to pave between its tracks, etc.

The answer further sets out that in May, 1892, the respondent issued its bonds, secured by mortgage on all its property, for the sum of $150,000, with interest at 6 per cent., payable semi-annually, for the purpose of converting the road into an electric road, and for the payment of its floating debt, but that it was unable to raise sufficient money thereon, and on June 27, 1893, it gave a mortgage upon all its property for $200,000, securing 200 bonds of $1,000 each, bearing interest at 6 per cent. per annum, payable semi-annually, for the purpose of retiring the issue of $150,000 of May, 1892, and the payment of its indebtedness incurred in the extension and improvement of its road; that this mortgage was given to the Illinois Trust & Savings Bank of Chicago, as trustee, and the bonds were issued and sold to *bona fide* purchasers, and are held principally in Boston, Mass.; that interest on said bonds for 1893 to the amount of $5,000 is due and unpaid, and that interest for 1894 for the six months ending July 1 is unpaid, and that said company has lost money every year since it began to operate by electricity; that it has no credit, and is unable to borrow a dollar; that within the last six months its officers have endeavored to procure loans on the credit of the company in St. Joseph, Chicago, and Benton Harbor of banks and capitalists having money to

loan, and have been absolutely refused. A statement of the receipts and expenditures is set out, showing a deficit for 1892 of $5,516; for 1893, a deficit of $10,760; for the months of January to September, inclusive, of the year 1894, a deficit of $2,846; and also showing a judgment against the company of $1,725, in addition to taxes now accrued and unpaid,—all of which shows a shortage from January 1, 1892, to October 1, 1894, of over $20,000. Some claimed equitable defenses are also set up in the answer.

No issue is asked by the relator, and the statement of facts contained in the answer must be taken as true.

We shall not discuss or determine in this proceeding the question as to whether the ordinance of December 28, 1891, was ever accepted by the respondent company, or the claimed equitable defenses. The *mandamus* must be refused, however, on the second ground set forth in the answer. It appears by the answer that the officers of the company, in the financial straits in which it is placed, cannot procure funds to do the paving; that it is an utter impossibility to do what it is asked to have done; that it cannot pay the current expenses; and it is clear that a writ of *mandamus* will not issue to compel the performance of an act when it is apparent that the parties against whom it is to be directed have no power to comply therewith. As was said in *Silverthorne v. Railroad Co.*, 33 N. J. Law, 176:

"Of course, it is obvious that a return which shows a legal impossibility to do what the writ directs must, in the nature of things, as a general rule, be good; and, consequently, a want of funds and an inability to procure them will, for the most part, be a legal answer to the precept of the court requiring cause shown why certain moneys should not be paid."

This rule was recognized in *Railway Co. v. People*, 120 Ill. 200. It was said:

"It is an admitted fact that the road is greatly out of repair, * * * but the answer shows that the company has neither the funds, nor the means of raising them, which are required to put the road in a safe condition. Now, while the matter thus set up in the answer no more exonerates the company from the duties which it owes the public than the inability of one to pay his honest debts would relieve him from his legal liabilities to his creditors, yet it does show a conclusive reason why *mandamus* is not a proper remedy in the case; for no principle of law is better settled than that the writ should not be granted in any case where it is clear that it would prove unavailing; as where the act sought to be enforced is, from its very nature, physically impossible, or where, from extrinsic causes, it has become so, or where performance, though not absolutely impossible, is from any cause not within the power of the defendant. But whatever the ground may be, whenever it is apparent that the defendant is unable to perform the act sought to be thus enforced, the writ, as a general rule, will be denied,"—citing *People v. Railroad Co.*, 55 Ill. 95; *People v. Lieb*, 85 Id. 484; *People v. Trustees of Schools*, 86 Id. 613; *Cristman v. Peck*, 90 Id. 150; *People v. Hatch*, 33 Id. 9.

It was further said in that case:

"If, as seems to be the case, the defendant is wholly unable to discharge the duties it owes to the public, and which the law has imposed upon it, a proceeding in the nature of a *quo warranto* is the proper remedy, and not *mandamus*."

See, also, *People v. Railroad Co.*, 58 N. Y. 152; *People v. Hayt*, 66 Id. 606.

It is a general rule that a writ of *mandamus* will not issue unless it clearly appears that the person to whom it is directed has the absolute power to execute it. *Turnbull v. Giddings*, 95 Mich. 314; *Corby v. Durfee*, 96 Id. 11; *City of Port Huron v. Jenkinson*, 77 Id. 414; Merrill, Mand. § 76.

We are satisfied, from the return made to the order to show cause, that *mandamus* is not the proper remedy in the present case. It is shown that it is impossible to

borrow or otherwise raise the money to pay for the paving; and it would be futile to make the order, as the parties could not be punished for contempt in disobeying it. The city is not without its remedy, but *mandamus* is not the proper one.

The writ must be denied.

The other Justices concurred.

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BESSIE L. DALY v. GEORGE S. HOSMER, CIRCUIT JUDGE OF WAYNE COUNTY.

Divorce—Cross-bill—Verification—Amendment—Taking testimony.

1. Where, in a divorce suit, the complainant petitions the court to set aside the decree granted the defendant under his answer in the nature of a cross-bill, on the grounds, among others, that the verification to the answer fails to negative the existence of collusion, as required by the statute, and that no replication to complainant's answer to the cross-bill was filed, it is within the discretion of the court to permit an amendment of the verification so as to make it conform to the statute, and the filing of said replication.[1]

[1] NON-COLLUSION CLAUSE IN VERIFICATION TO BILL FOR DIVORCE.

For cases construing 3 How. Stat. § 6232, which provides that the oath or affirmation administered to the complainant in swearing to a bill for divorce shall recite that he or she does solemnly swear that there is no collusion, understanding, or agreement whatever between complainant and defendant in relation to said application for divorce, see:

1. *Ayres v. Circuit Judge*, 90 Mich. 380, holding that said statutory requirement is mandatory, and the absence of said non-collusion clause cannot be waived by any act of the defendant.

2. *Harrison v. Harrison*, 94 Mich. 559, holding that an answer in the nature of a cross-bill must be verified in order to authorize a

2. 3 How. Stat. § 6231, which provides that no proofs or testimony shall be taken in any divorce suit until four months after the filing of the petition or bill, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony, applies only to the petition or original bill, and its object is attained in four months from the filing of the petition or bill, as well where a cross-bill is filed as where it is not.

Mandamus. Argued October 23, 1894. Denied November 7, 1894.

Relator applied for *mandamus* to compel the respondent to set aside a decree for divorce. The facts are stated in the opinion.

C. J. Reilly, for relator.

Philip T. VanZile, for respondent.

HOOKER, J. The relator filed a bill for divorce on September 9, 1893. The defendant filed an answer in the nature of a cross-bill on December 26, 1893, said answer being verified; but said verification did not contain the averment negativing collusion, as required by 3 How. Stat. § 6232. On January 17, 1894, complainant filed an answer

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decree for the defendant, but, if not, it may be amended, where the proof shows an absence of collusion.

3. *Holcomb v. Holcomb,* 100 Mich. 421, holding that, where the jurat states that "there is no agreement or understanding" between the parties in relation to the application for divorce, the defendant should not be permitted to object for the first time in the Supreme Court that the oath is not in strict conformity with the statute, she having appeared, answered, contested the case, and filed a petition to set aside the decree appealed from.

4. *Tackaberry v. Tackaberry,* 101 Mich. 102, holding:

a—That, where the original bill is properly verified under the statute, an objection that an amendment or a supplemental bill, filed by stipulation of the parties, is not so verified, is without force.

b—That an objection, made for the first time on appeal, that the answer to a cross-bill is not sworn to, comes too late.

to the answer in the nature of a cross-bill. Proofs were taken in open court, beginning on March 14, 1894, and ending March 21, 1894. Both parties appeared by counsel, and both introduced testimony. Upon the 21st day of March a decree was made, granting a divorce to the defendant, and denying it to the complainant. On June 29, 1894, relator caused a petition to be filed in said cause, asking that the decree be set aside for the following reasons, viz.:

1. That the cause was not at issue when heard, because no replication to complainant's answer to defendant's cross-bill had been filed.
2. That defendant's answer in the nature of a cross-bill was not properly verified.
3. That the testimony was prematurely and unlawfully taken, because it was taken within the period of four months after the defendant's answer in the nature of a cross-bill was filed.
4. That a decree was rendered in favor of the defendant within four months after his cross-bill was filed.

The court denied the prayer of this petition, and made an order that defendant be permitted to verify his answer, and to file a replication *nunc pro tunc*. Upon complying with said order, defendant was granted a new decree, in all substantial respects like the first one.

It was a proper exercise of the court's discretion to permit the amendment of the verification and the filing of a replication after decree. Had the questions arisen upon the hearing, the power to do so would probably not have been questioned; but the questions were not raised then, and, when they were raised, were no more meritorious than they would have been upon the hearing. There is no legal impediment, for courts may permit amendments to the pleadings or proceedings after judgment. How. Stat. chap. 264, and notes.

3 How. Stat. § 6231, provides that—

"No divorce shall be granted unless the party exhibit-

ing the petition or bill of complaint therefor shall have resided in this State one year immediately preceding the time of exhibiting such petition or bill, or unless the marriage was solemnized in this State, and the complainant shall have resided in this State from the time of such marriage to the time of exhibiting the petition or bill, and, when the cause for divorce occurred out of this State, no divorce shall be granted unless the complainant or defendant shall have resided within this State two years next preceding the filing of the petition or bill; and no proofs or testimony shall be taken in any cause until four months after the filing of such petition or bill for divorce, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony."

It is contended that this section applies to proofs taken in support of the defendant's answer, because it is in the nature of a cross-bill, and contains a prayer for divorce. This construction requires an enlargement of the language used in the statute, which, strictly construed, applies only to the petition or original bill for divorce, which are the only instruments provided for the commencement of divorce proceedings. We are of the opinion that this provision of the statute was to prevent hasty divorces, and that the object is attained in four months from the filing of the petition or bill, as well where a cross-bill is filed as where it is not.

The proofs being seasonably taken, there was perhaps no necessity for the making of a second decree, which apparently was only made for prudential reasons.

The *mandamus* will be denied.

The other Justices concurred.

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THE ATTORNEY GENERAL, EX REL. JAMES A. SCOTT, v. CHARLES GLASER.

[See *post*, 405.]

Elections—Return of inspectors—Ballots—Marking.

1. Under the election law of 1891, the board of election inspectors are required, immediately on closing the polls, to proceed to canvass the votes, and, after the count of the tickets or ballots has been completed, immediately and publicly to declare the result. And it is held that the neglect of the board to complete the canvass on the night of the election, and the dating of their report on the next day, ought not to result in the disfranchisement of the voters.
2. Under the election law of 1891, any mark upon a ballot, other than one appropriate and necessary to designate the intention of the voter, must be regarded as a distinguishing mark.
3. The only instance in which an unnecessary mark is recognized as possible is in section 34, where it is provided that, if the elector votes for more than one person for the same office, such ballot shall not be counted for those persons, but shall be, as to them, null and void.

Information in the nature of *quo warranto* to determine the title to the office of comptroller of West Bay City. Argued June 29, 1894. Judgment of ouster entered November 7, 1894. Proceedings stayed pending rehearing, and judgment re-entered January 8, 1895. (See *post*, 405.) The facts are stated in the opinion.

Adolphus A. Ellis, Attorney General (*Hatch & Cooley* and *T. A. E. & J. C. Weadock*, of counsel), for relator.

G. H. Francis (*Pratt, Van Kleeck & Gilbert*, of counsel), for respondent.

MONTGOMERY, J. This is a contest over the office of comptroller of West Bay City. A recount was had under

the provisions of Act No. 208, Laws of 1887. Upon the recount as made by the common council, the respondent received a majority of 9. There were cast for the relator 1,169 votes which were undisputed, and for the respondent 1,147 votes which were undisputed. There were counted for the respondent an additional 40 votes which it is claimed by the relator should not have been counted, and there were counted for the relator 9 additional votes which it is claimed by the respondent should not have been counted for him.

The respondent contends that the votes of the First ward should not have been counted for either candidate, as the certificate of the inspectors of election bears date the 4th day of April. Section 36 of Act No. 190, Laws of 1891, provides that "immediately on closing the polls the board shall proceed to canvass the votes;" and section 38 provides that, "after the count of the tickets or ballots has been completed, the result shall be immediately publicly declared." The board did not in fact complete the canvass on the night of the election, but the return bears date the next day. We do not think the delay in canvassing the vote should result in disfranchisement of the voters. It would be a dangerous rule to establish that the board of election inspectors could thwart the will of the voters by a neglect to perform the duty imposed upon them by statute, and it should not be so held except where the plain provisions of the statute require it. See McCrary, Elect. §§ 190, 193, 247, and cases cited.

It becomes necessary, therefore, to determine whether the ballots which were counted on the recount by the common council should have been canvassed. It is claimed by the relator that the 40 ballots which the respondent claims should have been counted for him, and which were in fact counted by the common council, bear distinguish-

ing marks, within the meaning of the law, and should have been excluded.

Act No. 190, Laws of 1891, was in force when the election in question was held, and the material provisions of that act were as follows:

"Any elector may mark or stamp a cross in the space below the party name printed at the head of the ballot. If marked thus, such ballot shall be counted for all the nominees of such party whose names appear on the ballot in that column. If the voter shall have erased some name in the column, or marked a X before the name of a candidate in some other column for the same office, or written in a name under the name of any candidate, the name of such candidate shall not be counted as voted for by such ballot, but, if the name of the candidate shall have been erased, such vote shall be counted for the candidate whose name in another column shall have been marked or whose name shall be written under the name erased." Section 26.

Section 36 contains the provision that—

"Any ballot which shall bear any distinguishing mark or mutilation shall be void, and shall not be counted, and any ballot or part of a ballot from which it is impossible to determine the elector's choice of candidates shall be void as to the candidate or candidates thereby affected."

These provisions have never been before the Court for construction. Statutes containing similar provisions have been adopted in various states of the Union, and have generally been construed as involving a radical departure from the former method of voting, and, generally, a strict compliance with the requirements of such statutes has been required before the vote should be counted.

In Rhode Island the statute provides that the elector "shall prepare his ballot by marking in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled," and also that each ballot "shall be so printed as to give to each

voter a clear opportunity to designate, by a cross mark (X) in a sufficient margin at the right of the name of each candidate, his choice of candidates." Pub. Laws R. I. 1889, chap. 731, §§ 6, 18. This act was construed by the supreme court, and it was held—*First,* that, as the statute did not require a square to be printed on the ballot, a designation by a cross at the right of the name of the candidate was sufficient; *second,* that no other mark than a cross was a sufficient designation of the voter's intent under the statute. The court said:

"If another mark be used, there is nothing to certify its meaning. It might be conjectured that it was used inadvertently instead of a cross, but, in our opinion, such a conjecture would not justify the counting of it. The statute declares, 'No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him.' If marks other than crosses were counted, they might be used both to answer the purpose of crosses and to identify the ballots."

It was further held that the cross, to be effectual as a vote, must be placed at the right of a name printed on the ballot, and that a cross placed elsewhere was not a compliance with the statute. *In re Vote Marks,* 17 R. I. 812.

The statute of Indiana provided that the voter should "indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names: * * * *Provided,* however, that if he shall desire to vote for all candidates of one party, * * * and none other, he may place the stamp on the square preceding the title under which the candidates of such party * * * are printed, and the vote shall then be counted for all the candidates under that title, unless the name of one or more candidates under another title shall also be stamped, in which case the names of the candidates so

stamped shall be counted." Laws Ind. 1889, chap. 87, § 45. The court held that, in order that the elector may have his ballot counted at all, he must touch some one of the squares with the stamp; that his choice can be indicated in no other manner; that the elector cannot stamp his ballot elsewhere, and leave the election board to guess at his intention. After the election was held which was under consideration in that case, the law was amended so that "a stamp placed upon a ballot which does not touch a square thereon is declared to be a distinguishing mark, and the ballot is not counted." Laws Ind. 1891, chap. 94, § 9. The court say that "this amendment was intended to make certain that which prior to its passage was left, in some measure, to construction, but it only makes certain that which was intended by the legislature when it passed the original section." *Parvin v. Wimberg*, 130 Ind. 561. See, also, *Sego v. Stoddard*, 136 Ind. 297.

In Maine the statute provides that the voter "shall prepare his ballot by marking in the appropriate margin or place a cross (X) as follows: He may place such mark opposite the name of a party or political designation, * * * or he may place such mark opposite the name of the individual candidates of his choice for each office to be filled." Laws Me. 1891, chap. 102, § 24. The court say of this statute that—

"Its distinguishing feature is its careful provision for a secret ballot. The leading purpose of it was to give the elector an opportunity to cast his vote in such a manner that no other person would know for what candidate he voted, and thus to protect him against all improper influences, and enable him to enjoy absolute freedom from restraint and entire independence in the expression of his choice."

It was held that the ballot could not be counted when the cross was placed to the left, or midway above or below the name of the party or candidate, and not in the appro-

priate blank space at the right, or where the ballot mark was a straight line instead of a cross. It was said:

"If it be conceded that the intention of the voter may be correctly inferred from the mark actually made by him in each of these instances, it is still a fatal objection to the ballot that such an irregular and unauthorized mode of marking it might readily be, and probably would be, agreed upon with the voter as a distinguishing mark to identify the ballot cast by him, whenever identification was desired. Such a palpable disregard of the plain requirements of the act strikes at the root of the secret-ballot system." *Curran v. Clayton*, 86 Me. 42.

These cases support what we believe to be the true rule, that any mark upon a ballot, other than one appropriate and necessary under the law to designate the intention of the voter, must be regarded as a distinguishing mark. Any other rule would result in endless confusion, and would make the local inspectors judges of the voter's intention, and lead to bitter controversies. It was the evident purpose of the Legislature to provide against the necessity for this by laying down rules for the guidance of the voter, and providing a simple method of registering the vote; and while, in some instances, a rigid adherence to the prescribed method may result in throwing out honest ballots, we have not been able to find any safe middle ground to occupy. Either the question of the voter's intent must be held a question of fact in all cases, to be determined by the inspectors on an examination of the ballot, or it must be held that such marks, and such only, as can, under the law, be properly placed upon the ballot, and as are necessary to be there placed to register the voter's intent, are permissible. The only instance in which an unnecessary mark is recognized as possible is in section 34, where it is provided that, if the elector votes for more than one person for the same office, such ballot

shall not be counted for those persons, but shall be, as to them, null and void. This implies that a mark may be made in such a manner as not to indicate whom the voter intended to vote for. This might well have occurred under the law of 1891, through an unsuccessful attempt to vote for a candidate on the opposing ticket, as, under section 26, it was not only necessary to mark the name of such candidate with a cross, but also to erase the name of the candidate on the voter's own ticket. By the law of 1893 the Legislature has wisely dispensed with the necessity for the erasure of the name. See Laws of 1893, Act No. 202, p. 329.

Applying the rule of construction which we think should obtain in this case, there can be no doubt that the relator was elected. A large number of the defective ballots had a cross under the party name of the Republican and also of the Citizens' ticket. The tickets were, it is true, identical; but a single mark constituted a vote, and the second mark was wholly unnecessary and inappropriate to register the voter's intent,—as much so as would have been any mark placed under the Democratic ticket. Such mark might have been an agreed means for identification of the ballot, and must be held to have been a distinguishing mark.

There were also a number of tickets in which the names of the candidates as they appeared on both tickets, both being identical, were marked. These are subject to the same considerations.

As above stated, the law provides that, where the elector desires to vote a straight ticket, it shall only be necessary to mark a cross under the party name. In such cases there are no conditions under which the voter is required to erase names on another party ticket, or place any mark on such tickets, unless he desires to vote for some candi-

date whose name appears thereon, in which case he is required to place a cross in the square opposite the name of such candidate. There are a number of ballots counted for respondent in which the voter has, after marking one party ticket, erased by a cross or straight mark the names on the opposing ticket. As these marks of erasure are not only wholly unnecessary, but under the law inappropriate to express any intent, they must be treated as distinguishing marks.

There are numerous other tickets which it is not necessary to designate specially. A large number contain, not only the necessary cross under the party name, but from one to a dozen other crosses. Others contain particular devices. In one instance, a name is written on a portion of a ticket which does not purport to be the name of a candidate for any office. These tickets fall so clearly within the rule that it is unnecessary to particularize further.

We think judgment should be entered for the relator.

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

Upon respondent's application for a rehearing, the following opinion granting the same was filed November 13, 1894:

PER CURIAM. A rehearing has been asked in this case. We held in our former opinion that the section of the act of 1891 providing that ballots bearing distinguishing marks should not be counted should be construed to exclude all ballots which bear marks not appropriate and necessary to express the voter's intention. It is now said that the interpretation placed upon the decision is such as to exclude a large number of ballots cast at the recent election upon which there appears an erasure of the name

of the candidate on one party ticket and a cross before the name of an opposing candidate.

No such question is involved in the present case, as it arose under the act of 1891, which provided for striking off the name on the party ticket as well as the making of the cross in the square before the name of the opposing candidate. The ballots under consideration are ballots in which the name erased was one appearing on the opposing ballot.

But an examination of the opinion leads us to think that some of the language employed may have been misleading, and, as the public are naturally deeply interested in the subject-matter, we think it proper to state that it was not in the mind of the Court that ballots having a name erased under the party ticket and the name of an opposing candidate marked by a cross should not be counted, but that, in our opinion, such tickets are not legally objectionable, and should be counted. Act No. 202, Laws of 1893, § 26, it is true, provides that where only one candidate is to be elected to an office, and the elector desires to vote for a candidate not on his party ticket, he should make a cross in the circle under the name of his party, and also make a cross in the square before the name of the candidate for whom he wishes to vote on the other ticket, and "in such case it shall not be necessary to strike off the name of the candidate on the party ticket;" but section 17 of the act requires that the booths shall be provided with erasers, and section 26 clearly implies that such erasers may be used to erase the name of the candidate on the party ticket, for it is provided:

"A ticket marked with a cross in the circle under a party name will be deemed a vote for each of the candidates named in such party column whose name is not erased, except those candidates where a cross is placed in the square before the name of some opposing candidate."

The erasure of the name is recognized as appropriate to express the voter's intent not to vote for such candidate, and we do not think that when such an erasure is made on the party ticket, and the voter in addition places a cross before the name of the opposing candidate, either mark should constitute a distinguishing mark. Taken as a whole, we think it was intended by the act of 1893 that such an erasure should be treated as permissible, though not necessary.

The motion for rehearing presents other questions, the gravity of which induces us to grant a rehearing on the whole case.

THE ATTORNEY GENERAL, EX REL. JAMES A. SCOTT, v. CHARLES GLASER.

[See *ante*, 396.]

Statutes—Practical construction—Elections—Marking ballots.

1. The interpretation placed upon a statute by the different departments of the State having a duty to perform thereunder, while not absolutely binding upon the judicial department, is, in a doubtful case, to be given weight; citing *Westbrook v. Miller*, 56 Mich. 151.

2. The election law of 1891 provides:

   a—That "any elector may mark or stamp a cross in the space below the party name printed at the head of the ballot. If marked thus, such ballot shall be counted for all the nominees of such party whose names appear on the ballot in that column. If the voter shall have erased some name in the column, or marked a X before the name of a candidate in some other column for the same office, or written in a name under the name of any candidate, the name of such candidate shall not be counted as voted for by such ballot, but, if the name of the candidate shall have been erased, such vote

102 405
106 290
102 405
108 143
102 405
115 452
102 405
117 126
102 405
123 276
102 405
124 513
102 405
s61NW 648
129 220
102 405
135 s 46

shall be counted for the candidate whose name in another column shall have been marked or whose name shall be written under the name erased."

b—That "any ballot which shall bear any distinguishing mark or mutilation shall be void, and shall not be counted, and any ballot or part of a ballot from which it is impossible to determine the elector's choice of candidates shall be void as to the candidate or candidates thereby affected."

And it is held that ballots marked as follows should be counted:

a—Where the name of a candidate appears on two tickets, and a cross is placed in the square opposite his name on each ticket.

b—Where the names of the candidates on one ticket appear on another ticket, and a cross appears in the square under the heading of both of said tickets, or under the party name of one ticket and opposite a portion or all of the names on the other.

c—Where a cross appears opposite the names of the candidates on one ticket, or in the square under the party name of such ticket, and the names of the candidates on the opposing tickets are erased, either by horizontal lines or by a cross extending over all of said names.

d—Where two tickets are identical, and crosses are placed opposite all the names on each, and a line drawn through each name on the opposing ticket and through one of the names on the duplicate ticket.

e—Where a cross appears in the square under the party name of a ticket, and the name of a candidate thereon is erased, and the surname of the candidate for the same office on the opposing ticket is written in.

f—Where a cross appears in the square at the head of a ticket, and the name of one of the candidates on said ticket is partially erased, and another name written thereon with a lead pencil.

And it is held that ballots marked as follows should *not* be counted:

a—Where more than a single cross appears under the party name of one of the tickets.

b—Where a cross appears in the square under the party name of a ticket, and two marks similar to commas appear in the square under the party name of another ticket.

c—Where a cross, with a half circle drawn around it, appears under the party name of a ticket, and a figure 9 appears in the square under the heading of another ticket.

d—Where a cross appears in the body of the ticket outside of any square thereon.

e—Where a cross appears under the party name on a ticket, and a horizontal line is drawn through the square under the party name of each of the other tickets.

f—Where a cross appears under the party name on a ticket, and also opposite the name of a candidate on another ticket, and a line is drawn *under* the name of the candidate for the same office on the first-named ticket.

g—Where the ballot has no cross upon it, but a blot appears in the center thereof.

h—Where a ballot has no cross upon it, but a straight line is drawn through the square under the party name on one of the tickets.

i—Where a cross appears at the right of the square under the party name of one of the tickets, and a large circle is drawn around said square.

Rehearing, upon application of the respondent, of case reported in 102 Mich. 396. Argued November 20, 1894. Former opinion reversed in part January 8, 1895, and judgment of ouster entered. The facts are stated in the several opinions.

Adolphus A. Ellis, Attorney General (*Hatch & Cooley* and *T. A. E. & J. C. Weadock,* of counsel), for relator.

G. H. Francis (*Pratt, Van Kleeck & Gilbert,* of counsel), for respondent.

MONTGOMERY, J. A rehearing has been had in this case, and, after full consideration, we feel constrained to modify in substantial respects the original opinion. In the former opinion the Court held, in substance, that any mark upon a ballot not appropriate and necessary to express the voter's intention should be regarded as a distinguishing mark; and, applying this rule, it was held that when the name of the candidate appeared on two tickets, and a cross was placed in an appropriate place on each ticket, or opposite the name of the candidate on each ticket, neither vote should be counted. This conclusion was reached with some hesitancy, and in view of the practical difficulty of

applying any other general rule. But it is now earnestly pressed upon our attention that this construction runs counter to the practical construction which has been given by the law department of the State and by the election inspectors, and we feel impressed that sufficient consideration was not given to this fact in reaching the conclusion above stated.

It appears that on the 24th of February, 1892, the Attorney General prepared a letter of instruction to inspectors of election and electors, in which it was stated that where ballots were used on which two tickets appeared with the name of a candidate for a place on each ticket, and a cross was placed in an appropriate place on each ticket, the ballot should be counted for such candidate. Attorney General's Report for 1892, pp. 183, 188–190. The question was again presented in October, 1892, when the Attorney General gave a similar opinion, which is found at page 135 of the report of the Attorney General for 1893. In this opinion it was said:

"The fact that the voter has indicated in more than one way that he desires to vote for any candidate on the ballot is no reason why he should lose his vote or the candidate be deprived of the credit."

It would appear, therefore, that at three different elections the voters have acted with this opinion of the Attorney General before them; and, if we adhere to the construction which we have given to the statute, the result is that many electors must have lost their votes, although they have followed implicitly the instructions of the legal department of the State. This certainly is a result to be deprecated, and one which should only be reached if forced upon us. It is evident that the statute is not entirely clear, as there is no express declaration as to what constitutes distinguishing marks; and the determination of that question depends upon the construction which is to be

placed upon the various provisions of the statute quoted in the former opinion.

It has become a rule of law that the interpretation placed upon a statute by the different departments of the State having a duty to perform under the statute, while not absolutely binding upon the judicial department, is to be given weight in a doubtful case. In *Westbrook v. Miller*, 56 Mich. 151, it was said:

"When, in the performance of executive duties, it becomes necessary for the executive department to construe a statute, great deference is always due to its judgment, and the obligation is increased by the lapse of considerable time before its acts are called in question,"—citing numerous cases, among which are *Malonny v. Mahar*, 1 Mich. 26; *Britton v. Ferry*, 14 Id. 53; *Continental Improvement Co. v. Phelps*, 47 Id. 299.

See, also, *Baker v. Police Commissioners*, 62 Mich. 327; *People v. Hurst*, 41 Id. 328; *People v. May*, 3 Id. 598; *Johnson v. Ballou*, 28 Id. 379; *Pease v. Peck*, 18 How. 595.

We think, in view of this practical construction, it should be held that the class of ballots above referred to are not illegal. While it may be said that the placing of the cross opposite the name of the candidate on each of the two tickets was unnecessary, neither, by itself, was inappropriate to express the voter's intent, and we feel constrained to hold that the rule which was laid down in our first opinion was too rigid.

There were cast for the respondent certain tickets which had a cross under the party name of the Republican ticket, and also of the Citizens' ticket, both tickets being identical. These we hold should have been counted. In the record they are illustrated by Exhibit 2.

In the same opinion of the Attorney General first quoted, a ticket was presented in which the voter had placed opposite the names of the individual candidates on one ticket a cross, and had erased the names of the candidates on opposing tickets, and the opinion was expressed that

this was a valid vote for the candidates opposite whose names the cross was placed. The same considerations which lead us to hold that the votes first mentioned should be counted induce us to hold that these should likewise be counted. The erasure of the names upon the opposing ticket, while unnecessary, may have been made for the purpose of making more clear the intention of the voter. Tickets of this class are illustrated by Exhibit 15.

This case is presented on demurrer to respondent's rejoinder to relator's replication. There are 40 votes in dispute which were counted for respondent, and 9 votes which were counted for relator which are in dispute. In determining what votes should be counted or rejected, we are to be guided by the rejoinder of respondent, which the demurrer admits to be true, and for convenience we will tabulate them by precincts:

	To be counted.	To be rejected.
1st ward.	2 tickets: Corresponding to Exhibit 2.	1 ticket: Exhibit 3.
2d ward, 1st dist.	2 tickets: 1 Exhibit 2; 1 Exhibit H.	3 tickets: Exhibits E, F, and G.
2d ward, 2d dist.	6 tickets: 2 Exhibit 2; Exhibits I, J, K, and 8.	1 ticket: Exhibit 7.
3d ward.	1 ticket: Exhibit L.	2 tickets: Exhibits 9 and N.
4th ward, 1st dist.	5 tickets: 4 Exhibit 2; 1 Exhibit S.	4 tickets: 2 Exhibit 12; Exhibits 11 and 13.
4th ward, 2d dist.	2 tickets: Exhibit 2.	3 tickets: Exhibits T, U, and V.
5th ward.	2 tickets: Exhibit 2.	
6th ward.	3 tickets: Exhibit 15.	3 tickets: Exhibits 16, 17, and AA.
	To be counted, 23.	To be rejected, 17.

There are a number of these ballots which have under the heading more than a single cross. These crosses were not appropriate to express the voter's intent, and the ballots are excluded.

Exhibit 3 has a cross in the square under the Republican ticket, and two marks similar to commas in the square under the Democratic ticket. These marks could not have been used to express the voter's intent, and the ballot should be excluded.

One ticket (Exhibit 8) has a cross in the appropriate place under the Republican ticket, and on the ward ticket the name of the candidate for alderman is erased, and the word "Hayes," the surname of the candidate on the opposing ticket, written in. This ticket, we think, should be counted, as it is evident that the purpose was to express an intent to vote for Hayes, although the voter failed to write his full name.

Exhibit 17 has a cross under the heading "Republican Ticket," with a half circle round it, and a figure 9 written in the square under the head "Citizens' Ticket." This should not have been counted, as the figure used certainly could not have been appropriate to express any intent of the voter, or so intended.

Of the tickets counted for the relator, Exhibits B, W, and X should have been excluded, on account of multiplicity of crosses.

Exhibit M contained a cross under the head of the "Democratic Ticket," and a cross opposite the name of Charles Glaser, on the Republican ticket, with a line drawn underneath the name of James A. Scott, without erasing the name. This ballot was counted for Scott, but should not have been counted for either, as the voter's intent could not be ascertained.

Exhibit O was counted for the relator. The ticket had

no cross upon it, but a blot in the center of the ticket. This should not have been counted.

Exhibit P had no cross upon it, but a straight line underneath the Democratic ticket. This should not have been counted, as the intent of the voter was not expressed in the manner provided by statute.

Exhibit Z should have been excluded, as it had a cross under the Democratic ticket, outside the square, and the square was inclosed in a large circle, which could not have been used to express the voter's intent.

Of the nine votes counted for relator which are in contest, one (Exhibit C) was, we think, under the averments of respondent's rejoinder, properly counted for him. It is alleged of this ballot that it "was marked with a cross in the square at the head of the Democratic ticket, and one of the names of the ward officers was partially erased, and the name Walter L. Portt written thereon with a lead pencil." This was plainly an attempt to vote for Walter L. Portt for the office designated, and it should not be treated as a distinguishing mark.

It is also apparent from the averments in respondent's rejoinder that one ballot which was counted for respondent (Exhibit N) should have been counted for relator. This ballot was one cast in the Third ward, which is described in respondent's rejoinder as follows:

"The ticket was marked with a cross in the square at the head of the Republican ticket, and the name of Charles Glaser erased, and James A. Scott written in the Republican ticket, which ballot was also counted for respondent."

Deducting from the vote of the relator 8 votes, shown by respondent's rejoinder to have been improperly counted for him, and adding the vote in the Third ward just referred to, which was counted for respondent, and which has been deducted from his vote, shows the relator to

have received 1,171 votes. Deducting the 17 votes from respondent's vote, he is shown to have received 1,170. The relator was elected by a majority of 1 vote, and judgment should be entered for him.

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

HOOKER, J. I concur in the opinion of my Brother MONTGOMERY, except as to Exhibit L, which I think bears a distinguishing mark, and should have been rejected.

MCGRATH, C. J. In this case the official ballot was as found on page 414.

Exhibit H (Second ward, First district) had a cross in the space at the left of each name on both the Republican and Citizens' tickets, and a line was drawn horizontally through each name on the Democratic ticket, and also through the name of Alex Zagelmeyer, on the Republican ticket. Exhibit S (Fourth ward, First district) had a cross in the space at the head of the Republican ticket, and a cross in the spaces to the left of the first two names on the Citizens' ticket. I think that both of these tickets should have been rejected. If allowed to use the spaces and the horizontal lines in the manner here made use of, there is no reason why these very lines and spaces may not be used to identify the ballot, and there is no end to the combinations which may be made for that purpose. I think that all marks upon the ballot should be such as to repel any inference that the marks were intended as distinguishing marks.

Exhibit 7 (Second ward, Second district) has a cross in the space at the head of the Republican ticket, and another cross in the same column, at the head of the ward ticket, where no square is provided. Exhibit L (Third ward) has a cross at the head of the Citizens' ticket, and a line is drawn from the upper left-hand corner to the lower right-hand corner of the Democratic ticket, and an-

NAME OF OFFICE VOTED FOR.	Republican Ticket. ☐	Democratic Ticket. ☐	Citizens' Ticket. ☐
CITY.			
Comptroller	☐ Charles Glaser.	☐ James A. Scott.	☐ Charles Glaser.
Treasurer	☐ Reuben C. Tasker.	☐ Michael S. Griffin.	☐ Reuben C. Tasker.
Justice of the Peace	☐ Samuel L. Brigham.	☐ Charles S. Thomas.	☐ Samuel L. Brigham.
Bridge Commissioner	☐ Alex Zagelmeyer.	☐ John Bloomshield.	☐ Alex Zagelmeyer.
Ward Ticket.			

other line from the upper right-hand corner to the lower left-hand corner, forming a cross over the whole ticket. Exhibit P, instead of a cross in the space at the head of the ticket, has a line drawn horizontally across through the space, and extending three-eighths of an inch beyond the space on either side. In my opinion, these ballots should be treated alike. The intent is none the more manifest in the one case than the other. In Exhibit L the voter put a cross where he should have put lines by making use of the stamp provided therefor. In Exhibit P the voter put a line where he should have placed a cross, evidently making use of the line stamp, instead of the cross stamp. While it is true that in Exhibit L the voter has, in the manner pointed out by the statute, signified his intent by the usual cross placed in the proper place, he has placed upon his ballot marks which are inappropriate, and the only reason that the ballot is counted is that the mark so placed is thought to be indicative of a legitimate intent. Exhibit P, on the other hand, is rejected, simply because the intent to vote the ticket is not expressed in the statutory mode, although the mark is made at the point designated by the statute. These differences of opinion are liable to arise unless the rule is adhered to that whatever marks are placed upon the ballot must be those designated by the statute, and made where the statute indicates that they should be made. I think, therefore, that Exhibit L should have been rejected.

As these changes would not affect the result, I concur in the judgment of ouster.

THE ATTORNEY GENERAL, EX REL. MICHAEL S. GRIFFIN, v. REUBEN C. TASKER.

Elections—Marking ballots.

This case is ruled by *Attorney General v. Glaser, ante,* 405.

Information in the nature of *quo warranto* to determine the title to the office of treasurer of West Bay City. Argued June 29, 1894, and opinion filed November 7, 1894. Reargued November 20, 1894. Judgment entered for respondent January 8, 1895. The facts are stated in the cases cited in the opinions.

Adolphus A. Ellis, Attorney General (*Hatch & Cooley* and *T. A. E & J. C. Weadock,* of counsel), for relator.

G. H. Francis (*Pratt, Van Kleeck & Gilbert,* of counsel), for respondent.

MONTGOMERY, J. This case depends upon the same state of facts as was considered in the case of *Attorney General v. Glaser, ante,* 396. The relator is entitled to recover.

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

On rehearing the following opinion was filed January 8, 1895:

MONTGOMERY, J. This case was heard with the case of *Attorney General v. Glaser, ante,* 405, and depends upon the same state of facts, except that the respondent in the present case was shown, on the recount of votes had under Act No. 208, Laws of 1887, to have had a majority of 15;

and a re-examination of the votes upon the basis of the opinion in *Attorney General v. Glaser* shows that the respondent, Tasker, was duly elected by a majority of not less than eight. We consider it unnecessary to recapitulate the votes.

Judgment will be entered for respondent.

The other Justices concurred.

102	417
s110	617
102	417
f136	s265
102	417
145	210
102	417
150	s224

WESLEY L. HOFFMAN v. THE CITY OF PORT HURON.

Surveys—Boundaries—Location of highway—Evidence.

1. The reason for the rule that, as between the record of the survey of a highway, and a highway actually located upon the ground by fence lines, or by being graded and traveled or otherwise definitely fixed, the latter must prevail as the boundary of lands described as being so limited, does not exist unless the line of the road was actually located and definitely fixed, in which case the road itself becomes the controlling monument.
2. Streets that have been opened and acquiesced in by the parties interested, or by the public authorities, become permanent boundaries, and form new starting points for later surveys; citing *Twogood v. Hoyt*, 42 Mich. 609; *Van Den Brooks v. Correon*, 48 Id. 283; *Atwood v. Canrike*, 86 Id. 99, 103.
3. For the purpose of identification and certainty, resort may be had to a conveyance referred to in the instrument containing the uncertain description; citing *Daily v. Litchfield*, 10 Mich. 29; *Cronin v. Gore*, 38 Id. 381; *Fahey v. Marsh*, 40 Id. 236.
4. Where the description in a deed calls for land owned and occupied, the actual line of occupation is a material call to be considered in locating the boundaries.
5. Old fences have always been regarded as strong and trustworthy evidences in ascertaining and fixing boundaries; citing *Diehl v. Zanger*, 39 Mich. 601; *Twogood v. Hoyt*, 42 Id. 609;

Wilmarth v. Woodcock, 66 Id. 331; *Beaubien v. Kellogg*, 69 Id. 333.

6. Where two surveyors disagree materially as to the courses, quantity becomes a material consideration; citing *Winans v. Cheney*, 55 Cal. 567; *Hanson v. Township of Red Rock*, 57 N. W. Rep. 11.

7. A supposed boundary line, long acquiesced in, is better evidence of where the real line should be than a survey made after the original monuments have disappeared; citing *Stewart v. Carleton*, 31 Mich. 270; *Diehl v. Zanger*, 39 Id. 601.

Error to St. Clair. (Canfield, J.) Argued January 2, 1894. Decided November 7, 1894.

Ejectment. Plaintiff brings error. Reversed. The facts are stated in the opinion.

A. R. Avery and *H. W. Stevens* (*Avery Bros. & Walsh* and *Stevens & Merriam*, of counsel), for appellant.

O'Brien J. Atkinson and *Frank Whipple*, for defendant.

McGRATH, C. J. This is ejectment to recover the possession of a tract of land lying on the west shore of Lake Huron, in fractional section 26, town 7 N., of range 17 E., and known as "Fishery No. 1." Both parties derive title from a common source. The following diagram (a copy of that portion of the government survey) gives fractional section 26 and surroundings. (See diagram 1, page 419.)

The McNeil tract, referred to in the deeds hereinafter named, comprises private claims Nos. 244 and 357. In October, 1838, a plat was filed in the office of the register of deeds of St. Clair county, upon which the easterly portion of the McNeil tract, excepting the land between Lake street and the water, was laid out into lots and blocks. This plat shows a street along the lake shore, and eight other streets between Lake street and Fourth street, which

latter street bounds the plat on the west. The south line of the plat was Michigan avenue, and twelve other streets intervened between that avenue and Walnut street, which was the northern boundary of the plat. The north-easterly portion of this plat is inserted. (See next page.)

DIAGRAM 1.

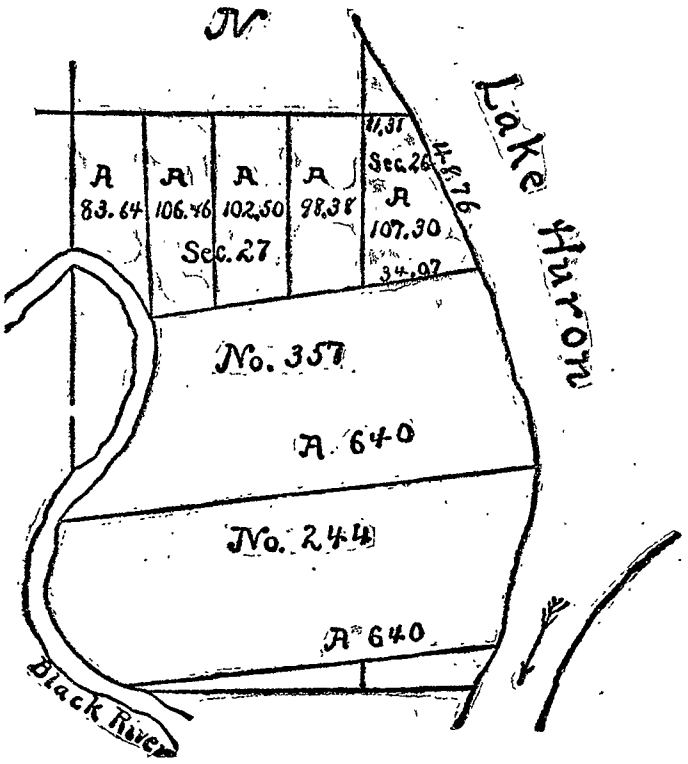
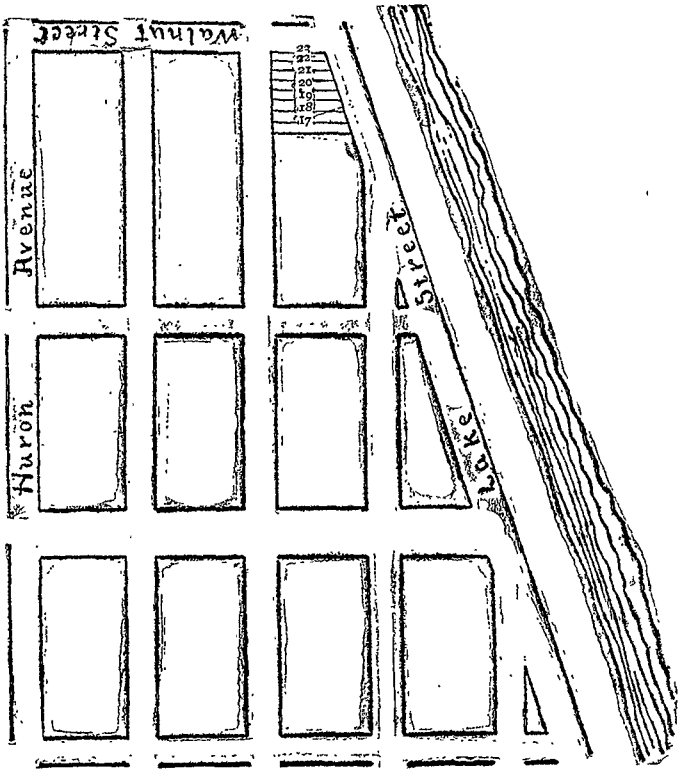


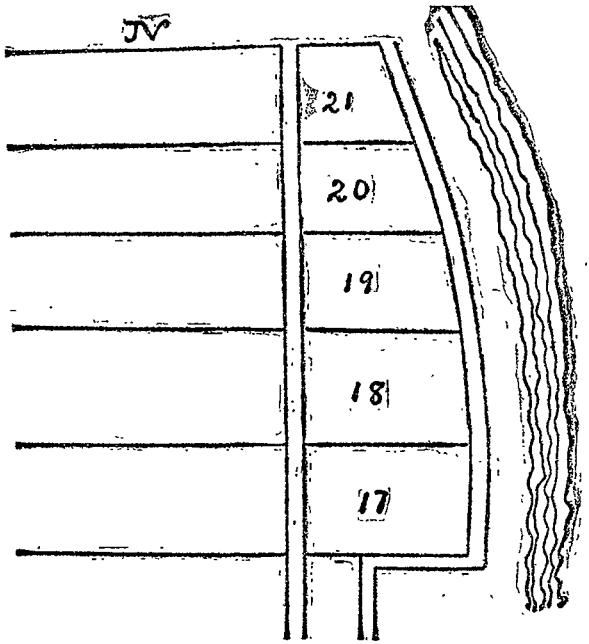
DIAGRAM 2.



On October 14, 1841, John McNeil and others filed a petition in the circuit court for the county of St. Clair, alleging their proprietorship to all of the lands covered by the plat, and that no part had been sold except one lot upon the highway; and, further, that at that time all of the village north of Superior street was a wilderness, and not needed for village purposes, as it was then a forest; and asking that the streets and public places north of such Superior street might be vacated. Upon this application the court made an order vacating the plat; and upon December 30, 1841, a second plat was filed, showing

all the lands north of Superior street and east of Fourth street, laid out into what have since been known as "Outlots of the McNeil Tract."

DIAGRAM 3.



(A) On the 19th of July, 1840, Charles Butler conveyed to Robert T. Holland "part of fractional section 26, * * * bounded as follows: Commencing 50 links north, 36 degrees west, from a stake standing on the line of the 'McNeil Tract,' so called, and being the south-east corner of that part of said fractional section which lies west of the Lake road; and running thence north, 26 degrees west, along the west line of said road, 4 chains and 50 links, to a stake; thence south, 80 degrees west, 6 chains and 67 links, to a stake; thence south, 26 degrees east, 4 chains and 50 links, to a stake; thence north, 80

degrees east, 6 chains and 67 links, to a stake, being the place of beginning,—and containing three acres of land."

(B) On the 1st day of February, 1841, Charles Butler deeded to Joseph D. Beers "the south part of fractional section 26, * * * lying west of the Lake road, excepting and reserving from the same three acres, heretofore sold to Robert T. Holland, off the south-east corner of said fractional section 26, lying on the west side of the said Lake road, and also reserving all of said section lying east of the said Lake road; said south part of said fractional section 26 containing, over and above the reservation herein mentioned, 50 acres of land." This deed conveys other lands, including parcels in the McNeil tract, and locates said pieces of land by reference to "a map of the subdivision of said McNeil tract."

(C) On the last-named date, Charles Butler deeded to William Bard, Thomas Suffern, and James McBride, "the following lots, in the village of Fort Gratiot, according to the field map, viz.: Lots 7 and 8 in block 55, lots 28 and 29 in block 60, also lots numbers 22 and 23 in block 19, the second last lot being the north-east corner of lot 21 of the McNeil tract, as subdivided; * * * also Fishery No. 1 on the lake shore, beginning at the north line of the Lighthouse Reserve on the lake, extending northerly 120 rods north of the north line of the 'McNeil Tract,' so called, including the land lying between the Lake road and the lake."

(D) On September 2, 1871, Beers, by executor, conveyed to John M. Hoffman "the south part of fractional section 26, * * * lying west of the Lake road (except three acres sold to Robert T. Holland), and containing 50 acres, be the same more or less."

(E) On June 3, 1873, Hoffman conveyed to Howe the last-named parcel, by like description.

(F) On June 9, 1873, Howe conveyed to Esther Dor-

wood a portion of fractional section 26, describing the same as follows: "Commencing at a stake standing in the south part of fractional section 26, town 7 north, of range 17 east; running thence easterly, at right angles with the Lake Shore road; thence south, on a line parallel with the road, 10 rods; thence westerly, at right angles with the road, 8 rods; thence northerly, at right angles with the last line, 10 rods, to the place of beginning,—containing half an acre of land, said land *including the house now occupied by the party of the second part.*"

(G) On November 24, 1876, Howe reconveyed to Hoffman "the south part of fractional section 26, * * * containing in all 53 acres, more or less, excepting three acres sold to Robert T. Holland, 2 acres to Mrs. Hall, one-half an acre to Mrs. Dorwood, and Fishery No. 1 on the lake shore."

(H) On February 6, 1877, Hoffman conveyed to the defendant "the south part of fractional section 26, * * * excepting three acres owned by Holland, two acres owned by Mrs. Hall, and half an acre owned by Mrs. Dorwood, and Fishery No. 1."

The plaintiff derives his title to Fishery No. 1 by deed dated April 25, 1882, from Thomas Suffern, by executors, to Wesley L. Hoffman, which deed purports to convey the entire title; a deed dated February 3, 1875, from the administrators of the estate of William Bard to John M. Hoffman, conveying an undivided one-third of Fishery No. 1; a deed bearing date April 25, 1882, from John M. Hoffman to Wesley L. Hoffman; and a deed dated September 16, 1882, from Robert T. Holland to Wesley L. Hoffman. These deeds of the Fishery contain a similar description to that above given in the deed from Butler to Bard and others (C).

Defendant insists that so much of Fishery No. 1 as was east of the premises conveyed has ceased to exist; that the

action of the waters of Lake Huron for a long series of years has had the effect to wear away the banks of the shore; that, at the point in question, it has so far encroached upon and worn away the land that the whole of that part of said fishery has been washed away, and that the place where it was is now covered by the waters of the lake, and that the water line now reaches to its lands. The plaintiff claims, on the contrary, that the fishery has not been washed away, but that it substantially remains; that the action of the water has not been such as materially to wear away the land; and that, though it may be worn away to some extent temporarily by storms, it generally makes on again to the beach, and, at least, a considerable part of the land constituting the fishery remains.

The disputed fact in the case is the location of the Lake road referred to in these several deeds. At a very early date, Robert T. Holland built a house upon the three acres conveyed to him by Butler (A), and inclosed said parcel by a fence. Many years ago, a street was opened on the line between fractional section No. 26 and the McNeil tract; and in 1876 Huron avenue was extended in a north-westerly direction beyond the north line of fractional section No. 26, connecting with the lake shore at a point north of said fractional section. The extension was called the "New Lake Road," and the old road was abandoned. The land conveyed as aforesaid to defendant was used by it for cemetery purposes. In 1883 a surveyor was employed by the cemetery board to locate the east line of said property. The surveyor was paid for his services by the cemetery board and plaintiff jointly. A survey was then made, the line fixed, and the cemetery authorities built a post and wire fence upon the line so fixed. The line as then fixed is the one for which plaintiff contends. In 1889 the cemetery authorities took down this fence, and constructed one to the water's edge. So

far as the record discloses, this was the first time that the defendant asserted the right to possession of any land east of the line of the fence so constructed as aforesaid.

No traces of any highway upon the surface of the disputed territory now remain. It appears that, for many years after the conveyances from Butler (A and B), there were trees and vegetation for some distance east of the Holland inclosure, and of the line fixed by the surveyor aforesaid; but violent storms have washed away the surface, and undermined many of the trees, so that much of the area between said fence line and the water's edge is a sandy beach, but the water's edge is still from 150 to 250 feet east of said fence line and east of the Holland inclosure. There was some evidence tending to show that the water's edge had been at times nearer to this line, and that, owing to the action of the cemetery authorities, the land had made on again; but it appears that, when the fence line was determined as aforesaid, there was land east of said line, and it does not appear that at any time the water line reached or passed such fence line. In the construction of the wire fence aforesaid, trees were made use of along the line to which to attach the wires.

Plaintiff introduced the township record of a highway along the shore, dated December 11, 1837, "surveyed by me, Nathan Ward, district surveyor, and Elijah Burch and Alexander Ashley, commissioners of highways." This survey gives courses, distances, and a large number of monuments. It commences on the north line of the township, and ends at "a post one chain from the west bank of Lake Huron," a point which is south of fractional section 26. The surveyor who located the fence line for the cemetery authorities in 1883 was called for plaintiff, and locates the starting point on the north line of the township, and admits his inability to find any of the intermediate monuments or finger posts except one, or to find the

"post one chain from the west bank," but claims to have followed the courses given in the highway survey aforesaid, and that such courses and distances brought him to the line of the road immediately in front of the fence inclosing the Holland tract, and upon the line of Lake street, as it appears upon the plats (2 and 3) above given. He found the stake upon the north line of the McNeil tract referred to in the deed (A) from Butler to Holland, and also the stake at the north-west corner of the Holland parcel, which is also referred to in that conveyance, and testifies that the line of the road as retraced according to the survey made in 1837 conformed to these stakes. He also locates the Dorwood half acre as fronting on the line so traced by him. He further finds that the Holland inclosure does not contain quite three acres, and that, in order to give Holland the full three acres within his inclosure, it would be necessary to extend the north and south lines nearly a rod. His retracing gives to that part of fractional section 26 lying west of the line run by him 96.9 acres of land.

The defendant introduced a survey of the highway made in 1843, and a subsequent survey made in 1854. The courses and distances given, so far as section 26 is concerned, are substantially the same as are given in the survey made in 1837. The defendant called its city engineer, who testifies that, by following the courses and distances indicated in the several surveys, he came out at a point opposite the Holland inclosure, 40 rods east of the meander line. Upon cross-examination the witness says:

"*Q.* And, at a point of the boundary of section 15, your road of 1837 crosses the meander line, does it not?

"*A.* Yes, sir.

"*Q.* According to the government survey, it crosses the meander line into Lake Huron in section 15?

"*A.* Yes, sir.

"*Q.* And your line of 1837 crosses the meander line at that point into Lake Huron?

"*A.* Yes, sir.

"*Q.* And your survey of 1843 also crosses the meander line at the same point into Lake Huron, does it not?

"*A.* I will not say that it passes into Lake Huron; it passes the meander line.

"*Q.* The meander line indicates what there?

"*A.* It indicates a line somewhere near the border of Lake Huron.

"*Q.* The margin of Lake Huron?

"*A.* Not necessarily close.

"*Q.* Within what distance would you say it was?

"*A.* Probably within 3 or 4 rods; possibly more at points.

"*Q.* At that point it crosses what is here indicated as the meander line?

"*A.* Yes, sir.

"*Q.* And it joins the other road very closely down here, at section 26,—the two roads come together?

"*A.* They are said to come together.

"*Q.* Near the north part of fractional section 26?

"*A.* Yes, sir.

"*Q.* And the survey brings them up together at that point?

"*A.* They are said to.

"*Q.* And, from that where you cross that meander line, how much further did you survey that line of 1843?

"*A.* I surveyed it down to near the south line of 15.

"*Q.* Or a mile and a half above Holland's?

"*A.* Yes, sir.

"*Q.* Did you survey it any further?

"*A.* No, sir.

"*Q.* Then, from there down it is a joint line?

"*A.* From there it is a line completed from the notes.

"*Q.* From the time it crosses these two surveys, the one of 1837 and the one of 1843, they never get west of the meander line, do they, again?

"*A.* No, sir; not according to the way they plat.

"*Q.* And they never get within anywhere near it at the south end?

"*A.* No, sir.

"*Q.* Now, according to the field notes, they come out just about as they should on the plat; that is, they join just about as they should?

"*A.* They join just about as they should according to the notes.

"*Q.* That is just about as they should join?

"*A.* Yes, sir.

"*Q.* Now, as a matter of fact, Mr. Rogers, if this survey was ever run on that line as you run it, they must have run either in the water from the time they passed section 15, or else the meander line is not correctly laid down on that map, is not that so?

"*A.* That is true, I guess.

"*Q.* So that either, as a matter of fact, these two surveyors who surveyed these roads, the one in 1837 and the other in 1843, ran that road into the water from the time they passed section 15 down to the end, or else they have both made a mistake, or else the government has made a mistake?

"*A.* Yes; I think that can be answered in the affirmative.

"*Q.* Or else you have made one?

"*A.* Yes; put that in too, if you want to.

"*Q.* Now, the two must have made practically the same mistake, must they not,—substantially the same mistake?

"*A.* It seems to me, the way their notes plat. * * *

"*Q.* Now, at this point, I don't remember how many rods you said you were out there in the lake.

"*A.* I said over 40 rods.

"*Q.* How many chains would that be?

"*A.* 10 chains.

"*Q.* Beyond the meander line?

"*A.* Yes, sir.

"*Q.* So that, if the road was ever run out into the lake at that point, that meander line was set 10 chains west of the road?

"*A.* If the road was ever there, the meander line was 10 chains west. * * *

"*Q.* Why do you estimate, Mr. Rogers, that there was ever any land out there, beyond the meander line, upon which to run a road?

"*A.* I never said there was, that I know of.

"*Q.* You made a map in which you located a road out there?

"*A.* I didn't locate a road. I located some minutes of a survey that was placed in my hands. * * *

"*Q.* At that point, then, you knew the fact that the center of the road, what was called the 'Lake Road'

there, was at that point when you made the survey up here in section 4?

"*A.* I knew about it according to that plat.

"*Q.* Then, if that plat was correct, you had two definite points of certainty when you made the survey?

"*A.* Not in those minutes. It doesn't say anything about that. It simply gives courses and distances from one point.

"*Q.* If that Lake road was correct on the plat at that point—

"*A.* If it was?

"*Q.* If it was correct at that point, and this quarter post up at that point was correct, you had two points of certainty, had you not?

"*A.* Yes; if that was correct.

"*Q.* So that you knew, when you were surveying here, when you crossed this line and ran out into the lake, you knew that you were there out of the way, that you were making a mistake, or somebody else had made a mistake, did you not?

"*A.* Certainly, I did."

The defendant supplemented this testimony by that of a number of witnesses, none of whom had resided upon the road, or at or near the land in question, but who had occasionally, at intervals between 1836 and 1860, traveled along this shore. The testimony of these witnesses, however, does not tend to show any authoritative location of a highway, nor does it tend to locate any particular or definite way by user. The witnesses disagree as to the distance from the Holland house to the fence, as to the distance from the fence to the road, and from the road to the water. No other definite monument is referred to. A majority of them fix the distance from the house to the fence at from 5 to 6 rods. Certain of them insist that the road was near the fence, and two of them state that the Holland fence was the west boundary of the highway; others state that it was from 25 to 30 feet from the fence; and others vary the distance from 4 to 10 rods. The distance from the road to the water is given by some at

4 rods, by others at 6, by others at 8, again at 10, and by some as high as 20 to 25 rods. All agree that there was no road cut out, having any definite or uniform width, and that travelers drove anywhere between the road and the lake. One witness says:

"There were quite a number of tracks parallel with each other every two or three rods. Have seen as many as half a dozen parallel tracks. Everybody made a road for themselves."

Another says:

"There were numerous traveled tracks."

Another:

"There were half a dozen roads. When it got packed with heavy sand, we would shift again, and so on."

Another says:

"Some places the roads were 3 rods apart; some places, not over 2 rods. Farmers jogged in, I suppose, to get the best road."

Another says:

"There was no cut-out road, except cut out to take a sled through. They took out a few trees to let a sled through, and kept as close to the water as they could, so as to have as slight a cut as they could. It was what you would call a 'bush road.'"

Another says:

"It was never more than a mere wagon track through the timber. There were no regular dimensions, or anything like that."

Another says:

"It was supposed to be a road, but they run anywhere between the road and the beach. In very dry weather they would go just as close to the water as they could get,—right on the border of the lake. The road as traveled wasn't straight; it zigzagged around."

Several of these witnesses say they "think," or that

they "should say," or that their "judgment is," that Holland's fence had been moved, or that it must have been moved, to the west. No witness testifies to the fact of removal, but they judge from alleged changed appearances at times years apart. Ransom Holland, whose father lived in the house upon this inclosure from about the time of the purchase of the three-acre tract until 1886, and who himself has lived upon the tract since his birth, in 1841, testifies that the fence is now where it has always been. A number of these witnesses give the course of the road in the vicinity of the Holland tract as north-easterly, but the government meanders make fractional sections 26, 23, 22, 15, 10, 9, and 4. Section 23 contains less than 12 acres. The north line of 22 is less than 54 chains, and the north line of 15 is 22 chains, and the course of the meander line is nearly direct from the south line of 26 to the starting point in 4.

The survey commences on the north line of the township, and locates its southern terminus at a point south of the land in question. There was no east and west road at such terminus, and the presumption is that it closed with an existing highway. This survey was made in December, 1837, and the plat (diagram 2) showing the course of the highway from the north line of the McNeil tract southerly, beyond the terminus of the recorded survey, to the Lighthouse Reserve, was recorded in October, 1838.

As between the record of a highway, being a survey thereof by the proper authorities, or a dedication thereof to the public, and such a use of the margin along the shore of the lake, which margin is from 10 to 30 rods in width, as is indicated by the testimony of the defendant's witnesses, which use includes the use of the way described in the survey or defined in the plat, the former must prevail, because the most certain. There is no room in the present case for the application of the rule that, as between

the record of the survey of a highway, and a highway actually located upon the ground by fence lines, or by being graded and traveled or otherwise definitely fixed, the latter must prevail, and the presumption must be in such case that the description in the deed, bounding the land by such highway, referred to the highway as it actually existed upon the ground at the time of the conveyance. The reason for that rule does not exist unless the line of the road was actually located and definitely fixed, in which case the road itself becomes the controlling monument. Streets that have been opened and acquiesced in by the parties interested, or by the public authorities, become permanent boundaries, and form new starting points for later surveys. *Twogood v. Hoyt*, 42 Mich. 609; *Van Den Brooks v. Correon*, 48 Id. 283. In *Atwood v. Canrike*, 86 Id. 99, 103, it is said that—

"Without proof that the line of the road, as shown by the record, had been opened or used at the time the deed was made, or proof that no road called a 'State road' had been opened or used, * * * the record would not be material."

In the present case there is no proof that, at the time when Butler conveyed these parcels of land, a highway had been cut out or graded or worked or its location definitely fixed by authoritative action, and, as respects use or travel, the testimony clearly tends to show that the use was not confined to any line within a strip of land from 10 to 30 rods in width. Testimony of that character is admissible only as a *dernier* resort. *Kilgannon v. Jenkinson*, 57 Mich. 325. See, also, *Lyle v. Lesia*, 64 Mich. 16.

The Holland tract is described in the deed from Butler to Holland (A) by metes and bounds, the courses and distances are given, and four stakes are expressly referred to. The deed from Butler to Beers (B) excepts three acres, "heretofore sold to Holland, off the south-east corner of

said fractional section 26, lying west of the Lake road." The Dorwood tract is described in the deed from Howe to Dorwood (F) by metes and bounds, courses and distances. These deeds refer not alone to the Lake road as a boundary, but to these parcels as located on such Lake road, and stakes on the highway are frequently referred to as monuments. The Holland parcel is referred to as occupying the south-east corner of the tract included in the general description. As is said in *Willey v. Snyder*, 34 Mich. 60, written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time.

"Descriptions do not identify of themselves; they only furnish the means of identification. They give us certain marks or characteristics,—perhaps historical *data* or incidents,—by the aid of which we may single out the thing intended from all others; not by the description alone, but by that explained and applied. Even lands are not identified by description until we place ourselves in the position of the parties by whom the description has been prepared, and read it with the knowledge of the subject-matter which they had at the time."

The conveyances through which defendant derives its title furnish the means of identification. The boundaries of neither of these excepted tracts are defined in the deeds in which the exceptions are made. Resort to the deeds conveying the excepted parcels is absolutely essential. It is well settled that, for the purposes of identification and certainty, resort may be had to a conveyance referred to in the instrument containing the uncertain description. *Daily v. Litchfield*, 10 Mich. 29; *Cronin v. Gore*, 38 Id. 381; *Fahey v. Marsh*, 40 Id. 236; *McAfee v. Arline*, 83 Ga. 645; *Weeks v. Martin*, 10 N. Y. Sup. 656; *Cannon v. Emmans*, 44 Minn. 294.

The deed to Dorwood (F) expressly referred to the land

as occupied by the grantee, and it was held in *Fahey v. Marsh* and *Cronin v. Gore* that, where the description in a deed calls for land "owned and occupied," the actual line of occupation is a material call to be considered in locating the boundaries. Neither Holland nor Mrs. Dorwood could be heard to say that the conveyances to them embraced land east of the monuments referred to in their deeds. The highway to which their grantors referred was made manifest and certain by monuments, courses, and distances given in the conveyances. The result of defendant's contention would be to permit it to take lands lying between the highway defined in the Holland and Dorwood deeds and the highway sought to be established, and to cut off both tracts from the highway.

The surveyor who fixed the line in 1883 found two of the stakes referred to in the deed from Butler to Holland (A),—one of them at the south-east, and the other at the north-west, corner of that tract. In addition, the surveyor testified that Holland's fence took substantially the course named in the deed (A), and that it made allowance for a highway along the east line of the inclosure. Old fences have always been regarded as strong and trustworthy evidences in ascertaining and fixing boundaries. *Diehl v. Zanger*, 39 Mich. 601; *Twogood v. Hoyt*, 42 Id. 609; *Wilmarth v. Woodcock*, 66 Id. 331; *Beaubien v. Kellogg*, 69 Id. 333. It was also shown that the area in the Holland inclosure was within one-tenth of an acre of the quantity named in the Holland deed (A), and that the line contended for by plaintiff gave to that part of the fractional section substantially the quantity of land named in the conveyances thereof. In February, 1841, Butler conveyed to John McNeil "the north fractional part of section 26, * * * containing 44 acres of land, reserving the land between the road and the lake for fishing." The deed

from Butler to Beers gives the quantity thereby conveyed at 50 acres, and the quantity conveyed to Holland is stated at three acres, making the total acreage given in that part of the section lying west of the road 97 acres. Paldi, who made the survey for the cemetery board, and whom plaintiff called, computes the acreage west of the line fixed by him at 96.9 acres. The starting point of the surveyed highway is found. The post at the southern terminus is lost. All the intermediate finger posts, except "a rill," are gone. Two surveyors disagree materially as to the courses. In such case, quantity becomes a material consideration. *Winans v. Cheney,* 55 Cal. 567; *Hanson v. Township of Red Rock,* 57 N. W. Rep. 11.

Again, the recorded maps or plats (2 and 3) show a street or roadway to the east of the lots, and a margin between the street and the lake, extending from the north line of the McNeil tract southerly to the Lighthouse Reserve, which street is a continuation of the way indicated by description in the Holland deed (A). The survey of the highway was made in December, 1837. Plat 2 was recorded in October, 1838. Plat 3 was recorded in December, 1841, and locates the street on the same lines as does the second plat. The deed to Holland (A) is dated July 19, 1840. The deed from Butler to Beers (B) and the deed from Butler to Bard and others (C) are dated in February, 1841. The deed from Howe to Mrs. Dorwood (F) is dated June 9, 1873. The deed from Hoffman to defendant is dated February 6, 1877. What constituted Fishery No. 1, excepted in the last-named conveyance, is made certain by reference to other conveyances. The highway survey antedates the plats; the first plat antedates the deed to Holland; and both plats antedate the deeds of the parcels the boundary line between which is in dispute, as both deeds in terms refer to the second plat. These facts respecting the plats and the determination of the boundary

lines of the Holland and Dorwood tracts were not disputed, and the jury should have been instructed that the description in the deeds referred to a highway so located, and that they would not be justified in finding that reference was intended to a highway from 50 to 70 rods east of that line so fixed, or to any other highway than that specifically indicated. There is no evidence in this record tending to show that, when the conveyances A, B, and C were made, there was any other road actually located upon the ground or cut out, or to which travel was confined, or that had such a character as a highway that it might be treated or adopted as a boundary line, and held to control a recorded survey or plat. Much less could a shifting way be allowed to control a boundary line definitely fixed by monuments referred to in the conveyances. Nor do we think that the use of said highway subsequent to that time, including, as it did, travel up to the line fixed, was such as to locate definitely any other highway line which can be held to control the recorded highway survey. If it be true that, in the resurveys alleged to have been authoritatively made in 1843 and 1854, the line through section 26 was not changed, that fact would negative any intention on the part of the authorities to recognize any change in the course or location of the road; and the further fact that as late as 1873, at the time of the conveyance to Esther Dorwood, the line as then fixed conformed to that referred to when A, B, and C were made, would indicate clearly that there was no recognized change in the location of the highway.

Respecting the line of the highway north of the Dorwood tract, the parties must be held to have referred to a highway which was a continuation of the highway as defined south of that point. In view of the existence of the survey when the conveyance to Holland was made, the short time that elapsed between the date of the survey

and that conveyance, the plats locating the *situs* of the highway, and the fact that no road had been actually cut out or otherwise definitely located upon the ground, it must, we think, be presumed that the road referred to was the surveyed road, and that the line of said road as indicated by the plats and stakes was the surveyed line, as understood by the parties to the conveyances in which the road is referred to as a boundary. That line was fixed at a time when no dispute had arisen. Up to the time of the conveyance to Mrs. Dorwood, and up to the time that the fence was erected, in 1883, the line thus indicated seems to have been unquestioned. Although the travel had been of a fugitive character during the entire period, and resurveys had been made by the authorities, yet no change had been made in the survey of the line in question. While these circumstances may not, as a matter of law, be conclusive as to the correctness of the location of the line of the highway, yet they are trustworthy evidences to be considered by the jury, and tend to corroborate Paldi's resurvey.

Mr. Rogers, in his survey, seems to have started out with the assumption that the magnetic declination named in the survey of 1837 was the correct one; and although it carried him across the meander line, and out into the lake, at a point nearly three miles north of the southern terminus of the survey, and kept him there until, when he reached 26, he was 40 rods east of the meander line, and from 50 to 70 rods east of the line fixed, by description and plat and stakes, at or shortly after the time that the survey was made, and although the plats extended such highway beyond the southern terminus of the surveyed highway, he made no effort to reconsider the assumption with which he started out, or to harmonize his resurvey with conditions which seem to have existed for over 50 years. As contended for by plaintiff, we think

that the presumption is that the highway as surveyed was within the government meander lines. In any event, the boundary line as indicated by the courses given in the Holland deed, the stakes referred to in that deed and in the Dorwood deed, the fences inclosing the Holland and Dorwood tracts, and the line of the highway as fixed by the plats, is the boundary that must control, and this upon the principle that a supposed boundary line, long acquiesced in, is better evidence of where the real line should be than a survey made after the original monuments have disappeared. *Stewart v. Carleton*, 31 Mich. 270; *Diehl v. Zanger*, 39 Id. 601.

With reference to the line north of the Dorwood tract, as already intimated, the parties must be held to have referred to a highway which was a continuation of the highway as defined south of that point; and the location of the lines extended must be determined by following from that point, northerly, the courses given in the recorded survey within the limits of the section.

Plaintiff also made the claim of title by adverse possession, and complains of the instruction that if Holland's possession was not in hostility to, but in recognition of, Suffern's title, and he held under Suffern, as a tenant or by his permission, then such possession would not be a sufficient one upon which to found an independent title. This instruction was erroneous. Defendant does not claim through Suffern. Holland's possession, as tenant of Suffern, was the possession of the latter; and plaintiff, having acquired that title, could tack possession under it.[1]

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

The other Justices concurred.

[1] Suffern was claimed to be the survivor of the grantees named in the deed C, which created an estate in joint tenancy.

102 439
142 309

FRANK KRAFT v. JOHN KRAFT, JOSEPH KRAFT, AUGUSTA KRAFT, AND ANTHONY KRAFT.

Estates of deceased persons — Homestead — Exemption — Equity practice—Lien—Contribution.

1. Under section 3, art. 16, of the Constitution, the homestead of a family, after the death of the owner thereof, is exempt from the payment of his debts during the minority of his children, and neither the probate nor chancery court has power to decree its sale to pay debts allowed against the estate of said owner.
2. Prior to the issuance of letters of administration, an heir at law of the decedent, who was also a general creditor of the estate, paid the balance due on a contract for the purchase of the homestead occupied by the decedent at the time of his death, and the same was conveyed to all of the heirs, some of whom were minors. Said heir then filed a claim against the estate, made up of the money so paid, and moneys claimed to have been loaned to the decedent to pay upon the contract and for other purposes. The claim was allowed, after which the claimant filed a bill to declare the same a lien upon the homestead, and for its sale to satisfy said lien. The bill failed to show that there was no personal property belonging to the estate, or that the rents were insufficient to take care of complainant's claim. And it is held that the complainant, having voluntarily submitted his claim to the jurisdiction of the probate court, and having rested content with such jurisdiction until after the time for appeal had expired, has elected his remedy, and will not be allowed to put either the estate or the other heirs to an expensive suit in chancery to enforce the claim for the moneys paid on the contract.

Appeal from Wayne. (Donovan, J.) Submitted on briefs June 29, 1894. Decided November 20, 1894.

Bill to declare and enforce a lien on the homestead of a deceased person. Defendants appeal. Decree reversed, and bill dismissed. The facts are stated in the opinion.

William B. Jackson, for complainant.

Bowen, Douglas & Whiting, for defendants.

GRANT, J. The bill of complaint contains the following allegations:

"1. That the complainant and defendants, together with one Anna Eland, are the sole heirs at law of one John Kraft, who died intestate in the city of Detroit, on March 5, 1890, in possession of a certain city lot described in the bill, and concerning which the litigation is taking place, which said lot the said John Kraft held under a purchase contract, and occupied with said heirs as his homestead, and on which contract there remained to be paid of the purchase money $144.32 at the time of the decease of said John Kraft; that 15 days after the death of the said John Kraft, and prior to the emanation of letters of administration, the complainant spontaneously paid said arrearage to the vendor, who immediately deeded the lot to all of said heirs, and of whom three were minors, the youngest being only 12 years of age.

"2. That on June 25, 1890, administration of the estate was committed to one Ralph Phelps, who took possession of the lot, the same being abandoned by the family.

"3. That on decedent's death he was indebted to complainant for money loaned to pay on said contract, 'and for other purposes,' in the sum of $560; that complainant filed his claim against said estate with the commissioners on claims, who duly allowed him, against said estate, $711.44.

"4. That complainant has acquired by purchase of one of the adult heirs, viz., Anna Eland, her share and interest, and now holds one-third as 'joint tenant' with the other heirs.

"5. That the premises are out of repair, and do not yield a sufficient rent to pay the taxes; that those for 1891 are due and unpaid, and that no money is in the hands of the administrator wherewith to pay the same; that a sewer tax of $24.63 rests upon the lot, and, unless paid, the lot will be sold for it, and the complainant's interest sacrificed."

The prayer of the bill is that—

"The money so advanced by your orator to pay said Freud upon said land contract may be decreed to be a lien thereon, and the money so due your orator from said John Kraft,

deceased, may also be decreed a lien upon said premises, and the same may be decreed to be sold to pay the same."

The answer of John and Joseph, who are of age, admits the heirship; that their father died possessed of the land, and that it was held by him under a contract from Freud; that the premises were occupied by their father as a homestead; that the premises are out of repair; that the taxes of 1891 are due and unpaid, and also a special tax for a sewer. They aver ignorance of the terms of the contract, and of any payments made by complainant, and of any allowance of complainant's claim against the estate, except as they are informed by the bill of complaint. They deny that the homestead has been abandoned. The infant defendants answered, submitting their rights and interests to the court. Replication was filed and proofs taken in open court, and decree entered for complainant giving him a lien upon the land for his entire claim allowed against the estate.

Complainant presented his claim against the estate in two items,—one for $711, and one for $35. The basis of each claim is the same, viz.: "For money paid to and for said deceased." An administrator was duly appointed, who is in possession of all the assets of the estate, including these premises, which he has rented, and complainant is collecting the rents for him. The bill is silent as to the amount of the assets in the hands of the administrator, and the proof upon this point is equally silent.

The bill alleges that the premises constituted the homestead of the deceased's family at the time of his death. Under the Constitution (article 16, § 3), the homestead is exempt from the payment of all his debts during the minority of his children. It follows that the premises cannot be sold by the decree of either the probate or chancery court to pay debts allowed against the estate.

When the minors become of age, the premises will be subject to sale to pay such debts.

The complainant's claim is the only one allowed against the estate. If there were no homestead, the probate court could, upon petition, order the property sold. After payment of the small amount due upon the contract, complainant included this amount in his claim against the estate. It was not put down as a separate item, nor was any claim of lien or preferment filed with it. He voluntarily included this item with others as money paid for the deceased without specification. Upon the hearing in the court below, complainant refused the offer of the defendants to allow the bill to be considered as a bill for contribution (which, in fact, it was not) as to the $144.32, provided that amount be remitted from the total amount allowed, and they be allowed to take an appeal from the allowance of the balance of the claim.

The complainant is not, in our judgment, in position to invoke a court of equity to give him a lien upon the premises. He has voluntarily submitted his claim to the jurisdiction of the probate court. It is allowed and stands as a valid claim. He does not show that there is no personal property, nor that the rents are insufficient to take care of his claim. His claim was allowed in February, 1891, and he rested content with the jurisdiction of that court until March, 1893, after the time for appeal had expired, when he filed this bill. He has therefore elected his remedy, and will not be allowed to put either the estate or the defendants to an expensive suit in chancery to enforce a claim which amounts to a trifle over $100.

Decree reversed, and bill dismissed, with costs of both courts.

The other Justices concurred.

102 443
108 522

ADELIA A. OLIN v. DAVID C. LOCKWOOD ET AL.

Replevin—Contest between mortgagees—Judgment.

1. How. Stat. § 8342, which provides that "when either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages, in all cases arising under this chapter [288], and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties," is only applicable to a case where one party is the general owner, and the other a lienor or part owner.[1]
2. Where a prior mortgagee replevies the mortgaged property from the second mortgagee, and its value as found by the jury exceeds the amount of the mortgages, and the jury further find that the property was unlawfully detained by the defendant, the plaintiff is entitled to a judgment and to the costs of suit.

Error to Iron. (Stone, J.) Submitted on briefs October 2, 1894. Decided November 20, 1894.

Replevin. Plaintiff brings error. Reversed, and judgment entered in this Court in accordance with the opinion. The facts are stated in the opinion.

Julius J. Patek, for appellant.

Moriarty & Abbott, for defendants.

LONG, J. Action of replevin. Neither plaintiff nor defendants are the general owners of the goods replevied, but are mortgagees. Plaintiff took them into her possession under the writ against defendants. There is no dis-

[1] For cases bearing upon the proper construction of and practice under said section, see *Upham v. Caldwell,* 100 Mich. 264, and note.

pute of fact. Plaintiff had a prior mortgage lien on the property, which the jury found amounted to $611.07, and the defendants' second mortgage amounted to $376.35. The value of the property was found to be $1,060. The jury also found by their verdict that the property was unlawfully detained by defendants. Upon this verdict, the court directed a judgment to be entered in favor of the defendants against plaintiff for the amount of their lien of $376.35, and that defendants have execution therefor. Judgment was given plaintiff for costs of suit against defendants, and execution for the collection of such costs awarded. Plaintiff brings error.

It is insisted that under this verdict the only judgment which could be entered was one in favor of plaintiff for costs against defendants; that if defendants desired to have the goods in their possession they should have tendered plaintiff the amount of her lien and costs; but that, not having made such tender, they could not waive return and have their lien assessed against plaintiff, and thus have their money judgment against her. Plaintiff's mortgage was conceded to be the first lien, and had to be first paid out of the property. For the purpose of enforcing this lien by foreclosure and sale, the plaintiff was entitled to possession of the goods and chattels; and the jury found that they were wrongfully detained by defendants. It cannot be said, because the jury found the value to be $1,060, that plaintiff, on such foreclosure sale, could realize that amount. If the goods fell short of bringing the amount of the two mortgages and costs, certainly the loss should not fall upon the first mortgagee; and yet, under the judgment entered, this would be the result, for the plaintiff, being compelled to pay the defendants the amount of their mortgage lien in full, might not be able to realize that amount out of the goods after satisfying her mortgage and costs of foreclosure.

How. Stat. § 8342, provides that when either of the parties to an action of replevin, at the time of commencement of suit, has only a lien upon, or special property or part ownership in, the goods, and is not the general owner, that fact may be proved on the trial or on the assessment of damages, and the finding of the court or jury shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties. Under this statute it is claimed by defendants that the court properly directed a finding of the amount of the lien of each party, and that the only judgment which could in justice be rendered is the one directed by the court. This provision of the statute is applicable to a case where one party is the general owner, and the other a lienor or part owner. Here the parties both had liens only. The prior lienor had the right of possession, unless the amount of her lien was paid or tendered. If the defendants desired to have a return of the property, this was the way to obtain it; but they had no right to a money judgment against the plaintiff. Under the findings of the jury the judgment should have been in favor of the plaintiff and for costs of suit. *Kennedy v. Dawson*, 96 Mich. 79; *Frederick v. Circuit Judge*, 52 Id. 529.

Inasmuch as there is no dispute of fact, the judgment below will be reversed, and judgment entered here in accordance with the above, with costs of this Court in favor of the plaintiff.

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

MICHAEL J. ENRIGHT v. GEORGE DUFF ET AL., POLICE COMMISSIONERS OF THE CITY OF PORT HURON.

Municipal corporations—Removal of police—Authority of commissioners.

By the amended charter of the city of Port Huron (Act No. 392, Local Acts of 1893), the police force, which had been under the control of the common council, and the members of which were not subject to removal until charges had been preferred against them, and they afforded an opportunity of being heard in their defense, was placed under the control and management of a commission created by the act, with exclusive power to appoint members of the force, and to suspend or remove policemen under and for such causes as should be fixed by the ordinances and charter of the city and the rules adopted by the commission. It was further provided that the existing police force should continue to hold their offices until their successors should be appointed and qualified. And it is held that the members of the police force had no fixed tenure of office at the time of the enactment of said statute; that its evident purpose was to confer upon the commission authority to reorganize the force; and that a policeman who received his appointment under the earlier law cannot complain of his removal by the commission for his alleged physical incompetency, on the ground that charges were not preferred against him, and the question of his physical incapacity tried and determined by said commissioners.

Certiorari to St. Clair. (Vance, J.) Argued October 2, 1894. Decided November 20, 1894.

Relator applied to the circuit court for *mandamus* to compel respondents to reinstate him as a member of the police force. Respondents bring *certiorari* to review order granting the writ. Reversed. The facts are stated in the opinion.

Northup & O'Donnell, for relator.

Phillips & Jenks, for respondents.

MONTGOMERY, J. This is *certiorari* to review the decision of the circuit judge granting a *mandamus* to compel the reinstatement of the relator as a member of the police force of the city of Port Huron.

It appears by the return that the police commissioners removed the relator after having caused a physical examination to be made, and having apparently satisfied themselves that the relator was physically incompetent. No charge was brought against the relator of any misconduct, nor is any now suggested. His contention is that he was entitled to have charges regularly preferred against him, and the question of his physical incapacity tried and determined by the board of commissioners, before they were justified in causing his removal.

Prior to 1893 the control of the police was in the common council of the city, and an ordinance had been adopted which provided, by section 6, that—

"No policeman shall be removed until charges shall have been preferred against him, and he afforded an opportunity of being heard in his defense. But pending the hearing of such charges, the chief of police may suspend such member from duty."

It is contended by the police commission—First, that this ordinance, if it be deemed in force, should not be construed to have application to cases of removals for physical incapacity,—that the word "charges" implies something more than a determination of physical incapacity for the service; and, second, that, under the amendment to the laws hereinafter noted, the power to reorganize the police force and to displace the incumbents was conferred upon the police commission when organized, and that those holding under earlier appointment could, upon the reorganization, be displaced by the appointment of successors. If this contention be sound, it becomes unnecessary to

determine what would have been the relator's right under the earlier law.

The provisions of the amended charter are found in Act No. 392, Local Acts of 1893. At page 1165, section 48 provides that—

"The police force of the city of Port Huron, as now organized, shall be under the control and management of a police commission hereby created."

After providing for the constitution of the commission, it is further enacted as follows:

"Said commission shall, within 60 days after the passage of this act, and on the first Monday of June in each year thereafter, appoint a chief of police, who shall be *ex officio* marshal of said city, and perform all the duties to be performed by the marshal under the charter and ordinances of said city. Said commission shall have the exclusive power to appoint members of the police force, to suspend or remove the chief of police or policemen under and for such causes as shall be fixed by the ordinances and charter of said city and the rules adopted by said commission."

Further:

"Said commissioners shall serve without compensation, and the city clerk shall be *ex officio* clerk of said commission: *Provided,* that the chief of police or any policeman shall not be appointed or removed except by a vote of the majority of the members of said commission: *And Provided, further,* that the present police force, including the chief, shall continue to hold their respective offices until their successors are appointed and qualified."

We think that by these provisions it was intended to confer upon the commission power to reorganize the police force in the first instance. The commission is given exclusive power to appoint members of the police force. It is further provided that the present police force, including the chief, shall continue to hold their respective offices until their successors are appointed and qualified. This

provision is certainly not apt to express an intent that successors shall only be appointed to the members of the force after the incumbents have been tried for offenses or incompetency, and dismissed from the service. The members of the force had no fixed tenure at the time of the enactment of this statute, and the evident purpose was to confer upon the new commission the authority to reorganize the force. The relator is not an appointee of the present commission, but derives his appointment from the common council under the earlier law. This being the case, he was subject to removal, and is not in position to complain of the action of the commission.

The order directing his reinstatement will be reversed.

The other Justices concurred.

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102 449
134 s 98

SETH W. FIELDS v. MERRILL COLBY, HIGHWAY COMMISSIONER OF THE TOWNSHIP OF IOSCO.

Equity practice—Appeal—Highways—Public necessity—Cul de sac.

1. Where the record in a chancery appeal case consists of the bill, answer, replication, decree, and a claimed copy of the proofs taken in open court, but no case has been settled as provided by the statute, the proofs cannot be considered, but the case will be heard on the bill and answer.
2. A bill in equity is no evidence for the complainant; and where the case is submitted on bill and answer, and no exceptions are filed to the latter, relief must be based on the admissions in the answer; and, if it denies or does not admit any averment that is material to the prayer for relief, the bill must fail; citing *Wiegert v. Franck*, 56 Mich. 200.
3. A sworn answer to a bill in equity must be taken as true where

the case is heard on bill and answer; citing *Ruhlig v. Wiegert*, 49 Mich. 399.

4. There is no statute or rule of law that expressly determines that, before a public highway can be laid out, it must have certain and definite *termini* in other public highways.

Appeal from Livingston. (Person, J.) Argued October 4, 1894. Decided November 20, 1894.

Bill to restrain defendant from taking further proceedings to open a highway. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

Edward S. Grece and *J. L. Pettibone*, for complainant.

John Cummiskey and *S. S. Abbott (Luke S. Montague*, of counsel), for defendant.

LONG, J. A decree was entered in the court below dismissing complainant's bill, from which he appeals. The record returned here contains the bill, answer, replication, decree, and a claimed copy of the proofs taken in open court; but, as no case was settled as provided by statute, the proofs cannot be considered. The appeal will not be dismissed, but the case heard here on bill and answer.

A bill in equity is no evidence for complainant; and where the case is submitted on bill and answer, and no exceptions are filed to the latter, relief must be based on the admissions in the answer; and, if it denies or does not admit any averment that is material to the prayer for relief, the bill must fail. *Wiegert v. Franck*, 56 Mich. 200. The answer was not sworn to, and the rule must be followed that a sworn answer to a bill in equity must be taken as true where the case is heard on bill and answer. *Ruhleg v. Wiegert*, 49 Mich. 399.

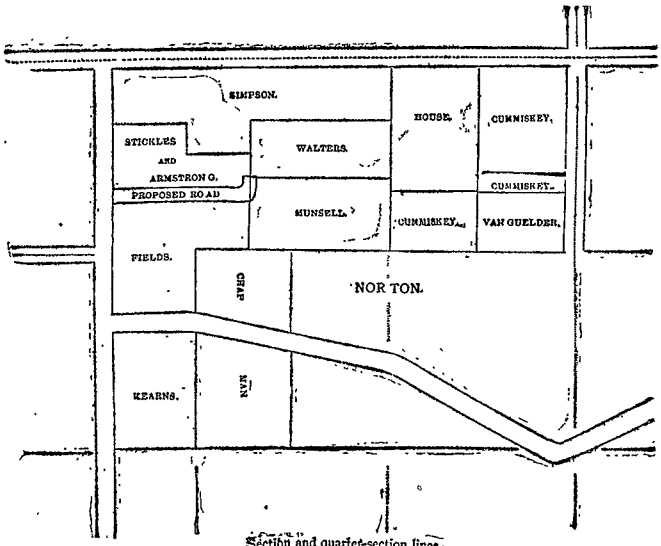
It appears that in August, 1893, a petition was made by the requisite number of freeholders to the defendant, as

commissioner of highways, to lay out and establish a highway. The land to be taken may be seen from the plat on following page.

The commissioner served the proper notice of hearing, and, before the day of hearing, a protest was filed with him. On the day of hearing, the commissioner made his order, in due form, for laying out and establishing the highway. This bill is filed to enjoin the defendant from opening the highway, or taking any further proceedings therein, or from interfering with complainant in the possession of his premises, which are proposed to be taken. The bill avers that the original petition for the laying out of the highway was procured by the false representations of Munsell and Walters, for whose accommodation, it is claimed, the highway was to be established, in that they represented that the road was a public necessity, and was to be opened for the public benefit, but that the whole expense was to be paid by Walters and Munsell, and that the road was to be only two rods wide, and that Walters and Munsell had no way of reaching their land except by this road, and had been forbidden to cross those lands. It is also alleged that this highway is not a public necessity, and that Walters and Munsell had permission to cross other lands to get to their own, and purchased said land with full knowledge of the situation. It is also claimed that the only proceeding which they could of right take is for a private road to their lands, and in which proceeding they would be compelled to pay the whole expense, as the road to be laid out is a *cul de sac*.

The answer admits the proceedings to lay out the highway, and asserts—

"That, in pursuance of said application and notice, defendant found the said highway necessary, and did determine and did lay out and establish a highway, as described in said bill of complaint, and that said highway



Section and quarter-section lines.

SECTION 1 AND A STRIP OFF FROM THE EAST SIDE OF SECTION 2.

IOSCO, LIVINGSTON COUNTY, MICH.

was and is a legal and valid public highway, under the laws of the State, and that all the proceedings for the laying out thereof have been regular and according to the laws of the State; that the said highway is a public highway, under the laws of this State, and is for the benefit of not only the said William Walters and Henry J. Munsell, but for all the inhabitants of this State; and that the application therefor was for a public highway, as appears by said application, and not for a private way or road; and that the freeholders who signed said application for said highway did so for the express purpose of having a public highway laid out; and this defendant denies that any false or fraudulent representations were made to any of said petitioners for said highway, and denies that any of said freeholders were told that the said highway was to be a private road, and not a public highway. He denies that any false or fraudulent representations were made to said freeholders or to any one; and this defendant says that the said William Walters and Henry J. Munsell had no way of reaching their said premises, or either of them, by any road; that, as this defendant is informed and verily believes, they had been in the habit of crossing the fields of other adjoining owners from the public highway for some time, but had acquired no right of way across any of the lands to the said premises; that, as he is informed and believes, soon before the laying out of the said highway, the said Henry J. Munsell and William Walters had been, each of them, forbidden to any longer cross the said premises of others to their said lands; and this defendant avers that all the said questions as to the necessity of said public highway, and the necessity of establishing and laying out the same, came before this defendant at the time of the laying out of said highway, and were passed upon by him officially, as said highway commissioner, and that this defendant also considered the protest that was presented to him at the time of the laying out of said highway, and that the complainant and others were given opportunity by this defendant to make such objections, present such protests, and make such showing as was legal in the matter, before the final determination of this defendant, as said commissioner, to lay out and establish said highway; that in said proceeding this defendant, as said highway commissioner, determined the question of whether said highway was the best and most feasible one

for a highway to said premises, and determined that it was."

This answer must be taken as true,—that the laying out of the highway was a public necessity, and that no false representations were made in procuring it to be laid out. It is admitted by counsel for complainant that, under certain circumstances, a *cul de sac* might be considered a public highway; but it is said that no such circumstances exist here, as it is for the private use of Walters and Munsell only. The answer denies this, and asserts that it is a public necessity, and the commissioner has so found in his order. There is no statute or rule of law that expressly determines that, before a public highway can be laid out, it must have certain and definite *termini* in other public highways.

We think the case is settled upon the facts set up in the answer, which are conclusive upon us.

The decree of the court below must be affirmed.

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

102	454
111	624
102	454
135	[3]280
135	[2]659
102	454
152	[2]247

MARIA S. WHITAKER ET AL. v. THE ERIE SHOOTING CLUB AND JAY W. KEENEY.

Adverse possession—Marsh land.

1. The requirements of an adverse possession necessary to establish title to real estate are well understood, but the difficulty arises in applying these requirements to the particular case, which, as a rule, must be controlled by its own facts and circumstances.

2. The established rule of this Court is that "it is sufficient if the

acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question" (*Murray v. Hudson*, 65 Mich. 670, 673); that the occupation need not be such as to inform a passing stranger that some one is asserting title; that if it be such as to notify and warn the owner, should he visit the premises, that a person is in possession under a hostile claim, it is sufficient.

3. Complainant's ancestor, in 1837, purchased a piece of marsh land near one of the Great Lakes, which land was at times entirely submerged by the waters thereof. The principal use of which the land was capable, aside from cutting the hay growing around a sulphur spring thereon, was for hunting birds. The ancestor died in 1890. For ten years prior to his death, he lived within 40 miles of the land, but never exercised any acts of possession over the same. January 16, 1860, a tax deed was executed by the State for the taxes of 1857, and was recorded the same year, and thereafter the land was assessed to the grantees, who paid the taxes, and who were understood by all living in the neighborhood to be the owners of the land. In May, 1879, one of the grantees leased his half of the land to a shooting club. The lease was recorded in 1880. The lessee caused signs to be posted at various places around the land, upon which was painted a notice that the land belonged to the club, and that all trespassers would be prosecuted. At the expiration of this lease a similar one was executed by a grantee of the same lessor to another shooting club, and recorded. During the occupancy by these clubs, said signs were placed in position every spring, and taken up every fall, because the ice would carry them away. Watchmen were also employed during the shooting season to keep off trespassers. All of these acts of possession were continued from 1880 up to 1893, when complainants filed a bill to set aside said tax deed and the last-mentioned lease as a cloud upon their title. The lessor answered the bill, claiming title by adverse possession, and asking that his title be affirmed. And, in affirming a decree granting said affirmative relief, it is held:

a—That, while it may well be conceded that paying taxes, or asserting title, or the common understanding in the neighborhood, or making surveys, or an occasional renting for trapping and shooting, was not sufficient to establish title by adverse possession, yet such acts were all competent evidence to be considered in determining the question.

b—That the notices which were posted around the land from early in the spring till late in the fall, every year for 12 successive years, were notice of an adverse title and possession;

that the owner, if he had visited the land, could not have failed to understand their meaning, as they were inconsistent with his rights as the original owner of the fee.

Appeal from Monroe. (Kinne, J.) Argued October 4, 1894. Decided November 20, 1894.

Bill to quiet title. Complainants appeal. Decree affirmed. The facts are stated in the opinion.

Willis Baldwin (*Ira G. Humphrey*, of counsel), for complainants.

De Forest Paine, for defendant Erie Shooting Club.

Ira R. Grosvenor, for defendant Keeney.

GRANT, J. The complainant Maria S. Whitaker is the widow, and the other complainants are the heirs at law, of Harry Whitaker, deceased, who died in June, 1890. Harry Whitaker purchased the land in question in 1837. The object of the bill is to remove a cloud from complainant's title, caused by a tax deed made by the State of Michigan, January 16, 1860, to Elias W. Hedges and Andrew J. Keeney for the taxes of 1857, a deed from Andrew J. Keeney to Jay W. Keeney, dated August 14, 1889, and a lease executed by Jay W. Keeney to the Erie Shooting Club, August 28, 1889. The defendant Keeney answered, claiming title by adverse possession, and asking affirmative relief, affirming his title. The shooting club answered, admitting the execution of the lease and its incorporation, and leaving complainants to their proofs on their other allegations.

The Situation and Character of the Land:

The land is a piece of marsh situated in the south-east corner of Monroe county, about 120 rods from the mainland, on the west, and a mile from the sea wall of the shore of Lake Erie, on the east. Between it and the

mainland is mud, which is at times covered with water. Upon it is a large sulphur spring. Around the spring the land is a little higher, and, on a few acres, grows hay fit for use. At low water the land around this spring is from a foot and a half to two feet above the water. When the wind blows from Lake Erie the land is entirely submerged. The only way to reclaim it, so as to render it fit for cultivation, would be the erection of a dike around it, several feet high. The only use to which it can ever be put, aside from the cutting of the hay around the spring, is for hunting birds, muskrats, and mink, but its principal use is for hunting birds.

Abandonment by Complainants' Ancestor:

From 1837 to 1892 neither the complainants nor their ancestor exercised any act of possession. For 10 years prior to his death Harry Whitaker lived in Detroit, 40 miles distant. Maria S. Whitaker testified on behalf of the complainants as follows:

"*Q.* Do you know what became of his property?

"*A.* Well, it was overflowed. We had nothing to do with it.

"*Q.* What did you do with this spring lot?

"*A.* I don't know as anything. We all supposed it went. We considered it all lost. We thought it wasn't worth anything.

"*Q.* And you abandoned it?

"*A.* Yes.

"*Q.* You never paid any taxes on it?

"*A.* No, sir, I think not. I never knew any being paid.

* * * * * * * * * * * * * * *

"*Q.* When did you first know your husband left this property?

"*A.* I knew he bought it at the time, but, as I say, we had given it up. It was overflowed, and we supposed it was worth nothing. I don't suppose he knew it was worth anything."

Prior to 1860 the land was sold for taxes to various parties, who took no steps to obtain possession.

Defendants' Connection with the Land:

Mr. Hedges and Andrew J. Keeney knew that Mr. Whitaker had abandoned the land at the time of the purchase of the tax title. Their tax deed was placed upon record January 30, 1860. From that time to the present the taxes were assessed to and paid by them. Hedges and Keeney leased the right to trap upon the premises to various parties every year, some years receiving $4 or $5; some, $12 or $15; and other years receiving nothing. They also caused some willows to be planted near the spring, and occasionally cut hay. No other acts of actual possession are shown, except that they occasionally went to the land to look after it, as owners of land usually do. From 1860 to the commencement of this suit, it was understood by all living in the neighborhood that this was the property of Hedges and Keeney. On May 8, 1879, Andrew J. Keeney executed to the Bay Pointe Shooting Club a lease of the undivided half interest of the land, which interest is now the sole subject of controversy here, for the purpose of hunting and shooting snipe, wilk fowls, and all other birds recognized as game by the laws of the State, and for all other purposes necessary and incident thereto, and for no other use or purpose. This lease was recorded November 15, 1880. This club immediately caused signs to be painted, and posted at various places around this land the following notice:

"Lands of Bay Pointe Shooting Club. All Trespassers will be Prosecuted. [Signed]
"A. J. KEENEY, President."

At the termination of that lease, and on August 28, 1889, Jay W. Keeney executed a similar lease to the Erie Shooting Club, which was recorded March 22, 1890. During the occupancy by these clubs, these signs were placed in position every spring, and taken up every fall, because the ice would carry them away. Watchmen were

also employed to keep off trespassers during the shooting season. These acts of possession continued from 1880 to the commencement of this suit, in 1893.

The requirements of an adverse possession necessary to establish title to real estate are well understood. The difficulty arises in applying these requirements to each case as it arises. Each case, as a rule, must be controlled by its own facts and circumstances. The established rule of this Court is:

"It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question." *Murray v. Hudson,* 65 Mich. 670, 673.

The occupation need not be such as to inform a passing stranger that some one is asserting title. If it be such as to notify and warn the owner, should he visit the premises, that a person is in possession under a hostile claim, it is sufficient. After long and intentional abandonment by the owner in this case, those under whom the defendants claim obtained a tax deed from the State of Michigan. They immediately placed this on record. This, of itself, was a sufficient disseisin to support an action of ejectment by the original owner. *Hoyt v. Southard,* 58 Mich. 434. The defendant at once commenced to exercise such acts of possession and ownership as were consistent with the character of the land. Evidence of the general understanding in the neighborhood that he was the owner, and that it was called his, was held competent, as tending to establish the notoriety of defendant's possession and claim of title. *Sparrow v. Hovey,* 44 Mich. 63. *Pedes possessio* is not indispensable. The land need not be fenced. Buildings are not necessary. Where the possession claimed was by cutting grass and pasturing cattle each year during the season, and planting trees, it was held to be evidence of

a practically continuous, exclusive, and hostile possession. *Sauers v. Giddings*, 90 Mich. 50. Openly and notoriously claiming and using land in the only way it could be used without fencing or cultivation was held to establish adverse possession. *Curtis v. Campbell*, 54 Mich. 340. Cropping land, though no one was actually upon it, and nothing done thereon, between harvest and recropping, was held to establish adverse possession. *Cook v. Clinton*, 64 Mich. 309.

It may well be conceded that paying taxes, or asserting title, or the common understanding in the neighborhood, or making surveys, or an occasional renting for trapping and shooting, is not sufficient to establish title by adverse possession. But they are all competent evidence to be considered in determining the question. The notices which were posted around this land from early in the spring till late in the fall, every year for 12 successive years, were notice of an adverse title and possession. The owner, if he had visited it, could not have failed to understand their meaning. They were inconsistent with the rights of the original owner of the fee. The land was then valuable for little else than shooting. Mr. Whitaker lived within 40 miles of this land for 10 years, with these open, notorious assertions of title and possession posted around the land from early in the spring till late in the fall. This substantially covered all the time during which this land could be used for any purpose except for hunting muskrats. The notice denied all right to use unless authorized by the club.

We need not discuss the question of possession prior to the lease of the Bay Pointe Shooting Club. Ten years' adverse possession under the tax deed is sufficient.

The decree will be affirmed.

The other Justices concurred.

LEVI K. FULLER ET AL. v. ANDY BYRNE.

Conditional sale—Lien—Waiver.

Where a contract for the sale of a piano provides that the instrument shall remain the property of the vendor until the purchase price and any judgment rendered thereon is paid in full, the vendor has the right to obtain such judgment, and the title to the piano will not pass until the judgment is paid.

Error to Gogebic. (Haire, J.) Submitted on briefs October 4, 1894. Decided November 20, 1894.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

Button & Norris, for appellant.

Chamberlain & Trumbull, for plaintiffs.

LONG, J. Defendant is sheriff of Gogebic county, and levied an execution upon, and took into his possession, a piano which he found in the possession of Carl Marquardt. The execution was against Marquardt, and the sheriff levied upon the property as belonging to him. The plaintiffs in this suit are piano dealers, and had delivered the piano in question to Marquardt under a conditional contract of sale, which contained the following stipulation:

"The said instrument is and shall remain the property of said Estey & Camp until each and every of said amounts, and interest thereon, and any judgment rendered thereon, is paid in full."

This action is replevin brought by plaintiffs against Byrne, and the property was taken under the writ. On the trial it appeared that the plaintiffs, before the sheriff levied his execution, had brought suit against Marquardt,

and obtained personal judgment for the amount due on the contract. It was therefore contended that plaintiffs had relinquished their claim. The court below directed judgment in favor of plaintiffs for six cents damages and costs of suit.

The court below was correct in so finding. The plaintiffs and Marquardt had entered into a contract by which the title to the property was to remain in the vendors until the "amounts, and interest thereon, and any judgment rendered thereon, is paid in full." Under this contract the vendors had the right to obtain judgment against the vendee for the amount due, and interest thereon, and the title was not to pass until such judgment was paid. There is no intention shown here to release the lien or pass the title. The mere fact of personal judgment was not, under the contract, to release the lien or pass title, until judgment paid. See *Kirkwood v. Hoxie*, 95 Mich. 66, and cases there cited.

Judgment is affirmed.

The other Justices concurred.

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THE PRESTON NATIONAL BANK OF DETROIT v. THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY ET AL.

[See 84 Mich. 364.]

Assignment of accounts—Evidence—Estoppel—Receivers—Compensation.

1. A corporation secured a bank by an assignment to it of $150,000 of good and collectible accounts, then existing or thereafter to be acquired. And it is held that parol proof is admis-

sible to show in what sense the parties used the word "accounts," and what they understood to be included within it; and to this proof and the surrounding circumstances the court will look in determining said questions.

2. The corporation had placed upon its books certain accounts for goods shipped to consignees, to be paid for when sold, charging the consignees upon shipment, and crediting them with payments and discounts. The evidence disclosed that both the party who represented the corporation in making the assignment, and the cashier of the bank, understood and agreed that these accounts were included in the assignment. And it is held that, the corporation having treated these accounts as within the terms of the assignment, and obtained the loans from the bank, which the assignment was made to secure, upon the representation that said accounts were within the meaning of that term as used in the assignment, and the bank having relied upon that fact in making the loan, the corporation is estopped to assert the contrary.

3. There also appeared upon the corporate books certain accounts for goods sold under special contract, and for which notes had been taken. The contracts provided that title to the property should remain in the company until paid for, and that any notes taken should not be considered as payment, but only as evidence of indebtedness, and should not constitute a waiver of the right to a mechanic's lien. And it is held that said accounts were within the terms of the assignment.

4. The bank filed a bill to enforce the assignment, and secured a decree for the collection of the accounts by the receivers of the corporation, and that the bank should have a lien upon the money thus collected. And it is held that, the expense of making such collections having been incurred under the express decree of the court, it is inequitable that the receivers should go without compensation, or that they should be paid out of funds which should go to unsecured creditors, and that they are entitled to compensation for their services out of the funds belonging to the bank which they have collected.

Appeal from Wayne. (Hosmer, J.) Argued October 9 and 10, 1894. Decided November 20, 1894.

Petition by complainant to compel the payment of certain moneys claimed under a prior decree. Complainant appeals. Decree reversed, and one entered in this Court

in accordance with the opinion. The facts are stated in the opinion, and in 84 Mich. 364.

Julian G. Dickinson (*John D. Conely* and *Alfred Russell*, of counsel), for complainant.

Thomas A. Wilson (*Edwin F. Conely*, of counsel), for defendants.

GRANT, J. The assignment and facts out of which this controversy has arisen will be found in 84 Mich. 364. Under that decision a decree was entered giving the complainant "a lien upon all moneys collected by the said defendants Emerson and Eldred, as assignees and as receivers, upon said accounts, and upon all notes, bills receivable, lands, goods, chattels, and other things taken in compromise, satisfaction, or partial or complete discharge or payment of said accounts. The receivers proceeded under this decree to collect the various accounts and debts due to the purifier company. In keeping their accounts, and in their report to the court, the receivers entered and kept the amounts received in several classes, marked, respectively, Schedules A, B, C, D, E, F, G, and H.

Schedule A is entered as—

"Accounts appearing on the books of the George T. Smith Middlings Purifier Company, January 14, 1890, which were for merchandise sold, upon which the whole or a part has been received by R. H. Emerson and Z. C. Eldred, receivers."

"B": "Accounts appearing on the books of the company for which notes had been given, and which notes were overdue and unpaid at the time of the assignment (January 14, 1890), upon which the whole or a part has been received by the receivers."

"C": "Accounts appearing on the books of said company, January 14, 1890, which were for mill contracts incomplete at date of assignment, upon which the whole or a part has been received by the receivers."

"D": "Accounts appearing on the books of said com-

pany which were for merchandise in the hands of other parties on sale for the benefit of said company, upon which the whole or a part has been received by the receivers."

"E": This is the same as Schedule A, excepting that nothing has been received upon the accounts.

"F": This is similar to "B," but nothing has been paid upon the notes which had been given, and were overdue and unpaid at the time of the assignment.

"G": "Accounts which were for mill contracts which were incomplete at date of assignment."

"H": This is similar to "D," but nothing has been paid upon the accounts.

It is conceded that the accounts marked Schedules A and E come within the terms of the assignment to complainant. The receivers contended that the other accounts were not within its terms, and refused to pay them over to the complainant, whereupon it filed this petition to compel such payment. Issue was joined, proofs taken, and the court below entered a decree sustaining the contention of the receivers.

For the sake of convenience, we may group the disputed accounts under two heads, viz., special-contract accounts and consignment accounts.

These special contracts were written, and provided that the company agreed to deliver to each vendee the machinery and materials for a flouring mill, and to put them in the mill. The vendee agreed to pay a certain amount upon the execution of the contract, another when the machinery was ready to ship, another during the construction of the mill, another when the mill was ready to start, and the remainder was to be evidenced by executing and delivering to the company negotiable promissory notes, which were to be secured by a first mortgage upon the premises. It was further agreed that the title to the machines, machinery, and material should remain in the said company until fully paid for, and that if notes were given they

should not be considered as payment, but only as evidence of indebtedness. It was further provided that the taking of such notes, or security therefor, should not waive the right of the company to a mechanic's lien. The notes did not pay these accounts, and they were still as valid, as accounts, as they would have been had no notes been given. The retention of the title to the goods as security for the payment of the purchase price did not operate to change the character of the accounts. If the accounts had all been of this kind it would be unreasonable to hold that the assignment conveyed nothing, yet such would be the logical conclusion of the defendants' contention. Such construction would have enabled the company to defeat the security altogether by making such arrangements with its customers after it was given.

The consignment accounts were also evidenced by written contracts. The goods were shipped to consignees, to be paid for when sold. The prices were fixed, the consignees had the entire charge and control over the goods, paid their own storage and other expenses, and were to render a quarterly account of the goods sold. Of this latter class was an account against W. R. Dell & Son, of London, England, who had the entire charge of the business upon the continent of Europe, amounting to over $29,000 at the time of the assignment. All these accounts appeared upon the books of the company, and were all kept in the same manner. Dell & Son were charged upon the books with goods sold, and were credited with payments and discounts allowed them.

It is contended by counsel for the receivers that the contract of assignment covers only such accounts as were collectible, viz., such accounts as could be sued upon and judgment obtained by the production in evidence of the books; such as had become a positive obligation against

the debtor, where there was an unconditional liability on the part of the debtor to pay. If the word "account" had an inflexible technical meaning, and that were the one contended for, there would be force in this contention. But it has not. Webster defines it to mean—

"A registry of pecuniary transactions; a written or printed statement of business dealings, or debts and credits, and also of other things subjected to a reckoning or review."

Bouvier defines it as—

"A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation," and cites the authorities for his definition.

Parol proof is therefore admissible to show in what sense the parties used it. and what they understood to be included within it. To this proof and the surrounding circumstances the court will look to ascertain the intention of the parties and determine in what sense they use words of flexible meaning.

It is clearly established by the evidence that Mr. Smith, who represented the company, and Mr. Hayes, the cashier of the bank, understood and agreed that these accounts were included in the assignment. Smith, in order to obtain large loans at the bank, included in his representations the accounts now in dispute, and referred to these foreign accounts, and particularly to those of Dell & Son and of one Tyson, who had a large account in Australia. Complainant wrote to ascertain the financial standing of Tyson. Dell & Son were not ordinary agents for the sale of goods for their employer. But we are not required to interpret the contract between them and the company. It is enough to say that the company placed these upon its books as accounts, treated them as accounts within the terms of the contract, obtained the loans upon the

representation and reliance that they were, and that both it and its assignees are thereby estopped to assert the contrary. The receivers have no rights either at law or in equity which the purifier company did not have, and they can make no defense in this suit which the company could not make were it the sole party.

It is also contended that the receivers are not entitled to compensation for their services out of the funds belonging to complainant which they have collected. We think otherwise. The expense incurred in collecting has been done under the express decree of this Court, and it is inequitable that the receivers should go without compensation, or that they should be paid out of funds which should go to unsecured creditors.

The decree is reversed, and decree entered in this Court in accordance with the above opinion, with the costs of both courts to the complainant.

The other Justices concurred.

THE REEDER BROS. SHOE COMPANY v. ANTON PRYLINSKI.

Fraudulent purchase—Rescission—Right of assignee.

1. The right to recover property, the title to which never passed by reason of the fraudulent representations of the purchaser as to his financial condition, passes to an assignee of the vendor's business and book accounts.
2. The failure of a vendee, who knows that he is in failing circumstances or insolvent, to disclose that fact to a vendor, will not make the purchase fraudulent, unless coupled with an intent on his part, at the time of the purchase, not to pay for the goods; citing *Zucker v. Karpeles*, 88 Mich. 413.

Error to Bay. (Maxwell, J.) Argued October 5, 1894. Decided November 20, 1894.

Replevin. Defendant brings error. Reversed. The facts are stated in the opinion.

Simonson, Gillett & Courtright, for appellant.

Peter Doran (*T. A. E. & J. C. Weadock,* of counsel), for plaintiff.

LONG, J. Plaintiff, a corporation, brought replevin, and took into its possession a stock of boots and shoes sold by George H. Reeder & Co. to defendant. The goods were sold in January, 1893, to be delivered at various times, and most of them were delivered before the plaintiff corporation was organized. George H. Reeder & Co. consisted of George H. and Milton Reeder The plaintiff corporation was organized on March 15, 1893, the stockholders being the two Reeders and six other persons. George H. Reeder & Co. thereupon sold and conveyed their business to the corporation, together with their book accounts.

Defendant had been trading with George H. Reeder & Co. since May, 1892, and discounted the firm's bills up to the time the goods in controversy were sold; the last bill discounted being sold in September, 1892. At that time, plaintiff claims, the defendant made a statement to Milton Reeder as to his financial condition, in which he claimed to own the stock of goods in his store, amounting to $3,500 or $4,000; that he owed no persons but Baldwin & Co., of Detroit, and Snedicor & Hathaway, and those were small bills, not due; that he owned the building in which he was doing business, and the residence where he lived. On these representations the bill of September, 1892, was sold, amounting to about $130. In January, 1893, Geo. H. Reeder & Co. gave him credit for a bill of goods of about

$650; he at that time stating that his financial condition was about the same, and that there had been no change therein since September before.

In June, 1893, after the assignment to the plaintiff corporation of this account, it was discovered that the representations made by the defendant in January previous were not true; that, instead of the title to the store and house being in him, it was in his wife; and that he owed her about $1,800 in addition. Plaintiff, claiming that, by reason of these false representations, the title to the goods did not pass to the defendant under the sale made by George H. Reeder & Co., and that the corporation had the right, under its assignment of the account, to assert its ownership to the goods, made demand for their return, and, upon the demand being refused, took them under its writ of replevin.

Defendant, on the trial, admitted that the buildings belonged to his wife, and that he was indebted to her, but denied that such fact affected his solvency, or that he made the representations as to his financial condition as claimed. It appeared that chattel mortgages were given by defendant to his Detroit creditors in July, 1893, after the goods in controversy were replevied. On the trial the plaintiff prevailed.

1. It is contended by defendant that plaintiff could not recover, for the reason that, if the representations were made as claimed, they were made to George H. Reeder & Co., and not to plaintiff, and that only the party injured by the fraud could complain of it; that the transaction is voidable only by the party injured, and not by a stranger. Several cases are cited in support of this proposition.[1]

[1] *Crane v. Reeder*, 25 Mich. 303; *Spoon v. Gilbert*, 44 Id. 535; *Dayton v. Fargo*, 45 Id. 153; *Richardson v. Welch*, 47 Id. 309; *Lumber Co. v. Gustin*, 54 Id. 624; *Lewis v. Rice*, 61 Id. 97; *Waterbury v. Andrews*, 67 Id. 281.

But those cases are not like the present. Similar cases were referred to in *Sweet v. Converse,* 88 Mich. 1, 12, in which it was said:

"All of the cases cited concede that the rule contended for—that a right of action for fraud is not assignable—has no application to an assignment of something which is in itself tangible, capable of delivery, involving a right of property. In such case, the right to whatever remedy the assignor has follows the assignment."

The action here is not for fraud and deceit, but to recover the property, on the ground that the title never passed. The assignee is in the same position as the assignor of the demand, with like rights of recovery. It was not an assignment of a right of action for the fraud, but the right of the assignor to recover the specific property.

2. It is contended that the court erred in its charge to the jury on the question as to what would amount to fraudulent conduct on the part of the defendant, and by reason of which the title to the goods did not pass. The following is a portion of the charge complained of:

"If a fraud is practiced, the title never passes. The buyer never had them [the goods], or any interest in them. They were all still the property of the plaintiff. Now, this is not only so if these representations were false and were actually made, but it is also so if the defendant was in failing circumstances when he ordered these goods, and did not disclose these facts to the plaintiff. I repeat, gentlemen, in addition to the right to cancel this contract on the ground of false representations, a concealment of the actual facts of his circumstances may be a fraud. Now, if he was insolvent, and did not inform the plaintiff in this suit of it, the plaintiff had a right to retake these goods, and can recover in this action. If he was in failing circumstances when he bought these goods, and did not disclose that fact, the plaintiff had a right, on discovering the facts, to rescind the contract and save the goods. In these cases the title to the property never vests in the defendant If a man is in a store, apparently doing good

business, but in failing circumstances, or absolutely insolvent, a sale to him is void or voidable, unless he communicates the true circumstances to the parties from whom he purchases. Now, if you find either of these three facts,—that the fraudulent representations were made, that he was in failing circumstances, or that he was insolvent,—you will find a verdict for the plaintiff. * * *

"If you find that the representations were made, or that he was in failing circumstances, and did not disclose it, or that he was insolvent, and did not disclose his condition, you will find for the plaintiff. If, on the other hand, you find all these things—First, that the representations were not made; second, that he was not in failing circumstances, or did disclose his failing circumstances; third, that he was not insolvent, but in a condition to pay,—you will find for the defendant."

This charge does not embody the law of this State, as held by several decisions of this Court. In *Zucker v. Karpeles*, 88 Mich. 413, 433, the court below instructed the jury:

"If Karpeles was insolvent at the time he purchased the goods, and knew that he was insolvent, and failed to disclose this to the plaintiffs in the case at the time of the purchase, the purchase, under those circumstances, is deemed in law a fraudulent purchase."

It was said by this Court:

"We think the court erred in this instruction. There are some authorities which support the view of the law stated by the court, but the weight of authority is the other way,—that it does not render a purchase fraudulent simply from the fact that the purchaser knew at the time that he was insolvent, and failed to disclose that fact to his vendor. It is necessary, in order to make his purchase fraudulent, that he should, at the time he purchased the goods, intend not to pay for them;" citing *Shipman v. Seymour*, 40 Mich. 274.

It is claimed, however, on the part of plaintiff, that some other portions of the charge modified this portion, and placed the right to recover on the true ground. We have examined the charge as a whole, and cannot find that

the views expressed in this part of the charge are in any way modified. The court was clearly wrong.

The judgment below must be reversed, and a new trial granted.

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

LINCOLN S. ROGERS AND CHARLES H. THORPE v. ALBERT H. RAYNOR AND JOHN TAYLOR.

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Partnership—Exemptions—Waiver—Common-law lien—Parties—Misjoinder.

1. Copartners cannot join in an action of trover for their individual exemptions in the partnership property.
2. Where partners in a venture involving the publication and sale of a book deliver the paper and electrotype plates to contractors, who are to do the press work and binding, they waive their individual exemptions, and subject the books to the lien of the contractors for their labor.

Error to Wayne. (Donovan, J.) Submitted on briefs October 10, 1894. Decided November 20, 1894.

Trover. Defendants bring error. Reversed. The facts are stated in the opinion.

Henry M. Duffield, for appellants.

Sloman, Moore & Duffie (*Sloman, Groesbeck & Robinson,* of counsel), for plaintiffs.

HOOKER, J. The plaintiffs were partners in a venture involving the publication and sale of a book. It was the principal business of Thorpe, but not of Rogers. In

furtherance of their venture, they delivered to Raynor & Taylor, copartners, a quantity of paper and electrotype plates, under a contract by which they were to do the press work for $300. Subsequently, this contract was modified so as to include the binding of the books. Raynor & Taylor performed the labor, and delivered upwards of 5,000 of the books, but retained about 500 finished volumes and some unbound sheets, and about 5 reams of the paper furnished. At this juncture, Raynor & Taylor commenced an action against the plaintiffs for the recovery of a balance of the contract price, and attached the property in their hands. Judgment being rendered in their favor for $145.62 damages and $10 costs, the property attached was sold upon execution; and the plaintiffs brought trover against Raynor & Taylor, and recovered a judgment of $250. There was evidence tending to show that the property was worth $500. This recovery was had upon the theory that plaintiff Thorpe was entitled to exemptions from the property sold.

Counsel for the appellants asserts:

1. That the plaintiffs could not properly join in an action of trover for their individual exemptions.
2. That, under the undisputed evidence, Rogers was entitled to no exemptions from this property, and was therefore an improper party to the action.
3. That the judgment recovered by defendants was for the purchase price of the property, and that such property was therefore subject to execution therefor.
4. That appellants had at least a lien upon the property for their labor, as against which no exemptions could be claimed.

It is plain that the property levied upon and sold was subject to the levy so far as any rights growing out of the partnership are concerned; and, if Rogers had no right to exemption, he has no cause of action against the appellants, for they have invaded no legal right of his. It is equally clear that he has no right to complain of their

denial of Thorpe's right to exemptions, for he has no interest in the property, all of his interest having passed to the appellants by the sale. One who has no interest in or right to the property is not a proper party to an action at law for its recovery, and parties who have no joint interest cannot join as parties plaintiff. While it is true that in the case of *Skinner v. Shannon*, 44 Mich. 86, several partners recovered their exemptions in a joint action of trover, the question of misjoinder appears not to have been raised. In the case of *McCoy v. Brennan*, 61 Mich. 362, it is expressly held that copartners of one bringing trover for exemptions are not necessary parties, and the obvious fact that the right to exemption is individual is asserted. See, also, *Russell v. Lennon*, 39 Wis. 570. We think the misjoinder is plain, and it is well settled that a misjoinder of plaintiffs is fatal. 1 Saund. Pl. & Ev. 11.

By attaching this property, the appellants have shown that they considered this property to be owned by the plaintiffs. As such, they put labor upon and other material with it, and had a lien upon it as against the firm, and have proceeded to avail themselves of it by judgment and execution. Unless it can be said that the lien must give way to the exemption, they obtained a valid title by the purchase, so far as appears from the record. If this property is to be held to be exempt, it must be under the eighth subdivision of the statute. How. Stat. § 7686. Together with a large quantity of similar property, it was delivered to the appellants for the purpose mentioned. Before it was to be used for the purposes of trade, appellant's labor upon it was necessary. Under well-settled rules of law, a lien attached for this labor, and there is no reason for supposing that it was not so understood and intended. Indeed, the record shows that the labor was to be paid for when the books were delivered. If an intention to create a lien was necessary, this testimony implies

it, and there is nothing to contradict it. By the provisions of the ninth subdivision of section 7686 of Howell's Statutes, certain liens upon exempt property are void; but the property mentioned in the eighth subdivision, under which this property is claimed to be exempt, is expressly excepted. We think that, when the plaintiffs made this contract with appellants, they waived their exemptions, and subjected the property to the lien of appellants for their labor.

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

The other Justices concurred.

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CECILIA THOMPSON ET AL. v. FELICIA MARLEY ET AL.

Trust—Statute of frauds—Parol agreement—Pleading—Resulting trust.

A daughter, by means of fraud and undue influence, procured from her father a deed of his real estate upon the understanding that she should hold the lands in trust, and after his death distribute them among all of his heirs at law according to the statute of descent. The deed was not recorded, and the father afterwards conveyed portions of the land, and the daughter witnessed and took his acknowledgment to the conveyances. About 15 months after the execution of the first deed, the daughter procured from her father a second deed of the same lands, and caused the same to be recorded, and thereupon claimed, under said last-mentioned deed, to own said lands in fee, and denied that the first-mentioned deed was ever executed and delivered to her. After the father's death, a bill was filed by a portion of the heirs at law, setting forth the foregoing facts, and praying for the setting aside of the second deed, and the execution of the trust created by the first deed. The bill did not allege that there was any fraud practiced in procuring the second deed, or that any trust was connected therewith, unless an allegation that the defendants were in possession of all of the lands, and that the same were held in trust by said daughter for all of the parties to the suit

as tenants in common, amounted to such an allegation. The defendants demurred generally. On the argument of the demurrer, the court, noticing that it was not alleged in the bill whether the trust was by parol or in writing, inquired of the complainants' solicitor whether there was any written declaration of the trust, and was informed that there was none. This fact was further evidenced by the framework of the bill, and the court found accordingly, and sustained the demurrer upon the following grounds, which are approved on appeal:

a—That a parol trust, such as is set forth and claimed in the bill, is void, and cannot be declared and enforced by a court of equity.

b—That the fact that the complainants were the children of the grantor did not of itself create in them an equitable beneficial interest in said lands at the time of the execution of the first deed.

c—That, if there was any equitable beneficial interest existing in the complainants at the time of the execution of the first deed, it was by virtue of the parol understanding and declaration of trust, which must be resorted to by them for the purpose of determining said trust and who are the beneficiaries under its terms; that, if such parol understanding was void for the purpose of declaring the trust and making it enforceable, it would be equally void for the purpose of establishing a beneficial interest in the complainants.

d—That, while no resulting trust arose in favor of complainants, still, in view of the fact of the father being in possession of the land when he executed the first deed, and continuing in possession until his death, and of said deed having been procured by undue influence, with the intent not to carry it into effect, the parol agreement, made at the same time, was such a fraud as vested in the father an equitable title to the lands; that he might have filed a bill at any time to set aside said deed for the reason stated, and, if he had died with the lands in that situation, his rights in the premises would have devolved upon his heirs or personal representatives.

e—That, there being no allegation in the bill setting up any fraud against the second deed, or that there was any trust or intended trust connected with it,—the general allegation in that regard, above set forth, being insufficient for that purpose,—said second deed, under the pleadings in the case, must be construed as vesting an absolute title in fee in said daughter.[1]

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[1] For analogous cases, see *Shafter v. Huntington*, 53 Mich. 310, and authorities there cited.

Appeal from Mackinac. (Adams, J.) Argued October 10, 1894. Decided November 20, 1894.

Bill to set aside a deed, and to declare a trust under a prior deed. Complainants appeal. Decree dismissing bill affirmed. The facts are stated in the opinion.

James McNamara, for complainants.

Henry Hoffman, for defendants.

LONG, J. This cause was heard below on bill and general demurrer, and the demurrer there sustained, and bill dismissed.

The bill alleges, substantially, that all the parties to the cause are the children and heirs at law of Michael Marley, deceased, who died June 22, 1893; that on September 15, 1891, Michael Marley conveyed the premises in controversy here to his daughter Felicia Marley, by warranty deed, without any consideration, and with the understanding that said property should be held in trust by her, to be distributed after his death between herself and the other children and heirs at law of said Michael Marley, in proportion to their just shares as provided by law; that said Felicia acquiesced in said understanding with her father, and, the more fully to carry out the same, the said deed was not placed on record, so that sales could be made of portions of the land in the name of Michael in his lifetime; that such sales were made, and Felicia took the acknowledgment of such conveyances, and witnessed the same, during the lifetime of her father. It is claimed that this deed was procured by fraud and undue influence. It is further alleged that on December 13, 1892, Felicia procured another deed of warranty from her father, and caused the same to be recorded, and now claims the entire fee to the premises under said last-mentioned deed, and

wholly denies that said first-mentioned deed was ever made, executed, and delivered to her. The bill does not set up any fraud in procuring this last deed, or claim that there was any trust connected with the giving of it. The bill prays that this second deed be set aside, and the trust created by the first deed be executed.

Upon the hearing in the court below, the learned circuit judge filed a written opinion, from which we quote with approval as follows:

"It will be observed that the bill does not allege, in terms, whether the trust claimed with reference to the first deed was by parol, or declared by some instrument in writing. The court, however, on the argument of the demurrer, noticing that fact, *i. e.*, that it was not alleged whether the trust was by parol or in writing, inquired of the complainants' solicitor whether there was any written declaration of the trust, and was informed by him that there was none; and from the framework of the bill, as well as by the statement made by complainants' solicitor, the court is satisfied that there was no written declaration of the trust claimed with reference to the deed of September 15, 1891, and, if there was a trust by the understanding of the parties, that it was a parol trust, and not one declared in writing.

"The question arises whether, considering it as a parol trust, and not in writing, it could be established, decreed, and enforced by this court. The statute provides that all express trusts shall be in writing, and in section 5573, which defines the purposes for which an express trust may be created, provides in the fifth paragraph that, where the trust is for the beneficial interest of any person or persons, such trust shall be fully expressed and clearly defined upon the face of the instrument creating it.

"The decisions in this State and elsewhere are numerous to the effect that an express trust cannot be raised by parol. *Wright v. King*, Har. Ch. 12, 17; *Bernard v. Bougard*, Id. 143; *Brown v. Bronson*, 35 Mich. 418. It does not seem necessary further to pursue the inquiry as to whether a parol trust, such as that set forth and claimed in the bill of complaint (if it is to be treated as a parol trust), could be declared and enforced by a decree

of this court; but, looking at it in that way, it must be declared void.

"In *Randall v. Constans,* 33 Minn. 329 (23 N. W. Rep. 530, 531), it was held that, where it does not appear by any averment in the bill of complaint whether the agreement or declaration of trust was in writing or by parol, it will be presumed by the court that the agreement referred to was in writing, and valid within the requirements of the statute of frauds; and the court refers, as authorities upon that proposition, to the cases of *Wentworth v. Wentworth,* 2 Minn. 277; *Cozine v. Graham,* 2 Paige, 178; Reed, Stat. Frauds, § 505; Hill, Trustees, 93. In this case the court places its finding that it may be presumed to be in writing in such a case upon the fact that there were no admissions on the subject upon the argument; but in the case at bar it has been distinctly admitted by complainants' counsel, on the argument, that there was no written declaration of the trust. The principle decided in *Randall v. Constans* could not be made to apply, and the trust, if there was any such an understanding as alleged in the bill of complaint, must be held to be by parol, and therefore void under the statute of frauds.

"The next question that arises is whether, if the deed of September 15, 1891, was procured, as alleged in the bill, by undue influence, by a scheme on the part of defendant Marley and those who assisted her, and with the understanding that it was for the use and benefit of all the other heirs of Michael Marley, and she would distribute the land between the heirs, as alleged in the bill of complaint (and the demurrer is an admission of this allegation), there was a resulting trust, or implied trust, growing out of these facts.

"In the case of *Randall v. Constans,* the subject is pretty fully considered, and authorities are collated and discussed; and the court holds that where there is fraud or artifice in procuring title to property, or the same is wrongfully taken or retained in his own name by one occupying a fiduciary relation, a trust results in favor of the party equitably entitled, 'and, generally, where the legal title is obtained by fraud, equity turns the fraudulent procurer into a trustee in order to get at him;' that in such a case it is not the parol agreement upon which the court acts, but the fraud, which gives the court jurisdiction to determine the appropriate relief. The court further says that—

"'It may be stated as a general rule that where the grantor parts with property on the faith of the promise of the grantee to hold it as security, or to fulfill a trust concerning it, equity will not permit such grantee to retain the property in violation of his agreement, but will compel him to restore it, or its value, or the proceeds thereof, and in proper cases may enforce it, if partly performed, and justice could not otherwise be done in the premises.'

"Upon this proposition the court refers to a number of leading cases, which are well considered, and would go to the extent of establishing that doctrine. In this case the court further says:

"'It is not material that the legal title passed to the grantee from a third party, who held the title as trustee for the equitable owner, the transaction being for the benefit of the latter. Such transfers, whatever the particular form, when made to secure a debt or advances, are usually construed to be in the nature of mortgages, and upon that basis adequate relief can ordinarily be administered.'

"The court refers, by way of illustration, to *Siemon v. Schurck*, 29 N. Y. 598, where a deed was taken in the name of a third party without the knowledge or consent of the person who furnished the consideration, and on that ground it was held that a trust resulted in her favor, which the court might enforce; but, as appears by the subsequent language of the court, that was mainly on the ground that the person last mentioned had an equitable beneficial interest in the property at the time of the conveyance, and the court holds that the mere fact of said person furnishing the consideration would not raise a trust in the nature of a resulting trust in favor of such person unless there was fraud in the transaction. This appears to be the plain meaning of sections 5569, 5571, How. Stat.

"It will be observed that the bill in this case does not allege any existing beneficial interest in the complainants at the time of the execution of the deed of September 15, 1891. They are alleged to be the children of Michael Marley, but that fact of itself does not create an equitable beneficial interest in such children in the lands of their father existing at that time.

"If there was any equitable beneficial interest existing at that time in the complainants, it was by virtue of the parol understanding and declaration of trust, and the parol understanding must be resorted to by them for the purpose

of determining the trust and the parties having a beneficial interest under the terms of the trust; and, if the parol understanding was void for the purpose of declaring the trust and making it enforceable, it would be equally void for the purpose of establishing a beneficial interest in the complainants.

"Then, if it be true that there was such a parol understanding as alleged in the bill, that the deed was obtained by undue influence and methods stated in the bill, and by reason thereof a resulting trust arises, it would arise in favor of the grantor in the deed, who had been deceived (Michael Marley), as at that time he was the only party who had a subsisting beneficial interest in the lands. In the case of *Randall v. Constans,* the court says:

"'While a parol agreement to execute a trust cannot be enforced, and a mere refusal to perform a contract is not in itself a fraud, yet, where property has been conveyed in reliance upon its fulfillment, equity will not permit a party to retain the property and refuse to perform the agreement, and thereby consummate a fraud upon the opposite party by so retaining it without consideration, and in violation of his agreement.'

"It seems to me from these considerations, upon the statement of facts upon the bill of complaint and the admissions of the demurrer, Michael Marley being in possession of this land, and continuing in possession until his death, and the deed of September 15, 1891, having been procured from him by undue influence, and with the intent not to carry it into effect, that the parol agreement made at the same time was such a fraud as vested in Michael Marley an equitable title to these lands. He was in possession, and might have filed his bill at any time to set aside that deed for the reason stated. If he had died with the property in that situation, his rights in the premises would have devolved upon his heirs or personal representatives; but such was not the case, and on the 13th of December, 1892, he executed a warranty deed to his daughter of the same premises, acknowledged it, delivered it, and it was put upon record. This was about six months prior to his death. During that time Felicia Marley appears, from the bill, to have been in possession of the property, and still in possession.

"As before stated, there is no allegation in the bill setting up any fraud against the second deed, or that there was any trust or intended trust connected with it, unless

the allegation in the tenth paragraph of the bill, that 'the same [lands] are all held in trust by said Felicia Marley for all the parties to this suit, as tenants in common,' could be so construed. I do not think, however, that that is a sufficient allegation of the agreement by which the trust is claimed to have been created, and of the fraud, if any existed, as against the deed of December 13, 1892, and, so far as I can see, that deed, under the pleadings in this case, must be construed as vesting an absolute title in fee in Felicia Marley."

We concur fully in the views of the circuit judge as above expressed. The case is plainly distinguishable from *Bigelow v. Sanford,* 98 Mich. 657. In that case, as in *Randall v. Constans,* 33 Minn. 329, cited by the learned circuit judge, it did not appear by the bill whether the declaration of trust was in writing or by parol; and it was held that, where a party offers to show an agreement, it is to be presumed that he proposes to prove all that is requisite to make the agreement sufficient in law. In the present case it was expressly admitted by counsel on the hearing that the trust rested in parol. Upon this admission the court below acted, and properly held that it was void.

The decree below dismissing the bill must be affirmed.

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

MOSES DUQUETTE v. THOMAS RICHAR.

Payment—Attorney and client—Assumpsit—Defenses.

1. The delivery by a vendee to the attorney for the vendor, in his presence, of a certificate of deposit indorsed in blank, as part payment on a land contract, is the same as delivery to the vendor.

2. In an action to recover money paid on a land contract which the defendant refused to carry out, it is no defense that the payment was made by a certificate of deposit owned by the plaintiff's wife, it appearing that she indorsed the certificate in blank, and loaned it to the plaintiff, and that the defendant received it as a payment from him.

Error to Muskegon. (Russell, J.) Argued October 11, 1894. Decided November 20, 1894.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Turner, Turner & Turner, for appellant.

Nelson DeLong, for plaintiff.

GRANT, J. Plaintiff, by direction of the court, recovered a verdict and judgment for $300 claimed to have been paid by him to the defendant as the first and part payment on a parol contract for the purchase of land, which the defendant refused to carry out.

1. The payment was made by a certificate of deposit in a bank, which certificate was owned by plaintiff's wife. Defendant and his attorney, plaintiff and his wife, and one Bassett were present when the payment was made. The wife indorsed the certificate, and handed it to Bassett, who delivered it to the defendant's attorney. The certificate was presented to the bank and paid, but it does not appear by whom it was presented for payment. It was produced upon the trial by the bank. It is claimed that there was no evidence to connect the defendant with the certificate, or to show that he received the money. The delivery to his attorney was the same as delivery to him, and justified the instruction given.

It is further insisted that the certificate was the property of the wife, and that, therefore, the plaintiff cannot maintain the suit. The testimony, however, is ample to

show that she in fact loaned the money to her husband, and paid it for him. The defendant received it as a payment from him. The arrangement between him and her did not concern the defendant.

2. After plaintiff had testified on cross-examination that it was not agreed between him and defendant that, if he was not in on the following Monday by the time the bank closed, he was to forfeit the $300, the defendant's counsel asked him if his own attorney did not inform him that this was the defendant's claim. The testimony was properly excluded. What either party claimed to the other after the controversy had arisen had no tendency to prove what the agreement was.

Judgment affirmed.

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

GUSTAV FETTERS v. WILLIAM F. ATKINSON ET AL.

[See 79 Mich. 575; 83 Id. 412.]

Trust—Accounting—Costs.

A trustee, to whom a chattel mortgage had been executed to secure certain of the mortgagor's creditors, took in payment for a portion of the mortgaged property, which he had sold to certain of the beneficiaries, their promissory note. He afterwards turned out the note to an unsecured creditor, who had recovered a judgment for less than the amount of the note against the trustee as garnishee of the mortgagor, under an agreement that the avails of the note should be applied, so far as necessary, in satisfaction of said judgment. The note was sued in the name of the trustee, a judgment recovered, and the amount thereof paid into court, whereupon one of

the makers filed a bill for an accounting, and to protect his interest in the surplus. And it is held that the unsecured creditor, to whom the note was turned out, had the right to take out of the proceeds of the judgment rendered thereon the costs and expenses, including attorney fees incurred in collecting said note.

Appeal from Wayne. (Lillibridge, J.) Argued October 10, 1894. Decided November 20, 1894.

Bill for an accounting. Complainant appeals. Decree dismissing bill as to defendant Swift affirmed. The facts are stated in the opinion, and in 79 Mich. 575, and 83 Id. 412.

William Look and *Ira G. Humphrey* (*Edwin F. Conely* and *Orla B. Taylor*, of counsel), for complainant.

Charles M. Swift, defendant *in pro. per.*

McGRATH, C. J. This proceeding grows out of *Atkinson v. Weidner*, 79 Mich. 575, 83 Id. 412. Complainant was one of the defendants in that suit, and now seeks to restrain the appropriation of the surplus remaining after the satisfaction of the Booss & Co. judgment. Defendant Swift was the attorney for Booss & Co., and he alone answers, setting up that—

"The defendant Atkinson, as the legal owner of the demand note hereinbefore referred to, had a right to collect the same, and to authorize this defendant to collect the same, and had a right to agree with this defendant to pay him for his services in the collection thereof, and, without express agreement, would be liable to pay therefor; and this defendant avers that, when he received said note from said Atkinson, it was understood and agreed between this defendant and said Atkinson that said note was in no sense received as payment or part payment of said claim of Booss & Co., but was to be sued for and in the name of Atkinson, and the avails applied on the claim of Booss & Co.

"There was no express agreement as to the payment of

this defendant for his services, but defendant insists that there was an implied agreement and liability on Atkinson's part to pay him the value of such services, and to reimburse him for his advances. This implied liability has been since recognized by said Atkinson, who has agreed that the said services of said defendant and the services of counsel employed by him are worth the sum of $1,800, and he recognized the defendant's lien for that amount, and has authorized him to retain that sum from the amount of such judgment, and apply the balance on the Booss judgment."

The makers of the note refused to pay the same, or any part thereof, and an expensive litigation became necessary. It is clear that, if Atkinson had brought the suit in the course of the execution of the trust, he would have been entitled, in an accounting, to a credit for services, and the costs and expenses of that litigation. If the makers of the note had paid the amount of the Booss & Co. judgment upon the note, the conduct of the trustee, and complainant's equities growing out of that conduct, and the other circumstances, would have been proper matters for consideration in a proceeding for the protection of the surplus; but they did not, and, inasmuch as Booss & Co. did only what Atkinson was entitled to do, they are entitled to take out of the proceeds of the note a reasonable compensation for so doing. No question is raised as to the reasonableness of the claim made.

The decree of the court below dismissing the bill as to defendant Swift is affirmed, with costs.

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

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PETER MCRAE v. THE GARTH LUMBER COMPANY.

Logging contract—Evidence—Replevin—Judgment—New trial—Review of decision denying motion.

1. Where the evidence as to whether or not a claimed contract was made is conflicting, the question should be submitted to the jury.

2. Plaintiff, after receiving from defendant a portion of a quantity of saw-logs driven by the defendant for him, brought replevin for the remainder of the logs, 648 of which were not taken on the writ. The evidence showed how many logs were cut, marked, and put into the river, and that defendant ran said logs, with other logs, to its boom, and there was testimony from which the jury could estimate how many logs were received by the plaintiff before the issuance of the writ. And it is held that it was not error for the court to permit the jury to find a verdict for the value of the logs not taken on the writ.

3. The action of the circuit judge in refusing to grant a motion for a new trial will not be reviewed where his reasons for such refusal are not incorporated in the bill of exceptions as a part of the record of the proceedings had on said motion.[1]

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[1] REVIEW OF DECISION OF CIRCUIT JUDGE REFUSING MOTION FOR NEW TRIAL.

For cases bearing upon the proper construction of and practice under Act No. 134, Laws of 1893, which provides that "in all cases hereafter taken to the Supreme Court on writ of error or appeal, where a motion for a new trial has been previously refused by the trial judge, the party appealing the same may incorporate in the bill of exceptions a record of all proceedings had on said motion for a new trial, including the reasons given by the trial judge in refusing to grant said new trial," and that "exceptions may be taken and error assigned on the decision of the circuit judge in refusing such motion, and the same shall be reviewed by the Supreme Court," see:

1. *Gemberling v. Lazarus*, 100 Mich. 324, holding that the statute does not apply where the motion was decided, and writ of error issued, before the act took effect.

2. *Morley v. Wayne Circuit Judge*, where relator applied for *mandamus* to compel the respondent to give and file his reasons

Error to Delta. (Stone, J.) Argued October 11, 1894. Decided November 20, 1894.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

Sawyer, Waite & Waite, for appellant.

George Gallup, for plaintiff.

LONG, J. Action of replevin. Plaintiff had verdict and judgment in the court below, finding the title in him to such property as was taken on the writ, and a money judgment of $1,427.49 for property described in the writ, and not found by the officer.

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for refusing to grant a motion for a new trial, and to incorporate said reasons in the bill of exceptions. On April 4, 1894, a claimant against the estate of a deceased person recovered a verdict for $23,000. Ten days later a motion for a new trial was made, based upon the files, records, and proceedings in the case, upon the stenographer's minutes taken on the trial, and upon a certain affidavit filed in support of said motion. The reasons assigned why a new trial should be ordered were:

a—The erroneous admission and rejection of testimony.

b—The refusal to give certain requests to charge, and the giving of certain alleged erroneous instructions in the general charge.

c—Because the verdict was against the weight of evidence submitted upon the trial.

d—Because the claim was one of equitable cognizance, and not a proper subject for a jury trial.

The motion was argued May 12, 1894, and denied July 21, 1894, at which time the circuit judge filed his reasons as follows:

"I have carefully examined the errors alleged to have been made in the trial of this cause, and I am not satisfied that any error was committed. I have given this case what attention and consideration it was possible for me to give, and I direct that the verdict stand, and that the motion for a new trial be denied, with $10 costs."

The circuit judge returned that the bill of exceptions was noticed for settlement for October 1, 1894, at which date the counsel for the appellee did not appear; that it was again noticed for settlement for November 24, 1894, at which time counsel for both parties appeared, and settled some disputed propositions; that on

The claim of the plaintiff on the trial was that he cut and delivered into the White Fish river, in the winter of 1892–93, 10,655 white pine logs, and 765 pieces of waney timber, and that such logs and timber were driven down the river by defendant, and put into its boom; that thereafter plaintiff received from the defendant, before commencement of suit, 7,824 of the logs, and all but 61 pieces of the timber, leaving a balance of logs in defendant's possession of 2,831, and the 61 pieces of timber. Demand was made for this balance, when defendant claimed a lien for driving under a contract for 50 cents per thousand feet. Plaintiff denied this contract, but made a tender of

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December 18, 1894, counsel again appeared, and further disputes were settled, and, as this necessitated some changes, it was agreed between counsel that, these changes being made, the bill should be signed; that on December 19, 1894, the bill was presented to the circuit judge by the attorney for the appellant, corrected as agreed upon, and was signed by him; that, after the refusal of the motion for a new trial, the circuit judge heard nothing more concerning the order of denial until December 14, 1894, at which time one of the attorneys for the appellant asked him to file reasons for denying the motion; that the respondent told said attorney that the whole thing had passed from his mind, and that, if he had to file additional reasons, he should order a reargument of the motion, and, as the bill of exceptions had been practically settled, he thought it was too late to make such a demand; and that thereupon he was served with the notice to file his reasons as aforesaid.

The circuit judge submitted:

a—That the request to file reasons should have been made before the motion was decided, or at least before the writ of error was sued out, and not delayed until a day or two before the bill of exceptions was settled.

b—That the reason already given—that he was satisfied no error had been committed, and therefore a new trial was refused—was ample reason for denying the motion; and that he did not understand that the statute required him to make an argument in support of the position, or that the reasons should be set forth at length.

The application for *mandamus* was denied January 31, 1895. No opinion was filed.

$885, which amounted to 35 cents per thousand. Plaintiff took, under his writ, 2,183 logs and all the timber, leaving 648 logs unaccounted for, and for which the money judgment was entered. Under order of the court, on motion for new trial, the plaintiff remitted from this judgment the sum of $120.

The first contention in the court below was that a contract existed between the parties, by which plaintiff agreed to pay 50 cents per thousand feet for driving the logs. It is conceded that the tender was not sufficient to cover this amount. The plaintiff denies that such a contract was ever made. The court left that question to the jury to determine; but defendant contends that the testimony shows conclusively that such a contract was made, and that the court should so have directed the jury. After a careful examination of the testimony we are satisfied that there was a conflict of evidence on that point, and the court was correct in leaving it to the jury.

It is also contended that the court was in error in permitting the jury to find a verdict for the value of the logs not taken under the writ, for the reasons:

1. That there was no evidence showing how many logs came into the possession of the defendant, other than the amount agreed upon as having been sorted.
2. That there was no evidence to show how many logs had been delivered to plaintiff.

We think the testimony does show how many logs came into the possession of defendant; at least, the testimony shows how many logs were cut, marked, and put into the river, and it is shown that defendant took possession of them, and ran them, with other logs, to the boom. It is also shown, or such testimony was given from which the jury could estimate, how many logs were delivered to the plaintiff.

The questions presented by this record are mostly such as

were settled in the court below by the verdict of the jury under a very full and fair charge. It is claimed, however, that the court should have granted a new trial on newly-discovered evidence. Act No. 134, Laws of 1893, has provided for the manner of review. Among other things, it is provided by that act that there may be incorporated in the bill of exceptions a record of all the proceedings had on the motion for a new trial, including the reasons given by the trial judge in refusing to grant a new trial. Exceptions may be taken, and error assigned on such decision. The reasons of the circuit judge for refusing the new trial are not given. Apparently, the judge was not asked to give his reasons for such refusal. Unless the statute is followed in this regard, this Court cannot review that action.

We are satisfied that the case was fairly tried, and we find no error in the record calling for a new trial.

The judgment is affirmed.

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

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ARTHUR H. SWARTHOUT v. ELIZABETH LUCAS.

[See 99 Mich. 347.]

Contempt — Non-payment of costs — Dismissal of appeal from justice's court.

1. The purpose of How. Stat. § 7260, which provides that "when any rule or order of the court shall have been made for the payment of costs or any other sum of money, and proof by affidavit shall be made of the personal demand of such sum of money, and of a refusal to pay it, the court may order a

precept to commit the person so disobeying to prison until such sum, and the costs and expenses of the proceeding, shall be paid," is to enable courts to enforce interlocutory orders, no other means of enforcement being provided by statute.

2. On the hearing of a motion to dismiss an appeal from justice's court for the failure of the appellant to pay certain costs and for defects in the appeal bond, an order was made requiring the payment of said costs and the amendment of the bond within 10 days, or in default thereof the appeal be dismissed. The order further required the appellant to pay to the attorney for the appellee an attorney fee of $5. The order was not complied with. Contempt proceedings were instituted because of the non-payment of said attorney fee, and the appellant was adjudged guilty of a criminal contempt, and an order was made that he forthwith pay said fee and the costs of the contempt proceedings, and that he remain imprisoned in the common jail of the county until such payment should be made, or until he should be thence discharged by due course of law. And it is held that the case must be treated as though the correct practice had been followed,—making the payment of costs one of the conditions of the order, and a part of the judgment in case of non-compliance; that the court had ample power to enforce its order, and to award an execution for the costs, and could not, by the mere form of the order, deprive the appellant of the protection of How. Stat. § 7257, subd. 3, which confines the remedy by contempt proceedings to cases where, by law, execution cannot be awarded.

Certiorari to Saginaw. (McKnight, J.) Argued October 25, 1894. Decided November 20, 1894.

Certiorari to review an order of the circuit court committing plaintiff for contempt. Reversed. The facts are stated in the opinion, and in 99 Mich. 347.

John F. O'Keefe (*Weadock & Purcell,* of counsel), for plaintiff and petitioner in *certiorari.*

Bauer & Eaton, for defendant.

McGRATH, C. J. This is *certiorari* to the circuit court to review an order committing plaintiff for contempt. Swarthout brought suit in justice's court against Elizabeth

Lucas. Defendant had judgment, from which plaintiff appealed.

On motion to dismiss the appeal, the following order was entered:

"In this cause, motion having been made by Fred. L. Eaton, Jr., attorney for the defendant and appellee, to dismiss the appeal for failure to comply with the statute, after hearing counsel for the respective parties therein, it is ordered that the said plaintiff and appellant pay to the said defendant and appellee the sum of $17.75, justice's fees in said cause, as provided for in section 7003, Howell's Annotated Statutes, and the bond in said cause be amended, within 10 days; and, in default of said plaintiff complying with said conditions as aforesaid within said time, the said appeal to be dismissed.

"And it is further ordered that the said plaintiff pay to the said defendant's attorney the sum of $5, as an attorney fee for said motion."

The purpose of section 7260, How. Stat., is to enable courts to enforce interlocutory orders, no other means of enforcement being provided by statute. Section 7257 expressly confines the remedy by contempt proceedings to cases where, by law, execution cannot be awarded. Section 7021 expressly provides that, if an appeal be dismissed or discontinued, the court shall enter judgment in favor of the appellee for costs. In *Detroit & Birmingham Plank Road Co. v. Circuit Judge,* 27 Mich. 303, it was held that the proper practice, in case of a motion to dismiss an appeal for defects in the affidavit or bond, is to make an order *nisi* that the appeal be dismissed unless, within a time specified, a new and correct affidavit or bond be filed. The court had the power to enter such an order, and to make the payment of the costs one of the conditions, and a part of the judgment in case the other conditions were not complied with. The case must be treated as though such practice had been followed. The court having ample power to enforce its order, and to award an execution for

the costs, it could not, by the mere form of the order, deprive the party of the protection of the statute.

The order adjudging plaintiff guilty of contempt must be set aside, with costs against defendant.

The other Justices concurred.

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THERESA BERLES v. ALLEN C. ADSIT, CIRCUIT JUDGE OF KENT COUNTY.

Husband and wife—Competency as witnesses—Garnishment.

Under 3 How. Stat. § 7546, which provides that "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," except in certain cases, a wife, when garnished in a suit against her husband, cannot, without his consent, be examined as to transfers of property made to her by her husband.

Mandamus. Argued October 23, 1894. Granted November 20, 1894.

Relator applied for *mandamus* to compel respondent to set aside her default, entered in a garnishee suit because of her refusal to submit to an examination. The facts are stated in the opinion.

Fletcher & Wanty, for relator.

McGarry, McKnight & Judkins, for respondent.

MONTGOMERY, J. An action was commenced in the circuit court for the county of Kent by the Peninsular Stove Company, as plaintiff, against Joseph Berles. Garnishee proceedings were also instituted against Theresa

Berles, the relator, who is the wife of Joseph Berles. Judgment was rendered against the principal defendant. The affidavit for a writ of garnishment set forth that the garnishee defendant had property, money, goods, chattels, and effects in her hands and under her control, belonging to the principal defendant, Joseph Berles, which she held by a conveyance or title that was void as to creditors of Joseph Berles; the proceedings being based upon 3 How. Stat. § 8091. Relator answered, denying liability. She was thereupon cited to appear and submit to an examination before respondent. She appeared, and, it appearing that she was the wife of the principal defendant, the attorney for her husband objected to her being examined in regard to the transfer of the property in question, on the ground that he, the husband, was a party to the action, and that her testimony would be against him, and therefore incompetent. The objection was overruled, and, the relator declining to answer the questions, plaintiff entered her default for refusing to submit to an examination. The relator moved to set aside the default on the ground that she could not be compelled to submit to such examination. This motion was overruled, and the present application is made for an order requiring the circuit judge to set aside the default.

The question involved is whether, in a garnishee proceeding, the wife of the principal defendant may be examined as to transfers of property made to her by the husband.

3 How. Stat. § 7546, provides that "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," except in certain cases not necessary to be stated here. Was the wife competent to testify in this proceeding as a witness for or against her husband? The proceeding is analogous to a judgment

creditor's bill in aid of execution. In *De Farges v. Ryland,* 87 Va. 404, it was held in such case that the transferee, the wife, was not competent to testify against the objection of her husband. The same holding was made in *Niland v. Kalish,* 37 Neb. 47. We are cited to *Thompson v. Silvers,* 59 Iowa, 670, which sustains the respondent's contention. But we find the Iowa statute differs materially from ours. We think the objection of the husband was valid, and should have been sustained.

The writ will issue.

The other Justices concurred.

JAMES GARDNER v. FRANK HICKOCK.

Forcible entry and detainer—Complaint—Description of premises.

1. In proceedings for forcible entry and detainer, the description of the premises must be sufficiently definite to enable the officer executing the writ to restore complainant to possession, and exclude the defendant therefrom.[1]
2. The complainant, claiming to have been forcibly excluded from the possession of a portion of a stable leased of the defendant, instituted proceedings for forcible entry and detainer. The premises were described in the complaint as "the following described lands and premises, situate in the village of Allegan, in said county, to wit: The first two stalls at the left of the entrance to the first floor, and standing room on that floor for a buggy, and the north half of the upstairs, of the third entrance, counting from the north side, to the building known as the 'Rink Building,' situate on the east side of Water street, in the village of Allegan, situate on lots 232 and 233." And it is held that the description is too indefinite to enable

[1] See *Clark v. Gage,* 19 Mich. 507.

the officer executing the writ of restitution to restore complainant to possession, and exclude the defendant therefrom; and that the only remedy open to the complainant is an action for breach of the lease.

Error to Allegan. (Padgham, J.) Argued October 24, 1894. Decided November 20, 1894.

Forcible entry and detainer. Complainant brings error. Affirmed. The facts are stated in the opinion.

Fidus E. Fish and *Hannibal Hart,* for appellant.

C. R. Wilkes, for defendant.

GRANT, J. Defendant was the owner of a small stable, containing three standing stalls and two box stalls. He used it as a boarding stable, and also kept two horses of his own. On April 12, 1893, complainant made an agreement with defendant by which he was to keep his horse and buggy in the stable, paying $1.25 per month. Complainant claims that the agreement was for one year, while defendant claims that it was from month to month. At the end of six months, defendant notified complainant that he could use the stable no longer, and excluded him from its use. Complainant then instituted this suit before a circuit court commissioner to recover possession. The jury found against him before the commissioner, whereupon he appealed to the circuit court, where a verdict was directed in favor of the defendant.

The agreement was oral, and is stated by the complainant as follows:

"The bargain was that I was to have one stall until July, and have standing room for my buggy on the floor, and then I was to have half of the barn after July."

He did not occupy any stall exclusively, nor was any part of the place set off to him for his buggy.

The reasons given by the court for its instruction were that, under complainant's own evidence, the two were to occupy the premises substantially together; that complainant occupied different stalls in the barn; that the barn floor was to be occupied together; that complainant had the right to place his buggy upon the floor, while defendant had the right to remove it for other use when occasion required; that the stalls were occupied by different horses; that the space above was jointly occupied for keeping hay; and that each carried a key to the same door.

The case is not of sufficient importance to justify an extended statement of the evidence. The premises to which the complainant asks restitution are described in his complaint as follows:

"The following described lands and premises, situate in the village of Allegan, in said county, to wit: The first two stalls at the left of the entrance to the first floor, and standing room on that floor for a buggy, and the north half of the upstairs, of the third entrance, counting from the north side, to the building known as the 'Rink Building,' situate on the east side of Water street, in the village of Allegan, situate on lots 232 and 233."

In these proceedings the description must be so definite that the officer executing the writ must be able to restore complainant to possession, and exclude the defendant therefrom. It is apparent that this could not be done in the present case. It was not contemplated that the defendant should surrender to complainant the exclusive use of any particular portion of the stable. The only remedy open to the complainant is an action for breach of contract.

The instruction was correct, and the judgment is affirmed.

The other Justices concurred.

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THE FLINT & PERE MARQUETTE RAILROAD COMPANY v. THE BOARD OF STATE AUDITORS.

[See 89 Mich. 481.]

Costs against State—Interest—Board of State Auditors.

1. The State is not liable for interest on demands under the general provision of the statute relating to interest; citing *U. S. v. North Carolina*, 136 U. S. 211; *U. S. v. Sherman*, 98 Id. 567; *State v. Board of Public Works*, 36 Ohio St. 409; *Railroad Co. v. State*, 14 L. R. A. 438.
2. In suits between individuals, the prevailing party is entitled to interest upon the costs awarded in his favor from the date of the judgment or decree; citing *Hayden v. Hefferan*, 99 Mich. 262.
3. How. Stat. § 8984, which provides that "in all civil suits and proceedings by or in the name of the people of this State, instituted by any officer duly authorized for that purpose, and not brought on the relation or for the use of any citizen or upon any penal statute, the people shall be liable for costs in the same cases, and to the same extent, as if such suit or proceeding were instituted by an individual," and How. Stat. § 7756, which provides that "every suit or proceeding in a civil cause, instituted in the name of the people of this State by any public officer duly authorized for that purpose, shall be subject to all the provisions of law respecting similar suits or proceedings when instituted by or in the name of any citizen, except where provision is or shall be otherwise expressly made by statute, and in such suits and proceedings the people of this State shall be liable to be nonsuited, and to have judgment of *non pros.* or of discontinuance entered against them, in the same cases, in like manner, and with the same effect as in suits brought by citizens, except that no execution shall issue thereon," clearly evidence an intention to subject the State to precisely the same liability for costs, and for the incidents of a judgment, as an individual is subject to, with the single exception relating to the method of collecting the demand, and require the payment of the same sum in discharge of a judgment for costs as would be required to be paid by an individual.
4. How. Stat. § 7757, which provides that, "whenever costs shall

be adjudged against the people of this State in any civil suit or proceeding instituted by any officer duly authorized for that purpose, it shall be the duty of the Auditor General to draw on the Treasurer for the amount thereof, upon the production of an authenticated copy of the record of judgment, or of the order adjudging such costs, with a taxed bill thereof, and upon the certificate of the Attorney General that such suit or proceeding was duly instituted as the law required," does not require the auditing by the Board of State Auditors of an account based upon a judgment for costs rendered against the State, as a condition to the drawing by the Auditor General of a warrant upon the Treasurer for the amount of said costs.

Mandamus. Argued October 25, 1894. Denied November 20, 1894.

Relator applied for *mandamus* to compel respondent to allow its claim for interest on a judgment for costs against the State. The facts are stated in the opinion.

William L. Webber, for relator.

A. A. Ellis, Attorney General, for respondent.

MONTGOMERY, J. The State, on relation of the Attorney General, commenced suit in chancery against the relator for the recovery of certain lands. On appeal to the Supreme Court of the State, the railroad company prevailed, and a decree was entered that defendant recover costs of both courts from the State. 89 Mich. 481. This order was made in December, 1891. Before the costs were finally taxed, an appeal was taken to the Supreme Court of the United States on behalf of the State, which was, on March 12, 1894, dismissed, and an order entered that defendant recover costs in that Court. 152 U. S. 363. Relator filed its bill for costs with the Board of State Auditors, and claimed to recover interest upon the amount of costs awarded in the State court from the date of judgment, and upon the costs of the United States Supreme Court from the date of the judgment of that Court; the

total charge for interest being $173.33. The interest charged was disallowed, and *mandamus* is asked to compel the allowance of this item.

Some question is made as to whether, under the statute, the Board of State Auditors has any duty to perform in connection with the allowance of a claim for costs; but, as both parties desire an expression of the Court upon the merits, we do not pause to consider this question, except to refer to How. Stat. § 7757, to which further reference will be made hereafter.

The important question is whether relator is entitled to interest upon the judgment. It is conceded by counsel, and may be treated as settled by this Court in *Hayden v. Hefferan,* 99 Mich. 262, that in suits between individuals the prevailing party is entitled to interest upon the costs from the date of the judgment or decree. But it is contended by the Attorney General that the State is not liable for interest on demands under the general provision of the statute relating to interest, and in this contention he is supported by the uniform current of authority. *U. S. v. North Carolina,* 136 U. S. 211; *U. S. v. Sherman,* 98 Id. 567: *State v. Board of Public Works,* 36 Ohio St. 409; *Railroad Co. v. State,* 14 L. R. A. 438. But it is contended by relator that the statutes in this State relating to judgments against the State render the State liable for interest on costs the same as in case of individuals.

How. Stat. § 8984, provides that—

"In all civil suits and proceedings by or in the name of the people of this State, instituted by any officer duly authorized for that purpose, and not brought on the relation or for the use of any citizen or upon any penal statute, the people shall be liable for costs in the same cases, and to the same extent, as if such suit or proceeding were instituted by an individual."

Section 7756 provides that—

"Every suit or proceeding in a civil cause, instituted

in the name of the people of this State by any public officer duly authorized for that purpose, shall be subject to all the provisions of law respecting similar suits or proceedings when instituted by or in the name of any citizen, except where provision is or shall be otherwise expressly made by statute; and in such suits and proceedings the people of this State shall be liable to be nonsuited, and to have judgment of *non pros.* or of discontinuance entered against them, in the same cases, in like manner, and with the same effect as in suits brought by citizens, except that no execution shall issue thereon."

The succeeding section (7757) provides that—

"Whenever costs shall be adjudged against the people of this State in any civil suit or proceeding instituted by any officer duly authorized for that purpose, it shall be the duty of the Auditor General to draw on the Treasurer for the amount thereof, upon the production of an authenticated copy of the record of judgment, or of the order adjudging such costs, with a taxed bill thereof, and upon the certificate of the Attorney General that such suit or proceeding was duly instituted as the law required."

These provisions are very broad, and, we think, clearly evidence an intention to subject the State to precisely the same liability for costs, and for the incidents of a judgment, as an individual is subject to, with the single exception relating to the method of collecting the demand.

In *U. S. v. Sherman*, 98 U. S. 565, the statute provided that in suits against public officers, where recovery should be had in any such suit, and the court should certify that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the government, no execution should issue against the collector or other officer, but the amount so recovered should, upon final judgment, be provided for and paid out of the proper appropriation from the treasury. It was held in that case that interest should not be allowed. But there was no federal statute considered which so

broadly imposed upon the government the same obligations as those resting upon an individual; and, further, it was truly said in that case:

"When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government. But not until then. Before that time the government is under no obligation, and the Secretary of the Treasury is not at liberty, to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given, The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the amount recovered."

We think the reasoning in this case would be conclusive were it not for the provisions above quoted from sections 8984, 7756. But while the word "interest" is not used in either of these sections, we think they are sufficiently broad to require the payment of the same sum in discharge of a judgment for costs as would be required to be paid by an individual.

Section 7757, above quoted, does not require the auditing of this account by the Board of State Auditors. It is made the duty of the Auditor General to draw his warrant upon the Treasurer for the amount of the costs.

It will be unnecessary to issue a writ in the present case.

The other Justices concurred.

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JACOB HANSELMAN v. ANDREW J. DOVEL.

Husband and wife—Competency as witnesses—Divorce—Adultery —Order of proof.

1. In a suit by a husband for debauching and carnally knowing his wife, and thereby alienating and destroying her affection for him, brought after he has secured a divorce from her, the husband is not a competent witness to testify to the charge of adultery.
2. The plaintiff sought to introduce in evidence an alleged conversation with the defendant, in which the matter of the frequency of the defendant's calls upon the plaintiff's wife was gone over, and in which he talked about said calls, and why they were made, and what he was doing there. It was admitted by plaintiff's counsel that he did not expect to show that any admission was made at the conversation of criminal intimacy between defendant and plaintiff's wife. The court sustained the objection of defendant's counsel to the introduction of the conversation, unless it was connected with something else to make it relevant. And it is held that the ruling simply went to the order of proof; that the offered testimony would not, standing alone, have been sufficient to warrant a verdict for the plaintiff; and that it cannot be said that the ruling was prejudicial.

Error to Manistee. (McMahon, J.) Argued October 26, 1894. Decided November 20, 1894.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

George L. Hilliker, for appellant.

A. V. McAlvay and *Thomas Smurthwaite*, for defendant.

MONTGOMERY, J. This is an action for criminal conversation. Verdict for defendant.

1. On the trial the plaintiff called a witness, one J. M. Ramsdell, who testified that during 1893 he called upon

plaintiff and his wife at their rooms, and between January and August of that year saw defendant there as often as once a week; that he had a conversation with defendant in regard to his calls there, once; thinks it was in the spring or early summer. He was then asked the following question:

"State who began the conversation, and what was said.

"*Mr. McAlvay:* We object to it as immaterial and irrelevant, and ask what is sought to be shown by it.

"*Mr. Hilliker:* We seek to show simply this: That Mr. Dovel came to see Mr. Ramsdell because Mr. Ramsdell, as Mr. Dovel said, had talked with Mrs. Hanselman about the effect of his calls there, and Mr. Dovel came there, protesting as to Mr. Ramsdell's interference with his calls. They had a conversation there, in which the matter of the frequency of his calls was gone over, in which he talked about his calls there, and why he went there, and what he was doing there; and we seek to bring that out, and about these very calls he was making down at this house."

The court, after an examination of the declaration, said:

"The gist of the complaint, as I understand it, is a carnal knowledge and alienation through this, and not by other means. So I have some doubt about the relevancy of the testimony as to the frequency of the calls there, as to conversations at least, especially in advance of any evidence that frequent calls had been made. You did not expect to show, or have not offered to show, that there were any admissions made at this conversation of criminal intimacy.

"*Mr. Hilliker:* No, sir.

"*The Court:* I think I will sustain the objection to the introduction of the conversation at the present time, unless it is connected with something else to make it relevant."

The ruling simply related to the order of proof, and, as it is clear that the offered testimony would not, of itself, have been sufficient to entitle the plaintiff to claim a verdict from the jury, we think it cannot be said that the ruling was prejudicial. There was a plain intimation that, if the plaintiff were afterwards able to offer testimony

which tended to substantiate the main charge, the testimony here offered would be admitted. This the plaintiff appears to have been unable to do, unless it shall be held that the testimony of the plaintiff himself was competent.

2. This leads us to the consideration of the most important question presented, which is whether, after a divorce between the plaintiff and his wife, the husband is a competent witness to testify to the charge of adultery, in a suit brought against the alleged paramour of the wife.

3 How. Stat. § 7546, provides:

"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."

In *Mathews v. Yerex*, 48 Mich. 361, it was held that under this statute the wife is not a competent witness for the husband in a suit brought by him for criminal conversation. The doctrine of this case was reaffirmed in *Reynolds v. Schaffer*, 91 Mich. 494.

In *Carter v. Hill*, 81 Mich. 275, it was held that the husband is not a competent witness for himself in such a case. It was said by Mr. Justice CAHILL:

"This statute was intended to subserve a wise public policy; and we think we ought to call attention to the flagrant violation of it in this case, even though no point be made upon it by counsel. * * * The clear purpose of the statute is to preserve with sacredness the confidences of the marriage state, and to render it impossible for either husband or wife to speculate upon the other's dishonor, relying upon their own testimony to make or support a case."

The question remains whether, after the termination of

the marriage relation, it is competent for the husband to testify to the alleged fact of adultery occurring during marriage. We are cited to no case in which such testimony has been held competent.

In the case of *People v. Marble*, 38 Mich. 117, the incompetency of such testimony is implied, rather than stated. In that case the witness was permitted to testify to transactions which did not consist of communications made during marriage, and it was said:

"Since the relation had ceased when he was called, and as the prosecution 'was not in consequence of adultery,' there was nothing to qualify his general competency, save the exception in the second of the above-named sections, providing that, without the consent of both, neither husband nor wife, during the marriage or afterwards, shall 'be examined as to any communication made by one to the other during the marriage.'"

In the case of *State v. Jolly*, 3 Dev. & B. (N. C.) 110, the question arose whether, at the common law, the divorced husband was a competent witness to testify against the paramour of the wife, and it was held that he was not. It was said in the course of the opinion:

"It is argued by the attorney general that the criminal conduct testified to in this case was itself an outrageous violation of the marriage vow,—a matter in respect to which confidence was not yielded by the wife, nor could have been asked by the husband. * * * We are not satisfied that the exception contended for is established by the reasoning urged in its support. The rule we deem a valuable one, and we view with apprehension any exception having a tendency, more or less direct, to promote cunning, or to generate distrust where the best interests of society require that perfect frankness and confidence ought to prevail. If one exception be sanctioned because, from the character of the criminal act imputed, the dissent of the witness from its commission must be presumed, others may follow where the like presumption will be entertained, although not perhaps with equal confidence, and there will be danger of our having no rule capable of general and steady application."

In *State v. Phelps*, 2 Tyler (Vt.), 374, it was held that a woman divorced *a vinculo* is not a competent witness upon an indictment against her former husband to prove his adultery. And in *Rea v. Tucker*, 51 Ill. 110, it was held that in an action for *crim. con.* a divorced wife is not a competent witness to testify in behalf of her former husband, and against her alleged seducer.

There are cases in which the husband, after the divorce of the wife, has been permitted to call her to prove her own infidelity. *Ratcliff v. Wales*, 1 Hill, 63; *Dickerman v. Graves*, 6 Cush. 308. But in each of these cases the holding was put upon the distinct ground that the wife was not called to testify *against* her husband, while in *Ratcliff v. Wales* it was distinctly intimated that she would not be competent to testify against him. It was said:

"For the purpose of promoting a perfect union of interests and securing mutual confidence between husband and wife, the courts have generally refused to admit the wife as a witness against the husband, even after the marriage contract was at an end, when she was called to speak of any matter which happened during the continuance of the marriage, and which might affect the husband either in his pecuniary interest or character."

In the present case the testimony of the husband would affect the character of the wife, is offered in an action instituted by him in consequence of adultery, and we think is within the prohibition of the statute.

The judgment will be affirmed, with costs.

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

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EDGAR S. DEAN v. SAMUEL R. MUMFORD ET AL.

Will—Bill to construe—Trust—Suspension of power of alienation.

1. Where executors appear and answer a bill filed by a legatee, asking for a construction of the terms of the will if held valid, and asserting that it is as a whole invalid in equity, and in terms submit the question of the construction of the will to the court, the court may properly maintain jurisdiction.

2. The will, a construction of the terms of which is sought, provides:

a—That the wife of the testator shall have the use of his homestead, together with the furniture and other personal property thereon and connected therewith, to be used and enjoyed by her during her natural life as a home for herself, and for such of the testator's children as shall remain unmarried, and shall be agreeable to her; that the taxes and repairs upon the homestead shall be paid by the executors from the estate; and that they shall also pay to the widow $1.500 per annum, in quarterly or monthly installments, as she may desire, during her natural life.

b—That the residue of the estate shall be divided equally among the testator's five children, naming them and giving their ages, or to the survivors of them, excepting that in case any of said children shall die, leaving a child or children, his or her interest shall go to and belong to said child or children.

c—That certain advances made to certain of the testator's children, and charged to them upon his books, together with any advances that may be made after the execution of the will, and charged to the child or children to whom made, shall be deducted from the portion given to such child or children.

d—That the portions given to three of the testator's sons, naming them (one of whom was unmarried when the will was executed), shall be held in trust by the executors, as trustees for said sons, their wives and children, and the interest, income, and profit thereof shall be used and paid as in the judgment of the executors shall be best for the support and maintenance of said sons, their wives and children, during the lives of said sons and their wives, and, upon the decease of said sons and their wives, the portion so held in trust by said

executors shall become the property of and go to the child or children of said sons, severally, and their heirs and assigns, forever.

And it is held:

a—That it was the purpose of the testator to divide the (residue of his) estate into five equal parts; that he did not intend by paragraph *d* that the portions set apart to his three sons should be held by his executors in trust for the common use of said sons, their wives and children; that, in so far as reference is had in said paragraph to the wife of said unmarried son, it was intended to mean any wife of his living at the time of the decease of the testator; and that, as to the estate vesting upon the death of the widow, the power of alienation was not suspended for a longer period than two lives in being.

b—That the intent is clearly manifested to make the entire estate subject to the payment of the taxes and the making of repairs on the homestead, and the payment of the annuity to the widow; that the executors are required to devote the income of the entire estate to that purpose, if necessity therefor exists; that the power of alienation was thereby suspended during the lifetime of the widow, and therefore the trust sought to be created by paragraph *d* is void.

c—That the will is not void *in toto;* that certain duties are imposed upon the executors which may, notwithstanding the failure of the limitation in paragraph *d*, be performed, and the provision charging against the shares of certain of the children of the testator the amounts advanced to them should be sustained.

d—That, as the widow has elected to take under the statute, it is not material to determine whether, upon the failure of the limitation in paragraph *d*, the children of the testator would take an absolute fee under paragraph *b* of the will, as their interest would be the same whether they take as heirs at law or by the terms of the will.

3. The following general propositions are summarized from the opinion of MONTGOMERY, J.:

a—Provisions in a will which are not valid when made and when the will takes effect cannot thereafter be made valid by the election of the widow to take under the statute.

b—No express words creating a trust are requisite, if the intent to devote the estate to a particular purpose is apparent from the terms of the will.

c—Where a duty is imposed upon the executor which makes it necessary for him to retain the possession and control of realty, he will take an interest adequate to enable him to per-

form this duty; and an alienation which cuts off that right is, by implication, prohibited.

d—Where a will provides that certain debts, legacies, and charges are to be paid, and the residue of the estate not thus expended is then to be divided, the particular debts, legacies, and charges will be considered a charge against the estate, real and personal

Appeal from Wayne. (Frazer, J.) Argued April 4, 1894. Decided December 7, 1894.

Bill for the construction of a will. Complainant appeals. Reversed, and decree entered in this Court in accordance with the opinion. The facts are stated in the opinion.

George W. Radford and *Edward A. Barnes*, for complainant.

Moores & Goff and *Hoyt Post*, for defendants.

MONTGOMERY, J. Complainant, as one of the legatees named in the will of Horace M. Dean, filed this bill against the defendants Mumford and Frank Dean, executors, and the codefendants as legatees, asking a construction of the terms of the will, if held valid, and asserting that it is as a whole invalid, in equity.

A preliminary question is raised as to the jurisdiction, it being claimed by defendants that, except at the suit of a trustee or *cestui que trust* who asks a direction as to the execution of a trust, a court of chancery has no jurisdiction to construe a will or declare any or all of its provisions invalid. But, however this may be, the executors have answered in this case, and in terms submitted the question of the construction of the will to the court. As it is undoubted that they might have invoked the jurisdiction of the court for that purpose by a bill, we think that, they having submitted the question, the court may properly maintain jurisdiction. *Sawtelle v. Ripley*, 85 Wis. 72.

The material parts of the will are as follows:

"*First.* I give and bequeath to my beloved wife, Mary C. Dean, the use of the homestead now occupied by us, No. 83 State street, together with all the furniture and other personal property thereon and connected therewith, to be used and enjoyed by her during her natural life as a home for herself, and for such of my children as shall remain unmarried, and shall be agreeable to her; the taxes and repairs upon said homestead to be paid by my executors from my estate.

"*Second.* I also give and bequeath to my said wife the sum of $1,500 per annum, to be paid to her quarterly or monthly by my executors, as she may desire; to be received, used, and enjoyed by her during her natural life.

"*Third.* All the rest, residue, and remainder of all the goods, chattels, real and personal estate, of whatsoever kind or nature, or wheresoever the same may be situated, I desire to be divided equally between my five children,—Edgar S., aged 38; Arch. H, aged 30; Herbert L., aged 28; Frank, aged 26; and Lizzie, aged 23,—or to the survivors of them, excepting in case any of them shall die leaving child or children surviving; then, in such case, the respective interests of my sons and daughter above named shall go to and belong to the child or children surviving them, respectively.

"*Fourth.* Whereas, I have advanced to my sons Edgar S. and Arch. H. certain sums of money, which will appear charged to them upon my books, and if I shall advance to them, or either of them, or others of my children, during my lifetime, other sums, all such sums in money or property which I shall advance to or pay for and shall charge to them, respectively, shall be deducted from the respective portions above designated to go to my said children.

"*Fifth.* I hereby will and direct that the portions hereinbefore designated for my said sons Edgar S., Arch. H., and Herbert L. be held in trust by my executors, as trustees for my said sons, their wives and children, and the interest, income, and profit thereof be used and paid as in the judgment of my said executors shall be best for the support and maintenance of my said three sons, their wives and children, during the lives of my said sons and their wives; and, upon the decease of said sons and their

wives, the portion so held in trust by my said executors shall become the property of and go to the child or children of said sons, severally, and their heirs and assigns, forever."

It is the contention of complainant—*First*, that the first and second clauses make the taxes and repairs and annuity a charge upon the estate, and create a trust in favor of the widow, which continues during her life; and, *second*, that, if this be not so held, then, under any construction which may be given to the fifth clause, the power of alienation is suspended for a longer period than during two lives in being, and that for this reason the trust created in the fifth clause falls.

The defendants contend—*First*, that inasmuch as the widow has elected to take under the statute, and not under the will, the validity or non-validity of the will should be determined without reference to the attempted provision for her; *second*, that the power of alienation was not, by the terms of the will, suspended during the life of the widow; and, *third*, that by the proper construction of the fifth clause, in connection with the third and fourth clauses, of the will, the power of alienation is not suspended, as to any portion of the estate which vested after the death of the widow, for a longer period than two lives in being.

We think, if the power of alienation was not suspended during the life of the widow, the case presents no very serious difficulty. It appears to be conceded by counsel who seek to maintain the validity of the will and its provisions that the fifth clause restrains alienation for the period of two lives in being. The construction of the will for which they contend is that, under the provisions of the third clause, the estate is to be divided into five equal shares; that two of the shares—those devised to Frank and

Lizzie—vest at once; that, by the terms of the fourth clause, certain advancements are to be taken out of the shares of Edgar S. and Arch. H., and the remainder is, in each instance, under the fifth clause, as in the case of the one-fifth interest of Herbert L., to be held in trust by the executors for the respective legatees named, their wives and children; and that, upon the decease of Edgar S. and his wife, Eliza, the one-fifth, less the deducted advancements, becomes the property of their children; and so in the case of Arch. H. and Herbert L. We think this contention is sound, so far as it relates to the third and fifth clauses, if it be held that there was no restraint on alienation during the life of the widow. It was very plainly the purpose of the testator to divide his estate into five equal parts, and we think it very clear that it was not the intention to provide by the fifth clause that the three parts which had been set apart by the third clause of the will to Edgar S., Arch. H., and Herbert L. should be held in trust for the *common* use of the sons, their wives and children. But it is suggested that, in this view, as Herbert L. was unmarried at the time the will took effect, the will should be construed to relate to any wife whom he might in the future marry, and, so construed, the estate would not vest in the children or heirs until after the expiration of two lives in being. We think the will not open to this construction, but that it was intended to mean any wife of Herbert L. living at the time of the decease of the testator. *Van Brunt v. Van Brunt*, 111 N. Y. 178. The will should not be given a construction, for the purpose of defeating the intention of the testator, which would bring within its purview one who should in the future become the wife of one of the legatees.

The important question, then, as it appears to be conceded, is whether the power of alienation was suspended during the life of the widow. If the contention of defend-

ants' counsel, that the election of the widow to take under the statute calls for a construction of the will as it would have read without any attempt to make provision for her, be allowed, this, with what we have above determined, would be an end of the case. A statement is found in the case of *Bailey v. Bailey*, 97 N. Y. 471, sustaining the contention of defendants' counsel. But in that case it had been determined in the opinion that the bequest to the widow was of a life estate in the property, which she had the right to sell if she chose; so that the statement affirming the doctrine here contended for was *dictum*. We cannot accept this as a correct statement of the law. The will must, it seems to us, be construed as made. It will not do to say that provisions which are incorporated in a will, and which are not valid when made and when the will takes effect, can thereafter be made valid by the election of the widow. This would, in effect, empower the widow to execute a will by validating what was previously no will. Counsel also cite, as sustaining this contention, *Woodburn's Estate*, 151 Penn. St. 586; *Small v. Marburg*, 77 Md. 11; and *Tracy v. Murray*, 44 Mich. 109. In the cases of *Woodburn's Estate* and *Small v. Marburg* the question before the court related to the effect of the election of the widow to take under the statute upon the distribution to be made of the estate. Neither case deals with the question of whether the widow can, by declining to take under the will, make that valid which was before invalid, nor was any such question before the court. In *Tracy v. Murray* the widow renounced her right to take under the statute, and elected to take under the will. The Court say:

"Accepting as correct the doctrine of those cases which hold that the widow becomes a purchaser of the legacy by releasing her dower, the contract is not a completed one until her acceptance of the provisions of the will after her

husband's decease. Had he purchased from his wife her dower, and given her his note therefor, upon his death such obligation, if not paid, would simply become a claim against his estate, and take its place, when proven against the estate, with the other allowed claims. The husband during his lifetime, wishing to make arrangements to have his wife release her dower interest in the lands of which he should die seised, makes an offer therefor which is not to be submitted to her for acceptance until after his decease."

This case, it will be seen, presented no question of validating invalid provisions of the will, but dealt with the rights of the widow as they existed under the will as made by the deceased; and the case certainly contains no intimation which sustains the contention here made.

Were these taxes and annuity a charge upon the estate in such a sense as to create a trust, and suspend the power of alienation? It is settled that no express words creating a trust are requisite, if the intent to devote the estate to a particular purpose is apparent from the terms of the will. Where a duty is imposed upon the executor which makes it necessary for him to retain the possession and control of realty, he will take an interest adequate to enable him to perform this duty; and an alienation which cuts off that right is, by implication, prohibited. Perry, Trusts, §§ 121, 313, and cases cited; *Cummings v. Corey*, 58 Mich. 494; *Vail v. Vail*, 7 Barb. 226. And where there is a provision in the will that certain debts, legacies, and charges are to be paid, and the residue of the estate not thus expended is then to be divided, the particular debts, legacies, and charges will be considered a charge against the estate, real and personal. See a discussion of this rule in 2 Jarm. Wills, p. *1,411 *et seq.*; *Greville v. Browne*, 7 H. L. Cas. 689; *Gainsford v. Dunn*, L. R. 17 Eq. 405; *Lafferty v. Bank*, 76 Mich. 35. It will be noticed in the present case that the will, after bequeathing the use of the homestead, makes the taxes and repairs upon the

homestead payable from the estate of the testator. It also provides for an annuity of $1,500 per annum, to be paid by the executors during the natural life of the widow, and then bequeaths all the rest, residue, and remainder of all the goods, chattels, real and personal estate, to the five children named. We think the intention is clearly manifested to make the entire estate, real and personal, subject to these charges, and the executors may devote the income of the estate, both real and personal, to that purpose, and are required to do so if necessity therefor exists. This attempted restraint on alienation must be held void.

The question is raised as to whether the will is void *in toto*. We think not. Certain duties are imposed upon the executors which might, notwithstanding the failure of the limitation in the fifth clause, be performed, and the provision charging against the shares of Edgar S. and Arch. H. the amount of certain advancements should be sustained.

As the widow has elected to take under the statute, it is not material to determine whether, upon the failure of the limitation in the fifth clause, the children would take an absolute fee under the third clause, as their interest would be the same whether they take as heirs at law or by the terms of the will.

A decree will be entered in accordance with these views. The costs will be paid out of the estate.

The other Justices concurred.

THE PEOPLE v. JOHN J. WHITTEMORE.

Criminal law—Return of examining magistrate—Malicious threats —Blackmail—Pleading—Evidence—Disqualification of prosecutor.

1. The failure of an examining magistrate, on requiring a respondent to recognize to answer the offense charged, to certify his finding that the offense has been committed,—his finding being "that there is probable cause to believe that said offense has been committed, and probable cause to believe the respondent guilty thereof,"—will not support an objection that the information filed on the basis of his return was not properly filed.

2. Respondent was convicted of maliciously threatening to accuse one Paul Lucas of the crime of perjury, in violation of How. Stat. § 9093, which provides that "if any person shall, either verbally or by any written or printed communication, maliciously threaten to accuse another of any crime or offense, * * * with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, he shall be punished," etc. The complaint, which was followed by the warrant, charged that the respondent did, on a certain day, willfully and maliciously, verbally, threaten to accuse the said Paul Lucas of willful and corrupt perjury, and did, on the day and at the place named, threaten to make a criminal complaint for such offense against the said Lucas, unless he would sign and execute a deed of certain lands owned by him, and situated in the state of Minnesota, with the intent and purpose of procuring the signature of said Lucas against his will to said deed, and with intent to injure and defraud said Lucas, contrary to the form of the statute, etc. And it is held:

a—That the complaint shows sufficiently that the threats were verbal.

b—That the complaint follows the language of the statute in its averment as to the making of the threats, and while, in the precedents, the name of the party to whom the threats were made is usually set out, the omission to do so is not fatal.

c—That the complaint sufficiently sets out the intent; that the statute makes it an offense to make such threats with intent thereby to extort money or any pecuniary advantage

whatever, or with intent to compel the person so threatened to do any act against his will; and that the intent to procure the signature of Lucas against his will to a deed of land was an intent to compel him to do an act against his will, to wit, to affix his signature to a deed.

3. The attorney for the plaintiff in a suit pending in Minnesota came to Michigan for the purpose of taking the depositions of certain witnesses in the case. Among other witnesses, he examined one of the defendants, who held the legal title to the land in dispute, which plaintiff claimed had been transferred without consideration. After the testimony had been taken, the attorney had an interview with said defendant, during which, as claimed by said defendant, he threatened to prosecute the defendant for perjury unless he would convey the land to the plaintiff. This the defendant refused to do, and a few days later the attorney caused the threatened prosecution to be instituted. Pending an examination, the prosecuting attorney and the attorney for said plaintiff started to drive to the home of said defendant to procure the execution of said deed. Another attorney followed them for the purpose of preventing the execution of the deed. The deed was not executed, and the said defendant thereupon made a complaint against the foreign attorney for maliciously threatening to accuse him of the crime of perjury. After the arrest of the defendant for perjury, one of his creditors, with whom he had deposited his title deed to the land in dispute as security, informed the Michigan attorney of said arrest, and requested him to investigate the matter. Prior to the visit of the foreign attorney to the defendant to procure said deed, the Michigan attorney had seen the foreign attorney and the prosecuting attorney, and informed the foreign attorney that if he went to the house of the defendant, as proposed, to force him to execute said deed, he would follow him and prevent his doing it. On the trial of the foreign attorney for threatening to accuse the said defendant of perjury, the prosecuting attorney being disqualified from acting, the court appointed the Michigan attorney to prosecute the case. Objection being made to such appointment, the attorney so appointed testified that he was not interested for the complaining witness at the time the prosecution was commenced in any way, but that he had since been retained to defend him in the perjury case. And it is held that said attorney was not disqualified from acting under said appointment under 3 How. Stat. § 557, which provides that no attorney shall be permitted to prosecute or aid in prosecuting any person for an alleged criminal offense where he is engaged or interested in any civil suit or proceeding depending upon

the same state of facts against such person, directly or indirectly.

4. Respondent having denied making any demand whatever upon Lucas, testimony tending to show that the latter was in fact guilty of perjury was inadmissible as bearing upon respondent's intent; nor was such testimony admissible for the purpose of impeaching Lucas, or to disprove malice upon the part of respondent.

5. Testimony relative to the arrest of Lucas, at the instance of the respondent, for perjury, and to the attempt to secure the execution of the deed, was admissible as bearing upon the respondent's intent.

Exceptions before judgment from Alpena. (Kelley, J.) Argued June 29, 1894. Decided December 7, 1894.

Respondent was convicted of maliciously threatening to accuse a certain person of the crime of perjury. Conviction affirmed, and record remanded for further proceedings. The facts are stated in the opinion.

W. E. Depew and *J. D. Turnbull,* for respondent.

A. A. Ellis, Attorney General, and *Joseph H. Cobb,* for the people.

MONTGOMERY, J. Respondent was convicted of maliciously threatening to accuse one Paul Lucas of the crime of perjury, in violation of How. Stat. § 9093.

The facts are that the respondent is an attorney, residing at St. Paul, Minn., and was the attorney of one Joseph Stehr, who had a suit pending in the Minnesota courts against Paul Lucas and others, involving the title to certain lands in St. Paul. Respondent came to Alpena in December, 1893, for the purpose of taking the depositions of witnesses in the case referred to, and, as subsequent events would indicate, with the further purpose of procuring a deed from Lucas to his client. On the 13th, 14th, 15th, and 16th of December, respondent examined

Paul Lucas as a witness in the case, before a circuit court commissioner. After the testimony was concluded, respondent invited Lucas to his room at the hotel, and, while there, Lucas swears, in substance, respondent threatened to prosecute him for perjury unless he would deed the land to his (respondent's) client, for a named consideration. These threats did not prove effectual, and on the 25th day of January, 1894, respondent made a complaint against Lucas for perjury, and caused his arrest. An examination was not had at once, but Lucas was taken to the office of the prosecuting attorney, who permitted him to go at large, with instructions to report to him (the prosecutor); and, apparently, the prosecutor interested himself in the effort to procure the deed from Lucas and his wife. On the 27th day of January the prosecuting attorney and the respondent in this case and Lucas started to drive from Alpena into the country, where Lucas resided, to procure the execution of the deed. Mr. J. H. Cobb, the attorney who now represents the people in this case, one Charles Golling, Judge Kelley, who presided at the trial, and the sheriff of Alpena county, followed the party for the purpose of preventing a consummation of the transaction. The deed was not procured, but Lucas returned to Alpena, a justice was called in, and the respondent was complained against for the offense here in controversy. The other facts necessary to an understanding of the case will be stated in connection with the particular questions to which they relate.

1. It is claimed that the information was not properly filed, for the reason that the respondent was never properly held for trial by an examining magistrate; the precise point being that the justice failed to return that he found that an offense had been committed, but certified that he found that there was probable cause to believe that an offense had been committed, and that there was probable

cause to believe the respondent guilty thereof. It was held in *Turner v. People*, 33 Mich. 368, that it was not necessary for the justice to make such certificate to the circuit court, and that the fact of taking bail imports the decision of the justice, and the fact of giving it imports a recognition of it by the accused. The ruling has been followed in *Cargen v. People*, 39 Mich. 549, and again in *People v. Ten Elshof*, 92 Mich. 167. It is suggested that the return fairly excluded the idea that the justice found as a fact that the offense had been committed. But the case is in this respect identical with that of *People v. Ten Elshof*, and is ruled by that case.

2. It is next contended that the complaint and warrant set forth no offense. It is claimed that the complaint does not specify the intent mentioned in the statute, or sufficiently set forth the threats, or specify to whom the threats were made, or state whether the threats were in writing or verbal. The warrant follows the complaint. The complaint was, in substance, as follows:

"That the said John J. Whittemore did, on the 16th day of December, 1893, willfully and maliciously, verbally, threaten to accuse him, the said Paul Lucas, of willful and corrupt perjury, and did then and there, on the 16th day of December, 1893, at the city of Alpena, county and State aforesaid, threaten to make a criminal complaint for such willful and corrupt perjury against him, the said Paul Lucas, unless he would sign and execute a certain paper writing and deed conveying to another the lands and tenements of him, the said Paul Lucas, situate and being in St. Paul, in the state of Minnesota, with the intent and purpose of procuring the signature of the said Paul Lucas against his will to said certain paper writing and deed, conveying his lands and tenements as aforesaid, with intent to injure and defraud him, the said Paul Lucas, contrary to the form of the statute," etc.

We think the complaint does show sufficiently that the threats were verbal.

As to the point that it is not stated to whom the threats

were made, the complaint follows the language of the statute in this regard, and while, in the precedents, the name of the party to whom the threats are made is usually set out, we find no case which holds that the omission is fatal to the indictment. An indictment in this form was held good in *State v. Young*, 26 Iowa, 122, although the precise point seems not to have been distinctly made.

We also think the complaint in the present case sufficiently sets out the intent. The statute makes it an offense to make such threats with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will. The intent to procure the signature of Paul Lucas against his will to a deed of land was an intent to compel Paul Lucas to do an act against his will, to wit, to affix his signature to a deed.

3. The court appointed J. H. Cobb to represent the people on the trial, and this is complained of. Mr. Cobb had not acted as attorney for Lucas in any civil proceeding which was pending, so as to be disqualified under the provisions of the statute (section 557). It appeared that Mr. Cobb was attorney for one Robert Rea, who had loaned $50 to Lucas on his (Lucas') depositing with Rea his title deed to the land in question. After Mr. Lucas' arrest, Mr. Rea said to Mr. Cobb that Lucas had been arrested, and requested Mr. Cobb to investigate it. Mr. Cobb saw Mr. Whittemore and the prosecuting attorney, and told Mr. Whittemore that, if he went into the country to force Lucas to give the deed, he (Cobb) would follow him, and prevent his doing it; and it appears that he did so. He testified in the circuit court that he was not interested for Lucas at the time the prosecution was commenced in any way, but that he had since been retained to defend Lucas in another criminal proceeding. We think it cannot be said that he was employed as attorney in any civil

proceeding involving the same state of facts as that involved here. The determination of this case would not in any way affect the criminal prosecution pending against Lucas for perjury.

4. The circuit judge charged the jury, in effect, that if the threats were made with the wrongful intent charged, and were made maliciously, the offense was complete, whether Lucas was or was not guilty of the offense of perjury. The respondent complains of this holding, and contends that if the respondent, having an interest in the matter, believed that Lucas was guilty of perjury, he had the right to threaten to prosecute Lucas, unless he should place the title where it belonged. But we think the law is settled otherwise. 2 Whart. Cr. Law, § 1664; Rosc. Cr. Ev. *979; *Rex v. Gardner,* 1 Car. & P. 479; *Reg. v Cracknell,* 10 Cox, Cr. Cas. 408; *Com. v. Buckley,* 148 Mass. 27; *Com. v. Coolidge,* 128 Id. 55; *State v. Goodwin,* 37 La. Ann. 713. The respondent in the present case denied having made the threats imputed to him, or having made any demand upon the prosecuting witness. His statement of the conversation was, in effect, that he offered to compromise the litigation with the complaining witness.

Respondent further contends that the testimony tending to show that Lucas was in fact guilty of perjury was proper for two purposes:

"It would tend to show that he was not a truthful witness, and that the threats were not made maliciously."

It has been held in some cases that, when the question involved is whether the demand for money is a demand for what respondent is in no way entitled to, evidence that the prosecuting witness has been guilty of an offense for which the accused is entitled to demand compensation is admissible, as bearing upon the question of the intent; that is, to determine whether the accused is seeking to

recover his own, or to extort money which does not belong to him. *Com. v. Jones,* 121 Mass. 57; *Mann v. State,* 47 Ohio St. 556. The reasoning of the latter case is against the clear weight of authority, as is apparent from an examination of the cases hereinbefore cited. In the case of *Com. v. Jones,* the fact that a demand was made upon the complaining witness was admitted by the accused, and evidence that the complaining witness had been guilty of a wrong against him, for which he was entitled to demand compensation, was held admissible, as having a bearing upon the question of the respondent's intent, he having denied a threat of prosecution. But in the case of *Com. v. Buckley,* decided by the same court, it was held that evidence that the complaining witness had in fact committed the offense was not competent for the purpose of impeaching him; and it was also said of the other contention made by the respondent here, that it was competent on the question of malice:

"The malice required by the statute is not a feeling of ill will toward the person threatened, but the willful doing of the act with the illegal intent. If the threat was willfully made with the intent to extort money, it was a malicious act, and the fact that the charge was true would be immaterial."

We think there was no error in the ruling in this regard.

5. Respondent's counsel asked an instruction as follows:

"If the respondent said to Paul Lucas, 'You come not in my will and give me a deed, I send you and your sister to State prison for life,' this would not constitute a crime."

The circuit judge charged the jury, and we think correctly:

"It would not be necessary that the precise words should be used, that he [the respondent] would complain of him [the complaining witness], or charge him with the

commission of perjury. If he used language which clearly imported that intention,—clearly implied and imported that he intended to charge him with false swearing and perjury,—it would be sufficient."

And, further:

"It is claimed here by the people that the direct charge was made that if this old man, to state it in his own language, did not come under or within his will, he would send him and his sister to the penitentiary for life. * * If you find in this case that, in connection with that statement, with that threat, he had been directing his attention to the fact that he had sworn falsely, or sworn in conflict with other witnesses, you have a right to determine whether it was a threat that he would send him to the penitentiary for life for such discrepancies in his testimony, or not."

We think this charge fully justified by the record in the case.

6. Complaint is made of the admission of testimony relative to the subsequent arrest of the prosecuting witness at the instance of respondent, and to the attempt subsequently to procure the execution of the deed by Lucas. We think this testimony was admissible as bearing upon the respondent's intent.

A careful examination of the record convinces us that there was no legal error committed on the trial.

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

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

102	528
110	3
102	528
114	508
102	528
128	683
128	684
102	528
144	[2] 53
102	528
154	[4]555
102	528
f155	[3]374

ABIJAH WESTON v. THE COUNTY OF LUCE.

Taxes—Payment under protest—Action against county—Duress—Pleading—Bill of particulars—Demurrer.

1. Section 58 of the tax law of 1893, which authorizes the county treasurer, after the return of lands for unpaid taxes, to receive, under like provisions as in section 53 of the act, the amounts of the several taxes or any of them due, does not authorize the payment of taxes to the county treasurer under protest, and the bringing of a suit against the county to recover back the moneys so paid.[1]
2. The payment by a land-owner to the county treasurer, under protest, of illegal taxes assessed against his land, in order to secure from that officer the certificate required by the tax law of 1893 as to the payment of taxes to entitle his deed, given to a prospective purchaser, to record, does not constitute payment under duress, so as to give to the land-owner a common-law right of action against the county for the recovery of the moneys so paid, although he would otherwise have been prevented from making such sale.
3. A bill of particulars is no part of the declaration, and cannot affect its sufficiency upon demurrer.
4. A demurrer to an entire declaration, which, in addition to the special counts, contains the money counts, which are good, cannot be sustained.

Error to Luce. (Steere, J.) Argued October 3, 1894. Decided December 7, 1894.

Assumpsit. Plaintiff brings error. Reversed, and record remanded for further proceedings. The facts are stated in the opinion.

C. W. Dunton and *McMahon & Oren,* for appellant.

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[1] For cases bearing upon the question of the recovery of taxes paid under the pressure of an actual or threatened levy, or under statutory protest, see *Canfield Salt & Lumber Co. v. Township of Manistee,* 100 Mich. 466, 473, and note.

S. N. Dutcher, for defendant.

HOOKER, J. Defendant demurred to the declaration filed in this case, which is based upon the claim for money paid to the county treasurer under protest. The action is brought against the county. The declaration alleges, in substance, that the taxes were levied upon the plaintiff's land, which was returned for non-payment; that the plaintiff thereafter found an opportunity to sell the land, but as the certificate of the county treasurer, required by section 135 of the tax law of 1893, could not be obtained without paying these taxes, he paid them to the treasurer under protest; that he was obliged to do this, or lose his opportunity to sell, as the purchaser could not have his deed recorded without such certificate. He claims that this was duress, and that he is entitled to recover the amount paid from the county, the taxes being void. The money counts are made a part of the declaration, but the bill of particulars limits the claim to the cause mentioned above.

The plaintiff supports his contention upon two grounds:

1. That the statute (section 58, Act No. 206, Laws of 1893) authorizes the recovery sought.
2. That the declaration states a good cause of action at common law.

Counsel cite us to How. Stat. p. 1277, for the first law passed in this State permitting the recovery of invalid taxes which have been paid under protest. It was passed in 1882, and, being held not to apply to taxes upon personal property (see *Lyon v. Receiver of Taxes,* 52 Mich. 271), was amended by section 41 of the tax law of 1889 to cover such taxes. At the last session of the Legislature the tax law was changed. Section 53, Act No. 206, Laws of 1893, is a substantial re-enactment of the statutes above cited. It reads as follows:

"Any one may pay the taxes, or any one of the several taxes, or any part thereof, on any parcel of land, and the treasurer shall note across the face of the receipt, in ink, any portion of the taxes remaining unpaid. He may pay any tax, whether levied on personal or real property, under protest to the treasurer, specifying at the time in writing, signed by him, the grounds of such protest, and such treasurer shall minute the fact of such protest on the tax roll and in the receipt given. The person paying under such protest may, within 30 days, and not afterwards, sue the township for the amount paid, and recover, if the tax is shown to be illegal for the reason specified in such protest. Any person owning an undivided share, or other part or parcel, of real property assessed in one description, may pay on the part thus owned by paying an amount having the same relation to the whole tax as the part on which payment is made has to the whole parcel. The person making such payment shall accurately describe the part or share on which he makes payment, and the receipt given, and the record of the receiving officer, shall show such description, and by whom paid; and, in case of the sale of the remaining part or share for non-payment of taxes, he may purchase the same in like manner as any disinterested person could. Any person having a lien on property may, after 30 days from the time the tax is payable, pay the taxes thereon, and the same may be added to his lien, and recovered, with the rate of interest borne by the lien. A tenant of real estate may pay the taxes thereon, and deduct the same from his rent, unless there be an agreement to the contrary. Such payment may be made to the township treasurer while the tax roll is in his hands, or afterwards to the county treasurer. The receipt given shall be evidence of such payment."

The section permits payment to the township treasurer under protest, and the commencement of suit against the township, within 30 days thereafter, to recover the money paid.

Section 58 of the same act is as follows, viz.:

"After the return of lands for unpaid taxes, the county treasurer is authorized to receive, under like provisions as in section 53 of this act, the amounts of the several taxes or any of them due."

It is argued that, while this language does not expressly authorize payment of the tax under protest, or recovery from the county of money so paid, these rights are included, under the language used.

The language authorizes the payment and receipt of the various taxes, or any of them, due, "under like provisions as in section 53." What are the provisions of section 53 under which they may be paid? The first sentence of that section allows the payment of any one of several taxes or any part thereof, on any parcel of land, and requires the treasurer to note across the face of the receipt given, in ink, any portion of the taxes remaining unpaid. It is to this sentence alone that this provision of section 58 applies. It is true that section 53 contains a number of other provisions, viz., payment upon undivided interests or a portion of a description, payment by persons holding liens upon the land, or by tenants. But it is not necessary to look to section 58 for authority for making such payments to the county treasurer. Several of them are covered by the last two sentences of section 53 itself, and all of them by section 59. A literal construction of section 58, in accordance with the plaintiff's claim, would require the action to be commenced against the township, although the money was paid to the county treasurer. To sustain plaintiff's contention, we must infer that the Legislature intended to authorize such action against the county. We think this improbable. The Legislature authorized payment under protest within the limited time that the roll should be in the hands of the township officers. It restricted the time within which an action could be commenced to recover the same. This is inconsistent with the theory that it was intended that such course could be taken later, when it would be productive of more inconvenience. The second count of said declaration, alleging the bare fact of payment of illegal taxes,

under protest, to the county treasurer, does not state a cause of action.

The first count is more specific, alleging not only the illegality of the tax, and its payment under protest, but the further fact that it was paid to enable the plaintiff to sell his land, which otherwise he would have been prevented from doing, by reason of his inability to procure the treasurer's certificate, which section 135 of Act No. 206 of the Laws of 1893 requires to entitle a deed to record. It is contended that this was such duress as to make such payment involuntary, and to authorize an action against the county, under the principles of the common law. Were this conceded, the count is faulty, in that it does not state that the defendant has received the tax, or any portion of it, to its use. Cooley, Tax'n (2d ed.), 805.

It is, however, contended that a common-law right of action exists, because the plaintiff could not sell his land without paying this tax, as the prospective purchaser could not record the deed without paying the tax, and would not purchase without payment, so that his deed might be recorded. The payment of money to prevent the threatened seizure and sale of goods by an officer in possession of a legal warrant is a payment under duress, and may be recovered. It is upon the principle that such warrant "is in the nature of an execution running against the person and property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability." "Where there is compulsion, actual, present, potential, in inducing that payment, by force of process available for instant seizure of person or property, and the demand is really illegal," payment and recovery back are permitted. The element of coercion is essential to the right, and payment must be made to prevent seiz-

ure or arrest. *Peebles v. Pittsburgh,* 101 Penn. St. 304; Dill. Mun. Corp. § 940; *Taylor v. Board of Health,* 31 Penn. St. 73; *Commissioners v. Walker,* 8 Kan. 431; *Railroad Co. v. Commissioners,* 98 U. S. 541; *Lamborn v. Commissioners,* 97 Id. 181; *City of Detroit v. Martin,* 34 Mich. 170; *Baker v. City of Big Rapids,* 65 Id. 76; *Betts v. Village of Reading,* 93 Id. 77; *Canfield Salt & Lumber Co. v. Township of Manistee,* 100 Id. 466. Whether this rule should extend to cases of payment to relieve land from a lien for taxes need not be discussed, as that question is not involved. The action is not based upon the claim that the land is in danger of sale, but that, owing to the levy of the tax upon it and the requirement of the certificate, the plaintiff cannot sell the land.

We are aware that in a case resembling this (*State v. Nelson,* 41 Minn. 25), upon *mandamus* brought by the purchaser to compel the treasurer to receive the valid portion of a tax and issue the certificate, the supreme court of Minnesota held that the proper remedy was for the owner to pay the tax, and bring an action to recover it. But we are unable to agree with that decision. We consider it an extension of the rule, which we understand to limit payment to cases of threatened divestiture of property, under circumstances which would deny a judicial hearing before such divestiture, as in case of a sale of goods, or (in those states where it is held to apply to real estate) to cases where title to land is to be put in jeopardy by a sale for taxes. It does not include cases where payment is made from speculative motives, as to enable the owner to make an advantageous sale. If it did, it might as well be held to apply to a case where a purchaser would be lost by reason of the existence of the tax as to one where the deed could not be recorded for want of a certificate. In fact, it would be equally applicable to any case where the outstanding tax is an impediment to any

disposition that the owner might desire to make of the property. We do not deny that it might prove an embarrassment, but it does not follow that the public should be subjected to an action, for it does not fall within the reasons upon which the right depends. Instead of being a payment under duress of property, the seizure of which is threatened, it is at most a payment under duress of prospective profits.

But this is not as meritorious a case as the Minnesota case, where the *owner* was not permitted to record her deed. In that case it was said:

"Nor is it necessary, in order to constitute compulsory, as distinguished from a voluntary, payment, that the unlawful demand be made by an *officer* who is prepared to enforce it by process. There may be that kind and degree of necessity or coercion which justifies and virtually requires payment to be made of the illegal demands of a private person, who has it in his power to seriously prejudice the property rights of another, and to impose upon the latter the risk of suffering great loss if the demand be not complied with. * * * Obviously, the question of necessity must be considered and determined under the circumstances affecting each particular case. The reasons of necessity upon which the law, in this particular, must be deemed to be founded, are applicable in full force in this case, and would have justified the payment of the tax in question, and a subsequent recovery of it if illegal. The officer, of course, could not certify that the taxes were paid while this tax stood undischarged and its validity undetermined. The register of deeds was prohibited by law from recording the deed until the fact of payment should be thus certified to him. The relator could not secure the recording of the deed by which she had acquired title to this land. If not recorded, she was liable, by force of our registry law, to be wholly divested of her title," etc.

"The inducements which the law thus imposes upon a grantee of lands to pay a tax of inconsiderable amount, rather than to suffer his title to valuable lands to be thus jeopardized, may well be deemed to amount to compulsion. The coercion is certainly as real, and of substantially the same nature, as in the case of a distress of goods."

If it be conceded that "coercion" is a proper term to use in connection with that case, it is a negative coercion, while the case of the threatened seizure of goods is active. One is an inconvenience resulting from the application of a general rule of law to the circumstances in which the party places himself; the other, an unwarranted attempt to enforce an invalid claim by depriving him of specific property under color of process in its nature judicial. The relator was at liberty to pay or not. If not, she was denied the privilege of recording her deed. The right to record the deed was no inalienable right. It originated in the liberality of the public. It was a privilege that she held in common with others. Unquestionably, the legislature might abolish the recording of deeds altogether, unless it was a constitutional right, and in that case the electors could do so. If this is so, can it be said that it was not within their power to make the right conditional, or to limit it to lands upon which the taxes should be paid? And, if it be, is it done at the expense of making the public liable for damages resulting from the inability of persons who are not entitled to the benefit of the act, because not able to comply with its conditions, or, what is substantially equivalent thereto, through payment and suit to recover the money? Why should it be assumed that the object of the law was to induce people to pay invalid taxes? Is it not quite as reasonable that the public policy, which makes the record of deeds desirable for the preservation of evidence of title, should also have a care for the prospective purchaser, and offer him some protection by an assurance that the taxes were paid up to the date of the record of the last deed? Several states have similar requirements, but we have never supposed that they gave to persons the right to pay the taxes, and get the benefit of the registry, and then bring an action for the money paid, under the pretense that it was paid under duress, thereby

removing clouds and quieting titles in courts of law. We very much doubt the policy of the law which would subject townships, counties, and cities to actions under such circumstances. It is doubtless right that persons who pay money to avoid seizure of their chattels should be permitted to recover the same by action where such seizure would be a wrong, but we doubt the propriety of so extending the rule as to permit citizens to speculate upon such right. In the Minnesota case the county was subjected to an expensive suit to recover $6.25, so that the plaintiff might record her deed. But the reasons given for the decision in that case do not exist here. There the owner was deprived of the benefit resulting from recording her deed; here the plaintiff's deed is recorded, and he has all the security that the record can afford. As already stated, his only complaint is that his purchaser is to be deprived of the right to record his deed without paying an invalid tax, which operates to lessen the price obtainable for his land. We think such a case is not within the rule.

The money counts, however, are valid; and the fact that a bill of particulars limits the claim, to which it might restrict the proof, cannot be permitted to affect the declaration upon demurrer. The bill of particulars is no part of the pleading, and might be amended before or at the trial. *Cicotte v. Wayne Co.*, 44 Mich. 173, 59 Id. 512. The abstract right to bring a suit by declaration upon the common counts against a county is settled by former adjudications. *Endriss v. Chippewa Co.*, 43 Mich. 317; *Cicotte v. Wayne Co.*, 44 Id. 173, 59 Id. 512. The demurrer is to the whole declaration, and, inasmuch as the money counts are good, it cannot be sustained. 1 Shinn, Pl. & Pr. § 683; Chitty, Pl. 664, and cases cited.

The judgment of the circuit court must be reversed,

and an order entered overruling the demurrer, and remanding the cause for further proceedings.

The other Justices concurred.

SUSAN H. WILLIAMS v. THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Railroad companies—Negligence—Operation of road under traffic agreement—Possession—Evidence—Failure to produce books upon notice—Pleading—Extent of injuries.

1. Plaintiff sued for personal injuries received by falling through a cattle guard on a railroad which the defendant was operating at the time of the trial under a traffic agreement made with the company which owned the road. The plaintiff contended that there was sufficient evidence that the defendant was in possession of the road at the time of the accident to raise a question for the jury. On a review of the testimony, plaintiff's contention is sustained.

2. A witness for the defendant, who had been treasurer of the road owning the line, testified on cross-examination that $80,000 of the earnings of the road were sent by him to bankers in New York city, at the direction of the president of his company, who was also president of the defendant, and that certain books in the defendant's possession, and which it had failed to produce pursuant to notice, would show what disposition was made of said money. And it is held that the natural and proper inference, if these facts were established, was that the defendant did not care to produce said books, for the reason that they would show the receipt of this money by the defendant, and counsel might properly urge it to the jury.

3. The accident occurred January 2, 1892. The defendant admitted that it was in possession of the road April 1, 1892. And it is held that a mortgage upon the road, given by the defendant, and dated May 15, 1893, had no tendency whatever to prove that the defendant was in possession of the road at the time of the accident, and that it was error to admit it.

4. It was averred in the declaration that plaintiff's body was injured by dislocation, straining, and laceration, and injuries of muscles, nerves, and otherwise. The evidence tended to show that the knee and hip were injured, and that in consequence the sciatic nerve became inflamed; a physician testifying that, as a result of the injury, neuritis, described as an inflammation of a nerve, followed. This evidence was objected to, because no secondary injuries or results were counted upon. And is held that the evidence was properly admitted, under the declaration.

Error to Cass. (O'Hara, J.) Argued October 3, 1894. Decided December 7, 1894.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

Howell & Carr and *C. E. Cowgill (John T. Dye,* of counsel), for appellant.

E. L. Hamilton and *Edward Bacon,* for plaintiff.

HOOKER, J. Plaintiff recovered a judgment for personal injuries received by falling into a cattle guard, from which defendant appealed. The principal contest in the case was over the question of defendant's operation of the road; it being claimed that it was not in possession of the railroad at the time of the accident, though it was afterwards. The road was owned by another company. The plaintiff claims that there was sufficient evidence that defendant was in possession of the road at the time of the accident to raise a question for the jury. The evidence of the plaintiff upon the subject consisted of:

1. A traffic agreement granting to the defendant the right to operate the road and have its earnings for 100 years from July 1, 1891, and promising, on the part of the defendant, to raise $4,000,000 upon its bonds to equip the road.

2. A mortgage executed by the officers of both companies to secure said bonds, given in conformity to the agreement.

3. Testimony by the plaintiff that she bought a ticket at the station of the Big Four Company (that being a name by which defendant is known), and that she supposed it was over the Cleveland, Cincinnati, Chicago & St. Louis road; that "James Truitt was the company's agent at that place;" and that she supposed "the station and platform were on the ground of this corporation." To this last statement, counsel for the defendant said, "No question about that."

4. James Truitt's testimony that he knew when this railroad company extended its right of way through there, and that the station, platform, and cattle guard were on the company's ground. He was not asked whether he was the agent of the defendant.

Upon this showing by the plaintiff, it is clear, and neither side disputes, that the Cincinnati, Wabash & Michigan Company was the owner of the railroad, and that whatever rights to enter into possession of or operate it the defendant had, it acquired from that company. In the light of that admitted fact, the testimony of Truitt did not tend to show that the defendant was in possession, as his testimony was as consistent with the idea that he referred to the Cincinnati, Wabash & Michigan Company as to the defendant. It was apparently undisputed that at the time of the trial the defendant was in possession of the road. The statement of the plaintiff that she bought a ticket at the station of the Big Four road was true, in a sense, though the Big Four road was not in possession at the time. She bought it at the station, and that station was, when the question was asked, the station of the Big Four road. Her suppositions at the time of the trial that the ticket was over the Cleveland, Cincinnati, Chicago & St. Louis Line, and that the station and platform were upon the company's ground, threw no light on the question of possession at the time of the accident.

It is plain that the testimony of these two witnesses did not furnish much light upon the question of defendant's possession at the time. Some of this testimony was

admissible, because it tended to show that the accident occurred upon the railroad, and that the ticket was purchased of the company which was operating it, and the motion to strike it out was therefore properly denied. Moreover, under ordinary circumstances, such evidence would be sufficient to sustain a verdict, if there was no evidence to the contrary. It cannot be said that it was no evidence of possession, and therefore the court did not err in refusing the request to charge that it was not direct evidence that the defendant was in possession. If the statement was intended to be that the plaintiff bought a ticket at the defendant's station, technically it was as direct and comprehensive as though she had said that she knew that she bought a ticket at the station of the defendant. It was not as emphatic. It is the other evidence in the case that renders this testimony weak, and it is because it begets the belief that the witness may not have discriminated between the two companies. It was therefore for the jury to determine its value. The court might, with propriety, have said to the jury that this testimony should be viewed in the light of plaintiff's means of knowing whether the defendant was in possession, but it was not error to refuse to instruct the jury that the testimony of the plaintiff and Truitt was not competent evidence that the defendant was operating the road.

The contract and mortgage were legitimate evidence that the defendant was in possession, and, in the absence of the testimony given for the defendant, would have supported the claim of possession sufficiently to sustain the verdict.[1] Being so, we cannot say that the testimony of the defendant has overcome it.

Defendant's counsel argue that the right of defendant

[1] The traffic agreement was dated April 1, 1891; the mortgage, May 9, 1891; and the accident occurred January 2, 1892.

to take possession does not establish the fact that it did so, and this is true; but the fact remains that, having a grant of the road, and having issued its bonds as it promised to do, it is not a violent presumption to conclude that it had taken possession. That presumption can be overcome by proof to the contrary, but it is for the jury to say when it is overcome. Moreover, cross-examination of the witnesses called to overcome this presumption developed the fact that the earnings of this road were not retained by the treasurer of the Cincinnati, Wabash & Michigan Company, but, contrary to ordinary custom, if not in violation of the statute, they were sent to a bank in New York by direction of the president, who, it turns out, was president of the defendant; and it also appears that the treasurer's book of the Cincinnati, Wabash & Michigan Company was in the hands of the defendant company, and that, although the court postponed the trial nearly a month to enable defendant to produce books and papers which would throw light upon the subject, notice to produce which was given, no effort appears to have been made to produce this book, which was no further away than New York. We think there was room for the argument that while the road was ostensibly managed through the employés of the Cincinnati, Wabash & Michigan Company, and in its name, it was actually conducted by and for the benefit of defendant,—a question which could only be determined by the jury. What has been said disposes of several of the assignments of error in relation to the introduction of evidence.

Counsel for defendant complain that the plaintiff's attorney was permitted to read to the jury the notice to produce documents and papers, and to argue that the defendant had not complied with the order of the court by producing them. It is said that the records of the court show no such order, that it would have been void if

made, and that counsel could not properly assume that defendant had books or papers which it did not produce. The record in the case shows that the court made an oral order to produce these books, and gave counsel nearly a month to do so. This order was probably no more or less than the usual determination, when such questions arise, that the plaintiff was entitled to the production of such documents. No exception is called to our attention, in relation to this order, taken at the time it was made. As to the assumption that documents existed, it is sufficient to say that the witness testified that he sent $80,000 of the earnings of the road to New York, at the direction of the president of his company, and the books would show what disposition was made of it, which books were in defendant's possession. Those books were covered by the notice or order, but were not produced. What was the inference, if not that defendant did not care to produce them, for the reason that they would show the receipt of this money by defendant? It was a natural and proper one, if these facts were established, and counsel might properly urge it upon the jury.

Various exceptions were taken at the close of the argument of counsel to statements made in the course of such argument; among others, to his charge that "defendant was trying to dodge this liability by claiming it was not operating the road;" that "defendant was a sea serpent, which had swallowed the small fish," *i. e.*, the C., W. & M., in 1891; that "it did not mortgage its other lines, but only that of the C., W. & M;" that the defendant was liable, regardless of the actual management; that "the Cleveland Company was a monster." It is true that this controversy practically turned upon a cold question of fact, *i. e.*, whether the defendant was in control of the road at the time of the accident; and, were the question to be submitted to a bench of judges, we doubt if counsel

would have couched his points in the language which he seems to have thought proper to use to the jury. The court might properly have required counsel to confine himself to a discussion of the facts in more temperate language. We cannot, however, presume that it had the effect that counsel for defendant seems to think it had. It may have had an opposite effect upon the jury. We must suppose that, as men of intelligence, they were capable of comprehending the point at issue, and that, as honest men, they determined that point upon the testimony and the instructions of the court. As a rule, the trial court must control these matters, in which it has a large discretion.

A mortgage upon the road, executed by defendant, dated in 1893, was offered in evidence. Counsel for defendant allege this to have been error. It is asserted in opposition that the language read from it was not objected to, or any exception taken. A reference to the record shows that the admission of this mortgage was strenuously opposed, and exception taken. It was dated a year after the admitted time that the defendant took possession. It was clearly immaterial, and had no tendency whatever to prove possession two years before. It was error to admit it. *Pierson v. Spaulding,* 67 Mich. 640, 649; *Dikeman v. Arnold,* 78 Id. 455, 460, 83 Id. 218.

A physician gave evidence tending to show that, as a result of the injury, neuritis followed. This is alleged to have been inadmissible, under the declaration, because no secondary injuries or results were counted upon. Neuritis was described as inflammation of a nerve. The declaration alleged that plaintiff's body was injured by dislocation, straining, and laceration, and injuries of muscles, nerves, and otherwise. The evidence tended to show that the knee and hip were injured, and that the sciatic nerve

became inflamed in consequence. We think this was properly admitted, under the declaration.

It is unnecessary to discuss in detail the various other assignments of error. Many of them are upon refusals to give specific requests, where the ground is covered by the general charge, or where, under our view of the evidence, there was no occasion to give them. We have examined them, and find nothing in them calling for a reversal of the case.

For the error above mentioned the judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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CHARLOTTE ROLF v. THE CITY OF GREENVILLE.

Municipal corporations—Defective sidewalk—Accumulation of ice and snow.

This case is ruled by *McKellar v. City of Detroit*, 57 Mich. 158, where it was held that a city is not liable for injuries received by a fall on a sidewalk, occasioned by the accumulation thereon, from natural causes, of ice and snow.[1]

Error to Montcalm. (Davis, J.) Submitted on briefs October 4, 1894. Decided December 7, 1894.

Negligence case. Plaintiff brings error. Affirmed. The facts are sufficiently stated in the opinion.

Ellsworth & Barden, for appellant.

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[1] See *Canfield v. Railway Co.*, 78 Mich. 356; *Kannenberg v. City of Alpena*, 96 Id. 53.

N. O. Griswold, for defendant.

GRANT, J. Plaintiff's claim for damages is based upon the allegation of negligence that a certain sidewalk along Franklin street, one of the most public streets in the city, was dangerous and unsafe for public travel by pedestrians, and was so rendered unsafe by a heavy snow which had fallen many days previous to the accident, and "had been tramped and beaten down by the school children and others walking thereon when the snow was soft, after which rain and warm days had melted it from the sides of said sidewalk, leaving the center thereof uneven and irregular ice, much higher in the center of said sidewalk than at the sides thereof." A demurrer was interposed and sustained.

The case is expressly ruled by *McKellar v. City of Detroit,* 57 Mich. 158. Discussion is unnecessary.

Judgment affirmed.

The other Justices concurred.

PETER DAMM AND AUGUST CLUG v. GEORGE H. MASON.

[See 98 Mich. 237; 100 Id. 577.]

Res judicata—Replevin—Directing verdict.

1. Plaintiffs and defendant held chattel mortgages upon the same property. Defendant's mortgage was executed prior to the date of plaintiffs' mortgage, but was not filed until after plaintiffs' rights had accrued. Defendant replevied the property from the mortgagor, and plaintiffs, claiming the property under their mortgage, brought this action of replevin to test

the title. And it is held that a judgment, afterwards recovered by the defendant in his suit, is not *res judicata* of the questions involved in plaintiffs' suit.

2. Where there is no dispute as to the value of the property not recovered on a writ of replevin, the court is justified, on directing a verdict for the plaintiffs, in stating the amount for which the verdict should be rendered.

Error to Muskegon. (Russell, J.) Submitted on briefs October 5, 1894. Decided December 7, 1894.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion, and in 98 Mich. 237, and 100 Id. 577.

Turner, Turner & Turner, for appellant.

Jones & Clark, for plaintiffs.

MONTGOMERY, J. This action was replevin, brought by these plaintiffs, who claimed under a mortgage executed to them by one Henry L. Partrick. Defendant also held a mortgage on the same property, executed by Partrick prior to the date of the plaintiffs' mortgage, but left off the record until after plaintiffs' rights accrued. On the 16th of January, 1893, the defendant, Mason, replevied from Partrick a large amount of property, including the property in question. The property thus coming into Mason's hands, plaintiffs, claiming the right to it under their mortgage, brought this suit in replevin, to test the title.

1. Defendant claimed to have shown on the trial that the title to some of the property was adjudicated in the case of *Mason v. Partrick,* 100 Mich. 577, and claimed that such judgment was *res judicata.* But, aside from the fact that the record fails to show in whom the title was adjudicated to be, a sufficient answer to the defendant's

contention is that plaintiffs were not parties to that suit; so far from it that they had, before that adjudication, brought this independent action to have their right to the property herein settled, leaving Partrick and Mason to settle in their suit all that the court in that proceeding was authorized to settle, viz., the rights of Partrick and Mason as between themselves.

2. Certain of the property was not recovered on the writ, and the circuit judge, in directing a verdict, stated the amount for which the verdict should be rendered. There was no dispute about the amount, and this course was justifiable.

Judgment will be affirmed, with costs.

The other Justices concurred.

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GOTTLIEB GENNERT v. ALBERT IVES, JR.

Corporations—Failure to file annual report—Liability of director for corporate debts.

1. 3 How. Stat. § 4161b1, which provides that manufacturing companies shall file an annual report with the Secretary of State, and that, if any of the directors shall willfully neglect or refuse to make such report, they shall each be liable for all of the corporate debts, and subject to a prescribed penalty, only applies to such of the directors as willfully neglect or refuse to make the report.

2. A presumption arises that the failure to file the report was intentional, and therefore willful.

3. Where, in a suit brought under the statute to charge a director with a debt of the corporation, the defendant testifies that, as far as he is concerned, there was no purpose in keeping the report back; that he left the management of the business to the president of the corporation; that he was not aware of

the requirement that such a report be filed; and that during the period when the report was due he had not in mind that he was a director of the corporation,—such testimony, if not disputed, is sufficient to overcome the presumption arising from the failure to file the report, and the court is justified in withdrawing the question from the jury.

Error to Wayne. (Carpenter, J.) Submitted on briefs October 4, 1894. Decided December 7, 1894.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Charles K. Latham and *Horace H. Rackham,* for appellant.

Dickinson, Thurber & Stevenson, for defendant.

MONTGOMERY, J. This action was instituted to charge defendant with a debt of the Harris Photographic Supply Company, a corporation in which he was one of the directors. It is based upon section 12 of Act No. 232, Laws of 1885, being section 4161*b*1, 3 How. Stat. This section, after providing that annual reports shall be filed by the directors of corporations, proceeds:

"If any of said directors of any such corporation shall willfully neglect or refuse to make the report required by this section, they shall each be liable for all the debts of such corporation, and subject to a penalty of $25," etc.

Two questions are discussed in the briefs of counsel in this Court:

1. Whether the statute is to be so construed as to render all of the directors liable in case of the willful neglect of one or of a majority of the directors.

2. Whether, in the absence of proof, the failure to file a report is to be presumed willful, and, if such a presumption obtains, whether it was conclusively overcome by the testimony in this case.

Statutes imposing liability of the character here sought to be established have been uniformly held to be penal in

their nature, and to require strict construction. Thomp. Liab. Off. 447; *Arms Co. v. Barlow*, 63 N. Y. 62; *Breitung v. Lindauer*, 37 Mich. 217. And it is held that the penalty will only be imposed in cases where the plain language of the provision requires it. *Whitaker v. Masterton*, 106 N. Y. 277.

We think there is little difficulty in construing this statute. The meaning of the statute is that such of the directors as willfully neglect or refuse to make the report shall be liable. The same persons, precisely, as are made liable for the indebtedness, are made subject to a further penalty. It cannot be assumed that the Legislature intended to impose the penalty upon one director for the willful neglect of his fellow director, unless the language employed imperatively calls for this construction, and such, we think, is not the case here.

We are cited to the case of *Van Etten v. Eaton*, 19 Mich. 187, as sustaining the plaintiff's contention that all of the directors are liable in case of the intentional neglect of less than all. But the statute there under consideration was essentially different from the one here being considered. That statute, being section 23 of the act of February 5, 1853 (Comp. Laws 1857, p. 580), reads:

"If the directors of any such company shall intentionally neglect or refuse to comply with the provisions and to perform the duties required of them by sections 3, 5, 18, and 19 of this act, they shall be jointly and severally liable, in an action founded on this statute, for all the debts of such corporation contracted during the period of such neglect or refusal; and such of them as were present and acting as such directors at any time during such neglect or refusal shall be guilty of a misdemeanor, and may, on conviction thereof, be fined a sum not exceeding $5,000," etc.

It will be noticed that this statute dealt with the directors collectively, and treated of the neglect as the neglect of the board of directors, the condition being, "if

the directors of any such company shall intentionally neglect," etc., whereas the present law provides the remedy "if any of said directors shall willfully neglect," etc., and provides that "they" shall be liable, etc., referring very plainly back to the word "any." It is also to be noted that the law of 1853, in providing for a penalty, limited the action to those who were present and acting as such directors during the time of such neglect, thus raising an implication that, so far as liability for indebtedness was concerned, the actual presence of the director was not necessary. Under the present law, as above stated, the penalty for willful neglect is imposed upon the same persons as those made liable for the indebtedness, and we hold those persons to be those who compose any of the directors who willfully fail to make a report. The circuit judge was of this opinion, and in so construing the statute was right.

We think, on the authority of *Van Etten v. Eaton*, it should be held that a presumption arises that the failure to file the report required by statute was intentional, and therefore willful. It was said in that case:

"If the plaintiff should be required in the first instance to prove by direct evidence the actual intent in the minds of the delinquent directors, and should be precluded from making proof by inference from the fact of omission to perform the act required by the statute, the object of the law would be seriously obstructed, if not, in many cases, altogether defeated."

This language was used with reference to the contention made by the plaintiff in error in that case—

"That it was necessary that the plaintiff show that the neglect imputed to the directors was intentional, and that, whatever inference as to intention might properly be drawn from the bare omission to report, the jury were not bound to consider it as sufficient evidence of an intention to neglect the duty, although no explanation of the cause or reason of the failure was submitted."

In the present case, however, the defendant accepted the burden of overcoming the presumption, and his testimony stands undisputed. The defendant testified that, so far as he was concerned, there was no purpose in keeping the report back; that he left the management of the business to the president of the corporation; that he was not aware of the requirement that such a report be filed; and that during the period when this report was due he had not in mind the fact that he was a director of the corporation. As this testimony was not disputed, and as it was sufficient to overcome the presumption, the court was right in withdrawing the consideration of the question from the jury. See *Hill v. Chambers,* 30 Mich. 422; *Hurley v. Watson,* 68 Id. 531.

The judgment will be affirmed, with costs.

The other Justices concurred.

THE VILLAGE OF VICKSBURG v. EDMUND S. BRIGGS.

Disorderly conduct—Violation of village ordinance—Evidence.

1. A section of a village ordinance which provides that "any assemblage of persons, in any place in said village, engaged in any noisy, boisterous, contentious, or quarrelsome language or strife, or who shall be fighting or quarreling thereat, shall be deemed, and is hereby declared, a disorderly assemblage," is not limited in its scope by a prior section of the same ordinance which provides that "every assemblage of persons in any street, lane, alley, or public place in said village, and upon any sidewalk or cross-walk thereof, and upon the street corners, and in front of or adjacent to any of the churches, hotels, business houses, or public buildings in the said village, engaged in noisy, boisterous, contentious language or conduct, shall be deemed a disorderly assemblage," so as to make it

inapplicable to a disorderly assemblage of persons in a saloon in said village.

2. The contention that, unless the section first cited is limited in its scope to public places, such as are enumerated in the section last cited, it is unconstitutional, is untenable.

3. Where in a prosecution for a violation of a village ordinance which declares any assemblage of persons, in any place in the village, engaged in any noisy, boisterous, contentious, or quarrelsome language or strife, or who shall be fighting or quarreling thereat, a disorderly assemblage, and providing for the punishment of any person or persons who shall be convicted of a violation of said ordinance, the complaint alleges, and the testimony tends to show, that the disorderly assemblage was in a saloon in said village, it is not error for the court to permit the prosecuting attorney to cross-examine the respondent as to facts occurring after he had left the saloon, it appearing that the inquiry related to the subject of whether or not he was attempting to follow up the parties with whom he was engaged in the quarrel in the saloon, thus bearing upon the question of motive.

Exceptions before judgment from Kalamazoo. (Buck, J.) Submitted on briefs October 5, 1894. Decided December 7, 1894.

Respondent was convicted of the violation of a village ordinance. Conviction affirmed. The facts are stated in the opinion.

James H. Kinnane, for respondent.

J. R. Cropsey, for the village.

MONTGOMERY, J. This is a prosecution under section 2 of ordinance 9 of the village of Vicksburg, which provides that—

"Any assemblage of persons, in any place in said village, engaged in any noisy, boisterous, contentious, or quarrelsome language or strife, or who shall be fighting or quarreling thereat, shall be deemed, and is hereby declared, a disorderly assemblage."

On the trial, the testimony tended to show that the

alleged disorderly assemblage was in the saloon of Howard & Wineberg in said village; and respondent insisted, and insists here, that section 2, above quoted, does not apply to assemblages of persons in a saloon, the precise contention being that section 2 is limited in its scope by section 1, which provides—

"That every assemblage of persons in any street, lane, alley, or public place in said village of Vicksburg, and upon any sidewalk or cross-walk thereof, and upon the street corners, and in front of or adjacent to any of the churches, hotels, business houses, or public buildings in the said village, engaged in noisy, boisterous, contentious language or conduct, shall be deemed a disorderly assemblage."

We do not think that section 2 is limited in its scope by section 1. If it were, section 2 would be apparently unnecessary.

It is also suggested that, unless section 2 is limited in its scope to public places, such as are enumerated in section 1, it is unconstitutional; but what provision of the Constitution it is claimed to infringe is not pointed out, and none with which it is in conflict occurs to us.

It is also objected that the circuit judge permitted the prosecutor to cross-examine the respondent, when upon the stand, as to facts occurring after he had left the saloon. The inquiry related to the subject of whether the respondent was attempting to follow up the parties with whom he was engaged in the quarrel in the saloon, and bore upon the question of motive.

Complaint is also made of a portion of the charge in which the judge instructed the jury that—

"If the defendant, Briggs, was engaged in fighting and quarreling with one Barnhart, and used loud and boisterous or profane language, respondent would be guilty, without regard to who was the aggressor."

But this is not a fair statement of the charge of the

court, for he charged, in connection with these instructions, as follows:

"If, on the other hand, what he [referring to respondent] claims is true, and what has been testified to by himself and his witnesses, and that all he did was to act in self-defense; that he used no vile and opprobrious language towards Barnhart on the occasion in which a disagreement arose as to whether Briggs was wrong or Barnhart was wrong; if a disagreement arose, and Barnhart was the aggressor, and that all Briggs did was to defend himself, —then he could not be convicted, although his defending himself would be technically fighting the other party."

We think the points of error relied upon were not well assigned.

The conviction will be affirmed.

The other Justices concurred.

JULIUS WANNER v. CHARLES MEARS.

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Practice in Supreme Court—Assignments of error—Negligence—Towage.

1. An assignment that "the circuit judge erred in charging the jury and in giving the requests for plaintiff found on pages 134-140 of record" cannot be considered, it appearing that the pages cited contain many statements by the court in which the law is correctly stated, whatever may be said of some of them.
2. In a suit to recover the value of a sailboat lost, as claimed by the plaintiff, through the carelessness of the defendant, it appeared that the defendant towed plaintiff's scow, to which the sailboat was attached, across a lake, for the purpose of reaching a sunken vessel, which the plaintiff was to raise for the defendant; that the plaintiff was on the scow, and, after the sailboat was safely across the lake, the steamer turned to go up the shore, and the sailboat capsized; that, upon plaintiff's signal, the steamer slackened her speed, and plaintiff

drew the sailboat alongside the scow, and signaled the steamer to go ahead, he thinking they were so near shore she might run the distance; that the sailboat towed in that way for a short distance, when she "chawed her line off near the stem, and went off, at least drifted away." And it is held that, from the plaintiff's own showing, he was present, and gave the directions what to do; that, if any one was at fault, it was not the defendant, and the court erred in permitting a recovery.

Error to Oceana. (Dickerman, J.) Submitted on briefs October 5, 1894. Decided December 7, 1894.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

James Brassington (*Nelson DeLong*, of counsel), for appellant.

F. W. Cook, for plaintiff.

LONG, J. August 10, 1891, plaintiff and wife gave to defendant a chattel mortgage on their wrecking scow and outfit for $500, to secure the payment of their note of like amount, due on or before one year from date. The parties at that time all lived in Chicago, Ill., and the mortgage was given and filed there. The mortgage contained a clause giving the mortgagors the right of possession until default made in payment, and also the following stipulation:

"Or if the mortgagee, his executors, administrators, or assigns, shall feel he is insecure or unsafe, or shall fear diminution, removal, or waste of said property, or if the mortgagors shall sell or assign, or attempt to sell or assign, the said goods and chattels, * * * then, and in any or either of the aforesaid cases, all of said note and sum of money, both principal and interest, shall, at the option of said mortgagee or his executors, * * * become at once due and payable, and the said mort-

gagee, his executors, administrators, or assigns, or any of them, shall thereupon have the right to take immediate possession of said property, * * * and may remove and sell and dispose of the said property, or any part thereof," etc.

September 23, 1891, defendant took possession of the property by virtue of this clause in the mortgage, and, as the defendant says, "because the plaintiff threatened to take the property away to Muskegon or elsewhere, and I was fearful I would lose my security." Defendant advertised the property for sale on October 1, 1891. September 30 plaintiff tendered defendant the sum of $70 in money and an account for services rendered, which he claimed, with the $70, amounted to enough to discharge the mortgage. This tender was refused, and, defendant refusing to surrender the property, plaintiff brought this suit to recover the value of the mortgaged property, and also in the same action claimed to recover for the value of a sailboat which he claimed was lost by the carelessness and negligence of the defendant. On the trial in the court below before a jury, the plaintiff had judgment for the amount claimed

Several errors are assigned, but the principal ones relate to the rulings of the court in the charge, and the refusal to charge as requested.

The court charged the jury, in relation to the sailboat, that, if it was lost through the carelessness and negligence of the defendant, plaintiff would be entitled to recover its value. It is contended that this was error, for the reason that there was no evidence given which would warrant the finding that it was lost by defendant's negligence. It appears that on September 3, 1891, defendant wrote plaintiff at Chicago to come with his outfit to Silver Lake, Oceana county, Mich., to raise the sunken vessel, the Vesta V., belonging to defendant. Defendant towed

plaintiff's scow with his steamer Rumbell, the sailboat being tied to the scow. According to plaintiff's testimony, he was on the scow, and saw that the sailboat was safely across the lake until the Rumbell turned to go up the shore, when he noticed the sailboat capsize. He signaled the Rumbell. She slackened speed. He drew the sailboat alongside the scow, and signaled the Rumbell to go ahead, because he thought they were so near shore she might run the distance. He says: "The sailboat towed that way for a short distance. Finally she chawed her line off near the stem, and went off; at least drifted away." This is plaintiff's own version of the loss. He was there, and himself gave directions what to do. Certainly, from this showing, if any one was at fault, it was not the defendant; and the court was in error in permitting a recovery for the loss of the sailboat.

The work done for the defendant by plaintiff was in raising the Vesta V., which he seeks to have applied as payment on his mortgage.

"The circuit judge erred in charging the jury and in giving the requests for plaintiff found on pages 134-140 of record." Evidently this assignment relates to all the pages from 134 to 139, inclusive; but these pages contain many statements by the court in which the law is correctly stated, whatever may be said of some of them. It is too well settled that such an assignment cannot be considered to need comment here.

We have carefully considered the other claimed errors, and they need no discussion, as on a new trial the rights of the parties will probably be fully protected.

It is claimed by the plaintiff, however, that the case ought not to be reversed, even if there be error found in reference to the charge about the sailboat, as the amount could be deducted from the judgment, and, with that deduction, the judgment affirmed. The testimony in the

case is too uncertain for us to determine what value the jury placed upon the sailboat.

The judgment is reversed, and a new trial granted.

The other Justices concurred.

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CHARLES D. CHILDS v. WILLIAM B. PELLETT ET AL.

Equity pleading — Multifariousness — Partnership — Use of firm name—Interest in real estate—Mortgage by one partner —Retiring member—Liability for firm debts— Payment—Renewals of bank notes.

1. While the court may, of its own motion, raise the question of multifariousness, it is not bound to do so, or to permit the defendants to raise it upon the hearing where full justice can apparently be done upon the record.
2. The use by one partner of the firm name in indorsing his personal note, given to a bank in renewal of his individual note held by it as security for a loan, the proceeds of which he contributed to the firm capital in consideration of his admission as a member, is not within the scope of the partnership business, and, if so used without the consent of his copartners, the bank cannot hold the firm as indorser.
3. The owner of a manufacturing business conveyed to his brother, with whom he formed a partnership, an undivided one-half of the land used in connection with the business. Subsequently each brother deeded an undivided one-sixth of the land to a third person, who was admitted into the firm. It was understood between the partners that the land should be partnership property, and that each partner should hold his undivided interest for the purposes of the partnership. And it is held that the land is subject to the payment of the debts of the firm
4. One of the brothers retired from the firm under the following arrangement with his copartners: He sold to his brother his one-third interest in the firm business, and agreed to sell him his one-third interest in the real estate when he should pay

him $2,000, being the remainder of the purchase price agreed to be paid for all of his interest in the firm assets. The remaining partners, who succeeded to the business of the firm under a new firm name, agreed that the retiring partner might hold said undivided one-third of the real estate as security for the payment of said $2,000, and released him from all liability for existing debts. And it is held that it was within their power to do this; that, as between said retiring partner and themselves, they had no right to treat said interest in said real estate as partnership property for the purpose of adjusting accounts between themselves, without discharging the lien of the retiring partner upon it; that, if he held it in trust for the partnership, it was upon the condition that the remaining partners pay said $2,000; that this is true also as to creditors of the new firm, who have no greater rights as against said retiring partner in relation to said one-third interest in the real-estate than the firm had; but that said arrangement cannot deprive the creditors of the old firm of the right to the application of said interest in the real estate to the satisfaction of their claims, if it should become necessary, as all of the property of the retiring partner, including his said interest in the real estate, would be subject to such debts after all other partnership property should be exhausted, and therefore the rights of such partner must depend upon the question of his release by the creditors of the original firm.

5. Where the title to an undivided interest in partnership lands is vested in one member of the firm, a mortgage executed by him thereon to secure a firm debt is valid, and as to such interest has precedence over the claims of general creditors; but such a mortgage, if given to secure the individual obligation of the mortgagor, must be postponed to the payment of partnership debts.

6. Whatever may be the rule in other cases, in the absence of evidence of a contrary intention, renewals of notes at a bank ought always to be regarded as payment, because the banks themselves so regard them.

Appeal from Genesee. (Moore, J., presiding.) Argued October 9, 1894 Decided December 7, 1894.

Bill for the dissolution of a partnership, an accounting, the appointment of a receiver, and the cancellation of cer-

tain mortgages. Defendants appeal. Decree modified and affirmed. The facts are stated in the opinion.

Wisner, Lee & Aitken, for complainant.

George R. Gold, for defendant First National Bank.

Durand & Carton, for defendants Pellett.

HOOKER, J. Prior to the year 1880, defendant William B. Pellett was the owner of a sash and blind factory, in which he carried on business in the city of Flint. In January, 1881, his brother, John J. Pellett, engaged with him in the business, putting in additional capital, and receiving from William B. Pellett a deed of an undivided one-half of the real estate. In 1887 these parties arranged with the complainant, Childs, to become a member of the firm. He was to put in $5,000 in cash against the property of the firm then known as William B. Pellett & Co., the new firm to assume outstanding obligations, which included a debt of the firm to John J. Pellett of $3,500, and did not include a debt of $1,000, which the firm owed one Archie Brown. This debt had been secured by a real-estate mortgage upon the factory, but it was discharged by Archie Brown, so that the Pelletts could give to complainant a clear title to the undivided one-third of the real estate. This deed was given, and the complainant put into the concern $5,000 in cash. Of this sum $2,500 was borrowed of the First National Bank of Flint, one of the defendants, upon the note of complainant, which note, or a note given in renewal of the same, had upon it the name of the new firm, Pellett Bros. & Co., placed there unwarrantably by complainant, without the consent or knowledge of the Pelletts, and upon notes given in renewal, against their protest. This obligation is outstanding. The firm of Pellett Bros. & Co. obtained credit

at the First National Bank, taking up outstanding obligations, except $3,000 of the $3,500 owing to John J. Pellett, with money borrowed at the bank.

On July 15, 1890, John J. Pellett went out of the concern, under an arrangement with his partners substantially as follows: John sold to his brother, William, his one-third interest in the business, and agreed to sell him his one-third interest in the real estate when he should pay him $2,000 in addition to the sum paid down. William B. Pellett was to have a two-thirds and complainant a third interest in the new firm, which was to be known as the Pellett Table Company. The new firm gave its note for $3,000 to John J. Pellett for the amount due him from the firm. The notes of the new firm were given to the bank in renewal of notes of the old firm as they fell due. Complainant claims that the indebtedness to the bank was not increased, and it so appears. The business did not prosper, and an agreement was made between the Pellett Table Company, the bank, and one La Due, parties of the first, second, and third parts, respectively, dated December 26, 1890, which provided that on account of the company taking La Due as foreman and manager, the bank should pay for such lumber as the company should have delivered at its yard, the same not to exceed 500,000 feet at one time, the title to remain in the bank, and should sell the same to the company on weekly payments. It was also agreed that the company might deliver to the bank its manufactured tables, at a price and in lots mentioned. The sum received in excess of this price and expenses of sale was to be applied on the indebtedness to the bank. This agreement was to be in force during the year 1891. La Due entered upon the discharge of his duties under the contract, but William B. Pellett became dissatisfied, and on July 7, 1891, he mortgaged the one-

third interest in the real estate which stood in his name to his brother, John, to secure the sum of $3,000 which the firm owed John, and on the 18th of August he joined with John in a mortgage of $1,175 to Archie Brown, upon his claim against them, which was still unpaid. On September 8, 1891, the complainant executed, in the name of the firm, a chattel mortgage to the bank, covering all of the personal property of the firm, for the sum of $9,182.33.

At the expiration of the La Due contract the complainant filed the bill in this cause, making both of the Pelletts, the bank, and Archie Brown parties. The bill asserts that the Pelletts procured Childs' assent to engage in the business in the first instance by fraudulent representations concerning the value of the plant and business and the amount of the firm debts; that the claims of Archie Brown and John J. Pellett are fraudulent, and that John J. Pellett is in justice and equity liable to pay his share of the debts of the firm, which is insolvent; and that the real estate, though held in the individual names of the parties, is partnership property, and subject to the debts of the concern. The bill prays that the mortgages held by Pellett and by Brown may be canceled; that John J. Pellett and William B. Pellett, respectively, be required to account to complainant, the firm and its receiver, and the court, and the former required to pay his proportion of the firm debts; that the bank also be required to account with the parties mentioned and the court for the money received under the La Due contract, and be enjoined from foreclosing its chattel mortgage; that the real estate mentioned be decreed to be partnership property, and applied to the payment of the debts of the firm; that a receiver may be appointed to ascertain the validity of the debts, and pay those found to be valid, under the direction of the court, and to continue or close up the business of the firm.

The Pelletts joined in an answer, in which they deny fraud in inducing complainant to become a member of the firm, assert complainant's fraudulent use of the firm's name in indorsing his $2,500 note, allege that the John J. Pellett claim of $3,000 was and is a valid obligation of the firm, and that the amount of $1,175 was justly due to Archie Brown from them at the date of his mortgage, allege a fraudulent conspiracy by Childs and La Due to deprive them of their interest in and right of control of the business and property, and, impliedly at least, that the First National Bank was a party to said fraudulent conspiracy. Said answer denies the validity of the chattel mortgage, for the reason that it was given without the consent of William B. Pellett, and also because the property was already in the custody of the bank, as security for its debt, and was to remain so until the succeeding January, 1892. It avers the validity of both mortgages given by the Pelletts upon the real estate, admits the right to an accounting, but denies complainant's right to any other relief. It also denies any liability upon the part of John J. Pellett for the debts of the firm.

The bank files an answer, claiming the benefits of a cross-bill. It denies all fraudulent combination upon its part, alleges the existence of a present claim against the old firm, and that John J. Pellett is liable thereon. It claims priority over the mortgages given by the Pelletts, which it charges to have been made with the intention of defrauding the bank, the firm being insolvent. It asks a receiver, and the adjustment of its claim.

Archie Brown answers, asserting the validity of his claim and mortgage. It seems to be conceded that the Archie Brown mortgage has been purchased by the bank, although our attention has not been called to any evidence thereof.

Counsel for the Pelletts contend that the bill is multi-

farious, and, though we do not so decide, it is possible that, had the question arisen upon demurrer, it would be open to that criticism, under the decision in the case of *Woodruff v. Young*, 43 Mich. 548. See *Snook v. Pearsall*, 95 Mich. 537. If so, it is because of the various charges of fraud between the parties, and not because all are not proper parties to the suit. All have an interest in the accounting, which all seem to admit should be had, and all interested are proper parties. *Wales v. Newbould*, 9 Mich. 45; 1 Daniell, Ch. Pr. 216, and cases cited. While the court might, of its own motion, raise the question of multifariousness, it is not bound to do so, or to permit defendants to raise it, inasmuch as full justice can apparently be done upon this record. *Payne v. Avery*, 21 Mich. 524.

Upon a review of the evidence we are convinced that complainant has no just cause to complain of fraud upon the part of the Pelletts. We also think that the $2,500 note indorsed by the firm is his personal obligation, as between him and them, which it is his duty to pay. The note of $3,000, given by the firm to John J. Pellett, is a just and valid claim against the firm, drawing interest at 7 per cent. from July 1, 1891. The Archie Brown claim was a valid claim as between him and the Pelletts, but was never such against Childs, or any firm of which he was or is a member. It must be postponed to the payment of the partnership debts, except as hereinafter stated. The Pellett Table Company assumed all other debts owing at the time of its origin by William B. Pellett & Co. or Pellett Bros. & Co., and, as between the Pelletts and Childs, John J. Pellett is not liable upon such obligations.

We find no evidence that the bank was a party to the alleged conspiracy against the Pelletts, and agree with the circuit judge that on the 1st day of January, A. D. 1892, the sum of $12,512.45 was due and owing from the Pellett

Table Company to said bank, and that the sum should bear interest at 7 per cent. from that date. The note of $2,500 before mentioned is not a valid claim against said firm in favor of the bank, for the reason that such use of the firm name for the private purposes of complainant was not within the scope of the partnership business, and he never had the consent of his partners to use it. When first used, it was upon a renewal note, and, if it were not, there is nothing to indicate that the bank did not understand the fact that the complainant, and not the firm, borrowed the money for which this note was given, which was inferable from the fact that he gave his personal obligation, if it had no other information.

We will next discuss the interest of John J. Pellett in the real estate, and the question of his liability to the bank. The real estate originally stood in the name of William B. Pellett alone, unless possibly it be a small parcel. The half of it was deeded to John J. Pellett, and subsequently each deeded a sixth to Childs. This left the title to an undivided one-third in each. There can be no doubt that this land was understood to be partnership property between the Pelletts and Childs, and each held his undivided one-third for the benefit and purposes of the partnership. As such it was subject to the payment of the debts of the firm, and perhaps the settlement of accounts between the partners, subject to any dower rights which may exist, but which we cannot consider, as the necessary parties are not before the court. Pars. Partn. §§ 272, 273, and notes. But it was within the power of the partners to dispose of this land, and competent for them to allow John J. Pellett to go out of the firm, taking his undivided one-third with him. This they seem to have done to the extent of agreeing that he should hold it as security for the payment of $2,000 by his brother, William, in a settlement between him and the firm,

whereby he sold his interest, and was released from liability upon existing debts. As between him and his partners, they had no right to treat this undivided one-third as partnership property for the purpose of adjusting accounts between themselves, without discharging John's lien upon it. If he held it in trust for the partnership, it was upon the condition that they pay the $2,000 due from William. This is true also of creditors of the new firm, who would have no greater rights against John J. Pellett in relation to this property than the firm had. But an arrangement of this kind could not deprive the creditors of the firm of Pellett Bros. & Co. of the right to the application of this property to the satisfaction of their claims, if it should become necessary, for all of the property of John J. Pellett, including this, would be subject to such debts after all other partnership property should be exhausted. Again, the $3,000 mortgage would be upon a footing somewhat similar, for, although it should be held that it was valid as against the new firm, it could not be as against creditors of the old firm, as all of John's property would be subject to levy, after exhaustion of the partnership property. Hence the rights of John J. Pellett as to these items must turn upon the question of his release by the bank from liability upon the indebtedness which originated while he was a partner, which never was paid, and which was represented by notes given in renewal, from time to time, by the new firm, without objection upon the part of the bank, whose cashier testifies that he supposed that the bank could not avoid such release.

The question whether renewal notes extinguish the debt is a vexed one, and is usually one of fact, and the courts have differed somewhat upon the presumptions which arise from the bare fact of renewal by a note bearing the signature of other parties. The subject was discussed in the

case of *Nightingale v. Chafee,* 11 R. I. 609, where it was held that an agreement to discharge a retiring partner will not be inferred from the acceptance of the note of the continuing partners. Whatever may be the rule in other cases, we concur with Prof. Parsons in the opinion that, unless there is evidence of a contrary intention, "renewals at bank ought always to be regarded as payment because the banks themselves so regard them." See 2 Pars. Notes & B. (2d ed.) p. 203. In commenting upon the opinion, the court in the Rhode Island case says, "He does not tell us how he knows they so regard them." This opinion of Prof. Parsons is not to be brushed away by a question. The practices of banks are well known, and from them their understanding may be inferred. Certainly, since the passage of the federal banking law, the whole course of national banks has been at variance with the idea that the original debt continued, and that successive renewals were additional and collateral security to the first obligation. The policy of the law is to require the banks to confine their loans to short-time paper, generally secured by indorsers, who may vary from time to time as the notes are renewed. We think it would be a surprise to those who indorse paper to be told that their obligation remains after the note has been taken up and canceled by successive renewals, each with a different indorser, and each in its turn taken up and canceled. *Smith v. Shelden,* 35 Mich. 42. In the present case the bank received the notes of the new firm after as well as before the La Due contract was made, and with full knowledge of the retirement of John J. Pellett, and supposed, as the cashier testified, that he was no longer liable, by reason of the course taken.

We think, therefore, that John J. Pellett's lien of $2,000 is a valid claim upon the undivided third of the land, as is also the mortgage for $3,000 given by William

upon the undivided third which stood in his name, said $3,000 being a valid firm debt, and that these have precedence over other debts as to those parcels, but not over the claim of Archie Brown, to which they are subject.

This seems to dispose of the questions raised in the case in accordance with the views of the learned circuit judge, except as regards the mortgages to Archie Brown and John J. Pellett. As to those the decree will be modified as herein indicated. In other respects it will be affirmed, with costs to the defendants the bank and John J. Pellett.

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

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IN THE MATTER OF THE ESTATE OF JULIUS LEFEVRE, DECEASED. WILLIAM RENAUD ET AL., PROPONENTS, V. ROSE PAGEOT ET AL., CONTESTANTS.

Will—Mental incompetency—Evidence—Declarations.

1. On the contest of a will on the ground of the mental incapacity of the testator, the following testimony is inadmissible:
   a—Statements made by one of the legatees, prior to the death of the testator, that he was crazy.
   b—The statement of a party who, on an occasion not long prior to the death of the testator, was sent for to draft his will, and who declined to go, that his reason for declining was that he did not consider the testator capable of making a will; such testimony being clearly hearsay of the most damaging kind.
   c—Acts or statements of the testator tending rather to show that he was irritable than incompetent.
2. It is competent to show the expressed declarations of the testator as to his intended disposition of his property, even

though made a considerable time (in the present case, 13 years) before the making of the will, and, in the absence of proof of some change in purpose, the remoteness of time when the declarations were made bears rather upon the weight of the testimony than its admissibility.

Error to Wayne. (Hosmer, J.) Argued October 9, 1894. Decided December 7, 1894.

Appeal from the probate of a will. Proponents bring error. Reversed. The facts are stated in the opinion.

John G. Hawley, for appellants.

James H. Pound, for contestants.

MONTGOMERY, J. The will of Julius Lefevre was contested on the two grounds of mental incapacity and undue influence. At the close of the testimony the circuit judge withdrew the latter question from the jury. The jury found against the will on the ground of mental incapacity, and the proponents appeal.

1. It is contended that there was no such evidence of mental incapacity as warranted the court in submitting the case to the jury. No good purpose would be served by setting out the testimony at length, but a careful examination of the record convinces us that there was sufficient evidence to justify the submission of the case to the jury.

2. Lucy Renaud was named as one of the legatees in the will, and contestants were permitted to offer testimony of statements made by her before the decease of Lefevre, to the effect that he (Lefevre) was crazy. This question is ruled by the case of *O'Connor v. Madison,* 98 Mich. 183, and cases cited at pages 190–192.

3. Testimony was given by a witness (Henry Kunze) to the effect that on an occasion not long prior to Lefevre's

death a messenger came to one Charles F. Peltier, a partner of the witness, with a request that he (Peltier) go to decedent's boarding house, and draft a will for him; and the witness was further permitted to testify that Peltier declined to go, and gave as a reason that he did not consider Lefevre capable of making a will. This was clearly hearsay of the most damaging kind. It enabled the contestants to give Mr. Peltier's unsworn opinion to the jury, and this without any statement of the facts upon which it was based. The impropriety of admitting such testimony could not well have been better demonstrated than it was in the present case. Mr. Peltier was himself afterwards called as a witness, and testified that he had no recollection of having talked with Lefevre for some time before his death, and that it might have been five years before he died, and in his sworn testimony did not show that he had any such knowledge as would have warranted the contestants in asking his opinion as to the mental incapacity of the deceased; and yet his unsworn opinion, which must have been based on hearsay, was before the jury.

4. Numerous other errors are assigned, most of which relate to questions which are not likely to arise on another trial, and which do not, therefore, require discussion. It is proper to say, however, that in some instances testimony of acts or statements of deceased was admitted, which tended rather to show that he was irritable than incompetent. Of this class were his expressions of opinion about Fred Moran and Dr. McGraw. It appears that litigation had arisen in which he was interested and opposed to Mr. Moran, and his expressions as to Dr. McGraw were expressions relating to his competency as a physician. However ill-judged his expressions may have been, they did not furnish evidence of mental weakness. As was said in *Prentis v. Bates*, 93 Mich. 234, 243:

"Where the testimony of the witness only goes the length of showing acts which are entirely consistent with sanity, and which have not the slightest tendency to show insanity, it would be a dangerous rule which would permit his opinion to be received."

We think the cases cited, and other decisions of this Court, furnish a sufficient guide to control upon a new trial of the case.

5. We think it was competent to show the expressed declarations of the deceased as to his intended disposition of his property, even though made a considerable time before the making of the will. It is difficult to fix any precise period as the limit in such cases. Testimony which is said to have had a similar tendency in *Fraser v. Jennison,* 42 Mich. 206, went no further than to tend to prove the existence of friendly relations between the deceased and his relatives. This testimony, standing by itself, might well have been held too remote, but, in the absence of proof of some change in purpose, the remoteness of time when the expression of such an intention is made bears rather upon the weight of the testimony than its admissibility.

For the errors pointed out, the judgment will be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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The People, ex rel. Louis M. Hartwick, Prosecuting Attorney of Oceana County, v. Albert G. Avery.

Elections—Validity—Mistakes of officers—Irregularities.

The appointment by a village council of the president and one of the trustees of the village, who are candidates for office, to act upon the board of election inspectors, and the appointment by said board of another candidate as one of the clerks of the election, and the posting of notices in the nature of instructions to voters, which conform to those provided for by the election law of 1891, instead of 1893, under which latter law the election is to be held, are irregularities, and will not invalidate the election; it appearing that in making and acting under such appointments the council and members of the board of election inspectors acted in good faith, believing that the board was to be appointed under How. Stat. § 2794, and that the provision of the 1893 law, that no person shall act as an inspector who is a candidate for any office to be elected by ballot at the election, did not repeal or alter the section of the statute cited.

Error to Oceana. (Russell, J.) Submitted on briefs October 11, 1894. Decided December 7, 1894.

Information in the nature of *quo warranto* to test the title of respondent to the office of trustee of the village of Shelby. Relator brings error. Affirmed. The facts are stated in the opinion.

L. M. Hartwick (*L. G. Rutherford,* of counsel), for appellant.

A. E. Souter and *Bundy & Travis,* for respondent.

Hooker, J. An information in the nature of *quo warranto* was filed in the circuit court for the county of Oceana, to try the title of the defendant, Albert G. Avery, to the office of trustee of the village of Shelby.

The findings of fact show that Avery received a majority of the votes cast at said election.

Two questions arise in the case:

1. At the time of such election, William H. Barry and George W. Woodward held the offices of president and trustee of said village, respectively. They were also candidates for the offices of president and street commissioner, respectively, at said election, and Edward B. Gaylord was a candidate for trustee. Said Barry and Woodward were appointed by the village council to act upon the board of election inspectors at said election, and said Gaylord was appointed by said board as one of the clerks of said election. In making and acting under such appointments the council and members of the board acted in good faith, believing that the election board was to be appointed under How. Stat. § 2794, and that the provision of Act No. 202, Laws of 1893, providing that "no person shall act as an inspector who is a candidate for any office to be elected by ballot at the election," did not repeal or alter the statutory provision referred to, governing village elections, and prescribing that the president and clerk of the village and one of the trustees, or any three of the trustees, to be appointed by the council, shall be the inspectors of the election, and that the president, when present, shall be chairman, and the others shall be clerks, of the board of inspectors. There is nothing in the record to show that the result of the election was in any respect different from what it would have been had other persons officiated as inspectors, or had these persons not been candidates upon the ballot.

2. Notices in the nature of instructions to the voter were posted, but, instead of being in exact conformity to the law of 1893, were such as were prescribed by the law of 1891.

It is contended that, for the reasons given, the election

was void; but we think otherwise. The electors are not to be deprived of the result of their votes at an election by the mistake of election officers, when it does not appear to have changed the result. Under repeated decisions it is settled that the matters relied on here were irregularities, and did not invalidate the election. *People v. Bates,* 11 Mich. 362; *People v. Higgins,* 3 Id. 233; *People v. Cicott,* 16 Id. 283; *Adsit v. Secretary of State,* 84 Id. 420; *Farrington v. Turner,* 53 Id. 27; *Loranger v. Navarre,* 102 Id. 259; *Taylor v. Taylor,* 10 Minn. 107; *State v. Bernier* (Minn.), 38 N. W. Rep. 368.

The judgment of the circuit court will therefore be affirmed.

The other Justices concurred.

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DAVID TURNER v. THE ST. CLAIR TUNNEL COMPANY.

Practice in circuit court—Motion to quash service of process—Trial of issue—Railroad companies—Sufficiency of service.

1. In a personal injury case against a railroad company, the defendant moved to set aside the service of the declaration on the ground that the person upon whom service was made was not an agent or officer of the defendant company upon whom process could be served so as to bind the defendant. At the time set for the hearing of the motion, the plaintiff demanded an issue, the form of which he tendered to the court. Defendant's counsel thereupon asked for the same time in which to plead or demur as he would be entitled to in case of the service of a declaration. This request was refused, but the court continued the hearing over two days for that purpose, at the expiration of which time the court, upon motion of plaintiff and against the defendant's objection, entered an order framing an issue, and, by consent of counsel for both parties, the issue thus framed was set for

trial before the court for a day five days later. The defendant excepted to this direction, except as to the waiver of a jury and the time of trial. And it is held that the case is ruled by *Haywood v. Johnson*, 41 Mich. 605, where it was said that, "instead of proceeding to raise an issue by the formal and somewhat dilatory course by pleading, it is perfectly admissible for the court, in case the plaintiff wishes to control the point on an issue joined, to frame an issue on the basis of the motion, and then proceed without unnecessary delay to try it, and get a determination of the fact on the record, with the same effect as though the issue had been introduced by pleading."[1]

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[1] SUGGESTION UPON THE RECORD, AND TRIAL OF ISSUE JOINED THEREON.

For statutory provisions, see How. Stat. §§ 7761–7763, 7766, 7767, which provide:

a—That "whenever a suggestion shall be made upon the record, or in any stage of the proceedings, in any cause, which the adverse party shall have a right to controvert, a copy of such suggestion shall be served upon the adverse party or his attorney, in the same manner as other pleadings, and such party may plead thereto, according to the practice of the court, in the same manner, and within the same time, as to a declaration."

b—That "if an issue of fact be joined upon any such suggestion, the same shall be tried, and judgment rendered thereon, as on other issues."

c—That "the party making such suggestion may be nonsuited, and may have judgment of *non pros.* or discontinuance entered against him, for the same causes, and in the same cases, as in suits at law."

d—That "when there shall be a motion or other proceeding in any court of record, in which it shall be necessary for either party to have the deposition of any witness who shall have refused voluntarily to make his deposition, the court may direct a commission to be issued to one or more persons, inhabitants of the county in which such witness resides, to take his testimony."

e—That "such witness may be subpoenaed to attend and testify before such commissioners in the same manner as before referees, and with the like effect, and obedience to such subpoena shall be enforced in the same manner."

Illustrative Cases.

1. *Stringer v. Dean*, 61 Mich. 196, where plaintiff recovered a judgment in a suit commenced by attachment, defendant being published in for want of personal service. On May 5 thereafter the

2. 3 How. Stat. § 8137, which provides that a summons or a copy of the declaration in any suit against a corporation shall be served on the presiding officer, cashier, secretary, or treasurer, or any other officer or agent of such corporation, and 3 How. Stat. § 8147, which provides for the service of process in suits against railroad companies upon any station agent or ticket agent at any station or depot along the line or at the end of the railroad of such company, both apply to the service of

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defendant moved the court to set aside the judgment and quash the writ of attachment, on the ground, among others, that, as the affidavit failed to show that either of the parties resided in the county where the suit was commenced, it should have shown that the defendant was a non-resident of the State, or that he had no property in the county where he resided subject to attachment. In support of said motion the defendant filed an affidavit showing that both he and the plaintiff were residents of another county than that in which the suit was brought, and that at the time of the commencement of the suit he was possessed of personal property subject to attachment in the county where he resided. An order was made giving the defendant until May 22 to file a further affidavit in support of the motion, and giving the plaintiff until June 4 to file counter-affidavits, or, at his election, frame an issue under the statute. Defendant complied with the order, and on September 11 plaintiff elected in writing to frame an issue, and served notice of such election on defendant's attorney, and on September 14 entered a motion for leave to frame an issue to try the question of defendant's possession of personal property as averred in his affidavit, excusing his laches because of his inability to find any statute under which to frame such issue. And it was held that, unless some jurisdictional defect appeared upon the face of the proceedings, the plaintiff was entitled to frame an issue under his motion, and contest the questions raised, outside of the record, and at his election try the same before a jury, and that his delay in making his election under the order did not deprive him of such right.

2. *Muskegon Booming Company v. Circuit Judge*, 97 Mich. 622, where plaintiffs, after entering a motion for a new trial, and after noticing the motion for hearing, presented a petition to the court, setting forth said facts, and averring that for the purposes of the motion it was necessary to have the deposition of a certain employé of the defendant who had refused voluntarily to make his deposition in that behalf, and praying that a commission be issued to take said deposition. An order was made that a commission issue. The defendant applied for *mandamus* to vacate the order, and the application was denied.

process upon railroad companies, it being intended by section 8137 to extend, rather than restrict, such service.[1]

Certiorari to St. Clair. (Vance, J.) Argued October 12, 1894. Decided December 7, 1894.

Defendant brings *certiorari* to review an order denying a motion to quash the service of a declaration. Affirmed. The facts are stated in the opinion.

Atkinson & Wolcott, for petitioner.

Chadwick & McIlwain, for plaintiff.

LONG, J. This controversy arises over the sufficiency of the service of the declaration by which suit was commenced upon the defendant company, and the rulings of the court in framing an issue to determine the force of such service. Defendant entered a motion to quash the service on the ground that one F. C. Kenney, upon whom the service was made, was not an agent or officer of the defendant company upon whom process could be served which would bind the defendant. On the hearing of this motion the plaintiff demanded an issue, and tendered the form of such issue to the court. Thereupon the defendant's counsel requested that he be allowed the same time to plead or demur as he would be entitled to in case of service of declaration. This was denied, but the court continued the hearing for three days for that purpose, at which time the court, against defendant's objection, framed the issue as follows:

[1] For cases bearing upon the question of who is an officer or agent, within the meaning of the statutes authorizing the service of process in certain cases upon any "officer or agent" of a corporation, see *Kirby Carpenter Co. v. Trombley*, 101 Mich. 447, and note.

"Was F. C. Kenney, the person on whom the declaration filed in this cause was served, such an officer, agent, or employé of the defendant, or so connected with its business, on January 26, 1894, as that service could be made on him, and bind the defendant, under the laws of this State?"

This issue, which seems to have been consented to by plaintiff's counsel, was set for hearing before the court for a day five days thereafter.

This ruling of the court in framing the issue, and refusing the request for time to plead or demur, raises the first question presented, but we think the case ruled by *Haywood v. Johnson*, 41 Mich. 605, in which it was said that,—

"Instead of proceeding to raise an issue by the formal and somewhat dilatory course by pleading, it was perfectly admissible for the court, in case the plaintiff wished to control the point on an issue joined, to frame an issue on the basis of the motion, and then proceed without unnecessary delay to try it, and get a determination of the fact on the record, with the same effect as though the issue had been introduced by pleading."

The issue thus framed was heard before the court. Mr. Kenney was sworn as a witness, and from his testimony the court made a finding as follows:

"It is my conclusion from the testimony that Kenney was the representative of the tunnel company, in charge of its business at this point; that he had charge of and managed all passenger and freight business, including the running of trains through the tunnel; that he had control of and directed the running of all trains on the American side, west to the Grand Trunk Junction, about three miles west from St. Clair river, and about two miles west of the tunnel portal, and about one and a half miles west of the tunnel station; that he was in charge of all the tunnel company's business and property at that point, and was the person highest in authority there and in St. Clair county; that he had charge of the tunnel yards, kept the pay roll, and was himself on the pay roll of the defendant company; that he was jointly paid by the C. & G. T. Ry.

Co., the G. T. Ry. Co., and the tunnel company, and his salary and office expenses were paid one-third by each; that he was directly responsible to the general superintendent, located at Montreal, for his action; that his jurisdiction extended over the property and management of the business of the tunnel company, both on the American and Canadian sides of the St. Clair river; that he issued passes through the tunnel; that he issued orders in his own name in reference to the tunnel company's business, when necessary. It was not claimed on the argument, but was treated as a conceded fact, that neither the presiding officer, secretary, treasurer, nor cashier of the defendant company lived in St. Clair county.

"From these and other facts shown by the testimony, it is my conclusion that he represented the general superintendent at this point, and was such an agent as is contemplated by section 8137, 3 How. Stat., on whom service could be made."

The testimony of Mr. Kenney warrants the findings of fact made by the court, and the only question which can arise is whether Mr. Kenney, under the facts found, was such an agent as provided by 3 How. Stat. § 8137, upon whom process could be served. This section provides:

"Suits against corporations may be commenced by writs of summons or by declaration in the same manner that personal actions may be commenced against individuals, and such writ or a copy of such declaration in any suit against a corporation shall be served on the presiding officer, cashier, secretary, or treasurer, or any other officer or agent of such corporation, or by leaving the same at the banking house or office of such corporation, and may be served in any county in the State where the plaintiff resides: *Provided*, that in any county of the State where said plaintiff may reside, other than the one wherein the principal office of such corporation may be located, a writ of attachment may be the first process against such corporation, which shall be served in the same manner as other writs of attachment issuing out of the court wherein suit is commenced; and, upon the return of such service being made, such corporation shall be deemed to be in court, and the like proceedings, as near as may be, shall be thereupon had as in cases of suits against indi-

viduals. * * * *Provided further*, that the attachment proceedings as herein provided for shall not apply to railroad companies or corporations whose right of way, or any part of the same, is within the boundaries of the State of Michigan, nor to navigation companies or corporations."

It is contended by counsel for defendant that this act does not apply to railroad companies as to service of process, but that 3 How. Stat. § 8147, makes the only provision for the service of process upon railroad companies. That section provides:

"Whenever in any suit or proceeding, either in law or equity, it shall become necessary to serve any process, notice, or writing upon any railroad company in this State, it shall be sufficient to serve the same upon any station agent or ticket agent at any station or depot along the line or at the end of the railroad of such company; and such service shall be deemed as good and effectual as if made on the officers, stockholders, or members, or either of them, of such company."

The court below held that section 8137 did not repeal section 8147, as was contended by plaintiff's counsel. In this construction, counsel for defendant agree with the learned circuit judge, but contend that the words, "or any other officer or agent of such corporation," contained in section 8137, have no application to railroad companies. We cannot agree with this contention. That section evidently was intended to apply to railroad companies as well as to other corporations. If it were not so intended by the Legislature, it is difficult to conceive why the section should provide that the attachment proceedings authorized by it should not apply to railroad companies. We see no difficulty in sustaining the two sections, and applying each to the service of process upon railroad companies. Section 8137 was intended to extend, rather than restrict, such service. Counsel, in their briefs, have gone into the history of the various enactments providing for service of

process upon corporations, but we think section 8137 too plain to need further discussion. The court below was right in holding the service good.

Some question is raised whether *certiorari* was the proper remedy, but we have concluded to dispose of the case on its merits, without regard to that question.

The order below is affirmed.

The other Justices concurred.

WILLIAM KEHL v. WILLIAM A. DUNN.

Exemptions—Piano.

A piano cannot be classed as "household goods, furniture, or utensils," within the meaning of How. Stat. § 7686, subd. 7, which exempts to each householder, from levy and sale under any execution, or upon any final process of a court, "all household goods, furniture, and utensils, not exceeding in value $250."

Error to Houghton. (Hubbell, J.) Submitted on briefs October 24, 1894. Decided December 7, 1894.

Replevin. Defendant brings error. Reversed, and judgment entered for defendant. The facts are stated in the opinion.

Chadbourne & Rees, for appellant.

A. R. Gray, for plaintiff.

LONG, J. This cause was tried before the court without a jury upon the following agreed facts: Plaintiff was the owner and in possession of a piano of the value of $200.

The defendant, as sheriff, levied an execution in favor of Simon Karger upon the piano and other property belonging to plaintiff, and presented a list of the property so levied upon to the plaintiff, who then and there selected the piano as his exemption, under subdivision 7 of section 7686, How. Stat. At the time of the levy, plaintiff was a householder, living in Houghton with his family, consisting of himself and wife and four children, all sons, aged respectively 15, 13, 12, and 8 years. The piano was, and had been for two years prior to the levy, kept in the house of plaintiff, and used for the instruction of his children in music. Plaintiff demanded possession of the piano, which was refused, and this action of replevin was brought by him and the piano taken on the writ. On the trial the court found the title in plaintiff, and awarded him judgment for costs.

The only question in the case is whether, under the provisions of the statute above cited, this piano is exempt. This subdivision exempts "to each householder all household goods, furniture, and utensils, not exceeding in value $250." Counsel for plaintiff has presented a brief and argument in the case to sustain this judgment that is certainly very ingenious, but no case is cited, under a statute like ours, which upholds his contention. While these statutes are construed with great liberality in favor of exemptions, yet we think the language employed in subdivision 7 is not open to a construction which would exempt a piano. A piano cannot be classed as household goods, furniture, or utensils, within the meaning of the statute. The court below was in error in holding it exempt. See *Tanner v. Billings*, 18 Wis. 163; *Dunlap v. Edgerton*, 30 Vt. 224.

Judgment reversed, and judgment entered here for defendant.

The other Justices concurred.

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DAVID BROCK v. THE DWELLING HOUSE INSURANCE COMPANY.

Fire insurance—Conditions of policy—Appraisal—Right to bring suit.

1. After proofs of loss have been made, it is the duty of a fire insurance company, within a reasonable time, to make manifest its disagreement with the amount claimed by such proofs.
2. A condition in a fire insurance policy that a loss thereunder shall not become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss required in the policy have been received by the company, including an award by appraisers when appraisal has been required, makes such appraisal, when required, a condition precedent to the right to sue; and the company has a reasonable time within the 60 days after proofs of loss have been furnished in which to move with respect to the ascertainment or estimate of the loss.
3. A policy-holder made his proofs of loss, and, without waiting for any action by the company, asked for the appointment of appraisers, and they were appointed. And it is held that the insured cannot be heard to say that, inasmuch as no effort had been made by the parties looking to an adjustment, the appointment of appraisers was premature, and that an appraisal must be regarded as having been required within the language of the policy.
4. Where the conduct of the appraiser appointed by the company in refusing to agree on an umpire is inexcusable, and virtually amounts to a refusal to proceed with the appraisement, the fact that the appraisement was not concluded before suit was brought will not bar an action on the policy. So held, where the company selected as its appraiser an insurance adjuster who resided in a city 135 miles distant from the city where the fire occurred, and where the appraiser selected by the insured resided. The two appraisers disagreed as to the selection of the third appraiser. The company's appraiser suggested the names of three persons, residing at a distance from the place where the fire occurred, and the appraiser for the insured offered the names of 12 residents of the locality from which the jury, in case of a suit, would be drawn. The

appraiser for the company assigned no valid reason for a refusal to accept one of the 12, the only reason given being that he did not care to take the chances of getting an appraiser that would be partial

Error to Bay. (Maxwell, J.) Submitted on briefs October 24, 1894. Decided December 7, 1894.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Shepard & Lyon, for appellant.

Pratt, Van Kleeck & Gilbert, for plaintiff.

McGRATH, C. J. The policy upon which suit is brought contains the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable 60 days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice, within 30 days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

* * *

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two

competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall be *prima facie* evidence of the amount of such loss. The parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.

"This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. * * * * *

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 12 months next after the fire."

The property insured consisted of a dwelling-house. The loss occurred July 25, 1892. After the fire, the company's agent visited the locality, and had a conversation relative to the loss. An offer was made by the agent, which, in view of the subsequent correspondence, must be regarded as an offer of compromise, rather than an acknowledgment of liability on the part of the company, or an estimate of the amount of the loss. At this interview, a proposition was made to have an appraisal, but the company's agent said that he didn't propose or didn't care to arbitrate the matter.

On August 16, 1892, the company wrote to plaintiff as follows:

"On the 6th inst., instead of receiving a call from you, I had one from Mr. Van Kleeck, who said he was your

attorney in the matter of your claim under policy 731,375. That there be no misunderstanding in this matter, I would remind you that in my conversation with you I did not state what position the company would take in the matter, and did neither admit nor deny liability on the part of the company in your favor. Neither did I in my conversation with Mr. Van Kleeck admit or deny such liability. Reserving to the company all its rights under the policy, I remain."

Again, on August 30, the company wrote:

"Yours of the 17th inst. at hand, inclosing affidavit of David Brock *in re* claim under policy 731,375. Whether the policy was valid or void at the time of the fire, I do not wish to be understood as expressing any opinion, either directly or by implication. In case of a policy void at time of the fire, no form of affidavit, however fully it might set forth the facts, would be operative to inject validity into the claim; whereas, if it were valid at time of fire, an affidavit in manner and form like the one referred to would not be a compliance with the requirements of the policy, to which I refer you. As this affidavit, therefore, could in neither contingency have any force or effect, I return the same without either demanding or waiving full compliance on the part of the insured with the requirements of the policy.

"Neither admitting nor denying liability on the part of the company, nor waiving or extending any of the terms, provisions, conditions, or requirements of the policy, I remain."

On September 1, 1892, plaintiff sent on proofs of loss, and in the letter suggested an appraisal of the property. On September 9 plaintiff wrote again, asking for a reply to the letter of the 1st. On September 12, defendant wrote as follows:

"I would say that the company is willing to have the value of the building at the time of the fire appraised, as per the terms of the policy, with the understanding that in so doing it reserves all its rights in the matter, and that nothing so far done is to be construed as a waiver of its rights under the policy, nor an acknowledgment of any liability on its part in favor of Mr. Brock."

On September 13 plaintiff replied, naming one Callender as appraiser. On September 16 defendant wrote, objecting to Callender, and saying:

"*If you want an appraisal,* you must, in accordance with the policy, select a competent and disinterested man."

On January 12, 1893, plaintiff wrote as follows:

"Messrs. Shepard & Lyon, on inquiry from them yesterday, say that they have done all, in the insurance matter of David Brock's claim under policy 731,375 against your company, that they are authorized to do. We have furnished all information we have in regard to the loss. Mr. Brock has presented himself for examination under oath, at your request. It seems to us that the only thing necessary to make this matter complete is for you to send us draft and take up your policy. As to the matter of appraisal suggested to you in ours of September 13, we desire to say that, so far as Brock is concerned, he has no desire to insist or oppose an appraisal. We have waited since that date for you to act in that matter if you desire so to do. We now say, as we understand the matter, Brock is entitled to his money, and if we do not hear from you at once, with draft inclosed, we shall conclude that you are in possession of some fact which you conclude is a complete bar to his right to make such claim. As to such matters, if any, others than us must decide."

In reply defendant wrote:

"I would say that an appraisal *was demanded by Mr. Brock,* agreed to by the company with the understanding that it would not in any event prejudice its rights under the policy, and should not be a waiver of any of the conditions of the policy, or of a forfeiture thereof (see the conditions of the policy, lines 92 and 93, Mich. Stand., cited in a former letter to you), and we have for some time been waiting for Mr. Brock to name an appraiser,—some person possessing the attributes required of him by the policy. We are still waiting for Mr. Brock to name his appraiser, and prefer that he abide by his election to submit the matter to appraisal, as provided by the policy."

On January 18, 1893, plaintiff wrote nominating one

Huntley as appraiser, and on January 24 defendant wrote nominating one Hilton, an insurance adjuster residing at Grand Rapids. On February 1 plaintiff wrote as follows:

"Pursuant to your letter of January 24, '93, Mr. Charles A. Hilton came here on the 27th of January, and he, together with Mr. Huntley, signed a declaration to appraise the property insured under the Brock policy. They then endeavored to agree upon an umpire. We understand that Mr. Hilton objected to any person from this county to act as such umpire. At any rate, they were unable to agree on one, and did nothing on that day. Mr. Hilton went away, saying he would return January 31, and complete the matter. Mr. Huntley came that day, and waited the whole of the day for Mr. Hilton, and again to-day. Your Mr. Hilton has not appeared, and no word has been received from him in regard to the matter at all. We therefore conclude you have determined to abandon the matter of appraisal. We shall therefore expect a decided answer whether you now propose to pay the claim made under the policy."

On February 3 defendant wrote that the general agent was out of the city, but that Hilton had been communicated with. On February 5 Hilton wrote Huntley, submitting the names of three persons, one a resident of Grand Rapids, another of Lansing, and one Patzer, of Saginaw. Huntley replied, submitting the names of 12 residents of Bay City, and saying:

"I don't think it necessary to go outside of Bay City in order to find an impartial and honest contractor and builder to act as umpire in case we don't agree, and take the liberty of sending you this list to choose from. Any one of them will be acceptable to me. The most of them are strangers to me, being known only by sight and reputation. I am willing to throw out those that are acquainted with me or acquainted with the facts in any way, and send you list hoping you will find some one who will be acceptable to us both."

On February 11 Hilton wrote Huntley as follows:

"I do not question the honesty, ability, or integrity of

any contractor in Bay City, but, not being acquainted with any of them, I consider the chances of getting one that would be partial in his ruling and decisions. I do not care to take the chances, and cannot consent to the selection of an umpire from Bay City or West Bay City. We certainly ought to be able to find some one outside that would be satisfactory to both of us. When we can agree upon such an one, I am ready to proceed. If you cannot accept any one of the names that I proposed, you can make a list of from three to six names, selected from different localities, and submit to me, and I will see if there is not some one of them that I can accept."

Huntley replied as follows:

"Not being acquainted with the gentlemen you name in yours of February 5, or their business standing, I don't care to take the chances; and, knowing by reputation the names on the list I sent you on February 7, I think a judicious selection can be made from them."

Nothing further was done, and on February 16, 1893, suit was commenced.

On February 11 defendant's general agent wrote, alleging his absence from the city when plaintiff's letter of the 1st was received, and saying:

"I write Mr. Hilton to-night inquiring as to his version of the story. My impression is that you would like to deprive us of the privilege of a fair appraisal under the policy by refusing to agree to any fair proposition that might eminate from Mr. Hilton, but I mean that, if we have any rights under the policy, they shall be maintained. *You will bear in mind that the demand for appraisal came originally from you.*"

To the declaration herein, defendant pleaded the general issue, with notice that upon the trial it would insist in its defense that plaintiff had failed to comply with the terms of the policy, and that said policy was inoperative and void, and the defendant released from all liability thereunder, for the following reasons:

"*First.* That the plaintiff was not the sole and unconditional owner of the property insured, free from all liens

whatever, but that one William Brock had an interest and ownership in said property as well as said plaintiff at and previous to the time of said fire, whereby said policy became void.

"*Second.* This defendant will show that the said policy became inoperative and void, and that plaintiff is not entitled to maintain action or suit upon said policy, for the reason that there was a disagreement as to the amount of loss under said policy, and the amount of said loss is required by the terms of said policy to be ascertained by two competent and disinterested appraisers, and because the amount of the loss has not been so estimated or appraised, and no award has been made by any arbitrators as to the amount of such loss, and therefore the plaintiff is not entitled to maintain this action for loss under said policy.

"*Third.* Because this defendant has 60 days after such appraisal and adjustment of loss under said policy in which to pay the same, and that such term of 60 days has not yet elapsed since any appraisal and adjustment of the amount of said loss has been had."

At the close of the proofs, defendant's counsel requested the court to instruct the jury that plaintiff had not established title to the property; that the policy appeared to have been transferred to plaintiff, whereas the conveyance was made to William and David Brock, and thereafter William conveyed to David, a notation of which did not follow on the policy, and a knowledge thereof was not brought home to the defendant; and that, inasmuch as arbitration proceedings had been agreed upon and were pending, and arbitrators were, on the day that the suit was brought, negotiating with reference to the selection of an umpire, the action was prematurely brought, and plaintiff could not recover. The court, however, instructed the jury that—

"An agreement to arbitrate prevents the commencement of suit while the agreement is in force, and the parties are actually acting under it. An agreement to arbitrate will take a suit already pending out of court, but, if they fail to act on it, still the suit may be maintained. In this

case, the policy provides that the insured shall select one man, and the company select another man, and that they two shall pick a competent, disinterested party for an umpire. You have heard what the letters say in regard to that subject, and you have heard the testimony of the witnesses. Now, in order to have an arbitration of any effect, both parties must conduct themselves with absolute fairness. You have heard the negotiations between the two arbitrators, and that they did not agree. Unless an arbitration has gone farther than merely the appointing of the two men and their efforts to agree upon a third party, after the lapse of time that elapsed after this fire, and before the commencement of this suit, I charge you that the clause for an arbitration is not a bar to this action."

The provisions of this policy are evidently intended to enable the parties thereto to agree between themselves as to the amount of the loss, and, in the event of a failure to agree, to submit the same to arbitration. After proofs of loss have been made, it is clearly the duty of the company, within a reasonable time, to make manifest its disagreement with the amount claimed by such proofs. The policy expressly provides that—

"The loss shall not become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required."

This provision makes such appraisal, "when required," a condition precedent to the right to sue. The defendant has a reasonable time within the 60 days after proofs of loss have been furnished within which to move with respect to the ascertainment or estimate of the loss. Had the time elapsed and no move been made in that direction, the plaintiff would undoubtedly have had the right to bring suit. In the present case, however, plaintiff, with his proofs of loss, and without waiting for any action by the company, prompted undoubtedly by what had occurred between the parties before proofs of loss had been furnished,

asked for the appointment of appraisers, and they were appointed. The plaintiff cannot now be heard to say that, inasmuch as no effort had been made by the parties looking to an adjustment, the appointment of appraisers was premature. An appraisal must be regarded as having been required within the language of the policy.

Another question, however, presents itself. The terms of the policy do not contemplate, in case of a disagreement between the parties, that partisans shall then be appointed as appraisers. It is contemplated that the two appraisers appointed may agree, but the parties themselves are as likely to agree as two persons selected because of individual bias. As is said in *Bradshaw v. Insurance Co.*, 137 N. Y. 137, the term "disinterested" does not mean simply lack of pecuniary interest, but requires the appraiser to be one not biased or prejudiced. The defendant selected as its appraiser an insurance adjuster residing at Grand Rapids, a point 135 miles distant from the place where the fire occurred. The two disagreed as to the selection of an umpire. Defendant's appraiser then suggested the names of three persons, one of whom resided in Grand Rapids, another at Lansing, and the third at Saginaw. The agreement does not contemplate that the umpire shall be selected at random, or without some knowledge on the part of both appraisers as to his competency and fitness. Parties living in the locality would naturally be best qualified to pass upon the question of values, and an appraiser would not be under obligation to make trips to other localities than that of the fire to ascertain as to the propriety of appointing the person suggested as an umpire. The agreement contemplates an inexpensive method of settlement. Strangers to the locality are not usually selected as appraisers, and, in case of the inability of the appraisers to agree, a third party known to both, and in whom both have confidence, is supposed

to be selected. An investigation as to the parties named by defendant's appraiser would have been productive of expense and delay. The fact that defendant selected a person who resided 135 miles distant, and who, for that reason, was unacquainted with the residents of the locality of the loss, and was not competent to judge of their fitness, does not affect the reasonableness of the rule, and did not impose the duty of travel and investigation upon the appraiser appointed by plaintiff. The facts are not disputed. Defendant's appraiser insisted upon the appointment of a person with whom he was presumably acquainted, who was a stranger to the locality and to plaintiff's appraiser. The latter offered the names of 12 residents of the locality from which the jury, in case of suit, would be drawn. No valid reason is assigned for a refusal to accept one of the 12, and the only reason given is that he did not care to take the chances of getting one that would be partial. The requirement that plaintiff's appraiser should go into other portions of the State to make inquiry as to the fitness of the persons named was not a reasonable one. The suggestion that some one be selected from the locality of the fire was not unreasonable. It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable, and virtually amounts to a refusal to proceed with the appraisement, the fact that the appraisement was not concluded before suit brought will not bar an action on the policy. *McCullough v. Insurance Co.*, 113 Mo. 606; *Bishop v. Insurance Co.*, 130 N. Y. 488; *Uhrig v. Insurance Co.*, 101 Id. 362; *Bradshaw v. Insurance Co.*, 137 Id. 137. In the McCullough case the court say:

"The appraisers could not agree as to the value of the property destroyed or the amount of damages sustained, nor could they agree on the third man. McGraw then

suggested the names of four or five persons, some of whom resided in the county, some at Boonville, and some at other points not far distant. White would not agree to either of them, and suggested the names of some others, living in St. Joseph, Kansas City, and St. Louis, at least 200 miles distant from where the fire occurred. McGraw would not agree to any of the persons suggested by White. White then left for Louisville, Kentucky, and did not return again. McGraw's objection to the persons suggested by White was because of the remoteness at which they resided from the place of the fire, and their want of knowledge of the value of the property in that locality, but White would not agree to any other person. His testimony was not taken in this case, nor is there any excuse offered for his refusal to accept some one of the persons as umpire that were suggested by McGraw. His course under the circumstances, to say the least of it, is not to be commended, was unreasonable, unjust, and tantamount to a refusal to proceed with the appraisement. Justice and fair dealing did not require the plaintiffs to wait longer than they did before instituting their suit."

The judgment is therefore affirmed.

The other Justices concurred.

THE CITY OF SAGINAW v. DANIEL J. CAMPAU.

Constitutional law—Eminent domain—Qualifications of jurors.

In a street-opening case, a challenge to the array was interposed on the ground that, under the charter of the city, the persons listed to serve as jurors in the court where the proceedings were pending, and from which persons the jury had been drawn, were required to be qualified electors of fair character and sound mind, freeholders in said city, and capable of understanding and speaking intelligibly the English language, while the Constitution provides that, when private property

is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property. And it is held that there is no constitutional objection to the Legislature imposing the additional qualifications mentioned in said charter.

Appeal from recorder's court of the city of Saginaw. (Brenner, J.) Argued October 25, 1894. Decided December 7, 1894.

Petition to open and extend Houghton avenue in the city of Saginaw. Respondent appeals. Affirmed. The facts are stated in the opinion.

Weadock & Purcell, for appellant.

William G. Gage, for petitioner.

LONG, J. Proceedings were commenced in the recorder's court for the city of Saginaw to open and extend Houghton avenue, and to take private property therefor. No contention is made about the regularity of the proceedings, but when the jury was impaneled counsel for the respondent challenged the array, for the reason and on the ground that section 8 of title 15 of the charter of the city of Saginaw, under which the proceedings were being had, is in conflict with and in violation of sections 2 and 14 of article 18, and section 15 of article 15, of the Constitution of this State, in that it does not allow the respondent a jury of freeholders, within the clear intent and meaning of the above-mentioned provisions of the Constitution, but that by its terms the constitutional rights of respondent are circumscribed and abridged, so that no freeholder not possessing the special qualifications prescribed in the charter can sit as a juror in condemning land for public uses, whereas by the terms of the Constitution the respondent is entitled to have a jury of freeholders without any quali-

fications or limitations whatever, subject only to challenge for cause. This challenge was overruled, and the jury returned a verdict in favor of the city, awarding damages to respondent of $1,550. Respondent appeals.

Section 8, tit. 15, of the charter (Act No. 402, Local Acts of 1893) provides:

"On the first Tuesday of June in each year, between the hours of 9 and 12 o'clock in the forenoon, the assessor of the city of Saginaw, the clerk of said court, and the marshal of said city shall meet together in the office of said assessor in said city, and shall then proceed in public to select from the last annual assessment roll of said city (which roll the custodian shall produce before them) a list of 100 persons to serve as jurors in said court, the persons so selected to be qualified electors of fair character, of sound mind, freeholders in said city of Saginaw, and capable of understanding and speaking intelligibly the English language. Said list shall be signed by the said assessor, clerk, and marshal, if they be all present and assist in the making thereof: * * * *And provided further*, that if said list is not selected within the time above limited, or if for any reason a legal list shall not have been made, the judge of said court may by his order, entered of record in said court, command the said assessor, clerk, and marshal to proceed forthwith to select said list and sign and file the same."

Sections 2 and 14 of article 18, and section 15 of article 15, of the Constitution are as follows:

"Sec. 2. When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record as shall be prescribed by law: *Provided*, the foregoing provision shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duty as highway commissioners."

"Sec. 14. The property of no person shall be taken for public use without just compensation therefor. Private

roads may be opened in the manner to be prescribed by law; but in every case the necessities of the road, and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of proceedings, shall be paid by the person or persons to be benefited."

"Sec. 15, art. 15. Private property shall not be taken for public improvements in cities and villages, without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders, and actually paid or secured in the manner provided by law."

The case falls so squarely within the doctrine enunciated by this Court in *People v. Harding*, 53 Mich. 48, that discussion is hardly necessary. In that case the respondent was convicted in the recorder's court of the city of Detroit of the crime of larceny from a store in the day-time. After the jury was impaneled, the respondent challenged the array, and for cause of challenge claimed that the act under which the jurors were selected was unconstitutional. That act provides, among other things, that the officers in selecting the jury "shall take the names of such only as are not exempt from serving on juries, who are in possession of their natural faculties, and not infirm or decrepit, of good character, of approved integrity, of sound judgment, and well informed, and conversant with the English language, and free from all legal exceptions," etc. Comp. Laws 1871, § 5978, as amended by sections 7623–7630, How. Stat. The act was held valid. It was said:

"It will thus be seen the qualifications are to-day the same substantially as at common law. By the statute of 6 Geo. IV. chap. 50, Parliament attached certain property qualifications, and in this State the Legislature has added certain qualifications to protect the rights of parties, and provide an intelligent and impartial jury."

It was held that the provisions of the Constitution—article 6, §§ 27, 28—were not intended to limit the powers of the Legislature thereafter to change the law rela-

tive to the manner of selecting jurors, or to the persons or officers who should make the selections, or the lists from which the selections should be made; and that "the only restriction upon the legislative powers is that jurors shall have the qualifications of electors, and that they shall reside in the vicinage." Under the charter in question the jurors are to have the qualifications of electors and reside in the vicinage, and we see no constitutional objection to the Legislature imposing the other qualifications attached. These qualifications are very similar to those in *People v. Harding, supra,* and thus applied to criminal trials. The court below was not in error in overruling the motion.

It is also insisted that the court was in error in permitting the petitioner to submit to the jury two blank forms of verdicts. We see no force in this objection, as the respondent could not be harmed by it.

Judgment is affirmed

The other Justices concurred.

The People v. James Taugher.

Criminal law—Larceny—Intent.

Where, in a prosecution for larceny, it appears that the respondent's possession of the property was lawful in the first instance, his mere refusal to deliver it to the owner on demand will not warrant a conviction.

Exceptions before judgment from Muskegon. (Dickerman, J.) Submitted on briefs October 25, 1894. Decided December 7, 1894.

Respondent was convicted of the crime of larceny. Conviction reversed, and respondent discharged. The facts are stated in the opinion.

Jerome E. Turner, for respondent.

A. A. Ellis, Attorney General, and *Charles B. Cross*, Assistant Prosecuting Attorney, for the people.

GRANT, J. The respondent was convicted, under a common-law information, of the larceny of a buggy. The entire evidence upon which he was convicted is stated in the record as follows:

"That on the 19th day of July, 1893, Mrs. Taugher, wife of the defendant, came to the city of Muskegon with a horse and buggy, and while in said city her buggy was smashed by an electric car, and that Fred W. Thompson, superintendent of the electric railway, procured of Peter Damm, complaining witness in this cause, a buggy for the use of Mrs. Taugher, to enable her to return to her home,—the buggy to be returned by her on the following day; that Mrs. Taugher did not return the buggy; that afterwards, and on the 25th day of July, 1893, Mrs. Taugher and defendant, James Taugher, came together to said city of Muskegon with said buggy, and were met on one of the streets of said city by said Thompson and said Peter Damm; that Thompson said to Damm: 'Here is your buggy; now, take it, and I will pay for one day, and they must pay for the rest;' that at this time defendant was in the buggy, and his wife on the sidewalk, close to the buggy; that Peter Damm then laid his hand on one of the thills of the buggy, and said, 'This is my buggy, and I want it right here, now;' that then Mrs. Taugher said to Thompson, 'When are you going to fix my buggy?' that Thompson replied: 'I have nothing to do with it; you must see Mr. Nims, the president of the company, about it;' that defendant did not leave the buggy, and that Damm made no further effort to obtain the buggy; that defendant said, 'Let me have the buggy to take my wife to Nims' office, and I will return it on my way back,' to which Peter Damm consented, and released his hand from the thill of the buggy; that this conversation occurred about 11 o'clock in the forenoon; that Taugher and wife

went to Nims' office, Taugher remaining in the buggy while his wife went to Nims' office, and were seen there and in the street in front of the office by Peter Damm, and that defendant remarked to Damm, 'We are waiting for Mr. Nims;' that the buggy was not returned to Damm, but was driven by Taugher and wife out to their farm, about 4 miles from the city of Muskegon, the said farm being the home of defendant, and the place where Mrs. Taugher wanted to go on the day of the accident to her buggy. The next day, Damm drove out to the farm, saw Taugher, and told him he had come for the buggy. Taugher told him that his wife was out picking berries, and had the buggy with her. Taugher also said he had two horses,—a colt and an older one. Taugher then had one horse hitched to a cultivator, and a colt was seen by Damm running in a pasture on the farm. Taugher also told Damm that his wife would not give up the buggy until her own was fixed, and told Damm that he should go to the street-car company for his buggy, to which Damm replied, 'You want me to have a lawsuit to accommodate you?' and Taugher said, 'I guess you will have to.' That Damm then searched Taugher's premises, but did not find the buggy; that Damm then returned to the city, and caused the arrest of Taugher for the larceny of a buggy; * * * that, at the time of Taugher's arrest at the farm, Taugher told the officer that he (Taugher) never stole a buggy; that his wife went to town, and met with an accident, and that she got the buggy from Thompson, and still had it in her possession; that he (Taugher) had nothing to do with it whatever, and that the buggy was then in the barn; that at the time of defendant's arrest the officer did not search the barn or premises of Taugher, but brought defendant to the city of Muskegon, and the next day went again to Taugher's premises with Damm, and searched the farm, but did not find the buggy; that on the same day, and after his return to the city of Muskegon, the officer went to the jail where defendant was confined, and asked him where the buggy was; that defendant said in response that the buggy was up in the barn; that the officer then said to defendant: 'You know better; it was not there yesterday, and it is not there to-day;' that Taugher inquired if the officer had been up to the farm, and was told 'Yes;' that the officer then told defendant that he had made inquiries of Mrs. Taugher, and that she told him that the buggy was not there to-day,

and was not there yesterday; that defendant thereupon told the officer that it was no use to pick him, as he would get nothing out of him; that defendant also told the officer 'that may be some friends of mine in town may have the buggy;' that the officer asked for their names, and was told by Taugher that he would not give their names,—that he would not put anybody in trouble."

The respondent introduced no evidence.

It is contended by the attorney for the people that the respondent intended to steal the buggy from the outset, and that he requested and obtained the consent of Mr. Damm to use the buggy temporarily with felonious intent. We do not think that a felonious taking is established by the proof. He was in the lawful possession of the buggy when Damm approached him upon the street and demanded possession. Damm, by placing his hand upon the thill, did not recover possession.

The people rely upon the case of *People v. Camp*, 56 Mich. 548. In that case the respondent obtained possession of a horse from a boy, the son of the owner, who evidently had no authority to act for his father, and afterwards secreted him.

A felonious taking is essential to establish the crime of larceny at the common law. Respondent's possession was lawful until the demand. He would be liable in a civil action of replevin or trover, but no criminal intent is shown.

It follows that the conviction must be set aside, and the respondent discharged.

The other Justices concurred.

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ARMINDA JOURDAN v. WILLIAM PATTERSON AND SYLVIA PATTERSON.

Deed—Delivery—Evidence—Burden of proof.

1. In ejectment for dower, the defendants claimed under a deed signed and acknowledged by the plaintiff's husband four days before his marriage to the plaintiff, but which she claimed was not delivered until a few days before his death, at which time, her testimony tended to show, he was not competent to make such delivery. And it is held that his condition at that time was of no consequence, the sole issue being, was the deed delivered before the marriage, at which time no question as to the competency of the husband was raised?
2. The grantee testified that the deed was delivered to him the day of its date. Previous to the commencement of the ejectment suit, in his answer to a bill filed to set aside the deed, he had stated that the deed was delivered to him at a date subsequent to the marriage of the grantor to the plaintiff, and this statement was introduced in evidence to contradict the witness. On his redirect examination, he testified that he did not know what the word "delivery" meant in law, and was then asked to state what he meant by the use of the word in his answer in the equity suit. And it is held that it was proper for him to explain, if he could, what he understood by the term.
3. The grantee admitted that the deed was kept in a locked box in the grantor's house, and that he obtained the key from the grantor (his father) two or three days before his death, unlocked the box, and took the deed out. And it is held that, under these circumstances, there was no presumption of delivery arising from the deed itself or the record thereof, and that the burden of proof was upon the defendants to show its delivery.

Error to Ottawa. (Padgham, J.) Argued October 24, 1894. Decided December 7, 1894.

Ejectment. Defendants bring error. Reversed. The facts are stated in the opinion.

Stephen H. Clink, for appellants.

Farr & Soule, for plaintiff.

GRANT, J. Plaintiff and one Joseph Jourdan were married March 22, 1887. He died December 28, 1891. At the time of his marriage he was in possession of the real estate in which the plaintiff now seeks to recover dower. Four days before the marriage, he made, signed, and acknowledged a deed so his son, Pearley Jourdan, which was not recorded until after his death. Defendants were in possession under Pearley Jourdan. If the execution became complete by delivery before the marriage, plaintiff is not entitled to dower. If the execution failed by non-delivery until after the marriage, she is entitled to recover. The only issue, therefore, before the jury, was the time of delivery.

1. Plaintiff claims that the deed was delivered a few days before Joseph's death. Evidence was admitted tending to show that he was not at that time competent to deliver the deed, by reason of his illness. Its admission was error. His condition on that day was of no consequence, and would naturally prejudice a jury against the son, the real party in interest; the sole issue being, was the deed delivered before the marriage, at which time no question is raised as to competency?

2. Previous to the commencement of this action a bill had been filed against Pearley Jourdan to set aside the deed. To this, Pearley filed an answer, in which it was stated that the deed was made and executed March 18, 1887, and was duly delivered to him December 25, 1891. Pearley testified in this case that the deed was delivered the day it bore date. This statement in the answer was introduced to contradict him. On his redirect examination he testified that he did not know what the word "delivery" meant in law. He was then asked to state

what he meant by the use of the word in his answer in the equity case. We think it was proper for him to explain, if he could, what he understood by the term. A layman might use the word "delivery" when the act to which he referred would not constitute the delivery required to effect a complete execution of a deed.

3. The judge instructed the jury that the burden of proof was upon the defendants to show the delivery of the deed. This was not error, under the circumstances of this case. Pearley Jourdan admitted that the deed was kept in a locked box in his father's house, and that he obtained the key from his father two or three days before his death, unlocked the box, and took it out. Under these circumstances, there was no presumption of delivery arising from the deed itself or the record thereof. *Patrick v. Howard*, 47 Mich. 45.

There are many other assignments of error, but it is unnecessary to mention them. In some, no objection was made. In others, when the testimony was offered, defendant's counsel only said, "I object." This forms no basis for an exception. *Hutchinson v. Whitmore*, 95 Mich. 592; *Young v. Stephens*, 9 Id. 507. In those assignments where the objection was properly taken there was no error, and it would be of no profit to the profession to discuss them here.

For the reasons above given, the judgment must be reversed, and a new trial ordered.

The other Justices concurred.

EMERY LEWIS AND ALBERTHY LEWIS v. LOUIS H. KEAN ET AL.

Equity practice—Payment under decree—Register in chancery.

1. A party may object that his money be intrusted to an officer of the court, and he has a right to be heard before such an order is made.
2. In the absence of an order by the court, the payment of the amount due on a chancery decree to the register in chancery is not binding upon the party entitled to the money, and he may entirely ignore such payment.
3. A chancery decree directed the payment of a certain sum of money to the complainants, or their solicitor, within a stated time. The defendant failed to pay or tender the amount to the complainants, and refused to pay it to their solicitor, although the complainants gave the solicitor written authority to receive the money, which he showed to the defendant, and demanded payment. On the last day fixed for payment, the defendant deposited with the register in chancery the amount claimed to be due, and notified the complainants of such deposit, the validity of which they refused to recognize. Defendant thereupon filed a petition praying the court to adjudge the decree paid and discharged. And it is held that an order finding that the defendant had substantially performed all of the requirements of the decree, and declaring it satisfied and discharged of record, cannot be sustained.

Appeal from Wayne. (Hosmer, J.) Submitted on briefs October 26, 1894. Decided December 7, 1894.

Petition by defendant Louis H. Kean to adjudge a decree paid and discharged. Complainants appeal. Decree modified. The facts are stated in the opinion.

Jay Fuller, for complainants.

Hoyt Post, for defendant Kean.

GRANT, J. On August 28, 1893, the complainants ob-

tained a decree against the defendants, by which it was decreed that there was due from the defendant Louis H. Kean the sum of $446.50, with interest at 6 per cent. per annum from June 18, 1890, on a contract for the sale of lands described in the bill of complaint. It was also decreed that a deed made by complainants to said Kean was delivered without authority from them, and was void; that the above-mentioned amount, with interest thereon and costs, be paid to complainants within six months from the date of the decree; that the above-mentioned deed should be set aside, and declared null and void, unless said Kean should pay to the complainants, or to their solicitor, within said six months, the amount as above stated; that the defendant Straker was indebted to complainants in the sum of $100; that he pay the same, and that complainants have execution therefor. These are all of the provisions of the decree involved in this proceeding. The defendant Kean did not pay or tender to the complainants the amount of the decree, although the decree provided for the payment thereof to their solicitor, and the complainants gave him written authority to receive it, which was shown to said Kean by the solicitor, and payment demanded, which was refused. On the last day provided for the payment, Kean deposited with the register of the court the sum then claimed to be the amount covered by the decree. It was not sufficient by a small amount, which he afterwards deposited with the register. He then notified the complainants of this deposit. They refused to recognize such deposit as valid, or to look to the register for the payment of the money, claiming that it was not authorized by the decree, and that the time for payment had expired. Kean thereupon filed a petition praying the court to adjudge the former decree paid and discharged. The court below found that Kean had substantially performed all the

requirements of the decree, and entered an order declaring that it was satisfied and discharged of record.

This decree cannot be sustained. The law does not authorize the payment to the register of the amount due on a chancery decree. The court may make such an order, but, until so ordered, the complainant is not bound by such act on the part of the defendant. He may entirely ignore it. A party may object that his money be intrusted to an officer of the court, and has a right to be heard before such order is made. The defendant might as well have deposited it with the judge or any other member of the court, and then ask to have his decree declared paid and satisfied. It was expressly decreed that the defendant should pay this amount directly to the complainants or their solicitor. Tender of the exact amount to one of them was absolutely essential to comply with the decree to entitle him to its discharge.

It may well be questioned whether the defendant Kean is entitled to any relief at all; but, inasmuch as this involves a forfeiture, which equity as well as law abhors, and exact justice can still be done, the decree will be modified, and a decree entered in this Court directing the defendant Kean to pay the amount of the decree, with interest and costs, within 30 days. The complainants will also recover the costs of this proceeding in the court below and in this Court.

The other Justices concurred.

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128 556

DANIEL P. MCMULLEN ET AL. v. ROLLIN H. PERSON, CIRCUIT JUDGE OF INGHAM COUNTY.

Board of supervisors—County bonds—Erection of court-house—Suit to enjoin—Jurisdiction.

1. How. Stat. § 483, subd. 8, which provides that the several boards of supervisors shall have power to provide for the payment of any loan made by them by a tax upon the county, which shall in all cases be within 15 years from the date of such loan, limits the issue of all county bonds to 15 years.
2. A board of supervisors adopted a resolution authorizing the borrowing of $35,000 upon the credit of the county, for the purpose of erecting a court-house, and the issuance of the bonds of the county for that sum, payable in ten installments, within 30 years of the date of their issue, the first installment to be made payable 10 years from said date. The loan was adopted by the electors, and the board of supervisors passed a resolution authorizing the issuance of the bonds, to be payable in 15 years from the date of issue. And it is held that the voters were clearly given to understand that the entire loan would not be payable in 15 years, but would be extended over a period of 30 years; that no such loan is authorized by law, and it was therefore void; but that, if the resolution were valid, the board disregarded the instructions of the electors, by making the entire amount payable at one time, and that for this reason the proposed issue of bonds is void.
3. How. Stat. § 6612, which provides that when it may be necessary to file a bill or information, or to commence any proceedings in chancery, on the part of or in behalf of the people of the State, the same may, at the election of the Attorney General, be commenced in the circuit court for the county of Ingham, in the equity side thereof, and said court shall have complete jurisdiction and full power and authority in the premises, authorizes the filing of a bill by the Attorney General in said court, upon the relation of citizens and taxpayers of another county, to enjoin the issuance by the board of supervisors, without legal authority, of bonds to be used in the erection of a court-house.

Mandamus. Argued October 30, 1894. Denied December 7, 1894.

Relators applied for *mandamus* to compel respondent to dissolve an injunction restraining the issue of certain bonds. The facts are stated in the opinion.

M. V. & R. A. Montgomery, for relators.

A. A. Ellis, Attorney General (*McDonell & Hall* and *Humphrey & Grant,* of counsel), for respondent.

GRANT, J. The board of supervisors of the county of Cheboygan, desiring to submit to the electors the question of the erection of a court-house, and the issue of bonds to obtain the necessary funds therefor, passed the following resolution by the requisite two-thirds vote:

"*Resolved,* that the board of supervisors of Cheboygan county be authorized to borrow $35,000 upon the faith and credit of the county of Cheboygan, and to issue the bonds of said county, to be payable in 10 installments, within 30 years of the date of their issue, first installment to be made payable 10 years from date of issue, and to bear interest at not exceeding (6) six per cent. per annum, to be used for the purpose of building and erecting a court-house in the county of Cheboygan."

The resolution further provided for the submission to the voters of printed ballots, on each of which were to be printed the words "For the Loan" and "Against the Loan;" with the appropriate square before each, in which the voter was to make a cross. The loan was adopted by a large majority. The board, after the canvass of the votes and the declaration of the result, adopted a resolution reciting the facts, and authorizing the issue of $35,000 of bonds, payable in 15 years from the date of issue, at 5 per cent. per annum. The Attorney General, upon the relation of several citizens and tax-payers, filed a bill in chancery in the circuit court for the county of Ingham, praying for a perpetual injunction against the board of supervisors and others, to enjoin the issue of the bonds,

and the purchase of a court-house site which the board had voted to purchase. A preliminary injunction was issued. The defendants (the relators here) moved to dissolve the injunction. The court dissolved it as to the purchase of the site, but retained it as to the issue of the bonds.

Two questions are raised:

1. Is the issue of the bonds authorized by the resolution and the action of the electors?
2. Has the court of chancery in Ingham county jurisdiction?

1. Section 483, How. Stat., defines and limits the powers of the board of supervisors in financial matters. They cannot exceed the authority there expressly given over the erection of county buildings and the loaning of money. They may fix and determine the site of any county building. Under clause 6, they may cause any such building to be erected, and prescribe the time and manner of erecting the same. By clause 7, they can borrow no greater sum than $1,000 for the purpose of constructing any public building, unless authorized by a majority of the electors of said county. Clause 8 authorizes them—

"To provide for the payment of any loan made by them by tax upon such county, which shall in all cases be within 15 years from the date of such loan."

The learned counsel for relators doubt whether subdivision 8 applies to an issue of bonds. We think, however, that the statute is susceptible of but one construction, viz., that it limits the issue of all bonds to 15 years.

By the resolution, no bonds could be made payable till the expiration of 10 years. It is argued that the 30-year limit provided in the resolution is of no consequence, and that the board might make the amount payable in semi-annual installments, so as to bring it within the limit of

15 years. We cannot assent to this construction. The proposition upon which the electors voted clearly was that the bonds should be made payable in installments extending over a period of 10 to 30 years. If the argument for relators be sound, then the board might make the entire amount payable in 10 monthly installments. The voters were clearly given to understand that the entire loan would not be payable in 15 years, but would be extended over a period of 30 years. No such loan is authorized by law, and it was therefore void. The intent of this law clearly is to prevent the imposition of burdens by taxation extending far into the future, upon those who could have no voice in imposing them.

But, if the resolution were valid, the board disregarded the instruction of the electors, by making the entire amount payable at one time. Many electors might not vote for the imposition of a tax of $35,000 in 15 years, who would vote to pay in installments extending over a period of 30 years. It must be held, therefore, that the proposed issue of the bonds is void because it is not such as the electors authorized.

2. This bill was filed under the supposed authority conferred by section 6612, How. Stat., which reads as follows:

"When it may be necessary to file a bill or information, or to commence any proceedings in chancery, on the part or in behalf of the State, the same may, at the election of the Attorney General, be commenced in the circuit court for the county of Ingham, in the equity side thereof, and said court shall have complete jurisdiction and full power and authority in the premises."

The authority of the Attorney General to institute proceedings of this character has been repeatedly sustained. *Attorney General v. City of Detroit,* 55 Mich. 181; *Attorney General v. Board of Auditors,* 73 Id. 53; *Attorney General v. City of Detroit,* 71 Id. 92; *Attorney General v. City of Detroit,* 26 Id. 263. The power of the Legislature

to provide that such suits may be instituted in the county of Ingham, where the office of the law department of the State is located, is beyond question.

3. The circuit judge dissolved the injunction in so far as it restrained the purchase of a site for the court-house. That question is therefore not before us for determination.

The writ will be denied, without costs.

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

IN THE MATTER OF THE ESTATE OF CATHERINE SCHILLING, DECEASED. DELLA MOORE v. HENRY SCHINDEHETTE, EXECUTOR, ETC., ET AL.

Will—Estates in land—Restraint upon alienation.

A mother devised to four of her children each one-fifth of her estate, and to the child or children of a fifth child the remainder of the estate. The will then provided that none of the real estate should be sold or divided between said devisees before the youngest child should arrive at full age, and that, in case the fifth child should die leaving no child or children, the remainder of the estate should be given to the four devisees, share and share alike. The fifth child had one child when the will was executed and at the time of the death of the testatrix. Two daughters were thereafter born to her, one of whom, as also the child first mentioned, died before their mother. And it is held that, as to the real estate devised to the four children in fee, the proviso restricting its alienation or division before the youngest child should attain full age is void; nor can it now be upheld as to the remaining one-fifth, which vested in the surviving grandchild at the death of her mother.

Certiorari to Wayne. (Donovan, J.) Submitted on briefs October 31, 1894. Decided December 7, 1894.

Defendants bring *certiorari* to review an order of the circuit court affirming an order of distribution made in the probate court. Affirmed. The facts are stated in the opinion.

Edwin F. Conely and *Orla B. Taylor,* for appellants.

A. G. Pitts and *Julian G. Dickinson,* for claimant (Della Moore).

LONG, J. Catherine Schilling died testate September 19, 1883, leaving five children her surviving, to wit, Caroline Friederika, wife of Thomas Moore; Heinrich M., aged 18 years; George L., aged 13; Herman M., aged 11; and Maria W., aged 6 years. The will was admitted to probate October 23, 1883. The provisions of the will necessary to a discussion of this case are as follows:

"*First.* After the payment of all my debts and debts of my funeral and other expenses, I give and bequeath and devise my estate as follows: To my four children Heinrich Martin Schilling, George Ludwig Schilling, Herman Martin Schilling, and Maria Wilhelmina Schilling, each one-fifth (1-5) part, and to the child or children of my daughter Caroline Friederika, formerly Schilling, and at present wife of Thomas Moore, of Detroit, Michigan, one-fifth (1-5) part, of all my real and personal estate, goods, chattels, moneys on hand, in bank or otherwise, bills receivable, and all other articles of every name and nature.

"*Second.* Provided always, that none of my said real estate shall be sold or divided between my said heirs before my youngest child is at the age of twenty-one (21) years.

"*Third.* And it is hereby expressly provided that in case my daughter Caroline Friederika, wife of Thomas Moore, should die without leaving any child or children, then their fifth part shall be given to my first four-mentioned children, share and share alike."

At the time of the death of the testatrix, her daughter Caroline Friederika Moore had one child, Grace by name.[1]

[1] Grace was born September 18, 1882, and the will was executed June 4, 1883.

September 20, 1884, another daughter was born,—the present claimant, Della Moore,—and in November, 1886, Grace died. In 1887, another daughter, Minnie by name, was born to Caroline Friederika Moore, but she died in the fall of that year, and shortly after her death the mother died. Thus the only child living at her death was Della. The bulk of Mrs. Schilling's property was in real estate, and it so remained until January 12, 1891, when the greater portion of it was condemned by the city for the purpose of opening a street. Thereby a fund of $4,475 was created, which by order of this Court was turned over to the executor, and is now in his hands.[1] It is agreed between counsel that the fund thus created shall be treated as real estate, and is subject to the law relating thereto. Upon the settlement of the estate the probate court made an order of distribution of the residue after payment of debts, etc., giving to Della Moore one-fifth part. The executor and the other devisees appealed. This order of distribution was affirmed in the circuit. An appeal is taken from that order of affirmance.

Counsel for claimant, Della Moore, contend:

1. That upon the death of Caroline Friederika Moore the claimant, Della, became absolutely entitled to a one-fifth interest in said estate.

2. That the second paragraph of the will, which provides that no distribution of the estate shall be made until the youngest child becomes of age, is invalid, and therefore the claimant is entitled to immediate possession of her share.

The probate and circuit courts must have arrived at this conclusion, as an order of distribution was made, though the youngest child of the testatrix has not yet attained her majority.

On the other hand, it is contended by counsel for ap-

[1] See *City of Detroit v. Schilling*, 93 Mich. 429.

pellants that the estate granted to the claimant is a vested future estate, without the intervention of a precedent estate, subject to be divested in favor of the children of the testatrix upon the happening of a contingency subsequent, to wit, the extinction of the class now consisting of the claimant, Della Moore, before the period of distribution; and counsel argue that it is the contingent interest of the children of the testatrix which counsel for claimant leave out of sight; that it is this interest which, in this case, prevents the claimant from taking a fee-simple; that the fee is not held in abeyance, but is vested; that counsel for claimant make no distinction between an estate defeasible upon condition subsequent and a fee-simple; that the fee passes in the one instance as well as in the other; that the claimant has a fee interest, but not a fee-simple absolute interest. Claim is therefore made that such construction should be given the will as to protect the contingent remainder over to the children of the testatrix, and hence no distribution should be made until the arrival at age of the youngest child of the testatrix, as that is the period fixed by the will for distribution.

We cannot assent to this proposition. By the first paragraph of the will the four children Heinrich Martin, George Ludwig, Herman Martin, and Maria Wilhelmina were each given one-fifth. This is a devise to each of them of one-fifth of the estate in fee-simple absolute. The other fifth is given by the same paragraph to the child or children of Caroline. The child or children of Caroline take this one-fifth subject to the conditions of the third paragraph. But by this third paragraph, if Caroline should die without leaving any child or children, the four children of the testatrix first named were to take this other fifth in fee; if, however, Caroline left child or children her surviving, such child or children should take

this fifth in fee. Caroline did leave a child her surviving, the claimant in this case.

In giving construction to the will, we must, if legal, carry out the intent of the testatrix. This one-fifth is the only part in controversy. When the testatrix died, Caroline was living, and had one child, Grace, who took this one-fifth part in fee, conditioned, however, to let in after-born children of Caroline, who would take an equal share with her. Grace died, Della was born, and Minnie was born and died, leaving Della the only representative of this class. Della then held the estate in fee, subject to the contingency of being opened to let in other children born to Caroline to share with her, and the further contingency of surviving her mother, Caroline. These are the only contingencies provided for in the will. It may then be said that at the death of the testatrix this one-fifth part vested in fee in Grace, subject to the contingencies mentioned; and that Della, who is the representative and survivor of this class, and took this one-fifth interest in fee upon these contingencies, now holds this fifth part in fee-simple absolute by the death of her mother, for by the death of Caroline leaving a child all possibility of the children of the testatrix taking has become extinct.

Counsel for appellants concede that on the death of the testatrix it was a vested future estate in a class subject to open and let in new members until the death of Caroline Moore, under sections 5523, 5524, How. Stat. But they claim that it was subject to be wholly divested by the extinction of the class before the period of distribution, in which case there would be a remainder over to the children of the testatrix. The period of distribution, however, is not fixed by the third paragraph of the will, and the time when this fifth part was to vest absolutely in fee in the children of Caroline is not dependent upon the

time of the distribution fixed by the second paragraph of the will, but is fixed by the time when Caroline should die, leaving child or children.

The contention that the second paragraph is void has great force. As to the four-fifths of the estate which was vested in the first-named children in fee, it is void; for one of the essential features of an estate in fee is the right to convey, and when a testator attempts to attach a restriction on such right to convey such restraint is void as repugnant to the nature of the estate. *Mandlebaum v. McDonell*, 29 Mich. 78. At the death of Caroline Moore, her daughter Della took the fifth part in fee, as no contingency can now arise by which it could be divested; and, so far as the children of the testatrix are concerned, they have no interest in it whatever. There is no provision in the will as to what disposition is to be made of the income from the estate. Whatever income there may be from this one-fifth, since it vested in the claimant at the death of her mother in 1887, she would be entitled to. The second clause of the will being void as to the four-fifths given to the testatrix's children, it can hardly be said that it can be upheld as to the one-fifth now resting in claimant. The intent of the testatrix was to keep the estate intact until the arrival at legal age of the child Maria Wilhelmina, then aged six years. It has failed as to four-fifths of the estate because of the restraint upon alienation. It cannot be said that the testatrix intended to tie up this one-fifth and not the whole. We think the court below very properly ordered distribution to the claimant as well as to the others.

The judgment must be affirmed.

The other Justices concurred.

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102 618
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ARCHIBALD P. MCKINNON AND THOMAS W. BURRELL v. SAMUEL G. M. GATES.

Practice in circuit court—Evidence—Factors and brokers—Action for commission.

1. Immaterial or irrelevant testimony must be of such a character as naturally to prejudice the jury against the party objecting to its admission; otherwise, the judgment will not be reversed for its admission.
2. Where an objection to incompetent testimony is overruled, a failure to object to similar testimony afterwards introduced, and the meeting of the same by counter proof, does not waive the error.
3. In an action to recover a commission agreed to be paid by the purchaser of logs, papers relating to the situation, amount, character, and quality of the logs, which one of the plaintiffs gave to the defendant during the negotiations, are admissible as part of the *res gestae*.
4. The testimony of the defendant that in his conversation with the plaintiffs he had no idea that they intended to charge for commission was properly excluded.
5. Where plaintiffs seek to recover, upon an express contract, a certain commission agreed to be paid on the purchase of a quantity of saw-logs, testimony on their part that the commission on the sale of the logs was worth 3 per cent. on the dollar on the amount for which the logs sold is inadmissible; citing *McDonald v. Ortman*, 98 Mich. 40, 42.[1]
6. Where a lumber manufacturer receives an option on a quantity of logs from a log and lumber broker, and agrees to pay a certain commission if he purchases the logs, he cannot defend, in an action to recover the agreed commission, upon the ground that he purchased the logs from the owner conditionally, or upon terms different from those contained in the option, the broker being ignorant of any such change.

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[1] For cases involving the admissibility of testimony of this character under various circumstances, see *Alderton v. Wright*, 81 Mich. 294; *Wyatt v. Herring*, 90 Id. 581; *Lewis v. Roulo*, 93 Id. 475; *Banghart v. Hyde*, 94 Id. 49; *Swarthout v. Lucas*, 101 Id. 609, and cases cited.

7. A telegram from the owners of logs to a log broker, to whom they had given an option on the logs, which he had sold to a lumber manufacturer for an agreed commission, stating that the option was extended, is competent evidence, in a suit by the broker to recover the commission, of the extension of the option.

Error to Cheboygan. (Pailthorp, J.) Argued October 31, 1894. Decided December 7, 1894.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

C. L. Collins, for appellant.

McArthur & Sprague (*Oscar Adams,* of counsel), for plaintiffs.

GRANT, J. Plaintiffs recovered a verdict and judgment for $2,329.04, principal and interest, as commission on the sale of a lot of logs purchased by defendant from McConnell & Tough, of Canada. Plaintiff McKinnon resides in Cheboygan, in this State, has been a lumberman for 18 years, and for the last 6 years has been principally engaged in dealing in logs and lumber on commission. Burrell is a lumberman doing business mostly in Canada. The defendant is a manufacturer of lumber in Bay City, Mich. McConnell & Tough had about 9,000,000 feet of logs lying in the Spanish river and one of its tributaries in Canada. Burrell, learning that the logs were for sale, made a partial examination, and on February 18, 1891, obtained a written option in the name of the plaintiffs for their purchase. The price was $7.50 per thousand feet. Plaintiffs were to have 30 days within which to conclude the purchase, two-thirds to be paid in cash upon the completion of the contract, and the balance when the logs were scaled at the mouth of the river. A contract had been let by McConnell & Tough to drive the logs, for which plaintiffs agreed

to pay. February 19, 1891, Burrell wrote McKinnon, inclosing the option.

Plaintiffs declared upon an express contract for 3 per cent. commission with the defendant if he purchased the logs. Their evidence supported the claim. Defendant denied any contract whatever with the plaintiffs, and gave evidence to support his claim. Defendant and the Michigan Pipe Company purchased the logs, and the purchase was evidenced by a written agreement. This agreement differed from the terms of the option in three particulars:

1. The price per thousand was $7.90, instead of $7.50.
2. McConnell & Tough agreed to drive the logs, and deliver them at the mouth of the river.
3. The contract provided that if the vendors should not be able to deliver the logs, or any portion thereof, during the spring or summer of 1891, owing to their being stuck for want of water, lost by tempest, or any other unavoidable accident, neither party should be compelled to carry out the agreement, and the vendees should be liable to pay for only such logs as were actually delivered.

The increased price was in consequence of the delivery at the mouth of the river, the driving being at the expense of the sellers rather than the buyers, as provided in the option. Only 675,000 feet were delivered, and the vendors and vendees settled their difference as to those undelivered, the terms of which settlement do not appear.

According to the plaintiffs' evidence, they gave their option to the defendant, who went to Canada and made the purchase. Defendant informed them that he had purchased, and they were not notified, and had no knowledge until after this suit was commenced, that the terms of the contract differed from those of the option. The issues of fact were settled by the jury in favor of the plaintiffs. The errors alleged arise upon the admission of testimony and the charge of the court.

1. The first error complained of is the admission of the

letter of February 19, 1891, from Burrell to McKinnon, and of an envelope and certain papers which McKinnon testified that he gave to defendant during the negotiations. These papers related to the situation, the amount, character, and quality of the logs, and included two letters written by McConnell & Tough to McKinnon, one saying:

"Have no estimate on quantity; not customary here. Less than 1,000 pieces Norway, balance white pine. Can mail specification if desired."

The other:

"Logs good. Your Mr. Burrell has thoroughly investigated our logs. We prefer purchasers to act on their own opinions. Little over seven to the thousand."

The letter of February 19 is of no consequence, except that it is claimed by the plaintiffs that it was introduced for the purpose of fixing the date. It contained nothing affecting the issue before the jury. It might with propriety have been ruled out as immaterial, but it is impossible to hold that its contents could have affected the jury to the prejudice of defendant. Immaterial or irrelevant testimony must be of such a character as naturally to prejudice the jury against the party objecting to its admission; otherwise, the judgment will not be reversed for its admission. The other papers were properly introduced as part of the *res gestae*. They related to the subject-matter in controversy, and contained information which might be of value to the proposed purchaser.

2. The court refused to permit the defendant to testify that in his conversation with the plaintiffs he had no idea that they intended to charge for commission. His secret understanding was incompetent. The intent and agreement of the parties were to be determined from their conversation and their acts. Neither party was at liberty to testify to his understanding.

3. Mr. McKinnon was permitted to testify that "the

commission on the sale of these logs was worth 3 per cent. on the dollar on the amount for which the property sold." On cross-examination of this same witness the court ruled out testimony to show the time occupied by the plaintiffs in the negotiations with defendant. If the former testimony were competent, the latter would be equally so; nor would it be an answer to the latter to say that the question was not broad enough to cover plaintiffs' negotiations with McConnell & Tough, and their time and expenses incurred in examining the timber. It was the first step in the inquiry, and was admissible upon the theory of the plaintiffs that they could show the value of their services. At the time the testimony was offered, the defendant had raised no question of the reasonableness of the charge. Plaintiffs' suit was based upon an express contract set out in the declaration, and not upon a count for *quantum meruit*. This point is expressly ruled by *McDonald v. Ortman*, 98 Mich. 40, 42, where the authorities in this State are cited. The testimony should have been excluded. It is, however, insisted that other evidence of this character was afterwards introduced without objection; that the defendant introduced evidence to controvert it; and that this cured the error. This is not the law. One ruling upon the point by the court was sufficient, and the defendant had the right to rest upon such ruling, and to meet the evidence by counter proof without waiving the error.

4. The defendant requested the court to instruct the jury that, if he did not buy the logs under the option, he was not liable for the commission charges, and that at most plaintiffs could recover a commission only on the logs actually purchased and delivered. These requests were refused, and the court instructed the jury that it made no difference whether the terms of the purchase were in accordance with the terms of the option, unless the defendant, because of some fault of either the plaintiffs

or the owners of the logs, was deprived of the right of purchase in accordance with the exact terms of the option. We think the refusal and the instruction were correct. If the defendant received the option from the plaintiffs, and agreed to pay a commission if he purchased the logs, he cannot defend upon the ground that he purchased them conditionally, or upon terms different from those contained in the option. If McConnell & Tough refused to sell to defendant under the terms of the option, it was the legal duty of defendant to notify plaintiffs of that fact, and thus give them the opportunity to seek other purchasers or to abandon the option. No other course can be justified by reason and fair dealing.

5. On March 19, 1891, McConnell & Tough telegraphed McKinnon, saying:

"Gates still negotiating. Extended time to Monday,—24th."

The admission of this telegram is alleged as error because defendant was not shown to have had any knowledge of it, and that it could not in any manner affect him. The testimony was competent to show the extension of the option. In view of a new trial, it may be well to remark that a different question would have been presented if the option had expired before the purchase, without any fault of the defendant, and he had purchased in good faith, relying upon its expiration.

Judgment reversed, with costs, and a new trial granted.

The other Justices concurred.

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LOUISE M. TUNNICLIFFE, BY HER NEXT FRIEND, v. THE BAY CITIES CONSOLIDATED RAILWAY COMPANY.

Married woman—Personal injuries—Damages—Loss of time—Miscarriage—Negligence—Instructions to jury.

1. In a personal injury case prosecuted by a married woman, the plaintiff was permitted to testify, against objection, that before receiving the injury complained of she had painted pictures for profit, and was able to earn a certain sum per week, and that by reason of the injury she was rendered unable to do that kind of work. And it is held that the husband is, *prima facie*, entitled to the earnings of his wife, and that it was error to admit the testimony, and permit a recovery for the impairment of plaintiff's ability to earn money.
2. The plaintiff contended that as she was a minor, and prosecuted the suit by her husband as her next friend, he would be estopped by the verdict from bringing suit thereafter to recover for such services, and hence no injury could have been done the defendant. It appeared, however, that, after the objectionable testimony had been given, a question on the same line was put to another witness, which was objected to, and the court said: "I think the husband is entitled to the wages. I guess there is no use going into that in this case at all." And it is held that, after this statement, the defendant's counsel could not be expected to meet such proofs as had crept in on the subject; that the subsequent charge of the court to the effect that, if the plaintiff was entitled to recover, she was entitled to the value of her time, etc., was not only erroneous as matter of law, but, given as it was, after said statement by the court, which cut off proofs on the part of the defendant, was based upon a necessarily *ex parte* showing.
3. The testimony in a personal injury case brought by a married woman tended to show that one of the results of the injury was a miscarriage. The court instructed the jury that they might, if they found a verdict for the plaintiff, give as a part of her damages what they should find the society, enjoyment, and prospective services of the child were reasonably worth. And it is held that the charge was clearly erroneous; that there was, of course, no proof in the case as to the prospective

earnings of the child, even if the mother would be the proper person to recover for such loss; that the loss of the child's society would not be a proper element of damages; that while the jury are allowed to consider the case with all its facts, and to take into account, for the purpose of compensation, not only the physical pain, but also mental suffering, in determining the award of damages, and while, of necessity, this involves, to some extent, a consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb, yet beyond this it would not be competent for the jury to go, and attempt to compensate for the sorrow and grieving.

4. In a personal injury case against a street-railway company, the declaration averred that, in the rear platform of the car from which plaintiff was attempting to alight at the time she received the injury complained of, the defendant had negligently placed and permitted to remain an iron bolt, which projected above said platform a specified distance; that while plaintiff was passing out of said car, and onto and over said platform, for the purpose of alighting therefrom, and was stepping from the platform of said car to the steps thereof, said car being stationary, the defendant negligently caused said car to be suddenly started and moved forward, by means whereof plaintiff was thrown down and against said car, and down and upon the platform thereof, and down and upon and against the steps of said car, and her dress skirt or skirts caught on said bolt, and she was held fast to and against said car and platform and steps, and partially upon the ground, and was so held, dragged, and carried along by the motion of said car, and injured, etc. Plaintiff's testimony was to the effect that she was in the act of stepping off the car when it started, and was thrown backward, and her clothing caught; that she took it for granted that her clothes were caught; that she did not know in what; that she could not see, but in her struggle she threw her arm behind her, and, as she did so, her hand came down on something that projected from the platform; that she pulled her skirt, and a bolt came out from the platform. On cross-examination she testified that she should think the bolt had no part in throwing her down, aside from the jerking of the car. The defendant contended that there was no room under this testimony for the jury to find that plaintiff's clothing caught on the bolt before she was thrown backward. And it is held that this is too narrow a construction of the testi-

mony; that it appears from the charge of the court that defendant contended before the jury that plaintiff's story was unreasonable, and that the injury could not have occurred in the manner supposed by her; that the jury had a right to construe the facts, and if, in their judgment, it was more reasonable to suppose that plaintiff's clothing caught upon the bolt without her knowledge before the car started, and threw her to the ground, it cannot be said that the circumstances of the case did not furnish a justification for that inference.

Error to Bay. (Maxwell, J.) Argued October 11, 1894. Decided December 7, 1894.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

T. A. E. & J. C. Weadock, for appellant.

James Van Kleeck, for plaintiff.

MONTGOMERY, J. Plaintiff is a married woman and a minor. She sues by her next friend to recover for personal injuries received while attempting to alight from a car of the defendant. Plaintiff recovered, and defendant brings error. The negligence alleged was that—

"While plaintiff, with the consent and permission of said defendant, with due care and diligence on her part, was passing out of said car, and onto and over the rear platform of the same, for the purpose of alighting therefrom and leaving said car, and was stepping from the platform of said car to the steps thereof, said car being then and there stationary, said defendant carelessly and negligently caused said car, from which she was then departing and stepping off, to be violently and suddenly started, jerked, and moved forward, by means whereof this plaintiff, while in the exercise of proper care and diligence on her part, was thrown down and against said car, and down and upon the platform thereof, and down and upon and against the steps of said car, and her dress skirt or skirts caught on said bolt, so negligently put, placed, and permitted to be and remain in said platform by said defendant as aforesaid, and she was held fast to and against said car, and to and against the platform of

said car, and to and against the steps thereof, and partially upon the ground, and was so held, dragged, and carried along by the motion of said car," etc.

The declaration had previously alleged that defendant had "carelessly and negligently placed, and permitted to be and remain, an iron bolt, extending and projecting above the rear platform, to wit, five inches."

1. In the course of the charge to the jury, the circuit judge asked for suggestions from counsel. Defendant's counsel thereupon asked the court to charge that the plaintiff could not recover under any circumstances by reason of the location of the bolt or pedal, and called attention to a portion of the charge of the court as follows: "I do not understand that it is seriously contended by the defendant if the accident happened because of this bolt remaining in an improper place during the journey, to endanger women getting off the car, but what the company is liable,"—and asked that it be modified. The plaintiff's testimony was to the effect that she was in the act of stepping off the car when it started, and that she was thrown backward, and her clothing caught. She further testified:

"I took it for granted that my clothes were caught; I didn't know in what. I could not see, but in my struggle I threw my arm behind me, and, as I did so, my hand came down on something that projected from the platform, and I pulled my skirt, and a bolt came out from the platform."

On cross-examination she testified:

"I should think the bolt had no part in throwing me down, aside from the jerking of the car."

It is claimed by the defendant that there was no room under this testimony for the jury to find that plaintiff's clothing was caught before she was thrown backward. But we think this construction of the testimony is too narrow. It would appear from the charge of the court

that defendant had contended before the jury that plaintiff's story was unreasonable, and that the injury could not have occurred in the manner supposed by plaintiff. The jury had a right to construe the facts, and if, in their judgment, it was more reasonable to suppose that her clothing had been caught upon the bolt without her knowledge before the car started, and threw her to the ground, we cannot say that the circumstances of the case did not furnish a justification for that inference.

2. On the trial the plaintiff was permitted, against the defendant's objection, to testify that before the injury she had painted for profit, and was able to earn $5 to $10 and $15 per week, and that by the injury she was rendered unable to do this kind of work. The court charged the jury upon the subject of damages as follows:

"She is entitled to recover, in case you so determine from the evidence,—she is entitled, first, to the value of her time. Whatever it was worth a month or a week, you will give it to her, if you come to that conclusion, as I said before."

It was error to admit this testimony, and permit a recovery for the impairment of the plaintiff's ability to earn money. The husband is, *prima facie*, entitled to the earnings of the wife. *Hicks v. McLachlan*, 94 Mich. 282.

But it is contended in the present case that, as the husband was a party to the proceedings as next friend to the plaintiff, he would be estopped by the verdict from bringing suit hereafter to recover these damages, and hence that no injury could have been done defendant; and *Baker v. Railroad Co.*, 91 Mich. 298, is cited as sustaining this contention. The case cited fully recognizes that the objection as made in a suit prosecuted by the next friend is good; but it was held in that case that inasmuch as such testimony was admitted, and as plaintiff *actually received payment* upon the judgment in his capac-

ity as next friend, he ought not to be permitted to recover it again in his individual capacity. In the present case, the defendant, upon making the objection, had no reason to apprehend that the plaintiff expected to claim a recovery for any damages not within the issue; and particularly was this true under the circumstances of this case, as it appears conclusively that the defendant could not have understood that it was necessary to offer any proof to meet the plaintiff's testimony, for, after the plaintiff's testimony, above quoted, had been given, a question was put to another witness on the same line, which was objected to, and the court said:

"I think the husband is entitled to the wages. I guess there is no use going into that in this case at all."

After this, certainly, the defendant's counsel could not be expected to meet such proofs as had crept in on this subject; and the subsequent charge, above quoted, was not only erroneous as matter of law, but, given as it was, after the previous intimation which cut off proofs on the part of the defendant, was based upon a necessarily *ex parte* showing.

3. The testimony tended to show that one of the results of the injury to plaintiff was a miscarriage. The court charged the jury as follows:

"As to this child, if the plaintiff lost a child by reason of the liability of the defendant in this case, you may give damage for it. The society, enjoyment, and prospective services of the child is a recognized element in that regard, and you may give what it is reasonably worth."

This charge was clearly erroneous. There was, of course, no proof in the case as to the prospective earnings of the child, even if the mother would be the proper person to recover for such loss. Nor would the loss of the child's society be a proper element of damages. While the jury are allowed to consider the case with all its facts, and to

take into account, for the purpose of compensation, not only the physical pain, but also mental suffering, in determining the award of damages, and while, of necessity, this involves to some extent a consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb, yet beyond this it would not be competent for the jury to go, and to attempt to compensate for the sorrow and grieving of the mother. As was said in *Bovee v. Town of Danville,* 53 Vt. 183:

"If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject of compensation. But the rule goes no further. Any injured feelings *following* the miscarriage, not part of the pain *naturally attending* it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachael, she wept for her children, and *would not* be comforted, a question of *continuing* damage is presented, too delicate to be weighed by any scales which the law has yet invented."

The only case which we have found which is in seeming conflict with this is that of *Smith v. Overby,* 30 Ga. 241; but the supreme court of that state, in the later case of *Railroad Co. v. Randall,* 85 Ga. 297, in treating of a charge which permitted of a recovery for the pain, suffering, or *sorrow* resulting from miscarriage, said:

"We would suggest that the word 'sorrow' be omitted from the charge of the court on the next trial. It is most too remote to be considered an element of damage, unless it is that sorrow which accompanies the actual injury, and is suffered at the time of the miscarriage. The loss of a child by a miscarriage would affect women

so differently that it would be hard for *men*, sitting as jurors, to estimate it as an element of damage; and we therefore think it would be better to omit in the future any instruction to the jury upon the question of sorrow as an element of damage. Pain and suffering give a wide latitude to juries, and there are very few complaints made of the smallness of the amounts found by juries upon these two elements of damage,"—citing the case of *Bovee v. Town of Danville*, above cited. See, also, 5 Amer. & Eng. Enc. Law, 42.

Numerous other questions are discussed in the briefs of counsel, but we think it unnecessary to consider them at length. Those relating to the expressions of pain and complaints of present suffering are within the previous rulings of this Court. See *Girard v. City of Kalamazoo*, 92 Mich. 610; *Lucas v. Railway Co.*, 92 Id. 412, and cases cited. None of the other questions are likely to arise on a new trial.

For the errors pointed out, the judgment will be reversed, with costs, and a new trial ordered.

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

STEPHEN F. DERRY v. THE BOARD OF EDUCATION OF THE CITY OF EAST SAGINAW.

102 631
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146 66

Schools and school-districts—Contract of employment—Discharge—Damages.

A school board contracted with a qualified teacher for a year's services at a fixed salary, and reserved the right to discharge the teacher at any time whenever the board might desire to terminate the contract, upon one week's written notice to be given by its committee on teachers and text-books. Proceed-

ings were taken by the board with a view to terminating the contract, but the teacher, claiming that they were invalid and ineffectual, presented himself for work under the contract, and was refused employment. And it is held that in any event such refusal was equivalent to notice under the contract, and entitled the teacher to only one week's salary thereafter.

Error to Saginaw. (McKnight, J.) Argued November 1, 1894. Decided December 7, 1894.

Assumpsit. Defendant brings error. Reversed, and judgment entered in this Court for the plaintiff for one week's salary. The facts are stated in the opinion.

Charles S. Smith, for appellant.

Tarsney & Wicker, for plaintiff.

GRANT, J. Plaintiff sued to recover for services as school teacher. The defendant pleaded the general issue, with notice that the contract sued upon was canceled and terminated before the time when the said plaintiff's services were to begin.

Plaintiff was teaching at the time of the execution of the contract, as principal of the ungraded school. At a regular meeting of the board held June 15 it refused to adopt the recommendation of the committee on schools to discontinue the ungraded school, and adopted a resolution appointing plaintiff principal at the same salary as the previous year. June 16 the secretary of the board, on its behalf, executed a written contract with plaintiff, whereby he agreed "to serve as a teacher in the public schools of the city for the ensuing school year, commencing September 5, for $700." The contract contained the following clause:

"Said board reserving to itself the right to change said teacher from one school or grade to another school or grade, or to discharge said teacher at any time whenever it may desire to terminate this contract, upon one week's

written notice to said teacher by its committee on teachers and text-books."

June 29 a special meeting of said board was held to take action upon the resignation of the superintendent of schools, and to consider such other business as might properly come before the board. At this meeting the action of June 15 was reconsidered, and a resolution adopted discontinuing the ungraded school, and also instructing the committee on teachers and school books to give plaintiff the requisite notice that his services were no longer required. July 7 the committee wrote plaintiff, notifying him that his contract would terminate July 16. At the time this notice was mailed he was out of town, and did not receive it until in August or the 1st of September. He, however, was informed of the action of the board June 30. At the opening of the schools in September he presented himself for work under the contract, and was refused employment. He secured other employment in May following. The court directed a verdict for three months' salary.

The defendant denies the authority of the secretary to make the contract. This objection comes too late, as the plea admitted its execution.[1]

Several objections are made to the validity of the action of the board in rescinding the contract. We deem it unnecessary to mention them. The board refused plaintiff employment at the opening of the school. This was equivalent to notice, and entitled him to recover for only one week's salary. *Fisher v. Monroe*, 21 N. Y. Supp. 995; *Peverly v. Poole*, 19 Abb. N. C. 271; *Hartley v. Harman*, 3 Perry & D. 567.

Judgment reversed, and entered in this Court for the

[1] See *Insurance Co. v. Howell*, 101 Mich. 332, 335, and note.

plaintiff in accordance with this opinion. The defendant will recover costs.

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

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104 519
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131 571

ADOLPHUS GRAVES v. THE JOINT BOARD OF SCHOOL INSPECTORS OF THE TOWNSHIPS OF BENTON AND GRANT, CHEBOYGAN COUNTY.

Fractional school-district—Alteration of boundaries—Jurisdiction.

The requirement of 3 How. Stat. § 5040, that, whenever the proper boards of school inspectors shall contemplate an alteration of the boundaries of a fractional district, the clerks of the several townships interested shall give at least 10 days' notice of the time and place of the meeting of the inspectors, and the alteration proposed, by posting such notice in three public places in the townships, one of which shall be in each of the districts that may be affected by such alteration, is jurisdictional, and proof of posting such notice should be filed with the clerk of the joint board before any action is taken.

Certiorari to review proceedings to alter the boundaries of a fractional school-district. Submitted on briefs October 31, 1894. Proceedings quashed December 7, 1894. The facts are stated in the opinion.

Frank Shepherd, for petitioner.

McGRATH, C. J. This is *certiorari* to review the action of certain boards of school inspectors of the townships of Benton and Grant in attempting to alter the boundaries

of a fractional school-district. The records of the meeting, returned here, do not contain any evidence that proof was made of the posting of the notice of the meeting; and the only notice appearing, if any was posted, was signed by the clerk of Benton township only.

The statute requires that, in case of a proposed alteration of a fractional district, the notice shall be given by the clerk of each interested township, and that it shall be posted in each of such townships. 3 How. Stat. § 5040. The statutory requirement is jurisdictional, and proof of posting such notice should be filed with the clerk of the joint board before any action is taken. *Coulter v. School Inspectors*, 59 Mich. 391; *School-District No. 3 v. School-District No. 1*, 63 Id. 51; *Fractional School-District v. School Inspectors*, 63 Id. 611; *Fractional School-District v. Metcalf*, 93 Id. 497. It appears by an amended return that no further proceedings have been taken to carry into effect the action here complained of.

The proceedings must be quashed and held for naught, with costs to petitioner.

The other Justices concurred.

JEROME HUTCHINSON v. HARVEY HUTCHINSON.

102 635
158 254

Bills and notes—Parol evidence—Replevin—Damages.

1. Where the giving and taking of a promissory note are the deliberate acts of the parties, with full knowledge of the contents of the instrument, and the note is not tainted with any fraud, parol evidence is inadmissible to change the terms of payment.
2. In replevin for a span of horses, for the purchase price of which

the defendant has given his promissory note, which is the only written evidence of the contract, it is competent for the plaintiff to show that the note was not received in payment, and that the title to the horses was to remain in him until the purchase price should be paid.

3. In replevin for a span of horses, the proper measure of the defendant's damages is the value of the use of the horses during the time he has been deprived of their use.

Error to Muskegon. (Dickerman, J.) Argued November 1, 1894. Decided December 7, 1894.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Brown & Lovelace, for appellant.

Jerome E. Turner, for defendant.

GRANT, J. In April, 1890, plaintiff leased his farm to his son, and at the same time sold him a span of horses, which are the subject of controversy in this suit. The price was $300, for which defendant gave his promissory note dated April 1, 1890, due April 1, 1893, which was the only written evidence of the contract. Plaintiff claimed, and his evidence sustained his claim, that the title was to rest in him until the purchase price was paid; that the note was given and received as a mere memorandum; that defendant was to pay $100 per year, should treat the team well, and use it only for farm purposes; that he had made no payments, and had maltreated the team. The verdict was for the defendant for the return of the property and $350 damages.

1. The court instructed the jury that parol evidence was not admissible to change the terms of the payment. The charge was correct. The note was not tainted with any fraud on the part of defendant. The giving and taking were deliberate acts of the parties, with full knowledge

of the contents of the instrument. Its legal effect was therefore binding upon both, and fixed the time of payment. The wisdom of the rule conspicuously appears in this case, where the parties radically disagree upon their conversations at and prior to the date of the note. In such cases the unambiguous writing must control.

2. It was competent to show that the note was not received in payment, and that the title should remain in the plaintiff for the purposes claimed by him. Upon this point the case was submitted to the jury under proper instructions. A serious error, however, was committed in admitting evidence of the defendant's damages, sustained by him between the time of the seizure under the writ and the trial. He testified under objection and exception that he was damaged to the amount of $800. The proper measure of damages was the value of the use of the team during the time the defendant was deprived of its use.

3. Defendant's counsel went outside of the record and of the limit of legitimate argument in commenting to the jury upon the wealth of the plaintiff and facts which did not appear in evidence.

Other errors are alleged, but, inasmuch as they are not likely to arise upon a new trial, they need not be mentioned.

Judgment reversed, and new trial ordered.

The other Justices concurred.

102 638
113 232

SAMUEL W. WEBBER v. WILLIAM ALDERMAN, IMPLEADED WITH GEORGE W. FRENCH.

Bills and notes—Release of surety—Partnership.

The individual promise of one member of a banking firm to release an accommodation indorser from liability on a note held by the firm, and to pay the note from means in his hands belonging to the maker of the note, cannot be construed as the promise of the firm, and will not exonerate the indorser from liability on the note.

Error to Ionia. (Smith, J.) Argued November 1, 1894. Decided December 7, 1894.

Assumpsit. Defendant Alderman brings error. Affirmed. The facts are stated in the opinion.

R. A. Hawley, for appellant.

Ellis & Miller, for plaintiff.

LONG, J. This is an action of *assumpsit* on a promissory note for $150, given by defendant French to Webber, Just & Co., and indorsed by defendant Alderman for accommodation. Plaintiff got the note by indorsement after maturity. Defendant Alderman, it is conceded, received none of the proceeds of the note. Webber, Just & Co. were a copartnership doing a banking business, the firm being composed of Samuel W. Webber, Josiah E. Just, Charles W. French, and a Mr. Fox. After the note matured, defendant Alderman called upon Charles W. French, who was a son of George W. French, the maker of the note, at the bank, and claims that it was there arranged between them that he should be released from the note. He was asked to give the conversation that took place at that time, and said:

"I stepped into the bank, and said to Charles French, in regard to his father's note that I was on,—the one that was about due; spoke to him about it,—and he says: 'You needn't pay any further attention to that note. Father has put means in my hands so I can take care of that note. I will release you entirely from the note, and see to it.' I relied upon that, that his father had put means in his hands by which he could take care of the note, and he would pay the note. I said nothing about paying the note after that."

He was asked:

"You understood that the means were in Charles French's hands, and not in the hands of the firm?

"*A.* Yes, sir; Charles French's hands."

It was also claimed by defendant Alderman that at that time the maker had property in his hands sufficient to pay the note, but had since become insolvent. Under this evidence the court below directed a verdict in favor of plaintiff against defendant for the amount of the note and interest. Judgment was entered upon the verdict, and defendant Alderman brings error.

Counsel for defendant seeks to invoke the rule that where the creditor promises to exonerate the surety, or to look solely to the principal for payment, and the surety is induced by such promise to postpone or relinquish any of the means of indemnity to which he might otherwise have resorted, it will take effect as an equitable estoppel, and deprive the promisor of the power of retraction. This is a correct statement of the principle. In *Harris v. Brooks*, 21 Pick. 195, 197, it was said:

"A parol declaration of the holder to the surety that he would exonerate him, and look to the principal only, is a good defense, on the ground that it lulls the party into security, and prevents him from obtaining his indemnity; and it would be fraud on the part of the holder afterwards, contrary to such assurance, to call upon such surety."

The same rule was laid down in *Rowley v. Jewett*, 56 Iowa, 492.

But there is no showing in the present case that the holders of the note, Webber, Just & Co., ever made any such promise. It was the individual promise of Charles W. French, and from the testimony of Mr. Alderman he looked to Charles W. French personally to pay and take care of the note. Charles W. French was not pretending to make the promise in behalf of the owners of the note, and it is evident that Alderman did not so regard it, for he was expressly asked if he understood that the means to pay the note were in Charles French's hands, and not in the hands of the firm, and responded, "Yes, sir; Charles French's hands." The promise he relied upon, then, was the individual promise of Charles W. French that he had means in his hands to pay the note, and would pay it, and release him (Alderman) upon it. The case is too plain for argument that this promise cannot be construed as the promise of Webber, Just & Co. to release Mr. Alderman, and the court below very properly directed the verdict for plaintiff.

The judgment is affirmed.

The other Justices concurred.

HANNAH HOGAN v. PATRICK HOGAN AND JAMES HOGAN.

[See 44 Mich. 147.]

Will—Estates in land—Waste—Firewood—Injunction—Election of remedy.

By the terms of a will the testator devised to his wife a life estate in certain land upon which he resided, and to two of his nephews 32 acres of land, subject, however, to its control by the widow until their majority, when it was to be sold, and the proceeds divided equally between them. The widow was also to have firewood off 5 of the 32 acres. Executors were appointed, but no estate or title was vested in them as trustees, nor was a power of sale given to them. The widow cut from the 5 acres, and sold, a quantity of ash and elm logs, intending, as she claimed, with the proceeds, to purchase coal for fuel. She and her vendee were enjoined at the suit of the nephews from removing the logs from the land. Pending a hearing of the equity suit, the widow attempted to cut the logs into firewood, whereupon the guardian of one of the nephews and the other nephew went upon the land and removed the logs, and the widow replevied the same. At the time the logs were cut there were a number of large beach and maple trees upon the 5-acre tract, which were more suitable for firewood than the ones cut. And it is held:

a—That the provision of the will giving the widow the right to firewood from the 5 acres is inconsistent with an intention to give her greater powers or privileges respecting said 5 acres, and must be regarded as indicating the character of the use which she is to enjoy of that portion of the 32 acres, and does not include the right to cut timber into logs, and with the proceeds purchase fuel, so long at least as there is an abundance of fuel timber.

b—That under the rule laid down in *Mandlebaum v. McDonell*, 29 Mich. 78, the devise to the nephews must be regarded as of a present vested remainder in fee; that the cutting of the timber was clearly waste; that the injury was one done to the inheritance; that the property in the logs was in the nephews, and they might seize it, bring trover for its conversion, or replevy it.

c—That, by the conduct of the widow in attempting to cut the logs into firewood, a danger to the property was threatened not contemplated when the bill was filed, the main object of which was to prevent further cutting, and the sale of the logs which had been cut; that the *statu quo* was changed by her own conduct, and, in view of another danger, the complainants had the right to avail themselves of another effective remedy to protect their property.

Error in Ionia. (Davis, J.) Argued November 2, 1894. Decided December 7, 1894.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Clute & Clute, for appellent.

George E. & M. A. Nichols, for defendants.

McGRATH, C. J. Plaintiff's husband died testate, leaving the west half of certain lands on section 22 to plaintiff, during her life, and upon her death to his brother Dennis; the east half of said lands to his brother Dennis; and certain other land, consisting of 32 acres, to two nephews, providing that such real estate should be sold when the nephews became of age, and the proceeds divided equally between said nephews. The will further provided that the widow was "to have firewood off 5 acres of the south-east corner" of the 32 acres, and that she "is to have control of these 32 acres until these children [the two nephews] become of age."[1] Plaintiff cut from the 5 acres named, and sold to one Bennett, a quantity of ash and elm logs. The widow and Bennett were enjoined in a proceeding in equity, on behalf of the nephews, from removing the logs. Pending a final hearing in that proceeding, plaintiff attempted to cut the logs into firewood, and Pat-

[1] For a copy of the will, see *Hogan v. Hogan,* 44 Mich. 148.

rick Hogan, guardian of one of the nephews, and James Hogan, the other nephew, went upon the land and took away the logs. Plaintiff brings replevin.

It is conceded that at the time of the cutting of the logs there were a number of large beach and maple trees upon the 5-acre tract, which were more suitable for firewood than the ones cut, but it is claimed by plaintiff that her intention was, with the proceeds of the logs, to buy coal for fuel.

It is insisted by plaintiff that the clause of the will giving the wife control of the 32 acres during the minority of the nephews imported a tenancy without impeachment for waste. The provision of the will giving to plaintiff the right to firewood from the 5 acres is inconsistent with an intention to give to the plaintiff greater powers or privileges respecting the 5 acres. It must be regarded as indicating the character of the use which she is to enjoy of that portion of the 32 acres. The right to cut firewood from woodland must be exercised in the usual manner, and cannot be extended to the use of the more valuable timber for other purposes, and does not include the right to cut such timber into logs, and with the proceeds buy fuel, so long at least as there is an abundance of fuel timber. *Phillips v. Allen*, 7 Allen, 115; *Padelford v. Padelford*, 7 Pick. 152; 1 Tayl. Landl. & Ten. § 352.

The will gives the 32 acres to the nephews, and provides that the same shall be sold when they become of age, and the money divided equally between them. Executors are appointed, but no estate or title is vested in them as trustees, nor is a power of sale given to them. Under the rule laid down in *Mandlebaum v. McDonell*, 29 Mich. 78, the devise to the nephews must be regarded as of a present vested remainder in fee. The cutting of the timber was clearly waste. The injury was one done to the inheritance. The property in the logs was in the

defendants, and they might seize it, bring trover for its conversion, or replevy it. 1 Washb. Real Prop. *119; *Howard v. Patrick*, 38 Mich. 795, 803.

The only other question raised by the assignments is as to the effect of the pendency of the chancery cause upon defendants' rights. The bill filed prayed that defendant therein might be restrained from cutting, selling, or disposing of timber, except for firewood, and that defendant might be required to account for all money received from the sale of logs, and that the logs then on the land might be sold under the direction of the court, and the proceeds decreed to belong to complainants. The bill did not pray for an accounting as to the logs not disposed of. The main object of the bill was an injunction to prevent further cutting, and the sale of the logs which had been cut. Whatever may have been the plaintiff's purpose, if she had succeeded the effect would have been to defeat a sale of the logs under the direction of the court. The theory of the bill was that complainants therein owned the logs. By her conduct, a danger to the property not contemplated when the bill was filed was threatened. The *statu quo* was changed by plaintiff's own conduct, and, in view of another danger, defendants had the right to avail themselves of another effective remedy to protect their property.

The judgment is affirmed.

The other Justices concurred.

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ACTION.

1. One day prior to the expiration of the year limited for bringing suit upon a fire insurance policy, a summons was issued from the circuit court, and sent by the clerk to the attorneys for the plaintiff, who, through an oversight, failed to transmit it to the sheriff of the proper county for service. And it is held that the right of action was not saved by the issuance, one day after the return-day of said writ, of a second summons, tested as of the day of issuance of the first summons, and its service upon the insurance company. *Peck v. Insurance Co.*, 52.
2. The fact that the first summons was not made returnable on the first Tuesday of any month, or on any day in term, is unimportant; and the clerk had no authority, on his own motion, to make so radical an amendment as was attempted by the issuance of the second summons. *Id.*

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not commenced within the time limited therefor in the policy. 52.

3. To recover a commission on a sale of real estate. 59.

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5. To recover an alleged over-payment of interest upon a mortgage, plaintiff claiming that by agreement of the mortgagee the rate of interest was reduced from 10 to 8 per cent. 119.

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7. By an administrator to recover moneys paid to the defendant upon policies of insurance held by defendant as security for loans made to the decedent. 126.

8. By a contractor to recover the balance of the contract price for an engine manufactured for the defendant, the defendant seeking to recoup damages for the failure of the plaintiff to complete the engine within the time agreed upon. 221.

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10. Upon a benefit and indemnity certificate issued by an accident association upon the life of a railroad conductor, who was killed while attempting to alight from a moving train, said certificate containing a condition that attempting to enter or leave moving conveyances using steam, etc., as a motive power were hazards not contemplated or covered by the insurance. 289.

11. Upon a promissory note, the defense being want of consideration, and that the note came into plaintiff's hands after it was due. 305.

12. To recover of a railroad company for services in carrying mail from the depot of the defendant to the postoffice in the city of Niles. 312.

13. By a foreign corporation for the value of goods ordered of

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it, the defense being that the contract was void, the plaintiff not having filed articles of association in this State, and paid the franchise fee, required by Act No. 79, Laws of 1893. 324.

14. Upon an insurance policy, the defense being attempted fraud in making the proofs of loss. 334.
15. To recover money paid on a land contract, which the defendant refused to carry out. 483.
16. To recover taxes paid to the county treasurer, under protest, in order to secure the certificate required to be filed as a condition to the recording of plaintiff's deed of the land. 528.
17. To charge the defendant with a debt of a corporation, in which he was one of the directors, for the failure of the directors to file an annual report. 547.
18. Upon a fire insurance policy, the defense being that the plaintiff was not the sole and unconditional owner of the insured property, that there was a disagreement as to the amount of the loss, and it had not been ascertained by appraisers, as required by the policy, and that the time given the defendant after such appraisal in which to pay the loss had not elapsed. 583.
19. To recover a commission agreed to be paid by a lumber manufacturer if he purchased a quantity of saw-logs upon which he had received an option from a lumber broker. 618.
20. By a school teacher to recover for services he was prevented by the school board from rendering, they claiming to have terminated his contract. 631.
21. Against an accommodation indorser, the defense being that the defendant had been released from liability by one member of the firm to which the note was given. 638.

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REPLEVIN.

1. Of saw-logs, the question involved being whether the evidence would, if it had been submitted to the jury, have justified them in finding a waiver on the part of the defendants of their legal right to the possession of the timber from which the logs were cut, so as to entitle the plaintiffs to the possession of the logs under a bill of sale given to them as security. 158.
2. Of mortgaged property by a prior mortgagee from a second mortgagee. 443.
3. By piano dealers from the sheriff of a piano which he had seized under an execution against the purchaser, to whom the instrument had been delivered under a conditional contract of sale. 461.
4. By the assignee of the assignor's business and book accounts to recover a stock of boots and shoes sold by the assignor to the defendant, the title to which never passed by reason of the fraudulent representations of the defendant as to his financial condition. 468.
5. Of a quantity of saw-logs. 488.
6. By mortgagees from a mortgagee of the same property, whose mortgage was prior as to date, but was left off the record until after plaintiffs' rights accrued. 545.

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5. For false imprisonment, the defendant having, by mistake, arrested the plaintiff on a criminal warrant, in place of the respondent named therein. 98.
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13. By the owner of a bakery for damages occasioned to his business by the leakage of fuel oil kept upon defendant's premises for use, its flow through the soil into a common sewer, the escape of the gases through a manhole in the immediate vicinity of the bakery, affecting the atmosphere in the neighborhood, and through sewer connections into and upon plaintiff's premises, injuring the products manufactured by him. 277.
14. For injuries received by a fall upon a sidewalk, the defense being that the claim had never been presented to the common council for audit and allowance, as required by defendant's charter. 300.
15. For injuries resulting in the death of the plaintiff's intestate, who was struck by an incoming train while crossing the railway track of the defendant. 307.
16. For criminal conversation. 505.
17. For injuries received by falling through a cattle guard, the principal contest in the case being over the question of defendant's operation of the road. 537.
18. For injuries received by a fall upon a sidewalk, occasioned by the accumulation thereon, from natural causes, of ice and snow. 544.
19. To recover the value of a sailboat, lost, as claimed, through the carelessness of the defendant, 554.
20. By a married woman to recover for injuries received while attempting to alight from a car of the defendant. 624.

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1. For a span of horses seized under a chattel mortgage given to secure the mortgagee on becoming surety for the appearance of the mortgagor to answer to any information that might be on file against him, etc. 83.
2. By two partners for their individual exemptions in the partnership property. 473.

ADVERSE POSSESSION.

1. The requirements of an adverse possession necessary to establish title to real estate are well understood, but the difficulty arises in applying these requirements to the particular case, which, as a rule, must be controlled by its own facts and circumstances. *Whitaker v. Erie Shooting Club*, 454.
2. The established rule of this Court is that "it is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question;" that the occupation need not be such as to inform a passing stranger that some one is asserting title; that if it be such as to notify and warn the owner, should he visit the premises, that a person is in possession under a hostile claim, it is sufficient. *Id.*
3. Paying taxes, or asserting title, or the common understanding in the neighborhood, or making surveys, or an occasional renting for trapping and shooting, is not sufficient to establish title by adverse possession, yet such acts are all competent evidence to be considered in determining the question. *Id.* 455
4. Signs posted around a piece of marsh land, leased by a shooting club, from early in the spring till late in the fall, every year for 12 successive years, and taken up every fall because the ice would carry them away, upon which was painted a notice that the land belonged to the club, and that all trespassers would be prosecuted, are held to have been notice of an adverse possession. *Id.*

See EVIDENCE (14, 15).

AMENDMENT—See DIVORCE; PLEADING (1).

ASSIGNMENT.

The right to recover property, the title to which never passed

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ATTACHMENT.

The rulings of the circuit judge in regard to the admission of evidence, made on the trial of an appeal from an order dissolving an attachment, are not reviewable on *certiorari*. *Rickel v. Strelinger*, 41.

ATTORNEY AND CLIENT.

A party who has recovered a judgment in the court below cannot stipulate in the Supreme Court to dismiss the suit without the consent of his attorneys, if he is at the time indebted to them for services in the case, and a stipulation so entered will be set aside on their motion. *Kirby v. La Dow*, 345.

BENEFICIARY—See LIFE INSURANCE (2–4).

BILL.

1. To set aside a deed of land purchased with money furnished by the complainant, the title to which was, as she claims, to vest in her, or in the grantee as trustee for her, but which the grantee, without her consent, took to himself absolutely; the defense being that the complainant knew that the deed was to be so taken, and that complainant has no right to relief, as she cannot establish a trust in the lands by parol. 1.
2. To redeem from an execution sale, and to declare the validity of certain mortgages. 5.
3. To set aside a trust deed, on the grounds that it was obtained by undue influence, and at a time when the grantor was mentally incompetent. 20.
4. To compel a trustee to satisfy a judgment rendered on a note of the *cestu que trust*, which the trustee purchased at a discount, and caused to be sued in the name of a third person, from the trust estate, at the sum paid for the note, and interest. 45.

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10. To enjoin church trustees from interfering with the complainant in the discharge of his duties as presiding elder of the congregation. 357.
11. To vacate an assessment for benefits upon a portion of the right of way and road-bed of a railroad company, occasioned by the paving of the street upon which said assessed property abuts. 374.
12. To declare and enforce a lien on the homestead of a deceased person. 439.
13. To restrain a highway commissioner from taking any further proceedings to open a highway. 449.
14. To remove a cloud from complainant's title, caused by a tax deed, a deed from one of the grantees of the tax deed to a third person, and a lease by him to a shooting club, the lessor claiming title by adverse possession. 454.
15. To declare a trust under a deed secured by a daughter, by means of fraud and undue influence, from her father upon the understanding that she should hold the lands in trust, and after his death distribute them among all of his heirs at law according to the statute of descent, and to set aside a second deed of the land, not tainted with any fraud, executed by the father to the daughter. 476.
16. Against a trustee for an accounting. 485.
17. By a legatee against the executors, and colegatees, for the construction of the will. 510.

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18. For the dissolution of a partnership, an accounting, the appointment of a receiver, and the cancellation of certain mortgages. 558.

BILL OF EXCEPTIONS—See NEW TRIAL.

BILL OF PARTICULARS.

A bill of particulars is no part of the declaration, and cannot affect its sufficiency upon demurrer. *Weston v. County of Luce*, 528.

BILLS AND NOTES.

The individual promise of one member of a banking firm to release an accommodation indorser from liability on a note held by the firm, and to pay the note from means in his hands belonging to the maker of the note, cannot be construed as the promise of the firm, and will not exonerate the indorser from liability on the note. *Webber v. Alderman*, 638.

See EVIDENCE (28, 29); PARTNERSHIP (1); PAYMENT (4).

BOARD OF SUPERVISORS.

A township temporarily represented by an appointed supervisor has the same voice upon the board of supervisors that it had while represented by the supervisor elected to such office. *Peck v. Board of Supervisors*, 346.

See BOND (5); STATUTES CONSTRUED (24).

BOARD OF STATE AUDITORS.

How. Stat. § 7557, does not require the auditing by the Board of State Auditors of an account based upon a judgment for costs rendered against the State, as a condition to the drawing by the Auditor General of a warrant upon the Treasurer for the amount of said costs. *Flint & Pere Marquette Railroad Co. v. Board of State Auditors*, 500.

BOND.

1. A jail-limits bond executed pursuant to the provisions of How. Stat. chap. 310, is given to the sheriff of the county in his official capacity, and stands as indemnity to his successor in office without any written assignment, and during

BOND—Continued.

its lifetime may be assigned by the sheriff in office to the party for whose benefit it was given, whenever a breach occurs. *Kruse v. Kingsbury*, 100.

2. A jail-limits bond is in effect a substitute for the custody of the sheriff; and, after admitting the prisoner to the liberty of the jail limits, the sheriff has no longer any power over him, either to restrain or discharge him. *Id.*
3. Section 5 of chapter 310, How. Stat., authorizes a sheriff who shall have taken a jail-limits bond, upon discovering that any surety to such bond is insufficient, to commit the prisoner who executed the bond to close confinement in jail, until other good and sufficient sureties shall be offered. And it is held that whether the prisoner is or is not in actual confinement when the other sureties are obtained cannot affect the validity of the bond. *Id.*
4. A judgment debtor, on being arrested on a body execution, gave a jail-limits bond. He was afterwards notified by the successor in office of the sheriff to whom the bond had been given that one of the sureties was insufficient, and that it would be necessary for him to procure a new bondsman. He thereupon took the bond, and secured the signature thereto of an additional surety, and returned the bond to the sheriff. And it is held that the contention that the additional surety did not sign the bond under such circumstances as to bind him is without force. *Id.*
5. A board of supervisors adopted a resolution authorizing the borrowing of $35,000 upon the credit of the county, for the purpose of erecting a court-house, and the issuance of the bonds of the county for that sum, payable in ten installments, within 30 years of the date of their issue, the first installment to be made payable 10 years from said date. The loan was adopted by the electors, and the board of supervisors passed a resolution authorizing the issuance of the bonds, to be payable in 15 years from the date of issue. And it is held that the voters were clearly given to understand that the entire loan would not be payable in 15 years, but would be extended over a period of 30 years; that no such loan is authorized by law, and it was therefore void; but that, if the resolution were valid, the board disregarded the instructions of the electors, by making the entire amount payable at one time, and that for

BOND—Continued.

this reason the proposed issue of bonds is void. *McMullen v. Circuit Judge*, 608.

See STATUTES CONSTRUED (24).

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4. To review an order of the circuit court of Wayne county denying a *mandamus* to compel the common council of Detroit to proceed to a hearing upon charges of official misconduct preferred against the relator as president of the board of fire commissioners, or to dismiss such charges. 343.
5. To review proceedings for the removal of the county-seat of Berrien county. 346.
6. To review the order of the circuit court of St. Clair county granting a *mandamus* compelling the Police Commissioners of Port Huron to reinstate the relator as a member of the police force. 446.
7. To review an order of the circuit court committing plaintiff for contempt in failing to pay certain costs, ordered to be paid on the dismissal of his appeal from a justice's judgment. 491.
8. To review an order denying a motion to quash the service of a declaration upon a railroad company, on the ground that the person upon whom the service was made was not

CERTIORARI—Continued.

an agent or officer of the defendant company upon whom process could be served so as to bind the defendant. 576.

9. To review an order of the circuit court affirming an order of distribution made in the probate court, the question involved being the validity of a proviso restricting the sale or division of the real estate by the devisees before the youngest child should arrive at full age. 612.
10. To review proceedings to alter the boundaries of a fractional school-district, the objection being that proof of the posting of notice of the time and place of the meeting of the boards of school inspectors was not filed with the clerk of the joint board before any action was taken. 634.

See ATTACHMENT.

CHATTEL MORTGAGE.

1. The giving of a chattel mortgage by an insolvent debtor to a trustee to secure *bona fide* debts is no evidence of an intent to defraud anybody, but is evidence of an attempt to secure the mortgagor's creditors. *Rickel v. Strelinger*, 41.
2. Evidence tending to show that a debtor, shortly prior to executing a chattel mortgage to a trustee to secure his creditors, stated to a member of a firm to which he was indebted that he had no debts aside from that of said firm and one other creditor, who was also secured by the mortgage, will not establish the fact that other claims secured by the mortgage, and which purport to have been incurred several months prior to the making of said statements, are not *bona fide*. *Id.*
3. The term "appear," as used in the condition to a chattel mortgage executed by a respondent in a criminal case to secure the mortgagees for becoming sureties for his appearance at a certain term of court to answer an information on file against him, and conditioned that, if the mortgagor shall "appear" at the next jury term of said court, then the mortgage shall be void, must be construed with reference to the obligation which the sureties have undertaken, and the appearance of the mortgagor at the term named will not void the mortgage, so far as notice to subsequent purchasers is concerned. *Crawford v. Vinton*, 83.

COMMENCEMENT OF SUIT—See SUIT.

CONDEMNATION PROCEEDINGS.

1. It is competent for the owners of land sought to be condemned for street purposes under 3 How. Stat. § 3064*a et seq.*, to waive their constitutional right to have the questions of necessity and compensation determined by a jury of freeholders. *Borgman v. City of Detroit*, 261.
2. The purpose of the trial provided for by 3 How. Stat. §§ 3064*g*–3064*k*, is to determine the questions of the public necessity for the improvement and for taking the property sought to be condemned, and the amount of compensation to be awarded therefor. In that proceeding there are two safeguards for the protection of the tax-payer, namely, his representation by the public authorities, and the provision that the judgment is to be entered, upon the verdict of the jury, by the court; and it is not contemplated that these questions shall be open to review in a tax proceeding. *Id.*
3. One of the 12 jurors impaneled and sworn in a street-opening case failed to appear on the adjourned day, whereupon counsel representing the city and the owners of the property sought to be condemned stipulated to proceed with the 11 remaining jurors, who found that a public necessity existed for opening the street, and fixed the amount of compensation to be paid to the property-owners. A bill was filed by several tax-payers, whose lands had been assessed to pay the compensation awarded, to restrain the collection of the tax, their contention being that the condemnation proceedings were void because less than 12 jurors sat in the case, and determined the questions of public necessity and the amount of damages to be awarded. And it is held that the complainants were not prejudiced by the action complained of, and that it did not invalidate the tax levy. *Id.*

See CONSTITUTIONAL LAW (7).

CONSTITUTIONAL LAW.

1. Act No. 230, Laws of 1885, as amended by Act No. 47, Laws of 1893, entitled "An act to provide for the prevention of the introduction and spread of cholera and other dangerous, communicable diseases," and the effect of the provisions of which is to declare it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with the rules and regulations of the State Board of Health, made and established pursuant

CONSTITUTIONAL LAW—Continued.

to said act, is not unconstitutional for the reason that it delegates to the State Board of Health legislative power, in contravention of section 1 of article 4 of the Constitution, which vests the legislative power in a Senate and House of Representatives. *Hurst v. Warner*, 238.

2. By section 3 of the act, the State Board of Health is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars or other public or private conveyances whenever it shall be shown to the satisfaction of the board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person, or property which has been exposed to cholera, diphtheria, or other dangerous, communicable disease, or when it shall be shown to the satisfaction of the board or inspector as aforesaid that any passenger, person, or property is being transported on such cars or other public or private conveyance from any locality within or without this State where any such dangerous, communicable disease exists, and where, under the circumstances shown to such board, such persons or property are likely to carry infection of such dangerous, communicable disease. And it is held that a rule which does not make it a prerequisite to the inspection authorized by section 3 that the baggage being transported come from a locality where such dangerous, communicable disease exists, as ascertained either by the board or inspector, is broader than the statute, and cannot be sustained. *Id.* 239.

3. The Court are not to be understood as intimating that it would not be competent for the Legislature to provide for the disinfection of all baggage, where, in the opinion of the State Board of Health, from the prevalence of a contagious disease, such precaution is necessary. *Id.*

4. The object of Act No. 358, Local Acts of 1891, entitled "An act to establish permanent dock, safety, sanitary, and building lines along the shores and margins and in the waters and on the bed of Grand river, within the corporate limits of the city of Grand Rapids, and to provide for the building and maintaining of suitable masonry walls along such lines, and to authorize the city of Grand Rapids to acquire private property for such public use," is to establish one line for all of the purposes named, and, considered in

CONSTITUTIONAL LAW—Continued.

this light, the title fulfills the requirements of the Constitution. *City of Grand Rapids v. Burlingame*, 321.

5. The insertion of the clause "so as to include the county of Manitou" in the title to Act No. 93, Laws of 1885, entitled "An act to amend section 1 of Act No. 142 of the Session Laws of 1883, being an act entitled 'An act to provide for selecting petit jurors in the Upper Peninsula,' so as to include the county of Manitou," restricted the title, and precluded legislation embracing any other territory than the county of Manitou. *Niles v. Circuit Judge*, 328.

6. The contention that, unless a section of a village ordinance which provides that any assemblage of persons, in any place in said village, engaged in any noisy, boisterous, contentious, or quarrelsome language or strife, or who shall be fighting or quarreling thereat, shall be deemed a disorderly assemblage, is limited in its scope to public places such as are enumerated in a prior section in the same ordinance, which provides that "every assemblage of persons in any street, lane, alley, or public place in said village, and upon any sidewalk or cross-walk thereof, and upon the street corners, and in front of or adjacent to any of the churches, hotels, business houses, or public buildings in the said village, engaged in noisy, boisterous, contentious language or conduct, shall be deemed a disorderly assemblage," it is unconstitutional, is untenable. *Village of Vicksburg v. Briggs*, 552.

7. In a street-opening case, a challenge to the array was interposed on the ground that, under the charter of the city, the persons listed to serve as jurors in the court where the proceedings were pending, and from which persons the jury had been drawn, were required to be qualified electors of fair character and sound mind, freeholders in said city, and capable of understanding and speaking intelligibly the English language, while the Constitution provides that, when private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property. And it is held that there is no constitutional objection to the Legislature imposing the additional qualifications mentioned in said charter. *City of Saginaw v. Campau*, 594.

CONTEMPT.

The payment of the costs awarded an appellee on dismissing an appeal from justice's court should be enforced by execution, and not by contempt proceedings. *Swarthout v. Lucas*, 493.

CONTRACT.

1. A writing signed by the payee in a note then past due, and bearing interest at 10 per cent., by which the payee agrees to let the maker "have all the money at 8 per cent.," may be well construed to be an open proposition to the maker to retain the money, at least until further demand, at the reduced rate of interest, and, when acted upon by the maker, the payee cannot be permitted to exact a greater rate. *Vereycken v. VandenBrooks*, 119.
2. Complainant contracted with a number of persons to erect for them a butter and cheese factory. The price was to be $3,950, one-half payable when the factory should be completed, and one-half in three months after that date. The contractees agreed to make such payments, and as soon as the contract price should be subscribed, or in a reasonable time thereafter, to incorporate under the general laws of the State. The aggregate amount of stock was to be not less than $3,950, divided into shares of $100 each, to be issued to the subscribers in proportion to their paid-up interest in the contract. It was further agreed that each stockholder should be liable only for the amount subscribed by him. The stock was all subscribed, the factory completed, and stock issued to the subscribers who had paid for the same, to the amount of $3,000. Complainant filed a bill against the corporation and the various subscribers to enforce a mechanic's lien upon the factory for the remaining $950. And it is held that the undertaking of the subscribers was several, and not joint, and that they are liable thereon only up to the amount of their several subscriptions. *Davis & Rankin Building & Manfg. Co. v. Murray*, 217.
3. The complainant would be entitled in equity, under such circumstances, to be subrogated to the rights of the non-paying subscribers to the stock to the amount remaining unpaid of the contract price. *Id.* 218.
4. Under the postal laws of the United States, each railroad company is bound to carry to and from the post-office all

CONTRACT—Continued.

mails at terminal points of its road, while the government lets special contracts for such carriage to and from the stations along the line. At a city which was a terminus of two divisions of defendant's road, and also a station on its main line, plaintiff had a contract with the defendant for the carriage of the mail of one of its divisions, and a contract from the government for the carriage of the main-line mail. Supposing it to be his duty under his contract with the government to carry the mail of the other division, plaintiff continued to do so without charge, until he learned of defendant's duty in the premises, when he declined further carriage of such mail. And it is held that, the defendant having permitted the performance of such services, and having had the benefit thereof, the law will presume that they were to be paid for, there being nothing in the relation of the parties that would repel the idea that payment was intended. *McClary v. Railroad Co.*, 312.

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE (2, 3, 6, 14-16, 21).

CORPORATIONS.

1. 3 How. Stat. § 4161b1, which provides that manufacturing companies shall file an annual report with the Secretary of State, and that, if any of the directors shall willfully neglect or refuse to make such report, they shall each be liable for all of the corporate debts, and subject to a prescribed penalty, only applies to such of the directors as willfully neglect or refuse to make the report. *Gennert v. Ives*, 547.
2. A presumption arises that the failure to file the report was intentional, and therefore willful. *Id.*
3. Where, in a suit brought under the statute to charge a director with a debt of the corporation, the defendant testifies that, as far as he is concerned, there was no purpose in keeping the report back; that he left the management of the business to the president of the corporation; that he was not aware of the requirement that such a report be filed; and that during the period when the report was due he had not in mind that he was a director of the corporation,—such testimony, if not disputed, is sufficient to overcome the presumption arising from the failure to file the report, and the

CORPORATIONS—Continued.

court is justified in withdrawing the question from the jury. *Id.*

See STATUTES CONSTRUED (8).

COSTS.

1. On the hearing of a motion to dismiss an appeal from justice's court for the failure of the appellant to pay certain costs and for defects in the appeal bond, an order was made requiring the payment of said costs and an attorney fee and the amendment of the bond within 10 days, or in default thereof the appeal be dismissed. And it is held that the payment of the costs should have been made one of the conditions of the order, and a part of the judgment in case of non-compliance; and that the court had ample power to enforce such an order, and to award an execution for the costs. *Swarthout v. Lucas,* 493.
2. In suits between individuals, the prevailing party is entitled to interest upon the costs awarded in his favor from the date of the judgment or decree. *Flint & Pere Marquette Railroad Co. v. Board of State Auditors,* 500.
3. How. Stat. §§ 8984, 7756, clearly evidence an intention to subject the State to precisely the same liability for costs, and for the incidents of a judgment, as an individual is subject to, with the single exception relating to the method of collecting the demand, and require the payment of the same sum in discharge of a judgment for costs as would be required to be paid by an individual. *Id.*
4. How. Stat. § 7557, does not require the auditing by the Board of State Auditors of an account based upon a judgment for costs rendered against the State, as a condition to the drawing by the Auditor General of a warrant upon the Treasurer for the amount of said costs. *Id.*

COUNTY SEAT.

1. After a resolution designating a place for the removal of a county seat had been offered, an amendment was offered making such designation to depend upon the city so designated providing a perfect title to a good and sufficient site for the buildings, and depositing with the county treasurer a designated sum to be used in the erection of such buildings. The committee to whom the amendment was referred

COUNTY SEAT—Continued.

reported that the resolution as amended would be legal, but did not recommend the adoption of the amendment. The report was accepted and adopted. No vote was taken upon the amendment, but the original resolution was adopted. And it is held that the amendment was not a part of the original resolution as adopted, and that its omission from the notice of election is not a valid objection to the validity of the proceedings. *Peck v. Board of Supervisors*, 347.

2. Resolutions of a board of supervisors relating to the method of submitting to the electors the question of the removal of the county seat, from their nature, must be acted upon before the question is submitted, and do not affect the question to be voted upon. *Id.*

3. It is not a valid objection to the validity of proceedings for the removal of a county seat that the county board of election commissioners prepared the ballots, that they were on a separate piece of paper from the township tickets, and were deposited in a separate ballot-box. *Id.*

See STATUTES CONSTRUED (9).

CRIMINAL LAW.

1. Where, in a prosecution for burglary, the defense is an alibi, and the officers who made the arrest explain their presence in the building by testifying that they expected it to be entered, it is not error to reject testimony, sought to be drawn out on their cross-examination, relative to the source from which they derived their information that a burglary was premeditated. *People v. Laird*, 135.

2. A case might arise where a person claiming to have been innocently at the place where the crime was committed, at the solicitation of a person suspected of being the informant, would be entitled to inquire whether such person was the informant. *Id.*

3. Where, in a prosecution for burglary, the sole disputed question of fact is as to the presence of the respondent at the scene of the burglary, and there is positive evidence on both sides of the question, it is error to instruct the jury that, if they find that there is positive evidence that the respondent did commit the offense, they are to pay no attention to the evidence which he has introduced tending to show his previous good character, such evidence being en-

CRIMINAL LAW—Continued.

titled to consideration in determining the disputed question. *Id.*

4. Where, in a prosecution for keeping respondent's saloon open after hours, three witnesses testify in behalf of the people that, after the hour for closing, they, in company with three women, whose names are not indorsed on the information, went into a room back of the bar-room kept by the respondent, and there purchased lager beer of respondent's barkeeper, it is not error for the court to deny respondent's motion to place the names of the women upon the information, and produce them as witnesses for the people; it appearing that the prosecution has not failed to put all parts of the transaction before the jury by the testimony of the three men, and that the introduction of the testimony of the women would be merely cumulative. *People v. Kindra*, 147.

5. After the respondent had rested, one of the women was found, and examined as a witness for the people. Her testimony corroborated that of the three men, but was taken under respondent's objection that it was more prejudicial to him than it would have been had it been taken earlier in the trial. And it is held that the time of calling the witness was within the discretion of the court, and, inasmuch as respondent was given the right to rebut the testimony, he cannot now complain. *Id.* 148.

6. After one of the witnesses for the people had been examined in chief, and cross-examined at some length, the court inquired of the prosecuting attorney if that was all of the witness, and that officer responded that he "was through with the witness some time ago," whereupon respondent's counsel stated that he desired to examine the witness. The court declined to wait for such examination, and dismissed the witness from the stand, and counsel for respondent took an exception to this proceeding, but did not advise the court what further questions he desired to ask of the witness. And it is held that, while the court should not have thus summarily dismissed the witness from the stand, yet it was the duty of the counsel for the respondent, under the circumstances, to state to the court some reason why he desired to examine the witness further; that no reason is here assigned, and the Court are unadvised as to whether the

CRIMINAL LAW—Continued.

respondent's rights were prejudiced by the action taken; and that, under the circumstances, they are unable to say that there was any prejudice, as the facts brought out on the direct examination seem to have been fully covered by cross-examination. *Id.*

7. Where, in a prosecution for keeping a saloon open after hours, the respondent was called as a witness in his own behalf, and testified that he had once been convicted of a like offense, his case cannot be said to have been prejudiced by the remark of the prosecuting attorney, in his closing argument to the jury, that the case followed another case, in which the respondent pleaded guilty. *Id.*

8. Under How. Stat. § 9236, which provides that, "if any person of whom an oath shall be required by law shall willfully swear falsely in regard to any matter or thing respecting which such oath is authorized or required, such person shall be deemed guilty of perjury," a charge of perjury cannot be predicated upon the sworn statements of a person who was subpœnaed to appear before a justice of the peace to furnish testimony upon which to base a complaint for a violation of the liquor law, no complaint, oral or written, having been made to the justice, at the time said statements were made, of the commission of such offense. *People v. Titmus*, 318.

9. An affidavit, made at the request of fire insurance adjusters, as to the correctness of the books of the insured and the amount of stock at the time of the fire, is not one upon which a prosecution for perjury can be based. *Metzger v. Assurance Co.*, 334.

10. The failure of an examining magistrate, on requiring a respondent to recognize to answer the offense charged, to certify his finding that the offense has been committed,—his finding being "that there is probable cause to believe that said offense has been committed, and probable cause to believe the respondent guilty thereof,"—will not support an objection that the information filed on the basis of his return was not properly filed. *People v. Whittemore*, 519.

11. Respondent was convicted of maliciously threatening to accuse one Paul Lucas of the crime of perjury, in violation of How. Stat. § 9093, which provides that "if any person shall, either verbally or by any written

or printed communication, maliciously threaten to accuse another of any crime or offense, * * * with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, he shall be punished," etc. The complaint, which was followed by the warrant, charged that the respondent did, on a certain day, willfully and maliciously, verbally, threaten to accuse the said Paul Lucas of willful and corrupt perjury, and did, on the day and at the place named, threaten to make a criminal complaint for such offense against the said Lucas, unless he would sign and execute a deed of certain lands owned by him, and situated in the state of Minnesota, with the intent and purpose of procuring the signature of said Lucas against his will to said deed, and with intent to injure and defraud said Lucas, contrary to the form of the statute, etc. And it is held:

a—That the complaint shows sufficiently that the threats were verbal.

b—That the complaint follows the language of the statute in its averment as to the making of the threats, and while, in the precedents, the name of the party to whom the threats were made is usually set out, the omission to do so is not fatal.

c—That the complaint sufficiently sets out the intent; that the statute makes it an offense to make such threats with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will; and that the intent to procure the signature of Lucas against his will to a deed of land was an intent to compel him to do an act against his will, to wit, to affix his signature to a deed. *Id.*

12. The attorney appointed to prosecute the respondent is held not to have been disqualified from acting under said appointment under the facts stated in the third head-note. *Id.* 520.

13. Where in a prosecution for threatening to accuse a party to a civil suit of perjury, unless he would sign and execute a deed of certain lands involved in the suit, the respondent denies making any demand whatever upon the witness for the deed, testimony tending to show that the witness was in fact guilty of perjury is inadmissible as bearing upon

CRIMINAL LAW—Continued.

the respondent's intent, or for the purpose of impeaching the witness, or to disprove malice upon the part of the respondent. *Id.* 521.

14. Testimony relative to the arrest of the witness, at the instance of the respondent, for perjury, and to the attempt to secure the execution of the deed, is admissible as bearing upon the respondent's intent. *Id.*

15. Where, in a prosecution for larceny, it appears that the respondent's possession of the property was lawful in the first instance, his mere refusal to deliver it to the owner on demand will not warrant a conviction. *People v. Taugher*, 598.

See note, 135.

DAMAGES.

1. A railway passenger who either produces a ticket which, as between the conductor and himself, entitles him to passage, or stands ready to pay the fare legally demandable, can recover substantial damages for being evicted from the car on his refusal to pay an unauthorized demand. *Zagelmeyer v. Railroad Co.*, 214.

2. In replevin for a span of horses, the proper measure of the defendant's damages is the value of the use of the horses during the time he has been deprived of their use. *Hutchinson v. Hutchinson*, 636.

See LIBEL (10).

DECLARATIONS—See WILL (7, 8).

DEED.

1. It cannot be said that the omission of the grantor to require a bond from the trustee named in the deed of trust is an unusual omission, and it is optional with the grantor to require it or not. *Liesemer v. Burg*, 20.

2. The fact that the friendly relations existing between the grantor and trustee at the time of the execution of the deed have changed to those of unfriendliness will not, of itself, justify the annulling of the deed. *Id.*

3. The record of a deed purporting to have been executed and acknowledged in another state, and to have had attached thereto the certificate of the clerk of the proper county, under his hand and the seal of said county, certifying to the official character of the acknowledging officer, the gen-

DEED—Continued.

uineness of his signature, and the execution and acknowledgment of the instrument according to the laws of said state, but which record fails to show that any *seal* was attached to said certificate, is inadmissible in evidence. *Hoban v. Cable*, 206.

4. A deed by which the grantor intended to convey the northerly 60 feet of a lot fronting on "Market street," so called, and having a depth of 158.96 feet north-westerly from said street, described the 60 feet as "beginning on Market street, between the lot hereby intended to be conveyed" and a lot northerly therefrom; thence north, 62 degrees and 15 minutes west, 158.90 feet; thence south, 31 degrees west, 60 feet; thence south, 62 degrees and 15 minutes *west*, 158.96 feet, to Market street; thence along said street north, 27 degrees and 55 minutes east, to the place of beginning. And it is held that by excluding the course of the third boundary line as given, and extending said line in the most direct course to Market street, a line is secured not only answering to the other terms of the description, but one which, with its extension, incloses something, which is, by the terms of the deed, "a lot intended to be conveyed," and which, to answer the terms of the portion of the description relating to the starting point, must lie next to the adjoining lot referred to; that, to make this clearer, the deed states that from the terminus of said third boundary line the boundary shall extend along Market street to the place of beginning; that the intent of the grantor is clear, and the deed is not a nullity for want of a sufficient description. *Id.* 207.

5. A father conveyed certain mortgaged lands, and inserted in the deed a clause reserving unto himself and a daughter, naming her, a life lease of the land "for and during the life of each of them." After the death of the father, the mortgage was foreclosed by advertisement, and the daughter filed a claim under How. Stat. § 8510, to the surplus arising on the sale, or to the use of such surplus during her natural life. And it is held that the language used excepted from the grant the use and enjoyment of the land during the lives of both father and daughter, as effectually as though that reservation had been for a fixed term of years, extending beyond the life of the father, and that at the father's

DEED—Continued.

death the right to that use for the unexpired portion of the period descended to his heirs. *Martin v. Cook*, 267.

6. A deed should be so construed as to give effect to the intent and design of the parties as manifested by the language used. *Id.*
7. The words "reserving" and "excepting" are often used indiscriminately, and whether a particular provision is an exception or a reservation does not depend upon the use of either term, but upon the nature and effect of the provision itself. *Id.*
8. From an examination of the cases cited in the opinion, and the decisions of the courts of this country, generally, upon the question here involved, it will be observed that, while the rule that a reservation in favor of a stranger to the instrument is invalid as a reservation has been adhered to, yet, in order to effectuate the intention of the grantor, such a reservation has uniformly been treated as excepting from the grant the thing reserved; and this holding has not been confined to cases where the reservation had been previously carved out. *Id.*
9. A daughter, by means of fraud and undue influence, procured from her father a deed of his real estate upon the *verbal* understanding that she should hold the lands in trust, and after his death distribute them among all of his heirs at law according to the statute of descent. And it is held that, while no resulting trust arose in favor of the heirs at law, still, in view of the fact of the father being in possession of the land when he executed the first deed, and continuing in possession until his death, and of said deed having been procured by undue influence, with the intent not to carry it into effect, the parol agreement, made at the same time, was such a fraud as vested in the father an equitable title to the lands; that he might have filed a bill at any time to set aside said deed for the reason stated, and, if he had died with the lands in that situation, his rights in the premises would have devolved upon his heirs or personal representatives. *Thompson v. Marley*, 477.
10. About 15 months after the execution of the deed, which had not been recorded, the daughter procured from her father a second deed of the same lands, and caused the

DEED—Continued.

same to be recorded, and thereupon claimed, under said second deed, to own said lands in fee. And it is held that in the absence of any fraud in procuring the second deed, or of any trust or intended trust in connection with it, said second deed vested an absolute title in fee in said daughter. *Id.*

11. In ejectment for dower, the defendants claimed under a deed signed and acknowledged by the plaintiff's husband four days before his marriage to the plaintiff, but which she claimed was not delivered until a few days before his death, at which time, her testimony tended to show, he was not competent to make such delivery. And it is held that his condition at that time was of no consequence, the sole issue being, was the deed delivered before the marriage, at which time no question as to the competency of the husband was raised? *Jourdan v. Patterson*, 602.

12. The grantee testified that the deed was delivered to him the day of its date. Previous to the commencement of the ejectment suit, in his answer to a bill filed to set aside the deed, he had stated that the deed was delivered to him at a date subsequent to the marriage of the grantor to the plaintiff, and this statement was introduced in evidence to contradict the witness. On his redirect examination, he testified that he did not know what the word "delivery" meant in law, and was then asked to state what he meant by the use of the word in his answer in the equity suit. And it is held that it was proper for him to explain, if he could, what he understood by the term. *Id.*

13. The grantee admitted that the deed was kept in a locked box in the grantor's house, and that he obtained the key from the grantor (his father) two or three days before his death, unlocked the box, and took the deed out. And it is held that, under these circumstances, there was no presumption of delivery arising from the deed itself or the record thereof, and that the burden of proof was upon the defendants to show its delivery. *Id.*

DELIVERY.

The delivery by a vendee to the attorney for the vendor, in his presence, of a certificate of deposit indorsed in blank,

DELIVERY—Continued.

as part payment on a land contract, is the same as delivery to the vendor. *Duquette v. Richar*, 483.

See DEED (12, 13).

DESCRIPTION—See DEED (4); FORCIBLE ENTRY AND DETAINER; SURVEYS (3, 4).

DISORDERLY ASSEMBLAGE—See STATUTES CONSTRUED (22).

DIVORCE.

Where, in a divorce suit, the complainant petitions the court to set aside the decree granted the defendant under his answer in the nature of a cross-bill, on the grounds, among others, that the verification to the answer fails to negative the existence of collusion, as required by the statute, and that no replication to complainant's answer to the cross-bill was filed, it is within the discretion of the court to permit an amendment of the verification so as to make it conform to the statute, and the filing of said replication. *Daly v. Circuit Judge*, 392.

See STATUTES CONSTRUED (14); note, 392.

DURESS.

Where, upon being served with a subpoena in a chancery foreclosure suit, the defendant mortgagor pays the amount demanded, under protest, there is not such duress of property as will make such payment involuntary, and enable him to recover an excess over the amount legally demandable, included in such payment. *Vereycken v. Vanden Brooks*, 119.

EJECTMENT—See note, 208.

ELECTIONS.

1. Voters finding a ticket upon the official ballot are not required to determine whether it is entitled to a place thereon, but may safely rely upon the action of the officers of the law, who they have a right to suppose have performed their duty. *Bragdon v. Navarre*, 259.
2. Under the election law of 1891, the board of election inspectors are required, immediately on closing the polls, to

ELECTIONS—Continued.

proceed to canvass the votes, and, after the count of the tickets or ballots has been completed, immediately and publicly to declare the result. And it is held that the neglect of the board to complete the canvass on the night of the election, and the dating of their report on the next day, ought not to result in the disfranchisement of the voters. *Attorney General v. Glaser*, 396.

3. Under the election law of 1891, any mark upon a ballot, other than one appropriate and necessary to designate the intention of the voter, must be regarded as a distinguishing mark. *Id.*

4. The only instance in which an unnecessary mark is recognized as possible is in section 34, where it is provided that, if the elector votes for more than one person for the same office, such ballot shall not be counted for those persons, but shall be, as to them, null and void. *Id.*

5. See, as to what are and what are not distinguishing marks under the election law of 1891, so as to prevent or not prevent the counting of the ballot. *Attorney General v. Glaser*, 405-407.

6. The appointment by a village council of the president and one of the trustees of the village, who are candidates for office, to act upon the board of election inspectors, and the appointment by said board of another candidate as one of the clerks of the election, and the posting of notices in the nature of instructions to voters, which conform to those provided for by the election law of 1891, instead of 1893, under which latter law the election is to be held, are irregularities, and will not invalidate the election; it appearing that in making and acting under such appointments the council and members of the board of election inspectors acted in good faith, believing that the board was to be appointed under How. Stat. § 2794, and that the provision of the 1893 law, that no person shall act as an inspector who is a candidate for any office to be elected by ballot at the election, did not repeal or alter the section of the statute cited. *People v. Avery*, 572.

EMINENT DOMAIN—See CONDEMNATION PROCEEDINGS; CONSTITUTIONAL LAW (7).

EQUITY JURISDICTION.

Where executors appear and answer a bill filed by a legatee, asking for a construction of the terms of the will if held valid, and asserting that it is as a whole invalid in equity, and in terms submit the question of the construction of the will to the court, the court may properly maintain jurisdiction. *Dean v. Mumford*, 510.

EQUITY PLEADING.

While the court may, of its own motion, raise the question of multifariousness, it is not bound to do so, or to permit the defendants to raise it upon the hearing where full justice can apparently be done upon the record. *Childs v. Pellett*, 558.

EQUITY PRACTICE.

1. The subpoena and underwriting provided for by Chancery Rule No. 122 may properly be treated as one instrument; and a return by an officer that he served a copy of the "within subpoena," which subpoena upon its face contains the underwriting, leaves no room to doubt that service was made of all that appears upon the face of the subpoena, and no more, and is sufficient. *Corning v. Burton*, 86.
2. Where the record in a chancery appeal case consists of the bill, answer, replication, decree, and a claimed copy of the proofs taken in open court, but no case has been settled as provided by the statute, the proofs cannot be considered, but the case will be heard on the bill and answer. *Fields v. Colby*, 449.
3. A bill in equity is no evidence for the complainant; and where the case is submitted on bill and answer, and no exceptions are filed to the latter, relief must be based on the admissions in the answer; and, if it denies or does not admit any averment that is material to the prayer for relief, the bill must fail. *Id.*
4. A sworn answer to a bill in equity must be taken as true where the case is heard on bill and answer. *Id.*
5. A party may object that his money be intrusted to an officer of the court, and he has a right to be heard before such an order is made. *Lewis v. Kean*, 605.
6. In the absence of an order by the court, the payment of the

EQUITY PRACTICE—Continued.

amount due on a chancery decree to the register in chancery is not binding upon the party entitled to the money, and he may entirely ignore such payment. *Id.*

7. A chancery decree directed the payment of a certain sum of money to the complainants, or their solicitor, within a stated time. The defendant failed to pay or tender the amount to the complainants, and refused to pay it to their solicitor, although the complainants gave the solicitor written authority to receive the money, which he showed to the defendant, and demanded payment. On the last day fixed for payment, the defendant deposited with the register in chancery the amount claimed to be due, and notified the complainants of such deposit, the validity of which they refused to recognize. Defendant thereupon filed a petition praying the court to adjudge the decree paid and discharged. And it is held that an order finding that the defendant had substantially performed all of the requirements of the decree, and declaring it satisfied and discharged of record, cannot be sustained. *Id.*

ESTATES OF DECEASED PERSONS.

Prior to the issuance of letters of administration, an heir at law of the decedent, who was also a general creditor of the estate, paid the balance due on a contract for the purchase of the homestead occupied by the decedent at the time of his death, and the same was conveyed to all of the heirs, some of whom were minors. Said heir then filed a claim against the estate, made up of the money so paid, and moneys claimed to have been loaned to the decedent to pay upon the contract and for other purposes. The claim was allowed, after which the claimant filed a bill to declare the same a lien upon the homestead, and for its sale to satisfy said lien. The bill failed to show that there was no personal property belonging to the estate, or that the rents were insufficient to take care of complainant's claim. And it is held that the complainant, having voluntarily submitted his claim to the jurisdiction of the probate court, and having rested content with such jurisdiction until after the time for appeal had expired, has elected his remedy, and will not be allowed to put either the estate or the other heirs to an

ESTATES OF DECEASED PERSONS—Continued.

expensive suit in chancery to enforce the claim for moneys paid on the contract. *Kraft v. Kraft*, 439.

See HOMESTEAD (3).

ESTOPPEL.

1. A corporation secured a bank by an assignment to it of $150,000 of good and collectible accounts, then existing or thereafter to be acquired. The corporation had placed upon its books certain accounts for goods shipped to consignees, to be paid for when sold, charging the consignees upon shipment, and crediting them with payments and discounts. Both the party who represented the corporation in making the assignment, and the cashier of the bank, understood and agreed that these accounts were included in the assignment. And it is held that, the corporation having treated these accounts as within the terms of the assignment, and obtained the loans from the bank, which the assignment was made to secure, upon the representation that said accounts were within the meaning of that term as used in the assignment, and the bank having relied upon that fact in making the loan, the corporation is estopped to assert the contrary. *Preston National Bank v. Purifier Co.*, 463.
2. There also appeared upon the corporate books certain accounts for goods sold under special contract, and for which notes had been taken. The contracts provided that title to the property should remain in the company until paid for, and that any notes taken should not be considered as payment, but only as evidence of indebtedness, and should not constitute a waiver of the right to a mechanic's lien. And it is held that said accounts were within the terms of the assignment. *Id.*

See ESTATES OF DECEASED PERSONS; LIFE INSURANCE (5, 7–10); NEGLIGENCE (23).

EVIDENCE.

1. Where a bill is filed to declare the title to land conveyed to a deceased person in his lifetime to be in the complainant, the complainant is disqualified under 3 How. Stat. § 7545, from testifying at all to matters which, if true, must have been equally within the knowledge of the decedent. *Connolly v. Keating*, 1.
2. The record in a former suit between the same parties, which

EVIDENCE—Continued.

tends to show that any fact involved in the issue in the second suit was litigated and set at rest in the former suit, is competent evidence of that fact, although it may not be conclusive upon all of the questions involved in the second suit. *Bond v. Markstrum*, 11.

3. When an action is sought to be maintained or defended by showing a former adjudication of questions upon which it depends, it must appear that such questions were litigated as a matter of fact; that they were submitted to and decided by the court or jury; and that they were not collateral inquiries, but crucial questions in the other controversy. *Id.*

4. Where the record does not contain the conclusive evidence as to such former adjudication, parol evidence is admissible to ascertain whether a given question was in issue, litigated, submitted, and decided, and possibly, in some cases, whether it was material; and in such event, under our system of pleading, the issue would not ordinarily be limited to the single question of such former adjudication, but the party would be at liberty to support his claim or defense by other evidence, which would be received subject to the effect that should be given to the evidence upon the question of such former adjudication. *Id.*

5. Where, in a suit upon a guaranty of rent, the defendant seeks to avoid liability by showing his release by the lessor, and the plaintiff introduces in evidence the record in a former suit brought by him against the defendant upon the same guaranty, in which he recovered a judgment for prior installments of rent, and it appears that the pleadings in said former suit were broad enough to cover said proposed defense, the burden of proof is upon the plaintiff to show that said defense was actually made and passed upon in the first suit. *Id.* 12.

6. The defendant should be allowed to introduce his evidence tending to show his release, and, if the jury find that that question was litigated and passed upon in the former suit, they should disregard such evidence. *Id.*

7. Where, in a suit to recover a commission on a sale of real estate, neither the pleadings nor plaintiff's version of the contract of employment leave the case open for any claim under the *quantum meruit*, it is not error to exclude

EVIDENCE—Continued.

testimony as to expenditures made by the plaintiff in advertising. *Thuner v. Kanter*, 59.

8. Where, in a suit by an administrator to recover moneys paid to the defendant upon policies of insurance held by defendant as security for loans made to the decedent (her son), the defendant seeks to set off a claim for the rent of a portion of a house which the decedent occupied in his lifetime, —the remainder being occupied by decedent's father up to the time of his death, and afterwards by the defendant,—it is competent for the plaintiff, as tending to establish his claim that the occupancy of the house by the decedent was rent free, to show that the decedent had contributed largely to the construction of the house, and had, both before and after the death of his father, made expensive improvements and paid taxes upon the entire property, and that during the entire time of such occupancy the decedent paid no rent, nor was any claim for rent ever made upon him. *Maybury v. Berkery*, 126.

9. The defendant exhibited a paper purporting to be a statement of the account between the decedent and herself, showing loans made by her to him at various times up to and including December 20, 1890, and also one of $2,000 made December 16, 1891, and aggregating, with interest charges, $15,515. It further appeared that on December 23, 1891, the decedent executed a note for $10,000 to the defendant, payable six months after date. Plaintiff testified that when he called upon the defendant in August, 1892, to inquire relative to the policies of insurance and the indebtedness of decedent to her, he asked defendant for a statement of said indebtedness, and she said she did not think she could give it; that thereupon her son in law, who was present, stated that the defendant had a note for $10,000 against the decedent, and that that should be sufficient to show the indebtedness. It further appeared that no moneys were advanced to the decedent by the defendant after December 20, 1890, until December 26, 1891, and that there was no new consideration for the $10,000 note, except the $2,000 loaned December 26, 1891, if that was a part of the consideration; and it was not pretended that the note was solicited for any purpose which the defendant had in view,

EVIDENCE—Continued.

except as evidence of the indebtedness. And it is held that the note was *prima facie* evidence of an account stated between the parties; that the burden was upon the defendant to rebut the presumption; and that whether this presumption had been removed was, under the facts in this case, a question for the jury. *Id.* 127.

10. There was testimony tending to show that the $2,000 received by the decedent December 26, 1891, was used to pay a demand which existed prior to December 23, 1891, the date of the note; that decedent had been, prior to December 26, 1891, making efforts to raise the money from other sources to meet said demand; and that the only claim made by the defendant after the death of the decedent and prior to the trial was the amount of the note. The plaintiff contended that the note embraced the $2,000 received after its date. There was no evidence as to the date of the *delivery* of the note. And it is held that the note is presumed to have been executed and delivered on the day of its date, but that such presumption is removable. *Id.*

11. Where in an action for slander consisting, as alleged, in charging the plaintiff with having committed the crimes of perjury and larceny, the defendant gives notice that under his plea of the general issue he will prove the truth of the charge as to the commission of the first-named crime, the court should exclude, not only such circumstances as tend to prove the truth of the other accusation, but all the circumstances which would tend to cast suspicion upon the plaintiff as having been guilty of said offense. *McNaughton v. Quay*, 142.

12. The question involved in this case is whether the evidence introduced on the trial would, if it had been submitted to the jury, have justified them in finding a waiver on the part of the defendants of their legal right to the possession of the timber from which the logs in dispute were cut, so as to entitle plaintiffs to the possession of said logs under the bill of sale given to them as security. And it is held that, in the light of the testimony, there could be no possible justification for such a finding, and that the trial judge properly so determined. *Sibley v. Ross*, 158.

13. Where a witness, upon being asked on his cross-examination in regard to certain statements claimed to have been

EVIDENCE—Continued.

made by him at a given time and place contradictory of his testimony upon his direct examination, either denies making said statements or testifies that he does not remember making them, it is competent for the party so cross examining, for the purpose of impeaching the witness, to introduce evidence tending to show that he made said statements. *Jensen v. Railroad Co.*, 176.

14. Where a plaintiff in ejectment establishes a *prima facie* title through conveyances from parties claiming under a deed executed by the apparent owner of the land, who had been in possession for many years, and the title thus established is disputed in no way unless the defendant has acquired a title by adverse possession, the erroneous admission in evidence of the record of a deed purporting to have been executed to said apparent owner is error without prejudice. *Hoban v. Cable*, 207.

15. A defendant in ejectment interposed the defense of adverse possession. In order to meet this, the plaintiff was allowed to prove by the grandfather of certain minor heirs who inherited the land, and through whom plaintiff claimed title, that the defendant's possession of the land was under an agreement made by him with the witness, who assumed to act for the minors, that defendant might occupy said land in consideration of his paying the taxes thereon. The testimony was objected to for want of proof of the authority of the grandfather to act for the minors. And it is held that, if the defendant in fact entered into the possession of the land under the agreement testified to, he did not enter in hostility to the minor heirs, and that for the purpose of establishing such fact the testimony was admissible. *Id.*

16. A dry goods and clothing merchant testified, in a suit to recover for damage to insured property, that he had been in the store of the plaintiff a number of times, but could not say that he was there within a month before the fire, but had been within a year; that he thought he had noticed a stock which would amount to anywhere from $9,000 to $12,000; that in such estimate he did not confine himself to the year before the fire, and that all he knew was that he had a recollection of being in the store several times, when he saw a good-sized stock of goods there. And it is held that the witness did not show himself competent to testify

EVIDENCE—Continued.

as to the value of the insured property. *Metzger v. Assurance Co.*, 334.

17. A corporation secured a bank by an assignment to it of $150,000 of good and collectible accounts, then existing or thereafter to be acquired. And it is held that parol proof is admissible to show in what sense the parties used the word "accounts," and what they understood to be included within it; and to this proof and the surrounding circumstances the court will look in determining said questions. *Preston National Bank v. Purifier Co.*, 462.

18. A wife, when garnished in a suit against her husband, cannot, without his consent, be examined as to transfers of property made to her by her husband. *Berles v. Circuit Judge*, 495.

19. In a suit by a husband for debauching and carnally knowing his wife, and thereby alienating and destroying her affection for him, brought after he has secured a divorce from her, the husband is not a competent witness to testify to the charge of adultery. *Hanselman v. Dovel*, 505.

20. The plaintiff sought to introduce in evidence an alleged conversation with the defendant, in which the matter of the frequency of the defendant's calls upon the plaintiff's wife was gone over, and in which he talked about said calls, and why they were made, and what he was doing there. It was admitted by plaintiff's counsel that he did not expect to show that any admission was made at the conversation of criminal intimacy between defendant and plaintiff's wife. The court sustained the objection of defendant's counsel to the introduction of the conversation, unless it was connected with something else to make it relevant. And it is held that the ruling simply went to the order of proof; that the offered testimony would not, standing alone, have been sufficient to warrant a verdict for the plaintiff; and that it cannot be said that the ruling was prejudicial. *Id.*

21. Where in a prosecution for a violation of a village ordinance which declares any assemblage of persons, in any place in the village, engaged in any noisy, boisterous, contentious, or quarrelsome language or strife, or who shall be fighting or quarreling thereat, a disorderly assemblage, and providing for the punishment of any person or persons who shall be

EVIDENCE—Continued.

convicted of a violation of said ordinance, the complaint alleges, and the testimony tends to show, that the disorderly assemblage was in a saloon in said village, it is not error for the court to permit the prosecuting attorney to cross-examine the respondent as to facts occurring after he had left the saloon, it appearing that the inquiry related to the subject of whether or not he was attempting to follow up the parties with whom he was engaged in the quarrel in the saloon, thus bearing upon the question of motive. *Village of Vicksburg v. Briggs*, 552.

22. Immaterial or irrelevant testimony must be of such a character as naturally to prejudice the jury against the party objecting to its admission; otherwise, the judgment will not be reversed for its admission. *McKinnon v. Gates*, 618.

23. Where an objection to incompetent testimony is overruled, a failure to object to similar testimony afterwards introduced, and the meeting of the same by counter proof, does not waive the error. *Id.*

24. In an action to recover a commission agreed to be paid by the purchaser of logs, papers relating to the situation, amount, character, and quality of the logs, which one of the plaintiffs gave to the defendant during the negotiations, are admissible as part of the *res gestae*. *Id.*

25. The testimony of the defendant that in his conversation with the plaintiffs he had no idea that they intended to charge for commission was properly excluded. *Id.*

26. Where plaintiffs seek to recover, upon an express contract, a certain commission agreed to be paid on the purchase of a quantity of saw-logs, testimony on their part that the commission on the sale of the logs was worth 3 per cent. on the dollar on the amount for which the logs sold is inadmissible. *Id.*

27. A telegram from the owners of logs to a log broker, to whom they had given an option on the logs, which he had sold to a lumber manufacturer for an agreed commission, stating that the option was extended, is competent evidence, in a suit by the broker to recover the commission, of the extension of the option. *Id.* 619.

28. Where the giving and taking of a promissory note are the deliberate acts of the parties, with full knowledge of the

EVIDENCE—Continued.

contents of the instrument, and the note is not tainted with any fraud, parol evidence is inadmissible to change the terms of payment. *Hutchinson v. Hutchinson*, 635.

29. In replevin for a span of horses, for the purchase price of which the defendant has given his promissory note, which is the only written evidence of the contract, it is competent for the plaintiff to show that the note was not received in payment, and that the title to the horses was to remain in him until the purchase price should be paid. *Id.*

See ADVERSE POSSESSION (3); CRIMINAL LAW (1-6, 13, 14); DEED (3, 12, 13); LIBEL (7-9); NEGLIGENCE (8-11, 17-19, 22, 23); SURVEYS; WILL (7, 8); note, 1.

EXCEPTIONS—See DEED (5, 7, 8).

EXECUTION SALE.

After the levy of an execution, the judgment debtor conveyed the land levied upon, and his wife, to whom the grantee executed mortgages upon the land to secure part of the purchase money, joined with her husband in a bond to the grantee conditioned for the payment of the judgment. More than a year but less than 15 months after the sale of the land on the execution, the obligors in the bond having failed to perform its conditions, the grantee raised upon her indorsed note the money necessary to redeem the land, and paid the same to the purchaser at the execution sale, who, in order to secure the indorser on said note, executed to him a quitclaim deed of the land. And it is held that the quitclaim deed conveyed only the rights of the purchaser under the sheriff's certificate of sale, and that the arrangement operated to protect the mortgage interest of the wife of the judgment debtor, and to give her the right to pay, prior to the execution of the sheriff's deed, the amount due on the certificate of sale, and thus discharge the obligation of her bond. *Smith v. Michigan State Bank*, 5.

EXEMPTIONS.

1. Copartners cannot join in an action of trover for their individual exemptions in the partnership property. *Rogers v. Raynor*, 473.
2. Where partners in a venture involving the publication and sale of a book deliver the paper and electrotype plates to

EXEMPTIONS—Continued.

contractors, who are to do the presswork and binding, they waive their individual exemptions, and subject the books to the lien of the contractors for their labor. *Id.*

3. A piano cannot be classed as "household goods, furniture, or utensils," within the meaning of How. Stat. § 7686, subd. 7, which exempts to each householder, from levy and sale under any execution, or upon any final process of a court, "all household goods, furniture, and utensils, not exceeding in value $250." *Kehl v. Dunn*, 581.

See HOMESTEAD (1, 3).

EXPERT—See EVIDENCE (16).

FALSE IMPRISONMENT.

1. This case forms an exception to the general rule that what constitutes probable cause to justify an arrest without a warrant is a question of law to be determined by the court. *Filer v. Smith*, 98.
2. When an officer, in making an arrest without a warrant, acts in good faith, and after such reasonable investigation as circumstances permit, he is not liable in damages, either actual or otherwise. *Id.*

FIRE INSURANCE.

1. Where a fire insurance policy provides that no suit or action thereon for the recovery of any claim shall be sustainable unless commenced within 12 months next after the fire, a suit cannot be maintained unless it is in fact commenced within the year specified in the policy. *Peck v. Insurance Co.*, 52.
2. A farmers' mutual fire insurance company insured a farm barn and its contents, without specifically describing the contents. Over eight years after the issuance of the policy, which had been kept in full force, the insured erected a new barn on another part of the farm, in which he stored the hay and unthreshed wheat raised on the farm that year, as also a portion of his tools and farming implements. The company had no notice of the erection of the new barn, or of the removal of the property. The barn and its contents were destroyed by fire. And it is held that the company is not liable for the contents of the barn, the permanent storage of the property in another building than that named in the

FIRE INSURANCE—Continued.

policy having withdrawn it from the protection of the policy. *Benton v. Insurance Co.*, 281.

3. The term "stack" has a well-defined meaning, and cannot be said to include unthreshed wheat in a mow in a barn. *Id.*

4. The term "legal representative," as used in the clause in the Michigan standard fire insurance policy, "wherever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured," refers to those who succeed to the insured's legal rights, by reason of his death or the transfer of the policy. *Metzger v. Fire Assurance Co.*, 334.

5. An agent of the insured, who had the entire management and control of the business, and who held a power of attorney from the insured authorizing him to settle for the loss, executed and delivered to the adjusters a false affidavit regarding the books of account which had been kept by him. And it is held that the insured, if not a party to the deceit, and acting in good faith, is not precluded from recovering upon the policy under a clause therein providing that the same shall be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, whether before or after loss. *Id.*

6. After proofs of loss have been made, it is the duty of a fire insurance company, within a reasonable time, to make manifest its disagreement with the amount claimed by such proofs. *Brock v. Insurance Co.*, 583.

7. A condition in a fire insurance policy that a loss thereunder shall not become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss required in the policy have been received by the company, including an award by appraisers when appraisal has been required, makes such appraisal, when required, a condition precedent to the right to sue; and the company has a reasonable time within the 60 days after proofs of loss have been furnished in which to move with respect to the ascertainment or estimate of the loss. *Id.*

8. A policy-holder made his proofs of loss, and, without waiting for any action by the company, asked for the appointment of appraisers, and they were appointed. And it is held that the insured cannot be heard to say that, inasmuch as no effort

FIRE INSURANCE—Continued.

had been made by the parties looking to an adjustment, the appointment of appraisers was premature, and that an appraisal must be regarded as having been required within the language of the policy. *Id.*

9. Where the conduct of the appraiser appointed by the company in refusing to agree on an umpire is inexcusable, and virtually amounts to a refusal to proceed with the appraisement, the fact that the appraisement was not concluded before suit was brought will not bar an action on the policy. So held, where the company selected as its appraiser an insurance adjuster who resided in a city 135 miles distant from the city where the fire occurred, and where the appraiser selected by the insured resided. The two appraisers disagreed as to the selection of the third appraiser. The company's appraiser suggested the names of three persons, residing at a distance from the place where the fire occurred, and the appraiser for the insured offered the names of 12 residents of the locality from which the jury, in case of a suit, would be drawn. The appraiser for the company assigned no valid reason for a refusal to accept one of the 12, the only reason given being that he did not care to take the chances of getting an appraiser that would be partial. *Id.*

See GARNISHMENT (1).

FIRES—See NEGLIGENCE (1).

FORCIBLE ENTRY AND DETAINER.

In proceedings for forcible entry and detainer, the description of the premises must be sufficiently definite to enable the officer executing the writ to restore complainant to possession, and exclude the defendant therefrom. *Gardner v. Hickcock*, 497.

FRAUD—See ASSIGNMENT.

GARNISHMENT.

1. A manufacturing company mortgaged its property in trust for creditors, after which it suspended active operations, and the mortgagees took possession of the property. The property was destroyed by fire, and a compromise was effected between the mortgagor and mortgagees and an insurance company, which had written policies on the property payable

GARNISHMENT—Continued.

in case of loss to the mortgagees, by which the insurance company agreed to pay a certain percentage of the insurance. Before making such payment, the insurance company was garnished at the suit of one of the mortgagor's creditors. There was no evidence to authorize the jury to find that the compromise was fraudulent, and the evidence showed that the amount of the insurance, as agreed upon, would not satisfy the debts secured by the mortgage. And it is held that a verdict was properly directed in favor of the garnishee defendant. *Williams v. Manufacturing Co.*, 49.

2. A wife, when garnished in a suit against her husband, cannot, without his consent, be examined as to transfers of property made to her by her husband. *Berles v. Circuit Judge*, 495.

GOOD CHARACTER—See CRIMINAL LAW (3); note, 135.

HIGHWAYS.

There is no statute or rule of law that expressly determines that, before a public highway can be laid out, it must have certain and definite *termini* in other public highways. *Fields v. Colby*, 450.

HOMESTEAD.

1. A lessee of lands who erects a dwelling-house thereon, and actually occupies the lands, is entitled to a homestead exemption. *Maatta v. Kippola*, 116.
2. Where a tenant at will erects a house on the leased land, and with his wife occupies the same as a home, an assignment of his leasehold interest, made with the assent of the lessor, is ineffectual to convey the homestead rights thus acquired, if not signed by the wife. *Id.*
3. Under section 3, art. 16, of the Constitution, the homestead of a family, after the death of the owner thereof, is exempt from the payment of his debts during the minority of his children, and neither the probate nor chancery court has power to decree its sale to pay debts allowed against the estate of said owner. *Kraft v. Kraft*, 439.

HUSBAND AND WIFE.

A wife, when garnished in a suit against her husband, cannot,

HUSBAND AND WIFE—Continued.

without his consent, be examined as to transfers of property made to her by her husband. *Berles v. Circuit Judge*, 495.

See EVIDENCE (19, 20); NEGLIGENCE (22); STATUTES CONSTRUED (5).

INSURANCE—See FIRE INSURANCE; LIFE INSURANCE.

INTEREST.

1. How. Stat. §§ 7756, 8984, clearly evidence an intention to subject the State to precisely the same liability for costs, and for the incidents of a judgment, as an individual is subject to, with the single exception relating to the method of collecting the demand, and require the payment of the same sum in discharge of a judgment for costs as would be required to be paid by an individual. *Flint & Pere Marquette Railroad Co. v. Board of State Auditors*, 500.
2. The State is not liable for interest on demands under the general provision of the statute relating to interest. *Id.*
3. In suits between individuals, the prevailing party is entitled to interest upon the costs awarded in his favor from the date of the judgment or decree. *Id.*

See CONTRACT (1).

INTERSTATE COMMERCE—See STATUTES CONSTRUED (8).

JAIL LIMITS BOND—See BOND (1–4).

JURY.

1. Where, in an action of trespass for an alleged unlawful entry into leased premises by the wife and sons of the landlord, the question whether or not the oral lease under which the plaintiff's husband held had terminated at the time of the entry is submitted to the jury, their finding will not be disturbed on appeal. *Brown v. McKimmie*, 35.
2. Where the defendant in an action for slander consisting, as alleged, in charging the plaintiff with having committed the crime of perjury, proves the truth of the charge to the satisfaction of the jury, the plaintiff is not prejudiced by a statement in the charge that the defendant admits speaking the words charged in the declaration, it appearing that the words admitted by him to have been spoken were not actionable *per se*. *McNaughton v. Quay*, 143.

JURY—Continued.

3. The list of names from which a petit jury was drawn was selected from the assessment rolls of 1892, instead of 1893, as required by the statute under which the names were drawn, and a challenge to the array was interposed on that ground. It appeared that a majority of the names selected were names of persons admittedly eligible. And it is held that that was sufficient; that if the others were not, and happened to be drawn, the result was that a sufficient number of qualified jurors did not attend upon the court, and How. Stat. §§ 7575, 7576, 7578, and 7580, point out the procedure in cases where from any cause this happens. *Niles v. Circuit Judge*, 328.

4. Where the evidence as to whether or not a claimed contract was made is conflicting, the question should be submitted to the jury. *McRae v. Garth Lumber Co.*, 488.

See CONDEMNATION PROCEEDINGS; CONSTITUTIONAL LAW (7).

LANDLORD AND TENANT.

1. Plaintiff and her husband were in possession of a house on the farm where the husband was at work; and, on the same day on which a notice to leave the premises was served on the husband, the wife and sons of the owner of the farm came to the house in the absence of plaintiff's husband, and, after informing her that she must move out at once, commenced taking the furniture out of the room where she was into an old kitchen, and told her to pack her clothes, shortly after which her husband came, and took her away. Plaintiff sued the wife and sons in trespass, claiming that she was driven from the house by the defendants, and that the time for which her husband had taken the premises had not expired. The defense was that the hiring was only for one month, and that the time had expired. The court left this latter question of fact to the jury, and instructed them that, if they found that the hiring had not terminated at the time of defendants' entry, they should take into consideration what took place in the house on that day; that the mere entry into the house by the defendants, under the circumstances, would not give plaintiff a right of action, even if the lease had not terminated, and, if plaintiff recovered, it must be for an injury to herself; and that the jury, in order to find a verdict for

LANDLORD AND TENANT—Continued.

the plaintiff, must find that the conduct of the defendants amounted to an eviction. And it is held that the charge properly stated the law. *Brown v. McKimmie*, 135.

2. A lessor, prior to the lessees' taking possession of the leased premises, assigned and delivered the leases to a creditor as security for his claim. Neither the leases nor the assignment were ever recorded. After the tenants had entered into possession, the lessor conveyed the leased premises to his wife by warranty deed. In a suit brought by the assignee to enforce his alleged equitable claim to the rent, the wife claimed to have purchased without notice of complainant's rights, while the complainant claimed that, the premises being in the possession of the lessees, and the leases in the custody of the complainant, it was the duty of the wife to make inquiry as to the terms of the leases, and as to the possession of the same, before purchasing, as the leases were the only evidence of the grantor's title to the rents reserved, and of his right to collect such rents, and that, in the absence of such inquiry, she was chargeable with notice of all the facts which she would have learned upon making the inquiry. And it is held that, while the possession of the lessees was notice of their rights, it was not notice that the title of the lessor had been incumbered by the assignment of the leases reserving rent to himself. *Steel v. DeMay*, 274.

See JURY (1).

LIBEL.

1. Where, in an action for libel, the alleged libelous words, standing alone, are unambiguous, they must be construed in their ordinary sense, in the light of such allegations of the circumstances surrounding the transaction as the declaration sets forth. *Simons v. Burnham*, 189.
2. A statement that a merchant has conveyed $10,000 worth of real estate to his wife for $5,000; that his other real estate is heavily mortgaged; and that he is heavily indebted to banks, upon which indebtedness he is paying a high rate of interest, giving the rates,—if it has no significance further than a *personal* one, is not libelous *per se*. *Id.*
3. Such a statement, sent to firms from whom the merchant is in the habit of purchasing goods on credit, would necessarily cause a loss of credit, and, if false, is actionable *per se*. *Id.*

LIBEL—Continued.

4. The sense or meaning of such a statement, if true, is not changed into a charge of fraud by the facts that the person therein referred to is a merchant, in the habit of dealing upon credit with the firms to whom the statement is sent; that the person sending the statement intended to injure the credit of said merchant with said firms; and that he accomplished his purpose. *Id.*
5. The question whether an intimation that a merchant is in failing circumstances or unworthy of credit is contained in the words, "In time of peace, prepare for war," used in connection with a true statement sent to firms from whom the merchant is in the habit of purchasing goods on credit, that said merchant has conveyed certain real estate to a woman bearing the same surname for $5,000, is for the jury. *Id.*
6. Where the defendant in a libel suit is entitled to an instruction that the alleged libelous words, as set forth in some of the counts of the declaration, are not susceptible of the construction alleged in the innuendo, but fails to ask that such instruction be given, except by a request which applies equally to all of the counts, and does not assign error upon language in the general charge upon the subject which made it possible for the jury to find the defendant guilty upon all of the counts, and his counsel fails to make the point in his brief that the court erred in using such language, a general verdict of guilty, which is sustainable under the *good* counts, will not be set aside. *Id.*
7. A letter sent by the defendant to one of the firms to whom the alleged libelous statement had been sent, dated about the time of the sending of the same, informing said firm that the firm of which the defendant was a member would withhold their patronage from any house or firm, etc., which might thereafter accept less than the full amount of their claim from any customer in the city where the plaintiff and defendant resided, except it should be from an assignee or a court of equity, and for liquidation, is admissible as tending to indicate malice, and show a motive for injuring the credit of the plaintiff. *Id.* 190.
8. Evidence offered by the defendant to show that the conveyance to plaintiff's wife was without consideration was excluded, the court holding that the truth of the alleged libel

LIBEL—Continued.

was not admissible, even in mitigation of damages, unless pleaded, and that, not being pleaded to the extent of a complete denial of the charge if interpreted in accordance with the innuendo, the plea was inadequate in case of such interpretation, and would not justify the admission of the proposed evidence. No effort was made to show that the alleged fact sought to be established by the rejected evidence was known to the defendant before sending the statement, nor was the court informed that it was so known. And it is held that such fact would be immaterial unless known to the defendant, and that, as the Court cannot say from the record that the evidence was material, familiar rules require that the judgment should not be reversed for its exclusion, though it might have been admissible had a proper foundation for it been laid. *Id.*

9. The testimony of the plaintiff that he never heard of any report that he was heavily indebted at three or four banks at rates of interest of from 8 to 10 per cent. was offered to negative the statement that it was so reported. And it is held that there was nothing in the testimony tending to show that the plaintiff would have been likely to hear such report, if made; that the testimony was negative, and should not have been admitted; that the law presumed the charge false, and the burden was upon the defendant to show the truth of the statement as made; and that, as the record fails to show that the plaintiff was reported as stated, the testimony of the plaintiff was harmless, and its admission error without prejudice. *Id.*

10. Counsel for the defendant contended that the only damages recoverable were special, and that the same had been neither alleged nor proved; but the court allowed the jury to bring in general damages, upon the theory that the words were actionable *per se.* And it is held that no error was committed in so doing. *Id.*

LIEN—See ATTORNEY AND CLIENT.

LIFE INSURANCE.

1. When the constitution of a mutual benefit association contains two inconsistent provisions, that most favorable to the insured will be adopted. *Wolf v. District Grand Lodge*, 23.

LIFE INSURANCE—Continued.

2. No person not of the class for whose benefit a mutual benefit association is authorized can be a beneficiary. *Id.*
3. Where the statute under which a mutual benefit association is organized, and its articles of incorporation, entitle its members to devise the death benefit fund to any person, although not of any of the classes named as beneficiaries, a provision of the constitution of the association which attempts to restrict members in their choice of devisees cannot be sustained. *Id.*
4. Where a member of a mutual benefit association fails to designate a beneficiary, and dies intestate, his heirs will take the death benefit, under the rule laid down in *Benefit Association v. Rolfe*, 76 Mich. 146. *Id.* 24.
5. Where a mutual benefit association, with full knowledge that a deceased member had misstated his age in his application for membership, bases its refusal to pay the death benefit *solely* upon the failure of the deceased to designate a beneficiary, the association is estopped, in a suit afterwards brought to recover said death benefit, from asserting such misstatement as to age as a defense. *Id.*
6. In a suit by an administrator to recover moneys paid to the defendant upon policies of insurance held by defendant as security for loans made to the decedent, one of which policies was payable to the defendant, the court refused to allow the jury to charge the defendant with the proceeds of this policy. And it is held that, it having been agreed between the defendant and the decedent that the amount of said policy, when received, should be applied upon, and should *pro tanto* extinguish, decedent's indebtedness to defendant, which agreement was valid, the defendant cannot be heard to say that the proceeds of said policy are not applicable to the payment of the debts of the decedent, nor can she offset the portion of said indebtedness thus extinguished against the moneys received on the other policies. *Maybury v. Berkery*, 128.
7. Where the secretary of a mutual accident insurance company, after being informed by a solicitor that a prospective applicant is carrying other insurance which, with that he proposes to take out, will exceed the limit prescribed by the company, and that he has agreed with the solicitor to drop such prior insurance at its expiration, sends the solicitor to

LIFE INSURANCE—Continued.

take the application, and he, in answer to a question in the application whether the applicant is carrying other insurance, writes in a negative answer, the knowledge of the secretary and the solicitor is that of the company, and it will be held to have waived the right to insist upon a forfeiture of the policy on account of the prior insurance. *Dailey v. Accident Association*, 289.

8. Where, in such a case, the secretary indorses an acceptance upon the application, and fills out the policy with intent to have it take immediate effect, and causes it to be mailed to the applicant as of force and effect at that time, the company cannot be heard to say that there was no delivery, though the policy did not reach its destination until after the death of the applicant. *Id.*

9. Where an insurance policy expressly refers to the application, and makes it a part of the contract of insurance, the two instruments must be construed together, in determining what the real contract is; and if the policy, as delivered, contains provisions not in the application, and which are not accepted by the applicant, they may be treated as waived by the company, and as constituting no part of the insurance contract. *Id.* 290.

10. A railroad conductor, in his application for accident insurance, stated that his sole business was running passenger trains. The application was accepted by the company, and a certificate issued, containing a condition that attempting to enter or leave moving conveyances using steam, electricity, water, or compressed air as a motive power were hazards not contemplated or covered by the insurance, and that no sum would be paid for injuries or death in consequence of such exposure, or while the insured was thus exposed. The certificate expressly referred to the application, which contained no such restriction as to entering or leaving trains when in motion, and made it a part of the contract of insurance. The insured was killed while attempting to alight from a moving train, and before the certificate had reached him in due course of mail. And it is held that it is common knowledge that conductors of passenger trains on all railroads must not only enter their trains when in motion, but leave them before they come to a full stop; that this may be a dangerous practice, but it is among the risks which the

LIFE INSURANCE—Continued.

passenger conductor assumes when he enters such employment; and that this knowledge is so general that the company, when it took and approved the application, must have had knowledge of it, and, in view of this, it cannot insist upon said restriction. *Id.*

LIMITATION OF ACTIONS—See STATUTE OF LIMITATIONS.

LIQUOR TRAFFIC—See CRIMINAL LAW (4–7).

LOCAL IMPROVEMENTS—See STATUTES CONSTRUED (13); TAXES (1, 2).

LOOKING AND LISTENING—See note, 181.

MANDAMUS.

1. *Mandamus* will not lie to compel a county clerk who, for a compensation paid by relator's competitors, employs a clerk at his own expense to superintendent their use of the files and records in the office for the purpose of making abstracts of title, to grant the same facilities to the relator without compensation, it appearing that the clerk is not legally bound to furnish such increased facilities, and that the furnishing of the same does not abridge the rights to which the relator is legally entitled. *Burton v. Reynolds*, 55.

2. Under Supreme Court Rule No. 63, which provides that "in proceedings for *mandamus*, where an order to show cause has been made, the respondent must answer fully every material allegation of the petition, and every material averment not so answered may be taken admitted by the respondent to be true as alleged, and, in case no answer is made and filed as required by such order, the Court, upon due proof of service of the order, will award a peremptory *mandamus* as prayed for, or enforce obedience to the order by process for contempt," the failure of the judge of the superior court of Grand Rapids to answer an order to show cause why he should not be compelled to vacate an order by him made dismissing the petition of the city of Grand Rapids for the establishment of permanent dock, safety, sanitary, and building lines along the shores and margins and in the waters and on the bed of Grand river, as provided by Act No. 358, Local Acts of 1891, on the ground that said act is unconstitutional, amounts to an admission by the respondent and the contesting property-owners that all of the material averments of the petition for the writ are true, and a per-

MANDAMUS—Continued.

emptory *mandamus* should issue as prayed. *City of Grand Rapids v. Burlingame*, 321.

3. The petition for *mandamus* gave said property-owners their day in court, and the order of the Supreme Court, overruling the order of the superior court, is conclusive and binding upon them as to all questions raised by their answers; but, inasmuch as it is possible that, since the original petition was filed, other parties may have acquired interests in the premises by transfer, mortgage, or otherwise, the relator should be allowed to amend said petition by making such persons, if any there are, parties. *Id.* 322.
4. Where in a *mandamus* case no issue is asked by the relator, the statement of facts contained in the answer must be taken as true. *City of Benton Harbor v. Railway Co.*, 386.
5. *Mandamus* will not lie to compel a street-railway company to comply with the provisions of an ordinance requiring it to pave the street between its rails and tracks where it appears from its answer that, owing to the financial straits in which it is placed, it is impossible for its officers to borrow or otherwise raise the money to pay for such paving. *Id.*

MARRIED WOMAN—See HUSBAND AND WIFE.

MECHANIC'S LIEN—See CONTRACT (2).

MISCARRIAGE—See NEGLIGENCE (24).

MORTGAGE.

1. A personal decree may be rendered in a foreclosure case against a grantee of the mortgagor, who has accepted a deed stating that it is subject to the mortgage, which the grantee assumes and agrees to pay. *Corning v. Burton*, 87.
2. A grantee who is thus liable cannot escape liability by inserting in his deed of the mortgaged premises a like agreement by his grantee to pay the mortgage debt. *Id.*
3. Doubtless equity would say that the second grantee was primarily liable, the first grantee next, and the mortgagor last; but all are liable. *Id.*
4. A petition for an execution for deficiency cannot be resisted on grounds inconsistent with the decree. *Id.* 96.
5. A subsequent purchaser of mortgaged premises, who in his deed had assumed and agreed to pay the mortgage, claimed

MORTGAGE—Continued.

the right on the hearing of a petition for an execution for deficiency to question the return of service of the original subpœna, he having denied in his answer to the petition that the subpœna was served upon him. And it is held that said defendant might have had the question of the validity of the decree determined by a proper motion before enrollment, or upon bill of review after enrollment, in which case all persons interested should be made parties; but that such question was not open for hearing in said ancillary proceeding. *Id.*

See CHATTEL MORTGAGE; DURESS; EXECUTION SALE; PARTNERSHIP (4); note, 87.

MULTIFARIOUSNESS—See EQUITY PLEADING.

MUNICIPAL CORPORATIONS.

1. Municipal corporations, in Michigan, are liable for injuries resulting from their neglect to repair public highways only where made so by statute. *Roberts v. City of Detroit*, 64.
2. Under the charter of the city of Detroit, which provides that the common council shall audit and allow all accounts chargeable against the city, but that no unliquidated account or claim or contract shall be received for audit or allowance unless it be verified by the affidavit of the person rendering it, and that it shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim against the city that it has never been presented to the common council for audit or allowance, or, if on contract, that it was presented without said affidavit and rejected for that reason, the presentation for audit and allowance of a claim for damages for injuries received by falling upon a defective sidewalk is a condition precedent to bringing suit to recover the same. *Springer v. City of Detroit*, 300.
3. Under a city charter providing that the council should have power to remove certain officers for cause, a copy of the charges made, with notice of the time and place of hearing, being first served, the council, at the time assigned for hearing charges preferred against an official, notwithstanding his protest, adjourned such hearing, upon the recommendation of the mayor, until after a certain report, regarding a matter not necessarily involved in such charges, should have been received. And it is held that such officer was entitled either to a hearing at that time, or to have a

MUNICIPAL CORPORATIONS—Continued.

time assigned therefor; and that the indefinite action of the council must be regarded as equivalent to a dismissal of the charges. *Goodfellow v. Common Council of Detroit*, 343.

4. By the amended charter of the city of Port Huron (Act No. 392, Local Acts of 1893), the police force, which had been under the control of the common council, and the members of which were not subject to removal until charges had been preferred against them, and they afforded an opportunity of being heard in their defense, was placed under the control and management of a commission created by the act, with exclusive power to appoint members of the force, and to suspend or remove policemen under and for such causes as should be fixed by the ordinances and charter of the city and the rules adopted by the commission. It was further provided that the existing police force should continue to hold their offices until their successors should be appointed and qualified. And it is held that the members of the police force had no fixed tenure of office at the time of the enactment of said statute; that its evident purpose was to confer upon the commission authority to reorganize the force; and that a policeman who received his appointment under the earlier law cannot complain of his removal by the commission for his alleged physical incompetency, on the ground that charges were not preferred against him, and the question of his physical incapacity tried and determined by said commissioners. *Enright v. Duff*, 446.

See NEGLIGENCE (7–12, 20); STATUTES CONSTRUED (3–6, 22); TAXES (1, 2).

MUTUAL BENEFIT ASSOCIATIONS—See LIFE INSURANCE (1–5).

NEGLIGENCE.

1. On a calm morning in September, when there was a heavy dew on the ground, defendant's servant set fire to some grass, weeds, and brush, which he had cut the previous day, and piled in what is termed a "cathole" on defendant's land. There had been no rain for several weeks, and the surface of the cathole was dry, but it was very wet just beneath the surface. About three hours after the fire was set, and while defendant's servant was on the ground with a bucket of water to watch the fire, the wind began to blow

NEGLIGENCE—Continued.

violently, and what is termed a "whirlwind" took up some of the fire, and carried it over a furrow which defendant's servant had plowed around the cathole, and set the stubble on fire, and, despite his efforts and the efforts of others to whom he had given the alarm, the fire ran to plaintiff's land and damaged his timber. And it is held that the question of defendant's negligence in setting the fire was for the jury. *Bolton v. Calkins*, 69.

2. A brakeman who rides in a standing position on the brake-beam of the tender of an ordinary road engine while backing across a river upon a trestle, at a rate of speed of from five to eight miles per hour, he having no place to hold onto except the draw-bar, against which he leans, and being in a position where he cannot see the engineer or fireman or be seen by either of them, is guilty of such negligence as will bar a recovery for injuries received by being struck by the end of a gate which had in some way become unfastened, and swung partly across the track, so as to come in contact with the rear end of the tender, and slide along, and crush the brakeman against the draw-bar. *Benage v. Railway Co.*, 72.

3. The contention that the swinging in of the gate was not one of the dangers to be expected, and that the brakeman had the right to assume that the railroad company would discharge its duty, and not permit the gate to be unfastened or across the track at the time of the accident, as it was closed only at night and opened each morning, cannot be sustained, the brakeman being in a position where he could not escape injury if the tender backed into any other obstruction upon the track, and likely to be thrown off by any sudden starting of the engine; nor will it do to say, under these circumstances, that, because it was the custom of others to ride in the same exposed place, therefore the brakeman was in the exercise of due care. *Id.*

4. Where the ordinance under which an electric street railway is operated only requires that the cars "after sunset shall be provided with colored signal lights in front and rear," the failure to have also a headlight or light attached to the dash-board of the car is not negligence *per se*. *McGee v. Railway Co.*, 107.

5. The rule that one must look and listen before crossing the

NEGLIGENCE—Continued.

tracks of a steam railway is equally applicable to an electric street railway. *Id.*

6. Defendant operates an electric street railway in the city of Grand Rapids, and by ordinance is permitted to run its cars at a rate of speed not exceeding 15 miles per hour. Plaintiff, while attempting to cross defendant's double tracks on South Division street, in the dusk of a dark and wet November evening, was struck by a south bound car which was running from 7 to 15 miles per hour, and injured. The car carried five electric lights inside, and the colored signal lights in front and rear required by the city ordinance. Plaintiff, after leaving the street curb, walked a distance of about 14 feet before reaching the track, and he testified that during this time he had his eyes upon a car coming from the south, and did not expect a car from the north, which he could have seen had he looked in that direction. Plaintiff had lived in the vicinity of the accident for many years, and knew of the constant passage in both directions of defendant's cars. And it is held that plaintiff was bound to know that the crossing was a place of danger; that he was bound to look both ways before getting upon the track; that it will not do to say that he acted prudently and carefully in looking before getting off the curb, and was therefore not bound to look again because he saw no car coming from the north at that time; and that a verdict should have been directed for the defendant. *Id.*

7. It is within the discretion of a circuit judge to permit the amendment of the declaration in a personal injury case by inserting therein, after the general description of the injuries alleged to have been sustained, an averment "that said injuries so received and sustained as aforesaid are permanent." *Edwards v. Village of Three Rivers*, 153.

8. A declaration in a personal injury case which, after describing the manner in which the injuries complained of were received, alleges that plaintiff was greatly wrenched, bruised, sprained, and injured in her left foot, ankle, and limb, so that on account thereof her said left foot, ankle, and limb became and were, and ever since said date have been and continued to be, greatly swollen, sore, and lame, so much so that plaintiff has ever since said injury been hardly able to walk about the house, and is thereby disabled from

NEGLIGENCE—Continued.

carrying on her business, that of keeping a boarding-house, and that said injuries so received and sustained by her as aforesaid are permanent, is sufficiently specific to admit of proof of permanent injuries of the kind alleged. *Id.*

9. It is not error to permit a witness in a personal injury case, whose attention has been called to the portion of the walk where the injury is claimed to have been received, to testify to the condition of the walk at that point, the evidence being competent as bearing upon the question of notice. *Id.*

10. The introduction of testimony on the part of the defendant in a personal injury case tending to show that the plaintiff had for many years prior to the injury been lame, that her limbs had long troubled her, and that she had varicose veins, justifies the admission on behalf of the plaintiff of the testimony of acquaintances of the plaintiff tending to show an absence of such conditions; that plaintiff was healthy, and had been during the period covered by defendant's testimony; and that intimate acquaintances never had known that she was afflicted in the manner testified to. *Id.*

11. A witness for the plaintiff was examined about a point in the walk 35 or 36 feet from a bridge, and testified concerning a hole in the walk at that point that he thought was 5 inches deep. The plaintiff identified the place of the accident as being near a telephone pole, which she located at a distance of from 34 to 35 feet from the bridge. The witness said nothing about a telephone pole in describing the place he saw. Expert witnesses were asked hypothetical questions, in which the hole was described as of the depth testified to by the witness. And it is held that the court properly allowed the questions to be answered, as it was for the jury to say whether or not the plaintiff was hurt in the place testified to by the witness. *Id.* 154.

12. A request to charge in a personal injury case, which goes to the extent of saying that if the plaintiff, at the time she stepped into the hole in the sidewalk upon which she was injured, was afflicted with *any* disease, it was necessary for her to use more caution in looking for holes in the walk than is required of ordinarily healthy persons, is properly refused. *Id.*

13. Where the jury, in a negligence case against a railroad com-

NEGLIGENCE—Continued.

pany, find specially that but one of the required statutory signals was given before crossing a country highway, the negligence of the defendant is established. *Jensen v. Railroad Co.*, 176.

14. Where a driver is unable to see an approaching train for a distance of 128½ feet from the crossing, it is contributory negligence for him to drive that distance, and attempt to cross the track, without stopping his team to listen. *Id.*

15. Plaintiff's intestate is held to have been guilty of such negligence, in walking a distance of 48 feet after passing an open railroad gate at a city street crossing, and before reaching the track, where she was struck by a passenger train, during which time she could have seen the train for a distance of 425 feet if she had looked in the direction from which it was coming, as to bar a recovery, unless it should be held that the fact that the gate was not let down excused her from exercising care in crossing the track. *Dawe v. Railroad Co.*, 307.

16. The rule established by *Richmond v. Railway Co.*, 87 Mich. 374, and *Evans v. Railroad Co.*, 88 Id. 442, that a party approaching a railroad track has a right to rely upon the absence of such warnings of danger as it is shown to be the custom of the railroad company to give, will not excuse the negligence of the decedent, who testified that she thought the gates did not fall for a yard engine, for, if she was looking for a yard engine, as she testified, she could as easily have seen the passenger train. *Id.*

17. A witness for the defendant in a personal injury case against a railroad company, who had been treasurer of the road owning the line, testified on cross-examination that $80,000 of the earnings of the road were sent by him to bankers in New York city, at the direction of the president of his company, who was also president of the defendant, and that certain books in the defendant's possession, and which it had failed to produce pursuant to notice, would show what disposition was made of said money. And it is held that the natural and proper inference, if these facts were established, was that the defendant did not care to produce said books, for the reason that they would show the receipt of this money by the defendant, and counsel might properly urge it to the jury. *Williams v. Railway Co.*, 537.

NEGLIGENCE—Continued.

18. The accident occurred January 2, 1892. The defendant admitted that it was in possession of the road April 1, 1892. And it is held that a mortgage upon the road, given by the defendant, and dated May 15, 1893, had no tendency whatever to prove that the defendant was in possession of the road at the time of the accident, and that it was error to admit it. *Id.*

19. It was averred in the declaration that plaintiff's body was injured by dislocation, straining, and laceration, and injuries of muscles, nerves, and otherwise. The evidence tended to show that the knee and hip were injured, and that in consequence the sciatic nerve became inflamed; a physician testifying that, as a result of the injury, neuritis, described as an inflammation of a nerve, followed. This evidence was objected to, because no secondary injuries or results were counted upon. And it is held that the evidence was properly admitted, under the declaration. *Id.* 538.

20. A city is not liable for injuries received by a fall on a sidewalk, occasioned by the accumulation thereon, from natural causes, of ice and snow. *Rolf v. City of Greenville*, 544.

21. In a suit to recover the value of a sailboat lost, as claimed by the plaintiff, through the carelessness of the defendant, it appeared that the defendant towed plaintiff's scow, to which the sailboat was attached, across a lake, for the purpose of reaching a sunken vessel, which the plaintiff was to raise for the defendant; that the plaintiff was on the scow, and, after the sailboat was safely across the lake, the steamer turned to go up the shore, and the sailboat capsized; that, upon plaintiff's signal, the steamer slackened her speed, and plaintiff drew the sailboat alongside the scow, and signaled the steamer to go ahead, he thinking they were so near shore she might run the distance; that the sailboat towed in that way for a short distance, when she "chawed her line off near the stem, and went off, at least drifted away." And it is held that, from the plaintiff's own showing, he was present, and gave the directions what to do; that, if any one was at fault, it was not the defendant, and the court erred in permitting a recovery. *Wanner v. Mears*, 554.

22. In a personal injury case prosecuted by a married woman,

NEGLIGENCE—Continued.

the plaintiff was permitted to testify, against objection, that before receiving the injury complained of she had painted pictures for profit, and was able to earn a certain sum per week, and that by reason of the injury she was rendered unable to do that kind of work. And it is held that the husband is, *prima facie*, entitled to the earnings of his wife, and that it was error to admit the testimony, and permit a recovery for the impairment of plaintiff's ability to earn money. *Tunnicliffe v. Railway Co.*, 624.

23. The plaintiff contended that as she was a minor, and prosecuted the suit by her husband as her next friend, he would be estopped by the verdict from bringing suit thereafter to recover for such services, and hence no injury could have been done the defendant. It appeared, however, that, after the objectionable testimony had been given, a question on the same line was put to another witness, which was objected to, and the court said: "I think the husband is entitled to the wages. I guess there is no use going into that in this case at all." And it is held that, after this statement, the defendant's counsel could not be expected to meet such proofs as had crept in on the subject; that the subsequent charge of the court to the effect that, if the plaintiff was entitled to recover, she was entitled to the value of her time, etc., was not only erroneous as matter of law, but, given as it was, after said statement by the court, which cut off proofs on the part of the defendant, was based upon a necessarily *ex parte* showing. *Id.*

24. The testimony in a personal injury case brought by a married woman tended to show that one of the results of the injury was a miscarriage. The court instructed the jury that they might, if they found a verdict for the plaintiff, give as a part of her damages what they should find the society, enjoyment, and prospective services of the child were reasonably worth. And it is held that the charge was clearly erroneous; that there was, of course, no proof in the case as to the prospective earnings of the child, even if the mother would be the proper person to recover for such loss; that the loss of the child's society would not be a proper element of damages; that while the jury are allowed to consider the case with all its facts, and to take into account,

for the purpose of compensation, not only the physical pain, but also mental suffering, in determining the award of damages, and while, of necessity, this involves, to some extent, a consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb, yet beyond this it would not be competent for the jury to go, and attempt to compensate for the sorrow and grieving. *Id.*

25. In a personal injury case against a street-railway company, the declaration averred that, in the rear platform of the car from which plaintiff was attempting to alight at the time she received the injury complained of, the defendant had negligently placed and permitted to remain an iron bolt, which projected above said platform a specified distance; that while plaintiff was passing out of said car, and onto and over said platform, for the purpose of alighting therefrom, and was stepping from the platform of said car to the steps thereof, said car being stationary, the defendant negligently caused said car to be suddenly started and moved forward, by means whereof plaintiff was thrown down and against said car, and down and upon the platform thereof, and down and upon and against the steps of said car, and her dress skirt or skirts caught on said bolt, and she was held fast to and against said car and platform and steps, and partially upon the ground, and was so held, dragged, and carried along by the motion of said car, and injured, etc. Plaintiff's testimony was to the effect that she was in the act of stepping off the car when it started, and was thrown backward, and her clothing caught; that she took it for granted that her clothes were caught; that she did not know in what; that she could not see, but in her struggle she threw her arm behind her, and, as she did so, her hand came down on something that projected from the platform; that she pulled her skirt, and a bolt came out from the platform. On cross-examination she testified that she should think the bolt had no part in throwing her down, aside from the jerking of the car. The defendant contended that there was no room under this testimony for the jury to find that plaintiff's clothing caught on the bolt before she was thrown back-

NEGLIGENCE—Continued.

ward. And it is held that this is too narrow a construction of the testimony; that it appears from the charge of the court that defendant contended before the jury that plaintiff's story was unreasonable, and that the injury could not have occurred in the manner supposed by her; that the jury had a right to construe the facts, and if, in their judgment, it was more reasonable to suppose that plaintiff's clothing caught upon the bolt without her knowledge before the car started, and threw her to the ground, it cannot be said that the circumstances of the case did not furnish a justification for that inference. *Id.* 625.

See NUISANCE; note, 181.

NEW TRIAL.

The action of the circuit judge in refusing to grant a motion for a new trial will not be reviewed where his reasons for such refusal are not incorporated in the bill of exceptions as a part of the record of the proceedings had on said motion. *McRae v. Garth Lumber Co.*, 488.

See note, 488.

NOTICE—See ADVERSE POSSESSION (4); SCHOOLS AND SCHOOL-DISTRICTS (2).

NUISANCE.

1. The percolation of deleterious matter, from the premises of the party who suffers it, through the soil, upon the lands of an adjacent owner, to the injury of the latter, is an actionable nuisance. *Brady v. Steel & Spring Co.*, 277.
2. Defendant kept upon its premises, for use, fuel oil. Plaintiff operated a bakery 500 feet distant, and sues for damages occasioned to his business by the leakage of the oil upon defendant's premises, its flow through the soil into a common sewer, the escape of the gases through a manhole in the immediate vicinity of the bakery, affecting the atmosphere in the neighborhood, and through the sewer connections into and upon plaintiff's premises, injuring the products manufactured by him. The city ordinance prohibited the deposit of any refuse, drippings, or nauseous liquid or other substance from distributing pipes or gas conductors into any sewer. And it is held that, in view of the ordinance, it cannot be said that the sewer was constructed by the city to carry away the oil, or that such a use was invited, or

NUISANCE—Continued.

was even permissive; that the nuisance which the ordinance aims to prevent does not depend upon the intent of the party causing it, and the fact that the deposit of the oil was negligent, or even accidental, did not make such use of the sewer lawful. *Id.*

PAROL EVIDENCE—See EVIDENCE (4, 17, 28, 29).

PAROL TRUST—See TRUSTS AND TRUSTEES (2).

PARTIES.

1. It is not uncommon to allow employés to participate in the profits of the business, but such method of determining their compensation does not entitle them to join with the employer in an action for an injury to the business. *Child v. Emerson*, 38.
2. A married woman purchased and established a milk and cream business, and constituted her husband her general agent and manager for a term of years, and agreed to pay him for his services $50 per month in advance, and five-eighths of the net profits of the business, to be calculated annually. And it is held that the husband had no property interests in the proceeds of the business, nor in the profits until an actual division of the same had been made, and that he was improperly joined with his wife in an action for slander of said business. *Id.*

See EXEMPTIONS (1, 2).

PARTNERSHIP.

1. The use by one partner of the firm name in indorsing his personal note, given to a bank in renewal of his individual note held by it as security for a loan, the proceeds of which he contributed to the firm capital in consideration of his admission as a member, is not within the scope of the partnership business, and, if so used without the consent of his copartners, the bank cannot hold the firm as indorser. *Childs v. Pellett*, 558.
2. The owner of a manufacturing business conveyed to his brother, with whom he formed a partnership, an undivided one-half of the land used in connection with the business. Subsequently each brother deeded an undivided one-sixth of the land to a third person, who was admitted into the firm.

PARTNERSHIP—Continued.

It was understood between the partners that the land should be partnership property, and that each partner should hold his undivided interest for the purposes of the partnership. And it is held that the land is subject to the payment of the debts of the firm. *Id.*

3. One of the brothers retired from the firm under the following arrangement with his copartners: He sold to his brother his one-third interest in the firm business, and agreed to sell him his one-third interest in the real estate when he should pay him $2,000, being the remainder of the purchase price agreed to be paid for all of his interest in the firm assets. The remaining partners, who succeeded to the business of the firm under a new firm name, agreed that the retiring partner might hold said undivided one-third of the real estate as security for the payment of said $2,000, and released him from all liability for existing debts. And it is held that it was within their power to do this; that, as between said retiring partner and themselves, they had no right to treat said interest in said real estate as partnership property for the purpose of adjusting accounts between themselves, without discharging the lien of the retiring partner upon it; that, if he held it in trust for the partnership, it was upon the condition that the remaining partners pay said $2,000; that this is true also as to creditors of the new firm, who have no greater rights as against said retiring partner in relation to said one-third interest in the real estate than the firm had; but that said arrangement cannot deprive the creditors of the old firm of the right to the application of said interest in the real estate to the satisfaction of their claims, if it should become necessary, as all of the property of the retiring partner, including his said interest in the real estate, would be subject to such debts after all other partnership property should be exhausted, and therefore the rights of such partner must depend upon the question of his release by the creditors of the original firm. *Id.*

4. Where the title to an undivided interest in partnership lands is vested in one member of the firm, a mortgage executed by him thereon to secure a firm debt is valid, and as to such interest has precedence over the claims of general creditors; but such a mortgagee, if given to secure the individual

PARTNERSHIP—Continued.

obligation of the mortgagor, must be postponed to the payment of partnership debts. *Id.* 559.

5. The individual promise of one member of a banking firm to release an accommodation indorser from liability on a note held by the firm, and to pay the note from means in his hands belonging to the maker of the note, cannot be construed as the promise of the firm, and will not exonerate the indorser from liability on the note. *Webber v. Alderman*, 638.

See EXEMPTIONS (1, 2); PARTIES.

PAYMENT.

1. Where, upon being served with a subpoena in a chancery foreclosure suit, the defendant mortgagor pays the amount demanded, under protest, there is not such duress of property as will make such payment involuntary, and enable him to recover an excess over the amount legally demandable, included in such payment. *Vereijcken v. VandenBrooks*, 119.
2. The delivery by a vendee to the attorney for the vendor, in his presence, of a certificate of deposit indorsed in blank, as part payment on a land contract, is the same as delivery to the vendor. *Duquette v. Richar*, 483.
3. In an action to recover money paid on a land contract which the defendant refused to carry out, it is no defense that the payment was made by a certificate of deposit owned by the plaintiff's wife, it appearing that she indorsed the certificate in blank, and loaned it to the plaintiff, and that the defendant received it as a payment from him. *Id.* 484.
4. Whatever may be the rule in other cases, in the absence of evidence of a contrary intention, renewals of notes at a bank ought always to be regarded as payment, because the banks themselves so regard them. *Childs v. Pellett*, 559.

See EQUITY PRACTICE (6, 7).

PERJURY—See CRIMINAL LAW (8, 9, 14).

PETITION.

1. For the surplus arising on the foreclosure of a mortgage by advertisement, or for the use of the same during the natural life of the petitioner, who is a daughter of the grantor of the mortgaged premises, who reserved in his deed,

PETITION—Continued.

to himself and the petitioner, a life lease of the land "for and during the life of each of them." 267.

2. To set aside a decree for divorce granted the defendant under his answer in the nature of a cross-bill, on the grounds that the verification to the answer fails to negative the existence of collusion, and that no replication to complainant's answer to the cross-bill was filed. 392.
3. To compel the receivers of a corporation to pay over to a bank, to which the corporation had assigned certain accounts, the proceeds realized from the collection of a portion of the accounts which the receivers claimed were not within the terms of the assignment. 462.
4. To open and extend a street, and to take private property therefor. 594.
5. To adjudge a decree directing the payment of a certain sum of money to the complainants, or their solicitors, within a stated time, paid and discharged. The money was deposited with the register in chancery, and complainants claim such deposit was unauthorized and void. 605.

PLEADING.

1. Where, in his original declaration, a plaintiff in ejectment claims title to the entire premises described therein, and on the trial the proofs disclose that as to a portion of the land he owns only an undivided interest, it is not error to permit an amendment of the declaration in conformity with said proofs. *Hoban v. Cable*, 207.
2. A demurrer to an entire declaration, which, in addition to the special counts, contains the money counts, which are good, cannot be sustained. *Weston v. County of Luce*, 528.

See BILL OF PARTICULARS; EVIDENCE (11); EXEMPTIONS (1); LIBEL (8); NEGLIGENCE (7, 8, 19); PARTIES; note, 208.

POLICE POWER—See CONSTITUTIONAL LAW (1–3).

PRACTICE IN CIRCUIT COURT.

Where a motion is made to set aside the service of a declaration on a railroad company on the ground that the person upon whom service was made was not an agent or officer of the defendant company upon whom process could be served so as to bind the defendant, instead of proceeding to raise an issue by the formal and somewhat dilatory

PRACTICE IN CIRCUIT COURT—Continued.

course by pleading, it is perfectly admissible for the court, in case the plaintiff wishes to control the point on an issue joined, to frame an issue on the basis of the motion, and then proceed without unnecessary delay to try it, and get a determination of the fact on the record, with the same effect as though the issue had been introduced by pleading. *Turner v. St. Clair Tunnel Co.*, 574.

See note, 575.

PRACTICE IN SUPREME COURT.

An assignment that "the circuit judge erred in charging the jury and in giving the requests for plaintiff found on pages 134–140 of record" cannot be considered, it appearing that the pages cited contain many statements by the court in which the law is correctly stated, whatever may be said of some of them. *Wanner v. Mears*, 554.

See EQUITY PRACTICE (2).

PRINCIPAL AND SURETY—See BOND (3, 4).

PRIVILEGED COMMUNICATIONS—See CRIMINAL LAW (1, 2); EVIDENCE (18–20).

PROTEST—See TAXES (3, 4).

PUBLIC HEALTH—See CONSTITUTIONAL LAW (1–3).

PUBLIC OFFICERS—See MUNICIPAL CORPORATIONS (3, 4).

PUBLIC RECORDS.

1. The files of courts of justice should not be open to the general public so as to permit a maker of abstracts of title to keep a clerk continuously in the office of the county clerk, occupying a place at the desk, carrying keys to all the file cases in said office, and removing and replacing files at will. *Burton v. Reynolds*, 55.

2. The rights of a maker of abstracts of title to access to the files and records of suits pertaining to real estate in the office of the county clerk, to enable him to make abstracts of the same to use in his business, do not depend upon the privileges which the clerk may choose to permit others to enjoy, but are measured by the law, and cannot be diminished for the benefit of others, nor can they be increased by

PUBLIC RECORDS—Continued.

reason of indulgence to others; and one whose business requires much examination has no greater rights than one whose interests require but little. *Id.*

QUARANTINE—See CONSTITUTIONAL LAW (1–3).

QUO WARRANTO.

1. To test the title of respondent to the office of trustee of a village, the validity of the election being attacked on the ground of the illegal appointment by the council of candidates for office to act upon the board of election inspectors. 572.
2. To test the title of the respondent to the office of township treasurer. 259.
3. To determine the title to the office of comptroller of West Bay City. Involves the construction of the election law of 1891 as to what are distinguishing marks so as to prevent the counting of the ballot upon which they appear. 396, 405.

RAILROAD COMPANIES.

1. There is no valid objection to a railroad company's charging an increased sum for passage where fares are collected on the train, provided that the sum collected does not exceed the statutory rate; but the company cannot impose, as a penalty for not purchasing a ticket before entering the car, such a sum that the fare collected on the train, including such additional amount, shall exceed the maximum allowed by law. *Zagelmeyer v. Railroad Co.*, 214.
2. 3 How. Stat. § 8137, which provides that a summons or a copy of the declaration in any suit against a corporation shall be served on the presiding officer, cashier, secretary, or treasurer, or any other officer or agent of such corporation, and 3 How. Stat. § 8147, which provides for the service of process in suits against railroad companies upon any station agent or ticket agent at any station or depot along the line or at the end of the railroad of such company, both apply to the service of process upon railroad companies, it being intended by section 8137 to extend, rather than restrict, such service. *Turner v. St. Clair Tunnel Co.*, 576.

See DAMAGES (1); NEGLIGENCE (2–6, 13–18, 25); STATUTES CONSTRUED (7); TAXES (1, 2).

REAL ESTATE BROKER.

Where, in a suit to recover a commission on a sale of real estate, the pleadings limit the issue to the question whether the plaintiff did in fact procure a purchaser, either at the price stated in the declaration or at a price satisfactory to the defendant, and the undisputed testimony shows that plaintiff did not bring the purchaser and the defendant together, and that the purchaser was not a customer of plaintiff, and did not acquire his knowledge that the property was for sale from him, directly or indirectly, a verdict is properly directed in favor of the defendant. *Thuner v. Kanter*, 59.

RECEIVER.

1. A village, claiming that a bonus by it paid to a manufacturing company was procured by fraud, filed a bill to set aside certain transfers of the property of such corporation, and to protect its rights therein. The court, pending a hearing, enjoined the officers of the company from interfering with its property, and appointed a receiver with general powers. And it is held that, while the injunction should be retained, the powers of the receiver should be limited to the protection of the property and the collection of debts. *Vance v. Circuit Judge*, 342.
2. A bank filed a bill to enforce the assignment to it by a corporation of certain accounts as security for loans made to the corporation, and secured a decree for the collection of the accounts by the receivers of the corporation, and that the bank should have a lien upon the money thus collected. And it is held that, the expense of making such collections having been incurred under the express decree of the court, it is inequitable that the receivers should go without compensation, or that they should be paid out of funds which should go to unsecured creditors, and that they are entitled to compensation for their services out of the funds belonging to the bank which they have collected. *Preston National Bank v. Purifier Co.*, 463.

RECORDING LAWS—See DEED (3); LANDLORD AND TENANT (2).

RECOUPMENT—See SALE (2-5).

RELIGIOUS SOCIETIES.

1. A conveyance or bequest to a religious association, or to trustees for such association, necessarily implies a trust. *Fuchs v. Meisel*, 357.
2. Where such a conveyance refers expressly or by implication to the constitution, by-laws, or other written documents of the organization, courts will look to the declarations thereof to ascertain the trust and the purpose for which the property was conveyed. *Id.*
3. While members of a church possess the right to withdraw from it, with or without reason, yet they cannot take with them, for their own purposes, or transfer to any other religious body, the property dedicated to and conveyed for the worship of God under the discipline of the religious association to which said church (a voluntary association) belongs; nor can they prevent the use of such property by those who choose to remain in the church, and who represent the regular church organization. *Id.*

See STATUTES CONSTRUED (10, 11).

RENEWAL NOTE—See PAYMENT (4).

REPLEVIN.

1. Where a prior mortgagee replevies the mortgaged property from the second mortgagee, and its value as found by the jury exceeds the amount of the mortgages, and the jury further find that the property was unlawfully detained by the defendant, the plaintiff is entitled to a judgment and to the costs of suit. *Olin v. Lockwood*, 443.
2. Plaintiff, after receiving from defendant a portion of a quantity of saw-logs driven by the defendant for him, brought replevin for the remainder of the logs, 648 of which were not taken on the writ. The evidence showed how many logs were cut, marked, and put into the river, and that defendant ran said logs, with other logs, to its boom, and there was testimony from which the jury could estimate how many logs were received by the plaintiff before the issuance of the writ. And it is held that it was not error for the court to permit the jury to find a verdict for the value of the logs not taken on the writ. *McRae v. Garth Lumber Co.*, 488.

REPLEVIN—Continued.

3. Plaintiffs and defendant held chattel mortgages upon the same property. Defendant's mortgage was executed prior to the date of plaintiffs' mortgage, but was not filed until after plaintiffs' rights had accrued. Defendant replevied the property from the mortgagor, and plaintiffs, claiming the property under their mortgage, brought this action of replevin to test the title. And it is held that a judgment, afterwards recovered by the defendant in his suit, is not *res judicata* of the questions involved in plaintiffs' suit. *Damm v. Mason*, 545.
4. Where there is no dispute as to the value of the property not recovered on a writ of replevin, the court is justified, on directing a verdict for the plaintiffs, in stating the amount for which the verdict should be rendered. *Id.* 546.
5. In replevin for a span of horses, the proper measure of the defendant's damages is the value of the use of the horses during the time he has been deprived of their use. *Hutchinson v. Hutchinson*, 636.

See STATUTES CONSTRUED (15).

REPORT—See CORPORATIONS.

RESERVATION—See DEED (5, 7, 8).

RES JUDICATA.—See EVIDENCE (2–6); REPLEVIN (3).

RESULTING TRUST—See STATUTES CONSTRUED (2).

RIPARIAN RIGHTS—See WATERS AND WATER-COURSES.

SALE.

1. Plaintiff sold and delivered to the defendant a mare, upon his agreement that if, upon a trial of speed to be made by an agreed driver within 90 days, the mare should trot to pole as fast as a mare owned by the defendant, he would pay an extra $100 for the mare. The defendant, through no fault of the plaintiff or the driver, failed to have the test of speed made. And it is held that, while the parties agreed to abide by the driver's decision as to the speed of the mare purchased of the plaintiff, yet such test was not a vital part of the contract, but only the means provided by the parties for ascertaining the speed of the mare; that the only condition upon which the payment of the $100 de-

SALE—Continued.

pended was that she could trot as fast as the one owned by the defendant; that this fact was made to appear by the undisputed evidence in the case; and that the defendant cannot avoid liability on the ground that, by reason of the sickness of one mare and the lameness of the other, he was prevented from making the agreed test within the 90 days, he being the only person who had it within his power to have said test made. *Deyo v. Hammond*, 122.

2. In a suit brought by a contractor to recover the balance of the contract price due for an engine manufactured for the defendant for use on one of its fishing tugs, the defendant sought to recoup damages for the failure of the plaintiff to complete the engine within the time agreed upon in the contract, and introduced testimony tending to sustain its claim. The plaintiff's testimony tended to show that the defendant agreed to bring the tug from the yard where it was being built to plaintiff's dock in two weeks after the making of the contract, so that the engine could be placed in the tug, but that it was not so brought until more than three weeks had elapsed, and that plaintiff's work was thereby delayed. And it is held that the plaintiff had a right to have the jury pass upon the question of said alleged delay, and that, if they found that it was caused by the failure to bring the tug to plaintiff's dock within the time agreed upon, for such time the plaintiff was not to be charged with the delay, or damages in consequence of it. *McKinnon Manfg. Co. v. Alpena Fish Co.*, 221.

3. Plaintiff further contended that the delay in completing the tug, if any, was occasioned by the builder of the tug, in not having his work done in time, and by another party, who did not complete the putting up of the smokestack in time. And it is held that the plaintiff could be held liable for its delay only, and not for the delay of the builder or the party who had contracted to put up the smokestack. *Id.*

4. After the engine had been used for a time, the shaft was broken, and the defendant claimed to recoup damages for the expense of putting in a new shaft. Upon examination, the shaft put in by plaintiff was found to have one or more flaws in the material from which it was made. And it is held that the request of the plaintiff for an instruction that the plaintiff, in the absence of a warranty of the engine,

SALE—Continued.

could not be held responsible for the breaking of the shaft if the break was due to interior seams or defects, not known to the plaintiff, and which could not have been discovered by an examination of the shaft, should have been given. *Id.*

5. Testimony was introduced tending to show that, after the plaintiff had commenced to build a pump in accordance with the contract, the engineer in charge of the tug, and who had been given authority by the defendant to oversee the work, and under whose directions the plaintiff had been directed to work, stated that he did not wish that kind of a pump, and the one in controversy was then made, under the orders and directions of said engineer. And it is held that the jury should have been instructed, as requested by the plaintiff, that, if they found the aforesaid facts, the defendant had no right to complain because the pump built differed from the one called for by the contract, and that the shipping of the pump back to the plaintiff would not entitle the defendant to make any claim therefor, if plaintiff declined to receive it. *Id.* 222.

6. Where a contract for the sale of a piano provides that the instrument shall remain the property of the vendor until the purchase price and any judgment rendered thereon is paid in full, the vendor has the right to obtain such judgment, and the title to the piano will not pass until the judgment is paid. *Fuller v. Byrne*, 461.

7. The failure of a vendee, who knows that he is in failing circumstances or insolvent, to disclose that fact to a vendor, will not make the purchase fraudulent, unless coupled with an intent on his part, at the time of the purchase, not to pay for the goods. *Reeder Bros. Shoe Co. v. Prylinski*, 468.

See ASSIGNMENT.

SCHOOLS AND SCHOOL-DISTRICTS.

1. A school board contracted with a qualified teacher for a year's services at a fixed salary, and reserved the right to discharge the teacher at any time whenever the board might desire to terminate the contract, upon one week's written notice to be given by its committee on teachers and textbooks. Proceedings were taken by the board with a view to terminating the contract, but the teacher, claiming that they were invalid and ineffectual, presented himself for

SCHOOLS AND SCHOOL-DISTRICTS—Continued.

work under the contract, and was refused employment. And it is held that in any event such refusal was equivalent to notice under the contract, and entitled the teacher to only one week's salary thereafter. *Derby v. Board of Education*, 631.

2. The requirement of 3 How. Stat. § 5040, that, whenever the proper boards of school inspectors shall contemplate an alteration of the boundaries of a fractional district, the clerks of the several townships interested shall give at least 10 days' notice of the time and place of the meeting of the inspectors, and the alteration proposed, by posting such notice in three public places in the townships, one of which shall be in each of the districts that may be affected by such alteration, is jurisdictional, and proof of posting such notice should be filed with the clerk of the joint board before any action is taken. *Graves v. Joint Board of School Inspectors*, 634.

SEAL—See DEED (3).

SHERIFFS—See BOND (1-4).

SLANDER—See EVIDENCE (11); LIBEL.

STATE—See COSTS (3).

STATE BOARD OF HEALTH—See CONSTITUTIONAL LAW (1-3).

STATUTE OF LIMITATIONS.

Plaintiff's intestate resided in Michigan at the time of his death, and was a member of a mutual benefit association. He left three heirs, one of whom was a resident of Germany, where she continued to reside until her death, which occurred some 10 years after that of the intestate. The remaining heirs were residents of Michigan and Ohio, respectively, and inherited the share of their co-heir in the death benefit, and subsequently assigned to plaintiff. And it is held that under How. Stat. § 8718,—which provides that if any person entitled to bring any of the actions mentioned in How. Stat. chap. 302, shall, at the time when the cause of action accrues, be absent from the United States and from the British Provinces of North America, such person may bring the action within the times in said chapter respectively limited after the disability shall be removed,—the

STATUTE OF LIMITATIONS—Continued.

statute of limitations did not begin to run until the death of said non-resident heir. *Wolf v. District Grand Lodge*, 24.

STATUTES.

The interpretation placed upon a statute by the different departments of the State having a duty to perform thereunder, while not absolutely binding upon the judicial department, is, in a doubtful case, to be given weight. *Attorney General v. Glaser*, 405.

STATUTES CONSTRUED.

1. 3 How. Stat. § 7545, which prohibits the "opposite party," in a suit prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, from testifying at all to matters which, if true, must have been equally within the knowledge of the decedent, applies to a party who files a bill to declare the title to land conveyed to the decedent in his lifetime to be in the complainant. *Connolly v. Keating*, 1.
2. How. Stat. § 5569, which provides that when a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person making such payment, but the title shall vest in the grantee, must be understood as applicable only to those cases in which the deed has assumed the form it has by *consent* of the party furnishing the consideration. *Id.*
3. The right of action given by 3 How. Stat. § 1446*c*, for injuries sustained from defective highways, etc., is confined to cases of bodily injury, and the statute in terms limits the recovery of damages to the person so injured or disabled; but, in case of his death, the right of action survives, under 3 How. Stat. § 7397, to his administrator. *Roberts v. City of Detroit*, 64.
4. The words "other property," as used in 3 How. Stat. § 1446*d*, which provides that if any horse or other animal, or any cart, carriage, or vehicle or *other property*, shall receive injury or damage from defective highways, etc., the municipal corporation in fault shall pay the owner just damages, etc., being preceded by several words descriptive of

STATUTES CONSTRUED—Continued.

particular kinds of property, are limited to things of a like kind. *Id.* 65.

5. Loss to a husband of the services of his wife, and money expended for surgical attendance and nursing, while she is suffering from injuries received by falling upon a defective sidewalk, do not constitute an injury to "other property," within the meaning of 3 How. Stat. § 1446*d*, and the husband has no right of action under said statute for the same. *Id.*

6. 3 How. Stat. § 1446*e*, which makes it the duty of municipal corporations to keep in reasonable repair, so that they will be reasonably safe and convenient for public travel, all public highways, etc., that are within their jurisdiction and under their care and control and which are open to public travel, does not give a right of action to everybody because it imposes a public duty, but must be construed with 3 How. Stat. §§ 1446*c*, 1446*d*, which give certain rights of recovery for neglect to perform the duty thus imposed. *Id.*

7. 3 How. Stat. § 3323, subd. 9, which authorizes railroad companies to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor, but provides that such compensation for transporting any passenger and his or her ordinary baggage, not exceeding a given weight, shall not exceed two, two and one-half, or three cents per mile, according to the gross earnings per mile of each road, will not permit a charge for a fraction of a mile, unless it is so large a fraction as to make the charge of one cent or more not in excess of the rate per mile fixed by the statute. *Zagelmeyer v. Railroad Co.*, 214.

8. Act No. 79, Laws of 1893, which requires every foreign corporation or association permitted after the passage of said act to transact business in this State, which had not, prior to the passage of said act, filed or recorded its articles of association under the laws of this State, and been thereby authorized to do business therein, to pay a designated franchise fee, and voids all contracts made in this State after January 1, 1894, by any foreign corporation not complying with said act, does not apply to foreign corporations whose business within this State consists merely of selling

STATUTES CONSTRUED—Continued.

through itinerant agents, and delivering, commodities manufactured outside of this State. *Coit & Co. v. Sutton*, 324.

9. It was intended by the use of the word "elect," in How. Stat. § 489, which provides that, "whenever a county seat is proposed to be removed, the board of supervisors for such county shall have power, by a vote of two-thirds of all the members *elect*, to designate a place to which such proposed removal is to be made," to require the consent of two-thirds of a full board to such designation, and not to deprive townships, which should be represented by appointed supervisors, of a voice in the proceedings. *Peck v. Board of Supervisors*, 347.

10. How. Stat. § 4639, which provides that "neither the canon law, nor the decrees, nor any decree or order of any ecclesiastical council or body, nor any custom or usage founded thereon, nor any custom or usage of any church, congregation, or religious society or religious order, shall hereafter be recognized or enforced in this State, so far as such law, usage, or custom shall relate to the acquisition, the tenure, or the control or disposition of any real estate, or any interest therein, or any use or trust connected or to be connected therewith," has never been construed so as to deprive those entitled to property rights, under the conclusive ecclesiastical order and decree, of a remedy which they otherwise have not. *Fuchs v. Meisel*, 347.

11. How. Stat. § 4649, which provides that, "whenever any religious society or corporation shall have exercised the franchises and privileges of a corporation for the term of 10 successive years, the same shall be presumed to have been legally organized in pursuance of the laws of this State," creates only a presumption, and does not, in and of itself, change a voluntary organization, by lapse of time, into a corporation. *Id.*

12. The exemption from taxation granted to the Michigan Southern Railroad Company under its special charter does not apply to lines organized under the general railroad law of the State, and thereafter leased and operated by said railroad company. *Lake Shore & Mich. Southern Ry. Co. v. City of Grand Rapids*, 374.

13. The contention that the words "in lieu of all other taxes," as

STATUTES CONSTRUED—Continued.

used in How. Stat. § 3360, which provides that the specific tax paid by a railroad company organized under the general railroad law shall be in lieu of all other taxes upon the property of such company, etc., preclude the levying by a city of special assessments for local improvements, cannot be sustained. *Id.*

14. 3 How. Stat. § 6231, which provides that no proofs or testimony shall be taken in any divorce suit until four months after the filing of the petition or bill, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony, applies only to the petition or original bill, and its object is attained in four months from the filing of the petition or bill, as well where a cross-bill is filed as where it is not. *Daly v. Circuit Judge*, 393.

15. How. Stat. § 8342, which provides that "when either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages, in all cases arising under this chapter [288], and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties," is only applicable to a case where one party is the general owner, and the other a lienor or part owner. *Olin v. Lockwood*, 443.

16. The purpose of How. Stat. § 7260, which provides that "when any rule or order of the court shall have been made for the payment of costs or any other sum of money, and proof by affidavit shall be made of the personal demand of such sum of money, and of a refusal to pay it, the court may order a precept to commit the person so disobeying to prison until such sum, and the costs and expenses of the proceeding, shall be paid," is to enable courts to enforce interlocutory orders, no other means of enforcement being provided by statute. *Swarthout v. Lucas*, 492.

17. Under 3 How. Stat. § 7546, which provides that "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

STATUTES CONSTRUED—Continued.

without his consent," except in certain cases, a wife, when garnished in a suit against her husband, cannot, without his consent, be examined as to transfers of property made to her by her husband. *Berles v. Circuit Judge*, 495.

18. How. Stat. §§ 7756, 8984, clearly evidence an intention to subject the State to precisely the same liability for costs, and for the incidents of a judgment, as an individual is subject to, with the single exception relating to the method of collecting the demand, and require the payment of the same sum in discharge of a judgment for costs as would be required to be paid by an individual. *Flint & Pere Marquette Railroad Co. v. Board of State Auditors*, 500.

19. How. Stat. § 7757, does not require the auditing by the Board of State Auditors of an account based upon a judgment for costs rendered against the State, as a condition to the drawing by the Auditor General of a warrant upon the Treasurer for the amount of said costs. *Id.*

20. Section 58 of the tax law of 1893, which authorizes the county treasurer, after the return of lands for unpaid taxes, to receive, under like provisions as in section 53 of the act, the amounts of the several taxes or any of them due, does not authorize the payment of taxes to the county treasurer under protest, and the bringing of a suit against the county to recover back the moneys so paid. *Weston v. County of Luce*, 528.

21. 3 How. Stat. § 4161b1, which provides that manufacturing companies shall file an annual report with the Secretary of State, and that, if any of the directors shall willfully neglect or refuse to make such report, they shall each be liable for all of the corporate debts, and subject to a prescribed penalty, only applies to such of the directors as willfully neglect or refuse to make the report. *Gennert v. Ives*, 547.

22. A section of a village ordinance which provides that "any assemblage of persons, in any place in said village, engaged in any noisy, boisterous, contentious, or quarrelsome language or strife, or who shall be fighting or quarreling thereat, shall be deemed, and is hereby declared, a disorderly assemblage," is not limited in its scope by a prior section of the same ordinance which provides that "every assemblage of persons in any street, lane, alley, or public place in said village, and upon any sidewalk or cross-walk thereof, and

STATUTES CONSTRUED—Continued.

upon the street corners, and in front of or adjacent to any of the churches, hotels, business houses, or public buildings in the said village, engaged in noisy, boisterous, contentious language or conduct, shall be deemed a disorderly assemblage," so as to make it inapplicable to a disorderly assemblage of persons in a saloon in said village. *Village of Vicksburg v. Briggs*, 551.

23. A piano cannot be classed as "household goods, furniture, or utensils," within the meaning of How. Stat. § 7686, subd. 7, which exempts to each householder, from levy and sale under any execution, or upon any final process of a court, "all household goods, furniture, and utensils, not exceeding in value $250." *Kehl v. Dunn*, 581.

24. How. Stat. § 483, subd. 8, which provides that the several boards of supervisors shall have power to provide for the payment of any loan made by them by a tax upon the county, which shall in all cases be within 15 years from the date of such loan, limits the issue of all county bonds to 15 years. *McMullen v. Circuit Judge*, 608.

25. How. Stat. § 6612, which provides that when it may be necessary to file a bill or information, or to commence any proceedings in chancery, on the part of or in behalf of the people of the State, the same may, at the election of the Attorney General, be commenced in the circuit court for the county of Ingham, in the equity side thereof, and said court shall have complete jurisdiction and full power and authority in the premises, authorizes the filing of a bill by the Attorney General in said court, upon the relation of citizens and taxpayers of another county, to enjoin the issuance by the board of supervisors, without legal authority, of bonds to be used in the erection of a court-house. *Id.*

STREET RAILWAYS—See NEGLIGENCE (4–6, 23–25).

SUBPOENA—See EQUITY PRACTICE (1).

SUBROGATION—See CONTRACT (3); ESTATES OF DECEASED PERSONS.

SUGGESTION UPON RECORD—See note, 575.

SUIT.

The commencement of suit in the circuit court by summons consists of suing out the summons, and delivering or trans-

SUIT—Continued.

mitting it to an officer of the proper county, with the *bona fide* intention of having it served. *Peck v. Insurance Co.*, 52.

SUMMONS.

A circuit court summons, issued on the day after the return-day of a former summons issued in the same case, which has not been returned, cannot be treated as an *alias*. *Peck v. Insurance Co.*, 52.

See ACTION (1, 2); SUIT.

SUPERVISOR.

An appointment of a supervisor for the remainder of the term of his predecessor is a valid temporary appointment, though it may not prevent an election. *Peck v. Board of Supervisors*, 347.

SURVEYS.

1. The reason for the rule that, as between the record of the survey of a highway, and a highway actually located upon the ground by fence lines, or by being graded and traveled or otherwise definitely fixed, the latter must prevail as the boundary of lands described as being so limited, does not exist unless the line of the road was actually located and definitely fixed, in which case the road itself becomes the controlling monument. *Hoffman v. City of Port Huron*, 417.
2. Streets that have been opened and acquiesced in by the parties interested, or by the public authorities, become permanent boundaries, and form new starting points for later surveys. *Id.*
3. For the purpose of identification and certainty, resort may be had to a conveyance referred to in the instrument containing the uncertain description. *Id.*
4. Where the description in a deed calls for land owned and occupied, the actual line of occupation is a material call to be considered in locating the boundaries. *Id.*
5. Old fences have always been regarded as strong and trustworthy evidences in ascertaining and fixing boundaries. *Id.*
6. Where two surveyors disagree materially as to the courses, quantity becomes a material consideration. *Id.* 418.
7. A supposed boundary line, long acquiesced in, is better evidence of where the real line should be than a survey made after the original monuments have disappeared. *Id.*

TAXES.

1. Terminal property of a railroad company, consisting of a freight-house and a portion of its road-bed and right of way, cannot be sold, under the provisions of a city charter, for non-payment of assessments thereon for local improvements. *Lake Shore & Mich. Southern Ry. Co. v. City of Grand Rapids*, 374.
2. The validity of an assessment for benefits upon a portion of the right of way and road-bed of complainant's road, including a freight-house on said right of way, occasioned by the paving of the street upon which said assessed property abuts, is sustained. The sale of said property to satisfy said assessments is set aside, but without prejudice to the right of the defendant city to proceed to the enforcement of the assessment in such mode as it may deem best. *Id.*
3. Section 58 of the tax law of 1893, which authorizes the county treasurer, after the return of lands for unpaid taxes, to receive, under like provisions as in section 53 of the act, the amounts of the several taxes or any of them due, does not authorize the payment of taxes to the county treasurer under protest, and the bringing of a suit against the county to recover back the moneys so paid. *Weston v. County of Luce*, 528.
4. The payment by a land-owner to the county treasurer, under protest, of illegal taxes assessed against his land, in order to secure from that officer the certificate required by the tax law of 1893 as to the payment of taxes to entitle his deed, given to a prospective purchaser, to record, does not constitute payment under duress, so as to give to the land-owner a common-law right of action against the county for the recovery of the moneys so paid, although he would otherwise have been prevented from making such sale. *Id.*

See STATUTES CONSTRUED (12, 13).

THREATS—See CRIMINAL LAW (11).

TRUSTS AND TRUSTEES.

1. Pending a suit against a trustee for an accounting, the trustee purchased at a discount a note given by the *cestui que trust* after the commencement of the suit, and placed it in the hands of a third person, who sued the *cestui que trust* thereon, and garnished the trustee, and recovered judgment for the

TRUSTS AND TRUSTEES—Continued.

face of the note, and interest. The *cestui que trust* filed a bill against the plaintiff and the trustee to have the note and judgment declared to be the property of the trustee, and compel him to satisfy the same out of the trust fund in his hands, at what he paid for the note, with interest. The defendants demurred generally to the bill. And, in affirming a decree overruling the demurrer, it is held:

a—That the general rule that a trustee cannot buy up a debt or an incumbrance for which the trust estate is liable for less than is actually due thereon, and make a profit to himself, but that such purchase inures for the benefit of the *cestui que trust*, is applicable to this case.

b—That the questions involved in this suit cannot be disposed of in the suit for an accounting, as the plaintiff in the suit upon the note is a necessary party in a proceeding to obtain the relief here prayed.

c—That the matters involved, to wit, the conduct of the trustee, and his dealings with the trust estate and in his relation as trustee, are peculiarly within the jurisdiction of a court of equity, and were not determined by the suit upon the note. *Petrie v. Badenoch*, 45.

2. After a father's death, a portion of his children filed a bill to enforce a trust claimed to have been created by the execution by the father in his lifetime to one of his daughters of a deed of his real estate upon the *verbal* understanding that she should hold the lands in trust, and after his death distribute them among all of his heirs at law according to the statute of descent. And it is held:

a—That a parol trust, such as is set forth and claimed in the bill, is void, and cannot be declared and enforced by a court of equity.

b—That the fact that the complainants were the children of the grantor did not of itself create in them an equitable beneficial interest in said lands at the time of the execution of the first deed.

c—That, if there was any equitable beneficial interest existing in the complainants at the time of the execution of the first deed, it was by virtue of the parol understanding and declaration of trust, which must be resorted to by them for the purpose of determining said trust and who are the beneficiaries under its terms; that, if such parol understand-

TRUSTS AND TRUSTEES—Continued.

ing was void for the purpose of declaring the trust and making it enforceable, it would be equally void for the purpose of establishing a beneficial interest in the complainants. *Thompson v. Marley*, 477.

3. A trustee, to whom a chattel mortgage had been executed to secure certain of the mortgagor's creditors, took in payment for a portion of the mortgaged property, which he had sold to certain of the beneficiaries, their promissory note. He afterwards turned out the note to an unsecured creditor, who had recovered a judgment for less than the amount of the note against the trustee as garnishee of the mortgagor, under an agreement that the avails of the note should be applied, so far as necessary, in satisfaction of said judgment. The note was sued in the name of the trustee, a judgment recovered, and the amount thereof paid into court, whereupon one of the makers filed a bill for an accounting, and to protect his interest in the surplus. And it is held that the unsecured creditor, to whom the note was turned out, had the right to take out of the proceeds of the judgment rendered thereon the costs and expenses, including attorney fees incurred in collecting said note. *Fetters v. Atkinson*, 485.

See DEED (1, 2, 9); RELIGIOUS SOCIETIES (1, 2); STATUTES CONSTRUED (2).

WAIVER OF JURY—See CONDEMNATION PROCEEDINGS.

WARRANTY—See SALE (4).

WASTE—See WILL (10).

WATERS AND WATER-COURSES.

1. Unless the contrary appear, a grant of land bounded by a water-course conveys riparian rights, and the title of the riparian owner extends to the middle line of the lake or stream. *Grand Rapids Ice & Coal Co. v. Ice & Coal Co.*, 227.
2. A boundary line may be so described as to preclude the extension of the grant by construction to the center of the stream. When it is said that meanders have no significance as boundaries, what is meant is that they do not preclude such extension of the grant. *Id.*
3. The shore proprietor takes by virtue of shore ownership,

WATERS AND WATER-COURSES—Continued.

His interest in the bed of the stream he acquires as appurtenant to the grant, and the extent of that interest depends upon his frontage, and the form, length, and breadth of the body of water upon which he abuts; and the fact that a lake may be of such form as to render the designation in it of the boundaries of the several riparian owners somewhat difficult is not an objection to the application of the rule. *Id.*

4. The rule laid down in *Clute v. Fisher*, 65 Mich. 48, that the owner of a fractional subdivision of land, made so by an inland lake, owns the soil under the water of said lake which would be included within the subdivision if its lines were fully extended, is inconsistent with the rule, repeatedly laid down in this State, that the shore proprietor owns to the thread or center of the stream, and with the rule announced in *Clark v. Campau*, 19 Mich. 328, and *Gas-Light Co. v. Industrial Works*, 28 Id. 182, that side lines are to be governed by the course of the stream, and the submerged land bounded by lines drawn at right angles with the central thread, rather than at right angles with the shore at the point of departure; and, while a correct result was reached in the Clute case, the reasons given are without support. *Id.* 228.

WILL.

1. The question involved in this case is whether the will, to construe which the bill is filed, gives to the wife of the testator the property therein mentioned absolutely or for life. And it is held that the wife did not take an absolute vested estate, but that it was the intention of the testator to place the funds in the hands of his executors, to be paid over to his wife from time to time, and at her death, if anything remained, such remainder to be divided among the other legatees as mentioned in the will. *Barnes v. Marshall*, 248.
2. See, for a case involving the construction of the terms of a will, *Dean v. Mumford*, 510.
3. Provisions in a will which are not valid when made and when the will takes effect cannot thereafter be made valid by the election of the widow to take under the statute. *Id.* 511.
4. No express words creating a trust are requisite, if the intent

WILL—Continued.

to devote the estate to a particular purpose is apparent from the terms of the will. *Id.*

5. Where a duty is imposed upon the executor which makes it necessary for him to retain the possession and control of realty, he will take an interest adequate to enable him to perform this duty; and an alienation which cuts off that right is, by implication, prohibited. *Id.*

6. Where a will provides that certain debts, legacies, and charges are to be paid, and the residue of the estate not thus expended is then to be divided, the particular debts, legacies, and charges will be considered a charge against the estate, real and personal. *Id.* 512.

7. On the contest of a will on the ground of the mental incapacity of the testator, the following testimony is inadmissible:

a—Statements made by one of the legatees, prior to the death of the testator, that he was crazy.

b—The statement of a party who, on an occasion not long prior to the death of the testator, was sent for to draft his will, and who declined to go, that his reason for declining was that he did not consider the testator capable of making a will; such testimony being clearly hearsay of the most damaging kind.

c—Acts or statements of the testator tending rather to show that he was irritable than incompetent. *In re Estate of Lefevre*, 568.

8. It is competent to show the expressed declarations of the testator as to his intended disposition of his property, even though made a considerable time (in the present case, 13 years) before the making of the will, and, in the absence of proof of some change in purpose, the remoteness of time when the declarations were made bears rather upon the weight of the testimony than its admissibility. *Id.*

9. A mother devised to four of her children each one-fifth of her estate, and to the child or children of a fifth child the remainder of the estate. The will then provided that none of the real estate should be sold or divided between said devisees before the youngest child should arrive at full age, and that, in case the fifth child should die leaving no child or children, the remainder of the estate should be given to the four devisees, share and share alike. The fifth child

had one child when the will was executed and at the time of the death of the testatrix. Two daughters were thereafter born to her, one of whom, as also the child first mentioned, died before their mother. And it is held that, as to the real estate devised to the four children in fee, the proviso restricting its alienation or division before the youngest child should attain full age is void; nor can it now be upheld as to the remaining one-fifth, which vested in the surviving grandchild at the death of her mother. *In re Estate of Schilling*, 612.

10. By the terms of a will the testator devised to his wife a life estate in certain land upon which he resided, and to two of his nephews 32 acres of land, subject, however, to its control by the widow until their majority, when it was to be sold, and the proceeds divided equally between them. The widow was also to have firewood off 5 of the 32 acres. Executors were appointed, but no estate or title was vested in them as trustees, nor was a power of sale given to them. The widow cut from the 5 acres, and sold, a quantity of ash and elm logs, intending, as she claimed, with the proceeds, to purchase coal for fuel. She and her vendee were enjoined at the suit of the nephews from removing the logs from the land. Pending a hearing of the equity suit, the widow attempted to cut the logs into firewood, whereupon the guardian of one of the nephews and the other nephew went upon the land and removed the logs, and the widow replevied the same. At the time the logs were cut there were a number of large beach and maple trees upon the 5-acre tract, which were more suitable for firewood than the ones cut. And it is held:

a—That the provision of the will giving the widow the right to firewood from the 5 acres is inconsistent with an intention to give her greater powers or privileges respecting said 5 acres, and must be regarded as indicating the character of the use which she is to enjoy of that portion of the 32 acres, and does not include the right to cut timber into logs, and with the proceeds purchase fuel, so long at least as there is an abundance of fuel timber.

b—That under the rule laid down in *Mandlebaum v. McDonell*, 29 Mich. 78, the devise to the nephews must be regarded as of a present vested remainder in fee; that the

WILL—Continued.

cutting of the timber was clearly waste; that the injury was one done to the inheritance; that the property in the logs was in the nephews, and they might seize it, bring trover for its conversion, or replevy it.

c—That, by the conduct of the widow in attempting to cut the logs into firewood, a danger to the property was threatened not contemplated when the bill was filed, the main object of which was to prevent further cutting, and the sale of the logs which had been cut; that the *statu quo* was changed by her own conduct, and, in view of another danger, the complainants had the right to avail themselves of another effective remedy to protect their property. *Hogan v. Hogan*, 641.

WITNESSES—See EVIDENCE (1, 16, 18, 19).

WRIT AND PROCESS—See ACTION (1); EQUITY PRACTICE (1); MORTGAGE (5); PRACTICE IN CIRCUIT COURT; RAILROAD COMPANIES (2); SUMMONS.

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